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Example 1
 Tashima v. AO

SECRET JUSTICE

(Public Interest Nonprofit Web Site)

It is about forcing change in a judicial system that has so far resisted it...

Judge Weinstein's Extraordinary Project of Disposing of 500 Habeas Corpus Cases in Unpublished Summary Memodispo "Opinions"

(In re Habeas Corpus Cases, No. 03-MISC-66)

Our federal courts are notorious for patently ignoring the rights of prisoners to due process and the rule of law and covering up this blatant abdication of the constitutional duties in "miscellaneous dockets" and publicly-inaccessible "unpublished opinions" - a category that is supposed to be reserved for purportedly frivolous, meritless "nuisance" cases.

Contrary to Judge Weinstein's suggestion, the actual orders in any of the 500 petitions are not available "on the court's electronic database." We are posting all orders which were able to locate on PACER and on commercial databases.

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More...

● **Under Construction**

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PART 2

Falkoff's Habeas Corpus Training Manual

Habeas Corpus Training Materials

Revised Third Edition

United States District Court Eastern District of New York

Marc D. Falkoff

Habeas Corpus Special Master

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Preface

In April 2003, Judge Jack B. Weinstein volunteered to clear a backlog of nearly eight hundred outstanding habeas corpus petitions filed by New York State prisoners in the United States District Court for the Eastern District of New York. The hoariest of these cases was filed in 1996; scores were filed in 1997 and 1998. Five hundred of these cases were reassigned to Judge Weinstein. Chief Judge Edward R. Korman and Judge Weinstein appointed the compiler of these materials as Special Master to aid in the disposition of the cases. See Appendix C.

This memorandum and the attached materials were developed as an instruction manual to introduce Judge Weinstein's new law clerks and interns to the rudiments of habeas corpus jurisprudence, a labyrinthine area of law that students infrequently encounter in law school. The materials do not pretend to be exhaustive. Rather, this manual was designed to orient the novice and to lay out, in a concise, practical and easily referenced manner, the principles and elements of the law of habeas corpus. For more breadth and depth, the reader is referred to James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001).

Some caveats: Judge Weinstein's project involves only habeas applications from state prisoners, who file their petitions pursuant to section 2254 of Title 28 of the United States Code. Federal prisoners, in contrast, pursue habeas corpus relief through section 2255.



Although the law surrounding both “2254 petitions” and “2255 petitions” is largely the same, it is not identical. Also, because all of the habeas applications in Judge Weinstein’s project were filed in the Eastern District of New York, explication of state-law issues in this memorandum focuses almost exclusively on New York law. Finally, be aware that the most important legislative reformation of habeas corpus law—the Antiterrorism and Effective Death Penalty Act of 1996—is still a relatively new statute. Litigation defining the meaning of this act, whose language is not a model of clarity, is dynamic and on-going. Both the Court of Appeals for the Second Circuit and the United States Supreme Court regularly are called upon to interpret the statute. Many of the recent decisions from these courts are referenced in this memorandum.

The first of the appendices are the habeas corpus statute and the rules governing section 2254 cases. Next are a pair of memoranda issued by Judge Weinstein with respect to the habeas project, including one that discusses the responsibility of the federal district courts to resolve habeas matters in a timely fashion. A pair of recent decision are included, several frequently cited Supreme Court cases with which clerks should be familiar, and a law review article providing an overview of AEDPA.

Also included in this edition as an appendix is a compendium of brief “boilerplate” analyses of legal claims that are frequently raised in the habeas context. This document is in large part a more expansive version of Part XI of the manual. It might provide clerks with a useful starting point for engaging with a number of prisoner claims.

The first edition of this manual was—to borrow a phrase from William Faulkner— well received in our own little postage stamp of soil. Later editions are more expansive than the first, hopefully without forsaking clarity. Clerks in New York and Connecticut reported the early editions to be quite useful. We hope this one will be as well.

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I. Function of the Writ of Habeas Corpus

A prisoner applying for a writ of habeas corpus is asking the federal district court to order his release from illegal custody.

Petitioners who seek release from state prison must follow the regulations in 28 U.S.C. § 2254. Federal prisoners must file their applications pursuant to 28 U.S.C. § 2255. Other detainees (such as foreign nationals being held in anticipation of deportation) seek the writ through 28 U.S.C. § 2241.

The rules are largely the same, but not identical, for each type of petition.

This memorandum deals exclusively with applications from state prisoners, i.e., “2254 petitions.” Each such case involves a prisoner who was convicted in state court and denied appellate and, frequently, collateral relief in the state judicial system.

II. Very Brief History of the “Great Writ”

Historically the writ was an appeal to the king to release a prisoner from incarceration that was ordered by a court lacking jurisdiction to do so. “Habeas Corpus” means “you have the body.” The writ was an order to petitioner’s jailer to bring him before the court.

In America, the writ expanded to encompass any kind of “illegal” detention. To take a simple example, a state prisoner can seek the writ in federal court by alleging that his conviction was obtained in violation of his Sixth Amendment right to counsel, applicable to the states through the Fourteenth Amendment.

Federal habeas review has always paralleled the Supreme Court’s direct review power. In substance, if not form, federal review of state court adjudications is appellate in nature.

III. New York & Federal Court Structure

Knowledge of the structure of the state criminal courts is essential when assessing a habeas corpus application. Before a federal court may address a petitioner’s claim, the claim must first have been properly presented to the appropriate state court, with appeals pursued to the extent permitted by state procedures. This is the “exhaustion” requirement, discussed below.

The following outline details the trajectories that a state prisoner’s claim may take in both the New York and federal courts.

A. Direct Appeal

N.Y. Supreme Court (trial and sentence)

N.Y. Appellate Division (direct appeal from judgment)

N.Y. Court of Appeals (discretionary appeal from denial of direct appeal) United States Supreme Court (discretionary appeal from denial of direct appeal)

B. Motion to Vacate Judgment (usually ineffective assistance of trial counsel or claims based on “off the record facts”)

N.Y. Supreme Court (New York Crim. Pro. Law § 440 motions to vacate judgment)

N.Y. Appellate Division (appeal from denial of New York Crim. Pro. Law § 440 motions)

C. Application for Writ of Error Coram Nobis (ineffective assistance of appellate counsel claims only)

N.Y. Appellate Division (coram nobis applications)

N.Y. Court of Appeals (bill signed into law in 2002 allows discretionary review of denial of coram nobis application)

D. Petition for Writ of Habeas Corpus (denial of federal right) Federal District Court (petition for writ of habeas corpus)

Court of Appeals for Second Circuit (appeal, via “certificates of appealability,” from denial of writ)

United States Supreme Court (discretionary appeal from denial of writ) E. Second or Successive Petitions for Writ of Habeas Corpus

Court of Appeals for Second Circuit (must seek permission to file petition in district court)

Federal District Court (petition for writ of habeas corpus) IV. Antiterrorism and Effective Death Penalty Act of 1996

Congress brought about significant changes in habeas corpus law with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).

The ostensible purpose of AEDPA was to streamline death penalty appeals, but the statute affects all of habeas corpus jurisprudence.

Formerly, factual determinations presented in a habeas claim would be reviewed deferentially but legal questions would be reviewed de novo.

Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner on a claim

that was “adjudicated on the merits” in state court only if it concludes that the adjudication of the claim: (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).

In other words, if the state court has addressed a prisoner’s claim, the federal district court may grant relief on the claim only if the state

court's resolution of the claim was "unreasonable" in some way.

An "adjudication on the merits" is a "substantive, rather than a procedural, resolution of a federal claim." *Sellan v. Kuhlman*, 261 F.3d 303, 313 (2d Cir. 2001) (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999)).

The Supreme Court has clarified the AEDPA standard of review. Under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (O'Connor, J., concurring and writing for the majority in this part).

Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

Under this standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. In order to grant the writ there must be "some increment of incorrectness beyond error," although "the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks omitted).

"[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002); see also *Yung v. Walker*, No. 01-2299, 2002 U.S. App. LEXIS 28137 (2d Cir. Aug. 1, 2003) (amended opinion) (district court's habeas decision that relied on precedent from the court of appeals is remanded for reconsideration in light of "the more general teachings" of Supreme Court decisions).

The Court of Appeals for the Second Circuit has also indicated that habeas relief may be granted if a state court's decision was contrary to or an unreasonable application of "a reasonable extension" of Supreme Court jurisprudence. *Torres v. Berbery*, No. 02-2463, 2003 U.S. App. LEXIS 16167, at *25 (2d Cir. Aug. 7, 2003).

Determination of factual issues made by a state court “shall be presumed to be correct,” and the applicant “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

V. Statute of Limitations

A. Generally

A state prisoner has one year from the date his conviction becomes final to file a habeas petition in federal court. See 28 U.S.C. § 2244(d)(1).

This limitations period ordinarily begins to run on “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). For New York prisoners, that generally means the conviction is final 90 days after leave to appeal to the New York Court of Appeals is denied, because defendants have 90 days to seek certiorari review before the United States Supreme Court. See *McKinney v. Artuz*, No. 012739, 2003 U.S. App. LEXIS 6745, at *22 (2d Cir. 2003); see also Sup. Ct. R. 13.

Prisoners whose convictions became final before the effective date of AEDPA, April 24, 1996, had a grace period of one year, until April 24, 1997, to file their habeas application. See *Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998).

“[T]he district court has the authority to raise a petitioner’s apparent failure to comply with the AEDPA statute of limitation on its own motion.” *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). “If the court chooses to raise sua sponte the affirmative defense of failure to comply with the AEDPA statute of limitation, however, the court must provide the petitioner with notice and an opportunity to be heard before dismissing on such ground.” *Id.*

B. Statutory Tolling

The limitations period is tolled while a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

In calculating the one-year limitation period, the “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted.” 28 U.S.C. § 2244(d)(2). The “filing of creative, unrecognized motions for leave to appeal” does not toll the statute of

limitations. *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000); see also *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (“[A]n application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. . . . The question whether an application has been ‘properly filed’ is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar.” (emphasis in original; footnote omitted)).

In addition, the term “pending” in the statute has been construed broadly to encompass all the time during which a state prisoner attempts, through proper use of state procedures, to exhaust state court remedies with regard to a particular post-conviction application. See *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999). “[A] state-court petition is ‘pending’ from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state’s procedures.” *Bennett v. Artuz*, 199 F.3d 116, 120 (2d Cir. 1999), *aff’d* by 531 U.S. 4 (2000); *Carey v. Saffold*, 536 U.S. 214 (2002) (holding that the term “pending” includes the intervals between a lower court decision and a filing in a higher court for motions for collateral review).

A motion for extension of time to file an appeal to a New York Court does not toll AEDPA’s limitations period unless an extension is actually granted. See *Bertha v. Girdich*, 293 F.3d 577, 579 (2d Cir. 2002).

C. Equitable Tolling

AEDPA’s one-year limitations period is not jurisdictional and may be tolled for equitable reasons. “Equitable tolling . . . is only appropriate in ‘rare and exceptional circumstances.’ To merit application of equitable tolling, the petitioner must demonstrate that he acted with ‘reasonable diligence’ during the period he wishes to have tolled, but that despite his efforts, extraordinary circumstances ‘beyond his control’ prevented successful filing during that time.” *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001).

A pro se litigant is accorded “some degree of latitude” in meeting filing requirements. *Brown v. Superintendent*, No. 97 Civ. 3303, 1998 WL 75686, at *4 (S.D.N.Y. Feb. 23, 1998). But “[it] has long been recognized that ignorance does not excuse lack of compliance with the law.” *Velasquez v. United States*, 4 F. Supp. 2d 331, 334–35 (S. D.N.Y. 1998) (holding that Bureau of Prison’s failure to notify prisoners regarding AEDPA’s time limitation did not warrant acceptance of untimely petition); see also *Brown*, 1998 WL 75686 at *4 (“self-serving statement that the litigant is ignorant of the law is not

grounds for equitable tolling of a statute of limitations”).

D. Effect of Stay and Dismissal on Limitations Period

The Supreme Court held in *Duncan v. Walker* that “an application for federal habeas corpus review is not an ‘application for State post-conviction or other collateral review’ within the meaning of 28 U.S.C. § 2244(d)(2),” and that therefore the section does “not toll the limitation period during the pendency of [a petitioner’s] first federal habeas petition.” 533 U.S. 167, 181–82 (2001). *Duncan* reversed a case in this circuit which held to the contrary. See *Walker v. Artuz*, 208 F.3d 357, 361–62 (2000).

Although the Supreme Court has now declared that AEDPA’s one-year limitations period is not tolled during the pendency of a properly filed federal habeas petition, this statute of limitations is not jurisdictional and may be tolled equitably. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). As Justice Stevens noted in his concurring opinion in *Duncan*,

[N]either the Court’s narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for [a first habeas] petition as a matter of equity. The Court’s opinion does not address a federal court’s ability to toll the limitations period apart from § 2244(d)(2). Furthermore, a federal court might very well conclude that tolling is appropriate based on the reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court’s jurisdiction within the 1-year interval prescribed by AEDPA.

533 U.S. at 183 (Stevens, J., concurring in part and in the judgment) (citation omitted).

The Second Circuit has indicated that tolling would be manifestly appropriate for an out-of-time petition where the petitioner has with diligence brought his federal habeas petition, moved to have the petition dismissed without prejudice in order to fully exhaust state remedies, proceeded to promptly exhaust his claims in state court, and thereupon renewed his habeas petition. *Rodriguez v. Bennett*, 303 F.3d 435, 438–39 (2d Cir. 2002).

In addition, the Second Circuit has directed that, after *Duncan*, the “only appropriate course in cases . . . where an outright dismissal could jeopardize the timeliness of a collateral attack” is to stay further proceedings. *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir.) (quotation omitted), cert. denied, *Fischer v. Zarvela*, 534 U.S. 1015 (2001); see also *Duncan*, 533 U.S. at 182 (Stevens, J., concurring in part and in the judgment) (“[I]n our post-AEDPA world there is no reason why a

district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so . . .”).

Where a petitioner has acted with reasonable diligence, it is appropriate to treat a prior dismissal as a stay. See *Musgrove v. Filion*, 232 F. Supp. 2d 26, 29 (E.D.N.Y. 2002) (“[T]he Court should have stayed the petition and allowed the petitioner to exhaust his state remedies. Because it did not do that, extraordinary circumstances prevented the petitioner from filing a timely petition. Accordingly, the Court will treat his dismissed habeas petition as if it had been stayed provided he acted with reasonable diligence between the dismissal and his return to federal court.”); *Butti v. Giambruno*, No. 02-CIV-3900, 2002 U.S. Dist. LEXIS 24708, at *8–*9 (S.D.N.Y. Dec. 26, 2002) (applying equitable tolling principles in similar situation). The Court of Appeals for the Second Circuit has found a reasonable period of time in which to initiate state collateral proceedings is thirty days and that a reasonable period of time in which to reopen federal proceeding following a state court decision is also thirty days. See *Zarvela*, 254 F.3d at 380–81.

E. Relation Back Doctrine

Prisoners cannot circumvent the strict AEDPA limitations period by invoking the “relation back” doctrine by arguing that a new petition should be treated as having been filed on the same day as a first petition. As the court of appeals has explained,

If [the limitations period] were interpreted as Petitioner argues, the result would be impractical. A habeas petitioner could file a non-exhausted application in federal court within the limitations period and suffer a dismissal without prejudice. He could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to “continue” his federal remedy, without running afoul of the statute of limitations.

Warren v. Garvin, 219 F.3d 111, 114 (2d Cir. 2000) (quoting *Graham v. Johnson*, 158 F.3d 762,

780 (5th Cir. 1999)).

F. Suspension Clause

The period of limitations set forth in AEDPA ordinarily does not violate the Suspension Clause. See *Muniz v. United States*, 236 F.3d 122, 128 (2d Cir. 2001) (“[T]he Suspension Clause does not always require that a first federal petition be decided on the merits and not

barred procedurally” (quotation omitted)); *Rodriguez v. Artuz*, 990 F. Supp. 275, 283 (S.D.N.Y. 1998) (AEDPA statute of limitations is not, “at least in general,” an unconstitutional suspension of the writ).

VI. Exhaustion

Prior to AEDPA, a state prisoner’s federal habeas petition would have to be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. See *Rose v. Lundy*, 455 U.S. 509, 522 (1989).

“This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner’s federal rights.” *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

The exhaustion requirement requires the petitioner to have presented to the state court “both the factual and legal premises of the claim he asserts in federal court.” *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc).

A district court may, in its discretion, deny on the merits habeas petitions containing unexhausted claims—so-called “mixed petitions.” See 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.”). The State may waive this requirement if it does so “expressly.” 28 U.S.C. § 2254(b)(3).

If a petitioner specifies only certain issues that he deems worthy of review in a letter seeking leave to appeal a conviction to the New York Court of Appeals, he will be deemed to have waived any remaining claims in the original appellate brief. *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991).

A claim may be presented for habeas review even if the federal grounds were not explicitly asserted before the state courts if the petitioner, in asserting his claim before the state court, (1) relied on pertinent federal cases employing constitutional analysis; (2) relied on state cases employing constitutional analysis in like fact situations; (3) asserted his claims in terms so particular as to call to mind specific rights protected by the constitution; or (4) alleged a pattern of facts well within the mainstream of constitutional litigation. See *Daye v. Attorney General*, 696 F.2d 186 (1982).

If a state prisoner has not exhausted his state remedies with respect to a claim and he no longer has a state forum in which to raise the claim, the claim may be deemed exhausted but procedurally barred.

Bossett v. Walker, 41 F.3d 825, 828–29 (2d Cir. 1994).

VII. Procedural Bar

A federal habeas court may not review a state prisoner's federal claim if that claim was defaulted in state court pursuant to an independent and adequate state procedural rule, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

If a state court holding contains a plain statement that a claim is procedurally barred then the federal habeas court may not review it, even if the state court also rejected the claim on the merits in the alternative. See Harris v. Reed, 489 U.S. 255, 264 n.10 (1989) ("a state court need not fear reaching the merits of a federal claim in an alternative holding" so long as it explicitly invokes a state procedural rule as a separate basis for its decision).

When a state court "uses language such as 'the defendant's remaining contentions are either unpreserved for appellate review or without merit,' the validity of the claim is preserved and is subject to federal review." Fama v. Comm'r of Corr. Svcs., 235 F.3d 804, 810 (2d Cir. 2000).

Where a state court "says that a claim is 'not preserved for appellate review' and then ruled 'in any event' on the merits, such a claim is not preserved." Glenn v. Bartlett, 98 F.3d 721, 724–25 (2d Cir. 1996).

Where "a state court's ruling does not make clear whether a claim was rejected for procedural or substantive reasons and where the record does not otherwise preclude the possibility that the claim was denied on procedural grounds, AEDPA deference is not given, because we cannot say that the state court's decision was on the merits." Su v. Fillion, No. 02-2683, 2003 U.S. App. LEXIS 13949 at *15 n.3 (2d Cir. July 11, 2003) (citing Miranda v. Bennett, 322 F.3d 171, 178 (2d Cir. 2003)). It is thus an open question whether there are "situations in which, because of uncertainty as to what the state courts have held, no procedural bar exists and yet no AEDPA deference is required." *Id.*

Ineffective assistance of trial counsel may be cause for a procedural default, but this claim must be presented to a state court before it can be heard on habeas.

VIII. Actual Innocence

A habeas petitioner "may also 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, 729 (2d Cir. 2002).

Because habeas corpus "is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), the Supreme Court has stated that "in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration," *id.* at 320-21 (quotations omitted). To ensure that this exception remains rare and will be applied only in the extraordinary case, the Court has "explicitly tied" the miscarriage of justice exception to the petitioner's innocence. *Id.* at 321. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence ... that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* at 324.

A showing of actual innocence serves merely as a gateway to the airing of the petitioner's defaulted claim and is not itself cognizable in habeas as a free-standing claim. See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). A habeas court is, in short, concerned "not [with] the petitioners' innocence or guilt but solely [with] the question whether their constitutional rights have been preserved." *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)); cf. *Jackson v. Virginia*, 443 U.S. 307 (1979) (habeas court may review an independent constitutional claim that the evidence adduced at trial was insufficient to convict a criminal defendant beyond a reasonable doubt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (reversing conviction of "Shuffling Sam" on direct review from conviction in Louisville's police court where there was no evidence that defendant violated city ordinances).

IX. Ineffective Assistance of Counsel

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The right to counsel is "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

In order to prevail on a Sixth Amendment claim, a petitioner must prove that

(1) counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," and

(2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 697.

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690–91.

Each factual claim made in support of an allegation of ineffective assistance of counsel must be fairly presented to a state court before a federal habeas court may rule upon it. See *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991). Where an additional factual claim in support of the ineffective-assistance allegation merely "supplements" the ineffectiveness claim and does not "fundamentally alter" it, dismissal is not required. *Caballero v. Keane*, 42 F.3d 738, 741 (2d Cir. 1994).

Although the Strickland test was formulated in the context of an ineffective assistance of trial counsel claim, the same test is used with respect to claims of ineffective appellate counsel. See *Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir. 1992). Appellate counsel does not

have a duty to advance every nonfrivolous argument that could be made, see *Jones v. Barnes*, 463 U.S. 745, 754 (1983), but a petitioner may establish that appellate counsel was constitutionally ineffective “if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker,” *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). Either a federal or a state law claim that was improperly omitted from an appeal may form the basis for an ineffective assistance of appellate counsel claim, “so long as the failure to raise the state . . . claim fell outside the wide range of professionally competent assistance.” *Id.* (quotations omitted).

X. Limited Habeas Relief for Errors of State Law

Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

Nonetheless, the Due Process Clause requires that state courts conducting criminal trials “proceed consistently with ‘that fundamental fairness’ which is ‘essential to the very concept of justice.’” *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

Errors of state law that rise to the level of a constitutional violation may be corrected by a habeas court, but even an error of constitutional dimensions will merit habeas corpus relief only if it had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted).

XI. Some Frequently Raised Grounds for Relief

A. Grand Jury Claims

Claims of deficiencies in state grand jury proceedings are generally not cognizable in a habeas corpus proceeding in federal court. See *Lopez v. Riley*, 865 F.2d 30, 32 (2d Cir. 1989). The Fifth Amendment right to a grand jury presentation in felony cases is not applicable to the states. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972). “Once a state itself creates such a right, however, due process may prevent it from causing the right to be forfeited in an arbitrary or fundamentally unfair manner.” *Michael v. Dalsheim*, No. 90 CV 2959, 1991 U.S. Dist. LEXIS 7273, at *30 (E.D.N.Y. May 22, 1991).

Ordinarily, conviction by a petit jury under a heightened burden of proof establishes the harmlessness of any error with respect to grand jury proceedings.

B. Duplicitous and Multiplicitous Charges

Under New York law, “a count is duplicitous when more than one offense is contained in a

single count. . . . An indictment or information is multiplicitous when a single offense is charged in more than one count.” *People v. Kaszovitz*, 640 N.Y.S.2d 721, 722 (N.Y. City Crim. Ct. 1996) (citing cases; emphasis added). “In determining whether two counts are multiplicitous, the traditional inquiry is whether each offense charged requires proof of a fact which the other does not. . . . If any doubt exists, it must be resolved against turning a single transaction into a multiple offense.” *Rodriguez v. Hynes*, No. CV-24-2010, 1995 U.S. Dist. LEXIS 21492, at *14 (E.D.N.Y. Mar. 2, 1995) (citations omitted). The harm to be avoided is the potential for defendant to be subjected to double jeopardy. See *United States v. Morales*, 460 F. Supp. 666, 667 (E.D.N.Y. 1978).

C. Plea Bargaining

To be constitutionally valid, a plea must be entered into knowingly and voluntarily, with an understanding of its consequences:

It is beyond dispute that a guilty plea must be both knowing and voluntary. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. That is so because a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one’s accusers, and the privilege against self-incrimination.

Parke v. Riley, 506 U.S. 20, 28–29, (1992) (quotations and citations omitted).

Plea offers are not per se coercive; plea bargaining is constitutional. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“While confronting a defendant with the risk of more severe punishment clearly may have a ‘discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’” (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973))).

The Constitution does not require a court to advise defendants of the immigration consequences of a guilty plea for the plea to be considered knowing and voluntary. *United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954); *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974); *United States v. Olvera*, 954 F.2d 788, 793–94

(2d Cir. 1992). For a plea to have been made knowingly and voluntarily, the defendant must have been informed of the direct consequences of the conviction. *Brady v. United States*, 397 U.S. 742, 755 (1970). However, he need not have been informed of the collateral consequences of that plea. *United States v. Salerno*, 66 F.3d 544, 550–51 (2d Cir. 1995). Deportation is a collateral, not a direct consequence of a guilty plea. See *Parrino*, 212 F.2d at 921; *Polanco v. United States*, 803 F. Supp. 928, 931–32 (S.D.N.Y. 1992) (“Deportation is a peripheral consequence, not a punishment imposed by the trial judge . . . [and] as such, the Court [is] under no duty to warn the petitioner of the likelihood of deportation”). But see *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (finding ineffectiveness where attorney affirmatively misleads defendant about deportation consequences and leaving open the question of whether “a failure to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable”).

D. Severance and Joinder

Joinder rules are a matter of state law and federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Nonetheless, the Due Process Clause requires that state courts conducting criminal trials “proceed consistently with ‘that fundamental fairness’ which is ‘essential to the very concept of justice.’” *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir. 1998) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). Errors of state law that rise to the level of a constitutional violation may be corrected by a habeas court, but even an error of constitutional dimensions will merit habeas corpus relief only if it had a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation omitted).

New York state law permits two offenses to be joined for trial when, inter alia, “They are based upon the same act or upon the same criminal transaction [or], . . . [e]ven though based upon different criminal transactions . . . such offenses are defined by the same or similar statutory provisions and consequently are the same or similar in law.” N.Y. Crim. Pro. Law § 200.20(2). Offenses joined pursuant to this subsection are subject to severance at the request of the parties, such that “the court, in the interest of justice and for good cause shown, may, upon application of either a defendant or the people, in its discretion, order that any such offenses be tried separately from the other or others thereof.” *Id.* § 200.20(3). “Good cause shall include but not be limited to situations where there is . . . [s]ubstantially more proof on one or more such joinable offenses than on others and there is a substantial likelihood that the jury would be unable to consider separately the proof as it relates to each offense.” *Id.*

E. Batson Challenges

“More than a century ago, the [Supreme] Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.” *Batson v. Kentucky*, 476 U.S. 79, 85 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880)). In *Batson*, the Court resolved

certain evidentiary problems faced by defendants trying to establish racial discrimination in peremptory strikes. It established a three-step burden-shifting framework for the evidentiary inquiry into whether a peremptory challenge is race-based. First, the party challenging the other party’s attempted peremptory strike must make a prima facie case that the nonmoving party’s peremptory is based on race. *Batson*, 476 U.S. at 96–97. Second, the nonmoving party must assert a race- neutral reason for the peremptory challenge. *Id.* at 97–98. The nonmoving party’s burden at step two is very low. Under *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam), although a race-neutral reason must be given, it need not be persuasive or even plausible. *Id.* at 768. Finally, the court must determine whether the moving party carried the burden of showing by a preponderance of the evidence that the peremptory challenge at issue was based on race. *Batson*, 476 U.S. at 96, 98.

Throughout the three *Batson* steps, the burden remains with the moving party. “It is not until the third step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.” *Purkett*, 514 U.S. at 768. Typically, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed. Because the evidence on this issue is often vague or ambiguous, the best evidence often will be the demeanor of the attorney who exercises the challenge. Evaluation of the attorney’s credibility lies “peculiarly within a trial judge’s province.” *Wainwright v. Witt*, 469 U.S. 412, 428 (1985).

F. Peremptory Challenges

“[P]eremptory challenges are not of federal constitutional dimension.” *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000). The Court has rejected the contention that, “without more, ‘the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury.’” *Id.* (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)).

G. Erroneous Evidentiary Rulings

For a habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so pervasive as to have denied him a fundamentally fair trial. *United States v. Agurs*, 427 U.S. 97, 108 (1976). The standard is “whether the erroneously admitted 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 that would have existed on the record without it. In short it must have been ‘crucial, critical, highly significant.’” *Collins v. Scully*, 755 F.2d 16, 19 (2d Cir. 1985) (quoting *Nettles v. Wainwright*, 677 F.2d 410, 414–15 (5th Cir. 1982)). This test applies post-AEDPA. See *Wade v. Mantello*, No. 02-2359, slip op. at 13 (2d Cir. June 13, 2003).

H. Fourth Amendment Violations: *Stone v. Powell*

Under *Stone v. Powell*, 428 U.S. 465 (1976), a federal habeas court is barred from reviewing Fourth Amendment claims so long as the state has provided petitioner with the opportunity for a full and fair litigation of his claim. An ineffective assistance of counsel claim premised on a failure related to the Fourth Amendment is cognizable on habeas. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

I. *Wade* Hearings (Suppression of Pretrial Identifications)

In *United States v. Wade*, the Supreme Court recognized that there is a “grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial,” 388 U.S. 218, 236 (1966), and that to protect defendant’s Sixth Amendment rights the trial court must ascertain prior to trial whether a witness’s identification testimony is tainted by an improperly made identification. Under New York’s Criminal Procedure Law, a court must conduct a hearing upon a defendant’s motion to suppress an improperly made previous identification unless there is no legal basis for the motion. See N.Y. Crim. Pro. L. §§ 710.20(6); 710.60(3). Under state caselaw, the court may also deny a hearing if the identification is “confirmatory” because the parties are known to each other. See *People v. Rodriguez*, 79 N.Y.2d 445, 453 (1992) (“To summarily deny a *Wade* hearing, the trial court had to conclude that, as a matter of law, [the identifying witness] knew defendant so well that no amount of police suggestiveness could possibly taint the identification.”).

J. *Rosario* Claims (Failure to Turn Over Witness Statements)

Pursuant to *People v. Rosario*, the state must provide a criminal defendant with the pretrial statements of any witness who will be called to testify on behalf of the prosecution. 173 N.E.2d at 883–84.

This rule has been codified in the New York criminal procedure law; the prosecutor is obliged to “make available to the defendant . . . any written or recorded statement . . . made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness’s testimony.” N.Y. Crim. Pro. Law § 240.45(1)(a). Rosario material “is valuable not just as a source of contradictions with which to confront [a witness] and discredit his trial testimony,” but also because the material “may reflect a witness’ bias . . . or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor.” Rosario, 173 N.E.2d at 883. “When the People delay in producing Rosario material, the reviewing court must ascertain whether the defense was substantially prejudiced by the delay. When, however, the prosecution fails completely in its obligation to deliver such material to defense counsel, the courts will not attempt to determine whether any prejudice accrued to the defense. The failure constitutes per se error requiring that the conviction be reversed and a new trial ordered. *People v. Rangelhelle*, 503 N.E.2d 1011, 1016 (N.Y. 1986).

Claims of ineffective assistance when dealing with Rosario material typically contend that counsel neglected to preserve a claim that the state failed to turn over the required pretrial statements of prosecution witnesses. See, e.g., *Flores v. Demski*, 215 F.3d 293, 304 (2d Cir. 2000) (defendant prejudiced by trial counsel’s failure to preserve Rosario claim); *Mayo*, 13 F.3d at 530–31, 534 (same with respect to appellate counsel).

K. Self-Representation

A defendant in a state criminal trial has the constitutional right to proceed without counsel if he voluntarily and intelligently elects to do so. See *Faretta v. California*, 422 U.S. 806, 807 (1975). A criminal defendant may proceed pro se if he “knowingly, voluntarily, and unequivocally” waives his right to appointed counsel. *Johnstone v. Kelly*, 808 F.2d 214, 216 (1986). “A state court’s violation of a defendant’s Sixth Amendment right to self-representation requires automatic reversal of a criminal conviction and is not subject to a harmless error analysis.” *Williams v. Bartlett*, 44 F.3d 95, 99 (2d Cir. 1994).

After trial has begun, a trial court faced with such an application must balance the legitimate interests of the defendant in self-representation against the potential disruption of the proceedings already in progress. *United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986). “In exercising this discretion, the appropriate criteria for a trial judge to consider are the defendant’s reasons for the self-representation request, the quality of counsel representing the party, and the party’s prior proclivity to substitute counsel.” *Williams*, 44

F.3d at 100 n.1 (citation omitted).

L. Competency

It is well-settled that the “criminal trial of an incompetent defendant violates due process.” *Medina v. California*, 505 U.S. 437, 453 (1992). This “prohibition is fundamental to an adversary system of justice.” *Drope v. Missouri*, 420 U.S. 162, 172 (1975)). In determining whether a criminal defendant is competent to stand trial, the trial court must consider “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960). The duty to protect a defendant from being tried while incompetent persists throughout trial, so “even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.” *Drope*, 420 U.S. at 181.

M. Brady Claims

The prosecution in a criminal matter has a constitutional obligation to disclose exculpatory evidence to the defendant. See *Brady v. Maryland*, 373 U.S. 83 (1967), *Giglio v. United States*, 405 U.S. 150 (1972). “A finding of materiality of the evidence is required under Brady.” *Giglio v. United States*, 405 U.S. 150, 154 (1972). Exculpatory evidence is considered material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Nondisclosure merits relief only if the prosecution’s failure “undermines confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678).

N. Miranda Violations

The Supreme Court has held that “the ultimate question, whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.” *Miller v. Fenton*, 474 U.S. 104, 112 (1985); see also *Whitaker v. Meachum*, 123 F.3d 714, 716 (2d Cir. 1997). However, a state court’s determinations of factual matters, such as the “length and circumstances of the interrogation, the defendant’s prior experience with the legal process, and familiarity with the Miranda warnings,” are considered questions of fact, which are entitled to a presumption of

correctness under 28 U.S.C. § 2254(d). Miller, 474 U.S. at 117.

A person questioned by law enforcement officers after being “taken into custody or otherwise deprived of his freedom of action in any significant way” must be “warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Miranda, 384 U.S. at 444. “Custodial interrogation” is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Id.; see also Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (duty to give Miranda warnings is triggered “only where there has been such a restriction on a person’s freedom as to render him ‘in custody’”).

“Two discrete inquiries are essential to the determination” of whether a defendant has been taken into custody for Miranda purposes: “first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 113 (1999) (footnote omitted).

“It is well settled . . . that a police officer’s subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of Miranda, . . . [and] the same principle obtains if an officer’s undisclosed assessment is that the person being questioned is not a suspect,” because “[i]n either instance, one cannot expect the person under interrogation to probe the officer’s innermost thoughts.” Stansbury v. California, 511 U.S. 323, 324 (1994) (per curiam). An officer’s subjective beliefs are relevant only to the extent they would affect “how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” Id. at 324–35; see also Berkemer v. McCarty, 468 U.S. 420, 442 (1994) (“A policeman’s unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”).

O. Sandoval Hearings (Impeachment of Petitioner by Prior Convictions)

If petitioner did not testify at trial, this claim is not cognizable on habeas review. See Luce v. United States, 469 U.S. 38, 43 (1984) (“to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify”); Grace v. Artuz, No. 00-CV-1441, 2003 U.S. Dist. LEXIS 6969, at *26 (E.D.N.Y. Apr. 22, 2003) (“petitioner’s claim as to the impropriety of the Sandoval ruling

does not raise a constitutional issue cognizable on habeas review”).

P. Denial of Defendant’s Right to be Present

A criminal defendant has the right “to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.” *Faretta v. California*, 422 U.S. 806, 819 n.5 (1975). However, “the right to be present is not absolute: it is triggered only when the defendant’s ‘presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.’” *Cohen v. Senkowski*, 290 F.3d 485, 489 (2d Cir. 2002) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106–06 (1934)).

Q. Denial of Right to Public Trial

The Sixth and Fourteenth Amendments guarantee an accused criminal a right to a public trial. “The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.” *Waller v. Georgia*, 467 U.S. 39 (quotation and footnotes omitted).

The right to a public trial is not absolute, however, and it may be limited under appropriate circumstances. Before a courtroom may be closed, (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and(4) it must make findings adequate to support the closure *Waller*, 467 U.S. at 48

(1984). Where the courtroom is to be only partially closed a movant need only demonstrate a “substantial reason” to justify the closure. *Woods v. Kuhlman*, 977 F.2d 74, 76 (2d Cir. 1992) (“a less stringent standard [is] justified because a partial closure does not implicate the same secrecy and fairness concerns that a total closure does”).

“*Waller* prevents a court from denying a family member’s request to be exempted from a courtroom closure unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake.” *Yung v. Walker*, ___ F.3d ___, ___ (2d Cir. 2003) (amended decision).

R. Use of Perjured Testimony

A conviction based on perjured testimony is analyzed under the Due Process Clause of the Fourteenth Amendment. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Under this standard, a conviction must be set aside if “the prosecution knew, or should have known, of the perjury,” and “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976). The court of appeals for the Second Circuit has thus far declined to “draw the contours of the phrase ‘should have known.’” *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003). The court of appeals has decreed that, because the Supreme Court has not clearly established that habeas relief is available in the complete absence of prosecutorial knowledge of perjury, AEDPA prevents granting of the writ on such grounds. *Id.* at 345 n.2 (after AEDPA, habeas petitioners can no longer rely on *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1998), in which habeas relief was granted in the absence of prosecutorial knowledge of perjury).

S. Prosecutorial Misconduct

Ordinarily, a prosecutor’s misconduct will require reversal of a state court conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair, and, therefore, a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Nonetheless, “when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair.” *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990) (citing *DeChristoforo*, 416 U.S. at 643). Inquiry into the fundamental fairness of a trial requires an examination of the effect of any misconduct within the context of the entire proceedings. *DeChristoforo*, 416 U.S. at 643. In order to view any prosecutorial misconduct in context, “we look first at the strength of the evidence against the defendant and decide whether the prosecutor’s statements plausibly could have tipped the scales in favor of the prosecution. . . . Ultimately, we must consider the probable effect the prosecutor’s [statements] would have on the jury’s ability to judge the evidence fairly.” *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted).

T. Erroneous Jury Instructions

“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 state 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.” *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. *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973). The question is “whether

the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.” *Id.* at 147.

U. Jurors Presumed to Have Followed Jury Instructions

The trial judge “must be convinced that the jury being addressed has a reasonable chance of understanding and acting upon instructions from the court. Any other approach undercuts the role and dignity of the trial judge, who is put in the position of uttering what he and everyone else in the courtroom knows is the equivalent of pure gibberish. In a democratic nation’s judicial system, dedicated to truth and justice, such a lack of connection with reality is unacceptable.” See, e.g., *United States v. Gallo*, 668 F. Supp. 736, 752 (E.D.N.Y. 1987).

V. Circumstantial Evidence Instruction

Under New York law, in criminal cases “which depend entirely upon circumstantial evidence[,] . . . the facts from which the inference of the defendant’s guilt is drawn must be established with certainty—they must be inconsistent with his innocence and must exclude to a moral certainty every other reasonable hypothesis.” *People v. Barnes*, 406 N.E.2d 1071, 1073 (N.Y. 1980) (quotation marks omitted). Although a “request for a circumstantial evidence instruction must be allowed when proof of guilt rests exclusively on circumstantial evidence,” a case involving direct evidence “does not qualify for the circumstantial evidence instruction.” *People v. Roldan*, 666 N.E.2d 553, 554 (N.Y. 1996) (no circumstantial-evidence charge where eyewitness testimony establishes an element of the crime); *Barnes*, 406 N.E.2d at 1073 (“this legal standard does not apply to a situation where . . . both direct and circumstantial evidence are employed to demonstrate a defendant’s culpability”).

IX. Verdict was Against the Weight of the Evidence

To the degree petitioner claims that his guilt was not proven beyond a reasonable doubt, the

relevant question for this court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner “bears a very heavy burden” when challenging the legal sufficiency of the evidence in a state criminal conviction. *Einaugler v. Supreme Court*, 109 F.3d 836, 840 (2d Cir. 1997). To the degree petitioner claims the verdict was against the weight of the evidence, such a claim does not present a federal constitutional issue.

X. Repugnant Verdicts

In *People v. Tucker*, the New York Court of Appeals set forth the New York rule concerning repugnant jury verdicts:

When there is a claim that repugnant jury verdicts have been rendered in response to a multiple-count indictment, a verdict as to a particular count shall be set aside only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury. . . .

The critical concern is that an individual not be convicted for a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all. Allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it. . . .

The instructions to the jury will be examined only to determine whether the jury,

as instructed, must have reached an inherently self-contradictory verdict.

431 N.E.2d 617, 617–20 (N.Y. 1981); see also *People v. Trappier*, 660 N.E.2d 1131 (N.Y. 1995) (“A verdict is inconsistent or repugnant . . . where the defendant is convicted of an offense containing an essential element that the jury has found the defendant did not commit. In order to determine whether the jury reached ‘an inherently self-contradictory verdict’ a court must examine the essential elements of each count as charged.”). Under New York law, New York courts could conclude a jury’s announcement in court of guilty or not guilty, rather than its markings on a verdict sheet, constitute the verdict of the jury. See *People v. Khalek*, 689 N.E.2d 914, 915 (N.Y. 1997) (“Because the jury’s unreported verdict was not announced in court, recorded in the minutes, or accepted by the court, it does not constitute a final verdict for double jeopardy purposes.”).

“The law is clear that a defendant may not attack his conviction on one count because it is inconsistent with an acquittal on another count.” *United States v. Romano*, 879 F.2d 1056, 1060 (2d Cir. 1989), citing *United States v. Powell*, 469 U.S. 57 (1984). Review for sufficiency of the evidence is a sufficient safeguard against jury irrationality. *Powell*, 469 U.S. at 67. No habeas relief is warranted on this procedurally defaulted claim.

XI. Abuse of Discretion in Sentencing

The assertion that a sentencing judge abused his or her discretion in sentencing is not a cognizable federal claim subject to review by a habeas court. See *Fielding v. LeFevre*, 548 F.2d 1102, 1109 (2d Cir. 1977) (citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). A challenge to the term of a sentence is not a cognizable constitutional issue if the sentence falls within the statutory range. *White v. Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992).

XII. Harmless Error

In order to be entitled to habeas relief, petitioner must demonstrate that any constitutional error

“had substantial and injurious effect or influence in determining the jury’s verdict,” and that the error resulted in “actual prejudice.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation marks omitted).

XIII. Certificate of Appealability

A habeas petitioner who has been denied relief by the district court on a claim may not appeal the denial to a federal court of appeals except by permission. The district court may grant a certificate of appealability with respect to any one of petitioner’s claims only if petitioner can make a substantial showing of the denial of a constitutional right. If a certificate is denied petitioner has a right to seek a certificate of appealability from the Court of Appeals for the Second Circuit. See 28 U.S.C. § 2253; *Miller-EI v. Cockrell*, 123 S.Ct. 1029 (2003). Any claims for which a certificate of appealability is granted will be reviewed de novo by the Court of Appeals.

XIV. Pro Se Litigants Papers to be Construed Liberally

A pro se litigant’s pleadings are held to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

XV. Appendices

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**Grant of Writ of Habeas Corpus: THOMAS, DAVID V.
KUHLMANN, SUPT., SULLIVAN, No. 97-CV-2096**

Below are links to some unpublished documents of interest (all in

pdf):

Certificate of Appealability on Prosecutorial Misconduct Claim

Order Regarding Stay Pending of Appeal

Stipulation of Dismissal of Appeal Filed by the State

Complete Civil Docket No. 97-CV-20096 (it is rather instructive, indeed).

Contrary to Judge Weinstein's suggestion, the actual order granting said writ (filed on March 20, 2003) is not available "on the court's electronic database." We will post this order as soon as we locate it.

Below is the text of the published "MEMORANDUM, ORDER & JUDGMENT" of April 10, 2003 (255 F.Supp.2d 99).

United States District Court,

E.D. New York.

Larry THOMAS, Petitioner,

v.

Robert KUHLMAN, Superintendent, Sullivan Correctional Facility;
Dennis Vacco,

Attorney General of New York, Respondents.

No. 97-CV-2096 (JBW).

April 7, 2003.

Richard Joselson, Esq., The Legal Aid Society, Criminal Appeals
Bureau, New York City, for Petitioner.

Morgan Dennehey, Esq., Assistant District Attorney, Kings County,
Brooklyn, NY, for Respondents.

MEMORANDUM, ORDER & JUDGMENT

WEINSTEIN, Senior District Judge.

I. Introduction

At trial in this murder case, the prosecution elicited pivotal testimony from its key witness that she observed defendant on the fire escape of the victim's apartment building shortly before the victim was killed. When considered in the context of the state's case as a whole, this testimony placed defendant precisely at the window of the victim's apartment just before the murder.

It is now undisputed that it was physically impossible for the witness to have seen defendant at the victim's window, since the fire escape that abuts the victim's apartment was not visible from her vantage point. Even a rudimentary inspection of the crime scene would have made this crucial fact clear to police, prosecution and defense counsel.

Counsel's failure to make any investigation of the crime scene left him unable to challenge the witness's account and unable to counter the prosecution's factually incorrect summation argument--supported by the trial court's marshaling of the evidence--that defendant was seen on the fire escape of the victim's apartment shortly before her murder. Because the remaining evidence presented by the state was relatively slight and the jury was on the verge of hanging--requiring an Allen charge--there is a substantial likelihood that the jury would not have convicted defendant if the witness's testimony had been refuted.

Although defense counsel's performance was, in general, highly professional and efficacious, his failure to perform an adequate investigation in preparation for trial rendered his performance constitutionally ineffective. Defendant's petition for a writ of habeas corpus will be granted. His actual innocence or guilt of the crime of conviction is not implied.

This case raises the recurring issue of the ethical obligations of counsel when defending an impecunious client. Cf. *Jelinek v. Costello*, 247 F.Supp.2d 212, 280-81 (E.D.N.Y.2003) (interplay between wealth and representation). In particular, the state or defense counsel has a duty to expend resources for necessary investigations where a criminal defendant is unable to afford the attendant expenses.

II. Facts

Eva Sawyer, a social acquaintance of defendant, was beaten and stabbed to death in her apartment in Brooklyn in May 1988. Police investigators found no evidence of forced entry into her apartment.

The door and all windows were locked save for the window leading to the fire escape.

The day after the murder, defendant voluntarily accompanied a police detective to the precinct for questioning. He was asked about and described his romantic relationship with the victim, and suggested that he had recently endeavored to end it. He claimed not to have seen her for several days prior to her murder. He also stated that he had spent the entire night in question with another woman.

During the interview, detectives noticed spots that appeared to be dried blood on defendant's sneakers. He claimed the spots were mud from a newly planted tree, and over protest surrendered the sneakers to the police. Later testing proved the spots to be Type O blood, consistent with the victim's blood type (along with 45 percent of the population) but not with defendant's. He was subsequently arrested in July 1988.

At trial in June of the next year, proof of defendant's guilt included the evidence that blood spots on his sneakers were consistent with the blood type of the victim, that he enlisted a girlfriend in an attempt to falsely corroborate his alibi, and--most critically--that a witness had observed him on the fire escape just outside of the victim's apartment immediately before the crime was committed.

Although defendant persistently challenged the admissibility of the blood evidence at trial and on appeal, see *People v. Thomas*, 188 A. D.2d 569, 569- 72, 591 N.Y.S.2d 464 (2d Dep't 1989), he does not now press that claim.

The only issues in the present proceeding center on the witness testimony concerning defendant's presence on the fire escape of the victim's apartment.

Various police officers at trial established the likelihood that the murderer had entered or exited the victim's locked, second-floor apartment through a window opening onto the fire escape. The victim's cousin testified that the apartment's fire escape was at "the rear of her building." Trial Tr. at 55. There was no testimony at trial that there were other fire escapes on the building aside from one on the front of the building.

Having established that the murderer likely utilized the only fire escape that was located at the rear of the victim's building, the prosecution called as a witness Yvette Walker Artis (variously referred to in court papers as "Walker" and "Artis"), a young woman who at the time of trial was being held at Riker's Island on felony drug possession charges. On direct examination she acknowledged

that in exchange for her testimony the district attorney would allow her to plead to a misdemeanor offense, thus avoiding altogether what might have been a potential 25-year prison sentence. Artis, whose parents lived at 836 Crown Street--the apartment building situated across a courtyard from 826 Crown Street, where the victim resided--was at her parents' apartment building on the evening of the murder.

At trial, Artis testified that at about 2:00 a.m. she was in a stairwell in her parents' building, staring out of a window that overlooked 826 Crown Street. As she stated on direct examination, from this vantage point she could see the back of the victim's building:

Q. Where is 836 Crown Street in relation to 826 Crown Street?

A. Right next door.

Q. When you look at the back of the buildings, what does it look like from there?

A. A courtyard, people's windows and fire escapes.

Q. And can you see the fire escapes of 826 Crown Street from 836 Crown Street?

A. Yeah, if the [hallway] window's open.

Id. at 216-17. Artis, who had not been entrusted with a key to her parents' apartment, was waiting to be let into the apartment when she "saw something move across 826 on the fire escape," and then "saw somebody on the fire escape" on the second floor of the building. Id. at 218.

Although she had failed to identify defendant when police first showed her his photograph during their investigation of the murder, at trial she identified defendant as the man she observed on the fire escape at a second floor apartment window. If her testimony was credited by the jury, then it could only have concluded that defendant was on the fire escape outside of the victim's apartment at about the time of the murder.

Defense counsel's examination of Artis more firmly fixed for the jury the (incorrect) assumption that the apartment Artis observed was the victim's. On cross examination, counsel queried Artis about the layout of the buildings and the fire escapes:

Q. Now, when you're looking out this window, can you describe for us--you said the buildings are next to each other. How can you see

the other building?

A. Because it's a courtyard and you can see all the back windows to the back apartments and the side apartments, like this. So, there is a gate here, and then this window is here, and there's some buildings here.

Q. How many fire escapes go across the back of that building?

THE COURT: You're talking about 826?

[DEFENSE COUNSEL]: Right.

A. There's one to every floor, only on one side of the building that I know of.

Q. Only one fire escape that goes from the top of the building to the bottom, or--more than one?

A. One from the top to the bottom.

...

Q. And there's only one fire escape that goes all the way down?

A. I didn't build the building. I'm telling you how the building is.

.....

Q. You say there's only one fire escape?

A. On the back of the building.

Q. Where are the other fire escapes?

A. In the front.

.....

Q. So, there's only one fire escape in the front, and one in the back?

A. Yeah.

Id. at 241-46. Artis's testimony with respect to the layout of the

buildings and the fire escapes was never refuted, no pictures of the buildings or fire escapes were introduced into evidence, and no diagram of the buildings was ever presented to the jury.

If the jury believed Artis's testimony that she had seen a man on the rear, second floor fire escape of 826 Crown Street, then it is clear--given the uncontradicted testimony of the police officers, the victim's cousin, and Artis--that the only conclusion the jury could reasonably have reached is that the man Artis observed that evening was on the victim's fire escape, trying to get into the victim's apartment. This is precisely what the prosecutor argued to the jury in his summation, where he stated without objection that defendant "entered through a window," that "Evette Walker [Artis] saw him at the window at the time of the crime," and that "a further circumstance which prove[s] this is the man who murdered Eva [Sawyer]" is that he was "on the fire escape at 2 a.m." *Id.* at 344. The trial judge herself, in marshaling the evidence for the jury, likewise stated that "[t]he prosecution contends that they have proved ... that defendant was seen on Eva [Sawyer's] fire escape by Evette Walker [Artis]." *Id.* at 395.

It is now undisputed that none of the rear windows or back apartments of the victim's building are visible from the window from which Artis purportedly saw the defendant. At a hearing in the court, pictures and concessions established this critical discrepancy as a matter of fact. At most, therefore, Artis observed defendant on an entirely distinct fire escape from that abutting the victim's apartment, outside of the window to apartment B-4 instead of the window to the victim's apartment, which was B-7. This information was available to both the prosecution and defense in the police reports filed during the investigation, though it was never brought to the attention of the jury by either side at trial. See Pet'r's Appx. in Support of Pet. for Writ of Habeas Corpus, at A62 (police report indicating victim's apartment was B-7); *id.* at A63 (police report indicating that the apartment viewed by Artis was B-4); *id.* at A64 (police report indicating that apartment B-4 was occupied by Shade Olmo and her family).

The case was submitted to the jury, which after calling for exhibits and deliberating for some time indicated to the trial court that it was deadlocked and could not reach a decision. After the trial court urged the jury to try to reach a consensus, a verdict of guilty was delivered at 5:09 p.m. on the Friday before the Memorial Day weekend. Defendant was sentenced to 25 years to life in prison.

III. Procedural History

Defendant filed a timely notice of appeal. In his brief he raised five claims: (1) that his sneakers and the serology tests performed on them should have been suppressed because officers seized them without probable cause to arrest him; (2) that the in-court

identification testimony of Artis should have been suppressed because the police-arranged identification procedures were impermissibly suggestive; (3) that the trial judge improperly delegated responsibility for presiding over the pre-charge conference to her law assistant; (4) that the trial judge marshaled the evidence in an unfair manner in her charge; and (5) that the prison sentence was excessive. In December 1992, the Appellate Division affirmed defendant's conviction, noting inter alia that although the photograph shown to witness Artis was suggestive, an independent source for her identification of defendant was her opportunity to observe him on the fire escape. *People v. Thomas*, 188 A.D.2d 569, 572, 591 N.Y.S.2d 464 (N.Y.App.Div.1992). Permission to appeal to the New York Court of Appeals was denied in May 1993. *People v. Thomas*, 81 N.Y.2d 1021, 600 N.Y.S.2d 209, 616 N.E.2d 866 (1993).

In February 1994, defendant filed before the trial court a motion to vacate his conviction pursuant to section 440.10 of the New York Criminal Procedure Law. In that motion he argued first that the trial prosecutor denied him due process of law under the federal constitution by eliciting and then exploiting testimony from Artis concerning the layout of the crime scene that the prosecutor knew or should have known to be false. Second, he argued that his trial attorney denied him the effective assistance of counsel by failing to conduct an adequate investigation of the crime scene, by failing to review the police reports concededly in his possession, and by failing to interview two potentially exculpatory witnesses. The motion was denied without a hearing in August 1994.

Permission to appeal to the Appellate Division was granted, but in April 1996 that court affirmed the denial of the motion to vacate the conviction. *People v. Thomas*, 226 A.D.2d 484, 641 N.Y.S.2d 48 (N.Y.App.Div.1996). In dismissing defendant's ineffectiveness argument, the appellate court summarily stated that it "agree[d] with the People that defense counsel's failure to cross-examine the witness as to her inability to see the fire escape which led to the victim's room did not constitute ineffective assistance of counsel." *Id.* at 485-86, 641 N.Y.S.2d 48. It was, and is, the prosecutor's argument that defendant could have climbed to the top of the roof of the building on the fire escape that the witness could see, crossed over the roof and then descended the fire escape abutting the victim's apartment. The state courts apparently accepted this argument. The Appellate Division wrote:

The defendant argues that the proof which he adduced in connection with his motion to vacate the judgment of conviction established conclusively that the witness noted above could not have seen the "rear" fire escape of the victim's building from the vantage point that she had described during the trial testimony. Also, the defendant asserts that the proof submitted with his post-judgment motion

established conclusively that the only fire escape which was in fact visible to the witness did not provide access to the victim's apartment. Based on this premise, the defendant argues that the prosecutor committed "official misconduct" in failing "to correct false testimony".

The People respond by asserting, among other things, that whether the fire escape which was in fact visible to their key witness was adjacent to the "rear" or rather to the "side" of the victim's building is a matter of semantics. The People also assert that this witness, at trial, did not specifically testify that it was the fire escape outside the victim's apartment upon which she had seen the defendant.

The Supreme Court denied the motion without a hearing. We affirm.

It may well be that the fire escape referred to by the prosecution witness noted above would more accurately have been described as one located on the side, rather than at the rear, of the victim's apartment building. Also, it may well be that this fire escape did not give direct access to the victim's apartment. However, these facts were plainly discoverable by the defendant at the time of trial, and thus he may not rely upon C.L. 440.10(1)(g) in support of his argument that he was entitled to a hearing as a matter of law.

We agree with the People that there was no deliberate attempt by the prosecutor to submit the case to the jury based upon proof which he knew or should have known to be false. We also agree with the People that defense counsel's failure to cross-examine the witness as to her inability to see the fire escape which led to the victim's room did not constitute ineffective assistance of counsel. There was no evidentiary showing sufficient to warrant a hearing as to the defendant's motion insofar as it was made pursuant to C.L. 440.10(1)(b), (c), (f), and (h). The order appealed from should therefore be affirmed.

226 A.D.2d at 485-86, 641 N.Y.S.2d 48 (citations omitted).

The New York Court of Appeals denied leave to appeal this decision in August 1996.

Defendant, represented by counsel, filed the present habeas petition on April 23, 1997. The petition raises two contentions, both of which were rejected on the merits when presented to the state courts in section 440.10 motions and subsequent appeals. First, defendant argues that the "prosecutor improperly elicited false testimony from the main prosecution witness, although he knew or should have known that the testimony was false." Pet. for Writ of Habeas Corpus at 3. Second, he argues that he was "denied effective assistance of

counsel by his trial attorney's failure to expose the false prosecution evidence and to present affirmative exculpatory evidence regarding the nature of the crime scene." *Id.* at 4. He also argues that his state appellate counsel was ineffective.

IV. Law

A. AEDPA

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits" in state court only if it concludes that the adjudication of the claim "(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). Under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring and writing for the majority in this part). Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S.Ct. 1495.

A person in custody pursuant to a state court judgment has one year in which to file an application for a writ of habeas corpus. See 28 U.S.C. § 2244(d)(1). Prisoners whose convictions became final before the effective date of AEDPA, April 24, 1996, had a grace period of one year, until April 24, 1997, to file their habeas application. See *Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir.1998). Defendant, whose conviction became final before the effective date of AEDPA, filed his habeas corpus petition on April 23, 1997. The present petition is timely under the rule of *Ross*, as respondents properly concede. See Tr. of Hr'g of Mar. 20, 2003, at 2.

B. Ineffective Assistance of Counsel

1. Generally

The Counsel Clause of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel

for his defence." U.S. Const. amend. VI. This right to counsel is "the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (emphasis added). The Supreme Court has explained that in giving meaning to this requirement we must be guided by its purpose--"to ensure a fair trial"--and that therefore the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *id.* at 688, 104 S.Ct. 2052, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052. See also *United States v. Eyman*, 313 F.3d 741, 743 (2d Cir.2002).

A "reasonable probability" of a different result is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "The result of a [criminal] proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Purdy v. Zeldes*, --- F.3d ---, ---, 2003 WL 253144, at *6 (2d Cir.2003) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

Ineffective assistance may be demonstrated where counsel performs competently in some respects but not in others. See *Eze v. Senkowski*, 321 F.3d 110, 114 (2d Cir.2003). Although there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," the court must keep in mind that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 689, 696, 104 S.Ct. 2052.

2. Strategic Choices and Duty to Investigate

As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91, 104 S.Ct. 2052. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052. Where the nature of the crime scene is material to the

defense, counsel may be deemed ineffective for having failed to investigate it properly. See, e.g., *Williams v. Washington*, 59 F.3d 673, 680-81 (7th Cir.1995) (ineffective assistance in part for failure to investigate crime scene where doing so would have revealed evidence that, "given the layout of the home and the relatively crowded conditions, the alleged assault could not have taken place as claimed" (quotation omitted)); *People v. Donovan*, 184 A.D.2d 654, 655, 585 N.Y.S.2d 70 (N.Y.App.Div.1992) (ineffective assistance where counsel failed "to dispatch an investigator to the scene [of defendant's arrest] ... until after the trial had commenced," leaving him "unprepared to effectively argue [the issue] before the court").

The court of appeals for the Second Circuit has recently implied that all of counsel's significant trial decisions must be justified by a sound strategy--a significant raising of the bar that arguably requires an unrealistic degree of perfection in counsel. See *Eze*, 321 F.3d at 136 (remanding to district court for factual hearing because it was "unable to assess with confidence whether strategic considerations accounted for ... counsel's decisions").

C. Prosecutorial Misconduct Relating to False Testimony

A prosecutor may not knowingly allow a witness to give perjured testimony. See *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair...."). The same prosecutorial duty applies where the witness's testimony is simply false rather than perjurious. See, e.g., *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir.1995) ("The wrong of knowing use by prosecutors of perjured testimony is different, and misnamed--it is knowing use of false testimony. It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false."); *United States v. Iverson*, 637 F.2d 799, 805 n. 19 (D.C.Cir.1980); see also 5 Wayne R. LeFave, et al., *Criminal Procedure* 497 (1999) ("As lower courts have noted, it matters not whether the witness giving false testimony was mistaken or intentionally lying. If the prosecution knows that the witness's statement is untrue, it has a duty to correct it."). Misconduct may also occur where a prosecutor knowingly presents ambiguous evidence to the jury in a misleading manner. See *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir.1967) (prosecutorial misconduct occurs "not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact").

Where a conviction is achieved with the aid of testimony that the prosecution knew or should have known to be false, it "must be set aside if there is any reasonable likelihood that the false testimony

could have affected the judgment of the jury." Agurs, 427 U.S. at 103, 96 S.Ct. 2392. A successful challenge to a conviction based on the grounds of prosecutorial misconduct therefore requires the defendant to show that "(1) there was false testimony, (2) the Government knew or should have known that the testimony was false, and (3) there was 'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" United States v. Helmsley, 985 F.2d 1202, 1205-06 (2d Cir.1993) (quoting Agurs, 427 U.S. at 103, 96 S.Ct. 2392).

In general such challenges to convictions based upon false testimony are subject to a due diligence requirement on the part of defendant. As the court of appeals for the Second Circuit has explained in the analogous situation of a petition for a writ of habeas corpus seeking relief from federal custody, "[normally] the requirement that a collateral attack must be supported by evidence not available by reasonable diligence at trial applies to claims of a prosecutor's knowing use of false testimony." Helmsley, 985 F.2d at 1206. A limited exception to this rule exists where defendant claims the prosecutor was both aware of the falsity of the witness's statements and was "directly involved as a participant" in the transaction about which the witness was untruthful. *Id.* at 1207 (citing, as examples, a prosecutor's knowledge that a witness had falsely denied a plea deal because the prosecutor had made the deal with the witness; a prosecutor's knowledge that grand jury witnesses had testified contrary to the prosecutor's representations at trial because the prosecutor had elicited their grand jury testimony; and a prosecutor's knowledge that a witness at trial had falsely denied having testified before a grand jury because the prosecutor had called her as a witness at the grand jury). Stated succinctly, the court of appeals has never permitted a successful collateral attack for a prosecutor's knowing use of false testimony based entirely on evidence of which the defendant was aware, or in the exercise of reasonable diligence should have been aware, at trial, and [the court has] permitted such an attack to succeed, despite the existence at trial of some basis for the defendant to suspect the prosecutor's knowing use of false testimony, only where the prosecutor was directly involved in the falsity. *Id.* at 1208.

V. Application of Law to Facts

A. Ineffective Assistance of Counsel

Artis's testimony that she observed defendant at a second floor apartment on the rear fire escape of the victim's building at the time of the murder, along with her testimony that there was only one fire escape at the back of the apartment building, was not the only evidence of defendant's guilt. Other evidence included the blood stains on his sneakers and his construction of a false alibi. The Artis

testimony was, however, of overwhelming importance for the prosecution's case. Without this testimony it is doubtful that there would have been enough evidence to permit a jury verdict.

Relying upon Artis's statements, the prosecution was able to argue that defendant was seen at the window of the victim's apartment just before the murder, attempting to gain access to the apartment. The evidence dovetailed with the prosecution's theory of the case, which relied upon the fact that the door and all windows to the victim's apartment--save for that of the fire escape--were locked, and that the murderer likely entered and exited through the victim's fire escape window.

If defense counsel had made a proper investigation prior to trial--or if he had paid sufficient attention to the police reports that were turned over to him as Rosario material--he would have been able to deal significant blows to the prosecution's case in several ways. First, and most important, counsel would have eliminated all proof that defendant was seen that evening outside of the victim's window. It cannot be gainsaid that testimony placing defendant on a fire escape directly outside of the victim's apartment is decidedly more inculpatory than testimony that does no more than place defendant in a location elsewhere at the victim's building.

Second, with knowledge of the layout of the apartment buildings and their fire escapes, counsel could have argued that the witness, in identifying defendant as the man she saw on the fire escape, likely made an improper intuitive leap and jumped to the conclusion that she had seen defendant when in fact she had seen someone else. Counsel, that is, might well have argued that the witness-- who was repeatedly shown a picture of the defendant by police and recognized defendant from having previously seen him enter the victim's building--may simply have assumed that the man she saw on the fire escape was in fact the defendant. Such an argument by defense counsel might have been particularly effective given that the witness had initially failed to identify defendant, that she was in jail at the time of trial and testifying pursuant to a plea agreement, and that her credibility--at least in the eyes of the trial judge-- "leaves something to be desired." Pretrial Hr'g at 257.

Finally, if properly armed with the easily discoverable facts concerning the layout of the victim's apartment building, counsel would likely have chosen to highlight the implausibility of the prosecution's theory of the crime. Why, counsel would have asked, would defendant have been at the window of another resident's apartment when his plan all along was to murder his girlfriend in another apartment? Why would defendant have spent fifteen to twenty minutes--as Artis testified at the pretrial hearing--"messing with" the window of another apartment? *Id.* at 41.

The prosecutor urges that defense counsel's failure to investigate did not, at any rate, prejudice defendant because the prosecution could have argued at trial that defendant climbed up one fire escape, ran across the roof and then descended another fire escape in order to reach the victim's apartment. This alternative theory of defendant's actions might be sufficiently plausible to sway a jury to convict him, but the theory was never presented to a jury or subjected to adversarial testing by defense counsel. The theory is not so compelling as to merit the conclusion that, but for defense counsel's ineffective performance, there is no reasonable probability that the jury would have reached a different result.

Defense counsel, in an affidavit submitted in response to defendant's motion to vacate judgment, seeks to excuse his failure to investigate the crime scene. He claims primarily that defendant assured him that Artis's testimony concerning the layout of the apartment buildings was accurate. Setting aside the fact that defendant altogether denies that he gave counsel such assurances, under the circumstances of the present case it was unreasonable for either counsel--or a factotum such as a paralegal or investigator--to have failed to conduct any investigation whatsoever of the crime scene. Charged with second-degree murder, defendant was facing what was at the time the harshest penalty possible under New York law, and the case against him hinged crucially on the testimony of one eyewitness. That circumstance alone should have been enough to put counsel on notice that he had an obligation to see for himself what the crime scene looked like. At the very least counsel should have taken a subway ride to the witness's building in order to ascertain for himself whether the witness could really have seen the apartment in question through the bars and frosted glass that, as she explained at the pretrial hearing, covered much of the window through which she see purportedly saw defendant.

Counsel's failure to visit the scene himself or by an investigator is even more stunning in view of the trial court's observation at the pretrial hearing that the layout of the buildings was "important" and that "it would be very helpful if we had some kind of a diagram here, because it's impossible to really understand what the visual situation was like." Pretrial Hr'g at 78, 94. Given the gravity of the charges and the reasonable possibility that an investigation might have undermined pivotal testimony to be presented by the prosecution, it was a dereliction for defense counsel to rely on the assurances of a defendant who, as a layman, may or may not have understood the critical nature of the layout of the buildings.

There are costs involved whenever defense counsel is obliged to undertake an investigation. These costs are often substantial. The time which counsel must devote to visiting the crime scene represents at the very least a lost opportunity cost for an private

attorney, preventing him or her from generating other income to support his or her practice. Hiring an investigator in lieu of visiting the scene himself or herself also requires a financial outlay. What is counsel to do if defendant is unwilling or unable to finance even a rudimentary investigation?

Lawyering is a business. It has entrepreneurial and commercial demands. See Jelinek, at 280-81.

Having accepted the responsibility of representing a criminal defendant, counsel owes a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society. It is, in a word, not unfair to lay upon a lawyer the duty to perform a rudimentary inspection of a crime scene on behalf of a defendant in a murder case where such an inspection might reasonably yield tangible benefits to the defense.

In the present case, counsel stated to the district attorney's office that he did not believe defendant's family would have agreed to hire an investigator due to financial constraints. This explanation fails to excuse counsel's failure to investigate for several reasons. First, counsel concedes that he never actually consulted with either his client or his client's family about whether they could or would pay the fees associated with hiring an investigator to look over the crime scene. Had counsel explained to his client how crucial such an investigation might have been to the defense case, it seems likely that defendant's family, at the least, would have found a way in which to pay for an investigator. Although concededly an ex post assertion, defendant's sister now claims that the family would certainly have found the economic resources to do so. Counsel's failure to inquire of his client with respect to this important matter speaks to his incompetent representation in this regard.

Second, counsel did not apply to the trial court for money to pay for an investigator, even though defendant might have been entitled to funds from the county. Under New York law,

Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant ... is unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan [pursuant to New York County Law section 722], to obtain the services on behalf of the defendant or such other person.

N.Y. County Law § 722-c. In the absence of guidance from New York's higher courts, it is unclear whether section 722-c funds would

have been available for an indigent defendant who has retained counsel. In *People v. Powell*, for instance, a New York county court concluded that funds for a defendant with retained counsel were not authorized by the statute:

Defendant apparently construes this latter phrase [i.e., "counsel, whether or not assigned in accordance with a plan,"] to include retained counsel where it is claimed at the time of application to the court that defendant is indigent and cannot obtain other needed services. It is this court's opinion that such is not the construction or meaning of such a provision. The entire history of the statute relates to indigent defendants and section 722-c was enacted to provide an indigent defendant with services, in addition to those of counsel, which previously had been unavailable to an indigent defendant. As state by the court in [*People v. Baker*], "There certainly was no intent to provide carte blanche to the County Treasury." 101 Misc.2d 315, 420 N.Y.S.2d 968, 969 (1979) (citation omitted).

Nonetheless, it is not at all clear that funds would have been denied to defendant if requested by counsel. Another New York court has opined that although services "compensated pursuant to County Law section 722-c are a charge against the municipality in question and constitute a use of precious governmental funds," nonetheless "this cannot be the overriding concern when the ability of the court to carry out its essential function of assuring justice and due process is implicated." *In re Director of the Assigned Counsel Plan*, 159 Misc.2d 109, 603 N.Y.S.2d 676, 685 (1993). Given the paucity of case law on the subject and the apparent plain meaning of the statutory language, counsel in the present case should at least have moved the trial court for funds pursuant to section 722-c rather than abandon altogether the investigation.

Finally, even if no funds were forthcoming either from the defendant, defendant's family or the county, counsel still had a professional, ethical obligation to conduct the investigation himself. This is not a circumstance in which the investigation would have been unduly expensive and time consuming. No plane flights were necessary, no technical, medical or psychiatric experts were required. A simple subway or taxi ride to the crime scene and the expenditure of several hours of investigation were all that would be minimally necessary. It is admittedly somewhat unpalatable to the court to lay responsibility for the expense of such an investigation on defense counsel where the government itself refuses to acknowledge its responsibility to make funds available in order to achieve a fair trial. In this court, such funds would be made available in such a case. The financial obligation should in the end, in all fairness, rest with society. Nonetheless, even if county funds were not available, once counsel accepted defendant as a client it became his duty to perform a competent investigation on his behalf.

In sum, by failing to conduct an investigation of the crime scene under the circumstances of the instant case, counsel's performance fell below an objective standard of reasonableness measured under prevailing professional norms. There was no strategic rationale for failing to perform such an investigation, nor would there have been any tactical advantage in not using at trial the information that would have been gathered in such an investigation. Particularly given that the verdict was not overwhelmingly supported by the record, there is more than a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. The Appellate Division's conclusion otherwise is, respectfully, an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States in *Strickland v. Washington*.

B. Prosecutorial Misconduct

Habeas relief is not warranted with respect to defendant's other claim--that the prosecutor engaged in misconduct by eliciting and exploiting false testimony from witness Artis. Her testimony, that she observed defendant on the only fire escape affixed to the back of the victim's apartment building, was not accurate. In fact, the building has three fire escapes--one at the front, one at the back, and one at the side--and the fire escape upon which she observed an intruder was attached to the side rather than the rear of the victim's building. Artis's testimony was not perjurious; though her testimony concerning the layout of the building was false, it was not knowingly false.

The Appellate Division, when presented with the claim of prosecutorial misconduct, concluded that "there was no deliberate attempt by the prosecutor to submit the case to the jury based upon proof which he knew or should have known to be false." *Thomas*, 226 A.D.2d at 485, 641 N.Y.S.2d 48. There is no compelling evidence that the prosecutor knowingly made use of Artis's inaccurate testimony. It is a closer question whether he should have known the testimony to be false. Inspection of the police reports alone should have indicated to the prosecutor (as it should have to defense counsel) that the witness's testimony was so inaccurate as to be misleading. In addition, it is reasonable to expect the prosecution in a second-degree murder case to have had a more comprehensive understanding of the crime scene. It is quite probable, therefore, that the prosecution should have known that the witness's testimony was inaccurate. But even accepting that the prosecutor should have known that Artis's testimony was misleading and false, habeas relief on this ground alone would not have been warranted under the present circumstances.

If the prosecution had failed to turn over to defendant the police

reports indicating that Artis's testimony was misleading, then defendant's conviction would in all likelihood require reversal, regardless of whether the prosecutor had actual knowledge of the content of the police reports. See *Kyles v. Whitley*, 514 U.S. 419, 421, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (knowledge of exculpatory information possessed by the police is imputed to the prosecutor). That is not the situation here. The police reports were turned over to defendant, and his counsel had ample opportunity to glean from the reports the crucial information. There is no allegation that defense counsel was in any way impeded from visiting the crime scene. Where, as here, the prosecutor did not knowingly utilize false testimony and did not withhold from the defense the foundational evidence that would demonstrate the falseness of the witness's testimony, the burden lies on defense counsel rather than the prosecutor to call the jury's attention to the relevant exculpatory evidence. To hold otherwise would be to require the prosecution to take on duties that are properly in the domain of defense counsel.

VI. Conclusion

The petition for a writ of habeas corpus is granted.

Petitioner shall be released from respondent's custody unless appropriate steps are taken for a retrial within 120 days of the date of the previous judgment in this matter, March 20, 2003. This order is stayed pending completion of any appeal.

SO ORDERED.

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Earlier Petition for Writ of Certiorari: Supreme Court No. 99-7020 THOMAS, DAVID V. KUHLMANN, SUPT., SULLIVAN

PART 3

Click here to read Judge Weinstein's law review article titled "The Poor's Right to Equal Access to the Court" published in 1981 in volume 13 of Connecticut Law Review at p 651 et seq.

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