

Appendix A

S.D.N.Y. – N.Y.C.
20-cv-9324
Daniels, J.
Moses, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of February, two thousand twenty-six.

Present:

Amalya L. Kearse,
Eunice C. Lee,
Circuit Judges,
Eric R. Komitee,
*District Judge.**

Raymond Mayrant,

Petitioner-Appellant,

v.

25-1997

Julie Wolcott, Superintendent of Attica Correctional Facility,

Respondent-Appellee.

Appellant, proceeding pro se, moves for a certificate of appealability. Upon due consideration, it is 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 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

* Judge Eric R. Komitee, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
RAYMOND MAYRANT,

Petitioner,

-against-

JULIE WOLCOTT, Superintendent of Attica
Correctional Facility

Respondent.
-----X

MEMORANDUM DECISION
AND ORDER

20 Civ. 9324 (GBD) (BCM)

GEORGE B. DANIELS, United States District Judge:

Petitioner Raymond Mayrant, proceeding *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking to vacate his conviction of murder in the second degree in violation of New York Penal Law (NYPL) § 125.25(1) and attempted murder in the second degree in violation of NYPL §§ 110.00 and 125.25(1). (*See* Amended Petition (“Am. Pet.”), ECF No. 21, at 1.) Petitioner received a sentence of 50 years to life imprisonment, the aggregate of 25 years to life for the murder conviction and 25 years for the attempted murder conviction. *Id.*

On November 5, 2020, Petitioner submitted his original petition for a writ of habeas corpus, raising three claims: (1) the felony complaint was jurisdictionally defective; (2) the trial court erroneously granted the People’s for-cause challenge to a prospective juror who unequivocally affirmed she could be fair and impartial; and (3) the verdict was against the weight of the credible evidence. (Petition for Writ of Habeas Corpus (Pet.), ECF No. 2, at 4.) On November 3, 2022, with the permission from Magistrate Judge Barbara Moses, Petitioner amended his petition to add a fourth claim that his Sixth Amendment right to confront the adverse witnesses was violated when

the trial court allowed the cause of death to be stipulated into evidence without the autopsy report or a medical examiner's testimony. (Am. Pet., ECF No. 21, at 11.)

Before this Court is Magistrate Judge Barbara C. Moses's January 29, 2025 Report recommending that the Amended Petition be denied. (Report and Recommendation ("Report"), ECF No. 42.) Petitioner filed timely objections to the Report.¹ (Objection ("Obj."), ECF No. 44.) Having reviewed the objected-to portions of the Report *de novo* and the remainder of the Report for clear error, this Court ADOPTS the Report in full and OVERRULES Petitioner's objections. The petition is DENIED.

I. BACKGROUND²

A. Factual Background

Petitioner had been in a relationship with Diamond Dunn intermittently since 2005. (*See* Trial Tr. at 82:14–83:14.³) After Dunn gave birth to their daughter in 2008, she and Petitioner moved to Virginia where Petitioner's mother and sister lived. (*Id.* at 83:7–84:18.) After multiple domestic altercations, Dunn broke up with Petitioner and moved back to New York with their daughter. (*Id.* at 84:24–86:7.) The two stayed with Dunn's mother, Elvira Brown. (*Id.* at 86:5–7, 539:20–22.) In 2012, Dunn contacted Petitioner, hoping to rekindle their relationship. (*Id.* at 86:8–88:10.) When Petitioner asked to visit Dunn, she agreed. (*Id.* at 88:11–22.) She and Brown

¹ Petitioner represents that he received the Report on February 14, 2025, and his objection was dated February 17, 2025, within the 14-day objection period. (Obj. at 1.) Upon receiving a copy of the Petitioner's objections, Respondent did not contest the timeliness of these objections.

² The procedural and factual background is set forth in detail in the Report and incorporated by reference. (See Report at 2–22.)

³ "Trial Tr. ____" refers to the consecutively paginated transcript of the testimonial portion of Petitioner's trial (ECF No. 27-3 to 27-4), which took place from November 9 through December 3, 2015.

hosted Petitioner from December 26, 2012, until January 3, 2013. (*Id.* 89:6–90:4, 511:18–512:2, 513:25–514:18, 551:8–552:21.)

On the morning of January 3, 2013, Brown woke up early and left for work. (*Id.* at 93:10–23, 454:10–13.) While Petitioner remained in the apartment, Dunn woke up and took their daughter to school. (*Id.* at 93:1–94:3.) After returning home, Dunn and Petitioner had sex and fell back asleep. (*Id.* at 142:6–23.) When Dunn woke up, she found Petitioner awake and in an agitated state. (*Id.* at 96:10–17; 143:6–144:10.) After repeatedly telling Dunn to “stop playing with [him],” Petitioner pulled a gun from under the bed, pointed it at Dunn, and fired three shots. (*Id.* at 94:13–98:8, 144:8–13, 159:3–4.) Dunn survived the shooting. (*Id.* at 99:7–104:4.) As Brown returned from work, Petitioner ran from the bedroom and shot Brown. (*Id.* at 98:19–99:14.) Brown died as a result. (*Id.*) Petitioner fled from the apartment, and thereafter Dunn’s neighbor, reported the shooting to the police. (*Id.* at 13:12–15:9, 471:3–472:24, 340:4–343:19, 234:6–18.) After a police investigation and pursuit, U.S. Marshals arrested Petitioner at a homeless shelter in Warren, Ohio. (*Id.* at 340:11–15, 597:10–15.)

B. Procedural History

On January 11, 2013, Petitioner was charged with second-degree murder, attempted second-degree murder, first-degree manslaughter, and three counts of second-degree weapon possession in a felony complaint. (RA 002.⁴) The factual portion of the complaint was “based upon official investigation, and witnesses known to the Police Department.” (*Id.*) A grand jury then indicted Petitioner for the same charges as well as two counts of second-degree assault. (*Id.* at 007–12.)

⁴ “RA __” refers to the consecutively paginated Appendix for Respondent (ECF No. 26-1 to 26-3).

During juror selection for Petitioner's trial, a prospective juror stated that she and her sister were "almost robbed." (Trial Tr. at 115:13-18.) She first said that this experience would affect her ability to be fair and impartial, but, after further questioning, she said it actually would not. (*Id.* at 116:7-117:12.) She also disclosed that her son was on parole after pleading guilty and serving prison time for criminal possession of a weapon and conspiracy to commit murder. (*Id.* at 117:13-118:10.) When asked about Petitioner's choice to go to trial, the potential juror said, "I commend him for doing that." (*Id.* at 118:20-119:8.) After questioning, the court, over Petitioner's objection, granted the People's for-cause challenge.

During trial, the People called over a dozen witnesses, but did not call a witness from the Office of the Chief Medical Examiner to testify as to Brown's autopsy. (*Id.* 492:11-493:5.) On December 2, 2015, the prosecution planned to call its last witness at trial, medical examiner Monica Smiddy. (*Id.* at 492:12-13.) However, Smiddy had been severely injured the night before and would not be able to testify until the following week. (*Id.* at 492:12-18.) The prosecutor stated that another medical examiner present for the autopsy could testify later that afternoon. (*Id.* at 492:19-21).

Following this exchange, the trial court suggested that the parties stipulate to the cause of death rather than have the medical examiner testify, and enter the autopsy report into evidence. (*Id.* at 492:22-23). While Petitioner's counsel was initially unwilling to stipulate, they reconsidered and said that a stipulation sounded "appealing" after the court mentioned that "it saves those gruesome photos that you argued vociferously against them coming in." (*Id.* at 492:22-493:5). After a recess where Petitioner's counsel discussed the stipulation with his client, Petitioner's counsel explicitly confirmed that he showed the written stipulation to Petitioner who then consented to the stipulation on the condition that its language be adjusted slightly. (*Id.* at

495:6-15). After the court and parties pared down its language on the record, the parties agreed to enter the stipulation into evidence without the medical examiner's testimony. (*Id.* at 495:11-499:8). The parties stipulated that the medical examiner would have testified that the cause of death was "a gunshot wound [to the] torso," and that Brown was shot at "close range," dying "within seconds of being shot."⁵ (*Id.* at 502:16-503:12.) After the jurors entered the court room, the stipulation as to Brown's cause of death was entered into evidence as People's Exhibit 35 and read to the jury thereafter. (*Id.* at 502:5-503:23). The defense only called the Petitioner as a witness. (*Id.* 511:1-635:8.) During his testimony, he denied that he was even present when Dunn was shot. (*Id.* at 517:24-518:25.)

After closing arguments, the jury convicted Petitioner of murdering Brown and attempting to murder Dunn. (ECF No. 27-7, at 93:24-94:17.) He was then sentenced for a definite term of 25 years on the attempted murder charge and an indefinite term of 25 years to life on the murder charge, to run consecutively. (ECF No. 27-9 at 3:1-8.)

Following his conviction, Petitioner appealed to the New York Supreme Court, Appellate Division, arguing that (1) the trial court erred in granting the People's for-cause challenge; (2) the verdict was against the weight of the evidence; and (3) his sentence was excessive. (RA 13-56.) The Appellate Division unanimously affirmed his conviction, rejecting all of Petitioner's arguments. (*Id.* at 107-108.) Then, Petitioner filed his first N.Y. Crim. Proc. Law ("C.P.L.") § 440.10(1) motion to vacate his conviction. (*Id.* at 117-126.) He argued that the initial felony

⁵ The stipulation read, in full: "The People and Defense hereby stipulate that if Dr. Monica Smiddy, an expert in forensic pathology with the Office of the Chief Medical Examiner of New York City, were called to testify, she would testify to the following: 1. That an autopsy was done on January 4th of 2013 of Elzina Louise Brown. 2. That the cause of death was gunshot wound of torso, with perforations of heart and lungs. 3. That the entry wound was to her left chest and exit wound was in her right back. 4. That the path of the bullet was left to right, front to back and downward. 5. That People's exhibit 34 is an autopsy photo of Elzina Louise Brown for medical examiner number B13-0047. 6. That Elzina Louise Brown died within seconds of being shot. 7. That the gun which caused the wound was fired from close range. 8. That Elzina Louise Brown had no chance to survive with the injuries that she sustained." (Trial Tr. at 502:16-503:12.)

complaint was “jurisdictionally defective” since it “failed to establish the witnesses bases of knowledge of information and the grounds for belief.” (*Id.* at 119–125.) The trial court denied the motion pursuant to C.P.L. § 440.10(2)(c), holding that Petitioner’s claim arose from “facts readily attainable from the record” and “should have been raised on direct appeal.” (*Id.* at 338–340.) While the motion to vacate judgment was pending, Petitioner also submitted his initial petition for a writ of habeas corpus which argued (1) that the original felony complaint was jurisdictionally defective; (2) that the trial court erroneously granted the People’s for-cause challenge; and (3) that the verdict was against the weight of the evidence. (*See* Pet., ECF No. 2.) Federal review of a habeas petition requires the exhaustion of all state law remedies. Since Petitioner’s C.P.L. §440.10(1) motion based on the first claim was still pending, Magistrate Judge Moses stayed the petition “until 45 days after a decision is issued in state court” on that motion. (Order, ECF. No. 12, at 2.)

In state court, Petitioner requested a writ of error *coram nobis* on the ground that his appellate attorney was ineffective for failing to raise the argument alleging that the felony complaint was jurisdictionally defective. (RA 374–383.) The Appellate Division denied the application (*id.* at 634), and the New York Court of Appeals denied leave to appeal. (*Id.* at 635.) In his most recent challenge to the conviction in state court, Petitioner filed another C.P.L. § 440.10(1) motion to vacate the judgment on a new basis: that the trial court violated his Sixth Amendment right to confront the witnesses against him by permitting the parties to stipulate to facts concerning Brown’s cause of death. (*Id.* at 638–662.) Again, the state court denied the motion because the claim was procedurally barred pursuant to C.P.L. § 440.10(2)(e), and, in the alternative, the trial court denied the motion on the merits. (*Id.* at 681–684.) Because Petitioner had exhausted his state court remedies, Magistrate Judge Moses lifted the stay on the original

habeas corpus petition. (Order, ECF No. 15.) On a motion for leave to amend his habeas petition, Petitioner added the claim of his most recent C.P.L. § 440.10(1) motion, that the trial court violated his Sixth Amendment right to confront adverse witnesses. (Am. Pet. at 11.)

II. LEGAL STANDARDS

A. Reports and Recommendations

This Court “‘may accept, reject, or modify, in whole or in part, the findings or recommendations’ set forth in a magistrate judge’s report.” *James v. Capra*, 19-CIV-6966 (GBD) (KNF), 2020 WL 3100210, at *2 (S.D.N.Y. June 11, 2020) (quoting 28 U.S.C. § 636(b)(1)). If a party asserts a proper objection to a magistrate judge’s report, the court must “‘make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C). However, the court is not required “‘to hold a *de novo* hearing of the case.” *U.S. v. Raddatz*, 447 U.S. 667, 676 (1980) (quoting H.R. Rep., at 3–4, U.S. Code Cong. & Admin. News 1976, p. 6163). Instead, the court may “‘arrive at its own, independent conclusion” regarding Petitioner’s objections. *Nelson v. Smith*, 618 F.Supp. 1186, 1189–90 (S.D.N.Y.1985) (quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir.1983)).

Objections to a magistrate judge’s report must be “specific,” “written,” and submitted “[w]ithin 14 days after being served with a copy of the recommended disposition.” Fed. R. Civ. P. 72(b); accord 28 U.S.C. § 636(b)(1). “Portions of a magistrate judge’s report to which no or ‘merely perfunctory’ objections are made are reviewed for clear error.” *Rodriguez v. Uhler*, 15-CIV-9297 (GBD) (DF), 2018 WL 1633568, at *1 (S.D.N.Y. Apr. 3, 2018) (citing *Edwards v. Fischer*, 414 F. Supp. 2d 342, 346–47 (S.D.N.Y. 2006)). “The clear error standard also applies if a party’s objections are improper—because they are conclusory, general, or simply rehash or

reiterate the original briefs to the magistrate judge.” *Molemohi v. New York*, 18-CIV-9740 (GBD) (JLC), 2020 WL 1303560, at *2 (S.D.N.Y. Mar. 19, 2020) (citations omitted). Clear error arises when “upon review of the entire record, [the court is] ‘left with the definite and firm conviction that a mistake has been committed.’” *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quoting *United States v. Garcia*, 413 F.3d 201, 222 (2d Cir.2005)).

Since Petitioner is proceeding *pro se*, his objections are “generally accorded leniency” and should be construed “to raise the strongest arguments that they suggest.” *Sloane v. Rock*, No. 09-CV-5923 (CS) (LMS), 2011 WL 2070754 (S.D.N.Y. May 19, 2011) (quoting *Milano v. Astrue*, No. 05-6527, 2008 WL 4410131, at *2 (S.D.N.Y. Sept. 26, 2008)). However, “even a *pro se* party’s objections . . . must be specific and clearly aimed at particular findings in the magistrate’s proposal, such that no party be allowed a second bite at the apple by simply relitigating a prior argument.” *Pinkney v. Progressive Home Health Servs.*, No. 06-5023, 200 WL 2811816, at *1 (S.D.N.Y. July 21, 2008) (quotation omitted). *Pro se* status “does not exempt a party from compliance with relevant rules of procedural and substantive law.” *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 477 (2d Cir. 2006) (citation omitted).

Here, Petitioner has submitted objections to the Report’s conclusions as to all his claims except for his third claim, that the jury’s verdict was against the weight of the evidence. (Obj.) Much of Petitioner’s Objection rehashes or reiterates the arguments made in his petitions while some parts raise challenges specific to the Report. Given the more lenient standards imposed upon a *pro se* petitioner, this Court will apply a *de novo* standard to review the portions of the Report where Petitioner objected. Because Petitioner does not object to the portion of the Report concerning his third claim, the Court will review that portion for clear error.

B. Procedural Defaults for Habeas Corpus Petitions

a. Exhaustion of State Court Remedies

A state prisoner may apply for a writ of habeas corpus from a federal court “on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). § 2254(b)(1)(A) requires that the petitioner “has exhausted the remedies available in the courts of the State” before a federal court will entertain his petition for federal habeas relief. A petitioner has not exhausted his state court remedies when “he has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c). To exhaust state court remedies, the petitioner must fairly present the state courts with the “substantial equivalent” of the claim that he urges upon the federal court. *Strogov v. Att’y Gen. of N.Y.*, 191 F.3d 188, 191 (2d Cir. 1999) (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)). If the petitioner has not properly exhausted his state court remedies, the petition is procedurally barred and must be denied by the reviewing federal court. *Picard*, 404 U.S. at 275; 28 U.S.C. § 2254(b).

b. Independent and Adequate State Ground Doctrine

When a state court resolves a federal claim relying on a state law ground that is both “independent of the federal question and adequate to support the judgment,” federal habeas review of that claim is foreclosed. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be considered “independent of the federal question,” it must be “‘clear from the face of the opinion’ that the court intended to rely on the state rule in disposing of the federal claim.” *Robinson v. Greene*, 507 F. Supp. 2d 279 (W.D.N.Y. 2007) (quoting *Coleman*, 501 U.S. at 735). To be considered “adequate to support the judgment,” the state rule must be “firmly established and regularly followed” by the state. *Ford v. Georgia*, 498 U.S. 411, 412 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348

(1984)). Whether the rule is “firmly established and regularly followed” depends on “the specific circumstances presented in the case,” and “the asserted state interest in applying the procedural rule in such circumstances.” *Cotto v. Herbert*, 331 F.3d 217, 240 (2d Cir. 2003).

If the petitioner has previously defaulted on his federal claims in state court based on an independent and adequate state ground, the petition is procedurally barred “unless the petitioner demonstrates cause and actual prejudice,” *Coleman*, 501 U.S. at 748 (citing *Engle v. Isaac*, 456 U.S. 107 (1982)), or that federal habeas review is required to correct “a fundamental miscarriage of justice.” *Id.* (quoting *Engle*, 456 U.S. at 135.) To demonstrate “cause,” it must be shown that, “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 479 (1986). To demonstrate “prejudice,” the petitioner must show that the alleged violations “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982). Lastly, a “fundamental miscarriage of justice” only occurs where “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496.

C. Review of State Court Merits Determinations

Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), federal courts may review federal claims decided on the merits in the last reasoned state court ruling and grant habeas relief only if the state court decision:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented by the State court proceedings.

To grant the petition under the first element of § 2254(d), the state court ruling must be “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *White v. Woodall*, 572 U.S. 415, 420 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). “Clearly established Federal law” refers to Supreme Court precedent “as of ‘the time the state court renders its decision,’” not “later decided cases.” *Brown v. Davenport*, 596 U.S. 118, 136 (2022) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)). A state court decision is “contrary to” that federal law if (1) “the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or (2) “the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [their] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405–406 (2000). A state court decision involves an “unreasonable application” of federal law if (1) “the state court identifies the correct governing legal rule from [the Supreme Court’s] cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or (2) “the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* at 407.

Under the second element of § 2254(d), the federal court affords the state trial court substantial deference in their factual determinations. *See Brumfield v. Cain*, 576 U.S. 305, 314 (2015). A federal court will not find unreasonableness “merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). The fact that “reasonable minds reviewing the record might disagree” on the proper factual determination is insufficient to overcome the trial court’s determination. *Rice v. Collins*, 546 U.S. 333, 341–342 (2006). A federal court may find an “unreasonable determination of the facts”

where, for example, the trial court's assumptions about the record were incorrect by clear and convincing evidence, *see Wiggins v. Smith*, 539 U.S. 510, 528 (2003), or where the court ignored highly probative and material evidence, *see Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003).

III. ALL OF PETITIONER'S CLAIMS ARE DENIED

A. Petitioner's First Claim – The Complaint was Jurisdictionally Defective

Petitioner argues that the felony complaint used to commence the criminal action against him “is jurisdictionally defect[ive] because it never established reasonable cause,” and therefore, the arrest warrant obtained through this defective felony complaint was also improper. (Traverse, ECF No. 30, at 5.) Petitioner claims that the complaint “failed to establish the witness[’s] bases of knowledge” for alleging Petitioner’s involvement in the charged crimes. (Pet. at 9.) Thus, Petitioner contends the initial accusatory instrument was insufficient “to confer jurisdiction of the criminal action” in the state court, and as a result, the arrest made based on this jurisdictionally defective accusatory instrument violated the Fourth Amendment of the Constitution. *Id.*

a. This claim is procedurally barred.

This Court is foreclosed from habeas review of this claim because the state court relied on an independent and adequate state law ground in resolving this claim. New York State Law requires a court deny a C.P.L. § 440.10 motion when the defendant failed “to raise [that] ground or issue upon an appeal” when “sufficient facts appear on the record of the proceedings underlying the judgment to have permitted . . . adequate review of th[at] ground or issue.” C.P.L. § 440.10(2)(c). In Petitioner’s first C.P.L. § 440.10 motion, he presented the same jurisdictional defect claim to the state trial court, and it is “clear from the face of the opinion” that the state court relied upon C.P.L. § 440.10(2)(c) in denying his motion as procedurally barred. *Robinson*, 507 F. Supp. 2d at 286. The state court held that “C.P.L. § 440.10(2)(c) is applicable to the alleged

jurisdictional defect posited by the defendant. As defendant's claims directly reference the arrest warrant and felony complaint, which both implicate facts readily attainable from the record, both of his claims are barred." (RA 340.) The state court barred the instant claim since Petitioner failed to raise it on direct appeal pursuant to C.P.L. § 440.10(2)(c).

This procedural bar is "adequate to support the judgment" because it is "firmly established and regularly followed" in New York. *Ford*, 498 U.S. at 412; *See Clark v. Perez*, 510 F.3d 382, 393 (2d Cir. 2008) (holding that the state court's application of C.P.L. § 440.10(2)(c) constituted an adequate state procedural bar to Clark's federal habeas petition); *Arce v. Smith*, 889 F.2d 1271, 1273 (2d Cir. 1989) (failure to raise claims on appeal constituted a procedural default that precluded federal habeas review).

The state's interest in applying this procedural rule is apparent in seeking "to prevent CPL 440.10 from being employed as a substitute for direct appeal when defendant was in a position to raise an issue on appeal." *People v. Cooks*, 67 N.Y.2d 100, 103 (1986). Otherwise, habeas petitioners would be able to "constantly relitigate his claims." *Arce*, 889 F.2d at 1273. So, the state court's express reliance on C.P.L. § 440.10(2)(c) in denying Petitioner's C.P.L. § 440.10 motion to vacate the judgment constitutes an independent and adequate state law ground which precludes federal habeas relief.

b. This claim of Fourth Amendment violation is meritless.

Even if the claim was not procedurally barred, Petitioner's claim that the arrest warrant was improperly issued due to the allegedly defective felony complaint is also meritless. Petitioner argues that the issuance of the warrant constitutes a Fourth Amendment violation. (Obj. at 1-3.) The Fourth Amendment protects against unreasonable searches and seizures which includes arrests. *See Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 364 (2017). But, there is no Fourth

Amendment violation if there was probable cause for the arrest. *See Martinetti v. Town of New Hartford Police Dep't*, 112 F.Supp.2d 251, 252 (N.D.N.Y.2000) (citation omitted). Petitioner argues that the police department did not establish probable cause because their complaint does not set forth the details of their investigation or witness accounts. (Pet. at 11.) However, because Dunn immediately identified Petitioner as the shooter to her neighbor, there was probable cause to arrest. (Trial Tr. at 64, 96–98.)

In general, “probable cause to arrest exists when the officers have knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.” *Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir.2007) (internal citations omitted)). The Supreme Court has held “that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is sufficiently accurate to lead the officers directly to the suspect.” *Wong Sun v. U.S.*, 371 U.S. 471, 480 (1963) (citing *Draper v. United States*, 358 U.S. 307 (1959)). Dunn’s identification of Petitioner as the shooter constitutes sufficient probable cause for Petitioner’s arrest. Hence, Petitioner’s claims regarding his arrest warrant are meritless, do not indicate any substantial disadvantage at trial, and do not support a finding of prejudice as a result.

c. Petitioner’s Objection based upon ineffective assistance of counsel

In his objection, Petitioner argues for ineffective assistance of counsel, but did not object to the applicability of C.P.L. § 440.10(2)(c) as an independent and adequate state ground of the state court’s decision. (Obj. at 1–3.) Petitioner contends that his counsel’s failure to argue jurisdictional defect on appeal constitutes cause for his procedural default. (*Id.* at 2.)

Petitioner's claim of ineffective counsel is insufficient to demonstrate cause for the procedural default. The U.S. Supreme Court held in *Strickland v. Washington* that a counsel's assistance is constitutionally ineffective when (1) "counsel's performance was deficient", and (2) "the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688.

Here, counsel's assistance was not ineffective because Petitioner's jurisdictional defect claim was meritless. Any jurisdictional defect in a felony complaint was remedied by a superseding grand jury indictment on the same charges. C.P.L. §§ 100.05, 100.10, subd. 5, 180.10, 190.65, subd. 1; *See Brown v. Perlman*, No. 03cv2670 (RJH), 2006 WL 2819654, at *6 (S.D.N.Y. Sept. 29, 2006) ("Petitioner's claim regarding his arrest and pre-indictment proceedings is meritless because the grand jury indictment superceded any prior accusatory actions, rendering any alleged pre-indictment deficiencies irrelevant"); *People v. Black*, 705 N.Y.S.2d 696, 698 (3d Dep't 2000) (holding that a grand jury may make an independent determination as to whether there is reasonable cause for the charges even if there are defects in the felony complaint, and a valid indictment by the grand jury supersedes the felony complaint); *McKelvey v. Bradt*, No. 13CV3527 (CM) (DF), 2016 WL 3681457 (S.D.N.Y. July 6, 2016) (finding that the court obtains jurisdiction upon the filing of the indictment even with a defective felony complaint.) Upon Petitioner's request that his counsel raise this issue on appeal, counsel refused to do so for that very reason. (Traverse, Ex. 1 ("While I do believe that your premise that the faulty complaint could lead to a lack of jurisdiction, I also believe that once the grand jury has issued an indictment all of this becomes irrelevant") (citing *People v. Aaron*, 55 A.D.2d 653).) Accordingly, Petitioner's counsel's refusal to raise a meritless argument does not fall below an objective standard of

reasonableness. *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) (quoting *Jameson v. Coughlin*, 22 F.3d 427, 429–30 (2d Cir.1994)) (“The failure to include a meritless argument does not fall outside the ‘wide range of professionally competent assistance’ to which Petitioner was entitled.”) Therefore, Petitioner’s counsel was not ineffective in choosing to forego this claim, and Petitioner failed to establish cause for the procedural default.

Moreover, Petitioner’s counsel’s failure to raise the meritless jurisdictional defect claim did not create “actual prejudice” to Petitioner. *Coleman*, 501 U.S. at 748. First, there was no “actual and substantial disadvantage” resulting from the allegedly defective complaint because the grand jury indictment would have remedied any alleged jurisdictional defect of the felony complaint. *Frady*, 456 U.S. 152 at 153. To acquire trial jurisdiction, New York requires that the felony complaint “be followed by . . . an indictment based upon legally sufficient grand jury evidence.” *People v. Alejandro*, 70 N.Y.2d 133 (1987). In fact, the felony complaint did not serve as the “basis for prosecution” in the first place. C.P.L. § 1.20(8). After his arrest, Petitioner was indicted in the New York Supreme Court by a grand jury, properly imbuing the state court with jurisdiction regardless of any defect in the felony complaint. (RA 7–12.) As such, even assuming that the felony complaint was defective, it did not serve as the basis for Petitioner’s prosecution and cannot support a finding of prejudice.

Additionally, Petitioner’s objections do not demonstrate “a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750 (internal quotation marks omitted). Petitioner has not provided any “new reliable evidence that was not presented at trial” to demonstrate that the “constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Schlup v. Delo*, 513 U.S. 298 (1995). Any alleged defect in the felony complaint or arrest warrant did not preclude

Petitioner from introducing exculpatory evidence to show his actual innocence here. Petitioner fails to demonstrate a fundamental miscarriage of justice.

In conclusion, Petitioner's jurisdictional defect claim is procedurally barred from federal habeas review, and AEDPA review of the state court's holdings on the merits are unnecessary since the state court decided the motion purely on procedural grounds.

B. Petitioner's Second Claim – The Juror Discharge was Improper

On Petitioner's second ground for relief, he argues that the trial court erred in granting the People's for-cause challenge of a prospective juror ("the Juror"), since she "unequivocally stated that she would be fair and impartial." (Obj. at 4.) Petitioner claims that the People made the challenge "without proof that she was bias[ed]," and that they had wrongfully "attribut[ed] . . . [to her] statements by an unidentified person." *Id.* Petitioner also argues that an "unidentified person" who made the statement "I can't be fair" during *voir dire* may have been placed on the jury instead, making the jury partial. *Id.* Thus, Petitioner claims that the for-cause challenge and the resulting failure to strike the unidentified person "violated [his] Sixth Amendment Right to trial by an impartial jury." *Id.* at 5 (cleaned up.)

The right to a jury trial under the Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (internal citation and quotation marks omitted). To ensure this guarantee, the court must provide an "an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719 (1992). "The defense must be given a full and fair opportunity to expose bias or prejudice on the part of the veniremen." *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) (internal citation omitted). Federal law affords trial courts broad discretion to "intervene to ensure that the jury" comes to a fair and impartial verdict, and the only limitation to that discretion is "the requirement that there

be no prejudice to the defendant through a biased jury.” *Khan v. Capra*, 2021 WL 2270060 (S.D.N.Y. Apr. 26, 2021), *report and recommendation adopted in part, rejected in part*, 2021 WL 2135279 (S.D.N.Y. May 26, 2021) (quoting *Rosado v. Unger*, No. 11 Civ. 3747 (KBF)(THK), 2012 WL 5871607, at *2 (E.D.N.Y. Dec. 6, 2010)).

To successfully establish a constitutional violation and cognizable habeas claim, Petitioner must demonstrate that “the jury actually chosen was biased.” *Barnes*, 604 F.2d at 138; *see e.g.*, *Ross v. Oklahoma*, 487 U.S. 81 (1988) (failure to remove an unqualified juror for cause did not abridge the petitioner’s right to an impartial jury since the juror was removed by peremptory challenge and did not sit on the jury); *United States v. Perez*, 387 F.3d 201, 208 (2d Cir.2004) (defendant cannot succeed on a constitutional challenge based on an error during jury selection because he does not dispute that the jury that ultimately convicted him was fair and impartial). “A trial judge’s discretion will be upheld unless a defendant has been precluded from obtaining an impartial jury.” *Barnes*, 604 F.2d at 138. “Juror discharge and *voir dire* proceedings are governed by state law.” *McCrary v. Artuz*, No. CV 95-622, 1995 WL 728423, at *3 (E.D.N.Y. Nov. 28, 1995) (citing C.P.L. § 270.35, 270.15(3)). Violations of state law are not subject to federal habeas review unless such violations implicate constitutional concerns. 28 U.S.C. § 2254(a).

a. The claim regarding the Juror’s dismissal does not present a federal question.

First, Petitioner’s claim that the trial court erred by removing the Juror for cause fails since the claim does not present a federal question cognizable under federal habeas review. Her dismissal did not violate any state law, nor implicate any constitutional concerns. New York state law provides that “[i]f there is any doubt about a prospective juror’s impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have ‘replaced one impartial juror

with another.” *People v. Arnold*, 96 N.Y.2d 358 (2001) (quoting *People v. Culhane*, 33 N.Y.2d 90 (1973)). The decision of the New York Supreme Court, Appellate Division on this claim held that “the court providently exercised its discretion in excusing the panelist for cause, because her answers cast ‘serious doubt on [her] ability to render an impartial verdict,’” (RA 108 (quoting *Arnold*, 96 N.Y.2d at 363)). To the New York Supreme Court, it was appropriate to dismiss the claim based on state law standards for juror discharge. It is not the place of a federal habeas court to “reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Therefore, the Court denies the claim regarding dismissal of the Juror.

b. The claim regarding the unidentified prospective juror is meritless.

To demonstrate a constitutional violation, Petitioner claims that an unidentified prospective juror who stated “I can’t be fair” might have been selected into the jury in violation of his Sixth Amendment rights. (Obj. at 4–5.) Respondents argue that this unidentified juror was “without a doubt” the Juror that was stricken. (Memorandum of Law in Opposition (“Opp. Brief”), ECF No. 26, at 36). Petitioner disagrees. (Obj. at 4.)

At trial, the People asked prospective jurors whether Petitioner reminded them of a friend or family member, a single unnamed juror stated, “I can’t be fair.” (Trial Tr. at 179.) Sometime after that, the People challenged the Juror for cause, stating that, “[s]he said during questioning my *voir dire*, she cannot be fair and impartial.” (*Id.* at 193.) In response, defense counsel argued that “there was further inquiry . . . by the Court,” where “she said she can be fair.” *Id.* However, the trial judge had only addressed the Juror prior to the prosecutor’s questioning. In fact, the trial judge responded to defense counsel’s objection by saying, “Initially when I questioned her there was some confusion with language I had used, but when you [the prosecutor] asked her, she said she could not be fair and impartial.” (*Id.* at 194.) On direct appeal, the New York Appellate

Division found that, “[t]he *voir dire* record, viewed as a whole, supports the inference that it was [the Juror] who made these statements.” RA 107.

To overturn this factual finding, Petitioner must demonstrate that the finding by the state court represents an “unreasonable determination of the facts in light of the evidence.” 28 U.S.C. § 2254(d). Our review under this standard is “highly deferential” to the state court. *Hardy v. Cross*, — U.S. —, 132 S.Ct. 490, 491 (2011) (per curiam) (quotation omitted). The factual determination of the New York Appellate Division “is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood*, 558 U.S. at 301. The finding may be “unreasonable” where “reasonable minds could not disagree that the trial court misapprehended or misstated material aspects of the record in making its finding or where the court ignored highly probative and material evidence.” *Cardoza v. Rock*, 731 F.3d 169, 178 (2d Cir. 2013) (internal citations omitted).

Because only one juror stated that they could not be fair and the trial judge granted dismissal of the Juror based on that statement, the Appellate Division reasonably inferred that the Juror was the unnamed juror. There is no indication that the Appellate Division “misapprehended or misstated” these aspects of the record. *Cardoza*, 731 F.3d at 178 (citing *Wiggins*, 539 U.S. 510, 528). Petitioner did not point to any additional material evidence in the record to challenge the Appellate Division’s finding. Hence, the Appellate Division did not make an “unreasonable determination of the facts in light of the evidence” when they found that the Juror was the unidentified juror who made the statement in question. 28 U.S.C. § 2254(d).

Furthermore, Petitioner does not satisfy his “ultimate burden of proving by a preponderance of the evidence that his constitutional rights have been violated.” *Cardoza*, 731 F.3d at 178 (quoting *Epps v. Poole*, 687 F.3d 46, 50 (2d Cir.2012)). Petitioner argues that, if the

unnamed juror was not properly identified, then that prospective juror could have been on the jury which convicted him, violating his Sixth Amendment right to trial by an impartial jury. (Obj. at 4.) However, this does not rise to an injury of constitutional magnitude since Petitioner and his counsel were afforded ample opportunity to question the unnamed juror during their own *voir dire* or bring their own for cause challenge against the unnamed juror. "Part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Where a defendant is provided significant opportunity to identify, question, and challenge unqualified jurors, their Sixth Amendment interests in an impartial jury are protected, especially where a prospective juror disclosed their bias explicitly during jury selection. *See Tanner v. United States*, 483 U.S. 107, 107 (1987) (the petitioners' Sixth Amendment rights were not violated due to alleged juror misconduct since the petitioners were provided with ample opportunity during hearings to produce evidence of such misconduct); *United States v. Nieves*, 58 F.4th 623 (2d Cir. 2023) (after sufficient juror questioning, *voir dire* cannot be challenged as inadequate if defense counsel failed to object to or make challenges to prospective jurors when they had the opportunity to do so). Petitioner's counsel did not question the juror who made the statement and did not refer to the statement during the constitutionally sufficient *voir dire* provided. Also, Petitioner's counsel did not bring a for-cause challenge against any prospective juror, suggesting that the prospective juror at issue was actually the Juror who was already challenged by the prosecutor and dismissed.

Ultimately, Petitioner's second claim fails because it is not cognizable on federal habeas review, it does not demonstrate an unreasonable determination of the facts by the trial court or Appellate Division, and Petitioner does not demonstrate a constitutional violation.

C. Petitioner's Third Claim – The Verdict was Against the Weight of the Evidence

Since Petitioner did not object to Magistrate Judge Moses's Report on this claim, this Court will review this portion of the Report for clear error. Petitioner argues that the jury's guilty verdict was "against the weight of the credible evidence given [his] testimony adamantly deny[ing] [his] involvement in the shootings." (Am. Pet. at 8.) The Report correctly held that a weight-of-the-evidence argument is a claim under state law not cognizable on federal habeas review. *McKinnon v. Superintendent*, 422 Fed. App'x 69, 75 (2d Cir. 2011); *see also Douglas v. Portuondo*, 232 F.Supp.2d 106, 116 (S.D.N.Y. 2002). The claim arises under New York state law C.P.L. § 470.15(5) which allows courts "to make weight of the evidence determinations," rather than under the Constitution. *See Cintron v. Fisher*, No. 07-CV-1058 (KMK) (PED), 2012 WL 213766 (S.D.N.Y. 2012). For a claim asserting "an error of state law, . . . habeas review is not available." *Douglas*, 232 F.Supp.2d at 116. A federal habeas court may not "reexamine state-court determinations on state-law questions." *McGuire*, 502 U.S. at 67-68. Therefore, Magistrate Judge Moses properly determined that this Court does not have power to review the state court determination rejecting this claim.⁶ (Report at 25.) Accordingly, the Court denies Petitioner's weight-of-evidence claim.

D. Petitioner's Fourth Claim – The Stipulation Violated Petitioner's Right to Confront Adverse Witnesses

On Petitioner's fourth ground for relief, he argues that his Sixth Amendment right to confront adverse witnesses was violated when the trial court allowed Brown's cause of death to be

⁶ The Report properly states that a weight-of-the-evidence argument does not raise constitutional due process concerns unless "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Policano v. Herbert*, 507 F.3d 111 (2d Cir. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324). Even if Petitioner had brought a cognizable sufficiency-of-the-evidence claim under the Due Process Clause of the Constitution, the claim would fail on the merits. (Report at 25.)

stipulated without the testimony of a medical examiner. (Am. Pet. at 10.) In his petitions and objections, he argues that *Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021), a case decided by the Second Circuit Court of Appeals after his conviction, held that an autopsy report could not be stipulated into evidence without an opportunity to confront a medical examiner present for the autopsy. (Obj. at 5.) Since he could not have foreseen this decision at the time of his appeal, he asserts that there was sufficient cause for his failure to raise this argument on direct appeal, and the procedural bar should not apply as a result. (*Id.*) Petitioner also argues that his trial counsel erred in stipulating to the cause of death without submission of the autopsy report into evidence. (Traverse at 8.)

a. The claims regarding the stipulations are procedurally barred.

First, Petitioner's claim on this issue is barred because Petitioner has previously defaulted on this claim in state court based on an independent and adequate state ground. *Coleman*, 501 U.S. at 729. Petitioner had already moved to vacate the judgment under C.P.L. § 440.10(1) based on this claim, but the state court found that the motion was procedurally barred based on C.P.L. § 440.10(2)(c). (RA 681–684.) The state court concluded that the claim was “entirely record based” as the stipulation was discussed, entered into evidence, and read to the jury on the record, and Petitioner failed to raise the issue on direct appeal. (RA 683.) Hence, the state court relied on the C.P.L. § 440.10(2)(c) in disposing this claim, making it “independent of the federal question.” *Coleman*, 50 U.S. at 729. C.P.L. § 440.10(2)(c) is also “adequate to support the judgment” since New York state courts commonly rely on it in when considering C.P.L. § 440.10 motions such as the Petitioner's. *Ford*, 498 U.S. at 412.

Petitioner did not sufficiently demonstrate cause, prejudice, or a fundamental miscarriage of justice necessary to overcome the independent and adequate state ground. In his submissions to this Court, Petitioner presents two possible causes for his failure to comply with C.P.L. §

440.10(2)(c). In his Amended Petition, he argues that the claim was not raised on direct appeal because “[his] appellate attorney was ineffective.” (Am. Pet. at 11.) In his Objection, he reasserts that the claim was not raised on direct appeal because it is based on the Second Circuit’s decision in *Garlick v. Lee* which was published after his conviction, and there was “no way [he] could have anticipated the clarification in law.” (Obj. at 5.)

As stated before, attorney error only constitutes cause if it “constitutes ineffective assistance of counsel violative of the Sixth Amendment.” *Coleman*, 50 U.S. at 725. Here, Petitioner’s appellate counsel did not err in failing to raise the claim because it is meritless. A refusal to raise a meritless claim does not constitute ineffective counsel violative of the Sixth Amendment. *Aparicio*, 269 F.3d at 99. The Confrontation Clause of the Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause does not prohibit parties from stipulating to the content of testimonial evidence without an opportunity to confront, especially considering that a strategically worded stipulation may be advantageous to the defendant. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 328 (2009). Here, both defense counsel and Petitioner negotiated and explicitly consented to the factual stipulation, and neither of them objected to its entrance into evidence. (Trial Tr. at 495:6–15.) In fact, defense counsel acknowledged the strategic advantages of the stipulation as it would avoid the entrance of the “gruesome” autopsy photos into evidence upon the medical examiner’s testimony. (*Id.* at 492:22–493:5.) Hence, Petitioner did not demonstrate any ineffective assistance of counsel and cannot establish cause for the failure to raise this claim upon direct appeal.

Petitioner has also failed to demonstrate prejudice as a result of the stipulation. The stipulation did not work to “his *actual* and substantial disadvantage” since, as previously discussed,

it may have actually benefitted Petitioner by preventing the admission of “gruesome” autopsy photos into evidence. *Frady*, 456 U.S. at 170. Even so, the stipulation did not work an “error of constitutional dimensions” required to demonstrate prejudice since it did not constitute a violation of the Confrontation Clause or any other constitutional provision. *Id.* Similarly, the stipulation has not caused a “fundamental miscarriage of justice” since there was neither (1) “a constitutional violation,” nor (2) evidence suggesting that it led to the “conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496. Therefore, Petitioner’s last claim also fails since it is both procedurally barred and meritless.

b. Petitioner’s Reliance on *Garlick*

Petitioner’s argument based on the Second Circuit ruling in *Garlick* does not support his claim and *Garlick* does not constitute a cause for his procedural default. *Garlick* provides that, “the admission of the autopsy report at . . . trial through a surrogate witness” over *Garlick*’s objection violated the Confrontation Clause. 1 F.4th at 136. Here however, at Petitioner’s trial, there was no surrogate witness (i.e., a medical examiner not present for the autopsy), the autopsy report was not admitted into evidence, and he did not object to the stipulation. (Trial Tr. at 492:9–503:23.) Following *Garlick*, parties may still properly stipulate to testimonial material without a live witness. In fact, the Second Circuit acknowledged and approved of stipulations within the context of the Confrontation Clause in *Melendez-Diaz* where the court stated that “[d]efense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case.” *Melendez-Diaz*, 557 U.S. at 310 (noting that stipulations were central to the efficient administration of trials and the adversary process in light of the burdensome requirements of the Confrontation Clause). Hence, Petitioner’s reliance on *Garlick* is misplaced, and this case does not constitute cause for his procedural default.

IV. CONCLUSION

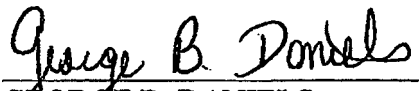
Petitioner does not assert an adequate ground to set aside his conviction and sentence pursuant to § 2254. Magistrate Judge Moses's Report and Recommendation is ADOPTED in full. Petitioner's objections to the Report and Recommendation are OVERRULED. The petition for a writ of *habeas corpus* is DENIED.

The Clerk of Court is directed to close this case.

Dated: New York, New York

July 28, 2025

SO ORDERED.



GEORGE B. DANIELS
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAYMOND MAYRANT,

Petitioner,

-against-

JULIE WOLCOTT, Superintendent of
Attica Correctional Facility,

Respondent.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 1/29/2025

20-CV-9324 (GBD) (BCM)

REPORT AND RECOMMENDATION
TO THE HON. GEORGE B. DANIELS

BARBARA MOSES, United States Magistrate Judge.

Petitioner Raymond Mayrant, proceeding *pro se*, seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. Petitioner was convicted in New York Supreme Court, Bronx County, of murder in the second degree in violation of N.Y. Penal Law (PL) § 125.25(1) and attempted murder in the second degree in violation of PL §§ 110.00 and 125.25(1). *See* Am. Pet. (Dkt. 21) at ECF p. 1. He was sentenced to an indeterminate term of 25 years to life on the murder conviction and a consecutive determinate term of 25 years on the attempt conviction, for an aggregate term of imprisonment of 50 years to life. *Id.*

In this action, referred to me for report and recommendation (Dkt. 5), petitioner asserts that he is entitled to the writ on four grounds: (1) the original felony complaint, on which he was arrested, was "jurisdictionally defective"; (2) the trial court erroneously granted the People's for-cause challenge to a prospective juror; (3) the verdict was against the weight of the evidence; and (4) the trial court deprived petitioner of his rights under the Confrontation Clause by allowing the parties to stipulate to the murder victim's cause of death without live testimony from the medical examiner. Am. Pet. at ECF pp. 5-10. The Appellate Division, First Department, considered and rejected petitioner's second and third claims on direct appeal, *People v. Mayrant*, 172 A.D.3d 408, 97 N.Y.S.3d 846, 846-47 (1st Dep't 2019), and the New York Court of Appeals denied leave to appeal. *People v. Mayrant*, 34 N.Y.3d 952, 134 N.E.3d 656 (2019). Petitioner raised his first and

fourth claims in two successive motions filed pursuant to N.Y. Crim. Proc. L. (CPL) § 440.10, *see* RA 123-26, 638-45,¹ both of which were rejected by the trial court as procedurally barred because petitioner failed to raise those claims on direct appeal. RA 338-40, 681-84. On August 24, 2021, the Appellate Division denied leave to appeal the first CPL § 440.10 motion, RA 373 (8/24/2021 Op.), and on March 29, 2022, the Court of Appeals denied leave to further appeal. *See People v. Mayrant*, 38 N.Y.3d 952, 185 N.E.3d 970 (2022). On July 26, 2022, the Appellate Division denied leave to appeal Mayrant's second CPL § 440.10 motion. RA 781.

For the reasons set forth below, the petition should be denied.

I. BACKGROUND

A. Factual Background

Petitioner Raymond Mayrant began dating Diamond Dunn in 2005, when Dunn, who was 15 at the time, was living with her mother, Elzina Brown, in an apartment at 1790 Story Avenue in the Bronx, New York. *See* Trial Tr. at 82:14-83:14.² The two met through Dunn's neighbor Tenisha Cephas, who lived in the apartment directly below Dunn and Brown. *Id.* at 82:16-17, 62:8-10. In 2008, Dunn gave birth to a daughter, Madison, and she and petitioner moved, as a couple, to Norfolk, Virginia, where petitioner's mother and sister lived. *Id.* at 83:7-84:9.

Between 2008 and 2010, petitioner was unfaithful, and Dunn caught him cheating. Trial Tr. at 85:6-16. Petitioner accused Dunn of infidelity as well. *Id.* at 85:16-20, 120:22-23, 550:13-25. Dunn tried to convince him she was faithful, but he did not believe her and the two fought. *Id.* at 120:17-21. Petitioner "would threaten and say I'm going to kill you." *Id.* at 150:5-7. Their fights

¹ "RA ____" refers to the consecutively-paginated Appendix for Respondent (Dkts. 26-1 to 26-3).

² "Trial Tr. ____" refers to the consecutively-paginated transcript of the testimonial portion of petitioner's trial (Dkts. 27-3 to 27-4), which took place from November 9 through December 3, 2015.

sometimes got violent. *Id.* at 85:24-25, 122:6-14, 125:14-23. Dunn reported petitioner's conduct to the police "a lot of times," but never pressed charges. *Id.* at 123:2-21, 150:8-14.

In 2010 or 2011, Dunn broke up with petitioner. Trial Tr. at 86:1-5, 129:1-7, 539:11-17. Dunn and Madison moved back to New York to live with Brown at 1790 Story Avenue. *Id.* at 86:5-7, 539:20-21, 541:22-25, 84:19-23. Following the breakup, petitioner's interactions with Dunn were limited. *Id.* at 129:17-19, 512:21-22. Dunn occasionally messaged petitioner to ask for child support or say she still loved him. *Id.* at 135:8-20, 546:1-22.

By 2012, Dunn "pretty much had forgiven" petitioner. Trial Tr. 86:25-87:1. Hoping that he had changed and wanting Madison to have a relationship with her father, Dunn sought to rekindle their romance. *Id.* at 87:19-88:1, 551:5-7. Dunn contacted petitioner and told him she wanted him back. *Id.* at 88:2-10. When petitioner asked to visit on December 26, 2012, Dunn agreed, hoping they "would be together like when [they] first met." *Id.* at 88:11-22, 89:9-12. Dunn and Brown hosted petitioner from December 26, 2012 until January 3, 2013. *Id.* at 89:16-17, 514:10-17, 551:8-552:7. Petitioner slept "in the bed with [Dunn] and Madison," including on the night of January 2, 2013. *Id.* at 89:16-19.

On the morning of January 3, 2013, Brown woke up early, got Madison ready for preschool, and left for her job as a crossing guard. Trial Tr. at 93:10-23, 454:12-13. Dunn took Madison to school at 7:55 a.m., and petitioner remained in the apartment. *Id.* at 93:1-94:3. When Dunn returned home, she and petitioner had sex and fell back asleep. *Id.* at 93:6-8. When Dunn awoke, petitioner was sitting on the edge of the bed, and "[i]t looked like he had been thinking hard." *Id.* at 94:6-8. Petitioner asked, "[D]idn't I tell you to stop playing with me?" *Id.* at 94:13-14. He then "got up and walked around to [Dunn's] side of the bed, which was by the window, and he just pulled this gun out from underneath the mattress and the box spring." *Id.* at 94:18-20. Dunn

had never seen the gun before, and neither she nor her mother carried weapons or kept firearms in the apartment. *Id.* at 94:21-95:1. Petitioner pointed the gun at Dunn, and she could see that it was a revolver. *Id.* at 95:2-6. At first, Dunn thought it was a joke and told petitioner to stop. *Id.* at 95:16-21. But petitioner kept angrily repeating, "why you always playing with me? Didn't I tell you to stop playing with me?" *Id.* at 96:10-17.

Standing at the foot of the bed, petitioner lifted one hand to his lips and kept the gun pointed at Dunn with his other hand. Trial Tr. at 95:23-7, 158:20-22. Then, "he cocked the gun back and . . . took a first shot, but nothing came out." *Id.* at 96:19-20. When petitioner shot again, a bullet hit Dunn on the top of her head, and she jumped up. *Id.* at 96:21-22. Petitioner fired two more shots. *Id.* at 159:3-4, 161:1-3. Dr. Lilly Gutnik, who treated Dunn at Jacobi Medical Center later that day, testified that she was "extremely lucky," in that one of the shots "grazed" her scalp, "going through the layers of skin and protection down to the actual bone" of her skull, but did not penetrate the cranium. *Id.* at 445:11-20.

Dunn remembers screaming for help and hearing her mother respond. Trial Tr. at 98:11-16. From another room, Brown, who had returned home from work, asked, "what's going on?" *Id.* at 98:17-18. Dunn saw petitioner run from her bedroom and heard a gunshot, after which she did not hear another word from her mother. *Id.* at 98:19-25. Petitioner ran back to Dunn's bedroom, put his clothes on, and fled the apartment, leaving his cell phone behind. *Id.* at 99:1-5, 21:19-21. After petitioner left, Dunn went to check on Brown, who was unresponsive, and then ran downstairs to Cephas's apartment to get help. *Id.* at 99:6-22.

Cephas heard three shots, "bang, bang, bang," from her apartment one floor down, and heard Dunn screaming, "Ma, Ma, Ma." Trial Tr. 63:4-11. Dunn then appeared at Cephas's door, "bloody, her nose [] busted, [and] her head [] bleeding." *Id.* 63:23-24 ("There was just blood

everywhere."). Dunn was "panicking, crying, screaming" when she said to Cephas, "Look what Raymond did to me." *Id.* at 64:2-7. Cephas called 911 and reported a shooting perpetrated by Dunn's "baby's father." *Id.* at 76:2-19. When detectives arrived, they found Brown dead. *Id.* at 468:1-10. New York Police Department (NYPD) detective Anthony Ribustello testified that the shots were likely fired by a revolver, because no brass shells were found at the scene. *Id.* at 2:2-19, 7:14-23, 51:12-15. Later that day, while in the hospital, Dunn confirmed to another NYPD detective, Robert Schlosser, that it was petitioner who shot her and killed her mother. *Id.* at 482:20-25.

Dunn was admitted to Jacobi Medical Center through the "trauma bay," with injuries consistent with gunshot wounds, including an "obvious deformity on her nose," "a hand deformity," a "shoulder abrasion" and a "very large scalp laceration." Trial Tr. at 424:10-12, 425:13-16, 441:22-24. An X-ray of her hand revealed "bullet fragments in the soft tissue." *Id.* at 447:11-12. Dunn received surgery to her head and nose. *Id.* at 102:1-7, 426:14-19. She was discharged from the hospital after six days, *id.* at 435:10-13, but later required plastic surgery to reconstruct her nose. *Id.* at 102:8-16, 429:3-5, 436:23-24.

Meanwhile, the NYPD "looked through [petitioner's] phone records" and "began to track him through his debit card." Trial Tr. at 471:14-22, 472:18-19. On January 4, 2013, at 9:17 p.m., petitioner used his debit card to withdraw money from an ATM in Augusta, Maine. *Id.* at 204:7-9. Over the next few days, petitioner continued to use the card in the Augusta vicinity: at a Rite Aid store in Lewiston, Maine, on January 5; at a gas station in Lewiston on January 6; and at a Super 8 Motel in Augusta on January 7, *id.* at 214:20-215:16, at which point he apparently ran out of money. On January 9, 2013, the Augusta Police Department (APD) "took a report of a stolen motor vehicle." *Id.* at 233:21-22. APD Detective Brian Wastella then contacted NYPD Detective

Schlosser to report that petitioner had hitchhiked to Augusta, stayed there for several nights, and then stole a vehicle from the family that had given him the ride, at which point the family went to the police. *Id.* at 233:21-23, 234:10-13, 472:18-24. Once the APD had the license plate number of the stolen vehicle, it put out a stolen vehicle report. *Id.* at 246:6-13.

On January 10, 2013, petitioner called Set and Services – his employer – and asked the company to release payroll for two days he had worked in December 2012 but had not yet been paid for. Trial Tr. at 328:13-19. The associate who took the call made note of the caller ID, googled the number petitioner was calling from, and reported to the NYPD that it was a homeless shelter in Ohio. *Id.* at 329:20-330:5. Set and Services then "pushed" petitioner's payroll (that is, paid him ahead of its normal schedule), because once he had access to the funds through his debit card, the card "could be tracked." *Id.* at 329:7-10.

On January 11, 2013, petitioner used his card in Warren, Ohio. Trial Tr. at 216:5-8, 220:6-7. That same day, U.S. Marshals found the stolen car outside of the Warren Family Mission, a homeless shelter. Trial Tr. at 340:11-15, 597:10-15. When they located petitioner nearby and told him he was under arrest, he said his name was "Richard." *Id.* at 343:13-16. However, the Marshals identified him by his "New York ID with his name on it" and his debit card, both of which were in his pocket. *Id.* at 343:17-19. Petitioner was taken to the county jail in Warren, Ohio, *id.* at 345:15-17, and Ohio law enforcement recovered the stolen car. *See id.* at 247:1-5. The gun was never recovered. *Id.* at 355:25-356:2.

B. Procedural History

1. Charging Instruments

On January 11, 2013, petitioner was charged with second-degree murder, attempted second-degree murder, first-degree manslaughter, and three counts of second-degree weapon

possession, in a felony complaint signed by NYPD Detective Rene Navaez. RA 002. The factual portion of the complaint read:

[Detective Narvaez] states, based upon official investigation, and witnesses known to the Police Department, that at the above time and place [approximately 3:00 P.M. at 1790 Story Avenue, Apartment 3D, Bronx, New York], the defendant shot Diamond Dunn in the face causing a gun shot wound to the face, substantial pain, and treatment at a local Bronx Hospital.

Deponent further states that defendant then shot Elzina Dunn Brown in the head and chest, causing her death.

Id. Also on January 11, 2013, the Bronx Criminal Court issued a warrant authorizing petitioner's arrest. RA 004. On January 15, 2013, petitioner waived extradition, in writing, and "knowingly and voluntarily consent[ed] to [] return" to New York. RA 005-06.

On January 31, 2012, a Bronx County grand jury charged petitioner with second-degree murder, pursuant to PL § 125.25(1); first-degree manslaughter, pursuant to PL § 125.20(1); attempted second-degree murder, pursuant to PL §§ 110, 125.25(1); two counts of first-degree assault, pursuant to PL §§ 120.10(1), (2); two counts of second-degree assault, pursuant to PL §§ 120.05(1), (2); and three counts of second-degree criminal possession of a weapon pursuant to PL §§ 265.03(1)(b), (3). RA 007-12.

2. Voir Dire

Petitioner's trial commenced on November 9, 2015. During jury selection, one prospective juror, Ms. H, stated that she and her sister were "almost robbed on Fordham Road" and that even though the police arrested "two kids," she and her sister were never "called in." Voir Dire Tr. (Dkt. 27-2) at 115:17-116:6. The prospective juror initially said that this experience would affect her ability to be fair and impartial, but then said it would not. *Id.* at 116:7-23. She also disclosed that her son was on parole after pleading guilty and serving "four to eight" for criminal possession of a weapon and conspiracy to commit murder. *Id.* at 117:13-118:3. When asked if she would hold it

against petitioner for going to trial, Ms. H said, "I commend him for doing that." *Id.* at 119:8. At the conclusion of that round of questioning, the court granted the People's challenge for cause to Ms. H over the objection of petitioner's counsel. *Id.* at 194:12-16.

3. Trial

The People called over a dozen witnesses, including Dunn, her neighbor Cephas, her uncle Robert Dunn (who stayed in Dunn and Brown's apartment the night of January 2, 2013); NYPD Detectives Ribustello and Schlosser; three other NYPD witnesses; APD Detective Wastella; one of the Deputy U.S. Marshals who arrested petitioner in Ohio; Dr. Gutnik; and representatives from Set and Services, Skylight Financial (petitioner's prepaid debit card provider), and Verizon Wireless, his cellular provider. The People did not call a witness from the Office of the Chief Medical Examiner to testify as to the autopsy of Brown. Instead, the parties stipulated that, if called, Dr. Monica Smiddy would testify that the cause of death was a "gunshot wound [to the] torso, with perforations of heart and lungs," and that Brown was shot at "close range" and died "within seconds of being shot." Trial Tr. at 502:16-503:17. Petitioner's counsel agreed to the stipulation after the court pointed out that "it saves those gruesome photos that you argued vociferously against them coming in, it saves them coming in." *Id.* at 492:22-493:5.

Before trial, the prosecution gave written notice that a criminal trespass case was pending against Dunn in Bronx County. On cross examination, Dunn confirmed she had been arrested, denied having trespassed, and declined to answer any further questions, invoking her rights under the Fifth Amendment. Trial Tr. at 173:8-18, 176:22-177:1. Later in the trial, defendant's counsel accidentally caught a glimpse of a copy of the complaint concerning Dunn and noticed that it included charges that the prosecution did not identify in the written notice. *Id.* at 186:17-189:6. The prosecutor then confirmed that he had mistakenly given the defense the wrong charges. *Id.* at

189:7-18. The court noted that the complaint against Dunn listed four charges – reckless endangerment, criminal mischief, endangering the welfare of a child, and harassment – and permitted the defense to recall Dunn to cross examine her on the subject. *Id.* at 188:13-15, 189:19-192:11. Dunn was recalled on November 24, 2015, and again invoked her Fifth Amendment rights. *Id.* at 258:13-260:15.

The defense called only one witness: petitioner. On the stand, petitioner denied shooting either Dunn or Brown. Trial Tr. at 511:5-8. He claimed that he took Madison to school on the morning of January 3, 2013, after which he went directly to Brooklyn to visit an elderly aunt, accidentally forgetting his phone at Dunn and Brown's apartment. Trial Tr. at 516:21-519:18, 603:5-7, 604:4-7. While he was visiting his aunt, petitioner testified, he saw on TV that he was wanted for murder, and immediately went to Connecticut, to borrow money from a friend, so that he could visit his mother in Virginia before turning himself in. *Id.* at 520:11-522:14. Unfortunately, the friend was not home, but petitioner was offered a ride by a truck driver, who said that he was going to Maine but would take petitioner to Virginia "in a day or two," when he went "that way." *Id.* at 522:15-523:25. After spending several days in Maine with the truck driver and the truck driver's daughter – with whom petitioner stayed the night in a rented motel room – the daughter gave him the keys to her Nissan Altima and petitioner set off for Virginia. *Id.* at 524:6-527:9. His intention was to tell his mother that he was going to turn himself in and ask "if she would come with [him] to do that." *Id.* at 527:10-14. However, petitioner "got lost," and ended up in Warren, Ohio, where he stayed in a mission, because he had run out of money, until he was arrested. *Id.* at 527:15-530:6.

Petitioner did not telephone his mother (or any other family members) during this period because – he said – he did not have his phone and could not remember their numbers. Trial Tr. at

568:3-11, 572:7-17, 595:13-15. He did not ask his aunt for his mother's number. *Id.* at 568:12-13. He acknowledged that he had enough money to get to Connecticut, *id.* at 578:3-4, to buy gas, *id.* at 593:5-6, and to rent a hotel room in Maine, *id.* at 578:18-20, 579:22-25, but insisted that he could not go directly to Virginia to see his mother because he "didn't have any money." *Id.* at 521:25; *see also id.* at 522:10-12, 578:13-17. Petitioner testified that he "might have" given the police a false name when he was arrested, because he was "scared." *Id.* at 531:1-11. He recalled telling the police in Ohio that he got there on a bus. *Id.* at 606:2-10. He explained that he made that false statement because he was afraid he would be charged with driving on a suspended license. *Id.* at 606:16-19.

On December 8, 2015, after closing arguments, the jury convicted petitioner of murdering Brown and attempting to murder Dunn. Dunn Tr. II (Dkt. 27-7) at 93:24-94:17. Petitioner was sentenced on December 11, 2016 (Dkt. 27-8), and then resentenced on February 11, 2016, to an indeterminate term of 25 years to life on the murder charge, and a "definitive term of 25 years" on the attempted murder charge, with the sentences to run consecutively. (Dkt. 27-9.)

4. Petitioner's Direct Appeal

On direct appeal to the Appellate Division, petitioner argued – through new counsel – that the trial court erred in granting the prosecutor's for-cause challenge to the prospective juror; that the verdict was against the weight of the evidence; and that his sentence was excessive. *See* RA 13-56. On May 2, 2019, the Appellate Division unanimously affirmed the conviction, holding that the trial court "properly granted the People's challenge for cause to the prospective juror[,]" that "[t]he verdict was not against the weight of the evidence[,]" and that there was "no basis for reducing the sentence." *People v. Mayrant*, 172 A.D.3d 408, 97 N.Y.S.3d 846. On September 9,

2019, the Court of Appeals denied leave to appeal. *People v. Mayrant*, 34 N.Y.3d 952, 134 N.E.3d 656.

5. Petitioner's First CPL § 440.10 Motion

Eight months later, in pro se papers dated May 6, 2020, petitioner sought to vacate his conviction pursuant to CPL § 440.10(1) on the ground that the initial felony complaint was "jurisdictionally defective," in that it "failed to establish the witness[']s bases of knowledge of information and the grounds for belief," and therefore that his arrest warrant was invalid and the trial court lacked jurisdiction to try the case. RA 119-31. On June 10, 2021, citing CPL § 440.10(2)(e), the trial court denied the motion because petitioner's claims arose from "facts readily attainable from the record," and therefore "should have been raised on direct appeal." RA 340. On August 24, 2021, the Appellate Division denied leave to appeal. RA 373. On March 29, 2022, the Court of Appeals denied further leave to appeal. *People v. Mayrant*, 38 N.Y.3d 952, 185 N.E.3d 970 (2022).

6. Petitioner's Initial Federal Habeas Petition

On November 5, 2020, petitioner submitted his pro se petition for a writ of habeas corpus, raising three claims: (1) that the original felony complaint was jurisdictionally defective; (2) that the trial court erroneously granted the People's for-cause challenge to a prospective juror who affirmed she could be fair and impartial; and (3) that the verdict was against the weight of the evidence. Pet. (Dkt. 2) at ECF pp. 4-5. Recognizing that his first claim was unexhausted – because his CPL § 440.10 motion was still pending – petitioner requested "a stay and abeyance" so that he could exhaust that claim. *Id.* Respondent joined in that request. (Dkt. 11.) On March 8, 2021, the Court stayed this action "until 45 days after a decision is issued in state court on petitioner's CPL § 440.10 motion." (Dkt. 12.)

7. Petitioner's Coram Nobis Application

In pro se papers dated July 4, 2021, petitioner sought a writ of error *coram nobis*, alleging that his appellate attorney was ineffective because, on direct appeal, "he failed to brief a colorful [sic] claim challenging the court lacking jurisdiction due [to] the felony complaint being jurisdictionally defective and unconstitutional search and seizure." RA 380. In a decision and ordered dated October 12, 2021, the Appellate Division denied the application, *see* RA 634, and on January 18, 2022, the Court of Appeals denied leave to appeal. *People v. Mayrant*, 37 N.Y.3d 1162, 181 N.E.3d 1152 (2022).

8. Petitioner's Second CPL § 440.10 Motion

In pro se papers dated October 31, 2021, petitioner once again sought to vacate his conviction pursuant to CPL § 440.10. RA 636-62. This time, he argued that the trial court violated his Sixth Amendment right to confront the witnesses against him by permitting the parties to stipulate to facts concerning Brown's cause of death, and asserted he could not have raised the point on direct appeal because "the only case to address the issue" is *Garlick v. Lee*, 1 F.4th 122 (2d Cir. 2021). RA 641-43.³ On June 7, 2022, citing CPL § 440.10(2)(e), the trial court denied the motion because "the defendant's allegations are entirely record based," and hence "his claim is procedurally barred." RA 683. In the alternative, the court denied the motion on the merits, noting that in this case (unlike *Garlick*) the parties stipulated to certain facts set forth within the autopsy report, after which the stipulation was "entered into evidence . . . without objection from the

³ In *Garlick*, the Second Circuit held that the admission of an autopsy report over the defendant's objection, through a "surrogate witness" not present for the autopsy, warranted the issuance of a writ of habeas corpus, because, under "clearly established Supreme Court precedent," an autopsy report "is testimonial and admissible only with confrontation." 1 F.4th at 133-34.

defense." *Id.* (explaining that *Garlick* "does not stand for the proposition that the court cannot accept a stipulation when that stipulation involves material that may be considered testimonial").

On June 22, 2022, petitioner sought leave to appeal the denial of his second CPL § 440.10 motion to the Appellate Division, arguing, among other things, that he "did object to counsel[s] stipulation, when counsel consulted with defendant off the record, and therefore that his motion was not "entirely record based" and should not have been denied as procedurally barred. RA 690-91. On July 26, 2022, the Appellate Division denied leave to appeal without opinion. RA 781.

C. The Amended Federal Habeas Petition

By letter dated April 9 and received April 25, 2022, petitioner notified the Court that he had exhausted his state remedies regarding his jurisdictional defect claim and requested that the stay in this Court be lifted. (Dkt. 14.) On August 19, 2022, I lifted the stay. (Dkt. 15.) On September 28, 2022 – at which point respondent had not yet answered or moved against the original Petition – Mayrant filed a letter-motion seeking leave to amend his petition to add a fourth habeas claim, namely, that his Sixth Amendment right to confront the witnesses against him was violated when the trial court "allowed the cause of death autopsy report to be stipulated . . . into evidence with nobody to testify from the medical examiner's office." (Dkt. 16 at ECF pp. 2-3.) That claim, as discussed above, was raised (in petitioner's second CPL § 440.10 motion) and exhausted during the pendency of the stay.⁴ On October 24, 2022, I granted petitioner's amendment request. (Dkt.

⁴ Under CPL § 450.90, no further appeal lies from an order denying leave to appeal the denial of a CPL § 440.10 motion to the Appellate Division. Thus, a petitioner fully exhausts the claims presented in his CPL § 440.10 motion by seeking leave to appeal to the Appellate Division. *See Jenkins v. Capra*, 2024 WL 5078063, at *10 (S.D.N.Y. 2024) ("To exhaust a claim raised before the state trial court in a collateral post-conviction motion, as in a motion made pursuant to CPL § 440.10 and § 220.60, a petitioner must seek leave to appeal the denial of the motion") (citing *Klein v. Harris*, 667 F.2d 274, 282-83 (2d Cir. 1981)).

20.) On November 3, 2022, petitioner filed his Amended Petition, re-asserting his three original claims and adding his Confrontation Clause claim.⁵

Respondent filed his opposition memorandum (Resp. Mem.) (Dkt. 26), together with the relevant portions of the state court record, on February 2, 2023. Petitioner filed a reply memorandum (Pet. Reply) (Dkt. 30) on March 6, 2023.

On November 6, 2024, petitioner advised that he had been transferred to the Attica Correctional Facility (Dkt. 39), after which the caption of this action was amended to name the current superintendent of that facility as the respondent. (Dkt. 40.)

II. DISCUSSION

A. Timeliness

Under 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner must file his habeas corpus petition within one year of the date his conviction becomes "final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The one-year period is tolled while "a properly filed application for State post-conviction or other collateral review," such as a CPL § 440.10 motion, remains pending. *Smith v. McGinnis*, 208 F.3d 13, 16 (2d Cir. 2000); *see also Sunter v. Capra*, 2016 WL 836346, at *3 (S.D.N.Y. Feb. 29, 2016). Time begins to run again on the date the state court issues a final order in the collateral proceeding and further appellate review is unavailable. *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999), *aff'd*, 531 U.S. 4 (2000).

⁵ In his Amended Petition, plaintiff blames his appellate counsel for failing to raise his jurisdictional defect claim and his Confrontation Clause claim on direct appeal. Am. Pet at ECF pp. 6, 10. Petitioner did not, however, plead a separate habeas claim for ineffective assistance of counsel.

Here, the New York Court of Appeals denied petitioner's leave application with respect to his direct appeal on September 9, 2019. His conviction became final 90 days later, on December 9, 2019,⁶ when his time to file a *certiorari* petition to the U.S. Supreme Court expired. *See Williams v. Artuz*, 237 F.3d 147, 150-51 (2d Cir. 2001). Petitioner's first CPL § 440.10 motion, filed on May 6, 2020, tolled his time to file until the Appellate Division denied leave to appeal with respect to that motion on August 24, 2021. *See Sunter*, 2016 WL 836346, at *3 ("AEDPA's statute of limitations is tolled from the date the petitioner files a § 440.10 motion until the date the Appellate Division denies the petitioner leave to appeal that decision."). By then, petitioner had already filed his initial Petition, making it timely by any measure.

B. Exhaustion and Procedural Default

Exhaustion of state court remedies is a condition precedent to federal habeas relief. 28 U.S.C. § 2254(b)(1)(A). A petitioner satisfies the exhaustion requirement by fairly presenting each of his claims to the highest state court available to him before presenting them to the federal court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). To fairly present a claim, a petitioner must identify both the facts that entitle him to relief, *Picard v. Connor*, 404 U.S. 270, 276-77 (1971), and the federal constitutional basis for the claim, *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995), thereby giving the state courts "a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). There are a number of ways to accomplish this task, *see Rustici v. Phillips*, 308 Fed. App'x 467, 469 (2d Cir. 2009), and the petitioner need not cite "book and verse on the federal constitution." *Picard*, 404 U.S. at 278. However, the claim must be presented with enough specificity to permit the state court to address it. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 153 (1996) (it is not "enough to

⁶ December 8, 2019, was a Sunday. *See* Fed. R. Civ. P. 6(a)(1)(C).

make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court").

Even if a petitioner has fairly presented all of his claims in state court, federal habeas review is barred if the state court's decision "rests on a state law that is independent of the federal question and adequate to support the judgment," such as where the state court "decline[s] to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). For a state law procedural ground to be "independent," the state court must have actually relied on that ground as a sufficient basis for its ruling. *Harris v. Reed*, 489 U.S. 255, 261-62 (1989) (independent and adequate state grounds exist if "the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar") (citations and internal quotation marks omitted). However, as long as the state court is "explicit in its reliance on a procedural default," federal habeas review is barred even if the state court chooses, as an alternative holding, to address the merits of the constitutional claim. *Id.* at 264 n.10 (federal courts must "honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law"). For a state law procedural ground to be "adequate," the procedure must be "firmly established and regularly followed by the state in question." *Monroe v. Kuhlman*, 433 F.3d 236, 241 (2d Cir. 2006) (quoting *Cotto v. Herbert*, 331 F.3d 217, 239 (2d Cir. 2003)). "Before accepting a procedural bar defense, a federal court must examine the adequacy of the alleged procedural default." *Cotto*, 331 F.3d at 239.

"In all cases in which a state prisoner has defaulted on his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result

of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. To establish "cause" for a procedural default, the petitioner must show that "some objective factor, external to Petitioner's defense, interfered with his ability to comply with the state's procedural rule." *Gutierrez v. Smith*, 702 F.3d 103, 111 (2d Cir. 2012). To establish "prejudice," the petitioner must show that the default "resulted in 'substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions.'" *Id.* at 112 (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)). To establish a "fundamental miscarriage of justice" (which, in the Supreme Court's "collateral-review jurisprudence . . . means that the defendant is actually innocent," *United States v. Olano*, 507 U.S. 725, 736 (1993)), the petitioner "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

C. Merits

Federal claims that have been decided on the merits in the last reasoned state court ruling are reviewable in federal district court under AEDPA's deferential standard of review. That standard permits a district court to grant habeas relief only when the state court's opinion:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented by the State court proceedings.

28 U.S.C. § 2254(d).

"Clearly established" federal law means "the holdings, as opposed to the dicta," of the decisions of the United States Supreme Court "as of the time of the relevant state-court decision," and does not include opinions of lower federal appellate courts. *Green v. Travis*, 414 F.3d 288,

296 (2d Cir. 2005) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). A 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 than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13. A decision involves an "unreasonable application" of clearly established federal law if the state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of [a] prisoner's case." *Id.* at 413.

This standard is intentionally difficult to meet. It preserves for federal courts "authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents," but "goes no further." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). A federal court cannot grant habeas relief "simply because [the] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Gilchrist v. O'Keefe*, 260 F.3d 87, 93 (2d Cir. 2001) (quoting *Williams*, 529 U.S. at 411). Similarly, an adjudication of a claim is not based on an unreasonable determination of facts "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citation omitted).

D. Petitioner's Claims

Petitioner's first claim (that the felony complaint was jurisdictionally defective) is procedurally barred, because the state court rejected it on independent and adequate state grounds, holding that he should have raised the claim on direct appeal, as required by CPL § 440.10(2)(c). Further, the first claim fails to raise any federal issue. His second and third claims (that the state court erroneously removed a potential juror for cause, and that the jury's verdict was against the

weight of the evidence) were properly exhausted on direct appeal, but present only state-law issues, and consequently are not cognizable on federal habeas review. His fourth claim (that the state court erred in permitting him to stipulate to the cause of Brown's death in lieu of admitting her autopsy report through competent testimony) raises a Confrontation Clause issue potentially cognizable on habeas review, and was fairly presented, in constitutional terms, to the trial court (in petitioner's second CPL § 440.10 motion) and the Appellate Division. *See* RA 641-43; RA 689-92. Respondent is correct, however, that the state court rejected the fourth claim on independent and adequate state grounds – holding that he should have raised it on direct appeal, as required by CPL § 440.10(2)(c) – such that it too is procedurally barred. *See* Resp. Mem. at 33-34. Moreover, the state court's alternative holding, rejecting the constitutional claim on the merits, was neither contrary to nor involved an unreasonable application of clearly established federal law.

I address each claim in turn.

1. First Claim: Jurisdictional Defect

In his first claim, petitioner presses the issue that he raised for the first time on May 6, 2020, in his initial CPL § 440.10 motion, which he filed after losing his direct appeal. His contention was (and is) that the felony complaint issued on January 11, 2013 was "jurisdictionally defective" because it "failed to establish the witness[s] bases of knowledge" for his belief that defendant committed the charged crimes, and failed to state that "the witness observed [petitioner] committing any criminal act," and therefore was insufficient to "confer jurisdiction of the criminal action and control over the accused person[.]" RA 123. Without a facially sufficient felony complaint, petitioner argues, a warrant for his arrest should never have been issued and the trial court lacked jurisdiction to hold a trial, "let alone convict [him]." RA 126; *see also* Am. Pet at ECF p. 5 ("illegal arrest warrant and lack of trial jurisdiction because my felony complaint which was

used to commence a criminal action against me was jurisdictionally defective"); Pet. Reply at ECF p. 5 ("[T]he felony complaint, which was used to commence a criminal action against petitioner is jurisdictionally defected because it never established reasonable cause.").

Habeas review of petitioner's first claim is procedurally barred because the state court's rejection of that claim rested on an independent and adequate state ground. *See Coleman*, 501 U.S. at 729-30. When considering petitioner's first CPL § 440.10 motion, the state court explicitly rejected the same arguments that petitioner makes here because they arise from facts "readily attainable from the record," namely, the felony complaint and the arrest warrant, and thus "should have been raised on direct appeal." RA 340. This rule is firmly established and regularly followed in New York. *See* CPL § 440.10(2)(c) ("[T]he court must deny a motion to vacate a judgment when . . . sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, [but] no such appellate review or determination occurred owing to the defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel[.]")

Even if not procedurally barred, the claim would be ineligible for habeas review because it raises only state law questions. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Ponnapula v. Spitzer*, 297 F.3d 172, 182 (2d Cir. 2002) ("a federal habeas court does not sit to correct a misapplication of state law, unless such misapplication violates the Constitution, laws, or treaties of the United States").

Moreover, petitioner cannot "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. Petitioner was not prejudiced by his appellate counsel's refusal to raise the jurisdictional defect issue on direct appeal,⁷ because "[a] question about whether a felony complaint was jurisdictionally defective is only a question of state law." *Chappelle v. Fisher*, 2008 WL 1724185, at *11 (S.D.N.Y. Apr. 10, 2008); accord *Scott v. Superintendent, Mid-Orange Corr. Facility*, 2006 WL 3095760, at *5-6 (E.D.N.Y. Oct. 31, 2006). For this reason, even absent the independent and adequate state ground, petitioner's first claim would not be cognizable on habeas review. *Estelle*, 502 U.S. at 68; see also *Gathers v. New York*, 2012 WL 71844, at *11 (E.D.N.Y. Jan. 10, 2012) ("claims regarding the felony complaint . . . do not implicate federal law," and thus "are plainly meritless in the context of a federal habeas proceeding.").

Nor has petitioner shown that "failure to consider the [first claim] will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Even as a matter of state law, petitioner's jurisdictional defect claim lacks merit, because the grand jury indictment "superseded any prior accusatory actions." *Brown v. Perlman*, 2006 WL 2819654, at *6 (S.D.N.Y. Sept. 29, 2006) (habeas claim based on "deficiencies in [petitioner's] arrest and other proceedings prior to his indictment" was "meritless," because his subsequent indictment by a grand jury "render[ed] any alleged pre-indictment deficiencies irrelevant"); see also *People v. Hart*, 25 A.D.3d 815, 816, 807 N.Y.S.2d 681, 682 (3d Dep't 2006) ("The indictment by the grand jury superseded the criminal court information and the proceedings before the local criminal court; the grand jury had the authority to indict regardless of any alleged defects in the earlier accusatory instrument or

⁷ See Pet. Reply at ECF p. 14 (letter from appellate counsel explaining "why I will not be raising the issues that you asked me to raise in your letter").

proceedings.") (citations omitted); *People v. Smith*, 304 A.D.2d 677, 678, 757 N.Y.S.2d 491, 491 (2d Dep't 2003) ("[E]ven if the felony complaint was defective, it was superseded by a valid indictment, rendering any claim regarding a purported defect in the felony complaint academic."). For this reason as well, petitioner's procedural default is not excused by his appellate counsel's decision not to pursue the claim on direct appeal. *See Aparodo v. Artuz*, 269 F.3d 78, 99 n.10 (2d Cir. 2001) (because the underlying claim lacked merit, appellate counsel was not ineffective for failing to raise it, and therefore petitioner had not established adequate cause to excuse his procedural default in state court); *James v. Artus*, 2005 WL 859245, at *16 (S.D.N.Y. Apr. 15, 2005) ("counsel cannot be ineffective for failing to raise a meritless claim").

Having procedurally defaulted in state court, petitioner is barred from obtaining habeas review of his first claim in this Court. *See Harris*, 489 U.S. at 262.

2. Second Claim: Juror Challenge

To the extent petitioner's second claim asserts that the trial court's grant of the People's for-cause challenge to the prospective juror violated his right to trial by a "particular jury chosen according to law, in whose selection the defendant has a voice," *see* Pet. Reply at ECF p. 6 (quoting *People v. Ivery*, 96 A.D.2d 712, 712, 465 N.Y.S.2d 371, 372 (1983)), he has once again raised "an issue of state-law, which is not cognizable on habeas review." *Khan v. Capra*, 2021 WL 2270060, at *8 (S.D.N.Y. Apr. 26, 2021), *adopted in part, and rejected in part on other grounds*, 2021 WL 2135279 (S.D.N.Y. May 26, 2021).⁸ As a general rule, "[j]uror discharge and voir dire proceedings

⁸ As the *Ivery* court made clear, the "right to a particular jury chosen according to law, in whose selection the defendant has a voice," is guaranteed by the New York Constitution, not by federal law. *Ivery*, 96 A.D.2d at 712, 465 N.Y.S.2d at 372. (citing N.Y. Const. art I, § 2). *See also Mackensy v. Miller*, 2010 WL 101321, at *6 (S.D.N.Y. Jan. 12, 2010) (petitioner's argument "that he was denied a trial by a jury 'in whose selection he had a voice' echoes the New York State Constitution, not federal law.>").

are governed by state law." *McCrary v. Artuz*, 1995 WL 728423, *4 (E.D.N.Y. 1995) (citations omitted); *see also* CPL § 270.20 (governing for-cause challenges to prospective jurors). And a violation of state law, including "New York's rule governing juror discharge," is "not a claim cognizable on federal habeas review unless the violation implicates federal constitutional concerns." *Johnson v. Artuz*, 2006 WL 1144513, *6 (W.D.N.Y. 2006); *accord* *McCrary*, 1995 WL 728423, at *4; *see also* *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) ("a mere error of state law . . . is not a denial of due process") (internal quotation marks and citation omitted).

In an effort to identify a "federal constitutional concern" in connection with his second claim, petitioner invokes the Sixth Amendment, *see* Pet. Reply at ECF pp. 6-7, which grants a criminal defendant the right to trial "by an impartial jury." U.S. Const. amend. VI. The right to a "panel of impartial, 'indifferent' jurors" is also grounded on principles of due process. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). It includes the "right to take reasonable steps designed to insure that the jury is impartial." *White v. Lape*, 2009 WL 2342817, at *2 (S.D.N.Y. 2009) (quoting *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J. concurring in part and dissenting in part)). One of the most important devices for doing so is the jury challenge, of which there are two types: "'for cause,' where actual bias is admitted or presumed" and "'peremptory,' where bias is suspected or inferred." *Id.* (quoting *United States v. Barnes*, 604 F.2d 121, 169 (2d Cir. 1979) (Meskill, J. dissenting)). "Trial courts have broad discretion in handling for-cause challenges during jury selection." *Mackensy*, 2010 WL 101321, at *5 (citing *United States v. Torres*, 128 F.3d 38, 42-44 (2d Cir. 1997)). Moreover, even if they exceed the bounds of that discretion, "[t]he only claim appropriate for constitutional review is that the jury actually chosen was biased." *Id.* (rejecting habeas claim arising out of trial court's rejection of petitioner's for-cause challenge to a prospective juror because the "suspect juror" was later removed via peremptory challenge and did

not sit on the case); *see also United States v. Perez*, 387 F.3d 201, 208 (2d Cir. 2004) (defendant in a non-capital case cannot succeed on a constitutional challenge based on an error during jury selection where he does not dispute that the jury that ultimately convicted him was fair and impartial); *Murray v. New York*, 2016 WL 11600770, at *5 (S.D.N.Y. Apr. 4, 2016) ("[T]here is no violation of the Sixth Amendment as long as the jury that ultimately is selected is fair and impartial.").

Here, petitioner contends that Ms. H should not have been excused for cause, but does not argue that her place was taken by a biased juror or otherwise suggest that the jury that ultimately convicted him was less than impartial. Consequently, his second claim "is not of constitutional magnitude," and the state court's decision, even if erroneous under state law, reflects "no constitutional error." *Mackensy*, 2010 WL 101321, at *6-7; *see also Khan*, 2021 WL 2270060, at *8 (claim that trial court erred in granting prosecutor's untimely for-cause challenge to a prospective juror "does not implicate the federal constitution where, as here, there are no allegations that the jury that convicted Petitioner was prejudiced against him").

3. Third Claim: Weight of the Evidence

Petitioner contends that the jury's verdict was against the "weight of the evidence." Am. Pet. at 8. It is well-settled, however, that "the argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus." *McKinnon v. Superintendent*, 422 Fed. App'x 69, 75 (2d Cir. 2011); *accord Fashaw v. Griffin*, 2020 WL 6482924, at *12 (S.D.N.Y. Nov. 4, 2020); *Cintron v. Fisher*, 2012 WL 213766, at *3 (S.D.N.Y. Jan. 24, 2012).

A weight-of-the-evidence claim arises under CPL § 470.15(5), which allows New York State appellate courts "to make weight of the evidence determinations." *Cintron*, 2012 WL 213766,

at *3. Such a claim does not implicate the Due Process Clause – or any other provision of federal law – because "as a matter of federal constitutional law a jury's verdict may only be overturned if the evidence is insufficient to permit any rational juror to find guilt beyond a reasonable doubt." *McKinnon*, 422 F. App'x at 75 (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), and *Policano v. Herbert*, 507 F.3d 111, 116 (2d Cir. 2007)); accord *Fawzi v. Kopp*, 2024 WL 5227326, at *12 (S.D.N.Y. July 15, 2024), *adopted*, 2024 WL 5224704 (S.D.N.Y. Dec. 24, 2024).

Here, the Appellate Division considered petitioner's CPL § 470.15(5) argument and rejected it, concluding that "[t]here is no basis for disturbing the jury's credibility determinations" because "[t]he surviving victim's account of the incident was plausible, and was corroborated by other evidence, while defendant's testimony was incredible." *People v. Mayrant*, 172 A.D.3d 408, 97 N.Y.S.3d 846, 847. This Court has no power to review that conclusion – which, in any event, was well grounded in the record.⁹ Petitioner's third claim therefore fails.

4. Fourth Claim: Right to Confront Adverse Witnesses

In his fourth claim, petitioner argues that the trial court violated his Sixth Amendment right to confront adverse witnesses when it permitted the parties to stipulate to certain facts concerning Brown's death without testimony from the medical examiner, *see* Am. Pet at ECF p. 10, adding that his trial counsel "was also in error for stipulating to the cause of death without an actual autopsy report being submitted into evidence as an exhibit." Pet. Reply at ECF p. 10. In this Court, as in his second CPL § 440.10 motion, petitioner relies on *Garlick*, which held that it was constitutional error to permit the introduction of an autopsy report, *over* the defendant's objection,

⁹ By the same token, even if petitioner had raised, exhausted, and pleaded a federal sufficiency-of-the-evidence claim under the Due Process Clause, it would fail on the merits.

"through a surrogate witness" who neither conducted nor observed the autopsy. 1 F.4th at 128. Petitioner's fourth claim, like his first, is procedurally barred. It is also meritless.

On December 2, 2015, near the close of the People's case, the prosecutor advised the court that Dr. Smiddy, who performed the autopsy of Brown, was injured and would be unable to testify until the following Monday, but that he could call "another medical examiner who was present for the autopsy." Trial Tr. at 492:12-21. When the court asked petitioner's counsel if he wished to "stipulate to the cause of death," counsel initially declined, but then changed his mind, explaining that the opportunity to prevent the introduction of the entire autopsy report, with "those gruesome photos," sounded "appealing." *Id.* at 492:22-493:5. After a recess, counsel confirmed that he showed the proposed language to his client and advised, "we're willing to stipulate," on condition that the stipulation was "pared down a little bit." *Id.* at 495:6-15. The parties then negotiated the precise language of the stipulation – on the record – and the prosecutor agreed to remove any reference to "the cause of death being homicide." *Id.* at 497:23-498:15. Petitioner's counsel then agreed to have the stipulation (as "pared down") admitted as an exhibit and read to the jury in lieu of introducing the autopsy report itself through a qualified witness. *Id.* at 499:19-10. The stipulation was entered into evidence (as People's Exhibit 35) only after petitioner's counsel expressly confirmed again – in petitioner's presence – that he had no objection. *Id.* at 502:8-10.¹⁰

¹⁰ The stipulation read, in full: "The People and Defense hereby stipulate that if Dr. Monica Smiddy, an expert in forensic pathology with the Office of the Chief Medical Examiner of New York City, were called to testify, she would testify to the following: 1. That an autopsy was done on January 4th of 2013 of Elzina Louise Brown. 2. That the cause of death was gunshot wound of torso, with perforations of heart and lungs. 3. That the entry wound was to her left chest and exit wound was in her right back. 4. That the path of the bullet was left to right, front to back and downward. 5. That People's exhibit 34 is an autopsy photo of Elzina Louise Brown for medical examiner number B13-0047. 6. That Elzina Louise Brown died within seconds of being shot. 7. That the gun which caused the wound was fired from close range. 8. That Elzina Louise Brown had no chance to survive with the injuries that she sustained." *Id.* at 502:16-503:12.

Although petitioner's Confrontation Clause claim is "entirely record-based," RA 683, he did not raise it on direct appeal, nor in his first CPL § 440.10 motion. When he did make the claim, in his second post-conviction motion, the court rejected it on an independent and adequate state ground, explaining that petitioner offered no reason for "failing to address this claim in his direct appeal," as required by CPL § 440.10(2)(c). RA 682-83. As noted above, this rule is firmly established and regularly followed in New York. *See* Part II(D)(1), *supra*.

Moreover, petitioner has once again failed to show cause for his state court default and resulting prejudice, or that a fundamental miscarriage of justice would occur if the merits of the federal claim were not considered. *Coleman*, 501 U.S. at 750. In the Amended Petition, he blames his appellate counsel, alleging – without any supporting facts – that he "was ineffective." Am. Pet. at ECF p. 10. In his reply brief, petitioner blames his trial counsel, arguing that he "was also in error for stipulating to the cause of death without an actual autopsy report being submitted into evidence as an exhibit." Pet. Reply at ECF p. 10.¹¹ However, trial counsel did not represent petitioner before the Appellate Division, and consequently could not have prevented him from raising the Confrontation Clause issue in his direct appeal, as required by CPL § 440.10(2)(c). Further, an allegation of ineffective assistance of counsel cannot furnish "cause" for a petitioner's failure to preserve or pursue a constitutional claim unless (i) counsel's ineffectiveness itself rises to the level of a Sixth Amendment violation, *see Edwards v. Carpenter*, 529 U.S. 446, 452 (2000), and (ii) petitioner presented his ineffectiveness claim to the state courts and exhausted it there. *See Murray v. Carrier*, 477 U.S. 478, 489 (1986) ("the exhaustion doctrine . . . generally requires that

¹¹ Petitioner reasons as follows: "[H]ad the jury been informed by [the] trial court that there is no autopsy report concerning the cause of death and no medical examiner being present to testify to the cause of death, would have resulted to the cause of death not being proven beyond a reasonable doubt and a not guilty verdict to follow." Pet. Reply at ECF p. 10.

a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."); *Scott v. Fisher*, 652 F. Supp. 2d 380, 406-07 (W.D.N.Y. 2009) ("[T]o claim that attorney error excuses a procedural default, a habeas petitioner must either have properly presented and exhausted an ineffective assistance of counsel claim in the state courts or, if the ineffective assistance of counsel claim is itself procedurally barred, separately show that there is 'cause' excusing said procedural default as well as prejudice resulting from the error.").

Petitioner never raised an independent claim of ineffective assistance of trial counsel in state court, and does not do so in this Court. Nor could he. The Supreme Court has consistently recognized that actions or omissions by counsel that "might be considered sound trial strategy" do not constitute constitutionally ineffective assistance. *Lugo v. LaValley*, 601 F. App'x 46, 48 (2d Cir. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Here, although Dr. Smiddy was temporarily unavailable, the People were prepared to call another witness from the Office of the Medical Examiner "who was present for the autopsy," Trial Tr. at 492:19-21, and thus competent to present expert testimony concerning the manner of Brown's death. See *People v. Ortega*, 40 N.Y.3d 463, 476, 227 N.E.3d 302, 310 (2023) (holding, post-*Garlick*, that "an expert medical examiner may offer conclusions as to the cause and manner of death, and surrounding circumstances, where that testifying expert performed, supervised, or observed the autopsy"). Under the circumstances – and after conferring with petitioner – trial counsel made the sensible decision to stipulate to a sanitized recitation of the cause of death, thus preventing the jury from seeing the entire autopsy report, complete with "gruesome photos," and hearing expert testimony that the cause of death was "homicide." Trial Tr. at 492:22-493:5, 497:23-498:5. Counsel's conduct

fell well within the boundaries of "sound trial strategy," *Lugo*, 601 F. App'x at 48, and cannot have prejudiced petitioner at trial.

Nor was petitioner's appellate counsel constitutionally ineffective in failing to raise the Confrontation Clause issue on direct appeal, because "counsel cannot be ineffective for failing to raise a meritless claim." *James*, 2005 WL 859245, at *16. As the state court explained in its alternative holding, rejecting petitioner's second CPL § 440.10 motion on the merits, *Garlick* "does not stand for the proposition that the court cannot accept a stipulation when that stipulation involves material that may be considered testimonial." RA 683. The state court was correct.

The Confrontation Clause gives criminal defendants the right to confront the witnesses against them, including the "declarants" of "testimonial statements" introduced at trial. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (certificates of laboratory analysts, attesting that the white powder recovered from defendant was cocaine, were "testimonial statements" that could not be used at trial absent the opportunity to cross-examine the analysts). In *Garlick*, the Second Circuit applied that analysis to an autopsy report, holding that the petitioner's constitutional rights were violated when the full report was admitted at his criminal trial for the truth of its contents, *over his objection*, with no live witness who could be cross-examined concerning either the autopsy itself or the conclusions reached in the report. 1 F. 4th at 134 ("[T]he autopsy report is testimonial and was erroneously admitted without an opportunity for cross-examination.").

Neither the Confrontation Clause nor anything else in the Constitution, however, *requires* a defendant to confront a potentially damaging witness where, as here, a negotiated factual stipulation offers a strategically advantageous path. The Supreme Court made this point in *Melendez-Diaz*, explaining:

Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt on the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.

557 U.S. at 328; *accord Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) ("[a]bsent stipulation, . . . the prosecution may not introduce a [forensic laboratory report] without offering a live witness component to testify to the truth of the statements made in the report.").

Because the trial court did not violate petitioner's Confrontation Clause rights by accepting the parties' stipulation as to the cause of Brown's death, petitioner's appellate counsel was not constitutionally ineffective in failing to raise that claim on direct appeal, and petitioner was not prejudiced thereby. Consequently, habeas review of petitioner's fourth claim is procedurally barred. By the same token, even if the claim were not procedurally barred, it would fail on the merits, because the state court's decision rejecting that claim was neither "contrary to" nor "involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d).

III. CONCLUSION

For the foregoing reasons, I recommend, respectfully, that the Amended Petition be DENIED. Because petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), I further recommend that no certificate of appealability be issued pursuant to 28 U.S.C. § 2253(c)(1)(A).

Dated: New York, New York
January 29, 2025



BARBARA MOSES
United States Magistrate Judge

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