# United States District Court
# Eastern District of New York

16-CV-01765
(Donnelly, D.J.)

In Re Harry Dorvilier

and

Harry's Nurses Registry

## AFFIDAVIT AND MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS


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| and | : | OF *HABEAS CORPUS* |
| Harry's Nurses Registry. | : | Docket Number<br>16-CV-01765 (AMD) |
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STATE OF NEW YORK )
) ss.
COUNTY OF QUEENS )

**JOHNNETTE TRAILL** , an attorney admitted to practice in this Court, being duly sworn, deposes and states as follows:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affidavit and the accompanying memorandum of law in opposition to the petition of Harry Dorvilier, which was filed in the United States District Court for the Eastern District of New York on April 12, 2016. I make the statements in this affidavit on information and belief, based on my review of the records and files of the Queens County District Attorney's Office and my conversations with Assistant District Attorney Christopher Blira-Koessler, who wrote the respondent's brief in the Appellate Division, Second Department.

2. By agreement with the Attorney General of the State of New York, the District Attorney of Queens County represents respondent in this matter.

3. Along with this response, the state submits via the electronic case filing system copies of the following documents: (a) the trial transcript; (b) the state court appellate briefs; (c) the decision of the Appellate Division, Second Department, affirming petitioner's conviction; (d) petitioner's motion for a writ of error *coram nobis*, and the State's response; (e) the decision of the Appellate Division, Second Department, denying petitioner's motion for a writ of error *coram nobis*;

(f) petitioner's application seeking leave to appeal from the denial of his motion for a writ of error *coram nobis*, and the State's response; (g) the order denying leave.

**Factual and Legal Background**

4. Petitioner Harry Dorvilier and Harry's Nurses Registry, Inc. (hereinafter the "Registry")[1] employed nurses who provided home-care to adults and children.[2] Since the nurses were employees, petitioner and the Registry, not the nurses, were responsible for the costs of Workers' Compensation Insurance. Despite this, and without permission from the nurses, petitioner and the Registry deducted one dollar per hour from the nurses' salaries to cover the costs of Workers' Compensation Insurance.

5. For the above-mentioned acts, petitioner and the Registry were charged with two counts of Grand Larceny in the Third Degree (New York Penal Law § 155.35), eleven counts of Grand Larceny in the Fourth Degree (New York Penal Law § 155.30[1]), Scheme to Defraud in the First Degree (New York Penal Law 190.65[1][A]), twenty-one counts of violating Article 2, Section 31 of the New York State Workers Compensation Law, and eight counts of Petit Larceny (New York Penal Law § 155.25) (Queens County Indictment Number 1709/2010).[3]

6. Petitioner and the Registry were each convicted after a jury trial before The Honorable Joel Blumenfeld, Supreme Court, Queens County, of two counts of Grand Larceny in the Third Degree (New York Penal Law § 155.35[1]), and eleven counts of Grand Larceny in the Fourth Degree (New York Penal Law § 155.30). On October 4, 2012, the court sentenced petitioner

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[1] As stated in this Court order of April 14, 2016, petitioner may not seek a writ of habeas corpus on behalf of the Registry (Order to Show Cause, p. 1 fn. 1).

[2] Petitioner has misspelled the name of the Registry in the caption of his papers, replacing "Nurses" with "Nursery," and this Court's Order to Show Cause dated April 14, 2016 has "Nursery" in the caption as well. As the Registry has always been known as "Harry's Nurses Registry" throughout the state court proceedings, and is still known as such according to the website maintained by the Registry (http://harryhomecare.com/), the State respectfully requests that this Court amend the caption of this case to read "In re Harry Dorvilier and Harry's Nurses Registry, Inc."

[3] The counts relating to Petit Larceny and violations of the Workers' Compensation Law were dismissed on speedy trial grounds (A. 596, 613-14, 761, 772-73, 784). Numerical references preceded by "A" refer to the appendix petitioner filed on appeal.

Dorvilier to five years' probation, ordered him to pay $26,000.00 in fines, and ordered him to perform thirteen days of community service. Harry's Nurses Registry, Inc., was sentenced to a three-year conditional discharge, and ordered to pay $26,000.00 in fines. Petitioner is currently under probation supervision.

**The Direct Appeal**

7. On direct appeal to the New York State Supreme Court, Appellate Division, Second Department, appellate counsel filed a sixty-two-page brief and raised four claims. Specifically, appellate counsel claimed that petitioner and the Registry received ineffective assistance of counsel; the trial court excessively interfered in the proceedings; the trial court improperly admitted expert testimony; and that the verdict was inconsistent. These claims were each comprised of numerous sub-claims. For example, appellate counsel raised about fourteen instances of alleged ineffective assistance, and about twenty instances of allegedly prejudicial interference by the court during the trial. Appellate counsel also challenged the testimony of the People's expert on three separate grounds.

8. The State filed an eighty-eight-page respondent's brief in response to appellate counsel's brief.

9. In a decision dated November 5, 2014, the Appellate Division, Second Department, unanimously affirmed the convictions. *People v. Dorvilier*, 122 A.D.3d 642 (2d Dept. 2014). Neither petitioner nor the Registry sought leave to appeal from this decision.

**The Petition for a Writ of Error Coram Nobis**

10. Petitioner, through counsel, then moved the Appellate Division, Second Department, for a writ of error *coram nobis*, claiming that appellate counsel was ineffective because he failed to raise a legal sufficiency claim, to wit, that the evidence of larceny was legally insufficient because the funds were in bank accounts controlled by petitioner, and that the nurses never acquired ownership over, or possession of the funds. In other words, petitioner posited that there was no larceny because he could not steal from himself.

11. In a decision dated July 29, 2015, the Appellate Division, Second Department, denied petitioner's petition for a writ of error *coram nobis*. *See People v. Dorvilier*, 130 A.D.3d 1061 (2d Dept. 2015). Citing to *Jones v. Barnes*, 463 U.S. 745 (1983), the court held that petitioner failed to establish that he was denied the effective assistance of appellate counsel.

12. In a letter dated August 24, 2015, petitioner sought leave to appeal to the New York State Court of Appeals from the Second Department's decision denying his *coram nobis* petition. In a decision dated October 23, 2015, the Honorable Leslie Stein, Associate Judge of the Court of Appeals, denied petitioner's leave application. *See People v. Dorvilier*, 26 N.Y.3d 1008 (2015).

**The Instant Habeas Corpus Petition**

13. Now, in papers dated April 12, 2016, petitioner *pro se* moves this Court for a writ of *habeas corpus*, alleging that appellate counsel was ineffective for failing to raise the aforementioned legal sufficiency claim.

14. For the reasons stated herein, this Court should deny the instant petition, because the Second Department's decision was not contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

WHEREFORE, and for the reasons stated in the attached memorandum of law, the Court should summarily deny the petition for a writ of *habeas corpus*.

Johnnette Traill
Assistant District Attorney
718-286-5862

Sworn to before me this
14th day of June, 2016

Notary Public

NANCY TALCOTT
Notary Public, State of New York
Registration #02TA6295261
Qualified in Nassau County
Commission Expires Dec. 30, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| In Re<br>Harry Dorviler<br><br>and<br><br>Harry's Nurses Registry. | MEMORANDUM OF LAW<br>IN OPPOSITION TO<br>PETITION FOR A WRIT<br>OF *HABEAS CORPUS*<br><br>Docket Number<br>16-CV-001765 (AMD) |

This Memorandum of Law is submitted in opposition to petitioner's petition for a writ of *habeas corpus*.

## ARGUMENT

### THE STATE COURT'S REJECTION OF PETITIONER'S CLAIM WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

Appellate counsel filed an extensive brief on petitioner's behalf, rasing numerous issues in an attempt to overturn petitioner's convictions. Despite appellate counsel's efforts, petitioner argues that counsel was ineffective for failing to raise a legal sufficiency claim on appeal, specifically, that the evidence of larceny was legally insufficient because the funds were in bank accounts controlled by petitioner, and that the nurses never acquired ownership over, or possession of the funds. In other words, petitioner posits that there was no larceny because he could not steal from himself. As will be demonstrated, the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the United States Supreme Court.

It is well established that a state prisoner's *habeas corpus* petition "shall not be granted with respect to any claim that was adjudicated on the merits" in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established"

Supreme Court law. 28 U.S.C. § 2254(d)(1). This standard requires deference to state-court determinations on the law and is different from the previous *de novo* standard because even an incorrect determination must be upheld if it is reasonable. *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

When the state court is determined to have adjudicated the claim on the merits, a federal *habeas* court must defer to the state court's decision in the manner prescribed in 28 U.S.C. § 2254(d)(1). Thus, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, __ U.S. __, 135 S.Ct. 1372, 1376 (2015). Put another way, the "state court decision must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods v. Etherton*, __ U.S. __ 136 S. Ct. 1149, 1151 (2016) (*quoting White v. Woodall*, 572 U.S. __, 134 S.Ct. 1697, 1702 [2014]).

In this case, Section 2254's deferential standard of review is applicable to petitioner's claims, as the state court adjudicated the merits of these claims. Accordingly, because the state court clearly decided these issues "on the merits," petitioner must satisfy the requirements of section 2254(d).

The state court decision can only be "contrary to" Supreme Court jurisprudence "if the State court arrives at a conclusion opposite to that reached by the Court on a question of law;" or "the State court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at" the opposite result. *Williams*, 529 U.S. at 405-06."Unreasonable application" means "the State court identifies the correct governing legal rule" as enunciated by the Supreme Court, but "unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. To be entitled to *habeas* relief, petitioner must demonstrate that the decision of the state court was "beyond fair-minded disagreement." *Harrington v. Richter,* 562 U.S. 86 (2011); *see also Woods*, __ U.S. __, 135 S.Ct at 1377-78. "If this standard is difficult to meet,

that is because it was meant to be." *Harrington*, 562 U.S. at 102. Indeed, "habeas corpus is a 'safeguard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03 (*quoting Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 [1979])

Petitioner's ineffective-assistance-of-counsel claim is squarely governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Williams*, 529 U.S. at 390. In *Strickland*, the Supreme Court held that, to establish a claim of ineffective assistance of counsel, a *habeas corpus* petitioner must show that his counsel supplied deficient representation, and that the petitioner suffered prejudice as a result of that deficient performance. *Id.* at 687-88. As to the first requirement, counsel's conduct must have so undermined the adversarial process that the process cannot be relied upon as having produced a just result. *Id.* at 686. Courts reviewing the conduct of counsel must be aware of the temptation to "second-guess" counsel and "every effort must be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. Moreover, the Second Circuit has held that "in case after case, we have declined to deem counsel ineffective notwithstanding a course of action (or inaction) that seems risky, unorthodox or downright ill-advised." *Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996). As to the second showing, a petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 698.

In attempting to demonstrate that appellate counsel's performance was deficient based on a failure to raise a claim, a petitioner must demonstrate more than the omission by appellate counsel of a non-frivolous argument; the petitioner must also show that but for the failure to raise the argument, there is a reasonable probability that the outcome of the appellate process would have been different. *See Jones v. Barnes*, 463 U.S. 745, 754 n. 7 (1983); *Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir.), *cert. denied*, 513 U.S. 888 (1994); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.), *cert. denied*, 513 U.S. 820 (1994); *Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1993), *cert. denied*, 508 U.S. 912 (1993). Appellate counsel is not required to "'raise every nonfrivolous issue

that the defendant requests'" *Jameson*, 22 F.3d at 429 (*quoting Jones*, 463 U.S. at 754 n. 7). Instead, the petitioner must demonstrate that appellate counsel "'omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.'" *Clark v. Stinson*, 214 F.3d 315, 322 (2d Cir.2000) (quoting *Mayo*, 13 F.3d at 533).

Furthermore, as the Supreme Court has explained, AEDPA review is "doubly deferential" when a petitioner raises a claim of ineffective assistance of counsel. *See Woods*, __ U.S. __, 136 S.Ct. at 1151. That is because "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Id.*, *quoting Burt v. Titlow*, 571 U.S. __, 134 S.Ct. 10, 17 (2013). Thus, in reviewing a state-court determination regarding an ineffective assistance claim, this Court is constrained to give " both the state court and the defense attorney the benefit of the doubt." *Burt*, __ U.S. __, 134 S. Ct. at 13.

Indeed, in order to succeed on a claim of ineffective assistance of counsel under the deferential standard of section 2254(d), a *habeas* petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state court decision applied *Strickland* incorrectly." *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, it is a petitioner's burden to show that the state court applied a standard other than *Strickland*, or applied *Strickland* to the facts of the case in an objectively unreasonable manner. *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Bell v. Cone*, 535 U.S. at 698-99. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. at 101. Here, petitioner has failed to meet his burden. He has also failed to establish that the state court's decision was "opposite to that reached by the [Supreme] Court on a question of law," or that the state court confronted facts "materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at" the opposite result. *Williams*, 529 U.S. at 405-06.

In his brief, appellate counsel raised a multiplicity of issues, any one of which, if deemed meritorious, could have resulted in reversal of petitioner's convictions and a new trial.

Counsel challenged trial counsel's effectiveness on approximately fourteen separate grounds, and counsel also claimed that the trial court excessively interfered in the proceedings, citing to about twenty instances of allegedly prejudicial interference by the court during the trial. In another point, counsel challenged the testimony of the People's expert, and did so on three separate grounds. Finally, appellate counsel argued that the verdict was repugnant. These claims were supported by both analysis of pertinent caselaw, as well as citations to the trial record. Appellate counsel thus satisfied the constitutional standard of effective assistance by capably presenting non-frivolous issues for consideration on appeal. Moreover, the issue petitioner faults counsel for failing to raise was not one that would have persuaded the Appellate Division to overturn his conviction.

Here, the evidence of larceny was overwhelming and, thus, appellate counsel correctly omitted a legal sufficiency challenge from his brief. At trial, the State established that petitioner's conduct met the elements of larceny as correctly charged by the court to the jury (A. 670 ["a person steals property when with intent to deprive another of property or to appropriate the property to himself or itself if it is corporation or to a third person, such person wrongfully takes property from the owner of property."]).[4] Consistent with this definition, the State established that the nurses were the true owners of the property. The State presented evidence that the nurses were petitioner's employees, and had earned the money deducted while in petitioner's employ, thus giving them, as the court charged the jurors on the term "owner," a "right to the possession of the property superior to that of the person who takes it" (A. 671).

In addition, the State proved that the taking was wrongful, and that petitioners acted with the intent to commit larceny. Specifically, the evidence demonstrated that the nurses never consented to any deductions from their paychecks to cover the costs of workers compensation insurance. The State introduced the nurses' paystubs/paychecks into evidence, and the nurses clearly

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[4] *See also* N.Y. Penal Law § 155.35(1) ("A person is guilty of grand larceny in the third degree when he or she steals property and . . . . when the value of the property exceeds three thousand dollars."); N.Y. Penal Law § 155.30(1) ("A person is guilty of grand larceny in the fourth degree when he steals property and when . . . . the value of the property exceeds one thousand dollars.").

testified that they did not authorize the deductions. Indeed, one of the nurses testified that the nurses protested the deductions at a meeting, but petitioner Dorvilier informed the assembled nurses that he was a "consultant" and, thus, "kn[ew] about *taking money from [their] check[s].*" Even after the nurses protested the deductions, petitioner still took the money from the nurses' paychecks (Hamilton: A. 219-20) (italics added). This demonstrated that petitioner had neither permission nor authority to make the deductions, but did so anyway, thus establishing that petitioner wrongfully took the nurses' money.

The State also established that the taking was wrongful through the testimony of Steven Carbone, District Manager for the Long Island District of the New York State Workers' Compensation Board, and deemed an expert on workers' compensation by the trial court. Carbone testified that the nurses qualified as employees, rather than independent contractors, under the New York State Workers' Compensation Law. This meant that petitioner, rather than the nurses, was responsible for paying the costs of workers' compensation insurance (Carbone: A. 484-85, 488-89, 491-93, 505, 507-08). Carbone's testimony that the nurses were not independent contractors was supported by the testimony of Lauren Hill, an employee of the New York State Department of Insurance, who testified that petitioner denied using independent contractors on the paperwork he submitted to the New York State Department of Insurance (Hill: A. 578). Since the nurses were employees, rather than independent contractors, there was no lawful basis for petitioner to take their money, further demonstrating that petitioner engaged in criminally wrongful conduct.

Moreover, the State provided proof of motive by presenting evidence that petitioner took the money to pay the increased cost of workers' compensation insurance. On August 2, 2006, the New York State Insurance Fund audited the Registry to determine whether its deposit and insurance premium coincided with its payroll records; a higher payroll meant that the Registry would have to pay more for insurance. The Fund determined that "there were 1099 workers [referring to IRS Form 1099-Misc.] that weren't listed on the application," so they increased the premium. Following the audit, petitioner's premium payments increased dramatically; in total, petitioner paid

the Insurance Fund $428,333.60 (Hill: A. 579-82, 589-90). The dollar-per-hour deductions began around the same time as the increase in premium payment amounts (*see, e.g.*, Formoso: A. 142-43). The increased cost of the insurance explained why petitioner committed larceny – to satisfy a personal debt – further confirming that the taking was not done for a lawful purpose, and that petitioner acted with criminal intent.

Hence, the State not only proved that the taking was non-consensual, but also that petitioner took the money to cover the cost of workers' compensation insurance, a cost that petitioner, rather than the nurses, was responsible for, thus establishing that petitioner wrongfully took the nurses' money with larcenous intent. Given the foregoing, appellate counsel cannot be faulted for omitting a legal sufficiency claim from his appellate brief.

Nor could appellate counsel have scored a reversal based upon the notion that the money belonged to petitioner because it was in his bank account, and that there was no larceny because a person cannot steal from himself. The problem with this theory is that petitioner was not stealing from himself. Under New York State law, the money belonged to the nurses, not petitioner, regardless of its physical location, for at least two reasons.

First, given that the nurses had earned the money specified on their checks, as well as any amounts deducted from said money, the nurses certainly had "a possessory right [over the funds] which, however limited or contingent, was superior to that of petitioner." *People v. Hutchinson*, 56 N.Y.2d 868, 869 (1982); *and see People v. Hightower*, 18 N.Y.3d 249, 255 (2011) (an owner is one who "acquire[s] a sufficient interest" in the stolen property superior to that of the taker.). In other words, the location of the funds, under New York caselaw, is immaterial; since the funds belonged to the nurses, not petitioner, by virtue of the work the nurses performed, the nurses had a right to the money superior to that of petitioner, regardless of its location.

Indeed, in *Hutchinson*, which involved an attempted bank robbery, the New York Court of Appeals concluded that a bank employee had a right of possession superior to that of the robber, even though the stolen funds "came from the drawer of two other tellers," and even though

the bank employee's possession could be described as "limited or contingent." *Hutchinson*, 56 N.Y.2d at 869. Clearly the bank employee in *Hutchinson* did not own or physically possess the money, but that did not mean he had no right to it whatsoever in determining whether a robbery occurred. *Hutchinson* thus underscores that possessory rights extend beyond the physical location of the taken property, and depend only on the status of the taker and the victim. This means that petitioner cannot call the money his own just because it was in his bank account – the nurses' right to be compensated for their services established a superior right to the funds. *Accord United States v. Whiting*, 471 F.3d 792, 799 (7th Cir. 2006) ("The funds withdrawn from employee paychecks represent an amount of money paid to employees in compensation. Once the contributions are withheld, the money no longer belongs to the company; rather, the funds belong to the employees. Therefore, employees have a present interest in the funds.").

The fallacy of petitioner's position becomes painfully obvious when extrapolated to its logical conclusion. Under petitioner's line of "reasoning," he could decide, unilaterally, and without lawful authority or the nurses' consent, to deduct each and every cent from the nurses paychecks to pay his personal debts, yet his actions would still not constitute a crime simply based upon the fact that the stolen funds were located in his bank account(s). Clearly, however, such dishonesty and disregard for the law is exactly what New York State's larceny statutes were enacted to address. Since petitioner, "possessing the requisite intent, exercised control over property inconsistent with the continued rights of the owner[s]" (*People v. Olivo*, 52 N.Y.2d 309, 316 [1981]) – in this case the nurses – appellate counsel wisely omitted this losing issue from his brief.

Second, the conclusion that the nurses were the true owners of the funds, regardless of their location, is further supported by *State v. Barclays Bank of New York, N.A.*, 76 N.Y.2d 533 (1990), in which the New York Court of Appeals explained that, to maintain an action for conversion, "a payee must have actual or constructive possession of a negotiable instrument in order to attain the status of a holder . . . . and to have an interest in it." *Barclays*, 76 N.Y.2d at 536 (citing

UCC 1-201[20]). In *Barclays*, the State of New York could not maintain an action for conversion because it never came into possession of the checks in question.

Here, by contrast, the nurses possessed the checks that petitioner gave them as employees of the Registry. *Barclays* demonstrates that the delivery of the paychecks to the nurses gave them an "interest" in the amounts represented by the checks, including the funds unlawfully deducted for workers compensation by petitioner. As such, since petitioner gave the nurses an "interest" in the funds in their accounts, as well as an "interest" in any deductions from the funds, by issuing and delivering paychecks to the nurses, petitioner cannot call appellate counsel ineffective for failing to argue that the deductions he made merely represented a shift in funds which were owned by himself alone, and no one else.

Based on the foregoing, competent appellate counsel could have reasonably concluded that petitioner's proposed legal sufficiency claim would not have led to a reversal. As such, appellate counsel's performance was not ineffective, but was consistent with the standards adopted by this Court. *See, e.g, Jones*, 463 U.S. at 751-52 (appellate counsel should "winnow out weaker arguments on appeal and focus on one central issue if possible, or at most on a few key issues."); *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) ("the Appellate Division did not unreasonably apply the *Strickland* standard in holding that Petitioner had not been denied the effective assistance of appellate counsel" where the proposed claim was meritless).

Petitioner makes no substantive arguments in support of his position, but apparently relies upon the submissions of his previous attorney. He also submits two decisions issued by the Administrative Law Judge Section of the New York State Unemployment Insurance Appeal Board relating to actions involving his nursing agency, and the issue of whether the nurses who worked for him were employees or independent contractors. Each decision deemed the nurses independent contractors rather that employees. One of these decisions was issued in 1999, and involved nurses who worked for the Registry between 1993 and 1995. The other, a decision from 2014, concerned insurance contributions for the years 2008 through 2010 (Petitioner's Document 4, filed 5/13/2016,

PageID # 43 to #47). But these submissions do not indicate that appellate counsel failure to raise a legal sufficiency claim in this case was so unreasonable as to merit federal habeas relief.

For one, neither one of these decisions was part of the record at trial or on appeal. Indeed, the 2014 decision is stamped "November 6, 2014," one day after the Appellate Division, Second Department, issued its decision in this case on November 5, 2014. Appellate counsel cannot be expected to make arguments based upon administrative decisions that are not part of the record.

Second, this case involved nurses who worked for the Registry, and insurance contributions made, during 2006 and 2007 (*see, e.g.*, A. 142-45, 169-70, 199, 221, 241-42, 277, 306-08, 324-25, 335-38, 362-66, 382-83, 422-27, 440-41, 453-55, 555-61, 568-90), a period covered by neither one of these decisions. Hence, even if these decisions were, in fact, part of the appellate record, counsel could have reasonably concluded that they would not have supplied a basis for a winning legal sufficiency argument.

Third, the administrative decisions describe facts at odds with the facts of this case. For example, the 1999 decision states that the nurses were independent contractors, *inter alia*, because they were responsible for finding a replacement to cover their shift if they were unavailable; were given no training by the Registry, a fact also mentioned by the 2014 administrative decision; and that the hospitals or nursing homes to which the nurses were assigned decided matters such as their hours, pay rate, and assignments. In this case, by contrast, the nurses received their assignments directly from petitioner and his supervisors; petitioner determined the nurses' pay rate and the length of their work shifts; the nurses worked under the supervision of a registered nurse employed by petitioner; the nurses were required to contact the Registry if they were unable to report to a work assignment; and petitioner provided in-house classes to keep the nurses updated on medication and treatments (*see, e.g.*, Formoso: A. 128, 131-37, 146-47, 156-57; Bendys-Pierre: A. 163; Hamilton: A. 216; Ali-El: A. 240; Cadet: A. 561- 62). Hence, the factual disparities between the administrative decisions and this case further prove that appellate counsel made a reasonable decision to omit a legal sufficiency argument.

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Fourth, even ignoring all of the above, the decisions of Administrative Law Judges are not binding on the Appellate Division. *See, e.g.*, *Keeffe v. Tax Appeals Tribunal of State of N.Y.*, 216 A.D.2d 692, 694 (3rd Dept. 1995) ("To the extent that petitioners rely on a prior decision by an ALJ in another matter, we note that the Tribunal was not required to follow such a decision and, even if it were, such a decision is not binding on this court."). Thus, appellate counsel cannot be faulted for not advancing arguments based upon these decisions.

And, fifth, a recent decision of the United States Court of Appeals for the Second Circuit – a decision which petitioner fails to supply or mention – found, in an action brought by petitioner's employees under the Fair Labor Standards Act (FLSA), that the nurses were, in fact, employees rather than independent contractors. Indeed, the nurses' status as employees was so plain that the District Court granted the nurses' motion for summary judgement, a decision which was affirmed by the Second Circuit. The Second Circuit decision cites various factors in support of its determination: the Registry fixed the nurses' pay rate; the nurses had to submit "progress notes" to receive payment; the nurses received training from the Registry; and the nurses worked under the direction of Registry supervisors, who handled matters such as document collection and emergencies. *See Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App'x 714, 717 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 2059 (2015). All of these factors are present in this case as well (*see, e.g.*, A. 134-135 [Registry provided nurses with training and nurses were required to call the Registry in case of an emergency]; A. 163, 216 [petitioner determined hours and pay rate]; A. 136-39, 156-57, 216-17 [nurses were required to fill out and submit progress notes and time sheets to Registry to get paid]; A. 146-47, 562 [if a nurse became ill and could not work their shift, they were required to report this to the Registry so that the latter could find a replacement]; A. 343 [supervisor assembled care plan for patients]; A. 377 [supervisor gave out assignments to nurses]). Thus, even if civil and/or administrative decisions or determinations outside the existing appellate record were legally and factually relevant, *Gayle* demonstrates that appellate counsel still did not act unreasonably by failing to brief and argue petitioner's legal sufficiency claim.

Indeed, aside from the above, petitioner's failure to mention the Second Circuit's decision is, perhaps, further explainable due to its damning observation that "the nurses are not just an integral part but the *sine qua non* of Harry's business." *Gayle*, 594 F. App'x at 718.[5] Surely appellate counsel could also have adopted a similar viewpoint based upon the facts of this case, and reasonably concluded that the nurses – the "sine qua non" of petitioner's business – without whom the money would never have entered petitioner's bank accounts to begin with, had a sufficient interest in the funds to support petitioner's larceny conviction.[6]

In sum, appellate counsel performed effectively, and the state court decision was an eminently reasonable application of *Strickland* and its progeny. As such, petitioner's application for a writ of *habeas corpus* should be denied.

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[5] The Second Circuit made this observation in response to petitioner's "cavil that the nurses are not integral to Harry's Nurses Registry, notwithstanding that 'Nurses' is – literally – Harry's middle name." *Gayle*, 594 F. App'x at 718.

[6] Indeed, the Second Circuit's opinion is a telling testament to the downside of appellate arguments – akin to the one petitioner faults appellate counsel for failing to raise – that are more likely to evoke derision than a reversal. Before the Second Circuit, petitioner argued that "the nurses are not covered by FLSA because they do not meet the threshold requirement of having performed overtime 'work,' having often left jobs at hospitals caring for 40 patients to now care only for one patient in a home, a '97.5% reduction in task responsibility.'" The Second Circuit strongly rejected this claim, stating, "This argument does violence to the dictionary definition of work as well as to the dignity of nurses, and we reject it emphatically." *Gayle*, 594 F. App'x at 718. And, as detailed above in footnote 4, petitioner's argument that the nurses were not integral to his business was met with, at best, lighthearted scorn, as demonstrated by the Second Circuit's witty observation that the word "nurses" was "literally" petitioner's "middle name." Here, appellate counsel might have reasonably feared that the state appellate court would react with similar scorn if confronted with petitioner's proposed "I cannot steal money that the nurses earned because it ended up in my bank account" claim, an argument that is as equally unpersuasive and offensive as was petitioner's "the nurses performed no work" claim, or his "the nurses are not important to my business" argument. On this basis, and without running afoul of *Strickland*, counsel may have rationally decided to omit defendant's proposed argument from his brief.

## CONCLUSION

For the reasons set forth above, petitioner's petition for a writ of *habeas corpus* should be denied.

Respectfully submitted,
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