No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICARDO NELLONS,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

PETITIONER'S APPENDIX

Ricardo Nellons, 17B1447
Petitioner, pro se
Cayuga Correctional Facility
P.O. Box 1186
Moravia, New York 13118

N.D.N.Y.
22-cv-1031
Hurd, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of February, two thousand twenty-five.

Present:

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

Ricardo D. Nellons,

Petitioner-Appellant,

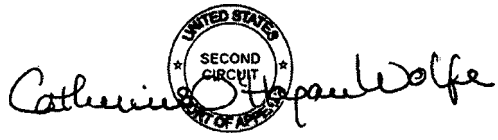
v. 24-2618

Gerard Jones,

Respondent-Appellee.

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

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



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 1st day of May, two thousand twenty-five.

Ricardo D. Nellons,

Petitioner - Appellant,

v.

Gerard Jones,

Respondent - Appellee.

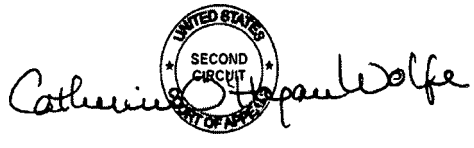
ORDER

Docket No: 24-2618

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

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICARDO D. NELLONS,

Petitioner,

v.

9:22-CV-1031 (DNH)

GERARD JONES,

Respondent.

APPEARANCES:

RICARDO D. NELLONS
Petitioner, pro se
17-B-1447
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

OF COUNSEL:

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New York, NY 10005

DANIEL P. HUGHES, ESQ.
Ass't Attorney General

DAVID N. HURD
United States District Judge

DECISION and ORDER

I. INTRODUCTION

Pro se petitioner Ricardo Nellons ("Nellons" or "petitioner") seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Dkt. No. 1, Petition ("Pet."); Dkt. No. 8, Memorandum of Law in Support of Petition ("Memo."). Respondent Gerard Jones, the Superintendent of Cayuga Correctional Facility ("respondent") has opposed. Dkt. No.

17, Answer; Dkt. No. 17-1, Response Memorandum ("Resp."); Dkt. No. 17-2–17-5, Supporting Exhibits. Petitioner has replied. Dkt. No. 23, Traverse ("Trav.").[1]

For the reasons below, the Petition is denied and dismissed.

II. RELEVANT BACKGROUND

A. Investigation and Arrest

In February 2016, the Syracuse Police Department received a tip from a confidential informant that a black male, known as "Tez" or "T-Money," was "actively involved in the sale of heroin in the City of Syracuse." Dkt. No. 17-2 at 161. Over the next six months, the Syracuse police, with the assistance of this confidential informant, identified "Tez" as petitioner Nellons, and, through a series of drug buys, developed probable cause that petitioner was dealing heroin out of a "stash" location at 215 Court Street. *Id.* at 162-165.

On August 18, 2016, the police received a search warrant for: (1) the downstairs, left-side apartment at 215 Court Street; (2) petitioner's person; (3) any vehicle owned, operated, or occupied by petitioner; (4) a 2016 Cadillac Sedan; and (5) a 2010 Buick LCR ("Initial Warrant").[2] *Id.* at 157-167, 169.

Police executed the Initial Warrant on August 18, 2016. Dkt. No. 17-3 at 310. By conducting some covert surveillance on 215 Court Street, the police observed petitioner and a female subject, who was later identified as Randisha Williams, leave "the residence . . . and board[ ] separate vehicles. Both vehicles then le[ft] the area and

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[1] For the sake of clarity, citations to parties' submissions refer to the pagination generated by CM/ECF, the Court's electronic filing system.

[2] The initial warrant authorized searches for all locations listed above except for the apartment at 437 Columbus Avenue. As described in more detail below, the police developed probable cause to search 437 Columbus Avenue during the arrest. Accordingly police sought and received an amended warrant to include a search of the apartment at 437 Columbus Avenue.

[were] stopped by [p]olice a few moments later." *Id.* After petitioner's and Williams's arrest, both individuals mentioned that petitioner kept an apartment at 437 Columbus Avenue. *Id.* at 310-11. A third individual who arrived at 215 Court Street shortly after the arrest also told police that petitioner had an apartment at 437 Columbus Ave. Dkt. No. 17-3 at 311.

Based on this additional information, police sought and received an amended warrant to include a search of the apartment at 437 Columbus Avenue ("Warrant"). *Id.* at 310-12.[3] At the 215 Court Street location, police seized a .9mm firearm, heroin, cocaine, crack cocaine, $18,980, digital scales, and a nightstand with a hidden compartment. Dkt. No. 17-3 at 288. At the 437 Columbus Avenue location, police seized a Toronto Blue Jays hat linked to a shooting suspect, ammunition, and a digital scale. *Id.* at 286, 311.

In September 2016, an Onondaga County grand jury returned a six-count indictment charging petitioner Nellons with three counts of Criminal Possession of a Weapon in the Second Degree, Reckless Endangerment in the First Degree, Criminal Possession of a Controlled Substance in the First Degree, and Criminal Possession of a Controlled Substance in the Third Degree. Dkt. No. 17-2 at 43-45.

B. Suppression Hearing

In December 2016, petitioner filed a pre-trial omnibus motion requesting, *inter alia*, the suppression of evidence seized from petitioner, one of petitioner's vehicles, 215

[3] Prior to the Warrant being granted, police entered the 437 Columbus Avenue apartment using keys recovered from petitioner and conducted a protective sweep. Dkt. No. 17-3 at 311. According to the record, the police entered the 437 Columbus Avenue apartment prior to receiving the Warrant based on "exigent emergency" circumstances; *i.e.*, the confidential informant informed police that it was already common knowledge that petitioner "was caught with 'a lot of dope[,]'" and police, therefore, feared that potential co-conspirators were "possibly destroying evidence or arming themselves[]" at the 437 Columbus Avenue apartment. *Id.*

Court Street, and 437 Columbus Avenue. Dkt. No. 17-2 at 145-154. Petitioner argued that the Initial Warrant did not indicate the number of confidential informants the police relied upon, making it impossible to "establish[the] reliability of a [confidential informant,]" and therefore impossible to establish probable cause. *Id.* at 149. Petitioner further argued that the Initial Warrant relied on incorrect information, noting that it erroneously stated a 2011 Buick Lacrosse was registered to petitioner when, in fact, it was registered to petitioner's father.[4] *Id.* at 149-50. Petitioner also claimed that the basis of the probable cause to search the 437 Columbus Avenue apartment was established using only evidence seized during the unlawful preliminary search of the apartment, making the amended Warrant "improperly issued." *Id.* at 148.

After a hearing, the trial court rendered a written decision denying petitioner's motion in part and reserving a decision in part. Dkt. No. 17-2 at 49-72. The trial court first established that police used two confidential informants in its investigation, rejecting petitioner's contention that the warrant did not specify the number of confidential informants. *Id.* at 57. The trial court then found both informants to be reliable, despite their evidence being hearsay, based on the two-pronged *Aguilar / Spinelli* test.[5] *Id.* at 56-65. Finding the informants reliable, the Court concluded the Initial Warrant was supported by probable cause, and, therefore, denied petitioner's motion to suppress evidence stemming from the Initial Warrant. *Id.* at 72.

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[4] The state courts did not address this point. Based on a review of the record, petitioner commonly used the vehicle, having been stopped by police in it at least twice prior to the 2016 drug investigation.

[5] The confidential informants' information was hearsay because the drug purchases conducted by the informants were not "controlled buys" witnessed by the police. Dkt. 17-2 at 55. Thus, the trial court found that the informants' reliability must be established by the *Aguilar/Spinelli* test. *Id.* at 56.

The trial court reserved decision on the legality of the amended portion of the Warrant in anticipation of another hearing focused on the search of the 437 Columbus Avenue apartment.[6] Dkt. No. 17-2 at 72.

C. Plea Agreement

In March 2017, petitioner pled guilty to one count of Criminal Possession of a Weapon in the Second Degree in satisfaction of the September 2016 indictment. Dkt. No. 17-5 at 35-44. In exchange for petitioner's guilty plea, the judge stated he planned to sentence petitioner to a 12-year term of imprisonment with 5 years of post-release supervision. *Id.* at 38. As part of the plea agreement, petitioner also admitted that he was "previously convicted on October 6[], 2003, of the crime of criminal possession of a weapon in the third degree." *Id.* at 40.

During the change-of-plea hearing, petitioner confirmed that he discussed the guilty plea with his counsel, understood the terms of the plea offer, confirmed that the plea offer, as recited, constituted the entirety of the promises that the prosecutors and court made to him, and that no one pressured him into accepting the plea offer. *Id.* at 39-41. Petitioner stated that he understood that, by accepting the plea agreement, he forfeited his rights to remain silent, to a speedy and public trial, to a presumption of innocence, and to call and confront witnesses. *Id.* at 42. Additionally, petitioner swore he had not consumed any drugs or medication prior to the hearing that could affect his understanding of the plea offer. *Id.* at 41. Based on petitioner's affirmations, the Court accepted petitioner's guilty plea. *Id.* at 43.

[6] Petitioner pled guilty prior to the trial court ruling on the suppression of evidence recovered from the 437 Columbus Avenue apartment.

On May 8, 2017, the trial court, in accordance with the plea agreement, sentenced petitioner to a 12-year term of imprisonment with 5 years of supervised release. Dkt. No. 17-5 at 46-50.

D. Direct Appeal

Petitioner appealed his conviction to the New York Appellate Division, Fourth Department ("Fourth Department"). Dkt. No. 17-2 at 1-32. Petitioner argued that: (1) the trial court erred in not holding a *Darden*[7] hearing, *id.* at 14-19; (2) defense counsel was ineffective for not requesting a *Darden* hearing, *id.* at 19-20; (3) the Initial Warrant contained an insufficient basis to find probable cause, *id.* at 21-29; and (4) petitioner's sentence was unduly harsh and excessive, *id.* at 29-31.

The Fourth Department denied petitioner's appeal on October 2, 2020. Dkt. No. 17-2 at 306-07. The Fourth Department ruled that petitioner failed to preserve the *Darden* issue because he did not request a *Darden* hearing and did not object to the court's failure to conduct one. *Id.* at 306. The Fourth Department also noted that trial counsel was "not ineffective for failing to [request a *Darden* hearing]" as the issue of "whether [petitioner] was entitled to a *Darden* hearing [was] not 'clear-cut.'" *Id.* at 307. The Fourth Department concluded that petitioner's "remaining contentions . . . lack[ed] merit." *Id.*

Petitioner filed for leave to appeal to the New York State Court of Appeals. Dkt. No. 17-2 at 308-313. On February 25, 2021, the Court of Appeals denied petitioner leave to appeal. *Id.* at 315.

[7] A so-called *Darden* hearing relates to the identity of informants.

E. Post-Conviction Relief

On February 7, 2022, petitioner filed a motion to vacate judgment in the Supreme Court, Onondaga County pursuant to Criminal Procedure Law § 440.10. Dkt. No. 17-3 at 194-209. Petitioner alleged he received ineffective assistance of counsel throughout his trial court proceedings. *Id.* at 198-204.

The Onondaga County Supreme Court denied petitioner's 440 motion, stating that § 440.10 motions are meant to inform the court of facts not reflected in the initial record and that petitioner's § 440.10 claims were essentially "identical" to his appellate arguments. *Id.* at 227-30. The County Court also noted that, to the extent petitioner raised new issues concerning the trial court's performance, those issues should have been raised on his direct appeal as the appellate record reflected "sufficient facts . . . to have permitted . . . adequate review of the ground or issue" on direct appeal. *Id.* at 229 (internal quotation marks and citations omitted).

Petitioner sought leave to appeal the denial of his § 440 motion to the Fourth Department. On September 16, 2022, the Fourth Department denied petitioner leave to appeal. *Id.* at 399.

Petitioner subsequently filed the instant Petition on October 3, 2022. Pet. at 1.

III. PETITION

Petitioner challenges his 2017 judgment of conviction entered by guilty plea in the Supreme Court, Onondaga County. Pet. at 1-19. Petitioner argues he is entitled to federal habeas corpus relief because: (1) the initial and amended warrant lacked probable cause, *id.* at 16-17; (2) his counsel was constitutionally ineffective, *id.* at 17; (3) the trial judge improperly sought information from the prosecutor to clarify the Initial

Warrant's probable cause, *id.* at 18; and (4) the trial judge and prosecutors relied on information external to the Initial Warrant to find probable cause, *id.* at 18-19.

Petitioner seeks his immediate release or, in the alternative, a new trial. *Id.* at 15.

IV. DISCUSSION

A. Fourth Amendment Claims

Petitioner's Claims 1, 3, and 4 all challenge the legality of the Initial Warrant or amended Warrant under the Fourth Amendment. Pet. at 16-19.

In *Stone v. Powell*, the Supreme Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, . . . a state prisoner [is not entitled to] federal habeas corpus relief on the ground that evidence [was] obtained in an unconstitutional search and seizure[.]" 428 U.S. 465, 482 (1976).

Building on *Stone*, the Second Circuit has held that habeas review of Fourth Amendment search and seizure issues may only proceed "(a) if the state has provided no corrective procedures at all to redress the alleged [F]ourth [A]mendment violations; or (b) if the state has provided a corrective mechanism, but the [petitioner] was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992) (citing *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir. 1977).

Petitioner contends that the *Stone* prohibition on Fourth Amendment claims does not bar his Claims I, III, and IV as they are in fact based on the Fourteenth Amendment Due Process clause. This argument must be rejected. A long line of cases in the Second Circuit have precluded petitioners from "'transmogrifying' [their] barred Fourth Amendment claim[s] into [] due process claim[s]" in an "attempt to end-run around

Stone's clearly established [prohibition on Fourth Amendment claims.]" *Ferron v. Goord*, 255 F. Supp. 2d 127, 133 (W.D.N.Y. 2003); *Gomez v. Miller*, No. 9:19-CV-1571 (TJM), 2021 WL 5446979, at *10 (N.D.N.Y. Nov. 20, 2021) ("Petitioner cannot circumvent Stone with the claim that his due process rights were violated during the suppression hearing."); *Connolly v. Artuz*, No. 0:93-CV-4470, 1995 WL 561343, at *7 (E.D.N.Y. Sept. 15, 1995) ("A petitioner may not cloak [their] Fourth Amendment claim in due process clothing to circumvent *Stone v. Powell*[.]") (cleaned up) (quoting *Gilmore v. Marks*, 799 F.2d 51, 57 (3d Cir. 1986)).Memo. at 16.

Alternatively, petitioner contends that his claims are not barred by *Stone* because he never received a "fair and full opportunity to litigate [his] Fourth Amendment claim[s]" in state court. Specifically, with respect to Claim 1, petitioner argues that the trial court's decision to not hold a *Darden* hearing "represent[ed] an 'unconscionable breakdown'" in the state's "correct procedures[,]" and, therefore, the *Stone* prohibition does not apply to his Petition. *Id.*

Upon review, nothing in the record suggests that there was an unconscionable breakdown in the state's procedures. An "unconscionable breakdown in [a] state's [corrective] process must be one that calls into serious question whether a conviction is obtained pursuant to those fundamental notions of due process that are at the heart of a civilized society." *Cappiello v. Hoke*, 698 F. Supp. 1042, 1050 (E.D.N.Y. 1988) (listing examples of an unconscionable breakdown as the bribing of a trial judge, the use of torture to extract a guilty plea, or the government's knowing use of perjured testimony).

An "unconscionable breakdown" may not be a mere disagreement with the outcome. Instead, it must include some sort of significant disruption or obstruction.

Capellan, 975 F.2d at 72. At best, what the state-court records show is a situation where petitioner *thinks* that the county court rendered an erroneous decision during an otherwise uneventful criminal proceeding. Memo. at 16.

The Second Circuit has explicitly held that a "mere disagreement" with a state court's Fourth Amendment decision "is not . . . equivalent [to] an unconscionable breakdown in the state's corrective process." *Capellan*, 975 F.2d at 72. In other words, petitioner "cannot gain federal review of a [F]ourth [A]mendment claim simply because the federal court may have reached a different result." *Id.* at 71.

Further, numerous Second Circuit district courts have also specifically held that a trial court's decision not to conduct a *Darden* hearing "is insufficient to establish the sort of unconscionable breakdown necessary for the Court to address [p]etitioner's Fourth Amendment claims." *Gomez*, 2021 WL 5446979, at *10; *Ferron v. Goord*, 255 F. Supp. 2d 127, 132 (W.D.N.Y. 2005) (holding that the trial court's failure to grant a *Darden* hearing was not an unconscionable breakdown); *Brown v. Donelli*, No. 6:05-CV-6085, 2009 WL 3429785, at *4 (W.D.N.Y. Oct. 16, 2009) (same).

With respect to Claims 3 and 4, petitioner claims that an unconscionable breakdown occurred when the trial court allegedly requested and received information extrinsic to the warrant application from the prosecutor in the trial court's December 20, 2016 letter. Memo. at 12-15; Dkt. No. 17-3 at 102-03. This argument must also be rejected. First, petitioner is factually incorrect—the prosecutor did not supply extrinsic information. In response to the trial court's request for clarification, the prosecutor wrote that while the Initial Warrant "should have been drafted in a more direct and concise fashion[,]" a "continuous reading of the entire application" clarifies the trial court's

questions as to how many informants were referenced because all of the requested information was within the Initial Warrant, albeit not all in the same place. Dkt. No. 17-3 at 112.

Second, petitioner still had access to state corrective procedures.[8] Specifically, petitioner directly appealed this issue and argued that the trial court and prosecutor acted improperly by relying on extrinsic information. Dkt. No. 17-2 at 24-28. The Fourth Department rejected this argument. *Id.* at 307. Petitioner does not contend, nor does the record reflect, that the Fourth Department acted improperly during the appeal where this issue was considered. In short, the Fourth Department fully and fairly considered the alleged impropriety and found none. The record reveals no reason to conclude otherwise. Accordingly, petitioner's Fourth Amendment claims are barred by *Stone* and Claims 1, 3 and 4 of the Petition are denied.

B. Ineffective Assistance of Counsel

Petitioner also claims that his trial counsel was ineffective for "failing to put the [P]eople's case through the appropriate adversarial testing process" and for failing to request a Darden Hearing. Memo. at 19-24.

Under *Tollett v. Henderson*, a petitioner who has pled guilty may not pursue federal habeas relief for ineffective assistance of counsel claims. 411 U.S. 258, 267 (1973) ("[A] guilty plea represents a break in the chain of events . . . . When a criminal

[8] Petitioner does not contend that New York courts failed to provide him with corrective procedures under the first prong of the *Capellan* test. Even if petitioner did make such an argument, numerous federal courts have recognized that New York's corrective procedures, of which petitioner availed himself, *see* Dkt. No. 17-2 at 145, are facially adequate "for the suppression of evidence[.]" *Gates v. Henderson*, 568 F.2d 830, 837 (2d Cir. 1977); *Capellan*, 975 F.2d at 70 n.1 ("Indeed, [] federal courts have approved New York's procedure for litigating Fourth Amendment claims, embodied in [CPL] § 710.10 *et seq.*") (internal quotation marks omitted); *Bradley v. LaClair*, 599 F. Supp. 2d 395, 409 (W.D.N.Y. 2009) (finding that New York's "procedure for litigating Fourth Amendment claims" has been found "by the federal courts in this Circuit to be 'facially adequate'").

defendant has [pled guilty] . . . he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

Importantly, however, ineffective-assistance claims that bear on the voluntariness of a guilty plea can bypass the bar imposed by *Tollett*. *Gomez*, 2021 WL 5446979, at *12. Such a voluntariness argument "is limited to [solely] attacking the voluntary and intelligent character of the guilty plea by showing that the advice [petitioner] received from counsel was not within acceptable standards." *Id.* (cleaned up).

"Consequently . . . all claims of ineffective assistance of counsel relating to events prior to the guilty plea that did not affect the voluntariness of the plea [are waived]." *Canal v. Donelli*, No. 9:06-CV-1490 (TJM/DRH), 2008 WL 4287385, at *3 (N.D.N.Y. Sept. 17, 2008); *Beckary v. Chappius*, No. 1:11-CV-0850, 2012 WL 3045691, at *10 (W.D.N.Y. July 25, 2012) ("[C]laims[that] involve counsel's pre-plea actions and do not affect the voluntariness of the plea itself[are] waived by [p]etitioner's voluntary, knowing[,] and intelligent guilty plea.").

Upon review, neither of petitioner's arguments touch on the voluntariness of his plea. *See Spencer v. Rockwood*, No. 9:22-CV-0239 (GTS), 2024 WL 3398390 at *12 (N.D.N.Y. July 12, 2024) (holding that "[p]etitioner's trial attorney's alleged failure to pursue *Brady* material and investigate potential defenses has nothing to do with the voluntariness of [p]etitioner's plea."). Petitioner has raised no other challenge to the validity of his plea. An independent review of the record reveals no basis for such a challenge, either. Accordingly, Claim 2 must be denied.

V. CONCLUSION

Therefore, it is

ORDERED that

1. The Petition, Dkt. No. 1, is **DENIED AND DISMISSED** in its entirety;

2. The Court declines to issue a Certificate of Appealability[9] in accordance with 28 U.S.C. § 2253(c);

3. Any further request for a Certificate of Appealability must be addressed to the Court of Appeals; *See* FED. R. APP. P. 22(d); 2d Cir. R. 22.1, and

4. The Clerk shall serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: August 7, 2024
Utica, New York.

David N. Hurd
U.S. District Judge

[9] *Banks v. Dretke*, 540 U.S. 668, 705 (2004) ("To obtain a certificate of appealability, a prisoner must 'demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

2021 WL 5446979
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Peter GOMEZ, Petitioner,

v.

Mark MILLER, Superintendent, Green Haven Correctional Facility [1], Respondent.

1 Mark Miller, Superintendent, Green Haven Correctional Facility, is substituted for Mark Royce. Fed. R. Civ. P. 25(c).

9:19-CV-1571 (TJM)

|

Signed November 20, 2021

|

Filed 11/22/2021

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DECISION and ORDER

Thomas J. McAvoy, Senior, United States District Judge

I. INTRODUCTION

***1** Petitioner Peter Gomez ("Petitioner") seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Dkt. No. 1 ("Petition"). On January 22, 2021, with the Court's permission, Petitioner filed a Second Amended Petition. Dkt. No. 24 ("Sec. Am. Pet."). On January 26, 2021, the Court directed Respondent to answer the Second Amended Petition. Dkt. No. 25. Respondent opposed the petition. Dkt. No. 28, Memorandum of Law in Opposition; Dkt. No. 29, Answer; Dkt. No. 30, State Court Records. Petitioner filed a traverse (Dkt. No. 32) and a supplemental traverse (Dkt. No. 34).

For the reasons that follow, the habeas petition is denied and dismissed.

II. RELEVANT BACKGROUND

A. Indictment

In April 2014, an Albany County grand jury returned a four-count indictment charging Petitioner with criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the first degree, and operating as a major trafficker. SR. at 14-18. [2] The charges arose from Petitioner's possession of cocaine with intent to sell in Cohoes, New York on March 18, 2014. *Id.* Police executed a search warrant for the search of a 2010 black Nissan and recovered four clear plastic bags containing cocaine. *Id.* at 138-139, 143.

2 "SR" refers to the state court record, found at Dkt. No. 30-1. "TR" refers to the transcripts of the suppression, plea, and sentencing hearings, found at Dkt. No. 30-2. Citations to the submissions refer to the pagination generated by CM/ECF, the Court's electronic filing system.

B. Suppression Hearing

In May 2014, Petitioner filed a pre-trial counseled omnibus motion. SR. at 115-151. Of relevance herein, Petitioner sought a *Huntley* and *Dunaway-Mapp* [3] hearing related to tangible property recovered from a search of his vehicle and his oral statements. *Id.* The trial court scheduled a *Huntley* and *Dunaway-Mapp* hearing (hereinafter "suppression hearing") to resolve the motions. *Id.* at 159.

3 A pretrial hearing pursuant to *People v. Huntley*, 15 N.Y.2d 72 (1965), is held to determine the voluntariness of inculpatory statements made by a criminal defendant to law enforcement officers. *See Huntley*, 15 N.Y.2d at 77–78. A *Dunaway* hearing is used to determine whether an arrest is supported by probable cause. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979). A *Mapp* hearing is a hearing to determine whether suppression of evidence obtained pursuant to a search or seizure by police officers is constitutionally warranted. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

The suppression hearing was held in Albany County Court on June 27, 2014 and July 10, 2014. TR. at 118. Petitioner was represented at the suppression hearing by retained counsel, Attorney Cheryl Coleman. *Id.*

At the hearing, Inv. Missenis, an investigator assigned to the Community Narcotics Enforcement Team and employed with the State Police for over 24 years, was called to testify. TR. at 22-23. Inv. Missenis submitted an application for a search warrant to Cohoes City Court Judge Van Ullen on March 14, 2014. *Id.* at 24-25. In the application, Inv. Missenis outlined his investigation that led to the application to search a 2007 white Audi AQ7 bearing New York registration GLC-7699. *Id.* at 28-29, SR. at 147. In the sworn application, Inv. Missenis claimed he received information for an unnamed confidential informant ("CI") that Petitioner distributed large quantities of cocaine. SR. at 146–151. The CI reported Petitioner was expected to arrive in Cohoes on March 14, 2014 and that he drove "a couple different vehicles, a white Audi Q7" and "a black Nissan Sentra" with a New Jersey registration, owned by Petitioner's girlfriend. *Id.* at 148; TR. at 43. The black Nissan was not the target of the warrant because Inv. Missenis did not know the license plate number. TR. at 29, 44. Judge Van Ullen signed the warrant on March 14, 2014. SR. at 145. Inv. Missenis attempted to execute the warrant, but Petitioner did not arrive in Cohoes on March 14, 2014, in any vehicle. TR. at 13, 43.

***2** Inv. Missenis later learned from the CI that Petitioner would arrive "a few days later." TR. at 52-54. Inv. Missenis testified that, on March 18, 2014, at approximately 5:30 p.m., Petitioner arrived on Lincoln Avenue in Cohoes, NY in a black Nissan. *Id.* at 31. Inv. Missenis and Investigator Vardeen approached the driver's side of the vehicle and Vardeen "pulled out her gun." *Id.* at 40. Petitioner "ran off," but was apprehended within minutes, handcuffed and transported to the police station. *Id.*

After Petitioner was detained, Inv. Missenis submitted an application for a search warrant for a 2010 black Nissan with New Jersey registration H39DCY to Judge Van Ullen. TR. at 30-31. In the application, Inv. Missenis referred to the March 14, 2014 application and warrant. *Id.* at 44; SR. at 141. Inv. Missenis averred, "[i]t should be noted that a couple of minutes before the traffic stop, CS-1 contacted your affiant and advised that Peter Gomez was in the area of 27 Lincoln Ave with the delivery of cocaine." SR. at 142. Judge Van Ullen signed the warrant on March 18, 2014. *Id.* at 139. Inv. Missenis executed the search warrant and recovered two plastic bags from the trunk containing a 2.2-pound brick of powder cocaine. TR. at 35-36.

The prosecution also called Investigator Robert Marrero ("Inv. Marrero") to testify. TR. at 58. Inv. Missenis called Inv. Marrero on March 18, 2014 to speak with Petitioner because "they assumed he didn't speak any English." *Id.* at 59-60. Inv. Marrero did not tell Petitioner he was under arrest and, to Marrero's knowledge, no one else told Petitioner he was under arrest. *Id.* at 68-60. Inv. Marrero and Petitioner engaged in "small talk," in English and Spanish, at the State Police barracks in Latham. *Id.* at 61. At that time, Petitioner was in handcuffs and "chained to a wall." *Id.* at 71. During the conversation, Petitioner asked, in English, "what was going on" and Inv. Marrero responded "I really don't know" but explained to Petitioner that he was taken into custody because he ran from the vehicle. TR. at 62, 74. Petitioner then asked if there was a warrant on his vehicle and Inv. Marrero responded, "I don't know." *Id.* at 62, 75.

The trial court rendered a written decision denying Petitioner's motion to suppress. SR. at 163-169. The trial court concluded, "[t]he information submitted in the March 14, 2014 search warrant application was clearly incorporated by reference into the second search warrant application." *Id.* at 167. The trial court continued, "the prior search warrant application was both available to the City Court Judge and sufficiently fresh in the Judge's memory so that he could accurately assess it[ ]" and further, the prior search warrant application was "available to [the City Court Judge] in a form which could be reviewed at a later date." *Id.* Accordingly, the trial court concluded that the March 18, 2014 search warrant was not defective and denied Petitioner's motion to suppress the tangible evidence. *Id.* at 167-168. The trial court also denied Petitioner's motion to suppress his statements regarding a warrant for his vehicle finding, "although the conversation clearly took place in a custodial setting," the statements were "spontaneous and unprompted by any inquiry." SR. at 167-168.

C. Supplemental Indictment

On October 7, 2014, Petitioner filed a counseled Order to Show Cause to dismiss Counts Two, Three, and Four of the indictment. SR. at 170-183. The trial court granted the motion, in part, and dismissed Counts Three and Four, with leave to re-present. *Id.* at 192. On January 23, 2015, the grand jury returned an indictment charging Petitioner with criminal sale of a controlled substance in the first degree and operating as a major trafficker. *Id.* at 18-19. This indictment was consolidated with the original indictment. *Id.* at 199.

D. Plea and Sentencing Proceedings

*3 On July 24, 2015, Petitioner and his counsel appeared in Albany Supreme Court for a hearing. TR. at 81. At the commencement, the trial court acknowledged that the People extended a plea offer to Petitioner; Petitioner would plead guilty to an A-II felony of criminal sale of a controlled substance in the second degree, in full satisfaction of the indictment, in exchange for a sentence of twelve years, five years post-release supervision, and a waiver of Petitioner's right to appeal. *Id.* at 81-82. Petitioner's counsel indicated he wished to accept the plea. *Id.* at 82.

Petitioner was placed under oath. TR. at 82. Petitioner stated he had enough time to discuss the case and plea agreement with his counsel. *Id.* at 85. Petitioner represented he could understand English and the proceedings, and had not taken any medication or drugs which would impair his thinking. *Id.* at 84-85. The court then explained the myriad of trial rights to which Petitioner was entitled and agreed to waive as a condition of the plea agreement. TR. at 86-87. Petitioner also stated he had not been promised anything or threatened into pleading guilty. *Id.* at 88. Petitioner was presented with, and signed, a waiver of appeal form. *Id.* at 90-91.

The court engaged in a colloquy with Petitioner whereupon he admitted to knowingly and unlawfully selling cocaine in excess of one-half ounce or more on March 18, 2014. TR. at 93-94. When the trial judge asked Petitioner if he had questions for the court, Petitioner "asked for a weekend" with his children. *Id.* at 95. The court responded, "I was willing to allow you to turn yourself in on Monday if you plead to the A-I with a possible sentence of up to 24 years." *Id.* at 96. The court stated that the plea offer was "A-II and you would plea to it today and be put in today." *Id.* Petitioner agreed. *Id.*

On September 4, 2015, Petitioner was sentenced as a second felony offender to a twelve-year determinate sentence followed by five years post-release supervision. TR. at 110.

On September 8, 2015, Petitioner's counsel filed a notice of appeal. SR. at 11.

E. Direct Appeal

On September 1, 2017, Petitioner filed a counseled brief and appendix in the Appellate Division, Third Department ("AD"). SR. 223-432. The issues raised by Petitioner in his direct appeal to the AD included: (1) the validity of his guilty plea and waiver of appeal; (2) the trial court erred in denying Petitioner's motion to suppress the tangible evidence and his statements; and (3) the trial court imposed a harsh and excessive sentence. *Id.* at 229. The AD dismissed Petitioner's direct appeal on May 1, 2018. *People v. Gomez*, 162 A.D.3d 1311 (3d Dep't 2018).

First, the AD noted Petitioner's challenge to the voluntariness of his guilty plea was unpreserved for review and "defendant made no statements during the plea colloquy to trigger the narrow exception to the preservation requirement[.]" *Gomez*, 162 A.D.3d at 1312. Next, the AD agreed that Petitioner's appeal waiver was invalid. *Id.* Third, the AD concluded the trial court appropriately denied Petitioner's motion to suppress Petitioner's statement "because it was spontaneous and not elicited by police interrogation[.]" *Id.* Similarly, the AD found the trial court properly denied suppression of the cocaine seized from Petitioner's car because the police "incorporate[d] by reference the prior search warrant application into the subsequent application[.]" *Id.* The AD reasoned, "the earlier information was given under oath to the same judge, who had a copy available to him and it was fresh in his memory, having been submitted only four days earlier." *Gomez*, 162 A.D.3d at 1312. The AD found the confidential informant to be reliable noting that the informant previously provided information to the police in another investigation, and his information was supported by text messages, which were seen by the officer who applied for the search warrant. *Id.* Finally, given the nature of the crime and Petitioner's criminal history, the AD concluded that the sentence was not harsh or excessive. *Id.*

*4 The New York State Court of Appeals denied Petitioner's application for leave to appeal the AD's decision on January 14, 2019. SR. at 458.

F. Motion to Vacate Judgment

On February 21, 2018, while Petitioner's direct appeal was pending, he filed a pro se motion to vacate his conviction pursuant to New York Criminal Procedure Law ("CPL") § 440.10 on the grounds that: (1) the trial court lacked jurisdiction because a laboratory report was not filed with the court pursuant to CPL § 715.50[4]; and (2) trial counsel was ineffective for: (a) failing to request a *Darden*[5] hearing; (b) failing to investigate the information in the search warrant application and affidavits; (c) failing to demand the identity of the confidential informant; (d) making inappropriate admissions in the omnibus motion; (e) failing to move to dismiss the indictment based upon CPL § 715.50; and (f)

unilaterally waiving Petitioner's right to testify before the grand jury. SR. at 459-480.

4 CPL § 715.50 provides, in pertinent part: "[...] in every felony case involving the possession or sale of a dangerous drug, the head of the agency charged with custody of such drugs, or his designee, shall within forty-five days after receipt thereof perform or cause to be performed an analysis of such drugs, such analysis to include qualitative identification; weight and quantity where appropriate. Within ten days after the report of such analysis is received by such agency, the head thereof or his designee shall forward a copy thereof to the appropriate district attorney and inform him of the location where the subject drugs are being held."

5 A *Darden* hearing is used to challenge the actual existence and reliability of any confidential informer who provided information that served as the basis for probable cause for a defendant's arrest. *See Daly v. Lee*, No. 11-CV-3030, 2014 WL 1349076, at *15 (E.D.N.Y. Apr. 4, 2014) (citing *Darden v. NY*, 34 N.Y.2d 177, 180 (1974)).

The People opposed Petitioner's § 440 motion. SR. at 545-549.

On July 2, 2018, the Albany Supreme Court denied Petitioner's § 440 motion. SR. at 551-553. The court first found Petitioner's jurisdictional claims to be without merit and held, "[t]he Court has not been persuaded that jurisdiction over the case and defendant would be in any way divested by the language of CPL § 715.50 and/or any of defendant's allegations about laboratory reports." *Id.* at 551-552. Second, citing to § 440.10(2)(b)[6], the trial court denied Petitioner's first five ineffective assistance of counsel claims holding that "sufficient facts appear on the record with respect to the ineffective assistance issue to permit adequate review thereof on appeal[.]" *Id.* The court also found that the sixth ground lacked merit. *Id.* The state court noted, "to the extent defendant has raised any additional ineffective assistance claims that are outside the record, the Court finds said arguments to be wholly conclusory and insufficient to warrant 440.10 relief and/or a hearing." *Id.* The court concluded, "[d]efendant's remaining arguments and requests for relief have been considered and found to be wholly lacking in merit." SR. at 522.

6 CPL § 440.10(2)(b) provides in pertinent part that a court may deny a motion to vacate a judgment when "[t]he judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal."

***5** Petitioner filed an application for permission to appeal. SR. at 554-659. The AD denied Petitioner's request. *Id.* at 661.

III. SECOND AMENDED PETITION

Petitioner contends he is entitled to federal habeas relief because (1) his plea was involuntary; (2) the search warrant lacked probable cause; (3) the trial court lacked jurisdiction; and (4) his retained counsel was constitutionally ineffective. Dkt. No. 24; Dkt. No. 25 at 3.

IV. DISCUSSION

A. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the state court's decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §§ 2254(d)(1), (2); *Cullen v. Pinholster*, 563 U.S. 170, 180-81, 185 (2011); *Premo v. Moore*, 562 U.S. 115, 120-21 (2011); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted)).

The Supreme Court has repeatedly explained that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents.' " *Nevada v. Jackson*, 569 U.S. 505, 508-509 (2013) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *see also Metrish v. Lancaster*, 569 U.S. 351, 358 (2013) (explaining that success in a habeas case

premised on § 2254(d)(1) requires the petitioner to "show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' ") (quoting *Richter*, 562 U.S. at 103).

Additionally, the AEDPA foreclosed "using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam) (quoting *Renico,* 559 U.S. at 779). A state court's findings are not unreasonable under § 2254(d)(2) simply because a federal habeas court reviewing the claim in the first instance would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." *Schriro*, 550 U.S. at 473.

Federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with "clear and convincing evidence." *Schriro*, 550 U.S. at 473-74 (quoting § 2254(e)(1)). "A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015). Finally, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]" *Johnson v. Williams*, 568 U.S. 289, 301 (2013).

B. Petitioner's Guilty Plea

***6** Petitioner contends his guilty plea was not made knowingly and intelligently due to the "coercive conduct of the trial court[.]" Dkt. No. 24 at 2. Respondent did not address this claim in the memorandum of law in opposition.

A federal court is precluded from issuing a writ of habeas corpus if an adequate and independent state-law ground justifies the petitioner's detention. *See Wainwright v. Sykes*, 433 U.S. 72, 81-85 (1977). Accordingly, "[f]ederal courts generally will not consider a federal issue in a case if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Garvey v. Duncan*, 485 F.3d 709, 713 (2d Cir. 2007) (citing *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). This results in a state-law procedural default. *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989) ("[A] federal claimant's procedural default precludes federal habeas review ... only if the last state court rendering a judgment in the case rests its judgment on the procedural default.").

This analysis applies with equal force "whether the independent state law ground is substantive or procedural...." *Garvey*, 485 F.3d at 713 (citing *Lee*, 534 U.S. at 375). Pursuant to this analysis, a state law ground is generally adequate where "it is firmly established and regularly followed in the state;" however, "in certain limited circumstances, even firmly established and regularly followed state rules will not foreclose review of a federal claim if the application of the rule ... [wa]s exorbitant." *Id.* at 713-14 (internal quotation marks omitted) (citing *Lee*, 534 at 376).

Here, the AD held that Petitioner's challenge to the voluntariness of his plea was unpreserved because he did not make a proper postallocution motion. *Gomez*, 162 A.D.3d at 1311-1312.

> New York courts routinely and regularly require defendants to make a motion ... to withdraw their guilty plea or to vacate the judgment in order to preserve for appeal any claim relating to the validity of the plea itself ... the Appellate Division's reliance on the state procedural rule ... constitutes both an adequate and independent ground for its decision.

Snitzel v. Murry, 371 F.Supp.2d 295, 301 (W.D.N.Y. 2004) (citing cases); *see also Irvis v. Haggat*, No. 9:12-CV-1538 (FJS/TWD), 2015 WL 6737031, at *8-9 (N.D.N.Y. Nov. 3, 2015) ("Habeas courts in this Circuit have recognized that failure to move to withdraw a guilty plea or move to vacate a judgment of conviction constitutes an independent and adequate state procedural rule barring federal habeas review of claims challenging the voluntariness of a plea....") (citing cases).

While Petitioner filed a § 440 motion, the Petitioner challenged the court's jurisdiction and the assistance of counsel, not the validity of the plea itself. SR. at 459-480. In fact, Petitioner never argued that the plea was invalid,

instead focusing on his counsel's failure to investigate, failure to move to dismiss the indictment, and waiver of Petitioner's right to testify before the grand jury. *Id.* Filing a § 440 motion alone is not enough to preserve an involuntary plea claim; instead, the motion must actually allege said claim. *See Brown v. Rivera*, No. 9:05-CV-1478 (RFT), 2008 WL 2559372, at *2-*3 (N.D.N.Y. June 23, 2008) (dismissing petition as procedurally barred where petitioner's 440 motion "asserted several claims of ineffective assistance of counsel, however, none of those claims concerned [counsel's] failure to preserve this involuntary plea claim."). Therefore, this represents an independent and adequate state rule resulting in a procedural default of Petitioner's claim.

***7** Procedurally defaulted claims are not subject to habeas review unless a petitioner shows cause for the default and actual resulting prejudice, or that the denial of habeas relief would result in a fundamental miscarriage of justice, i.e., that he or she is actually innocent. *House v. Bell*, 547 U.S. 518, 536-39 (2006); *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Jackson v. Conway*, 763 F.3d 115, 133 (2d Cir. 2014); *see Dunham v. Travis*, 313 F.3d 724, 730 (2d Cir. 2002) (" '[A]ctual innocence' means factual innocence, not mere legal insufficiency.") (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). To establish cause, petitioner must show that some objective external factor impeded his ability to comply with the relevant procedural rule. *Maples v. Thomas*, 565 U.S. 266, 280 (2012); *Coleman*, 501 U.S. at 753. If a petitioner fails to establish cause, a court need not decide whether he suffered actual prejudice, because federal habeas relief is generally unavailable as to procedurally defaulted claims unless both cause and prejudice are demonstrated. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (referring to the "cause-and-prejudice standard"); *Stepney v. Lopes*, 760 F.2d 40, 45 (2d Cir. 1985).

Here, the petition neither alleged nor does the record support any contentions of cause or actual innocence. Moreover, the fact that Petitioner admitted his guilt indicates that no fundamental miscarriage of justice will occur if the procedural bar is applied. *See Carpenter v. Unger*, Nos. 9:10-CV-1240 (GTS/TWD), 9:12-CV-0957 (GTS/TWD), 2014 WL 4105398, at *38 (N.D.N.Y. Aug. 20, 2014) (accepting recommendation to dismiss habeas petition as procedurally barred because, in the absence of any other evidence to the contrary, petitioner's admission of guilt in his plea allocution undercut any claims of actual innocence); *Brown*, 2008 WL 2559372, at *3 (holding that "[i]n light of Petitioner's ... admissions, it is difficult to envision a meritorious claim of innocence with respect to his conviction," therefore the Court's "decision not to consider [petitioner's] claim would not result in a fundamental miscarriage of justice.").

Because cause has not been established, no discussion of prejudice is necessary. Thus, there is nothing that can save Petitioner's procedurally defaulted claim: habeas relief is precluded.

In any event, even if this claim was not defaulted, no relief would issue. In order to comply with constitutional due process protections, a guilty plea must be knowing, voluntary and intelligent. *See U.S. v. Ruiz*, 536 U.S. 622, 628-689 (2002) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *Brady v. United States*, 397 U.S. 742, 748 (1970). "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the [petitioner]." *Ferrer v. Superintendent*, 628 F.Supp.2d 294, 304 (N.D.N.Y. 2008) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quotation marks omitted)).

> Applying this standard, to establish that a criminal defendant's guilty plea was knowingly, intelligently, and voluntarily entered the court must find, based upon the record of the relevant plea proceedings, that he or she 1) was competent to proceed and was fully aware of the nature of the charges faced; 2) had a rational and factual understanding of the proceedings; and, 3) was cognizant of the constitutional protections relinquished upon entry of the plea.

Capra v. LeClair, No. 9:06-CV-1230 (GTS/DEP), 2010 WL 3323676, at *9 (N.D.N.Y. Apr. 12, 2010) (citing *Oyague v. Artuz*, 393 F.3d 99, 106 (2d Cir. 2004)).

In evaluating whether a plea was knowing and voluntary, a court may consider, "among other things, [petitioner's] allocution statements." *Carpenter*, 2014 WL 4105398, at *19 (citing *U.S. v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997)).

> ***8** [T]he representations of the [petitioner], his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.

Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); *see also Padilla v. Keane*, 331 F.Supp.2d 209, 217 (S.D.N.Y. Aug. 19, 2004) ("Where ... [petitioner] ... has explicitly stated in his allocution that he fully understands the consequences of his plea and that he has chosen to plead guilty after a thorough consultation with his attorney, a district court on habeas review may rely on [petitioner's] sworn statements and hold him to them.").

"It is not coercion if a defendant pleads guilty to avoid a harsher sentence." *Spikes v. Graham*, No. 9:07-CV-1129 (DNH/GHL), 2010 WL 4005044, at *7 (N.D.N.Y. July 14, 2010) (citing *Brady v. United States*, 397 U.S. 742, 752–53 (1970)), *report and recommendation adopted*, 2010 WL 3999474 (N.D.N.Y. Oct. 12, 2010). "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'-and permissible-'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' " *Id.* (citations omitted).

During the plea hearing, the trial judge commented that Petitioner was charged with "a number of A-I felonies in the indictment" and despite those charges, Petitioner's counsel was "able to secure" a plea to an A-II felony. TR. at 85. When asked if he had questions of the court, Petitioner and the trial judge engaged in the following dialogue:

> THE DEFENDANT: Not a question. But, like, you see that when I give myself up today I just asked for a weekend with my kids on Monday. I would be back on Monday. I'm ready to give myself up.
>
> THE COURT: I already informed Miss Coleman and I'm sure she informed you, sir, I was more than happy to allow you to have the weekend to think about it and come back, or plea today to the A-I and come back. Ms. Coleman indicated that you were asking to plead to the A-II and you were willing to plead to it today and be put in.
>
> THE DEFENDANT: I know. I figured that you would be concerned about me probably running, because I just figured you thought -- I thought that you would doubt that I would come in after I cop out to the A-I but I am just giving you the faith that I'm willing to give myself up today.
>
> THE COURT: I was willing to allow you the weekend. Again, you knew we were on today and knew you were scheduled to start trial on Monday. I was willing to allow you to turn yourself in on Monday if you plead to the A-I with a possible sentence of up to 24 years. Ms. Coleman came back and indicated that you would prefer to plea to the A-II and you would plea to it today and be put in today. That is the plea bargain. Do you want to avail yourself of that plea bargain?

TR. at 96. Petitioner indicated that he wished to take the plea and had no further questions. *Id.*

A review of the transcript reveals that the judge explained the alternatives facing Petitioner without threatening or coercive language. *See Grimes v. Lempke*, No. 9:10-CV-68 (GLS/RFT), 2014 WL 1028863, at *12 (N.D.N.Y. Mar. 14, 2014) (citing *United States ex rel. McGrath v. LaVallee*, 348 F.2d 373, 377 (2d Cir. 1965) ("The mere explanation of the alternatives facing the defendant ... does not support the habeas corpus petitioner's allegations that the judge tricked and coerced (him) into pleading guilty by means of false assurances of consideration and a shorter sentence and fear inducing language.") (internal quotation marks omitted)). Further, Petitioner's admissions during the plea hearing belie his claim that his plea was not knowingly entered. Petitioner's assurances that counsel explained the charges and options to him and that he understood the rights he was giving up by pleading guilty and the consequences of his plea, including his appeal waiver, *see* TR. at 85-91, are entitled to the "weighty presumption[s] favoring the veracity of a defendant's sworn

plea of guilty[.]" *Doe v. Menefee*, 391 F.3d 147, 173 (2d Cir. 2004); *see also Blackledge*, 431 U.S. at 74.

***9** Therefore, Petitioner's claim for habeas relief, on this ground, is denied.

C. Fourth Amendment Claim

Petitioner argues the search warrant and application were defective and evidence seized pursuant to the warrant should have been suppressed. Dkt. No. 24 at 5. This claim is not cognizable on federal habeas review.

In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494-95; *see Pina v. Kuhlmann,* 239 F.Supp.2d 285, 289 (E.D.N.Y. 2003) ("It is well settled that [Fourth Amendment] claims are not cognizable for habeas corpus review where a State has provided a full and fair opportunity to litigate this issue."). As long as the state provides an opportunity to litigate a petitioner's Fourth Amendment claim, "it matters not whether the petitioner actually 'took advantage of the State's procedure.' " *Welch v. Artus*, No. 1:04-CV-0205, 2007 WL 949652 at *19 (W.D.N.Y. 2007) (quoting *Graham v. Costello*, 299 F.3d 129, 134 (2d Cir. 2002)).

Following *Stone*, review of Fourth Amendment claims in habeas petitions is proper only if: (1) the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (2) the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in that process. *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992) (citing *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir. 1977)); *see Ramdeo v. Phillips*, No. 1:04-CV-1157, 2007 W L 1989469 at *27 (E.D.N.Y. Jul. 9, 2007).

Petitioner cannot and does not contend that New York failed to provide a corrective procedure to redress his alleged Fourth Amendment claim. New York's corrective procedure for Fourth Amendment violations, codified at CPL § 710.10 *et seq.*, is facially adequate. *See* CPL § 710; *Capellan*, 975 F.2d at 70 n. 1. Under CPL § 710, a defendant may move to suppress evidence he claims was unlawfully obtained when he has "reasonable cause to believe that such [evidence] may be offered against him in a criminal action." *Huntley v. Superintendent, Southport Corr. Fac.*, No. 9:00-CV-191 (DNH/GHL), 2007 W L 319846 at *7 (N.D.N.Y. Jan. 30, 2007) (quoting CPL § 710.20).

The record reflects that Petitioner took full advantage of his opportunity to completely adjudicate this matter in state court. *See* TR. at 18-79 (suppression hearing transcript). At the conclusion of the suppression hearing, a Decision and Order, with a detailed discussion of the facts and analysis of the relevant law, was issued. SR. at 163-169. The decision was examined on direct appeal by the AD. *Gomez*, 162 A.D.3d. at 1312.

Nor do Petitioner's claims demonstrate an unconscionable breakdown in the state's corrective process. An "unconscionable breakdown in the state's process must be one that calls into serious question whether a conviction is obtained pursuant to those fundamental notions of due process that are at the heart of a civilized society." *Cappiello v. Hoke*, 698 F.Supp. 1042, 1050 (E.D.N.Y. 1988) (noting such examples as bribing of trial judge, government's knowing use of perjured testimony, or use of torture to extract a guilty plea), *aff'd*, 852 F.2d 59 (2d Cir. 1988); *accord Capellan*, 975 F.2d at 70 (observing that "unconscionable breakdown" must entail some sort of "disruption or obstruction of a state proceeding"). The focus of the inquiry regarding whether there has been an "unconscionable breakdown" must be on "the existence and application of the corrective procedures themselves" rather than on the "outcome resulting from the application of adequate state court corrective procedures." *Capellan*, 975 F.2d at 71; *see Graham*, 299 F.3d at 134. Nothing in the record supports a finding that there was an unconscionable breakdown in the corrective process in this case.

***10** To the extent that Petitioner argues he was not afforded a full and fair opportunity to litigate his Fourth Amendment claim because the trial court failed to entertain a *Darden* hearing and his counsel was ineffective, *see* Dkt. No. 24 at 5; Dkt. No. 32 at 9, 18, that claim is insufficient to establish the sort of unconscionable breakdown necessary for the Court to address Petitioner's Fourth Amendment claims. *See Crenshaw v. Superintendent, Five Points Corr. Fac.*, 372 F.Supp.2d 361, 370 (W.D.N.Y. 2005) (finding the petitioner's "assertions that the state courts were incorrect and defense counsel incompetent do not constitute the sort of 'breakdown' referred to in *Gates v. Henderson*" that would permit habeas review of a Fourth Amendment claim); *Ferron v. Goord*, 255 F.Supp.2d 127, 132 (W.D.N.Y. 2003)

(rejecting the *Darden* argument in the context of Fourth Amendment claims); *Brown v. Donelli*, No. 05-CV-6085, 2009 WL 3429785, at *4 (W.D.N.Y. Oct. 16, 2009) (holding that the trial court's failure to grant a *Darden* hearing was not an "unconscionable breakdown"); *Shaw v. Scully*, 654 F.Supp. 859, 865 (S.D.N.Y. 1987) ("Where petitioners have either taken advantage of an opportunity to present Fourth Amendment claims or deliberately bypassed the procedure ... courts within this circuit have refused to equate ineffective assistance of counsel with unconscionable breakdown.") (citations omitted); *Allah v. LeFevre*, 623 F.Supp. 987, 991-92 (S.D.N.Y. 1985) (rejecting a habeas claim that ineffective assistance of counsel can constitute an "unconscionable breakdown", stating that "it is plain from the majority opinion in *Gates* that the Court of Appeals had something other than ineffective assistance of counsel in mind when it speculated that an unconscionable breakdown in state process might permit federal habeas review."). [7]

7 The ineffective assistance of counsel claim is analyzed, *infra*, under *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). *Vasquez v. New York*, No. 17-CV-697, 2020 WL 2859007, at *6 (S.D.N.Y. Feb. 27, 2020) (reasoning that *Stone* does not bar an independent consideration of the ineffective counsel claim) (citations omitted), *report and recommendation adopted*, 2020 WL 1271363 (S.D.N.Y. Mar. 16, 2020).

Finally, Petitioner cannot circumvent *Stone* with the claim that his due process rights were violated during the suppression hearing. *See* Dkt. No. 32 at 11; *see Ferron*, 255 F.Supp.2d at 133 (holding that the plaintiff's "attempt to [...] end-run around *Stone's* clearly established barrier to habeas review by 'transmogrifying' his barred Fourth Amendment claim into a due process claim must fail.") (citations omitted).

Accordingly, Petitioner's Fourth Amendment claim is barred by *Stone*, and Ground One of the petition is therefore dismissed.

D. Jurisdiction

Petitioner contends that the trial court lacked jurisdiction because the prosecution failed to present a certified laboratory report to the grand jury and trial court. Dkt. No. 24 at 7. Respondent argues that the claim is not cognizable, precluded by Petitioner's guilty plea, and meritless. Dkt. No. 28 at 25-26. Petitioner raised this argument in his § 440 motion. SR. at 476-480. The trial court rejected the argument finding, "[t]he Court has not been persuaded that jurisdiction over the case and defendant would be in any way divested by the language of CPL § 715.50 and/or any of defendant's allegations about laboratory reports." *Id.* at 552.

"It is well-settled that a claim involving an error in a grand jury proceeding is not cognizable upon federal habeas review" because "[t]here is no federal constitutional right to a grand jury" and "any defect in the grand jury proceeding is cured by [a] petitioner's subsequent conviction." *Zimmerman v. Superintendent Conway*, No. 10-CV-1393, 2013 WL 12379648, at *23 (S.D.N.Y. May 7, 2013) (rejecting argument that trial court erred when it failed to dismiss the indictment on the ground that the petitioner was presented to the grand jury in shackles and surrounded by corrections officers) (internal quotation marks and citations omitted), *report and recommendation adopted sub nom.*, 2018 WL 6413144 (S.D.N.Y. Dec. 6, 2018); *see also Bingham v. Duncan*, No. 01-CV-1371, 2003 WL 21360084, at *4 (S.D.N.Y. June 12, 2003) ("[C]laims of error relating to state grand jury proceedings are not cognizable on federal habeas review, since '[t]he right to testify before a grand jury is a state statutory right, and is not of constitutional dimension.' ") (quoting *Green v. Artuz*, 990 F.Supp. 267, 273 (S.D.N.Y. 1998)).

***11** Further, once a defendant pleads guilty in open court, he or she may not "thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" because the plea "represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also United States v. Garcia*, 339 F.3d 116, 117 (2d Cir. 2003) (per curiam) ("It is well settled that a defendant who knowingly and voluntarily enters a guilty plea waives all non-jurisdictional defects in the prior proceedings."). Here, Petitioner attempts to avoid the *Tollett* doctrine by framing his challenge as a jurisdictional defect and claims the trial court was not provided with evidence that the "substance" acquired was "in fact [a] narcotic drug (cocaine)." Dkt. No. 24 at 7. Regardless of Petitioner's characterization of the challenge, the alleged failure to produce a "certified laboratory analysis report" is a state procedural defect, not a constitutional issue, and thus, waived by Petitioner's guilty plea. *See Ariola v. LaClair*, No. 07-CV-57 (GLS/VEB), 2008 WL 2157131, at *14 (N.D.N.Y. Feb. 20, 2008) (holding that jurisdictional challenges related to CPL § 730.30 relate to New York State

law and fail to allege federal constitutional issues) *report and recommendation adopted*, 2008 WL 2157130 (N.D.N.Y. May 20, 2008).

In any event, Petitioner's allegation that the grand jury and trial court did not receive the reliable evidence that the substance was cocaine lacks merit. Inv. Missenis testified before the grand jury and averred that he "field tested" the "white powder substance" recovered from Petitioner's trunk and "preliminarily identif[ied]" the substance as approximately 1324 grams of cocaine. SR. at 502. Inv. Vardeen also testified before the grand jury and averred that her field testing of the substance was also positive for cocaine. *Id.* at 508.

During the suppression hearing, Inv. Missenis testified that, based upon his training and experience, the powder substance recovered from Petitioner's vehicle was powder cocaine. TR. at 35. Additionally, Petitioner's statements to the Court during the plea hearing belie his assertions:

> THE COURT: Sir the indictment as amended for the purposes of a plea reads and charges you as follows. That on or about March 18, 2014 at approximately 5:40 p.m. while on Lincoln Avenue, City of Cohoes, County of Albany, State of New York you did knowingly and unlawfully sell one or more preparations, compounds, mixtures, or substances containing a narcotic drug. And the preparations, compounds, mixtures or substances are an aggregate weight of one-half ounce or more; to wit, at that time, on that date and location you did sell to another person more than one-half ounce of a controlled substance. That controlled substance being cocaine. Is that, in fact, the case sir?
>
> THE DEFENDANT: Yep.
>
> THE COURT: Did you know that it was in a weight in excess of one-half ounce or more?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And did you know that it was illegal and against the law to sell cocaine?
>
> THE DEFENDANT: Yep.

TR. at 93-94.

Accordingly, Ground Two of the petition is therefore dismissed.

E. Ineffective Assistance of Counsel

Petitioner contends that his counsel was ineffective because (1) she allowed him to "plead to a completed crim[inal] ... sale when neither an actual or even an 'attempted' sale of drugs ever occurred;" (2) she failed to advise Petitioner of a viable "agency" defense[8]; and (3) she allowed Petitioner to plea before examining the laboratory report. Dkt. No. 24 at 8-10. Respondent argues Petitioner's claim related to counsel's failure to review the laboratory report is unexhausted. Dkt. No. 28 at 15-24. Respondent further contends Petitioner's claims are foreclosed by his guilty plea and lack merit. *Id.*

8 Petitioner asserts he could not raise this issue on direct appeal because "[d]efense counsel had never informed petitioner of such outcome determinative defense before plea or at sentence." Dkt. No. 24 at 9.

1. Exhaustion

An application for a writ of habeas corpus may not be granted until a petitioner has exhausted all remedies available in state court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A), (B)(I), (ii). To satisfy the exhaustion requirement, a petitioner must do so both procedurally and substantively. Procedural exhaustion requires that a petitioner raise all claims in state court prior to raising them in a federal habeas corpus petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Substantive exhaustion requires that a petitioner "fairly present" each claim for habeas relief in "each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted). In other words, petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

***12** In the Order denying Petitioner's § 440 motion, the trial court listed Petitioner's challenged acts/omissions of his counsel as follows: (1) failure to request a *Darden* hearing; (2) failure to investigate the search warrant application and affidavits; (3) failure to demand the identity of the

CI; (4) presenting untrue and inappropriate admissions in the omnibus motion; (5) failure to move to dismiss the indictment; and (6) unilaterally waived Petitioner's right to testify before the grand jury. SR. at 552.

The exhaustion inquiry focuses on "whether the factual issue was presented to the state courts in a posture allowing full and fair consideration. Where such consideration was given the issue by the state courts, the federal district court will presume the correctness of the state court's factual determinations." *Smith v. Atkins*, 678 F.2d 883, 885 (10th Cir. 1982) (citing *Sumner v. Mata*, 449 U.S. 539 (1981)). While Respondent is correct that the "exact issue" of whether the Petitioner's counsel was ineffective for failing to produce the laboratory report was not argued in the § 440 motion, this Court need not make a determination with respect to whether the claim is properly exhausted because, Petitioner could still present his unexhausted claim to the state courts by filing a successive CPL § 440.10 motion. There is no time limit within which an individual must bring a section 440.10 motion, and the statute specifically states that a motion to vacate may be made "[a]t any time after the entry of a judgment[.]" CPL § 440.10(1).

Section 2254 "prohibits federal courts from granting relief to an applicant who has not exhausted the remedies available in the courts of the State," but allows "federal courts to deny the petition, regardless of whether the applicant exhausted his state court remedies." *Abuzaid v. Mattox*, 726 F.3d 311, 321 (2d Cir. 2013) (emphasis in original, internal quotation marks omitted) (citing 28 U.S.C. § 2254(b)(1)(A), (b)(2)). Unexhausted claims may be denied on the merits if the claims are "plainly meritless" (*Rhines v. Weber*, 544 U.S. 269, 277 (2005)) or "patently frivolous." *McFadden v. Senkowski*, 421 F.Supp.2d 619, 621 (W.D.N.Y. 2006); *see* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Because Petitioner's claims fail under either standard, the Court will dispose of them.

2. Legal Effect of Guilty Plea

Petitioner's ineffective assistance of counsel claims are foreclosed by his guilty plea. "In the context of a guilty plea, a petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the petitioner would not have pleaded guilty and instead would have exercised his or her right to trial." *Beckary v. Chappius*, No. 1:11-CV-0850, 2012 WL 3045691, at *9 (W.D.N.Y. July 25, 2012) (citing *Hill*, 474 U.S. at 58-59). A petitioner is limited to "attack[ing] the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within acceptable standards." *Id.* (internal quotation marks and citations omitted).

Any claims "which involve counsel's pre-plea actions and do not affect the voluntariness of the plea itself [are] waived by [a] voluntary, knowing, and intelligent guilty plea." *Beckary*, 2012 WL 3045691, at *10. Here, Petitioner's ineffective assistance claims are waived because, as previously discussed, Petitioner's plea was knowing, intelligent, and voluntary, and these claims involve pre-plea actions. *See U.S. v. Gregg*, 463 F.3d 160, 164 (2d Cir. 2006) ("a guilty plea ... conclusively resolves the question of factual guilt supporting the conviction, thereby rendering any antecedent constitutional violation bearing on factual guilt a non-issue[.]"); *Smith v. Burge,* No. 03 CIV.8648, 2005 WL 78583, at *11 (S.D.N.Y. Jan. 12, 2005) (finding that counsel's alleged failure to advise the petitioner of possible defense prior to entry of his guilty plea to be a "pre-plea ineffective assistance claim"); *Parisi v. United States*, 529 F.3d 134, 138 (2d Cir. 2008) (holding that the "assertion that an effective lawyer would have successfully obtained dismissal of his case, does not relate to the process by which [the defendant] agreed to plead guilty"); *Wimes v. Conway*, 10–CV–601T, 2011 WL 5006762, at *3 (W.D.N.Y. Oct. 20, 2011) (finding the petitioner's claim that his counsel was ineffective for failing to investigate certain evidence barred from review because the claim did not relate to the voluntariness of his guilty plea); *Hill v. West*, 599 F.Supp.2d 371, 392 (W.D.N.Y. 2009) (holding ineffective-assistance-of-counsel claims relating to pre-plea events, such as the failure to investigate and acquisition of discovery material, were effectively waived under *Tollett* because the petitioner's guilty plea was voluntary).

3. Merits

***13** Even assuming the claim survived Petitioner's valid plea, no relief would issue. To demonstrate constitutionally ineffective assistance of counsel, a petitioner must show that counsel's performance fell below an objective standard of professional reasonableness, and but for counsel's alleged errors, the result of the proceedings would have been different, and as a result, petitioner suffered prejudice. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Premo v.*

Moore, 562 U.S. 115, 121-22 (2011). The standard "must be applied with scrupulous care" in habeas proceedings, because such a claim "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial] proceedings[.]" *Premo*, 562 U.S. at 122. "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Richter*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 687) (internal quotation marks and further citation omitted). A petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... [and] that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Even if petitioner can establish that counsel was deficient, he still must show that he suffered prejudice. *Id.* at 693-94.

Demonstrating constitutionally ineffective assistance of counsel is "never an easy task ... [and] establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Premo*, 562 U.S. at 122 (citations and internal quotation marks omitted); *Burt v. Titlow*, 571 U.S. 12, 19 (2013) (noting that "AEDPA erects a formidable barrier" to federal habeas review of claims that have been adjudicated in state court). When reviewing a state court's decision under section 2254, "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable–a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal quotation marks and citation omitted). Federal habeas courts "must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)" because "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Richter*, 562 U.S. at 105. Instead, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

The *Strickland* test applies "to challenges to guilty pleas based on ineffective assistance of counsel." *Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012) (quoting *Hill*, 474 U.S. at 58). To establish prejudice in this instance, petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Petitioner raised ineffective assistance of counsel claims in his § 440 motion. While Petitioner did not include the specific grounds asserted in this habeas petition, the trial court stated, "to the extent defendant has raised any additional ineffective assistance claims that are outside the record, the court finds said arguments to be wholly conclusory and insufficient to warrant 440.10 relief or a hearing." SR. at 552. The court concluded, "[d]efendant's remaining arguments and requests for relief have been considered and found to be wholly lacking in merit." SR. at 522. The trial court's finding constitutes an adjudication on the merits rendering the AEDPA standard of review applicable with regard to that claim. *Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004); *Beckham v. Miller*, 366 F.Supp.3d 379, 388 (E.D.N.Y. 2019) (citing *Cavazos v. Smith*, 565 U.S. 1, 7, 9 (2011) (per curiam)), *appeal dismissed*, 2019 WL 4061513 (2d Cir. Aug. 6, 2019).

Counsel's alleged failure to present an agency defense is insufficient to establish ineffective assistance of counsel. "A defense attorney cannot be deemed ineffective for failing to pursue an unmeritorious defense or application." *Dark v. Crowley*, No. 6:16-CV-6432, 2020 WL 6291420, at *8 (W.D.N.Y. Oct. 27, 2020) (citing, *inter alia, United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995)). Here, the record lacks evidence suggesting that Petitioner's counsel acted without "reasonable professional judgment" in declining to pursue an agency defense. Moreover, Petitioner has not demonstrated that he would have refused to plead guilty and gone to trial if his attorney prepared an agency defense. *See Rodriguez v. Mitchell*, No. 95 CV 2496, 1996 WL 705451, at *2 (E.D.N.Y. Nov. 26, 1996).

***14** Petitioner was a second felony offender charged with two counts of criminal possession of a controlled substance, one count of criminal sale of a controlled substance and operating as a major trafficker and faced a possible sentence of up to 24 years. TR. at 96. Petitioner has failed to show that counsel's representation was deficient, much less that he suffered prejudice as a result. Counsel made an omnibus motion, cross examined the prosecution's witnesses, and filed a motion to dismiss the indictment. SR. at 191-193. Counsel negotiated a favorable plea deal for the intentional actions which Petitioner allocuted he engaged in. Petitioner was permitted to plead to one count in satisfaction of the entire indictment with a notable reduction in the amount of prison time to which Petitioner would be subjected. The record establishes counsel informed Petitioner of the advantages and disadvantages of pleading guilty. During the plead proceeding, Petitioner indicated he had been adequately advised by his counsel, had enough time to talk to her about

the plea proceedings. Petitioner also stated he was satisfied with the representation he received:

> THE COURT: Ms. Coleman was able to secure for you a plea to an A-II felony despite the fact that you are charged with a number of A-I felonies in the indictment. She has also been able to secure for you a plea offer that would result in a maximum period of incarceration of 12 years with five years post-release supervision.
>
> As a result of her efforts in that regard it would be my understanding that you are highly satisfied with her representation. Is that the case?
>
> THE DEFENDANT: I am satisfied.

TR. at 85-86.

Accordingly, the actions of counsel in securing the plea failed to meet the second *Strickland* prong as said actions were anything but prejudicial.

Thus, it appears that Petitioner benefitted substantially from counsel's representation. Consequently, Petitioner's claim of ineffective assistance of counsel must fail.

F. Additional Grounds for Habeas Relief in Reply Papers

Petitioner asserted the following additional grounds for relief in his traverse and supplemental traverse: (1) his counsel was ineffective for failing to request a *Darden* hearing; (2) the prosecution failed to disclose the laboratory report, which was a *Brady* violation; and (3) the prosecutor presented false testimony to the grand jury. *See* Dkt. Nos. 32 and 34.

"[C]ourts have observed that a traverse, or reply, is not a proper vehicle for raising additional grounds for habeas relief, and claims raised for the first time in such a pleading have been considered as not properly before the court." *Lee v. Greene*, No. 9:05-CV-1337 (GTS/DEP), 2010 WL 5779440, at *5 (N.D.N.Y. Dec. 15, 2010) (citing Rules Governing Section 2254 Cases in the United States District Courts, Rule 2(c)(1)), *report and recommendation adopted*, 2011 WL 500673 (N.D.N.Y. Feb. 10, 2011). "To raise additional grounds, a petitioner must file an amended petition to provide adequate notice to the state of additional claims." *Howard v. Graham*, No. 9:05-CV-1582 (LEK/DRH), 2008 WL 3925466, at *1 (N.D.N.Y. Aug. 20, 2008) (citing *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994)).

Here, Petitioner filed a petition (Dkt. No. 1), an amended petition (Dkt. No. 7), and a second amended petition (Dkt. No. 24). The aforementioned claims were not raised in any of the petitions. Moreover, Petitioner did not indicate to the Court, prior to filing his traverse or supplemental traverse, that he intended to assert new or additional claims. Therefore, Respondent was not afforded an adequate opportunity to address these additional claims and those claims are rejected. *Howard*, 2008 WL 3925466, at *1; *see also Parker v. Smith*, 858 F.Supp.2d 229, 233 (N.D.N.Y. 2012) (refusing to address new arguments raised in the traverse that were not in the petition because a traverse or reply is not the proper pleading in which to raise additional grounds for habeas relief) (citations omitted); *Parker v. Duncan*, No. 9:03-CV-0759 (LEK/RFT), 2007 WL 2071745, at *6 (N.D.N.Y. July 17, 2007), *aff'd*, 255 Fed. App'x 565 (2d Cir. 2007).

Even assuming the grounds were properly before the Court, the claims lack merit. Petitioner's claim related to counsel's failure to request a *Darden* hearing is procedurally barred. *See* N.Y. CPL § 440.10(2)(b); *Kimbrough v. Bradt*, 949 F.Supp.2d 341, 359 (N.D.N.Y. 2013) ("It is well-settled in this Circuit that section 440.10(2)(b) can provide an adequate and independent state law ground on which to deny habeas relief.") (citing, *inter alia, Holland v. Irvin*, 45 Fed. App'x 17, 20 (2d Cir. 2002)). The allegations related to the failure to disclose the laboratory report lack merit. *See* Part IV(D), *supra*; *Vasquez v. Stinson*, No. CV 96-1917, 1997 WL 469990, at *7 (E.D.N.Y. June 17, 1997) (reasoning that, to warrant a reversal of a conviction based upon a deprivation of due process under *Brady*, the petitioner must establish that the evidence in a laboratory report is sufficiently exculpatory).

***15** Finally, as discussed *supra*, errors in grand jury proceedings are not cognizable on federal habeas review. *See* Part IV(D), *supra*.

V. CONCLUSION

WHEREFORE, it is hereby

ORDERED that the Clerk of the Court shall amend the caption to substitute Mark Miller for Mark Royce; and it is further

ORDERED that the second amended petition, Dkt. No. 24, is **DENIED AND DISMISSED** in its entirety; and it is further

ORDERED that no Certificate of Appealability ("COA") shall issue because petitioner failed to make a "substantial

showing of the denial of a constitutional right" as 28 U.S.C. § 2253(c)(2) requires;[9] and it is further

9 *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (holding that if the court denies a habeas petition on procedural grounds, "the certificate of appealability must show that jurists of reason would find debatable two issues: (1) that the district court was correct in its procedural ruling, *and* (2) that the applicant has established a valid constitutional violation" (emphasis in original)).

ORDERED that the Clerk serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

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End of Document

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Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

William CONNOLLY, Petitioner,
v.
Christopher ARTUZ, Superintendent,
Greenhaven Correctional Facility, Respondent.

93 CV 4470 (FB).
|
Sept. 15, 1995.

Attorneys and Law Firms

William Connolly, Stormville, NY, pro se.

James M. Catterson, Jr., Suffolk County District Attorney by Susan I. Braitman, Riverhead, NY, for respondent.

MEMORANDUM AND ORDER

BLOCK, District Judge:

***1** Petitioner William Connolly ("Connolly"), *pro se,* seeks *habeas corpus* relief pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is denied.

I.

BACKGROUND

In 1988, Connolly was indicted in Suffolk County, New York for allegedly committing robbery in the second degree. Upon defense motions, the court conducted two pretrial hearings. First, the court held a hearing to determine whether to suppress (i) the testimony of Tony Santoro ("Santoro"), a fourteen year old witness who had identified Connolly during a police lineup and (ii) a statement made by Connolly at the time of his arrest because the police entered the apartment where he was staying without a warrant.[1] The court held that the lineup was not unduly suggestive and no illegal entry occurred because another resident of the apartment consented to the police's entry.[2] Second, the court held a hearing to determine whether the prosecution improperly failed to provide to Connolly certain evidence material to his defense, as required under *People v. Rosario,* 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961), *cert. denied,* 368 U.S. 866 (1961). The court found no *Rosario* violation warranting suppression of evidence or any other remedy. Tr. at 13-16 (June 15, 1990).

At trial, the prosecution demonstrated that during the evening of June 26, 1988, two caucasian males, each with handguns, robbed the San Remo Pharmacy ("Pharmacy") in Kings Park, Suffolk County, New York. One perpetrator, Lee Bahlkow ("Bahlkow"), who had previously confessed to the crime, testified for the prosecution, implicating Connolly as his accomplice. The prosecution also called, *inter alia,* Santoro as a witness. He testified that he had seen Connolly near the Pharmacy shortly before the robbery, saw him jump into the getaway car after the robbery and wrote down the car's license plate number. Santoro further testified as to his identification of Connolly during the police lineup.

Connolly took the stand in his defense. He testified, *inter alia,* that he was drinking in a park with a friend, Bobby Ryan, during the time the robbery occurred. Over the defense's objection, the prosecution impeached Connolly with a Notice of Alibi which he had previously served upon the government. The Notice of Alibi stated that at the time of the robbery, Connolly was in Manhattan with his then-girlfriend, Lori Pietsch. Notice of Alibi (Sept. 8, 1988); Tr. at 916 (June 25, 1990). The court subsequently reversed itself regarding the propriety of impeaching Connolly with the Notice of Alibi, stating that it is "merely a document prepared by the defense attorney pursuant to statute" and not "a statement by the defendant." Tr. at 1017 (June 26, 1990). It therefore instructed the jury to "disregard the questions and answers pertaining to the notice of alibi entirely" because "it is totally irrelevant to this trial." *Id.*

The jury returned a verdict of guilty on two counts of robbery in the second degree. The court sentenced Connolly to two concurrent terms of seven and one-half to fifteen years and imposed upon him a mandatory $100 surcharge.

***2** Connolly appealed his conviction and sentence to the New York Appellate Division, Second Department, which affirmed on December 21, 1991. *People v. Connolly,* 188 A.D.2d 610, 592 N.Y.S.2d 612 (2d Dep't 1992). He thereafter sought leave to appeal to the New York Court of Appeals, which denied such leave on March 16, 1993. *People v. Connolly,* 81 N.Y.2d 883, 613 N.E.2d 976, 597 N.Y.S.2d 944 (1993).

On September 30, 1993, Connolly filed the present petition arguing that the trial court deprived him of his due process protections in the following six ways:

1. It refused to declare a mistrial, rather than give a mere curative instruction, for the prosecution's improper use of the Notice of Alibi for impeachment purposes.

2. It failed to instruct the jury that the prosecution retained the burden of proof on all issues despite Connolly's introduction of an alibi defense.

3. It failed to sanction the prosecution with suppression of certain evidence for purportedly failing to turn over *Rosario* material.

4. It refused to suppress a statement made by Connolly at the time of his arrest even though the police entered his dwelling without a warrant.

5. It refused to suppress Santoro's identification testimony purportedly emanating from an unduly suggestive lineup.

6. It impermissibly permitted the prosecution to bolster Santoro's lineup testimony with the testimony of a police detective.

For the reasons discussed below, Connolly's petition is denied because three of his claims -- claims one, two and five -- lack merit, while the other three claims -- claims three, four and six -- fail to raise adjudicable issues.

II.

DISCUSSION

A. *Claims Dismissed On Their Merits*

1. *Claim One*

Despite respondent's arguments to the contrary, Connolly has properly exhausted in state court his claim that the purported prosecutorial misconduct of impeaching him with the Notice of Alibi so tainted his trial as to constitute a deprivation of his due process protections. In *Daye v. Attorney General of the State of New York,* 696 F.2d 186 (2d Cir. 1982), *cert. denied,* 464 U.S. 1048 (1984), the Second Circuit articulated four "ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution":

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

Id. at 194; *see also Stewart v. Scully,* 925 F.2d 58, 62 (2d Cir. 1991). In *Garofolo v. Coomb,* 804 F.2d 201 (2d Cir. 1986), the Second Circuit held that claims of prosecutorial misconduct, including a claim of improper cross-examination, fairly presented to the state court their constitutional nature because they had "sufficiently familiar federal constitutional implications to be within the mainstream of constitutional litigation," thereby satisfying *Daye's* fourth prong. *Id.* at 206. *See also Saunders v. Riley,* 1991 WL 95352 at *5 (S.D.N.Y. May 30, 1991) ("We find ... that petitioner's claim of misconduct on the part of the state trial prosecutor was sufficiently in the mainstream of constitutional litigation to 'fairly present' a federal issue to the state court"). Likewise, Connolly's prosecutorial misconduct claim here had "sufficiently familiar federal constitutional implications to be within the mainstream of constitutional litigation" and, therefore, it is ripe for review on its merits.

***3** "When prosecutorial misconduct is alleged, a new trial is only warranted if the misconduct is 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *United States v. McCarthy,* 54 F.3d 51, 55 (2d Cir. 1995) (quoting *Blissett v. LeFevre,* 924 F.2d 434, 440 (2d Cir.), *cert. denied,* 502 U.S. 852 (1991)). *See also Garofolo,* 804 F.2d at 206 ("[C]onstitutional error occurs only when the prosecutorial remarks [are] so prejudicial that they render[] the trial in question fundamentally unfair"). In making this assessment, "[t]he severity of the misconduct, curative measures, and the certainty of conviction absent the misconduct are all relevant to the inquiry." *McCarthy,* 54 F.3d at 55 (citation omitted).

Connolly's claim that the prosecutor's purported misconduct of impeaching him with the Notice of Alibi did not result in the denial of a fair trial. While the trial court subsequently ruled that it should not have permitted the prosecution to engage in such impeachment, the conduct at issue is not so severe as to warrant a new trial, particularly in light of the extensive curative instruction given to the jury.[3] Moreover, evidence of Connolly's guilt was overwhelming:

- Bahlkow, the confessed robber, testified that Connolly was his accomplice.
- At the time of his arrest, Connolly told police: "I'm tired of running. You got me for this afternoon. The money's in my wallet in my back pocket." Tr. at 762 (June 22, 1990); *see also* Tr. at 107 (Sept. 28, 1989). Connolly's wallet contained $1605.
- Santoro testified that he had extensive opportunity to view Connolly before and after the crime, including seeing him sitting in a parked car near the crime scene, exit the car and walk behind a nearby gas station, return to the car and remove something from the trunk, go back to the gas station and, sometime thereafter, jump into the car and speed off. He also testified that he took down the car's license plate number, which was later determined to belong to a friend of both Bahlkow's and Connolly's. Finally, he testified that he identified Connolly during a police lineup.
- Connolly had extensive scratches all over his body consistent with the police's description that the suspect had escaped into a wooded area.

Thus, there exists a significant degree of certainty that Connolly would have been convicted even if the purported misconduct did not occur. For these reasons, Connolly's first claim must be denied.

2. *Claim Two*

Connolly's second claim is that the trial court deprived him of his due process protections by failing to instruct the jury that the prosecution retained the burden of proof on all issues despite Connolly's introduction of an alibi defense. "The omission of an alibi charge[, however,] will not rise to the level of a constitutional violation, unless the omission by itself so infected the trial that the conviction violated due process." *Guzman v. Scully,* 1995 WL 135590 at *5 (S.D.N.Y. Mar. 29, 1995). In *Sanders v. Scully,* 1991 WL 35498 at *2 (E.D.N.Y. Mar. 1, 1991) (Nickerson, J.), the court held that no constitutional violation occurred where the trial court omitted giving an alibi charge because that court had "stated numerous times that the government had the burden of proving all of the elements of the charged crimes beyond a reasonable doubt." Likewise, in *Guzman,* the court found no constitutional violation where the trial court omitted an alibi charge because, *inter alia,* "the judge repeatedly instructed the jury that the prosecution has the burden of proof beyond a reasonable doubt and emphasized that the burden never shifts to the defendant." *Guzman,* 1995 WL 135590 at *5.

***4** Here, the trial court not only repeatedly and clearly stated that the burden of proof always remains on the prosecution, but -- contrary to Connolly's assertions -- also instructed the jury that this burden does not shift despite Connolly's introduction of an alibi defense:

> The People have the burden of proving the defendant's guilt as to every fact and every element essential to conviction. The burden never shifts. It remains with the People and that is throughout the proceedings. In other words, from the beginning of the trial until its conclusion the burden always rests with the People.
>
> Now, in this particular case, of course, the defendant took the stand and he testified concerning a number of matters including his testimony concerning his whereabouts on June 26, 1988. However, the fact the defendant testified does not alter this rule. That is, the burden of proof rests solely and exclusively with the People throughout. The defendant is required to prove nothing.

Tr. at 1017. This charge simply does not give rise to a due process violation and, therefore, Connolly's second claim fails.

3. *Claim Five*

Connolly's fifth claim is that the trial court deprived him of his due process protections by refusing to suppress Santoro's identification testimony which purportedly emanated from an unduly suggestive lineup. "Due process may be violated when, as judged under the totality of the circumstances, the identification procedure used is so impermissibly suggestive as to give rise to 'a very substantial likelihood of irreparable misidentification.'" *Torres v. Mitchell,* 1995 WL 384668 at *3 (E.D.N.Y. June 20, 1995) (Nickerson, J.) (quoting *Neil v. Biggers,* 409 U.S. 188 (1972)). As the Second Circuit recently explained:

> When objection is made to a pre-trial identification, an analysis of whether the witness may identify the defendant at trial involves a two step inquiry. First, the court inquires whether the pre-trial identification procedures were unduly suggestive. Second, if the procedures were unduly suggestive, the court must ask "whether an in-court identification will be the product of the suggestive procedures or whether it is independently reliable."

United States v. Tortora, 30 F.3d 334, 337 (2d Cir. 1994) (quoting *United States v. Concepcion,* 983 F.2d 369, 377 (2d Cir. 1992), *cert. denied.,* 114 S.Ct. 163 (1993); other citations omitted). In determining whether an identification is independently reliable, a court will examine the following five factors:

> (1) the witness's opportunity to view the criminal; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the identification.

Id. (citing *Biggers,* 409 U.S. at 199.). "In each case, [however,] the factors must be assessed in light of the totality of the circumstances, and the linchpin of admissibility is reliability." *Concepcion,* 983 F.2d at 378.

***5** Connolly complains that the other individuals in the lineup were sufficiently dissimilar to himself as to render the lineup unduly suggestive. On this point, the trial court ruled explicitly at the conclusion of the suppression hearing:

> I think the photographs [of the lineup] show that the individuals who were in the lineup are sufficiently similar to the defendant by way of coloring, age, facial hair and other physical characteristics, so that the defendant has failed to prove that this lineup was tainted and that, accordingly, his constitutional rights were violated and the results of the lineup must be suppressed. I find that the defendant has not so established that fact. I find that this lineup was not, on the information before me, was not suggestive. It meets the statutory and constitutional safeguards for [the] defendant.

Tr. at 119-20. "In federal *habeas corpus* proceedings, the state court findings are 'presumed to be correct unless, *inter alia,* they are not fairly supported by the record' [and] to upset such findings on review, Petitioner must present 'convincing' evidence that the findings are erroneous." *Nimmons v. Walker,* 1995 WL 373446 at *3 (S.D.N.Y. June 21, 1995) (citing 28 U.S.C. § 2254(d); *Marshall v. Lonberger,* 459 U.S. 422, 433 (1983); *Senna v. Patrissi,* 5 F.3d 18, 20 (2d Cir. 1993); and *Ventura v. Meachum,* 957 F.2d 1048, 1054 (2d Cir. 1992)).

Connolly has wholly failed to present "convincing" evidence that the trial court's findings are erroneous. The Court has reviewed the lineup photograph, *see Meatley v. Artuz,* 886 F. Supp. 1009, 1015 (E.D.N.Y. 1995) (Nickerson, J.) ("[T]his court has examined a photograph of the lineup"), and, rather than contradict the trial court's findings, it supports the findings. The Court agrees that the other individuals in the lineup were not so dissimilar as to render the lineup unduly suggestive. *See id.* ("'There is no requirement that a suspect in a lineup be surrounded by people identical in appearance'") (citations omitted).

Even assuming, *arguendo,* that the lineup was unduly suggestive, Connolly would still not be entitled to the relief he seeks. The record reveals that Santoro's in-court identification was reliable independent of the lineup. Santoro had ample opportunity to view Connolly, which he did with considerable attention; his initial description of the perpetrator was consistent with Connolly; Santoro expressed no material uncertainty regarding his identification; and the length of time between the crime and the identification was not excessive. For all these reasons, Connolly's fifth claim must fail.

B. *Claims Failing To Raise Adjudicable Issues*

1. *Claim Three*

Connolly asserts in his third claim that the trial court deprived him of his due process protections by failing to sanction the prosecution with suppression of evidence for failing to turn

over certain *Rosario* material, which is "generally considered to be the State's counterpart of the *Jencks* rule." *United States ex rel Butler v. Schubin,* 376 F. Supp. 1241, 1247 (S.D.N.Y. 1974) (referring to *Jencks v. United States,* 353 U.S. 657 (1957), *subsequently codified in* 18 U.S.C. § 3500), *aff'd mem.* 508 F.2d 837 (2d Cir. 1975)). The Supreme Court's decision in *Jencks* was based not on Constitutional principles, but rather on the Court's rule-making authority. *Palermo v. United States,* 360 U.S. 343, 345 (1959). *See also Butler,* 376 F. Supp. at 1247 n.16.

***6** As aptly stated only a few months ago in *Guzman,* "[t]his claim is not reviewable in the instant Petition because federal *habeas* review is 'limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States,'" whereas "[t]he *Rosario* decision embodies policy considerations grounded in state common law, not constitutional principles." *Guzman,* 1995 WL 135590 at *3 (quoting *Estelle v. McGuire,* 502 U.S. 62, 68 (1981)). *See also Clerkin v. Bartlett,* 1990 WL 252283 at *6 (E.D.N.Y. Dec. 31, 1990) (Raggi, J.) (*Rosario* "imposes obligations on prosecutors beyond those mandated by due process"); *Cruz v. Scully,* 716 F. Supp. 766, 769 n.5 (S.D.N.Y. 1989) ("[A] *Rosario* error is one of state law and thus not subject to review under a petition for a federal writ of *habeas corpus"); Butler,* 376 F. Supp. at 1247 ("*Rosario* is grounded in [New York] State's common law"). Accordingly, Connolly's third claim fails to raise an adjudicable issue and, therefore, it must be dismissed.

2. *Claim Four*

Connolly's fourth claim is that the trial court deprived him of his due process protections by refusing to suppress a statement he made at the time of his arrest even though the police entered the dwelling in which he was staying without a warrant. In essence, Connolly claims that the trial court's decision -- after a full hearing -- that the police did not violate the Fourth Amendment in arresting Connolly because another resident of the dwelling consented to the police's entrance, violated his due process protections.

In *Stone v. Powell,* 428 U.S. 465 (1976), the Supreme Court foreclosed *habeas corpus* review in federal court of purported violations of the Fourth Amendment where the petitioner was afforded a full and fair opportunity to litigate the issue in state court:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal *habeas corpus* relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id. at 494. The Court's rationale was that any incremental benefit in deterring illegal police conduct by applying the exclusionary rule in a *habeas* proceeding did not outweigh the cost to society of excluding relevant, reliable evidence in a criminal prosecution. *See Gilmore v. Marks,* 799 F.2d 51, 54-55 (3d Cir. 1986), *cert. denied,* 479 U.S. 1041 (1987). "In determining whether the state court has provided a full and fair opportunity to raise a [F] ourth [A]mendment claim, the court can consider whether the defendant was vigorously represented by counsel and was afforded a full appellate review." *Williams v. LeFevre,* 1988 WL 88424 at *3 (E.D.N.Y. Aug. 18, 1988) (Sifton, J.), *appeal dismissed,* 800 F.2d 1320 (2d Cir. 1989).

It is undisputed that Connolly was afforded a hearing to determine whether to suppress the statement at issue. At the hearing, he was represented by counsel who vigorously litigated the issue. Moreover, he had ample opportunity, which he took, to raise the issue on appeal after the trial court rendered an adverse ruling. Hence, there exists no serious question that he was afforded a full and fair opportunity to raise the Fourth Amendment claim in state court.

***7** Connolly, however, seeks to avoid the outcome mandated by *Stone* by cloaking his purported Fourth Amendment violation in the garb of a due process claim. His position, however, is not novel to *habeas corpus* jurisprudence. As stated by the Third Circuit in *Gilmore:*

> Even though due process violations, unlike some Fourth Amendment violations, are cognizable in a *habeas* proceeding in federal court, [a] petitioner may not cloak his or her Fourth Amendment claim in due process clothing to circumvent

> *Stone v. Powell*.... Due process is a flexible concept, but it cannot be stretched to protect a defendant from every asserted error in a state court's reasoning.... Accepting [the petitioner's] argument would allow *habeas* petitioners to transmogrify every unsuccessful Fourth Amendment claim into a due process violation.

799 F.2d at 57. *See also Williams,* 1988 WL 88424 at *3 ("[P]etitioner's 'fourth amendment claim is just that: a fourth amendment claim. Attempts to find other names for that claim will not make it anymore cognizable in the context of a federal *habeas* petition.'") (quoting *Herrera v. Kelly,* 667 F. Supp. 963, 970 (E.D.N.Y. 1987) (Glasser, J.), *appeal dismissed,* 856 F.2d 181 (2d Cir. 1988)). Connolly's attempt to "transmogrify" his barred Fourth Amendment claim into a due process claim must fail. His fourth claim, therefore, does not raise an adjudicable issue.

3. *Claim Six*

Connolly's final claim is that the trial court deprived him of his due process protections by impermissibly permitting the prosecution to bolster Santoro's lineup testimony with the testimony of a police detective, who stated that he saw Santoro select Connolly from the lineup. Tr. at 770 (June 20, 1990). Connolly asserts that this bolstering violated the evidentiary rule and policies derived from *People v. Trowbridge,* 305 N.Y. 471, 113 N.E.2d 841 (1953), which held that reversible error occurs where a police officer bolsters the testimony of an identifying witness by testifying that he or she saw the witness make the identification. As the court in *Styles v. Zandt,* 1995 WL 326445 (S.D.N.Y. May 31, 1995), recently state, however:

> Several courts have held that a claim of improper "bolstering" is not a cognizable basis of federal *habeas* relief. At most, petitioner's claim is that the testimony violated a New York evidentiary rule or policy derived from *Trowbridge*.... [S]tate law evidentiary errors[, however,] "are no part of a federal court's *habeas* review of a state conviction ... [since] [i]n conducting *habeas* review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Petitioner's claim is of constitutional magnitude only if it denied petitioner a "fundamentally fair trial." *Collins v. Scully,* 755 F.2d 16, 18 (2d Cir. 1985). Petitioner clearly has not made the required showing.

***8** 1995 WL 326445 at *5 (certain citations omitted). *See also Ayala v. Hernandez,* 712 F. Supp. 1069, 1074 (E.D.N.Y. 1989) (Glasser, J.) ("'The concept of "bolstering" really has no place as an issue in criminal jurisprudence based on the United States Constitution.... Violation of [the *Trowbridge*] rule, as is so with regard to many such state court rules, does not rise to a constitutional level.'") (quoting *Snow v. Reid,* 619 F. Supp. 579, 582 (S.D.N.Y. 1985)); *accord Orr v. Schaeffer,* 460 F. Supp. 964, 967 (S.D.N.Y. 1978) ("[T]his Circuit has never regarded the practice [of bolstering] as inimical to trial fairness"). Connolly's sixth claim thus fails to raise an adjudicable issue and, therefore, it too must be dismissed.

III.

CONCLUSION

For the foregoing reasons, the petition for a writ of *habeas corpus* is denied.

SO ORDERED.

1 The court conducted the suppression hearing pursuant to the Supreme Court's decisions in *United States v. Wade,* 338 U.S. 218 (1967) and *Dunaway v. New York,* 442 U.S. 200 (1979), and the New York Court of Appeals decision in *People v. Huntley,* 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

2 The court did suppress one statement made by Connolly due to the prosecution's failure to provide timely notice of its intent to offer it into evidence. Memorandum of Judge Denis R. Hurley at 2 (Dec. 7, 1989).

3 As noted above, the trial court informed the jury that the Notice of Alibi was "merely a document prepared by the defense attorney pursuant to statute" and not "a statement by the defendant"; it further admonished the jury to "disregard the questions and answers pertaining to the notice of alibi entirely" because "it is totally irrelevant to this trial." Tr. at 1017 (June 26, 1990).

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United States District Court,
W.D. New York.

Marvin BROWN, Petitioner,
v.
John J. DONELLI, Superintendent, Bare Hill Correctional Facility, Respondent.

No. 05-CV-6085.
|
Oct. 16, 2009.

Attorneys and Law Firms

Marvin Brown, Malone, NY, pro se.

Luke Martland, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. *INTRODUCTION*

*1 Petitioner, Marvin Brown ("Petitioner" or "Brown"), filed a timely petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his custody, following a judgement entered in New York State County Court, Ontario County, on September 20, 2002. Petitioner was convicted, after a jury trial, of one count of criminal sale of a controlled substance in the third degree (New York Penal Law ("Penal Law") § 220.39[1]), and one count of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). For the reasons set forth below, this petition is denied.

II. *FACTUAL BACKGROUND AND PROCEDURAL HISTORY*

By indictment number 02-01-031, Petitioner was charged with one count of criminal sale of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the seventh degree, arising out of the following incident. On January 2, 2002, a confidential police informant, John Wesley, went to 157 Genesee Street, in Geneva, New York, to purchase crack-cocain from Petitioner at the direction of the Geneva City Police Department. (T. 292, 299-300) [1]. Prior to leaving the police station for 157 Genessee Street, Geneva City police officers Hausner and Heieck searched Wesley, placed a wire in the inside pocket of his jacket, and gave him $50 to purchase the crack-cocaine. (T. 299-300). Officer Hausner followed Wesley in an unmarked police car to the location to observe the transaction. (T. 303). When Wesley arrived at 157 Genesee Street, Petitioner told Wesley that he did not want to sell drugs in front of the children at the residence, and he exited the apartment, walked westward up an adjacent street, and met Wesley approximately five minutes later at the corner of Colt and Genesee Streets. (T. 303-4, 353-4). Wesley then purchased a bag of crack-cocaine from Petitioner and returned to the police station. (T. 305-6). At the police station, Wesley received $40 for his role in the drug sale investigation, and the police confiscated the drugs and transported them to the Monroe County lab. (T. 308-9, 357). Petitioner was later arrested and indicted by a grand jury. (Arraignment Minutes at 2).

1 "T." refers to the state court trial transcript.

In a pre-trial omnibus motion, Petitioner requested a *Darden* [2] hearing and a hearing to determine whether the police had probable cause based on the information the confidential informant provided the police. (Minutes of Pre-trial Motions at 2-6). The trial court denied both requests following a pre-trial identification hearing in which Officer Hausner testified that he observed the transaction, and after the prosecution revealed the identity of the confidential informant, John Wesley, and disclosed that Wesley would be a trial witness. (Minutes of Pre-trial Motion/Hearing at 42).

2 A *Darden* hearing is an *in camera* hearing in which the trial court judge can examine a confidential informant to determine whether he exists, whether he is reliable and credible, and whether the police had probable cause based on the information provided by the confidential informant. This hearing is conducted *in camera* to preserve the anonymity of the informant. *See People v. Darden,*

34 N.Y.2d 177, 181-82, 356 N.Y.S.2d 582, 313 N.E.2d 49 (N.Y.1974).

The trial court also conducted a *Sandoval*[3] hearing. The court ruled that the prosecution could inquire about a previous misdemeanor conviction for criminal possession of a controlled substance in the seventh degree, a prior conviction for attempted criminal impersonation, and a prior juvenile delinquency proceeding involving theft. (Minutes of *Sandoval* Hearing at 22). Petitioner also made a motion *in limine* to exclude any uncharged crimes that may have led to the instant investigation. (Minutes of Pre-trial Motions at 7-8). The trial court declined to rule on the motion until trial. *Id.* at 9, 357 N.Y.S.2d 849, 314 N.E.2d 413.

3 A *Sandoval* hearing is based on the New York State Court of Appeals' decision in *People v. Sandoval,* 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413 (1974), that a trial judge may determine the use which may be made of the defendant's prior convictions or proof of the prior commission by the defendant of any specific criminal, vicious or immoral acts to impeach the defendant's credibility, should he take the stand.

***2** Following a jury trial, Petitioner was convicted on both counts in the indictment. Petitioner appealed his conviction to the Appellate Division, Fourth Department, arguing that (1) the trial court erred in denying a *Darden* hearing and a hearing to determine probable cause; (2) John Wesley was an accomplice, and the trial court should have instructed the jury that his testimony required corroboration; (3) he received ineffective assistance of counsel because counsel failed to ask for an instruction regarding the corroboration of Wesley's testimony; (4) the trial court erred in failing to grant Petitioner's motion *in limine* to exclude uncharged crimes; (5) the trial court erred in its *Sandoval* ruling, affecting Petitioner's decision to testify; (6) the trial court abused its discretion in failing to grant Petitioner's motion to dismiss based on discrepancies in the testimony regarding the weight of the cocaine; and (7) his sentence should be modified in the interest of justice. *See People v. Brown,* 2 A.D.3d 1423, 770 N.Y.S.2d 243 (4th Dept.2003, Brief for Defendant-Appellant at 4-5. The Appellate Division unanimously affirmed his conviction, holding that the trial court properly denied a *Darden* hearing; the conviction was supported by legally sufficient evidence and testimonial inconsistencies are an issue of weight, not admissibility; the confidential informant was not an accomplice as a matter of law and therefore, corroboration was unnecessary; the court's curative instruction following testimony regarding uncharged crimes cured any error that may have occurred through the court's failure to rule on Petitioner's motion *in limine;* the sentence should not be reduced; and that Petitioner's remaining claims lacked merit. *Brown,* 2 A.D.3d at 1424-5, 770 N.Y.S.2d 243. The New York State Court of Appeals denied further review. *People v. Brown,* 1 N.Y.3d 625, 777 N.Y.S.2d 24, 808 N.E.2d 1283 (N.Y.2004).

III. *GENERAL PRINCIPLES APPLICABLE TO HABEAS REVIEW*

A. The AEDPA Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), a federal court may grant habeas relief to a state prisoner only if a claim that was "adjudicated on the merits" in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U .S.C. § 2254(d)(1), or if it "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." § 2254(d)(2). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently that [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," limits the law governing a habeas petitioner's claims to the holdings (not dicta) of the Supreme Court existing at the time of the relevant state-court decision. *Williams,* 529 U.S. at 412; *accord Sevencan v. Herbert,* 342 F.3d 69, 73-74 (2d Cir.2002), *cert. denied,* 540 U.S. 1197, 124 S.Ct. 1453, 158 L.Ed.2d 111 (2004).

***3** A state court decision is based on an "unreasonable application of Supreme Court precedent if it correctly identified the governing legal rule, but applied it in an unreasonable manner to the facts of a particular case. *Williams,* 529 U.S. at 413; *see also id.* at 408-410. "[A] federal habeas court is not empowered to grant the writ just because, in its independent judgment, it would have decided the federal law question differently." *Aparicio v. Artuz,* 269 F.3d 78, 94 (2d Cir.2001). Rather, "[t]he state court's application must reflect some additional increment of incorrectness such that it may be said to be unreasonable." *Id.* This increment "need

not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000) (internal quotation marks omitted). Under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The [petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1);*see also Parsad v. Greiner,* 337 F.3d 175, 181 (2d Cir.2003) ("The presumption of correctness is particularly important when reviewing the trial court's assessment of witness credibility."), *cert. denied sub nom. Parsad v. Fischer,* 540 U.S. 1091, 124 S.Ct. 962, 157 L.Ed.2d 798 (2003). A state court's findings "will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

B. Exhaustion Requirement

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State ..." 28 U.S.C. § 2254(b)(1)(A); *see, e.g., O'Sullivan v. Boerckel,* 526 U.S. 838, 843-44, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *accord, e.g., Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994), *cert. denied,* 514 U.S. 1054, 115 S.Ct. 1436, 131 L.Ed.2d 316 (1995). "The exhaustion requirement is not satisfied unless the federal claim has been 'fairly presented' to the state courts." *Daye v. Attorney General,* 696 F.2d 186, 191 (2d Cir.1982) (*en banc*), *cert. denied,* 464 U.S. 1048, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984).

C. The Adequate and Independent State Ground Doctrine

"It is now axiomatic that 'cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred.' " *Dunham v. Travis,* 313 F.3d 724, 729 (quoting *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). "A habeas petitioner may bypass the independent and adequate state ground bar by demonstrating a constitutional violation that resulted in a fundamental miscarriage of justice, i.e., that he is actually innocent of the crime for which he has been convicted." *Id.* (Citing *Schlup v. Delo,* 513 U.S. 298, 321, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

***4** Although the Supreme Court "has repeatedly cautioned 'that the independent and adequate state law groud] doctrine applies to bar consideration on federal habeas of federal claims that have been defaulted under state law,' " *Dunham,* 313 F.3d at 729 (quoting *Lambrix v. Singletary,* 520 U.S. 518, 523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (emphasis added by Second Circuit), the Second Circuit has observed that "it is not the case 'that the procedural-bar issue must invariable be resovled first; only that is ordinarily should be [,]' " (quoting *Lambrix,* 520 U.S. at 525 (stating that bypassing procedural questions to reach the merits of a habeas petition is justified in rare situations, "for example, if the [underlying issues] are easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law")).

IV. *PETITIONER'S CLAIMS*

1. Fourth Amendment Violations

Petitioner first claims that the introduction of evidence obtained in violation of his Fourth Amendment rights led to his conviction. Pet. ¶ 22A.[4] Specifically, Petitioner claims that the denial of a *Darden* hearing to examine the existence and credibility of the confidential informant and the denial of a hearing to determine whether the police had probable cause to arrest Petitioner, violated Petitioner's Fourth Amendment right to be free of unreasonable seizures. *Id.*

4 "Pet." refers to Brown's petition for a writ of habeas corpus.

The Supreme Court has held that as long as a State "has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." *Stone v. Powell,* 428 U.S. 465, 481-82, 96 S.Ct. 3037, 49 L.Ed.2d 1067, (1976). The Second Circuit refined *Stone v. Powell* to allow federal habeas review of Fourth Amendment claims only in two situations: (1) when the State "has provided no corrective procedures at all to redress the alleged [F]ourth [A]mendment violations"; or (2) when the State "has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process." *Capellan v. Riley,* 975 F.2d 67, 70 (2d Cir.1992). In *Capellan,* the Second Circuit also recognized

that New York Criminal Procedure Law ("C.P.L.") § 710.10 et seq., New York's procedure for litigating Fourth Amendment claims, is "facially adequate" to satisfy this test. *Id.* Therefore, a petitioner convicted in New York will be entitled to habeas relief only if the trial court did not allow the petitioner to avail himself of the C.P.L. § 710.10 et seq. procedures, or if there was an "unconscionable breakdown" in their application.

In this case, Petitioner made an omnibus motion in which he requested *Darden* and probable cause hearings. The trial court heard arguments and reviewed case law prior to trial and determined that because the informant could be cross-examined at trial, and because there was other evidence connecting the defendant to the crime, a *Darden* hearing was not required. (Minutes of Motion/Hearing at 16). Additionally, the trial court ruled that a hearing to determine probable cause was unnecessary because Officer Hausner witnessed the transaction. *Id.* Petitioner appealed this ruling to the Appellate Division, Fourth Department, who upheld the trial court's decisions. *Brown,* 2 A.D.3d at 1424, 770 N.Y.S.2d 243, *leave denied,* 1 N.Y.3d 625, 777 N.Y.S.2d 24, 808 N.E.2d 1283 (N.Y.2004). Petitioner was given the opportunity to avail himself of the procedures of C.P.L. § 710.10 et seq. through his pre-trial motions and subsequent appeals, and he was not denied his Fourth Amendment rights simply because a hearing was not granted, as this is not an "unconscionable breakdown" in the application of the C.P.L. § 710.10 et seq. procedures. *See Ferron v. Goord,* 255 F.Supp.2d 127, 131-32 (W.D.N.Y.2003). Therefore, Petitioner had a "full and fair opportunity" to litigate his Fourth Amendment claim, and is not entitled to habeas relief.

2. Ineffective Assistance of Trial Counsel

***5** Petitioner next claims that he was denied effective assistance of trial counsel because counsel failed to request a jury instruction that the confidential informant was an accomplice, whose testimony required corroboration under New York State law. Pet. ¶ 22B. Petitioner raised this claim on direct appeal, and the Appellate Division held that it was without merit. *Brown,* 2 A.D.3d at 1425, 770 N.Y.S.2d 243, *leave denied,* 1 N.Y.3d 625, 777 N.Y.S.2d 24, 808 N.E.2d 1283 (N.Y.2004).

The Sixth Amendment to the Constitution provides that the accused in a criminal trial shall have the assistance of counsel for his defense. The right to counsel is fundamental to the criminal justice system; it affords the defendant the opportunity "to meet the case of the prosecution." *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). The appropriate Constitutional standard for assessing attorney performance is "reasonably effective assistance." *Strickland,* 466 U.S. at 687. To demonstrate constitutional ineffectiveness, "[f]irst, the defendant must show that counsel's performance was deficient." *Id.,* 466 U.S. at 687. To determine whether a counsel's conduct is deficient, "[t]he court must ... determine whether, in light of all of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.,* 466 U .S. at 690. In gauging the deficiency, the court must be "highly deferential," must "consider[ ] all the circumstances," must make "every effort ... to eliminate the distorting effects of hindsight," and must operate with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.,* 466 U.S. at 688-89. The Court must look at the "totality of the evidence before the judge or jury," keeping in mind that "[s]ome errors [ ] have ... a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Id.* at 695-96. Second, a habeas petitioner must demonstrate "that there is a 'reasonable probability' that, but for the deficiency, the outcome ... would have been different[.]" *McKee v. United States,* 167 F.3d 103, 106 (2d Cir.1999) (quoting *Strickland,* 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the [trial's] outcome," *Strickland,* 466 U.S. at 688; a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.,* 466 U.S. at 693. Thus, even serious errors by defense counsel do not warrant granting federal habeas relief where the conviction is supported by overwhelming evidence of guilt.

In this case, defense counsel's failure to request an accomplice instruction does not rise to the level of ineffective assistance of counsel under *Strickland.* Counsel could have reasonably concluded that a confidential informant assisting the police in criminal investigations, and engaging in criminal activity at the direction of the police, would not be an accomplice as a matter of law, and therefore any request for an accomplice charge would be futile. Additionally, it cannot be argued that the outcome of Petitioner's case would have been different because there was substantial other evidence connecting Petitioner to the crime, specifically, Officer Hausner's testimony that he arranged for the informant to purchase the drugs and he observed the drug sale. (T. 292-305). Therefore, this court agrees with the Appellate Division that Petitioner's claim for ineffective assistance of counsel is without merit.

3. Prosecutorial Misconduct and Erroneous Admission of Evidence

*6 Petitioner next claims that he was denied due process because the prosecutor elicited testimony from a witness that Petitioner was involved in prior, uncharged sales of narcotics, and because the court failed to rule on his motion *in limine* to exclude such testimony. Pet. ¶ 22C. Petitioner's claim involves the following exchange between the prosecutor and Officer Hausner at trial:

> Q: Okay. Now, back on January 2nd, 2002, did you prepare- or what did you do to prepare Mr. Wesley for what was then going to be happening around six or a little bit later in the evening?
>
> A: Mr. Wesley came into the police department. We spoke with Mr. Wesley on who was selling drugs in the City of Geneva. He indicated that a subject named [Brown] that lived on 157 Genesee Street, apartment number 2 was- would sell to him, narcotics. (T. 292-3).

To constitute a denial of due process based on prosecutorial misconduct, the prosecutor's actions must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright,* 477 U.S. 168, 182, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Floyd v. Meachum,* 907 F.2d 347, 353 (2d Cir.1990). "In evaluating whether allegedly improper [actions] by the prosecutor are grounds for reversal, the fundamental question is whether, if there was misconduct, it caused substantial prejudice to the defendant, thereby depriving him of his right to a fair trial." *United States v. LaMorte,* 950 F.2d 80, 83 (2d Cir.1991) (citing *United States v. Biasucci,* 786 F.2d 504, 514 (2d Cir.), *cert. denied,* 479 U.S. 827 (1986)). In determining the degree of prejudice to a petitioner, the factors to consider are the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct. *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *La Morte,* 950 F.2d at 83; *United States v. Modica,* 663 F.2d 1173, 1181 (2d Cir.1981).

Similarly, an erroneous admission of evidence will not deny a defendant due process unless the evidence "is so extremely unfair that its admission violates fundamental conceptions of justice." *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (internal quotation marks omitted). For the erroneous admission of unfairly prejudicial evidence to amount to a denial of due process, it must have been "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." *Johnson v. Ross,* 955 F.2d 178, 181 (2d Cir.1992) (internal quotation marks omitted); *Collins v. Scully,* 755 F.2d 16, 19 (2d Cir.1985) (evidence must be "crucial, critical, highly significant" (internal quotation marks omitted)).

In this case, the prosecutor's question does not rise to the level of misconduct that would deny the Petitioner a fair trial. Similarly, the alleged prejudice to Petitioner created by Officer Hausner's response, alluding to the fact that the police and John Wesley were aware that Petitioner sold drugs previously, did not deny Petitioner due process because the court promptly instructed the jury to disregard the testimony. (T. 296-299). This Court must assume that the jury followed the trial court's instructions. *See Zafiro v. United States,* 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Therefore, the curative instruction by the trial court was sufficient to cure any alleged prejudice and this court finds that the Petitioner was not denied due process through the prosecutor's question or through the trial court's failure to rule on Petitioner's motion *in limine* prior to trial.

4. Petitioner's Right to Testify

*7 Petitioner, who did not testify at trial, claims that his right to testify was impaired by the trial court's *Sandoval* ruling. Pet. ¶ 22D. Allegedly erroneous *Sandoval* rulings are not cognizable on federal habeas review where the claimant did not testify at trial. *See Luce v. United States,* 469 U.S. 38, 41-43, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984); *see also Brumfield v. Stinson,* 297 F.Supp.2d 607, 619-20. Because Petitioner did not testify at trial, his claim for habeas relief based on the trial court's *Sandoval* ruling is denied.

V. CONCLUSION

For the reasons stated above, Petitioner's request for habeas relief pursuant to 28 U.S.C. § 2254 is denied, and the petition is dismissed. Further, because the issues raised in the petition are not the type that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, this Court concludes that the petition presents no federal question of substance worthy of attention from the Court of Appeals and, therefore, pursuant to 28 U.S.C. § 2253 and Fed. R.App. P. 22(b), this Court denies a certificate of appealability. The Court also hereby certifies,

pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

ALL OF THE ABOVE IS SO ORDERED.

All Citations

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United States District Court,
N.D. New York.

John CANAL, Petitioner,

v.

John DONELLI, Respondent.

No. 06–CV–1490 (TJM/DRH).

Sept. 17, 2008.

Attorneys and Law Firms

John Canal, Lyon Mountain, NY, pro se.

Hon. Andrew M. Cuomo, Attorney General for the State of New York, Jodi A. Danzig, Esq., Ashlyn Dannelly, Esq., Assistant Attorneys General, of Counsel, New York, NY, for Respondent.

DECISION & ORDER

THOMAS J. McAVOY, Senior District Judge.

*1 This *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 was referred to the Hon. David R. Homer, United States Magistrate Judge, for a Report and Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.4.

No objections to the Report–Recommendation and Order dated January 16, 2008 have been filed. Furthermore, after examining the record, this Court has determined that the Report–Recommendation and Order is not subject to attack for plain error or manifest injustice. Accordingly, this Court adopts the recommendations of the Report–Recommendation and Order for the reasons stated therein.

It is therefore

ORDERED that the petition for a writ of habeas corpus is **DENIED and DISMISSED.**

IT IS SO ORDERED.

REPORT RECOMMENDATION AND ORDER [1]

1 This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.4.

DAVID R. HOMER, United States Magistrate Judge.

Petitioner pro se John Canal ("Canal") pleaded guilty to criminal possession of a controlled substance on June 11, 2003 in Albany County Court. Canal was sentenced to an indeterminate sentence of three and one-half to seven years imprisonment as a second felony offender and is currently serving his sentence. Canal seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds that (1) the prosecution obtained evidence pursuant to an unconstitutional search and seizure, (2) the prosecution obtained evidence pursuant to an unlawful arrest, and (3) his trial counsel provided ineffective assistance. For the reasons which follow, it is recommended that the petition be denied.

I. Background

On June 24, 2002, City of Albany Police Officers Olsen and Fargione observed Canal and two other men drinking from beer bottles [2] in front of 60 Dana Avenue in Albany, New York. D. R–12. Officers Olsen and Fargione ordered the three men to put their beverages down and put their hands on their head. *Id.* Officer Lawrence Heid arrived on the scene while the men were being ordered to put the beverages down. *Id.*, Supp. Hrg. 40–41. The three officers proceeded to pat the men down for weapons without incident. Supp. Hrg. 40–41. The officers then asked the men for identification, but only one produced a form of identification. [3] It was determined that the man with identification had a warrant issued by the Town of Colonie. D. R–12.

2 A letter followed by R-(number) refers to the pages of various documents contained in the Record on Appeal. *See* Docket No. 11, atta chment 2. The letter indicates the document referenced including the Decision and Order (D.), Suppression Hearing Transcript (Supp.Hrg.), Indictment (I.), Guilty Plea (P.), Memorandum of Law (M .), Notice of Omnibus Motion (Omnibus), and Forensic Report (F.). Not all of the page numbers are preceded by

"R-" since the Suppression Hearing transcript and Plea contain paginations separate from the rest of the documents.

3 Canal did not produce any identification but gave his name and state of residency. Supp. Hrg. 41–42.

The three men were arrested for violation of the City of Albany open container law.[4] M. R–17. During the post-arrest search, nine pieces of cocaine were discovered in Canal's pants pocket.[5] D. R–12; F. R–25. A grand jury indicted Canal on October 22, 2002.[6] I. R–7, R–8. Canal moved to suppress the cocaine and a suppression hearing was conducted on April 29, 2003, which resulted in a decision on May 27, 2003 denying the motion. Supp. Hrg.1–2, D. R–13. Canal pleaded guilty on June 11, 2003. P. 1, 5, 10. Canal was sentenced as indicated above, he appealed, and his conviction was affirmed by the Appellate Division. *See People v. Canal,* 24 A.D.3d 1034 (3d Dep't 2005). The New York Court of Appeals denied leave to appeal. *See People v. Canal,* 6 N.Y.3d 846 (2006). This action followed.

4 Code of the City of Albany, Pt. II, Ch. 105, Art. II, § 105–21 *et. seq.* D. R–13.

5 The cocaine totaled 700 mg. F. R–25.

6 The indictment alleged two counts of criminal possession of a controlled substance.

II. Discussion

A. Unlawful Search and Seizure

***2** In the first two grounds of his petition, Canal contends that the search which led to discovery of the cocaine was unconstitutional. He classifies the initial search as a pat-down and the second post-arrest search as one pursuant to an unlawful arrest. Trav. 7[7]

7 Trav. followed by a number refers to the pages of Canal's Traverse. Docket No. 14.

A search pursuant to an arrest will pass constitutional muster as long as the arrest was lawful. *Michigan v. DeFillippo,* 443 U.S. 31, 35 (1979). A lawful arrest alone permits a search and suspicion that the person is carrying weapons or contraband is unnecessary. *DeFillippo,* 443 U.S. at 35. The search which resulted in finding the cocaine in Canal's pocket was valid if it was part of a lawful arrest.

As a threshold matter, however, Canal must demonstrate entitlement to have as review of these claims. *See Stone v. Powell,* 428 U.S. 481 (1976). "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone,* 428 U.S. at 494; *Plunkett v. Johnson,* 828 F.2d 954, 956 (2d Cir.1987). Review of the Fourth Amendment claim is still precluded even if the petitioner does not take advantage of the opportunity to litigate his claim. *Graham v. Costello,* 299 F.3d 129, 134 (2d Cir.2002).

In this case it is clear that Canal has received numerous opportunities for full and fair litigation of his claims, notwithstanding the fact that he did not have a jury trial. Canal was granted a pre-trial suppression hearing and had the opportunity to call witnesses, which he failed to do. D. R–12. Canal was afforded and took the opportunity to cross-examine two of the three police officers involved in the arrest. D. R–12. The record reveals no indication that Canal's opportunity to present his Furth Amendment claims in the state court proceeding was infringed, limited, conducted unfairly, or undermined in any way. For this reason, then, the first two grounds of Canal's petition should be denied.

B. Unlawful Arrest

Canal contends in the second ground of his petition that his arrest was unlawful since there was no basis for the police to believe that he possessed weapons or drugs after the initial pat-down. Since nothing was produced during the initial pat-down, he argues that only a citation was warranted and the police lacked grounds to arrest him.

Under the Fourth and Fourteenth amendments to the Constitution, a police officer is permitted to conduct a warrantless search of a person if he or she is lawfully arrested. *See DeFillippo,* 443 U .S. at35. An arrest is lawful if the arresting officer had probable cause for the arrest. *Id.* at 36. Even an arrest based on a violation of an ordinance which is later found invalid will be upheld as long as there was probable cause at the time of the arrest. *Id.* at 37. Additionally, state court findings of fact are conclusive on the

court reviewing the habeas petition if supported in the record. *See* 28 U.S.C. § 2254(d); *Summer v. Mata,* 455 U.S. 591, 592 (1982).

***3** The state court found that Canal was on a public street with an open container of alcohol when encountered by the police. There can be no dispute that these facts suffice to establish that Canal violated a City ordinance which explicitly states that an open container violation is punishable by imprisonment. *See* M R–18; App. Div. 1–2. [8] The probable cause for an arrest in this case was based upon uncontested evidence that the officers observed Canal with the open container in his hand. Supp. Hrg. 4, D. R–12.

8 "App. Div." followed by a number refers to the pages of the Appellate Division Decision, Docket No. 11, attachment 4.

These state court findings are thus supported by the record and the facts found by the state court constituted probable cause for Canal's arrest. In the alternative, therefore, the second ground of Canal's petition should be denied for this reason.

C. Ineffective Assistance of Counsel

In his final ground, Canal contends that he received the ineffective assistance of trial counsel. He alleges failure to call witnesses at the suppression hearing, failure to object at that hearing, failure to obtain material facts and documents for the hearing, failure to call Canal to testify before the grand jury, and failure to complete the record of Canal's arrest at the suppression hearing.

All such claims were waived here by Canal's guilty pleas.

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973). The focus of a federal habeas inquiry in a case involving a guilty plea is "the voluntariness of the plea, not the existence ... of an antecedent constitutional infirmity." *Id.* at 266. Consequently, an unconditional guilty plea waives all claims of ineffective assistance of counsel relating to events prior to the guilty plea that did not affect the voluntariness of the plea. *United States v. Coffin,* 76 F.3d 494, 497–98 (2d Cir.1996); *Baker v. Murray,* 460 F.Supp.2d 425, 429–30 (W.D.N.Y.2006); *Vasquez v. Parrott,* 397 F.Supp.2d 452, 463 (S.D.N.Y.2005); *Conyers v. McLaughlin,* No. 96–CV–1743NAMGLS, 2000 WL 33767755, at *7 (N.D.N.Y. Jan. 27, 2000).

Thus, review of Canal's claim here is precluded because all bases for that claim occurred before Canal entered a plea of guilty. Canal raises no challenge to the validity of that plea and a review of the record reveals no basis for such a challenge. Accordingly, it is recommended that the third ground of Canal's petition also be denied. [9]

9 Respondent asserts various other grounds in opposition to the claims in Canal's petition. However, in light of the disposition recommended herein on the grounds considered, respondent's remaining grounds need not be addressed.

III. Conclusion

For the reasons stated above, it is hereby

RECOMMENDED that the petition for a writ of habeas corpus be **DENIED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roland v. Racette,* 984 F.2d 85, 89 (2d Cir.1993); *Small v. Sec'y of HHS,* 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

***4 IT IS SO ORDERED.**

All Citations

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Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Albert M. BECKARY, Petitioner,
v.
Plau CHAPPIUS, Warden, Elmira Correctional Facility, Respondent.

No. 11–CV–00850 (MAT).
|
July 25, 2012.

Attorneys and Law Firms

Herman Kaufman, Old Greenwich, CT, for Petitioner.

Paul B. Lyons, Office of New York State Attorney General, New York, NY, for Respondent.

DECISION AND ORDER

MICHAEL A. TELESCA, District Judge.

I. Introduction

*1 Petitioner Albert M. Beckary ("Petitioner"), through counsel, has filed a timely petition for a writ of habeas corpus under 28 U.S .C. § 2254 challenging the constitutionality of his custody pursuant to a judgment entered July 25, 2008, in New York State, County Court, Wyoming County, convicting him, upon a plea of guilty, of Attempted Assault in the First Degree (N.Y. Penal Law ("Penal Law") §§ 110.00, 120.10[1]). Petitioner was sentenced to a determinate term of fifteen years imprisonment with five years of post-release supervision.

II. Factual Background and Procedural History

A. Introduction

Petitioner was indicted by a Wyoming County grand jury and charged with Attempted Murder in the Second Degree (Penal Law §§ 110 .00, 125.25 [1]), Assault in the First Degree (Penal Law § 120.10[1]), and Assault in the Second Degree (Penal Law § 120.05[1]). The charges arose from an incident that occurred on the evening of June 5, 2007, wherein 44–year–old Petitioner beat 71–year–old Gary Preen ("Preen" or "the victim"), causing serious physical injury to Preen, in the parking lot of the "Vet's Club" in the Village of Perry, New York.

B. Pre–Plea Proceedings

On June 20, 2007, Petitioner appeared with counsel at a felony hearing held in the Village Court, Village of Perry, New York. Caroline Vosberg ("Vosberg") testified that she was tending bar at the "Vet's Club" on the night of June 5, 2007. *See* Resp't Ex. A at 6, 10. At approximately 9:30 p.m., she had to "throw [Petitioner] out" of the club because he "had too much to drink" and "was bothering people." *Id.* at 6–7, 10–11. Specifically, Petitioner "started yelling at [Preen]" but "[Preen] didn't want to fight," and instead "put his beer down" and left. *Id.* at 10–11. Therafter, Vosberg heard a noise outside, so she opened the back door and saw Petitioner's "upper body," as he was standing behind a vehicle. Vosberg thought that Petitioner "was beating on somebody's vehicle or something...." Petitioner "started screaming and jumping up and down. I hate you. I'm going to kill you. Bunch of swear words." Vosberg testified that "it dawned on" her that "it was [Preen's] truck behind [Petitioner] and [she] couldn't see [Preen]." *Id.* at 7. Vosberg "started screaming," but Petitioner "kept jumping and jumping and kicking." *Id.* Petitioner eventually "turned and looked at [Vosberg] and starting coming at" her, at which time she "slammed the door shut" and "locked it." *Id.* at 7–8. She called 911, and when she went out to see the victim in the parking lot, "[h] e was halfway under his vehicle. There was blood all over the place. His face was swollen. He was ... barely breathing and conscious. His ear ... looked like it was falling off." Vosberg "thought [Preen] was dead." *Id.* at 8. Vosberg confirmed that certain pictures offered by the People accurately depicted the victim's injuries that night. *Id.* at 9. Her hearing testimony also matched her sworn police statement from the night of the assault. See Resp't Ex. C.

*2 Police Officer Antonio Geraci of the Perry Police Department testified at the felony hearing that on the night of the assault, he arrested Petitioner at his home. *See* Resp't Ex. A at 12–14, 20. Following his arrest, Petitioner made certain sel-incriminating statements that Officer Geraci recorded in a written report that was admitted into evidence at the hearing. *See* Resp't Ex. A at 14–20. According to Officer Geraci's report, Petitioner told Officer Geraci that "he was stupid for what he had done to Gary Preen," and that he had "just lost it and beat the hell out of him." *See* Resp't Ex. D. Petitioner further stated, "[o]h my god[,] I am stupid[,] I can't believe this, I am a bad man, and I am in jail for beating up that man. This is God[']s way of telling me something. I am learning

a lesson of God[']s way. I never disrespect my elders and I can[']t believe I did that to Gary. I have hated him for so long and now this happens." *Id.*

Carol Preen, the victim's wife, testified that her husband was rushed to the hospital after the assault. His injuries included "bleeding on the brain," "a very huge hematoma on the right eye," a gash over the eye, and "his ear was torn away," such that it "had to be cauterized and stitched." *See* Resp't Ex. A at 22–23. At the time of the hearing, the victim still needed speech and other therapy. *See* Resp't Ex. A at 23–24.

According to hospital records, Preen suffered an "[a]ssault with subarachnoid hemorrhage, cerebral contusion and abrasions." *See* Resp't Ex. E at 1, 3. Photographs taken by the police at the hospital showed Petitioner's badly beaten face, which required multiple stitches. *See* Resp't Ex. B. He was discharged eight days later, on June 14, 2007, but required continuing "speech therapy" as well as occupational and physical therapy. *See* Resp't Ex. E.

Officer Geraci also testified at a grand jury proceeding, where he offered the same account of Petitioner's arrest and statements on the night of the arrest. *See* Resp't Ex. F at 22–24. Officer Geraci described the victim as "laying on the ground with half his head peeled off at the earlobe." *Id.* at 20, 26. On August 31, 2007, a Wyoming County grand jury charged Petitioner with second-degree attempted murder, first-degree assault, and second-degree assault. *See* Resp't Ex. G.

Subsequently, Petitioner retained new counsel, Michael Mohun, Esq. In a letter to counsel on October 8, 2007, Petitioner described the extreme side-effects he suffered from taking the anti-depressant Paxil. Petitioner also listed a number of "goals," including, "staying out of prison"; "[b]lame a drug and not me-if possible"; and "civil lawsuit against ... Paxil and generic mfr." *See* Resp't Ex. H at 4–5. Attorney Mohun later filed a Notice of Intent to Proffer Psychiatric Evidence to support the defenses of "extreme emotional disturbance" or "intoxication." *See* Resp't Ex. I.

***3** On November 8, 2007, a *Huntley* hearing was conducted with respect to Petitioner's motion to suppress his statements to Officer Geraci. *See* Resp't Ex. J. The court denied the motion. *See* Resp't Ex. K.

Counsel retained a psychiatric expert, Jeffrey J. Grace, M.D., Chief of Forensic Medicine at Buffalo Psychiatric Center, to determine whether Petitioner was competent to stand trial, and to advise whether Petitioner could assert the defenses of extreme emotional distress or intoxication. *See* Resp't Exs. L, M. In order to aid Dr. Grace, counsel provided him with certain material, including Petitioner's October 8, 2007 letter, which, according to counsel, described Petitioner's mental state "before Paxil" and "after Paxil." *See* Resp't Ex. L. On February 19, 2008, Dr. Grace issued his report (hereinafter "the Grace report") finding that Petitioner "was competent to proceed with court proceedings." Dr. Grace also found, however, that at the time of the crime, Petitioner was "act[ing] under the influence of an extreme emotional disturbance." *See* Resp't Ex. M. Dr. Grace referenced and attached to his report the documents forwarded by counsel, including Petitioner's October 8, 2007 letter to counsel. *Id.* Counsel later produced the Grace report, with attachments, to the prosecution and the court, citing his disclosure obligations under CPL § 240.30. *See* Resp't Ex. N.

Counsel also retained a "blood spatter expert," Dr. Herbert L. MacDonnell. *See* Resp't Ex. O. After reviewing the victim's medical records as well as Petitioner's shoes and clothing from the night of the assault, Dr. MacDonnell issued a report, dated January 9, 2008 ("MacDonnell report"), opining, among other things, that Petitioner's shoes could not have caused the victim's injuries because of the "directionality" of the blood stains on the shoes and clothing, and the "very small amount of what appears to be bloodstains on [Petitioner's] clothing and shoes." *See* Resp't Ex. O.

B. The Plea

The People offered Petitioner a plea deal, following which Petitioner sent counsel a letter from jail on April 3, 2008, stating that, days earlier, he had decided to abruptly reduce his dose of Paxil. In this letter, Petitioner noted, among other things, that "[he][was]—of course—leaning towards accepting the plea deal...." *See* Resp't Ex. P.

On April 10, 2008, Petitioner appeared with counsel and entered a plea of guilty to Attempted Assault in the First Degree. *See* Resp't Ex. Q. On the record, Petitioner acknowledged that he understood that, in satisfaction of the entire indictment, he was pleading guilty to Attempted Assault in the First Degree, a Class C felony, which would carry a determinate sentence ranging from 3 ½ to 15 years, at the judge's discretion, along with 2½ to 5 years of post-release supervision. *Id.* at 2–3, 5–7. As part of the plea, Petitioner also waived his right to appeal, and executed a formal waiver. *Id.* at 6–8; Resp't Ex. R. Petitioner acknowledged that he had discussed the plea with counsel, and that his plea had not been

induced by any other promises or threats. *See* Resp't Ex. Q at 8–9. He also stated that he understood that he was giving up various rights, including the right to a jury trial and to testify. *Id.* at 9–10. He then formally admitted the elements of attempted assault in connection with his attack on Preen. *Id.* at 11.

*4 On April 25, 2008, Petitioner consulted Paul A. Kettl, M.D., a psychiatrist, who reported that Petitioner's current "mood is and that Petitioner will "gradually taper Paxil over the next couple of weeks." *See* Resp't Ex. S.

C. Motion to Withdraw the Plea

Petitioner subsequently fired attorney Mohun and hired new counsel, Scott M. Green, Esq., who filed a motion dated July 11, 2008, to withdraw Petitioner's plea on the grounds that it was involuntary. Petitioner alleged that: (1) attorney Mohun "coerced" him into accepting the plea by threatening that the court would otherwise raise his bail; and (2) he was not competent to enter a voluntary plea because, prior to the plea hearing, he reduced his Paxil dosage and, as a result, could not "comprehend and understand the ramifications of his plea." *See* Resp't Ex. T at ¶¶ 10, 19. In a decision and order dated July 22, 2008, the county court denied Petitioner's motion. *See* Resp't Ex. V at 2.

D. Sentencing

Petitioner appeared with counsel for sentencing on July 25, 2008. At that time, the court imposed a determinate term of fifteen years imprisonment, along with five years of post-release supervision. *See* Resp't Ex. W.

E. Direct Appeal

Petitioner filed a counseled notice of appeal in the Appellate Division, Fourth Department. *See* Resp't Ex. X. The People moved to dismiss the appeal for failure to perfect. *See* Resp't Ex. Y. Subsequently, Petitioner retained new counsel, who opposed the motion and requested additional time. *See* Resp't Ex. AA. On April 15, 2010, the Appellate Division granted the People's motion to dismiss, stating that "the appeal is dismissed without further order unless the appeal is perfected on or before July 14, 2010." See Resp't Ex. BB. On July 12, 2010, Petitioner, through counsel, submitted a letter to the Appellate Division stating that Petitioner had "determined to withdraw his appeal." *See* Resp't Ex. CC. In a letter dated July 19, 2010, the Appellate Division informed Petitioner that his appeal had been dismissed on July 14, 2010. *See* Resp't Ex. DD.

F. Motion to Vacate the Judgement of Conviction

On March 11, 2011, Petitioner filed a counseled motion, pursuant to N.Y.Crim. Proc. Law ("CPL") § 440.10, to vacate the judgment of conviction on the following grounds: (1) his plea was involuntary because of Petitioner's withdrawal symptoms from a reduction of Paxil; (2) attorney Mohun was ineffective prior to and at the plea proceeding; and (3) the county court improperly refused to recuse itself. *See* Resp't Ex. EE. Among other things, Petitioner attached the following to his motion: a report dated August 4, 2010, authored by Dr. Kevin D. Whaley, a medical expert, opining that the victim's injuries had been caused by a stroke rather than blunt force trauma. *Id.* at attached Ex. 2 (hereinafter "the Whaley report"); and a report dated January 6, 2011, authored by Peter R. Breggin, M.D. (hereinafter "the Breggin report"), a psychiatric expert, opining that Petitioner had not been competent at the time of the plea due to his withdrawal from Paxil. *See* Resp't Ex. EE (attaching Ex. 12) (hereinafter "the Breggin report").

*5 In a decision and order dated April 21, 2011, the Wyoming County Court denied the motion. *See* Resp't Ex. HH. Leave to appeal was denied. *See* Resp't Ex. LL.

G. The Habeas Corpus Petition

This habeas corpus petition followed, wherein Petitioner seeks relief on the following grounds: (1) involuntary guilty plea; and (2) ineffective assistance of counsel. *See* Pet. ¶ 12 (Dkt. No. 1); Addendum ("Pet.Add."); Reply (Dkt. No. 15).

The Court points out that Petitioner lists " [i] nnocence of the petitioner" at ground four of the petition and refers the Court to his attached addendum for the supporting facts. *See* Pet. ¶ 12, Ground Four. As a result of Petitioner having listed this issue as a stand-alone claim in the petition, Respondent addressed it as a such in its answering papers. However, in his Reply, Petitioner asserts that Respondent has "mischaracterize[d] and misconstrue[d]" Petitioner's claim, explaining that:

> the issue is not, as stated by Respondent, whether Mr. Beckary was factually innocent; rather[,] the question is whether Mr.

> Beckary's attorney, Michael Mohun, unreasonably failed to conduct a required investigation into the question of Mr. Beckary's innocence.... Nothing put forth, either in Mr. Beckary's petition, pursuant to Criminal Procedure Law 440.10, or in his Section 2254 petition can be interpreted to constitute a claim of actual innocence.

Reply at 3. Because Petitioner is represented by counsel in the instant proceeding and because counsel has explicitly indicated that he is not raising a claim of actual innocence, the Court construes the habeas petition as not including a stand-alone claim of actual innocence, and only relies on Petitioner's "innocence" argument in the context of and in support of his ineffective assistance of counsel claim.

Moreover, in the addendum attached to his habeas petition, Petitioner alleges that the prosecution engaged in misconduct at the grand jury proceeding by eliciting false testimony from Officer Geraci. *See* Pet. Add. at 6–8. As Respondent correctly points out, however, these allegations are stated only in the factual portion of his addendum. *See* Resp't Mem. of Law at 29. Further, the allegations are not labeled or otherwise identified as or in the context of a stand-alone claim of prosecutorial misconduct. Notably, the first sentence of the addendum states that "[P]etitioner ... submits the attached petition ... raising the following constitutional claims: a) [i]neffective assistance of counsel; and b) [i]nvoluntariness of his guilty plea." Pet. Add. at 1. Said addendum then goes on to argue these two points as two discrete, stand-alone claims. *Id.* Respondent argues that the habeas petition does not include a claim of prosecutorial misconduct, and that the Court should not liberally construe Petitioner's counseled pleadings as raising such. Petitioner concedes that the claim was not specifically listed in the grounds for relief," but, nonetheless, urges the Court to "evaluate[ ] the issue" because "to hold otherwise would elevate form over substance." Reply at 10. Petitioner does not cite caselaw in support of his position, nor is the Court aware of any that is on point with the situation presented here that would compel it to liberally construe Petitioner's counseled pleadings. Accordingly, the Court declines to liberally construe Petitioner's addendum as raising a stand-alone claim of prosecutorial misconduct. *See e.g., Jones v. Goord,* 435 F.Supp.2d 221, 261 (S.D.N.Y.2006) ("the liberal reading of pleadings afforded to pro se litigants is not applicable when plaintiffs are represented by sophisticated counsel.... Plaintiffs have stated their claims, and those claims are what they are.").

***6** Additionally, in his Reply, Petitioner asserts "[t]he arguments [set forth therein] establish that the instant habeas corpus petition demand as a minimum an evidentiary hearing on the claims presented." Reply at 1. Indeed, "[a] district court has broad discretion to hear further evidence in habeas cases." *Nieblas v. Smith,* 204 F.3d 29, 31 (2d Cir.1999) (citing *Townsend v. Sain,* 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)). "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley,* 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quoting *Harris v. Nelson,* 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)); *see also Schriro v. Landrigan,* 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). As discussed below, it is abundantly clear that Petitioner's claims have no merit and that there are no grounds for habeas relief. Accordingly, habeas relief is denied, Petitioner's request for an evidentiary hearing is denied, and the petition is dismissed.

III. The Exhaustion Requirement

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State...." 28 U.S.C. § 2254(b)(1)(A); *see, e.g., O'Sullivan v. Boerckel,* 526 U.S. 838, 843–44, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *accord, e.g., Bossett v. Walker,* 41 F.3d 825, 828 (2d Cir.1994), *cert. denied,* 514 U.S. 1054, 115 S.Ct. 1436, 131 L.Ed.2d 316 (1995). "The exhaustion requirement is not satisfied unless the federal claim has been 'fairly presented' to the state courts." *Daye v. AttorneyGeneral,* 696 F.2d 186, 191 (2d Cir.1982) (en banc), cert. denied, 464 U.S. 1048, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984).

IV. The AEDPA Standard of Review

For federal constitutional claims adjudicated on the merits by a state court, the deferential standard of review codified

in the Anti–Terrorism and Effective Death Penalty Act ("AEDPA") applies. A habeas petitioner can only obtain habeas corpus relief by showing that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

V. Analysis of the Petition

1. Involuntary Guilty Plea

Petitioner asserts that his guilty plea was involuntary because: (1) counsel coerced him to enter a plea even though he was rendered incompetent by a reduction in his anti-depressant medication Paxil; and (2) counsel threatened that if Petitioner did not accept the plea, the judge would increase his bail. *See* Pet. ¶ 12, Ground Three; Pet. Add. at 25–34. Petitioner challenged the voluntariness of his plea in his motion to vacate, and the county court denied the claim on a state procedural ground, pursuant to CPL § 440.10(2)(c), finding that "[a]lthough sufficient facts appear in the record to have permitted appellate review of the [c]ourt's decision denying the motion to withdraw the plea, the defendant unjustifiably withdrew his direct appeal without seeking such review ." The county court went on to alternatively deny the claim on the merits. *See* Resp't Ex. HH at 2. In its answering papers, Respondent asserts that the claim is procedurally barred by an adequate and independent state law ground, namely CPL § 440.10(2)(c). *See* Resp't Mem. of Law at 17–19. Petitioner disagrees with the position taken by Respondent, arguing that the claim "is not procedurally barred; nor does the state court's rejection of this claim rest upon an independent adequate state law ground." Reply at 14. Because this claim can be easily resolved on the merits and because both parties have alternatively argued the merits of this claim, the Court bypasses the procedural default issue and addresses the claim on the merits. To the extent the county court adjudicated this claim on the merits in an alternative holding, this Court applies the AEDPA standard. Under that standard, Petitioner's claim is meritless and does not warrant habeas relief.

***7** It is well-settled that "[a] criminal defendant may not be tried unless he is competent, and he may not ... plead guilty unless he does so 'competently and intelligently.' " *Godinez v. Moran,* 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) and citing *Pate v. Robinson,* 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)). "For the plea to be voluntary, '[i]t is axiomatic' that the defendant must at least be competent to proceed." *Oyague v. Artuz,* 393 F.3d 99, 106 (2d Cir.2004) (quoting *United States v. Masthers,* 539 F.2d 721, 725 (D.C.Cir.1976)). The federal standard for determining competency to stand trial or plead guilty is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran,* 509 U.S. at 396–397 (quoting *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam)). "When a guilty plea is entered, the defendant waives several federal constitutional rights, including the right to trial by jury, the right to confront his accusers, and the privilege against compulsory self-incrimination." *Oyague,* 393 F.3d at 106 (citing *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274, (1969)). Thus, a guilty plea is valid only if the record demonstrates that it is voluntary and intelligent. *Boykin,* 395 U.S. at 242–43.

"[A]lthough 'the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law,' questions of historical fact, including inferences properly drawn from such facts, are in this context entitled to the presumption of correctness accorded state court factual findings.' " *Parke v. Raley,* 506 U.S. 20, 35, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) (quoting *Marshall v. Lonberger,* 459 U.S. 422, 431, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) (internal citation omitted)). Statements made by a defendant at a plea hearing constitute a "formidable barrier" that cannot be easily overcome in subsequent collateral proceedings because "[s]olemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison,* 431 U.S. 63, 73–74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Applying these standards to the instant case, the Court finds no basis to conclude that Petitioner's guilty plea was anything other than voluntary, knowing and intelligent.

At the plea proceeding, Petitioner acknowledged on the record that there were no impediments to him entering the plea, including that: he fully understood the plea agreement; he had an "adequate opportunity to talk [it] over" with his attorney; nobody had made additional promises to induce him to enter the plea; and nobody was "pressuring [him] or forcing

[him] in anyway to do this against [his] will." *See* Resp't Ex. Q at 8–9. Moreover, the plea transcript demonstrates that Petitioner was lucid and coherent, and that he did not mechanically respond to the court's questions with "yes" and "no" answers. When asked if he understood the proposed sentence, Petitioner answered, "[y]es, your Honor, I do." *Id.* at 5–6. When asked if he understood the proposed plea, Petitioner answered, "[y]es, your Honor, I do." When asked if he had "an adequate opportunity" to discuss the plea with his attorney and whether his attorney "answered all [his] question to [his] satisfaction," Petitioner replied, "[h]e has indeed, your Honor." Notably, at this time, Petitioner, nor his attorney, mention or otherwise indicate to the Court Petitioner was incompetent to enter the plea. Moreover, when asked if he was promised anything or had been pressured or forced to enter the plea against his will, Petitioner answered, "[n]o, sir." When asked whether he had questions about any of the rights or consequences of the plea, he answered in the negative, and he answered in the affirmative when asked if he was ready to go forward with the plea. *Id.* at 8–9. When asked whether he would formally plead guilty to the charges, Petitioner affirmatively stated, "[y]es, your Honor, I do plead guilty." Petitioner then went on to admit to the specific facts in the indictment. *Id.* at 8–9, 11.

***8** The Court agrees with Respondent that Petitioner's in-court, under oath statements, as summarized above, undermine his contention that his reduced Paxil dosage impaired his mental abilities, such that he was mentally incapable of comprehending the plea proceeding. Furthermore, the evidence Petitioner now offers of his alleged incompetence at the plea—namely, his April 3, 2008 letter to counsel and the Breggins' report (*see* Pet. Add. at 25–26)—do nothing to alter this Court's conclusion that Petitioner's plea was voluntary, knowing, and intelligent.

To support his position, Petitioner points to his April 3, 2008 letter to counsel, wherein he discusses, among other things, his mental and physical experiences with Paxil. *See* Resp't Exs. H, P. However, as Respondent points out, this letter undermines Petitioner's position rather than support it because, when read as a whole, it represents the coherent thought process of a rational individual. *See* Resp't Mem. of Law at 42. Indeed, the April 3, 2008 letter, which is dated just one week before the plea hearing, contains a scholarly description of the side effects of Paxil reduction. Indeed, such a letter cannot be considered the work of a man mentally unfit "to consult with his lawyer with a reasonable degree of rational understanding." *Godinez,* 509 U.S at 396–97.

Similarly, Petitioner's reliance on the Breggins' report as evidence of his incompetence at his plea is equally unavailing for several reasons. First, the Breggins' report relies on Petitioner's self-serving statements made to Dr. Breggins years after the plea. Second, various of the assertions contained in the lengthy Breggins' report—e.g., that Petitioner was physically and mentally exhausted at the plea hearing, that Petitioner was slurring his speech at the plea hearing, that Petitioner gave "yes" and "no" answers that were "probably previously-scripted in [Petitioner's] mind"—are simply belied by the transcript of the plea proceeding, which demonstrates that Petitioner was lucid when he answered the questions posed to him by the court. Finally, the conclusion reached in the Breggins' report—i.e., that Petitioner must have been incompetent at the time of the plea—is undermined by Dr. Breggins' own account of Petitioner's post-hearing experience with Paxil. That is, according to Dr. Breggins, on March 30 and 31, 2008, Petitioner reduced his Paxil dosage by half (from 30 mg to 15 mg per day). The report indicates that on April 1, Petitioner raised his dose to 20 mg, and remained at that dosage throughout the April 10 plea hearing. According to Dr. Breggins, "[t]his remained a very rapid reduction that was certain to cause adverse effects in a man who had been taking the drug steadily for 8 years." *See* Resp't Ex. E (attaching Ex. 12 at 21). Yet, according to this same report, Petitioner consulted another psychiatrist, Dr. Kettl, on April 25, 2008 (15 days after the plea hearing), and Dr. Kettl reported that Petitioner had further reduced his Paxil dose (from 20 mg to 15 mg). *Id.* Upon examining Petitioner at the lower dose, Dr. Kettl found that "[c]urrently his mood is good," and diagnosed Petitioner only with "alcohol abuse." *See* Resp't Ex. S. As Respondent points out in its reply papers, all of the extreme side effects that Petitioner claimed to have had at the time of the hearing when his dose was reduced were absent.

***9** Aside from the Paxil side effects, Petitioner also asserts that his plea was involuntary because his counsel threatened that if Petitioner did not accept the plea, the judge would increase his bail. *See* Pet. Add. at 31. This claim fails since Petitioner has offered no proof other than his self-serving assertion in support of the claim. Additionally, the record is clear that Petitioner assured the court at the time of the plea that no one had coerced him into pleading guilty. *See* Resp't Ex. Q at 8–9.

In sum, Petitioner's claim is unsupported by the record and is meritless. Accordingly, the Court finds that the state court's

adjudication of this claim did not contravene or unreasonably apply clearly established Supreme Court law. The claim is therefore denied in its entirety.

2. Ineffective Assistance of Counsel

Petitioner argues, as he did in his CPL § 440.10 motion, that Petitioner was ineffective because counsel: (1) failed to retain a medical expert to determine the cause of the victim's injuries; (2) labored under "a conflict of interest with Petitioner," as evidenced by his request for a deletion from the MacDonnell report; (3) violated the attorney-client privilege by disclosing Petitioner's October 8, 2007 letter to counsel; (4) failed to advise Petitioner of the intoxication defense; and (5) advised Petitioner to accept the guilty plea, despite evidence that Petitioner did not cause the victim's injuries and even though counsel knew that Petitioner was not competent at the time of his plea. *See* Pet. ¶ 12, Grounds One–Two. The county court adjudicated this claim on the merits and the AEDPA therefore applies. Under that standard, the claim is meritless.

Under the well-established authority, in order to prevail on an ineffective assistance of counsel claim a petitioner must show both that 1) his or her counsel's performance was deficient, in that it failed to conform to an objective, reasonableness threshold minimum level, and 2) that deficiency caused actual prejudice to the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Greiner v. Wells,* 417 F.3d 305, 319 (2d Cir.2005), *cert. denied,* 546 U.S. 1184, 126 S.Ct. 1363, 164 L.Ed.2d 72 (2006). To be constitutionally deficient, the attorney's conduct must fall "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690; *Greiner,* 417 F.3d at 319. An attorney's performance is judged against this standard in light of the totality of the circumstances and from the perspective of counsel at the time of trial, with every effort being made to "eliminate the distorting effects of hindsight [.]" *Strickland,* 466 U.S. at 689; *Greiner,* 417 F.3d at 319.

Courts generally presume under *Strickland* that constitutionally adequate assistance has been rendered, and significant decisions have been made through the exercise of sound professional judgment to which "a heavy measure of deference" is afforded. *Strickland,* 466 U.S. at 691; *Greiner,* 417 F.3d at 319. Prejudice is established by showing that there is a "reasonable probability" that but for counsel's deficiencies "the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Henry v. Poole,* 409 F.3d 48, 63–64 (2d Cir.2005). In the context of a guilty plea, a petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the petitioner would not have pleaded guilty and instead would have exercised his or her right to a trial. *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *United States v. Coffin,* 76 F.3d 494, 498 (2d Cir.), *cert. denied,* 517 U.S. 1147, 116 S.Ct. 1445, 134 L.Ed.2d 565 (1996).

***10** "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Thus, a habeas petitioner's unconditional guilty plea waives all claims of ineffective assistance of counsel relating to events prior to the guilty plea that did not affect the voluntariness of his plea. *Id* . at 267; *accord, e.g., Coffin,* 76 F.3d at 497–98.

(A) The Claims Unrelated to the Guilty Plea are Precluded from Review by *Tollett*

Petitioner argues that counsel was ineffective because: he failed to retain a medical expert to determine the cause of the victim's injuries; he labored under "a conflict of interest with Petitioner"; he disclosed to the county court "privileged and confidential information"; and that counsel failed to advise Petitioner of "the intoxication defense." These claims, which involve counsel's pre-plea actions and do not affect the voluntariness of the plea itself, were waived by Petitioner's voluntary, knowing and intelligent guilty plea (*see* discussion *supra,* at "Section V, 1"). *See Tollett,* 411 U.S. at 267; *see e.g., Burwell v. Perez,* 10 Civ. 2560(CM)(FM), 2012 U.S. Dist. LEXIS 65773 (S.D.N.Y. May 7, 2012) ("Because [Burwell's] guilty plea was voluntary and intelligent, Burwell's ineffective assistance claim, which concerns only his counsel's pre-plea actions (or failures to act), fails to state a violation of his constitutional rights that this Court can consider.") (citations omitted); *Rodriguez v. Conway,* 07 Civ. 9863(JSR)(AJP), 2009 U.S. Dist. LEXIS, *73–74, 2009 WL 636503 (S.D.N.Y. March 13, 2009) (finding Petitioner's ineffective assistance of counsel claim based on counsel's failure to timely file a notice of intent to produce psychiatric evidence in support of extreme emotional disturbance defense barred by voluntary guilty plea), report and recommendation adopted by 2009 U.S. Dist. LEXIS 89340 (S.D.N.Y. Sept. 27, 2009); *Sullivan v. Goord,* No. 05–CV6060(DGL)(VEB), 2007 U.S. Dist. LEXIS 98564, *11 (W.D.N.Y. Aug. 14, 2007) (Petitioner's "claims of

ineffectiveness ascribed to [his first] attorney ... are barred under *Tollett v. Henderson* because the substance of those claims do not relate to the voluntariness of [petitioner's] plea or the advice he received with regard to pleading guilty."), report and recommendation adopted by 2007 U.S. Dist, LEXIS 69444 (W.D.N.Y. Sept. 19, 2007).

(B) The Claims Related to the Guilty Plea are Meritless

Petitioner claims that his counsel was ineffective because he advised him to accept the guilty plea: (1) despite purported evidence that Petitioner did not cause the victim's injuries; and (2) even though counsel knew that Petitioner was not competent at the time of the plea. *See* Pet. ¶ 12, Ground Two. These claims are meritless.

***11** With respect to the former issue, there was overwhelming evidence—prior to the plea—that Petitioner caused the victim's injuries. Notably, Petitioner confessed to the assault of Preen after his arrest, and this confession was fully supported by the evidence presented at the felony hearing. Vosberg testified that she saw Petitioner's "upper body" as he stood behind Preen's truck and appeared to be "beating somebody's vehicle or something...." *See* Resp't Ex. A at 7. According to Vosberg, Petitioner "started screaming and jumping up and down. I hate you. I'm going to kill you. Bunch of swear words." *Id.* Vosberg also testified that she "started screaming," but Petitioner "kept jumping and jumping and kicking." *Id.* Moments later, she found Preen in the parking lot, horribly beaten. *Id.* at 8. In light of Petitioner's confession, which was supported by Vosberg's account of Petitioner beating the victim in the parking lot, counsel may have reasonably decided that investigation of the victim's extensive physical injuries would only serve to inculpate Petitioner further. Moreover, the particular medical expert that Petitioner faults counsel for having not called—namely, Dr. Whaley who prepared a report that was submitted to the county court in support of Petitioner's motion to vacate—concludes that all of the victim's injuries were caused by a stroke, rather than being kicked multiple times in the face and head. Petitioner asserts that the Whaley "report raised a reasonable claim of innocence, which is critical in view of [Petitioner's attorney's] refusal to have a forensic medical expert examine the cause of the Preen injuries, prior to advising Mr. Beckary to plead guilty." Pet. Add. at 10. The Court finds this contention meritless since the conclusion set forth in the Whaley report is refuted by Petitioner's confession, the physical evidence of the extensive injuries suffered by the victim, and the pre-trial hearing testimony. Thus, the Court finds that counsel's decision not to have a forensic medical expert examine the cause of the victim's injuries was not unreasonable under the circumstances, nor is there a reasonable probability that, had counsel performed as Petitioner wished him to, Petitioner would have chosen to stand trial rather than accept the plea.

Similarly, Petitioner's second argument—that counsel improperly advised Petitioner to plead guilty even though he knew Petitioner was suffering from Paxil withdrawals —fails insofar as Petitioner was competent at the time he entered the plea (*see* discussion *supra* at Section "V, 1"). Moreover, Petitioner has failed to establish a reasonable probability that, but for counsel's actions in this respect, he would have rejected the plea and insisted upon going to trial. Notably, in Petitioner's own letter of April 3, 2008 to his attorney (in which he sets forth the withdrawal symptoms of Paxil), he specifically states, "I am—of course-leaning towards accepting the plea...." See Resp't Ex. P.

***12** In sum, Petitioner's ineffective assistance of counsel claim is meritless. Accordingly, the Court cannot find that the state court's adjudication of this claim contravened or unreasonably applied clearly established Supreme Court law. The claim is therefore denied in its entirety.

V. Conclusion

For the reasons stated above, the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dkt. No. 1) is denied, and the petition is dismissed. Because Petitioner has failed to make "a substantial showing of a denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court declines to issue a certificate of appealability. *See, e.g., Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 111–113 (2d Cir.2000). The Court also hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

Petitioner must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within thirty (30) days of the date of judgment in this action. Requests to proceed on appeal as a poor person must be filed with United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

All Citations

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United States District Court, N.D. New York.

Saleem SPENCER, Petitioner,

v.

Mark ROCKWOOD, Superintendent of Gouverneur Correctional Facility, Respondent.

9:22-CV-0239 (GTS)

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Signed July 12, 2024

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DECISION and ORDER

GLENN T. SUDDABY, United States District Judge

I. INTRODUCTION

***1** Petitioner Saleem Spencer ("Petitioner") seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Dkt. No. 1, Petition ("Pet."). Respondent has opposed the petition and filed pertinent records from the state court proceedings. Dkt. No. 20, Response; Dkt. No. 20-1, State Court Records ("SR"); Dkt. No. 20-2, Memorandum of Law in Opposition ("Resp. Mem."); Dkt. No. 26-1, Plea Transcript ("PT"); Dkt. No. 26-2, Sentencing Transcript ("ST"). Petitioner has also filed a reply. Dkt. No. 22 ("Traverse").

For the reasons that follow, Petitioner's habeas petition is denied and dismissed.

II. RELEVANT BACKGROUND

A. Initial Criminal Proceedings

In July 2015, a confidential informant ("C.I.") purchased heroin from Petitioner on two occasions. SR 180. In October 2015, Petitioner was arrested pursuant to sealed Indictment No. 2015-147 (the "First Indictment"), which charged him with two counts of third-degree criminal sale of a controlled substance in violation of Penal Law § 220.39(1), two counts of third-degree criminal possession of a controlled substance in violation of Penal Law § 220.16(1), and two counts of seventh-degree criminal possession of a controlled substance in violation of Penal Law § 220.03. SR 230-233. Upon Petitioner's arrest, he was found in possession of 10.7 grams of cocaine packaged in 21 individual ziploc bags, digital scales, and $697 in cash. SR 344. As a result, a second indictment was issued – Indictment No. 2016-034 (the "Second Indictment") – which charged Petitioner with one count of third-degree criminal possession of a controlled substance in violation of Penal Law § 220.16(1), and one count of fourth-degree criminal possession of a controlled substance in violation of Penal Law § 220.09(1). SR 229-230.

B. Pre-trial Matters

In December 2015, Petitioner's trial counsel filed a demand for discovery, a demand for a bill of particulars, and a pre-trial omnibus motion related to the First Indictment. SR 152-156, 164-170, 182-186. Among other things, the pre-trial motion sought dismissal or reduction of the charges and requested that Petitioner be allowed to enter a program of judicial diversion for drug and alcohol treatment rather than face incarceration. SR 165-170. The trial court granted this request and referred Petitioner to the judicial diversion program for drug treatment. SR 264.

On March 16, 2016, Petitioner's counsel sent a letter to the trial court acknowledging that Petitioner had been on parole at the time of his arrest, and asked that the court consider sending Petitioner to inpatient rehabilitation at the Willard Drug Treatment Program before potentially starting the judicial diversion program, which would have allowed Petitioner to avoid jail time all together. SR 242. Petitioner's counsel acknowledged in the letter that if Petitioner did not succeed in the judicial diversion program, he would be facing an aggregate period of incarceration that could reach in excess of 10 years. *Id.*

On March 22, 2016, the judge overseeing the judicial diversion program determined that Petitioner was not appropriate for the program. SR 265.

***2** On May 16, 2016, Petitioner's counsel filed a supplemental pre-trial motion in response to learning that the drug transactions that formed the basis of the First Indictment and Second Indictment involved a C.I. rather than an undercover police officer. SR 175-178. The motion requested information about the C.I.'s criminal record and

any consideration the C.I. was afforded in exchange for cooperation in Petitioner's case, and also sought suppression of the C.I.'s "confirmatory" photograph identification. SR 175-178.

In May 2016, Petitioner's counsel filed another pre-trial omnibus motion related to the Second Indictment. SR 208-213. That motion sought, among other things, the dismissal or reduction of charges and the suppression of evidence. SR 211-212.

On June 16, 2016, the trial court heard oral argument on the pre-trial motion related to the Second Indictment. SR 239-240. During the proceeding, Petitioner's counsel acknowledged listening to a recording at the Cayuga County District Attorney's Office related to the drug sales charged in the First Indictment. SR 327. Nonetheless, Petitioner's counsel requested production of the recording, along with documentary evidence related to the C.I.'s criminal record and any consideration given to the C.I. for cooperating. *Id.*

At the conclusion of the hearing, the trial court directed the prosecution to turn over "recorded information" about the case, along with evidence related to the C.I.'s criminal record and any consideration given to the C.I. for cooperating, within 30 days. SR 327.

On July 18, 2016, Petitioner's counsel sent a follow-up letter to the prosecution requesting both the audio recording and relevant information about the C.I. SR 298.

C. Petitioner's Plea

On August 18, 2016, the parties appeared before the trial court for a pre-trial conference. *See generally*, PT. At the outset of the proceeding, the court acknowledged that the prosecution and Petitioner appeared close to reaching a plea agreement to satisfy both indictments. PT. 2-3. Specifically, the prosecution sought a 6-year determinate sentence, while Petitioner wanted a 5-year determinate sentence. PT. 2-3. The court indicated that, in an effort to resolve the matters, it would agree to sentence Petitioner to 5½ years in prison. PT. 3.

Initially, Petitioner's counsel asked the court for more time to discuss this arrangement with Petitioner, stating as follows: "[S]o if we could put this, put this over to next Thursday. I mean I do have trial next week, but I will go and see Mr. Spencer in the evening and see if we can get this done next Thursday morning, unless—or are you inclined to accept that now? It's a good offer." PT. 4. Petitioner responded to counsel by stating, "I'd take five and a half." *Id.* Counsel then added, "I don't like to pressure people. It's not the way to do things. It's a good offer and we'll go ahead with it." *Id.*

The prosecutor noted that the charges had been pending since October 2015, and that the People did not wish for the case to be adjourned any further. PT. 5. The trial court then addressed Petitioner as follows: "Saleem, do you need more time to speak to [defense counsel?] Are you ready to proceed? I'm not going to adjourn it out for a week, but I'll give you a few more minutes to speak to your attorney." *Id.*

After a discussion off the record, counsel re-iterated Petitioner's desire to plead guilty in exchange for 5½ years' imprisonment. PT. 5. The trial court then directly asked Petitioner if he needed more time to consider the matter, to which Petitioner responded, "No, your Honor." *Id.*

***3** The court then advised Petitioner of the consequences of pleading guilty, including that he would be giving up his right to remain silent and not incriminate himself. PT. 6. Petitioner stated that he understood these consequences, after which the following colloquy between the court and Petitioner occurred:

> THE COURT: All right. Saleem, I'm looking at Indictment 2016-147. Count 1 is criminal sale of controlled substance in the third degree, where it's alleged that on or about July 27 of 2015, here in the County of Cayuga, it's alleged that you knowingly and unlawfully sold a quantity of heroin, which as we all know is a narcotic drug, to another person. Is that correct?
>
> [PETITIONER]: Yes, your Honor.
>
> THE COURT: Saleem, tell me what happened on or about July 27 of 2015.
>
> (Discussion held off the record.)
>
> [PETITIONER]: Your Honor, on that date, from the indictment, criminal sale of controlled substance did happen, your Honor.
>
> THE COURT: It did happen?
>
> [PETITIONER]: Yeah.
>
> THE COURT: All right. So you admit you were in possession of heroin?
>
> [PETITIONER]: Yes, your Honor.

THE COURT: All right. And you admit that you did sell that heroin to another individual?

[PETITIONER]: Yes, your Honor.

THE COURT: Okay. You knew it was illegal to possess; you knew it was illegal to sell it?

[PETITIONER]: Yes, your Honor.

THE COURT: All right. Mr. Van Buskirk – Mr. --

[ASSISTANT DISTRICT ATTORNEY]: I'm satisfied with the colloquy as well, Judge.

[PETITIONER'S COUNSEL]: Yes, Judge. I'm satisfied.

THE COURT: Sorry about that, gentlemen. Saleem, relative to Count 1 of criminal sale of controlled substance in the third degree, how do you wish to plead?

[PETITIONER]: Plead guilty, your Honor.

THE COURT: All right. I'm looking at Indictment 2016-034. Count 1, criminal possession of a controlled substance in the third degree, where it's alleged that on or about October 16 of 2015, here in the City of Auburn, it's alleged that you knowingly and unlawfully possessed 10.7 grams of cocaine, a narcotic drug, and that it was contained in 21 individual Ziploc bags and that you did so with the intent to sell it. Is that correct?

[PETITIONER]: Yes, your Honor.

THE COURT: All right. Saleem, once again, tell me what happened on or about October 16 of 2015 here within the City of Auburn.

(Discussion held off the record.)

[PETITIONER]: On the day of October 16th, there was crack cocaine in my possession.

THE COURT: All right. And you don't dispute that it was more than 10-grams?

[PETITIONER]: I don't dispute.

[PETITIONER'S COUNSEL]: You don't argue?

[PETITIONER]: No, we don't argue, your Honor.

...

THE COURT: Would you agree with me, though, there were 21 individual Ziploc bags?

[PETITIONER]: Yes, your Honor.

THE COURT: You did – so you had that in your possession with the intent to sell it, is that correct?

[PETITIONER]: Yes, your Honor.

THE COURT: All right. Mr. Budelmann?

[ASSISTANT DISTRICT ATTORNEY]: Judge, I'm satisfied with the colloquy.

THE COURT: Saleem, relative to Count 1 of criminal possession of a controlled substance in the third degree, how do you wish to plead?

[PETITIONER]: Plead guilty, your Honor.

THE COURT: All right. I want you to understand that by pleading guilty, you waive or forfeit certain rights. First, you waive any right you may have to a hearing to suppress evidence. Secondly, by pleading guilty, you waive your right to a trial by jury. At a trial by jury you're presumed to be innocent and you're entitled to the following rights: You have the right to be represented by your attorney. You have the right to confront and cross-examine witnesses presented by the People. You have the right to remain silent, not to incriminate yourself.... You have the right but are not required to call and present witnesses on your behalf and to testify in your own behalf if that's what you choose to do. And, finally, you have the right to require the People to prove your guilt beyond a reasonable doubt to a jury of 12 individuals who must be unanimous finding you guilty beyond a reasonable doubt. Do you understand those rights?

*4 [PETITIONER]: Yes, your Honor.

THE COURT: Do you understand that by pleading guilty, you give up any defense you may have to these charges?

[PETITIONER]: Yes, your Honor.

PT. at 6-11.

Following this exchange, the trial judge spoke with the attorneys regarding post-release supervision, and then advised Petitioner that "under the law [he is] authorized to impose a maximum sentence of up to 12 years in prison on

each count[,]" but "as [a] condition of [Petitioner's] plea of guilty[,]" was promising him "a five-and-a-half-year prison sentence, followed by a period of post-release supervision of three years[,]" provided that Petitioner's presentence report did not reveal anything that would prevent the court from carrying out the agreed-upon sentence in good conscience. PT. at 11. The trial judge explained that if such a scenario were to occur, Petitioner would be allowed to withdraw his plea. *Id.* After Petitioner confirmed his understanding of these facts, the trial judge explained the meaning of post-release supervision to Petitioner, who confirmed his understanding of this as well. *Id.* at 11-12. Thereafter, the following exchange occurred:

> THE COURT: Saleem, other than the sentence promise which I placed on the record here this morning, has anyone made any other promises to you to have you plead guilty?
>
> [PETITIONER]: No, your Honor.
>
> THE COURT: Has anybody threatened you or forced you or pressured you in any way to plead guilty against your will?
>
> [PETITIONER]: No, your Honor.
>
> THE COURT: Have I said anything to you directly, or to your [sic] the best of your knowledge have I said anything to Mr. Van Buskirk to have you plead guilty against your will?
>
> [PETITIONER]: No, your Honor.
>
> THE COURT: Has Mr. Van Buskirk said anything to you to have you plead guilty against you[r] will?
>
> [PETITIONER]: No, your Honor.
>
> THE COURT: Are you satisfied with his services?
>
> [PETITIONER]: Yes, your Honor.
>
> THE COURT: Are you pleading guilty voluntarily and upon your own free will?
>
> [PETITIONER]: Yes, your Honor.

PT. at 12-13.

Thereafter, Petitioner was given a second felony drug offender statement to reflect that he was previously convicted of third-degree criminal sale of a controlled substance in April 2012, and fifth-degree criminal sale of a controlled substance in January 2004. PT. 13. Petitioner acknowledged his criminal history, and the court further advised Petitioner that his present guilty pleas could be the basis for additional or different punishment if he was ever again convicted of another crime, and Petitioner said he understood. *Id.* at 13-14. The court then adjourned the case for sentencing. *Id.* at 14.

D. Petitioner's Letter to the Court

Prior to sentencing, Petitioner sent a letter to the court regarding his guilty plea. SR 244. The letter provided additional details about Petitioner's drug transactions, including that Petitioner knew the C.I. by name, and that he obtained heroin for her as a "favor[,]" without profiting from the "alleged buys[.]" *Id.* Petitioner claimed in the letter that he "only pled guilty because [he] was scared of trial and 5½ years sound [sic] a lot better than 36 years if [he] had to lose at trial[,]" and asked that the court "regress" back to the pre-trial phase so that his lawyer could confront the C.I. *Id.* Petitioner stated that he felt "scammed and framed" because the charges against him arose out of controlled buys made by someone he knew, and he was not a heroin dealer. SR 245. Petitioner also stated, with respect to the cocaine possession that formed the basis of the Second Indictment, that he "only pled guilty because [he] knew it was on [him] at the time of the arrest when the cops took it out of the shorts [he] was wearing[,]" and the shorts were actually borrowed from a friend. *Id.* Petitioner then stated that he did not provide the information in the letter sooner because "it seems like every time I'm in court, I can't speak because my lawyer won't let me." SR 246.

E. Petitioner's Sentencing

***5** At sentencing in October 2016, the court acknowledged receiving Petitioner's letter, which was attached to the pre-sentence report. ST. at 2-3. Defense counsel acknowledged speaking to Petitioner that morning and noted that "he had not at that time indicated anything about withdrawing his plea." ST. at 2. Defense counsel also noted that the letter did not "change [Petitioner's] story necessarily, so much as enlarge it far beyond whatever is in the plea allocution." ST. at 3. Petitioner agreed with his attorney, saying that he was "comfortable with going forward," and did "not want to disrespect your offer at all your Honor." ST. at 4. Petitioner conveyed that he wanted to air his side of the story at a hearing where he could confront the C.I., but that he also did not want to lose the sentencing offer. ST. at 3-4. Petitioner opted to

accept the sentencing offer, as long as he could appeal the sentence and conviction. ST. at 5-6.

The prosecution noted that Petitioner's letter was not a claim of innocence, and in fact Petitioner admitted to being "in possession of a substantial quantity of cocaine, which is not subject to any agency defense." ST. at 6. The prosecution said Petitioner's letter did not sound like a motion to withdraw his plea, but that if the court was going to interpret it that way, the People would oppose it and oppose its inclusion in the record. ST. at 6-7. The prosecution further argued that Petitioner had committed at least 3 drug sale felonies within a dozen years, and that the agency defense could not apply to someone with such a prolonged criminal history of drug sales. *Id.* Specifically, the prosecution said that Petitioner had sold drugs for most, if not all, of his adult life and that it was not credible that he was merely a "possessor that was conned into supplying drugs." *Id.*

The court then proceeded to impose the agreed-upon sentence. ST. at 12. Under the First Indictment, Petitioner was sentenced to a determinate term of 5½ years' imprisonment and 3 years of post-release supervision for third-degree criminal sale of a controlled substance. *Id.* at 12-13. Under the Second Indictment, Petitioner was sentenced to a determinate term of 5½ years' imprisonment and 3 years of post-release supervision for third-degree criminal possession of a controlled substance. *Id.* at 13.

Each sentence was imposed concurrently with the other. ST. at 13. Petitioner was also ordered to pay $200 in restitution of buy money, in addition to fees and surcharges. ST. at 13.

F. Petitioner's Motion to Set Aside His Sentence

In April 2017, four months after his sentencing, Petitioner filed a motion to set aside his sentence pursuant to C.P.L. § 440.20. The motion complained that the New York State Department of Corrections and Community Supervision ("DOCCS") was requiring Petitioner to serve the time owed on his April 2012 sentence, for which he was on parole at the time of his 2015 offenses, before he began serving his sentences for the 2015 offenses. SR 1-8. Petitioner said that his plea agreements for his 2015 crimes mentioned only that the two sentences for those crimes would run concurrently with each other, and that the court never specified how those sentences would run in relation to his prior sentences. SR 2.

The prosecution opposed the motion, SR 10-11, and Petitioner submitted a pro se reply in support of his motion, arguing, among other things, that his understanding at the time he accepted the plea agreement was that he would be in prison for a maximum of 5½ years. SR 16-25. The prosecution submitted a sur-reply to argue that DOCCS did not enhance or alter Petitioner's sentence, and that Petitioner's aggregate term of imprisonment was mandatory as a matter of law. SR 26-29.

The court denied Petitioner's motion. SR 31-32. In doing so, the court addressed each of the arguments raised by Petitioner. *Id.*

After the court denied Petitioner's motion, Petitioner submitted a "reply" to the prosecution's sur-reply. SR 33-43.

***6** Petitioner then applied to the Appellate Division, Fourth Department, for leave to appeal the denial of his motion. SR 44-53. The prosecution opposed Petitioner's leave application, arguing that his sentences were authorized by law and that he received his negotiated, agreed-upon sentence for the underlying offenses. SR 103-104.

In December 2017, the Appellate Division denied Petitioner leave to appeal the denial of his motion. SR 106.

G. Petitioner's Direct Appeal

On direct appeal, Petitioner argued through counsel that the trial court committed reversible error by denying Petitioner's request to withdraw the guilty plea without a hearing. SR 109, 118-19. Petitioner also argued that his sentence was harsh and excessive because he had been struggling with drug addiction since 2003, and "there was no profit made on the sale," as he was merely "attempting to help a friend and ... acting as the middleman." SR 120-121.

In opposing the appeal, the prosecution argued that Petitioner's guilty plea was knowing, voluntary, and intelligent, and that the trial court properly exercised its discretion in denying Petitioner's motion to withdraw, to the extent Petitioner's pre-sentencing letter could be construed as such. SR 259, SR 270-272. The prosecution further noted, with respect to Petitioner's sentence, that Petitioner was facing up to 36 years in prison had he gone to trial on all of the charges against him in the indictments, and that the plea agreement secured by Petitioner's counsel was therefore "highly favorable[.]" SR 265, SR 273.

After the opposition brief was filed, Petitioner submitted a pro se supplemental brief arguing that he did not receive effective assistance of counsel because his trial attorney failed

to investigate and advocate on his behalf, and because trial counsel failed to be adversarial with the prosecution. SR 279. Petitioner also raised agency and entrapment defenses and argued that the outcome of his case would have been different had his attorney obtained discovery material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *People v. Rosario*, 9 N.Y.2d 286 (1961), which would have corroborated Petitioner's version of events related to the heroin sale. SR 282-285, 292. Finally, Petitioner argued that the Second Indictment should have been dismissed because it was based on an illegal search, with the October 2015 drug seizure being the "fruit" of his entrapment by law enforcement officials. SR 294.

The Appellate Division, Fourth Department, unanimously affirmed Petitioner's convictions under both indictments. SR 301-303. With respect to Petitioner's ineffective assistance claim, raised in his pro se supplemental brief, the Appellate Division found that the argument "survives [Petitioner's] guilty pleas only insofar as he demonstrates that the plea-bargaining process was infected by the allegedly ineffective assistance or that [Petitioner] entered the pleas because of his attorney's allegedly poor performance." SR 301. The appellate court also held that Petitioner's ineffective assistance arguments involved matters outside of the record on appeal, and thus had to be raised by way of a C.P.L. § 440.10 motion, but lacked merit to the extent reviewable on direct appeal because Petitioner received "advantageous pleas" and "nothing in the record cast doubt on the effectiveness of counsel." SR 301-302.

*7 The Appellate Division also rejected the arguments raised in Petitioner's principal brief, finding that the trial court afforded a reasonable opportunity to be heard concerning Petitioner's pre-sentencing letter and properly exercised its discretion in denying the motion to withdraw without an evidentiary hearing, to the extent Petitioner's letter could be construed as such. SR 302. The Appellate Division further found that Petitioner understood the consequences of his guilty pleas in exchange for a negotiated sentence that was less than the maximum term of imprisonment, and held that Petitioner's pleas were knowingly and voluntarily entered. *Id.* Finally, the Appellate Division found that the negotiated sentences were not unduly harsh or severe. *Id.*

H. Petitioner's Motion to Vacate His Conviction

Following the affirmance of his judgments of conviction, Petitioner filed a motion to vacate his conviction pursuant to C.P.L. § 440.10. SR 304-323. Petitioner argued that his plea was not knowing and intelligent because of counsel's ineffectiveness, that he was improperly denied *Brady* and *Rosario* discovery material, and that he was prevented from raising an agency defense. SR 304, 305, 308.

Petitioner claimed that the trial court ordered the prosecution to turn over the recordings of the alleged heroin sales, the C.I.'s full criminal history, and information about the consideration the C.I. received in exchange for cooperating with law enforcement, and this material was never received because trial counsel never "press[ed]" for it. SR 309. Petitioner further claimed that he specifically asked his attorney for the materials, to which his attorney replied, "it doesn't matter your [sic] being offered a good deal just take it," and "if the DA didn't come off the material by now he must not have to[ ]." SR 309-310.

Petitioner argued that the result of his case would have been different if the discovery material had been disclosed, and that his attorney did not "know the law" because he allowed Petitioner to plead guilty to "non-existent" charges. SR 311, 314. Petitioner also argued that law enforcement entrapped him, his cousin, and his brother, and that if it were not for this entrapment, he would have never been arrested, searched, and charged with drug possession in the second indictment. SR 317-318. Petitioner claimed the prosecution failed to disclose discovery materials because the prosecution knew the C.I. was not a reliable witness. SR 318. Finally, Petitioner argued that his criminal history had no bearing on his agency defense because "every case is different and unique in its own way." SR 310.

The prosecution opposed the motion and clarified the factual record through an affirmation submitted by the Chief Assistant District Attorney of Cayuga County. SR 324-335. The affirmation asserted that Petitioner's trial counsel had, in fact, listened to an audio recording of the drug sale from July 2015, and still sought to have the recording "turned over" during a motion argument on June 16, 2016, along with information regarding the C.I.'s criminal record and details of consideration offered to the informant. SR 327.

The prosecution conceded that its files did not indicate that any of the information was relayed to Petitioner's trial counsel, and that the assistant district attorney who was present at the motion argument on June 16, 2016, and ordered to turn over the recording and C.I. information was terminated on the same day as the motion argument. SR 327. However, the prosecution argued that the purported failure to turn

over this information was irrelevant because roughly two months after the motion argument, Petitioner knowingly and willingly pleaded guilty for a negotiated sentence well below the maximum sentence that could have been imposed. SR 326, 328, 330. The prosecution also noted that during the guilty plea, neither Petitioner nor his trial counsel mentioned anything concerning the audio recording or information about the C.I. SR 328. Furthermore, Petitioner's pre-sentencing letter to the trial court purportedly asking to withdraw his guilty plea failed to mention the lack of disclosure of recordings or information. *Id.*

***8** The prosecution separately addressed procedural deficiencies with Petitioner's arguments regarding *Brady* violations, and the lack of prejudice or ineffective assistance stemming from trial counsel's failure to obtain the *Brady* material or raise agency or entrapment defenses. SR 329-335.

The trial court denied Petitioner's C.P.L. § 440.10 motion in its entirety, noting that Petitioner's allegations were "insufficient to demonstrate that the plea-bargaining process was infected" by the alleged deprivations raised in Petitioner's motion. SR 341-344. Petitioner sought leave to appeal the denial of his motion, and the Appellate Division, Fourth Department, denied leave to appeal in May 2020. SR 345-352.

III. THE PETITION, RESPONSE, AND REPLY

In his Petition, Petitioner raises the following three grounds for why he believes he is entitled to federal habeas relief: (1) his plea was involuntary because trial counsel was ineffective; (2) the First Indictment was the product of entrapment, and for which he had a viable agency defense, and the Second Indictment was based on "Fruit of Poisonous Tree"; and (3) his sentence was harsh and excessive. Pet. at 6-11.

Respondent argues that the Petition should be dismissed because (1) Petitioner's ineffectiveness claim is barred by his guilty pleas, and the state court reasonably determined that he received effective assistance, (2) his claims concerning potential defenses are waived by his guilty pleas, barred from federal habeas review, and meritless, and (3) his sentence is within the limits of New York law. Resp. Mem. at 25-42.

In his reply, which is comprised of a three-page letter and attached case law, Petitioner contends that he was not provided with *Brady* material because of "prosecutorial misconduct[,]" and "conned and swayed" into accepting a guilty plea because his trial counsel "was working with the DA in a private sector[.]" Traverse at 2. [1] Petitioner further argues that his rights were violated when the trial judge improperly refused to allow him to "take [his] plea back[.]" *Id.* at 3.

1 Insofar as Petitioner contends that the prosecution engaged in misconduct by intentionally withholding *Brady* material and his trial counsel was ineffective based on a conflict of interest related to a relationship with an assistant district attorney, there is no evidence in the record related to these matters. In any event, the Court will address these arguments more fully below.

IV. DISCUSSION

A. Exhaustion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that an application for a writ of habeas corpus may not be granted until a petitioner has exhausted all remedies available in state court unless "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A), (B)(I), (ii). "The exhaustion requirement 'is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings[.]' " *Jimenez v. Walker*, 458 F.3d 130, 149 (2d Cir. 2006) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)).

To satisfy the exhaustion requirement, a petitioner must do so both procedurally and substantively. Procedural exhaustion requires that a petitioner raise all claims in state court prior to raising them in a federal habeas corpus petition. Substantive exhaustion requires that a petitioner "fairly present" each claim for habeas relief in "each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citations omitted); *Fama v. Comm'r. of Corr. Servs.*, 235 F.3d 804, 808 (2d Cir. 2000). In other words, a petitioner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The petitioner must have used the proper procedural vehicle so that the state court may pass on the merits of his or her claims. *Dean v. Smith*, 753 F.2d 239, 241 (2d Cir. 1985); *Barton v. Fillion*, No. 9:03-CV-1377 (DNH/GJD), 2007 WL 3008167, at *5 (N.D.N.Y. Oct. 10, 2007).

"[W]hen a 'petitioner fail[s] to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,' the federal habeas court should consider the claim to be procedurally defaulted." *Clark v. Perez*, 510 F.3d 382, 390 (2d Cir. 2008) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)).

***9** Liberally considering all of Petitioner's arguments made throughout the totality of his submissions, Petitioner's conclusory allegations in his Traverse – that his trial counsel had a conflict of interest based on a personal relationship with an assistant district attorney and the prosecution's failure to produce *Brady* material amounted to prosecutorial misconduct – are unexhausted. This is because neither argument was ever asserted in the state courts.[2] *See* SR 1-8, 109-122, 278-300; *see also Cano v. Walsh*, 170 Fed. App'x 749, 750 (2d Cir. 2006) ("The claim was not properly presented to the courts of New York because the petitioner never sought leave to appeal to the New York Court of Appeals the decision of the Appellate Division[.]") (citing *Morgan v. Bennett*, 204 F.3d 360, 369 (2d Cir. 2000)); *see also Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir. 1990) ("Until [petitioner] presents his claim to the highest state court – whether or not it seems likely that he will be held to be procedurally barred – he has not exhausted available state procedures.").

2 Although Petitioner's appeal from the judgment of conviction was based in part on trial counsel's ineffective representation, the articulated reasons for trial counsel's ineffectiveness do not include a conflict of interest. *See* SR 278-300. In addition, neither Petitioner's appeal nor his 440 Motion included a claim that trial counsel was unable to represent Petitioner due to a conflict of interest.

Both claims also appear to be based on matters outside the record.[3] Thus, it appears these claims are appropriate for review in a CPL § 440.10 motion. *See People v. Pinto*, 133 A.D.3d 787, 790 (2d Dep't 2015) (where petitioner's claims involve matters both on and off the record, the proper procedural vehicle is a motion pursuant to CPL § 440.10); *People v. Maxwell*, 89 A.D.3d 1108, 1109 (2d Dep't 2011) ("[W]here ... a defendant presents a mixed claim of ineffective assistance that depends, in part, upon matters that do not appear on the record, it cannot be said that 'sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal' (CPL 440.10 [2] [b]). Therefore, such a mixed claim, presented in a CPL 440.10 motion, is not procedurally barred, and the CPL 440.10 proceeding is the appropriate forum for reviewing the claim of ineffectiveness in its entirety[.]"); *cf. Kimbrough v. Bradt*, 949 F. Supp. 2d 341, 353 (N.D.N.Y. 2013) (explaining that where a petitioner has already used his or her direct appeal, "collateral review of ... record-based claims is also foreclosed.") (citing N.Y. Crim. Pro. Law § 440.10(2)(c)). Accordingly, the Court has no reason to conclude that remedies are no longer available to Petitioner in state court with respect to these claims.

3 Petitioner contends that his trial counsel had a personal relationship with one of the assistant district attorneys involved in Petitioner's case. *See* Traverse at 2. Petitioner also argues that the outcome of his case "would have been different" if the *Brady* material was produced, and implies that it was withheld for malicious reasons. *Id.* at 1-2. However, the State Court Record does not include the *Brady* information sought by Petitioner, or documentary evidence related to (1) the prosecution's motives for not producing this material, or (2) a relationship between Petitioner's trial counsel and an assistant district attorney. Therefore, any such documents remain outside of the record presented to the state courts.

However, under the AEDPA, a federal habeas court may still deny a claim on the merits "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). The AEDPA "does not articulate a standard for denying a petition pursuant to Section 2254(b)(2), and neither the Supreme Court nor the Second Circuit has established one." *Nickels v. Conway*, No. 10-CV-0413, 2015 WL 4478970, at *18 (W.D.N.Y. July 22, 2015) (noting that "[i]n this Circuit, the various formulations for the proper standard to be used share 'the common thread of disposing of unexhausted claims that are unquestionably meritless' ") (quoting *Keating v. New York*, 708 F. Supp. 2d 292, 299 n.11 (E.D.N.Y. 2010)), *certificate of appealability denied* (2d Cir. Dec. 29, 2015). Rather, the Supreme Court has made clear that district courts can "deny writs of habeas corpus under § 2254 by engaging in de novo review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review, *see* § 2254(a)." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010). Thus, unexhausted claims found to be meritless on de novo review may be dismissed on the merits. *See, e.g., DeVault v. Griffin*,

No. 16-CV-7281, 2020 WL 5209731, at *2 (S.D.N.Y., Aug. 31, 2020) ("[A] petitioner's unexhausted claims can be denied on their merits under a de novo standard of review." (citing 28 U.S.C. § 2254(b)(2) and *Berghuis*, 560 U.S. at 390)).

1. Conflict of Interest Claim

***10** As an initial matter, Petitioner does not identify the assistant district attorney with whom his trial counsel allegedly had a personal relationship, nor does he support his claim with any record evidence. However, even if the Court were willing to assume that Petitioner is referring to the assistant district attorney who was ordered to produce *Brady* material on June 16, 2016, this official was terminated on this same date, and Petitioner's trial counsel subsequently sent a letter to the newly assigned assistant district attorney seeking this information. SR 298, SR 327. In other words, the claim is entirely meritless.

Furthermore, the claim that trial counsel was incapable of representing Petitioner effectively based on a conflict of interest has nothing to do with the voluntariness of Petitioner's plea, and it is "well settled that a guilty plea represents a break in the chain of events which has preceded it in the criminal process and [a petitioner] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Williams v. Gonyea*, No. 9:16-CV-0460 (JKS), 2017 WL 4990645, at *5 (N.D.N.Y. Oct. 31, 2017) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Thus, the claim is barred under *Tollett*. *See Coward v. Bradt*, No. 9:11-CV-1362 (LEK/CFH), 2013 WL 6195751, at *15 (N.D.N.Y. Nov. 27, 2013) ("Coward's grounds for the ineffective claim, that counsel had a conflict of interest and also failed to move to dismiss the indictment, do not relate to the voluntariness of Coward's plea and are barred by *Tollett*.") (citing *Canal v. Donelli*, No. 06-CV-1490, 2008 WL 4287385, at *3 (N.D.N.Y. 2008)).

Finally, Petitioner has also failed to establish that he suffered any prejudice as a result of any perceived conflict of interest. *See Premo*, 562 U.S. at 121-22 (noting that petitioner "must show both deficient performance by counsel and prejudice" to succeed on an ineffectiveness claim). For these reasons, Petitioner's ineffective assistance claim based on trial counsel's alleged conflict of interest is meritless.

2. Petitioner's Challenge to the Prosecution's Disclosures

"To establish a *Brady* violation, a petitioner must show that (1) the undisclosed evidence was favorable to him; (2) the evidence was in the state's possession and was suppressed, even if inadvertently; and (3) the defendant was prejudiced as a result of the failure to disclose." *Mack v. Conway*, 476 Fed. App'x. 873, 876 (2d Cir. 2012) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "It is well-settled in this Circuit that vague and conclusory allegations that are unsupported by specific factual averments are insufficient to state a viable claim for habeas relief." *Flynn v. Colvin*, No. 9:13-CV-1247 (JKS), 2016 WL 7053582, at *6 (N.D.N.Y. Dec. 5, 2016) (citing *Skeete v. New York*, No. 1:03-CV-2903, 2003 WL 22709079, at *2 (E.D.N.Y. Nov. 17, 2003) ("[V]ague, conclusory and unsupported claims do not advance a viable claim for habeas corpus relief.")).

In this case, Petitioner has failed to explain how the materials that were not produced establish that he was innocent of the crime to which he pled guilty. Thus, even if the Court were to assume that exculpatory evidence should have been disclosed prior to the entry of a guilty plea,[4] Petitioner's argument that the prosecution failed to turn over such evidence is insufficient to establish a *Brady* claim in this case. *See Flynn*, 2016 WL 7053582, at *6 ("Flynn alleges that he was lied to about the length and content of the tape recording of the incident and was not given a police incident report. But Flynn provides nothing more than his unsupported assertions in support of this claim."); *Gathers*, 2012 WL 71844, at *9 ("[Petitioner's] conclusory assertion that the government failed to turn over evidence proving his innocence is insufficient to establish a *Brady* claim." (collecting cases)); *see also Strickler*, 527 U.S. at 281-82 (noting that "prejudice" is a necessary component of a *Brady* claim).

4 *See Gathers v. New York*, No. 11-CV-1684, 2012 WL 71844, at *9 (E.D.N.Y. Jan. 10, 2012) ("[T]he law is unsettled as to whether such evidence must be disclosed prior to entry of a guilty plea."); *Porath v. Miller*, No. 9:15-CV-0091 (JKS), 2016 WL 3172872, at *4 (N.D.N.Y. June 6, 2016) ("[T]he Supreme Court has never held that exculpatory material (as opposed to impeachment material) must be disclosed prior to a guilty plea.").

*11 Accordingly, Petitioner's claim that the prosecution violated his due process rights by failing to disclose favorable evidence is meritless.

B. Standard of Review Governing Exhausted Claims

As noted, the Petition also raises the following three grounds for why Petitioner believes he is entitled to federal habeas relief: (1) his plea was involuntary because trial counsel was ineffective; (2) the First Indictment was the product of entrapment, and for which he had a viable agency defense, and the Second Indictment was based on "Fruit of Poisonous Tree"; and (3) his sentence was harsh and excessive. Pet. at 6-11. These three claims are all properly exhausted.

Under the AEDPA, a federal court may grant habeas corpus relief with respect to a claim adjudicated on the merits in state court only if, based upon the record before the state court, the state court's decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §§ 2254(d)(1), (2); *Cullen v. Pinholster*, 563 U.S. 170, 180-81, 185 (2011); *Premo v. Moore*, 562 U.S. 115, 120-21 (2011); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks omitted)).

The Supreme Court has repeatedly explained that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e Supreme] Court's precedents.' " *Nevada v. Jackson*, 569 U.S. 505, 508-509 (2013) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *see also Metrish v. Lancaster*, 569 U.S. 351, 358 (2013) (explaining that success in a habeas case premised on § 2254(d)(1) requires the petitioner to "show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' ") (quoting *Richter*, 562 U.S. at 103).

Additionally, the AEDPA foreclosed " 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.' " *Parker v. Matthews*, 567 U.S. 37, 132 S. Ct. 2148, 2149 (2012) (per curiam) (quoting *Renico*, 559 U.S. at 779). A state court's findings are not unreasonable under § 2254(d)(2) simply because a federal habeas court reviewing the claim in the first instance would have reached a different conclusion. *Wood v. Allen*, 558 U.S. 290, 301 (2010). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold." *Schriro*, 550 U.S. at 473.

Federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with " 'clear and convincing evidence.' " *Schriro*, 550 U.S. at 473-74 (quoting § 2254(e)(1)). "A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015).

A. Petitioner's Challenge to Representation by Trial Counsel

*12 Liberally construed, the Petition raises multiple claims related to his trial counsel's representation. First, Petitioner alleges that counsel failed to (a) "press" for *Brady* material that was not disclosed and (b) investigate potential defenses. *See* Pet. at 6. Second, Petitioner alleges that trial counsel coerced him into pleading guilty. *Id.*

1. Legal Standard Governing Ineffectiveness Claims

To demonstrate constitutionally ineffective assistance of counsel, a petitioner must show that counsel's performance fell below an objective standard of professional reasonableness, and but for counsel's alleged errors, "a reasonable probability" exists that the result of the proceedings would have been different such that the petitioner suffered prejudice. *Premo*, 562 U.S. at 121-22 (noting that petitioner "must show both deficient performance by counsel and prejudice") (citation and internal quotation marks omitted); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The standard "must be applied with scrupulous care" in habeas proceedings because such a claim "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial] proceedings[.]" *Premo*, 562 U.S. at 122. "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney." *Richter*, 562 U.S. at 110 (quoting *Strickland*, 466

U.S. at 687) (internal quotation marks and further citation omitted). To establish a deficient performance by counsel, a petitioner must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ... [and] that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Demonstrating constitutionally ineffective assistance of counsel is "never an easy task ... [and] establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Premo*, 562 U.S. at 122 (citations and internal quotation marks omitted); *Burt v. Titlow*, 571 U.S. 12, 19 (2013) (noting that "AEDPA erects a formidable barrier" to federal habeas review of claims that have been adjudicated in state court). When reviewing a state court's decision under section 2254, "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable–a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal quotation marks and citation omitted). Federal habeas courts "must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)" because "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable." *Richter*, 562 U.S. at 105. Instead, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

2. Failure to Pursue *Brady* Material and Investigate Potential Defenses

Insofar as Petitioner's ineffectiveness claim is based on trial counsel's failure to pursue *Brady* material and investigate potential defenses, as noted, "the *Tollett* bar ... applies to 'ineffective assistance claims relating to events prior to the guilty plea.' " *Ture v. Racette*, No. 9:12-CV-1864 (JKS), 2014 WL 2895439 at *9 (N.D.N.Y. June 26, 2014) (citation omitted); *James v. Smith*, No. 9:12-CV-0857 (FJS/ATB), 2013 WL 4519773 at *8-9 (N.D.N.Y. Aug. 26, 2013) ("Petitioner's arguments that trial counsel was ineffective in pre-plea representation, e.g., by not conducting further investigation into whether the victim suffered 'physical injury' was an antecedent claim not affecting the voluntariness of his guilty plea. Such claims are effectively barred from consideration in a habeas proceeding by *Tollett*[.]"). Moreover, Petitioner's trial attorney's alleged failure to pursue *Brady* material and investigate potential defenses has nothing to do with the voluntariness of Petitioner's plea. Thus, Petitioner's request for habeas review of his ineffectiveness claim on these grounds is barred under *Tollett*.

***13** Furthermore, even if Petitioner's guilty plea did not bar habeas review, the Appellate Division rejected this ineffective assistance of trial counsel claim on the merits. SR 301-03. Thus, the relevant inquiry for this Court is whether or not the Appellate Division's determination under the *Strickland* standard was unreasonable.

In addressing the reasonableness of the Appellate Division's determination, the Court begins by noting that the entrapment, agency, and "fruit of the poisonous tree" defenses that Petitioner believes his trial counsel failed to investigate are meritless.

With respect to an entrapment defense, a defendant must present "some credible evidence" of (1) "government inducement of the crime," and (2) "a lack of predisposition on the part of the defendant to engage in the criminal conduct." *United States v. Cabrera*, 13 F.4th 140, 146-47 (2d Cir. 2021). "A defendant is predisposed to commit a crime if he is 'ready and willing without persuasion' to commit the crime charged and 'awaiting any propitious opportunity' to do so." *United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995) (quoting *United States v. Harvey*, 991 F.2d 981, 992 (2d Cir. 1993)). Predisposition may be shown by evidence of "(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." *Salerno*, 66 F.3d at 548 (quoting *United States v. Valencia*, 645 F.2d 1158, 1167 (2d Cir. 1980)).

Similarly, the agency defense permits individuals to avoid charges for selling drugs, as opposed to possessing them, "where the defendant's mere delivery of the drugs does not appear to involve the same degree of culpability, or warrant the extreme penalties, associated with pushing drugs[,]" *People v. Lam Lek Chong*, 45 N.Y.2d 64, 72 (1978), but this defense requires consideration regarding "whether the defendant has had other drug dealings with this or other buyers or sellers." *Id.* at 75.

In this case, Petitioner admittedly sold heroin to a C.I. in July 2015. PT. at 6-11. Before then, he had also been convicted on two separate occasions of selling drugs. SR 140-41. In addition, only a few months after these sales, Petitioner was arrested for possession of 10.7 grams of cocaine packaged in 21 individual ziploc bags, along with cash and digital scales. SR 328, 344. Based on these facts, it is unclear how a rational jury could conclude that Petitioner had no predisposition to selling drugs at the time of his sales to the C.I. *See, e.g., Dones v. United States*, No. 08-CV-926, 2010 WL 184451, at *6 (S.D.N.Y. Jan. 19, 2010) ("[I]n light of petitioner's prior drug convictions, it would have been equally difficult to persuade a jury that he was not predisposed to trafficking in narcotics."). In other words, there is no basis for concluding that trial counsel acted objectively unreasonable by not recommending that Petitioner pursue his entrapment and/or agency defenses at trial.

In addition, Petitioner's "fruit of the poisonous tree" argument is based on the premise that he would have succeeded on having the First Indictment dismissed under his entrapment or agency defenses, which would have eliminated the probable cause for searching his property and finding the drugs that formed the basis of the Second Indictment. *See* Pet. at 8-9. However, as noted above, it was not objectively unreasonable for trial counsel to doubt Petitioner's ability to succeed on entrapment and/or agency defenses if pursued at trial, which would have been fatal to his "fruit of the poisonous tree" defense. *See Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005) ("[A] lawyer's decision not to pursue a defense does not constitute deficient performance if, as is typically the case, the lawyer has a reasonable justification for the decision." (quoting *DeLuca v. Lord*, 77 F.3d 578, 588 n. 3 (2d Cir. 1996))); *Panuccio v. Kelly*, 927 F.2d 106, 109 (2d Cir. 1991) ("The likelihood that an affirmative defense will be successful at trial and an assessment of the probable increase or reduction in sentence relative to the plea if the defendant proceeds to trial are clearly relevant to the determination of whether an attorney acted competently in recommending a plea.").

***14** Moreover, with respect to Petitioner's argument that trial counsel should have pursued discovery material more aggressively, the record shows that trial counsel filed a pre-trial motion requesting information about the C.I.'s criminal record and any consideration the C.I. was afforded in exchange for cooperation in Petitioner's case, and followed up regarding the lack of production of this material two days after the expiration of the deadline set by the trial court for the assistant district attorney to produce it. SR 175-178, 298, 327. Petitioner entered his guilty plea one month later, and there is no evidence in the record that Petitioner's trial counsel would have abandoned his request for this material (or not pursued all plausible defenses at trial) had Petitioner not pled guilty. Additionally, Petitioner's trial counsel had already listened to the recordings related to the alleged heroin sales to the C.I. leading up to Petitioner's guilty plea, the additional information that trial counsel sought – the physical recordings of the alleged heroin sales and information about to the C.I. – related only to the charges in the First Indictment, and Petitioner's plea deal was for roughly half of the prison time that he could have been ordered to serve if found guilty of the charges in only the Second Indictment.

In light of the foregoing, Petitioner has failed to satisfy his burden of showing that trial counsel's performance fell below an objective standard of professional reasonableness. *See also Seifert v. Keane*, 74 F. Supp. 2d 199, 206 (E.D.N.Y. 1999) ("Given the favorable nature of petitioner's plea, the court cannot say that counsel's performance was deficient[.]"), *aff'd*, 205 F.3d 1324 (2d Cir. 2000).

Because Petitioner has failed to establish that his trial counsel's performance was constitutionally deficient, the Court need not reach the question of whether Petitioner was prejudiced by trial counsel's efforts related to pursuing discovery and potential defenses. However, for the sake of completeness, the Court notes that Petitioner has also failed to provide any credible explanation for why he believes he likely would have been acquitted at trial on all charges in both indictments, or received a more favorable sentence, had he not pled guilty. *See Belle v. Superintendent*, No. 9:11-CV-0657 (NAM), 2013 WL 992663, at *12 (N.D.N.Y. Mar. 13, 2013) ("In the context of a guilty plea, [in order to establish prejudice,] the [petitioner] must show a reasonable possibility that but for counsel's errors the outcome would have been different—i.e., the accused would not have pled guilty and would likely have been acquitted at trial, or would have received a significantly more favorable sentence.") (citing *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985)). Furthermore, as noted, the defenses he allegedly wanted to pursue are all entirely meritless. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."); *Jimenez v. United States*, No. 10-CR-316, 2015 WL 5098075, at *6 (S.D.N.Y. Aug. 31,

2015) (noting that because "it is unlikely that Jimenez would have been entitled to a jury instruction on entrapment, let alone that he would have succeeded on an entrapment defense at trial[,] ... Jimenez's counsel did not provide ineffective assistance of counsel by failing to discover and assert an entrapment defense in order to get the indictment dismissed or during plea negotiations, or by failing to inform Jimenez of the same when recommending that he plead guilty"). Thus, Petitioner has also failed to show that he was prejudiced by trial counsel's performance.

Accordingly, Petitioner has failed to demonstrate that the Appellate Division's conclusion that trial counsel was not ineffective (for failing to further pursue *Brady* material and investigate potential defenses) was contrary to, or an unreasonable application of, the *Strickland* standard, or that the decision was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d).

3. Inadequate Advice and Plea Recommendation

As an initial matter, Petitioner's claim that trial counsel coerced him into pleading guilty is belied by his own statements before the trial court at his plea hearing and sentencing hearing. Indeed, during the plea hearing, Petitioner expressly informed the trial court that he had sufficient time to discuss his case with his attorney, had not been coerced to enter a guilty plea, and was satisfied with his attorney's handling of the case, *see* PT. at 12-13, and at the sentencing hearing, he expressly stated that he did not wish to withdraw his guilty plea and lose the sentencing offer, despite his pre-sentencing letter. ST. at 2-6. These statements carry a "strong presumption of veracity" and are generally treated as conclusive in the face of subsequent attempts to contradict them. *Adames v. United States*, 171 F.3d 728, 732 (2d Cir. 1999) (quoting, *inter alia, Blackledge v. Allison,* 431 U.S. 63, 74 (1977)); *United States v. Torres*, 129 F.3d 710, 716-17 (2d Cir. 1997) (district court properly rejected claims that guilty plea was involuntary because defense counsel coerced plea and plea was entered out of fear that defense counsel was unprepared to go to trial where such claims were contradicted by defendant's plea allocution); *Carpenter v. Unger*, 9:10-CV-1240 (GTS/TWD); 9:12-CV-0957 (GTS/TWD), 2014 WL 4105398, at *19 (N.D.N.Y. Aug. 20, 2014) (noting that in evaluating whether a plea was knowing and voluntary, a court may consider, "among other things, [petitioner's] allocution statements"); *see also Padilla v. Keane*, 331 F. Supp. 2d 209, 217 (S.D.N.Y. Aug. 19, 2004) ("Where ... [petitioner] ... has explicitly stated in his allocution that he fully understands the consequences of his plea and that he has chosen to plead guilty after a thorough consultation with his attorney, a district court on habeas review may rely on [petitioner's] sworn statements and hold him to them.").

***15** Moreover, Petitioner has not provided any evidence regarding his discussions with trial counsel besides the self-serving statement in his 440 Motion that trial counsel advised him off-the-record during the plea hearing that the prosecution had yet to turn over *Brady* materials, but "it doesn't matter" because "your [sic] being offered a good deal" and should "just take it[.]" SR 309-310. In any event, discussions of this nature are neither inappropriate nor coercive. *See United States v. Juncal*, 245 F.3d 166, 172 (2d Cir. 2001) ("[D]efense counsel's blunt rendering of an honest but negative assessment of [petitioner's] chances at trial, combined with advice to enter the plea, [does not] constitute improper behavior or coercion that would suffice to invalidate a plea."); *Sylvester v. United States*, 369 Fed. App'x 216, 218 (2d Cir. 2010) ("The district court properly recognized that had the matter proceeded to trial and the Government chosen to call its confidential informant to testify that Sylvester sold him a firearm and was carrying a firearm during the drug sale-which the Government proffered it would have done-that testimony alone could form the basis of a conviction. Such is the law in this Circuit.... Thus, Sylvester's trial counsel did not err in providing him with advice to the same effect."); *see also Blackledge*, 431 U.S. at 74 ("The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.").

Furthermore, as noted, the evidence in the record shows that in exchange for Petitioner's guilty plea, he received a sentence that was 6 ½ years less than the sentence he could have received if he were found guilty of the charges in only one of the two indictments, which further belies Petitioner's contention that trial counsel's advice was objectively unreasonable.

Because Petitioner has failed to establish that his trial counsel's alleged recommendation that he take the plea offer was constitutionally deficient, the Court need not reach the question of whether Petitioner was prejudiced by the advice he received. However, for the sake of completeness, the Court once again notes that Petitioner has also failed to provide any credible explanation for why he believes he likely would have been acquitted at trial on all charges in both indictments, or

received a more favorable sentence, had he not pled guilty. Thus, Petitioner has also failed to show that he was prejudiced by trial counsel's advice.

Based on the foregoing, Petitioner's ineffective assistance claim based on trial counsel's alleged discussions of considerations for pleading guilty is meritless.

B. Petitioner's Potential Defenses

In addition to claiming that his trial counsel was ineffective for failing to pursue entrapment, agency, and unlawful seizure defenses, Petitioner appears to claim that those defenses themselves provide a basis to vacate his conviction. Insofar as the petition may be construed in this way, there are at least two problems with this argument.

First, Petitioner's guilty plea bars this Court from considering whether these defenses may provide a basis for vacating the conviction. *See Horton v. Bell*, No. 9:21-CV-262 (GLS/ATB), 2023 WL 10727421, at *11 (N.D.N.Y. Mar. 30, 2023) (finding that claims related to the government's unlawful interrogation, alleged violation of *Brady* obligations, and improper controlled call were all barred by *Tollett*), *report and recommendation adopted by* 2024 WL 1341091 (N.D.N.Y. Mar. 29, 2024); *Padilla v. Bradt*, No. 13-CV-7908, 2015 WL 394090, at *8 (S.D.N.Y. Jan. 29, 2015) (holding defective indictment claims fall under the *Tollet* rule that a petitioner may only attack the voluntary and intelligent character of the plea); *Bridgefourth v. Artus*, 475 F. Supp. 2d 261, 269 (W.D.N.Y. 2007) (finding a *Miranda* allegation regarding conduct antecedent to the guilty plea is waived). [5]

5 Petitioner acknowledged this bar during his plea hearing, when the trial court explained to him that he was waiving numerous rights by pleading guilty, including the rights to proceed to trial where he would be represented by his attorney, to confront and cross-examine witnesses, and to present any defenses to the charges, and Petitioner stated that he understood he was waiving those rights by pleading guilty. PT. 9-12.

***16** Second, as discussed above, Petitioner's claims related to the viability of defenses based on entrapment, agency, and unlawful search and seizure are all meritless. [6]

6 For the reasons discussed in Respondent's Memorandum of Law in Opposition, Petitioner's claim that the charges in the Second Indictment were the product of an unlawful search and seizure are also barred from federal habeas review. *See* Resp. Mem. at 36-40 (citing, *inter alia, Stone v. Powell*, 428 U.S. 465, 482 (1976) (holding that federal habeas relief is unavailable for a claim that evidence was recovered through an illegal search or seizure where, as here, the "the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim")).

C. Petitioner's Challenge to His Sentence

Petitioner claims that the trial court's imposed sentence was harsh and excessive. Pet. at 10. Respondent avers that Petitioner's excessive sentence claim is not cognizable on federal habeas review and, in any event, is meritless. Resp. Mem. at 40-42.

It is well-settled that "[n]o federal constitutional issue is presented where ... the sentence is within the range prescribed by state law." *White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992) (citation omitted); *see also Townsend v. Burke*, 334 U.S. 736, 741 (1948) ("The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus."); *Grimes v. Lempke*, No. 9:10-CV-0068 (GLS/RFT), 2014 WL 1028863, at *3 (N.D.N.Y. Mar. 14, 2014) ("It is well settled that the issue of whether a sentence was overly harsh or excessive is not a proper issue for review in the habeas context unless the sentence was outside of the permissible range provided for by state law.") (citing *White*, 969 F.2d at 1383).

Petitioner pled guilty to one count of criminal sale of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the third degree. *See* PT. at 6-11. Petitioner also acknowledged that he was a second felony offender during his plea hearing. *Id.* at 13-14.

Under New York law, criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree are both class B felonies. N.Y. Penal Law § 220.16; N.Y. Penal Law § 220.39. Where a person is a second felony offender, the maximum term of an indeterminate sentence for a class B felony is between nine and twenty-five years. *Id.* § 70.06(3)(b).

Petitioner was sentenced to a determinate term of 5½ years' imprisonment and 3 years of post-release supervision for third-degree criminal sale of a controlled substance, and the same determinate term for third-degree criminal possession of a controlled substance, with each sentence to run concurrent with the other. ST. at 12-13. Therefore, the sentences imposed by the trial court fall within the range proscribed by state law. Accordingly, Petitioner's excessive sentence claim provides no grounds for federal habeas relief. *See e.g., Rodriguez v. Griffin*, No. 9:16-CV-1037 (DNH), 2018 WL 6505808, at *24 (N.D.N.Y. Dec. 11, 2018) ("[Petitioner]'s ... sentences ... even if representing the maximum amount of time permissible ... fall within the limits set by New York law and therefore petitioner's claim provides no grounds for federal habeas relief.").

V. CONCLUSION

***17 WHEREFORE**, it is hereby

ORDERED that the petition (Dkt. No. 1) is **DENIED AND DISMISSED IN ITS ENTIRETY**; and it is further

ORDERED that no Certificate of Appealability ("COA") shall issue because Petitioner failed to make a "substantial showing of the denial of a constitutional right" as 28 U.S.C. § 2253(c)(2) requires;[7] and it is further

7 *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *see Richardson v. Greene*, 497 F.3d 212, 217 (2d Cir. 2007) (holding that if the court denies a habeas petition on procedural grounds, "the certificate of appealability must show that jurists of reason would find debatable two issues: (1) that the district court was correct in its procedural ruling, *and* (2) that the applicant has established a valid constitutional violation" (emphasis in original)).

ORDERED that any further request for a Certificate of Appealability must be addressed to the Court of Appeals (Fed. R. App. P. 22(b)); and it is further

ORDERED that the Clerk serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

All Citations

Slip Copy, 2024 WL 3398390

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