Cruz v. Coveny

2022 | Cited 0 times | S.D. New York | June 1, 2022

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
----------X JAMES CRUZ, Petitioner,

-against- RAY COVENY, Superintendent of the Elmira Correctional Facility,

Respondent. ----------X SARAH NETBURN, United States Magistrate Judge. TO THE HONORABLE ANALISA TORRES: James Cruz, proceeding pro se, petitions for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. After a jury trial in New York Supreme Court, Bronx County, Cruz was convicted of second-degree murder, pursuant to N.Y. Penal Law § 125.25[1]. Cruz raises two grounds for habeas relief: (1) the admission of recorded phone calls to friends and family made while he was a pretrial detainee infringed on his right to counsel; and (2) the admission of the phone calls, a photograph of the victim, testimony regarding third-party threats, and evidence of his nickname "Krime" violated his fundamental right to a fair trial. I recommend that the petition be DENIED.

BACKGROUND I. The Crime, the Investigation, and Trial Evidence

On November 13, 2010, Humberto Martin Palacios was shot and killed while sitting on the building stoop at 1148 Bryant Avenue in the Bronx (hereinafter "1148") .

18-CV-10713 (AT)(SN)

REPORT AND RECOMMENDATION

6/1/2022 NYPD detectives arrived shortly after the shooting and recovered ballistic evidence and the blue baseball cap Palacios was wearing at the time of his death. Detective David Dreyer spoke to the people at the scene, but no one provided any information. Other detectives told him that shots had been fired in another incident shortly before the shooting and that the superintendent of the building at 1148, "Rolando," and his nephew "Tato" had been involved.

Detective Dreyer subsequently obtained surveillance footage from 1138 Bryant Avenue (hereinafter "1138") showing the prior incident and the moments leading up to and immediately following the shooting. Dreyer recognized a man in the video whom he had spoken to at the scene but who denied any knowledge. Rolando later identified him as Cesar Montano. When confronted with the video footage, Montano agreed to cooperate with the investigation.

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Police arrested Cruz at his grandparents' home. As he was being taken into custody, he told them to "call Macho ." Cruz was brought to the police precinct for a line-up where Montano identified him as the shooter. Cruz was subsequently indicted and charged with two counts of second-degree murder, first and second-degree manslaughter, and two counts of second-degree criminal possession of a weapon.

Cruz's first trial ended in a hung jury, with seven jurors voting to acquit. At Cruz's second trial, the prosecution introduced the surveillance footage from 1138. The footage included video from four different surveillance cameras and showed both the earlier incident and the shooting itself. The footage of the first incident shows a small group of men, women, and children sitting outside 1138. A man wearing a white shirt and a baseball cap, who was later identified by Montano as Cruz, passes the group, turning his head towards them as he walks. One of the men, identified as Rolando by both Detective Dreyer and Montano, jumps up and appears to chase him. A third man, identified as Tato, follows them. The three men disappear from view. The remaining people on the steps also leave. Approximately 30 seconds later, Rolando returns, arriving back at the stoop as a man in a light blue hoody approaches from the opposite direction. Montano identified the second man as "Little Macho." Rolando, who carries a black object in his hand, punches Little Macho, dropping the black object on the sidewalk. Little Macho stumbles and then flees. Rolando and Tato remain on the sidewalk briefly before turning and walking up the block.

The footage picks up an hour later. The external cameras show a man in a turquoise hoody standing on the steps of 1138. Montano, wearing a dark blue jacket, walks down the block and up the stairs of 1138. A third camera inside the building shows him briefly waiting outside the exterior door, facing inward. Within seconds, a man runs down the block from the opposite direction, his arm outstretched, passing 1138. At trial, Montano identified the shooter as petitioner. The second man on the stoop immediately drops to the ground, and Montano briefly disappears from the door on the interior camera. The exterior cameras appear to show him pivoting to face the street as the running figure passes 1138, pauses, turns, and runs back the way he came. Montano then opens the door to 1138 and runs up the stairs.

At trial, Montano testified that he had previously purchased marijuana from Cruz, who he knew by his street nickname "Krime," and regularly saw him in the neighborhood, where he had lived for four years. An hour before the shooting, he observed Rolando chasing Little Macho down the block. Montano saw a gun fall and Rolando pick it up, followed by a gun shot. Little Macho ran away. Montano did not see Cruz at that time. At 6:30 p.m., Montano was sitting on the steps of 1148 when he got a call that weed was available for purchase in 1138. Montano got up and walked the short distance to 1138. He saw Cruz approaching from the opposite direction, but Montano walked up the steps and pressed the buzzer. While he was waiting to be admitted, he heard gunshots. Montano testified that he turned to face the street and made eye-contact with Cruz as he ran away from the scene, his hoody falling away from his face. Throughout his testimony, both Montano and the prosecutor referred to Cruz by his nickname Krime. 1

After Montano identified Cruz in the line-up, he left the police precinct and ran into "Big Macho" near a bodega. Big Macho was accompanied by another man, and both were carrying knives. Big Macho ordered Montano to enter a nearby apartment building, where the men demanded to know why he had been picked up by the police. Montano responded that he had an outstanding warrant. Although Big Macho and his companion professed not to believe Montano's story, he eventually persuaded them that he had no intention of cooperating with police in the investigation. As a result of the incident, Montano and his family were relocated. The Court then delivered a limiting instruction that this testimony was offered "to complete the narrative" and for "consciousness of guilt."

Haydee Bueso, Palacios's widow and the mother of his six -year-old child, also testified at trial. Bueso authenticated a photo of Palacios taken before his death, which was then shown to the jury. The photograph shows Palacios sitting in a chair, smiling for the camera. Bueso became emotional after viewing the photograph but composed herself and continued to testify.

Over objections from the defense, the prosecution introduced six recordings from phone calls Cruz made to friends and family while detained at Rikers Island. The calls generally revealed Cruz's then lawyer's view of the strength of the video evidence. In the first call, Cruz said he was "going through it" because his lawyer told him he had seen a video of the shooting. He added that his lawyer was planning to come see him the following Sunday. Cruz's friend asked, "so they got one?" and Cruz responded "yeah." When the friend expressed disbelief, Cruz

1 The prosecutor also referred to Cruz as Krime in his opening statement and the Court required Cruz to display a forearm tattoo of his nickname. told him "dead a ss, bro." In another call, Cruz told a friend that his lawyer saw the video and "they got me on the video." The friend asked if it was "bad" and Cruz responded "yeah, man." In a third call, Cruz told his mother that it was "over" because "[t]hey got [him] on camera." She responded: "But not you?" Cruz answered: "Yeah, me, me." His mother reassured him that the police would "catch the guy." In another call, Cruz told the caller that "they got [him] on video." When asked if he had seen the video, Cruz responded that only his lawyer had seen it.

In the final call, Cruz complained that "Mach" had not sent any money to his account, noting that when "Mach" was incarcerated Cruz had made weekly deposits. "I used to make like $300 to $400 a day selling bud," he continued. "I know how much [he's] getting. I know [he's] not broke."

After the calls were played, the parties stipulated that current counsel was not Cruz's attorney at the time the calls were recorded.

Following two days of deliberations, during which the jurors asked to view the surveillance footage, listen to the recordings of the phone calls, and read transcripts, the jury convicted Cruz of second-degree murder. He was sentenced to the maximum sentence of 25 years to life imprisonment.

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Cruz is currently incarcerated. II. Post-Conviction Procedural History

A. CPL § 330.30 Motion Cruz filed two motions to vacate the judgment, through counsel and on his own. Counsel argued that the prosecution had failed to prove that Cruz possessed the requisite intent, pointing out that the shooter in the surveillance footage appears to be firing randomly rather than aiming. In his pro se brief, Cruz argued that the trial court had failed to give a missing witness charge, double jeopardy attached upon declaration of a mistrial in his first trial, the verdict was repugnant, and the People had changed their theory of prosecution. The Court denied both motions, reasoning that counsel's motions for a trial order of dismissal at the close of the prosecution's case and again at the close of evidence were insufficiently specific to preserve the issues for appellate review. The Court added that the claims Cruz raised in his pro se motion did not satisfy the statutory criteria in CPL § 330.30.

B. Direct Appeal On appeal, Cruz's counsel argued: (1) the conviction was against the weight of the evidence because the prosecution had failed to prove that Cruz was the shooter and that the death was intentional; (2) the recordings of the Rikers Island calls were erroneously admitted and violated Cruz's right to counsel; (3) the admission of Montano's testimony regarding third- party threats, the photograph of Palacios, and the repeated mentions of the nickname "Krime" deprived Cruz of his due process right to a fair trial; and (4) Cruz's sentence was excessive.

The Appellate Division affirmed the conviction. People v. Cruz, 154 A.D.3d 429 (1st Dep't 2017). As relevant here, the Court rejected Cruz's argument that the admission at trial of the phone recordings, which disclosed what his former attorney told him about the strength of the video evidence, violated his rights to counsel and due process. The Court concluded that Cruz objected to this evidence on other grounds, and so this argument was unpreserved on appeal. Id. at 429–30. In the alternative, the Court rejected the claim on the merits, concluding that Cruz was on notice that the calls might be recorded, voluntarily disclosed what would have been privileged communications, and so waived the attorney-client privilege. Id. at 430. Furthermore, the calls did not provide any "insight into possible defense st rategies and preparations." Id. (quoting People v. Johnson, 27 N.Y.3d 199, 205 n. (2016)). The Court also held that the admission at trial of the third-party threats, decedent's photograph, and Cruz's nickname did not deprive him of a fair trial. Id. The Court found that, in each instance, the evidence was relevant and not unduly prejudicial.

Cruz sought leave to appeal to the New York Court of Appeals. In his application, defense counsel asserted that the trial court abused its discretion in admitting the phone calls. He argued that the Court should grant leave to clarify dicta in People v. Johnson, which suggested that the admission of phone calls that provide insight into defense strategies and preparations would be a violation of the right to counsel. Counsel also incorporated by reference the remaining claims raised in the appellate brief.

A Judge of the Court denied the application with leave to renew within 30 days after the Court of

Appeals issued a decision in People v. Cisse, 32 N.Y.3d 1198 (2019). See People v. Cruz, 30 N.Y.3d 1059 (2017) (Rivera, J.). In Cisse, the Court held that the defendant impliedly consented to the monitoring and recording of phone calls made while he was incarcerated at Rikers Island, and the admission of those "nonprivileged" calls did not vio late his right to counsel under the New York State Constitution. The same day, the Court of Appeals rendered a decision in People v. Diaz, 33 N.Y.3d 92 (2019), holding that incarcerated people do not have a reasonable expectation of privacy in nonprivileged telephone calls. Id. at 95. Although Cruz's counsel renewed his application and attempted to distinguish Cisse and Diaz, a Judge of the Court denied leave on May 9, 2019. People v. Cruz, 33 N.Y.3d 1030 (2019) (Rivera, J.).

C. The § 2254 Petition Interpreting Cruz's pro se § 2254 petition to raise the strongest arguments that it suggests, Cruz argues that the admission of the recorded phone calls violated his right to counsel, and that the admission of phone calls, third-party threats, the decedent's photo, and evidence of his nickname "Krime" individually and collectively deprived him of his fundamental right to a fair trial under the 14 th

Amendment. See Gomez v. Brown, 655 F. Supp. 2d 332, 342 (S.D.N.Y. 2009). The Respondent counters that the Appellate Division rejected his claim that the admission of the phone calls violated his right to counsel on an independent and adequate state law ground; in the alternative, the state court did not unreasonably apply relevant Supreme Court precedent in rejecting the claim on the merits because the Court has never ruled on the question. Regarding the remaining evidentiary claims, Respondent argues that state evidentiary issues are not cognizable on federal habeas review and the Appellate Division's determination was not an unreasonable application of clearly established Supreme Court precedent. In his reply, Cruz attempts to argue that his trial counsel did preserve the right to counsel claim for appellate review, all of his claims were fully exhausted on his direct appeal, and he did not waive his right to counsel by discussing his lawyer's opinion of the surveillance footage on the phone call.

DISCUSSION I. Timeliness

It is uncontested that Cruz's habeas petition is timely. The Antiterrorism and Effective Death Penalty Act (the "AEDPA") requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year. 28 U.S.C. § 2244(d)(1)(A). This one-year period serves the "well -recognized interest in the finality of state court judgments." Duncan v. Walker, 533 U.S. 167, 179 (2001). A petitioner's judgment becomes final 90 days after an order of the Court of Appeals is filed – i.e. , after the "period to petition for a writ of certiorari to the United States Supreme Court." Pratt v. Greiner, 306 F.3d 1190, 1195 & n.1 (2d Cir. 2002).

Cruz filed his petition for a writ of habeas corpus on November 14, 2018, after the Court of Appeals denied his leave application with leave to renew following a decision in People v. Cisse. Accordingly, this Court stayed all litigation deadlines pending the resolution of Petitioner's renewed application

for leave to appeal to the Court of Appeals . Cruz renewed his application for leave to appeal on March 11, 2019, and it was denied on May 9. Accordingly, his conviction became final on August 7, 2019, when his time for filing a petition for certiorari with the U.S. Supreme Court expired. As such, Cruz's petition – which was fully briefed well before AEDPA's one -year statute of limitation expired in August 2020 – is timely. II. Exhaustion

Before a federal court may review a § 2254 claim, a petitioner must exhaust all remedies provided in state court. 28 U.S.C. § 2254(b)(1)(A). A claim is deemed exhausted if the petitioner: (1) fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts; and (2) presented his claim to the highest state court that could hear his claim. Baldwin v. Reese, 541 U.S. 27, 29 (2004). Further, a habeas petitioner who has not met the State's procedural requirements cannot prevail on a claim unle ss he "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 v. Thompson, 501 U.S. 722, 750 (1991). "The procedural default doctrine protects the integrity of the exhaustion rule, ensuring that state courts receive a legitimate opportunity to pass on a petitioner's federal claims and that federal courts respect the state courts' ability to correct their own mistakes." Galdamez v. Keane, 394 F.3d 68, 73 (2d Cir. 2005). Cruz's right to counsel and fair trial claims are exhausted. Appellate counsel fully briefed both claims in his Appellate Division briefs, explicitly citing the constitutional grounds for each, and raised them again in his application for leave to appeal to the Court of Appeals. See Reid v. Senkowski, 961 F.2d 374, 376 (2d Cir. 1992) (stating that minimal reference to the Constitution satisfies the exhaustion requirement); see also de la Cruz v. Kelly, 648 F. Supp. 884, 888 (S.D.N.Y. 1986) (finding that the petitioner sufficiently alerted the state court of the constitutional aspect of his claims when he argued that the challenged ruling denied him a fair trial and cited the Fourteenth Amendment). III. Standard of Review

After exhaustion, but before a federal court can issue a writ of habeas corpus, a petition must satisfy a "difficult to meet[] . . . and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations and internal quotation marks omitted). Under the AEDPA, habeas relief may be granted only when the state court's 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 in the State court proceeding. 28 U.S.C. § 2254(d). "'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003). Under this rule, "circuit precedent does not constitute 'clearly established

Federal law '" and "cannot form the basis for habeas relief." Parker v. Matthews, 567 U.S. 37, 48–49 (2012); see also Rodriguez v. Miller, 537 F.3d 102, 106–07 (2d Cir. 2008) ("No principle of constitutional law grounded solely in the holdings of the various courts of appeals or even in the dicta of the Supreme Court can provide the basis for habeas relief.").

A state court decision is "contrary to" clearly established federal law "if the state court 'applied a rule that contradicts' that precedent or reached a different result than the Supreme Court on facts that are 'materially indistinguishable.'" Mannix v. Phillips, 619 F.3d 187, 195 (2d Cir. 2019) (internal alterations omitted) (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000)). As long as the state court decision applied the correct legal rule to the facts of a petitioner's case, it is not subject to habeas review, even if the federal court would have reached a different conclusion if it were to apply the rule itself. Williams, 529 U.S. at 406. A state court decision involves an "unreasonable application" of clearly established federal law if the court identified the legal rule set forth in governing Supreme Court cases, but unreasonably applied the rule to the facts of the case. Id. at 407–08. A federal court may grant habeas relief only when the state court decision, as it pertains to the issue of federal law, was "objectively unreasonable" in light of relevant precedent; thus, in construing and applying federal law, even erroneous state court decisions, if deemed reasonable, will survive habeas review. Id. at 409–13; see also Besser v. Walsh, 601 F.3d 163, 178 (2d Cir. 2010) ("The proper inquiry is not whether a state court's application of, or refusal to extend, the governing law was erroneous, but whether it was 'objectively unreasonable.'") (quoting Williams , 529 U.S. at 409–10). IV. Right to Counsel Claim

1. Procedural Bar "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" Walker v. Martin , 562 U.S. 307, 315 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 55 (2009)) (alteration in Kindler). The state-law ground may be substantive or procedural. Id.; accord Jimenez v. Walker, 458 F.3d 130, 138 (2d Cir. 2006). "Even where the state court has ruled on the merits of a federal claim 'in the alternative,' federal habeas review is foreclosed where the state court has also expressly relied on the petitioner's procedural default." Murden v. Artuz, 497 F.3d 178, 191 (2d Cir. 2007) (quoting Green v. Travis, 414 F.3d 288, 294 (2d Cir. 2005)). "To bar federal habeas review, however, the state court's decision must rest not only on an independent procedural bar under state law, but also on one that is 'adequate to support the judgment.'" Id. at 191–92 (quoting Jimenez, 458 F.3d at 138).

A state procedural bar is "adequate" if it "is firmly established and regularly followed by the state in question" in the "specific circumstances presented in a case." Monroe v. Kuhlman, 433 F.3d 236, 241 (2d Cir. 2006) (citation omitted); see also Cotto v. Herbert, 331 F.3d 217, 240 (2d Cir. 2003).

The Court of Appeals has repeatedly held that CPL § 470.05, New York's codified contemporaneous objection rule, constitutes an independent and adequate state ground of decision barring federal habeas review. See Garcia v. Lewis, 188 F.3d 71, 78–79 (2d Cir. 1999) (collecting cases); see also

Richardson v. Greene, 497 F.3d 212, 218 (2d Cir. 2007). Under § 470.05(2), the party claiming error must register an objection "at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same." Such an objection "is sufficient if the party made his position with respect to the ruling or instruction known to the court." Id. A general objection will not suffice: "New York's highest courts uniformly instruct that to preserve a particular issue for appeal, defendant must specifically focus on the alleged error." Garvey v. Duncan, 485 F.3d 709, 714 (2d Cir. 2007).

Cruz's claim that the admission of the phone call recordings violated his right to counsel is procedurally barred. In a pre-trial Molineux hearing, defense counsel objected to the admission of the calls on the grounds that they were unduly prejudicial because they would reveal that Cruz was incarcerated before trial. He requested, and the Court granted, a limiting instruction that the fact that Cruz was detained pretrial was irrelevant to the question of his guilt. Although the Court suggested that repeating a statement by his lawyer might not be evidence of consciousness of guilt, the prosecution clarified its position, and the Court admitted the recordings. When asked if he wished to add anything, defense counsel declined. Defense counsel did not raise – and the Court did not consider – whether the admission of Cruz's conversations discussing his lawyer's advice violated his right to counsel. Because defense counsel did not specifically object on those grounds, the Appellate Division correctly determined that the claim was unpreserved for appellate review. See People v. Miranda, 27 N.Y.3d 931, 932–33 (2016) (holding that Fourth Amendment claim was unpreserved where defendant objected to the admission of evidence on different grounds, despite the trial court's "mere reference" to the standard at issue on appeal); see also People v. Thomas, 50 N.Y.2d 467, 473 (1980) (noting that the preservation rule "applies generally to claims of error involving Federal constitutional rights"). The claim is still procedurally barred even though the Appellate Division addressed the merits of his argument in the alternative. Garcia, 188 F.3d at 77.

A petitioner may overcome a procedural bar by demonstrating either cause for the default and resultant prejudice, or that the failure to consider the federal habeas claim will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also DiSimone v. Phillips, 461 F.3d 181, 190 (2d Cir. 2006) ("Where a petitioner has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the petitioner can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" (brackets omitted) (quoting Bousley v. United States, 523 U.S. 614, 622 (1998))). Cruz has not demonstrated good cause to excuse trial counsel's failure to preserve the claim or presented "new," "credible," and "compelling" evidence of his innocence. Hyman v. Brown, 927 F.3d 639, 656–57 (2d Cir. 2019). His claims that Montano's testimony was fabricated are insufficient to satisfy his "demanding" burden. Id.

I therefore recommend the Court find that Cruz's right to counsel claim is procedurally barred because the Appellate Division's decision rested on the adequate and independent state ground of preservation.

2. Merits Review Even if the Court could reach the merits of Cruz's claim that the admission of the phone calls undermined his Sixth Amendment right to counsel, he cannot establish that the state court's determination was contrary to clearly established federal law or was based on an unreasonable determination of the facts. The Supreme Court has never squarely addressed the question of whether the admission of recorded inmate calls implicates the right to counsel. Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("[I]t is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." (quoting 28 U.S.C. § 2254(d)(1))). The Court has held that the deliberate elicitation of statements by federal agents in the absence of counsel violates the Sixth Amendment. See, e.g., Fellers v. United States, 540 U.S. 519, 523–24 (2004). But Cruz voluntarily shared the information with friends and family. See United States v. Jacques, 684 F.3d 324, 332 (2d Cir. 2012) ("When prison authorities place an informant in close proximity to a defendant, even when expecting the defendant to divulge incriminating information, the Sixth Amendment is not violated unless the informant actively elicits statements that are incriminating with regard to charged crimes.") (citations omitted). Thus, the state court decision was not an unreasonable application of Federal law as defined by the Supreme Court.

In state court, Cruz did not argue that the admission of the calls represented a per se violation of his right to counsel, recognizing that the New York Court of Appeals had previously rejected this argument in People v. Johnson. 27 N.Y.3d at 206. Instead, he relied on dicta from Johnson that left open the question of whether the admission of calls that provide insight into possible defense strategies and preparation violates the Sixth Amendment, arguing that the calls revealed defense counsel's opinion of his case and prejudiced him at trial. The Appellate Division rejected this interpretation of the conversations, finding that the recordings did not reveal litigation strategies. Instead, the Appellate Division concluded that the evidence was relevant to Cruz's consciousness of guilt, and any attorney- client privilege was waived. Cruz, 154 A.D.3d at 430 (citing United States v. Mejia, 655 F.3d 126, 133–35 (2d Cir. 2011)). Because there is no Supreme Court precedent holding that the right to counsel is violated by the admission of calls in which an inmate discloses communications with counsel to a third party, habeas relief on this ground is unavailable.

As such, should the Court find that Cruz's right to counsel claim is not procedurally barred, I recommend the Court find that it is without merit. V. State Evidentiary Violations

1. Legal Standard The Supreme Court has held that "federal habeas corpus relief does not lie for errors of state law," including erroneous state evidentiary rulings. Estelle v. McGuire , 502 U.S. 62, 67 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990)); see also Jones v. Conway, 442 F. Supp. 2d 113, 130 (S.D.N.Y. 2006) ("Where a petitioner merely challenges a state court's evidentiary rulings, this Court cannot consider the petitioner's claims."). In order to show that "the admission of evidence by a state court constitutes a ground for federal habeas relief, a petitioner 'must demonstrate that the alleged evidentiary error violated an identifiable constitutional right,'" namely, that the "alleged error was so prejudicial that it deprived him of a 'fundamentally fair trial.'" Jones,

442 F. Supp. 2d at 130 (internal citations omitted).

To rise to the level of a due process violation, the evidence must be "sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed in the record without it" when viewed "objectively in light of the entire record before the jury." Collins v. Scully, 755 F.2d 16, 18–19 (2d Cir. 1985). Federal courts apply a two-part analysis to determine whether the error deprived the petitioner of a fair trial, "examining (1) whether the trial court's evidentiary ruling was erroneous under state law, and (2) whether the error amounted to the denial of the constitutional right to a fundamentally fair trial" under clearly- established Supreme Court precedent. Taylor v. Connelly, 18 F. Supp. 3d 242, 257 (E.D.N.Y. 2014); see also Martinez v. Colvin, No. 1:17-cv-00757 (PKC)(KHP), 2018 WL 7047148, at *15 (Nov. 6, 2018), report & rec. adopted 2018 WL 6649608 (S.D.N.Y. Dec. 19, 2018). This is a "doubly difficult challenge" because it requires the petitioner to demonstrate that the admission of the evidence was "so prejudicial to his defense that he was deprived of due process and he must identify a Supreme Court case that clearly establishes that the admission of [the evidence] . . . constitutes a violation of the Fourteenth Amendment." Evans v. Fischer , 712 F.3d 125, 133 (2d Cir. 2013) (reversing district court's grant of a writ of habeas where petitioner had not identified any Supreme Court holding that was contrary to the state court's decision).

2. Analysis Cruz cannot show that the admission of the phone calls, decedent's photo, third-party threat testimony, and evidence of his nickname "Krime" violated his right to a fair trial. Cruz contends that each individual error was sufficient to constitute a due process violation. Respondent notes that Cruz's appellate counsel argued only that the cumulative effect of these errors denied him his fundamental right. Regardless of whether this claim was properly exhausted, I conclude that Cruz's arguments are meritless.

First, the trial court's evidentiary rulings were not erroneous under state law. The New York Court of Appeals has held repeatedly that recordings of phone calls made by incarcerated people are admissible at trial, although the Court has cautioned that trial judges should carefully weigh the probative value of the calls "to ensure compliance with constituti onal mandate and the usual rules of evidence and criminal procedure." See Johnson, 27 N.Y.3d. at 208. In Cisse, the Court concluded that the defendant had "impliedly consented to the monitoring and recording of his telephone calls," and the recording of the "nonprivileged phone calls did not violate his right to counsel under the New York State Constitution." 32 N.Y.3d at 1200. In a decision issued the same day, the Court rejected a Fourth Amendment challenge to the admission of call recordings. Diaz, 33 N.Y.3d at 95. Here, the trial court weighed the probative value of the calls as evidence of consciousness of guilt against their prejudicial effect and appropriately issued a limiting instruction cautioning the jury that the fact that Cruz was incarcerated while awaiting trial did not constitute evidence of guilt.

Similarly, the New York Court of Appeals has held that photographs of the victim are admissible as long as "they tend to prove or disprove some material fact in issue," a question "addressed to the sound discretion of the trial court." People v. Stevens, 76 N.Y.2d 833, 835 (1990). At trial, the

prosecution sought to argue that Cruz confused Palacios with Rolando or Tato, and so the photo allowed the jury to compare Palacios with the images of Rolando and Tato in the surveillance. As such, the photo was relevant to an element of the charged offense and so was admissible at trial under New York law. Id.; see also Davis v. People, No. 07-cv- 9265 (SHS)(FM), 2011 WL 2518951 at *14 (May 18, 2011) (finding photographs of victim "on joyous occasions" were relevant and so denying petitioner's due process habeas claim), report & rec. adopted 2011 WL 2519206 (S.D.N.Y. June 23, 2011).

Evidence of threats made by third parties are also admissible under New York law to prove consciousness of guilt if a nexus can be established to the defendant by either direct or circumstantial evidence. See People v. Plummer, 36 N.Y.2d 161, 164 (1975). Here, that nexus was established by Cruz's instruction to his grandparents to " call Macho," who approached and threatened Montano later the same day. The trial court also properly issued a limiting instruction cautioning the jury that Cruz had not been charged with any crime related to that evidence, and the testimony should be considered only for consciousness of guilt.

The question of whether the admission of Cruz's nickname was properly admitted is closer, especially given the prosecutor's repeated invocation of the name in his opening statement. See People v. Santiago, 255 A.D.2d 63, 66 (1st Dep't 1999) (reasoning that defendant's nickname "'Murder Mike' was only marginally relevant to [the witness's] testimony identifying defendant as the shooter" and the error was compounded by the prosecutor's reference to the name in summation). However, as in Santiago, any error was arguably harmless in light of Montano's identification of Cruz as the shooter. Id. Furthermore, the Appellate Division has routinely admitted evidence of nicknames such as "Danger," "Psycho," "Murder," and "Criminal" where relevant for identification purposes. People v. Johnson, 136 A.D.3d 498, 498 (1st Dep't 2016); People v. Louis, 192 A.D.2d 558, 558–59 (2d Dep't 1993); People v. Hoffler, 41 A.D.3d 891, 892 (3d Dep't 2007); People v. Tolliver , 93 A.D.3d 1150, 1150–51 (4th Dep't 2012).

Finally, Cruz contends that these evidentiary errors were magnified by additional errors, including that Detective Dryer's testimony was " hearsay," and that the Department of Correction officer who authenticated the recordings said that inmate calls were monitored for "security issues." To the extent Cruz raises these issues independently, they were not challenged below and are not exhausted claims. Moreover, Cruz has not established that the admission of this evidence violated the rules of evidence.

Even if one or more of these admissions violated New York law, Cruz cannot show that they violated his fundamental right to a fair trial under clearly established Supreme Court precedent. The most compelling evidence at trial was Montano's eyewitness identification of Cruz as the shooter. Although the consciousness of guilt evidence may have served to corroborate his testimony, neither the phone calls nor the third-party threat testimony was sufficiently material to provide a basis for conviction. Moreover, the trial court properly administered limiting instructions regarding the phone

calls and the third-party threats, tempering any possible prejudice to Cruz. See Dowling v. U.S., 493 U.S. 342, 352–53 (1990) (holding no violation of due process where challenged evidence was "circumstantially valuable in proving petitioner's guilt," and trial judge provided limiting instructions); see also Stenson v. Heath, No. 11-cv-5680 (RJS)(AJP), 2012 WL 48180 at *15 (Jan. 10, 2012) (holding that challenged evidence did not deprive petitioner of fundamentally fair trial where trial court gave a jury instruction making clear that it could be considered only for identification purposes), report & rec. adopted, 2015 WL 3826596 (S.D.N.Y. June 19, 2015). Most importantly, the Supreme Court has not held that the admission of the types of evidence challenged here constitutes a violation of the Fourteenth Amendment. See Evans, 712 F.3d at 133–34 (explaining that while Supreme Court precedents provide guidance as to "what evidentiary errors would not violate due process . . . they provide very limited guidance as to which evidentiary errors would do so"). Because Cruz cannot show that the admission of the phone calls, decedent's photo, third- party threat testimony, and evidence of his nickname denied him his fundamental right to a fair trial, I recommend that Cruz's claim for habeas relief on these grounds be denied.

CONCLUSION I recommend that the petition for a writ of habeas corpus be DENIED. Because the petition does not make a substantial showing of a denial of a constitutional right, a certificate of appealability should not issue. See 28 U.S.C. § 2253. I further recommend that the Court certify, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore in forma pauperis status should be denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444–45 (1962).

DATED: June 1, 2022

New York, New York

* * * NOTICE OF PROCEDURE FOR FILING OBJECTIONS

TO THIS REPORT AND RECOMMENDATION The parties shall have fourteen days from the service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Analisa Torres at the United States Courthouse, 500 Pearl Street, New York, New York 10007, and to any opposing parties. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Torres. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).