Castro v. LaManna

2020 | Cited 0 times | S.D. New York | March 30, 2020

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK Mario Castro,

Petitioner, -against- Jamie LaManna, Superintendent of Green Haven Correctional Facility,

Respondent.

1:18-cv-03315 (RA) (SDA) REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE. TO THE HONORABLE RONNIE ABRAMS, UNITED STATES DISTRICT JUDGE:

INTRODUCTION Pro se Petitioner Mario Castro ("Castro" or "Petitioner"), currently incarcerated at Green Haven Correctional Facility ("Green Haven") in New York State, se eks a writ of habeas corpus as authorized by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. (Am. Pet., ECF No. 19, at 1.) A Bronx County jury convicted Castro of Murder in the Second Degree pursuant to N.Y. Penal Law § 125.25(3). He was sentenced to an indeterminate term of imprisonment of from twenty-five years to life (with that sentence to run consecutive to another sentence he had been currently serving). (See Declaration in Opposition, filed April 12, 2019 ("Opp. Decl."), ECF No. 20, ¶ 4 ; First Dept. Brief for Defendant-Appellant, ECF No. 20-1, at 1.) In his Amended Petition, Castro seeks habeas relief on the following grounds: (1) that his right to a fair trial was violated when the trial court permitted the prosecution to introduce " highly inflammatory evidence" of alleged prior misconduct (Ground One); (2) the trial court's failure to deliver an accomplice-corroboration charge with respect to witness Joshua Mendez-Torres

("Torres") was a violation of Castro' s right to due process (Ground Two); and (3) Castro's right to a fair trial was violated by inaccurate witness testimony from Ramon Acevedo ("Acevedo") and the trial court's refusal to instruct the jury that Acevedo's guilty plea was not evidence of Castro 's guilt (Ground Three). (Am. Pet. at 3-9.)

On April 12, 2019, Respondent Jamie LaManna, Superintendent of Green Haven ("Respondent") filed his opposition to the Amended Petition. (See Opp. Decl.) 1

On June 18, 2019, Castro filed a reply in further support of his Amended Petition. (Reply, ECF No. 22.)

For the reasons set forth below, I respectfully recommend that the Amended Petition be DENIED in

its entirety.

BACKGROUND I. Facts Giving Rise To Petitioner' s Conviction

According to testimony presented at trial, 2

in 2006, Theresa Reyes ("Reyes") lived alone in a one-bedroom apartment at 1993 Bathgate Avenue, Bronx, New York. (See Tr. 51-52, 58 (Caban) 3

.) Reyes had a daughter, Piedad Bailon, who was dating Jose Holguin ("Holguin"). (Id. 49- 50.) Holguin was the uncle of Acevedo. (Id. 230 (Holguin).)

Holguin occasionally helped Reyes with tasks around her house, including once helping her hide, in a framed picture in her apartment, approximately $25,000 in cash received from an

1 Respondent's opposition memorandum of law ("Opp. Mem.") is attached to his Opposition Declaration and is filed at ECF No. 20 at pages 6 to 52. 2 Citations to pages of the trial transcript (which is filed at ECF No. ECF No. 25-4, 25-5 and 25-6) are made using the prefix "Tr." prior to the page number, e.g., Tr. 1. If the citation is to witness testimony, then the surname of the witness is included in parentheses after the transcript page(s), unless the context of the citation makes clear who was testifying. 3 Caban was Reyes' granddaughter. (Tr. 50.)

insurance payout. (Tr. 223-24, 267-68, 270 (Holguin), 388 (Acevedo).) In November 2006, Holguin enlisted Acevedo's help to assist Reyes move belongings to and from her home. (Id. 261-62, 273- 74 (Holguin), 369-80 (Acevedo).) During the move, Acevedo incidentally commented on a framed picture in Reyes' apartment in which, unbeknownst to Acevedo at that time, Reyes and Holguin had hidden the insurance money. (Id. 265 (Holguin), 376-80 (Acevedo).) Later that day, Holguin confided to Acevedo that he previously helped Reyes hide approximately $25,000 in the framed picture. (Id. 268-76 (Holguin), 379-81 (Acevedo).)

Petitioner, Acevedo, Pablo Garcia ("Garcia") and Torres grew up together in the Bronx. (Tr. 356-57, 408 (Acevedo).) They called themselves the "Bollo Brothers."

4 (Id. 880-81 (Torres).) After learning about the money hidden in the frame, Acevedo told Petitioner, Garcia and Torres about the money. (Id. 353-57, 380-400 (Acevedo).) Over the course of two meetings, the group planned to steal the money. (Id. 380-400, 486-90, 493 (Acevedo).) The group decided Acevedo should not participate, because he might be recognized. (Id. 392 (Acevedo).)

On December 17, 2006, Petitioner, Garcia and Torres met at Reyes' apartment building. (See Tr. 536-37 (Acevedo).) Torres decided not to go forward with the crime and left. (Id.) Petitioner and Garcia remained at Reyes' building overnight and , on the morning of December 18, 2006, they

accosted Reyes at her apartment door, forcibly gaining entry to her apartment by pushing the door open when Reyes opened it. (See id. 399-400, 510, 521-22, 525, 543 (Acevedo), 906-08 (Torres).) Petitioner and Garcia restrained Reyes with duct tape and other restraints, and

4 On December 19, 2006, the day after the break-in discussed below, Petitioner and Garcia both got tattoos on their forearms that contained the word "Bollo." (Tr. 409-12 (Acevedo), 904-05 (Torres).) In addition, in the weeks thereafter, Petitioner and Garcia purchased cell phones, iPods, clothing and new skateboards. (Id. 412-13 (Acevedo), 905-06 (Torres).)

rolled her into a blanket. (See id. 41-43 (Lt. Wilbur), 5

177-80 (Det. Curry), 6

404-05 (Acevedo), 604, 614-15 (Det. Skulsky). 7

Castro and Garcia left with Reyes still restrained inside her home. (Id. 41- 43 (Lt. Wilbur), 177-80 (Det. Curry), 404-05 (Acevedo), 604, 615 (Det. Skulsky).)

On December 19, 2006, the New York City Fire Department, responding to a 9-1-1 call reporting Reyes missing, forced entry into Reyes' apartment and discovered her deceased. (Tr. 34-44 (Lt. Wilbur).) A severed glove fingertip was found on Reyes' body. (Id. 681 (Det. Skulsky).) DNA evidence from the glove tip was uploaded into the Combined DNA Index System ("CODIS") but did not initially return a match. (Id. 635-36 (Det. Skulsky), 996-1008 (DeCastro). 8

On March 31, 2008, the Office of the Chief Medical Examiner was notified of an investigatory lead regarding the death of Reyes. 9

(Tr. 1008 (DeCastro).) The name of the person associated with the lead was Petitioner. (See id.) On April 14, 2008, Detective Skulsky interviewed Petitioner, who denied knowing Reyes. (Id. 636-46 (Det. Skulsky).) However, after being shown an autopsy photograph of Reyes and being told that his DNA was found on her body, Petitioner stated to Detective Skulsky, " if this is what God ha[s] in store for [me] then so be it." (Id . 646 (Det. Skulsky).)

5 Lieutenant Wilbur was employed by the New York City Fire Department and responded to the 9-1-1 call referenced below. (Tr. 33, 34-44.) 6 Detective Curry was a detective with the New York City Police Department assigned to the Crime Scene Unit. (Tr. 143.) 7 Detective Skulsky was a detective with the Bronx Homicide Task Force. (Tr. 593.) 8 DeCastro worked with the New York City Office of the Chief Medical Examiner in the Department of Forensic Biology. (Tr. 966.) 9 In 2007, Petitioner had been sentenced in an unrelated criminal proceeding and, as part of prison intake, his DNA was sampled and uploaded in CODIS, which led to a DNA match. However, the jury was not told of the unrelated crime, but only was told of an "investigative lead." (See Tr. 1008.)

On June 19, 2009, Detective Skulsky interviewed Torres. (Tr. 650-52 (Det. Skulsky).) Torres stated that Petitioner, Acevedo and Garcia had been involved with Reyes' murder . (Id.) On June 23, 2019, Detective Skulsky interviewed Acevedo. 10

(Id. 653-54 (Det. Skulsky).) Acevedo confessed to the murder and gave a videotaped statement. (See id. 654 (Det. Skulsky).) Acevedo signed a cooperation agreement and testified at trial against Petitioner, pursuant to that agreement. (See id. 360-66 (Acevedo).) II. Relevant State Court Proceedings

A. Molineux Hearing 11 Prior to trial, at a hearing on June 11, 2013, the prosecution made an application to introduce two prior bad acts of Petitioner and Garcia. 12

The first was a robbery in SoHo, during which Petitioner, Garcia and Torres robbed a woman on the street (the " SoHo Robbery"). (PT 79- 81.) The second was a burglary in Queens, during which Petitioner, Garcia and Acevedo burglarized the apartment of a friend of Acevedo (the " Queens Burglary"). 13

(PT 81-82.) The prosecution contended these two uncharged crimes were relevant, among other reasons, because Petitioner, Acevedo and Garcia utilized a common plan or scheme to rob and

10 Detective Skulsky previously had interviewed Acevedo, during which interview Acevedo denied having been involved with Reyes' death. (Tr. 417 -19, 434, 625.) 11 " A Molineux hearing is a pretrial hearing to determine whether the prosecution may use uncharged crimes or other bad acts to establish a defendant' s motive, intent, absence of mistake or accident, a ' common scheme or plan,' or identity." Person v. Ercole, No. 08-CV-07532 (LAP) (DF), 2015 WL 4393070, at *9 (S.D.N.Y. July 16, 2015) (citing People v. Molineux, 168 N.Y. 264 (1901)). 12 The Molineux hearing was held on June 12, 2013. Citations to pages of the hearing transcript (which are filed at ECF No. 25-1) are made using the prefix " PT" prior to the page number, e.g ., PT 1. 13 Acevedo had a key to the apartment, but left the window open to make it look like a random break-in. (PT 81-82.) Petitioner, Garcia and Acevedo had brought with them to the burglary a bag containing duct tape and other items. (Id.)

burglarize. (See PT 82.) Petitioner's counsel argued to exclude both the So Ho Robbery and the Queens Burglary. (See PT 93.) Justice Barbara F. Newman ruled that the prosecution could not use this evidence on its direct case. (See Tr. 741.)

B. Trial Commencing on June 26, 2013, Petitioner was tried by jury before Justice Newman. A summary of the trial testimony is set forth in Background Section I, supra. The Amended Petition implicates three aspects of the trial, i.e., (1) defense counsel's opening statement, (2) Acevedo's testimony and (3) the trial court's jury charge , which are discussed below.

1. Defense Counsel's Opening Statement During her opening statement, defense counsel described Acevedo as someone of questionable credibility who "had no problem setting up a family member's

friend .” (Tr. 30.) The prosecution later argued that this statement “open[ed] the door ,” and requested that Justice Newman revisit her Molineux ruling to permit the prosecution to use prior instances where Acevedo set up the Petitioner, like the Queens Burglary. (See Tr. 324-26, 329-32) Justice Newman denied the request, reasoning that defense counsel used the phrase “he sets up people” as a “semantic way of saying” that Acevedo set up Reyes and did not make mention of the prior alleged crimes. (Id. 333.)

2. Acevedo’s Testimony On direct examination, the prosecution elicited from Acevedo that, pursuant to the terms of his cooperation agreement with the Bronx District Attorney’s office, he had pleaded guilty to murder in the second degree and was sentenced to twenty years to life, but that if he testified truthfully, he would be allowed to replead to manslaughter in the first degree and be resentenced

to eighteen years flat. (Tr. 364.) When asked “who decides if you’re telling the truth when you sit here today and testify?” Acevedo answered, “[t]he jury does.” 14

(Id. 366.) On cross-examination of Acevedo, defense counsel elicited testimony regarding whether gloves or duct tape were discussed at the planning meetings and whether he and the others intended to hurt the victim. (Tr. 485-86, 494-506.) With respect to whether they discussed gloves or duct tape, Acevedo testified that “they knew already what to do.” (Id. 485.) Acevedo also was asked on cross-examination whether he had left a part of a glove in the victim’s apartment, which he denied. (Id. 566.)

Following Acevedo’s cross -examination, the prosecution again requested to introduce evidence of the Queens Burglary. (Tr. 476-86, 494-506, 576-90.) Over defense counsel’s opposition, Justice Newman granted the prosecution’s request:

The People contend that the cross-examination of Mr. Acevedo opened the door for them on redirect examination to elicit that on an occasion prior to December 2006, Mr. Acevedo had set up with the two same co-defendants to burglarize a woman in Queens whom Acevedo knew and that in fact that crime had occurred and no one got hurt. The defense opposes. On extensive cross-examination of Acevedo the defense attacked his credibility by impeaching his testimony that he thought that Ms. Reyes would not be hurt in the burglary and that he did not intend for her to be hurt. His plea minutes were used to impeach him. How and when and how detailed was the planning was examined by the defense in extensive cross- examination asking the witness whether he went into detail with the two others in planning specifically what would happen if Ms. Reyes resisted. He maintained that he expected that light restraint might be used by the two who went in but that he did not expect that she would be beat, dragged around or hurt. He said on page 485 of the transcript, “They knew already what to do.” Further, when questioned if duct tape was discussed, Acevedo testified, “Yes, they already 14 According to Petitioner, Acevedo’s cooperation agreement, which was in evidence (see Tr. 362), provides that it is the District Attorney’s Office that determines whether Acevedo testified

truthfully and satisfied his obligations under the agreement. (See First Dept. Brief for Defendant-Appellant at 25-26.)

had it. That's what was discussed." H e did not say why the details were not planned other than that he wanted to know as little as possible, but reiterated that he did not expect her to be hurt. Defense attacked his credibility on this point using his plea minutes and inferred that his testimony that he did not expect her to be hurt was a total fabrication, and that in fact the reason that he was making up this bogus story about slight force was that in fact he himself had gone into the apartment and killed Ms. Reyes who, of all three defendants only he was known by her. But there is another explanation for his belief Ms. Reyes would not be seriously hurt; that he had planned and the other two had executed months before an identical burglary, set up by Acevedo and no one got hurt, so he knew, as he said, that they knew what to do and from that testimony the jury may infer that is why he didn't know and didn't need to know all of the details here. The jury is entitled to hear on redirect this alternative explanation of why he believed that Ms. Reyes would not be hurt, to which he alluded when he said they knew what to do. Furthermore, since the defense has taken the position that only Acevedo had a motive to kill Ms. Reyes and did so, the defense attack on the credibility of his stated expectation that she would not be hurt as characterized as fake, false and nonexistent demands that the People be permitted to elicit the testimony concerning the Queens burglary to explain to the jury the background and context of his stated belief, confidence in them and that she would not be hurt.

* * * The redirect the People seek is properly admissible as directly responsive to the heart of the cross-examination by the defense of Acevedo. It provides the jury with the reason why he believed she would not be hurt and another reason why he left the details to them; the less that he knew the better and they had done it already so they had demonstrated that, as he testified to, they knew what to do. It counters the defense assertion that he concocted this testimony to cover the fact that he entered the apartment and killed her. (Tr. 741-44.)

Based on the trial court's ruling, the prosecution on redirect elicited testimony from Acevedo that, in the summer of 2006, Petitioner and Garcia burglarized an apartment in Queens; that Acevedo had given them the key to the apartment; that they made it look like a break-in; and that no one had gotten hurt, which was why he thought they could burglarize the apartment

without hurting Reyes. (Tr. 780-02.) On recross, defense counsel elicited that Acevedo had planned the Queens Burglary with Petitioner and Garcia; that Acevedo had initiated it; that the tenant was his friend; that Acevedo had waited at the subway station while Petitioner and Garcia burglarized the apartment; that Garcia had brought a bag with gloves; and that Acevedo had told the prosecutor about the Queens Burglary in 2011, but that he had not mentioned it in his prior statements in June 2009. (See id. 784-88.)

During redirect, the court instructed the jury that it had just " heard about something that allegedly occurred in Queens . . . [and Petitioner] is not being charged with any crimes related to this Queens

event" and that the testimony " is not to be used by you as any evidence that he committed any of the crimes he is on trial for here . . .. " (Tr. 780.) The court further instructed the jury that this "testimony is admissible and may be used by you only to explain why Mr. Acevedo's testimony was that he did not expect Ms. Reyes to be hurt in this crime and his testimony that he did not discuss the specific details of the Ms. Reyes crime with Mario Castro and Pablo Garcia before they committed it." (Id. 780-81.) 15

3. Trial Court's Jury Charge Defense counsel requested the trial court instruct the jury "that the fact that the accomplice [referring to Acevedo] did plead guilty . . . cannot be used as evidence against Mr. Castro. It's not binding on him, and it can't be used as evidence." (Tr. 1170.) Although the trial court did not give that charge, the court charged the jury as follows regarding Acevedo:

Under our law, Ramon Acevedo is an accomplice because there is evidence that he participated in and was convicted of, by plea, of a crime based upon the conduct alleged in the allegations here against the defendant.

15 The court repeated this instruction during its final charge. (Tr. 1332-33).

Our law is especially concerned about the testimony of an accomplice who implicates another in the commission of a crime, particularly when the accomplice has received or expects or hopes to receive a benefit in return for his testimony. Therefore, our law provides that a defendant may not be convicted of any crime upon the testimony of an accomplice unless it is supported by corroborative evidence tending to connect the defendant with the commission of this crime, these crimes. In other words, even if you find the testimony of Ramon Acevedo to be believable, you may not convict the defendant solely upon that testimony unless you find that it was corroborated by other evidence tending to connect the defendant with the commission of the crime. The corroborating evidence need not by itself prove that a crime was committed, and it need not prove by itself that the defendant is guilty. But the law requires that there be evidence that tends to connect the defendant with the commission of the crimes charged in such a way as may reasonably satisfy you that the accomplice is telling the truth about the defendant's participation in the crime. (Tr. 1334-35.)

C. Jury Verdict And Sentencing On July 22, 2013, Petitioner was convicted by the jury of murder in the second degree. (Tr. 1454.) On August 14, 2013, Petitioner was sentenced to an indeterminate prison term of twenty-five years to life (with that sentence to run consecutive to the sentence he had been serving at the time). 16

(Sentencing Tr. 28.) D. Direct Appeal In December 2015, on direct appeal to the Supreme Court of the State of New York, Appellate Division, First Department, Petitioner asserted, through his assigned counsel, the following claims: (1) Petitioner was denied a fair trial when the court permitted the prosecution to introduce highly inflammatory evidence of alleged prior misconduct; (2) the court failed to deliver an accomplice-corroboration charge with respect to witness Torres; (3} Acevedo's

16 The sentencing transcript is filed at ECF No. 25-6 at pages 600 to 627.

inaccurate testimony about the terms of his cooperation agreement and the court's refusal to charge that Acevedo's guilty plea was not evidence of Petitioner's guilt , misled the jury and violated Petitioner's right to a fair trial; and (4) Petitioner's sentence was excessive. (See Opp. Decl. ¶ 7.) On October 13, 2016, the Appellate Division, First Department, unanimously affirmed Petitioner's judgment of conviction. See People v. Castro, 143 A.D.3d 514 (1st Dep't 2016).

The First Department held that the trial court acted within its discretion in admitting evidence of Petitioner's prior burglary :

The court's Molineux ruling was a proper exercise of discretion. Although the court initially precluded the People from eliciting that defendant had previously committed a burglary with the other two perpetrators of the charged crime, the court properly permitted the People to ask a witness about that incident to clarify testimony elicited on cross-examination. That witness played a similar role in the prior burglary as he did in the burglary in the instant case, namely, planning the incident with the other two, targeting a building with which he was familiar, and staying away from the scene while the other two committed the burglary. In the absence of this information, the witness's testimony about the manner in which he planned the instant offense with the other two could have seemed confusing or implausible. Castro, 143 A.D.3d at 514. The First Department further held that " any error in the court's ruling was harmless in light of the overwhelming evidence of defendant's guilt, as well as the implausibility of his defense." Id.

In addition, the First Department found that Petitioner's claim that an accomplice - corroboration charge should have been given with respect to Torres was unpreserved and declined to reach it in the interest of justice or, alternatively, there was no need for said charge. Id. at 514-15. The appellate court also found that there was no " false" testimony by Acevedo about the terms of his cooperation agreement and that, in any event, any error was harmless. Id.

at 515. The court also rejected Petitioner's other claim regarding the jury charge. Id . Finally, the Appellate Division perceived no basis for reducing Petitioner's sentence. Id.

On December 1, 2016, Petitioner filed a letter with the New York Court of Appeals seeking leave to appeal. (Leave to Appeal Ltr., ECF No. 20-5.) The only grounds raised by Petitioner with the Court of Appeals related to the Molineux ruling as to the Queens Burglary. (See Leave to Appeal Ltr. at 2-8.) On January 16, 2017, Petitioner was denied leave to appeal to the New York Court of Appeals. See People v. Castro, 28 N.Y.3d 1143 (2017). III. Habeas Petition

On February 28, 2019, Castro filed the Amended Petition that is now before the Court. 17 The three claims in the Petition, which are addressed in this Report and Recommendation, are as follows: (1) the trial court erroneously permitted the prosecution to introduce evidence regarding the Queens

Burglary (Ground One); (2) the trial court should have given an accomplice- corroboration charge regarding Torres, even though Petitioner's counsel did not request such a charge (Ground Two); and (3) Acevedo's incorrect testimony about his cooperatio n agreement and the trial court's refusal to charge that Acevedo's guilty plea was not evidence of Petitioner's guilt deprived Petitioner of a fair trial (Ground Three). (See Am. Pet. 3-9.)

17 Castro's initial Petition had included ineffective assistance of counsel claims, which had not been exhausted. He sought a stay in this Court to permit him to exhaust those claims. His motion for a stay was denied and he was ordered by the Court to "amend his petition to include only his unexhausted claims." Castro v. LaManna, No. 18-CV-03315 (RA), 2019 WL 293388, at *2 (S.D.N.Y. Jan. 22, 2019).

DISCUSSION I. Legal Standards

A. AEDPA Generally " [F]ederal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers , 497 U.S. 764, 780 (1990). Rather, "28 U.S.C. § 2254 allows a court to entertain a habeas petition 'only on the ground that [an individual] is in custody in violation of the Constitution or laws or treaties of the United States.'" Garner v. Lee , 908 F.3d 845, 860 (2d Cir. 2018) (quoting 28 U.S.C. § 2254(a)).

Section 2254(d) provides, in relevant part, that a court may grant a writ of habeas corpus on a claim that has been previously adjudicated on the merits by a state court only if the state court adjudication: (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). A claim is considered " adjudicated on the merits" when it is decided based on the substance of the claim advanced, rather than on a procedural, or other, ground. See Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001). Further, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]" Johnson v. Williams, 568 U.S. 289, 301 (2013).

Under AEDPA, federal courts reviewing habeas petitions must accord substantial deference to state court decisions. " The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was

unreasonable—a substantially higher threshold. " Schriro v. Landrigan, 550 U.S. 465, 473 (2007). A state court decision is " contrary to" clearly established federal law where the state court either applies a rule that " contradicts the governing law" set forth in Supreme Court precedent or " confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision," and arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). An " unreasonable

application" of clearly established federal law pursuant to this provision occurs when the state court identifies the correct governing legal principle, but unreasonably applies that principle to " a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

In addition, federal habeas courts must presume that the state courts' factual findings are correct unless a petitioner rebuts that presumption with " clear and convincing evidence." Schriro, 550 U.S. at 473-74 (quoting 28 U.S.C. § 2254(e)(1)). " A state court decision is based on a clearly erroneous factual determination if the state court failed to weigh all of the relevant evidence before making its factual findings." Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 121 (2d Cir. 2015) (internal quotation marks omitted).

B. Exhaustion Requirement And Procedural Bar "[B]efore a federal court can consider a habeas application brought by a state prisoner, the habeas applicant must exhaust all of his state remedies." Carvajal v. Artus, 633 F.3d 95, 104 (2d Cir. 2011) (citing 28 U.S.C. § 2254(b)(1)(A)). The exhaustion requirement has two components. See Parrish v. Lee, No. 10-CV-08708 (KMK), 2015 WL 7302762, at *6 (S.D.N.Y. Nov. 18, 2015). First, a court considers whether the petitioner "'fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts.'" Id .

(quoting Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981)). "Second, having presented [the] federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim." Parrish, 2015 WL 7302762, at *7 (quoting Klein, 667 F.2d at 282). In connection with this requirement, "the Supreme Court has held that when a 'petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred,' federal habeas courts also must deem the claim procedurally defaulted." Sweet v. Bennett , 353 F.3d 135, 139 (2d Cir. 2003) (quoting Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991)).

"In New York, . . . a criminal defendant must first appeal his or her conviction to the Appellate Division, and then must seek further review of that conviction by applying to the Court of Appeals for a certificate granting leave to appeal." Galdamez v. Keane , 394 F.3d 68, 74 (2d Cir. 2005). "New York procedural rules bar its state courts from hearing either claims that could have been raised on direct appeal but were not, or claims that were initially raised on appeal but were not presented to the Court of Appeals." Spar ks v. Burge, No. 06-CV-06965 (KMK) (PED), 2012 WL 4479250, at *4 (S.D.N.Y. Sept. 28, 2012); see also DiGuglielmo v. Smith, 366 F.3d 130, 135 (2d Cir. 2004) (affirming the "denial of [a] habeas petition on the grounds, inter alia, that [petitioner's] claims were not properly exhausted" where "they were not properly presented to New York's highest court").

"When a petitioner can no longer present his unexhausted claim of trial error to the state courts," a

federal court sitting in habeas review "deem[s] the c laim procedurally barred." Richardson v. Superintendent of Mid-Orange Corr. Facility, 621 F.3d 196, 201 (2d Cir. 2010)

(internal quotation marks and citations omitted). The merits of a procedurally defaulted claim may not be reviewed by a federal court "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 claim[ ] will result in a fundamental miscarriage of justice." Coleman , 501 U.S. at 750; see also Murray v. Carrier, 477 U.S. 478, 495-96 (1986). 18

C. Adequate and Independent State Ground Doctrine Under the Adequate and Independent State Ground doctrine, "the Supreme Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Davis v. Racette, 99 F. Supp. 3d 379, 387 n.3 (E.D.N.Y. Apr. 21, 2015) (internal quotation marks omitted) (citing Coleman v. Thompson, 501 U.S. 722, 729 (1991)). "In the context of federal habeas review, if a state prisoner's federal challenge was not addressed in state court because the prisoner failed to meet a state procedural requirement, federal habeas review is barred." Id. (citing Coleman, 501 U.S. at 730). "A procedural rule is considered adequate if it is firmly established and regularly followed by the state in question." Davis v. Walsh, No. 08-CV- 04659, 2015 WL 1809048, at *9 (E.D.N.Y. Apr. 21, 2015) (internal quotation marks and citation omitted). "To be independent, the state court must actually have relied on the procedural bar as

18 The "cause" prong of the cause-and -prejudice test ordinarily requires a showing that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray, 477 U.S. at 488. The "prejudice" prong requires that the defendant suffer "actual prejudice resulting from the errors of which he complains." United States v. Frady , 456 U.S. 152, 168 (1982) (internal quotation marks and citation omitted). The petitioner must show that the errors at trial created an "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." Rosario - Dominguez v. United States, 353 F. Supp. 2d 500, 508 (S.D.N.Y. 2005) (quoting Frady, 456 U.S. at 170).

an independent basis for its disposition of the case[.]" Id . (internal quotation marks and citations omitted).

" A habeas petitioner may bypass the independent and adequate state ground bar by demonstrating a constitutional violation that resulted in a fundamental miscarriage of justice, i.e., that he is actually innocent of the crime for which he has been convicted." Dunham v. Travis, 313 F.3d 724, 730 (2d Cir. 2002); see also Coleman, 501 U.S. at 750 (merits of procedurally defaulted claim may not be reviewed by federal court "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 claim[] will result in a fundamental miscarriage of justice."). II. Castro's Claim Regarding The Admission Of

Evidence Of The Queens Burglary (Ground

One) Should Be Denied " In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire , 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" (citation omitted)). " A trial court's decision to admit evidence of uncharged crimes pursuant to Molineux "constitutes an evidentiary ruling based on state law" and is therefore generally not subject to habeas review." Cox v. Bradt , No. 10-CV-09175 (CM) (JLC), 2012 WL 2282508, at *14 (S.D.N.Y. June 15, 2012). " Notwithstanding these well-settled principles, habeas relief may be warranted based on a state court's evidentiary ruling in the rare case where a petitioner can demonstrate that an erroneous evidentiary ruling resulted in a violation of a fundamental constitutional right, like the right to a fair trial or due process." Id.

A petitioner " bears a heavy burden in challenging a state court's evidentiary ruling." Bonet v. McGinnis, No. 98-CV-06529 (HB), 2001 WL 849454, at *3 (S.D.N.Y. July 27, 2001). " To succeed on this claim, petitioner must demonstrate that the court admitted the evidence in error and that the evidence, viewed objectively in light of the entire record before the jury, was sufficiently material to provide the basis for conviction or to remove a reasonable doubt." Id. The Court first considers whether the exclusion of evidence was error under state law, and then considers whether the error amounted to the denial of the constitutional right to a fundamentally fair trial. See Stenson v. Heath, No. 11-CV-05680 (RJS) (AJP), 2012 WL 48180, at *12 (S.D.N.Y. Jan. 10, 2012), report and recommendation adopted, 2015 WL 3826596 (S.D.N.Y. June 19, 2015).

In Molineux, the New York Court of Appeals set forth five bases under which evidence of uncharged crimes may be relevant: (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan or (5) identity. Molineux, 168 N.Y. at 294-313. However, this list is "merely illustrative and not exhaustive." People v. Dorm, 12 N.Y.3d 16, 19 (2009) (citation omitted). Thus, for example, uncharged crimes are admissible to show the " [r]epeated commission of similar crimes with the same accomplice," People v. Arafet, 13 N.Y.3d 460, 466 (2013), and to " provide necessary background information on the nature of [a] relationship and place[] the charged conduct in context." Dorm, 12 N.Y.3d at 19. The admission of evidence of uncharged crimes is a " case- specific, discretionary exercise [that] remains within the sound province of the trial court, which is in the best position to evaluate the evidence." People v. Morris, 21 N.Y.3d 588, 597 (2013) (internal citations omitted). " Thus, the trial court's d ecision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law." Id.

The trial court acted reasonably in exercising its discretion. The trial court denied the prosecution's Molineux application on two occasions (both prior to trial and during trial), but later granted it based upon the cross-examination of Acevedo. As the First Department found, evidence of the Queens Burglary was admissible because in " the absence of this information, [Acevedo's] testimony about

the manner in which he planned the instant offense with the other two could have seemed confusing or implausible." Castro, 143 A.D.3d at 514 (citations omitted). The Queens Burglary explained why Acevedo thought Reyes would not be hurt, and explained why the perpetrators did not discuss gloves or duct tape in detail at the planning meetings since they already had the items and knew what to do. Thus, " the trial court reasonably applied New York law in a manner that was not contrary to or an unreasonable application of United States law or the Constitution." Vega v. Walsh, 669 F.3d 123, 126 (2d Cir. 2012) (affirming denial of habeas petition based upon trial court's admission of evidence of uncharged crimes).

In any event, even if the state courts erred in their application of New York's evidence law, there was no due process violation. See Young v. McGinnis, 319 F. App'x 12, 13 (2d Cir. 2009) ("Improperly admitted evidence can constitute a due process violation where it 'is so extremely unfair that its admission violates fundamental conceptions of justice.'") ; Vega v. Portuondo, 120 F. App'x 380, 382 (2d Cir. 2005) ("[T]he admission even of unfairly prejudicial evidence does not violate due process unless, taken in light of the record as a whole, it was sufficiently material to have removed a reasonable doubt that would otherwise have existed as to defendant's guilt."), cert. denied, 546 U.S. 836, (2005)). Putting aside the Queens Burglary evidence, the evidence of Petitioner's guilt was overwhelming, including DNA evidence, testimony by his accomplices and his own incriminating statement.

Moreover, "a s a number of courts in this District have observed, the Supreme Court has not held that the admission of evidence of a defendant's uncharged crimes to show the defendant's criminal propensity violates the Due Process Claus e." Fernandez v. Ercole, 14-CV- 02974 (RA), 2017 WL 2364371, at *4 (S.D.N.Y. May 31, 2017) (citing cases); see also Conroy v. Racette, No. 14-CV-05832 (JMA), 2017 WL 2881137, at *11 (E.D.N.Y. July 6, 2017) ("The Supreme Court has never held that a criminal defendant's due process right is violated by the introducti on of prior bad acts or uncharged crimes."). Thus, Petitioner has not demonstrated that the admission of evidence of the Queens Burglary violated his right to a fair trial under the Supreme Court's precedents. See Fernandez, 2017 WL 2364371, at *4 (S.D.N.Y. May 31, 2017) (denying habeas relief based on admission of evidence of uncharged crimes).

For these reasons, I recommend that Ground One of the Petition be denied. III. Grounds Two And Three Of The Amended Petition Are Procedurally Barred

Castro failed to raise either Ground Two or Ground Three in his application for leave to appeal to the New York Court of Appeals. The application for leave was confined to the Molineux ruling regarding the Queens Burglary. (See Leave to Appeal Ltr. at 2-8.) Thus, the claims contained in Grounds Two and Three are unexhausted and procedurally barred and should be denied. 19

See Sparks, 2012 WL 4479250, at *5 (habeas claim held to be procedurally barred where raised on direct appeal to the Appellate Division, but not included in leave application to Court of Appeals).

Under 28 U.S.C. § 2254(b)(2), "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in

19 Castro does not demonstrate (nor has he shown) cause for his failure to exhaust his claims, nor actual prejudice. And, given the record evidence of Castro's guilt, he cannot demonstrate a fundamental miscarriage of justice to overcome the procedural bar.

the courts of the State." H ere, the Court finds that Grounds Two and Three also should be denied on the merits, as discussed below. IV. Castro' s Claim Regarding An Accomplice-Corroboration Charge (Ground Two) Should

Be Denied Ground Two of Castro's Amended Petition should be denied because (A) there is an adequate and independent state ground to bar review of the claim; and (B) it does not raise any federal constitutional issue.

A. Adequate And Independent State Ground There is an adequate and independent state ground for denying Ground Two of the Amended Petition, such that Castro's claim in Ground T wo is procedurally barred. The Appellate Division held that Castro's claim that an accomplice -corroboration charge should have been given was unpreserved. Castro, 143 A.D.3d at 514-15.

New York's preservation rules constitute an adequate and independent state law ground. See Garcia v. Lewis, 188 F.3d 71, 79 (2d Cir. 1999) (" we have observed and deferred to New York' s consistent application of its contemporaneous objection rules"); accord Whitley v. Ercole, 642 F.3d 278, 288 (2d Cir. 2011). Thus, the claim based upon Ground Two is procedurally barred and is not reviewable by this Court. Castro also fails to show a fundamental miscarriage of justice, i.e., that he is actually innocent of the crime for which he has been convicted, Dunham, 313 F.3d at 730, given the overwhelming evidence of his guilt. Even assuming, arguendo, that Ground Two properly had been preserved, it nevertheless should be denied, as addressed below.

B. Ground Two Does Not Raise A Federal Constitutional Issue The trial court's decision not to give the accomplice-corroboration charge with respect to Torres, and the Appellate Division's affirmance thereof,

20 does not raise a federal constitutional issue for the Court to consider. " [R]egardless of whether there was a violation of state law in denying [Petitioner's] request for an accomplice-corroboration instruction, there was no violation of federal law, let alone of any federal constitutional right." See Young v. McGinnis, 319 F. App' x at 13 (citing Caminetti v. United States, 242 U.S. 470, 495 (1917) ("[T]here is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."); United States v. Hamilton, 334 F.3d 170, 179 (2d Cir. 2003) ("The testimony of a single accomplice is sufficient to sustain a conviction so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." (internal quotation marks omitted))).

20 As an alternative to its holding that the failure to charge was unpreserved, the Appellate Division held that "there was no need for an accomplice charge," and that "any error was harmless in any event." Castro, 143 A.D.3d at 515. An accomplice-corroboration charge is required where a witness is an "accomplice" as defined in Section 60.22 of the New York Criminal Procedure Law. An "accomplice" is defined as " a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in: (a) (b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged." N.Y. C.P.L. § 60.22(2). " The defendant bears the burden of establishing that the witness is an accomplice." People v. Sage, 23 N.Y.3d 16, 24 (2014) (citations omitted). Whether a witness is an accomplice is a " fact-sensitive determination [that] depends on the evidence presented at trial as to the crime charged." Id. (citations omitted). The accomplice relationship can be terminated. See People v. Breland, 83 N.Y.2d 286, 292 (1994) (one set of shootings in which accomplice participated found to be " legally discrete for accomplice corroboration purposes" from another set of shootings). In the present case, Torres did not participate in the home-invasion robbery.

V. Castro's Claim Regarding Acevedo's Purported Incorrect Testimony And The Trial

Court's Refusal To Charge (Ground Three) Should Be Denied Ground Three of Castro's Amended Petition has two aspects, i.e ., that Castro's right to a fair trial was violated by (1) inaccurate witness testimony from Acevedo, and (2) the trial court's refusal to instruct the jury that Acevedo's guilty plea was not evidence of Castro's guilt. (Am. Pet. at 3-9.) With respect to the first aspect, Ground Three should be denied because there is an adequate and independent bar to review of the claim, and with respect to both aspects, Ground Three should be denied on the merits.

A. Adequate And Independent State Ground Regarding "Inaccurate" Witness

Testimony As with Ground Two, there is an adequate and independent state ground for denying that aspect of Ground Three of the Amended Petition regarding the purportedly inaccurate testimony by Acevedo as to his cooperation agreement, such that it is procedurally barred. The Appellate Division held that Castro " did not preserve his contention[] that the . . . the prosecutor should have corrected [Acevedo's] allegedly false testimony." Castro, 143 A.D.3d at 514-15. Thus, as discussed above, this claim is procedurally barred and are not reviewable by this Court. (See Discussion Section IV.A, supra.) Even assuming, arguendo, that aspect of Ground Three properly had been preserved, it nevertheless fails, as addressed below.

B. Ground Three Fails On The Merits 1. Acevedo's "Incorrect" Testimony The Appellate Division's decision regarding Acevedo's purported incorrect testimony as to his cooperation agreement was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d). As an

alternative to its holding that the failure to charge was unpreserved, the Appellate Division held that

there was not "any 'false' testimony to correct, and that any error was harmless in any event." Castro, 143 A.D.3d at 515. This was not an unreasonable determination based upon the trial record.

During direct examination by the prosecution, Acevedo testified as follows regarding his cooperation agreement:

Q. . . . Does it make a difference if the District Attorney's Office or in this case specifically whether there is a conviction or an acquittal? Does that change what your agreement is? A. No, it doesn't. Q. Okay. According to the agreement if it turned out for some reason that you didn't have to testify in this case, for whatever reason that would be, and your testimony was not needed, would that make a difference in your agreement? A. No. Q. What does matter in that agreement, Mr. Acevedo? A. What matters is that I tell the truth. Q. And who decides if you're telling the truth when you sit here today and you testify? A. The jury does. (Tr. 365-66.) This testimony was not incorrect, as it was for the jury to decide whether Acevedo was telling the truth as he was testifying at trial. The trial court instructed the jury that " each of you is the sole and exclusive judge of the facts." (Tr. 1325.) The trial court also instruct ed the jury, as follows:

Evidence consists of the sworn testimony elicited on direct-examination and cross- examination and re-direct and re-cross, plus the stipulation that we had in

[e]vidence, plus any exhibits which were received and marked in evidence as well as testimony about exhibits that were marked only for identification. It is only on the basis of that evidence that you are to make your final determination of the facts. (Id. 1326.) Thus, the Appellate Division's determination of the lack of fals ity of Acevedo's testimony was not an unreasonable one. 2. Refusal To Charge Jury Regarding Acevedo's Guilty Plea Castro contends that the trial court erred by failing to charge the jury that Acevedo's guilty plea could not be used as evidence of Castro's guilt. The Appellate Division "considered and rejected" this argument regarding the trial court's charge. Castro , 143 A.D.3d at 515. The Appellate Division's decision was neithe r contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent. "In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to the jury on matters of sta te law, the petitioner must show not only that the instruction misstated state law but also that the error violated a right guaranteed to him by federal law." Sams v. Walker, 18 F.3d 167, 171 (2d Cir. 1994) (citing Casillas v. Scully, 769 F.2d 60, 63 (2d Cir. 1985)). "In weighing the prejudice from an allegedly improper charge, a reviewing court must view the instruction in its total context." Id. (citation omitted). Accord Alvarez v. Yelich, No. 09-CV-01343 (SJF), 2012 WL 2952412, at *7 (E.D.N.Y. July 17, 2012) (citing Sams, 18 F.3d at 171.). In the present case, the jury was instructed that Castro was "presumed innocent." (Tr. 1337.) The jury also was instructed that Acevedo was an "accomplice" and that " even if you find the testimony of Ramon Acevedo to be believable, you may not convict the defendant solely

upon that testimony unless you find that it was corroborated by other evidence tending to connect

the defendant with the commission of the crime." (Id . 1334-35.) In Sutton v. Conway, No. 06-CV-05833 (ENV), 2010 WL 744417 (E.D.N.Y. Mar. 2, 2010), the petitioner had argued that he was denied a fair trial and due process because the trial court failed to instruct the jury that the guilty pleas of his co-defendants could not be considered evidence of petitioner's own guilt. Id. at *8. In denying habeas relief, the court stated:

[T]he charge as a whole read to the jury by the trial court would have in no way caused the jury to believe that it could presume [petitioner's] guilt on the basis of his co-defendants' guilty pleas. The trial court very clearly (a) explained that [petitioner] was to be presumed innocent and (b) admonished the jurors that [petitioner] could not be convicted solely on the testimony of a witness who is an accomplice. Id. Here, as in Sutton, the Appellate Division's decision " was not contrary to clearly established federal law," and " the trial court's failure to give the subject charge was not objectively unreasonable." See id. For these reasons, Ground Three of the Amended Petition should be denied.

CONCLUSION For the reasons set forth above, I respectfully recommend that Castro's Amended Petition for a Writ of Habeas Corpus be DENIED in its entirety. My Chambers shall mail this Report and Recommendation to pro se Plaintiff at the address indicated on the docket. SO ORDERED. DATED: March 30, 2020 New York, New York

_____ STEWART D. AARON United States Magistrate Judge

* * * NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). 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, and any response to objections, shall be filed with the Clerk of the Court. 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 Abrams.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. 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).