EXHIBIT K

Habeas Corpus Training Materials

Revised Third Edition

United States District Court
Eastern District of New York

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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. Berbary*, 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. 01-2739, 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. Filion*, 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. Ranghelle*, 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. Whitly*, 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 countours 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").

W. *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.

Y. *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-El 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*