

Legal Issues Frequently Raised in Section 2254 Petitions

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I. 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). *See Price v. Vincent*, 155 L.Ed.2d 877, 885–86 (2003).

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)). 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 this 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 this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[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*, ___ F.3d ___, ___ (2d Cir. 2003) (amended order) (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). 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).

II. Limitations Period

Congress has set a one-year period of limitations for the filing of an application for a writ of habeas corpus by a person in custody pursuant to a state court judgment. *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.” *Id.* § 2244(d)(1)(A). A conviction becomes final for habeas purposes when the ninety-day period for filing a petition for a writ of certiorari to the United States Supreme Court has expired. *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.*

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)).

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), *aff’d*, 531 U.S. 4 (2000). “[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*, 199 F.3d at 120; *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 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).

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).

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). “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).

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)).

III. Time to Appeal

A petitioner has 30 days from the entry of conviction in which to file an appeal. *See* N.Y. Crim. Pro. Law § 460.10. “Petitioner cannot again seek leave to appeal these claims in the [New York] Court of Appeals because he has already made the one request for leave to appeal to which he is entitled. *See* N.Y. Court Rules § 500.10(a).” *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991).

IV. Effect of FOIL Requests on Limitations Period

Petitioner contends that his FOIL request, made pursuant to Article 78 of New York’s Civil Practice Law and Rules, statutorily tolled the limitations period pursuant to section 2244(d)(2) of Title 28 of the United States Code. The Court of Appeals for the Second Circuit has rejected this argument, concluding that the purpose of Article 78 proceedings is to discover material that might aid in a challenge to the conviction rather than a challenge to the conviction itself, and that “if a filing of that sort

could toll the AEDPA limitations period, prisoners could substantially extend the time for filing federal habeas petitions by pursuing in state courts a variety of applications that do not challenge the validity of their convictions.” *Hodge v. Greiner*, 259 F.3d 104, 107 (2d Cir. 2001) (holding open the possibility that in an appropriate case an Article 78 proceeding could be the functional equivalent of an application for state post-conviction or other collateral review). Petitioner’s FOIL request was not the functional equivalent of a collateral attack on his conviction.

The *Hodge* court explained that “[i]f a prisoner believes he is entitled to discovery in aid of a state or federal collateral attack, his remedy is to seek such relief from the court where a properly filed and timely collateral attack on his conviction is pending.” *Id.* Thus, even assuming the state did not respond appropriately to his FOIL request and that petitioner had a procedural due process right to receive FOIL information, he cannot show that there was an “impediment to filing an application created by State action in violation of the Constitution or laws of the United States,” 28 U.S.C. § 2244(d)(1)(D), that might reset the limitations period.

Petitioner’s claim that the limitations period should be equitably tolled during the pendency of his FOIL request is likewise unavailing. As in the *Hodge* case, petitioner was in no way prevented from filing a petition for a writ of habeas corpus and then seeking discovery pursuant to Rules 6 and 7 of the Rules Governing Section 2254 Cases in the United States District Courts. *See also Catillo v. Artuz*, 200 U.S. Dist. LEXIS 3064, at *13 (E.D.N.Y. Feb. 15, 2000).

V. Ignorance of Law Does Not Toll Statute

A pro se litigant is accorded “some degree of latitude” in meeting filing requirements. *Brown v.*

Superintendent, 1998 U.S. Dist. LEXIS 1936, 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”).

VI. Equitable Tolling

“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).

VII. Treating Withdrawal as Stay

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). Heeding Justice Stevens’ advice, 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 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 . . .”). Thus, 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).

VIII. AEDPA Limitations Period Expires While State Court Decision in the Mail

See Fed. R. Civ. Pro. 6(e) (“Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.”); *see also Zarvela v. Artuz*, No. 97-CV-2393, 1999 U.S. Dist. LEXIS 20602 at *4–*5 (E.D.N.Y. Dec. 3, 1999) (“Because [petitioner] was presumably served with the Appellate Division decision by mail, Federal Rule of Civil Procedure 6(e) granted him an additional three days in which to make a timely § 2254 filing.”). *But see Zarvela v. Artuz*, 254 F.3d 374, (2d Cir. 2001) (reversing on other grounds and noting that the court “need not consider . . . [the] decision to extend the one-year

limitations period by three days because [petitioner] was notified by mail of the state court's denial of his collateral challenge").

IX. Exhaustion

In the past, a state prisoner's federal habeas petition had to be dismissed if the prisoner did not exhaust 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).

Pursuant to AEDPA, a district court may now, 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."). In addition, the state may waive the exhaustion requirement, but a "State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." *Id.* § 2254(b)(3); *see also Ramos v. Keane*, No. 98 CIV. 1604, 2000 U.S. Dist. LEXIS 101, at *10 (S.D.N.Y. 2000) (state's failure to raise exhaustion requirement does not waive the issue).

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).

Exhaustion of a federal constitutional claim in state court does not invariably require citation of “book and verse on the federal constitution.” *Picard v. Connor*, 404 U.S. 270, 278 (1982) (internal quotation omitted). 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, relied on pertinent federal cases employing constitutional analysis, relied on state cases employing constitutional analysis in like fact situations, asserted his claims in terms so particular as to call to mind specific rights protected by the constitution, or alleged a pattern of facts well within mainstream of constitutional litigation. *See Daye v. Attorney General*, 696 F.2d 186 (1982).

X. Procedural Bar

A federal habeas court may not review a state prisoner’s federal claims if those claims were 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 “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). 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’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)). This congeries of holdings leaves it 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.*

A state prisoner is not required to seek collateral relief on facts and issues already decided on direct review. *Brown v. Allen*, 344 U.S. 443, 447 (1953).

XI. *Su* Language (Standard of Review When State Grounds Unclear)

Under *Su v. Fillion*, it may be that some of these preserved claims are entitled to a *de novo* standard of review rather than the standard set forth in AEDPA. Because none of petitioner’s claims

merit granting of the writ even under a *de novo* standard of review, this court will not waste any effort trying to divine whether the state courts did or did not rule on the merits of petitioner's federal claims. While this court might in theory rummage through the pretrial hearing transcripts, the trial transcripts, the pretrial and post-trial motions, appellate briefs, and collateral briefs in order to determine whether the court might "preclude the possibility that [any one of petitioner's] claim[s] was denied on procedural grounds," 2003 U.S. App. LEXIS 13949 at *15, undertaking such a task would be unwarranted. Unless otherwise indicated, all of petitioner's claims will be reviewed *de novo*.

XII. Alternative *Su* Language

All of petitioner's claims have been exhausted. Some were denied as "either unpreserved for appellate review or meritless." Those claims are therefore not foreclosed from review on the merits in federal court. Under *Su v. Fillion*, it may be that some of these preserved claims are entitled to a *de novo* standard of review rather than the standard set forth in AEDPA. Because none of petitioner's claims merit granting of the writ even under a *de novo* standard of review, this court will not waste effort attempting to determine whether the state courts did or did not rule on the merits of petitioner's federal claims. Unless otherwise indicated, all of petitioner's claims will be reviewed *de novo*.

XIII. Procedural Default of IAC Claim Because Not Raised on Direct Appeal

Respondent notes that some of the grounds asserted in support of a claim of ineffective assistance were deemed procedurally defaulted by the trial court when raised in petitioner's section 440.10 motion, because evidence on the record was sufficient for petitioner to have recognized the

claim and pursued it on direct appeal. It is a relatively close question whether to deem “adequate” a state rule that precludes a petitioner from raising a claim of ineffective assistance of trial counsel in a collateral proceeding where the claim might have been raised on direct appeal. *Cf. Massaro v. United States*, 123 S.Ct. 1690, 1696 (2003) (in the federal courts, “failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255”). At any rate, because the ineffective assistance claim lacks sufficient merit, this procedural argument need not be decided in the instant case.

XIV. Unexhausted but Procedurally Barred Claims

See Bossett v. Walker, 41 F.3d 825, 828–29 (2d Cir. 1994) (if a state prisoner has not exhausted his state remedies with respect to a claim, but no longer has a state forum in which to raise the claim, the claim may be deemed exhausted but procedurally barred).

XV. 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).

XVI. 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. This right to counsel is “the right to *effective* assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (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 (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, 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. *See also Wiggins v. Smith*, 539 U.S. ___, No. 02-311, slip op. at 8–10 (June 26, 2003); *United States v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2002). 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. In evaluating the prejudice suffered by a petitioner as a result of counsel’s deficient performance, the court looks to the “cumulative weight of error” in order to determine whether the prejudice “reache[s] the constitutional threshold.” *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir. 2001). The court must also 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 696. “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*, No. 02-7468, 2003 U.S. App. LEXIS 2053, at *18 (2d Cir. Feb. 6, 2003) (quoting *Strickland*, 466 U.S. at 694). Ineffective assistance may be demonstrated where counsel performs competently in some respects but not in others. *See Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003).

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. Counsel, in other words, “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691. Where counsel fails to make a reasonable investigation that is reasonably necessary to the defense, a court must conclude that the decision not to call an expert cannot have been based on strategic considerations and will thus be subject to review under *Strickland*’s prejudice prong. *See Pavel v. Hollins*, 261 F.3d 210, 223 (2d Cir. 2001) (counsel ineffective in a child sexual abuse case where his failure to call a medical expert was based on an insufficient investigation); *Lindstadt*, 239 F.3d at 201 (same). The Court of Appeals for the Second Circuit has recently gone so far as to imply that all of counsel’s significant trial decisions must be justified by a sound strategy—a significant raising of the bar that would appear to require 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”).

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

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) (dismissing petition as unexhausted where petitioner’s claim of ineffective assistance of counsel alleged more deficiencies before the habeas court than were presented to the state court, because “[t]he state courts should have been given the opportunity to consider all the circumstances and the cumulative effect of all the claims as a whole” (quotation omitted)). 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). Each significant factual claim in support of an ineffective-assistance allegation premised on appellate counsel’s deficient performance must be exhausted. *See Word v. Lord*, No. 00 CIV. 5510, 2002 U.S. Dist. LEXIS 19923, at *34–*35 (S.D.N.Y. Mar. 18, 2002) (Magistrate’s Report and Recommendation).

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).

XVII. Certificate of Appealability

A certificate of appealability may be granted with respect to any one of petitioner’s claims only if petitioner can make a substantial showing of the denial of a constitutional right. **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.

XVIII. Pro Se Papers to be Construed Liberally

See *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

XIX. *Batson*

“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).

Where the district court determines that the state courts erred in concluding there had been no prima facie violation of *Batson*, rather than granting the writ, a “reconstruction hearing” must be held “to determine, if possible, whether the state prosecutor had valid reasons for using his peremptory strikes as he did.” *Harris v. Kuhlmann*, Nos. 00-2740, 01-2139, 2002 U.S. App. LEXIS 20741 at *3–*4 (2d Cir. Oct. 10, 2003).

XX. Peremptory Challenges

“[P]eremptory challenges are not of federal constitutional dimension.” *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000). The Supreme 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)). “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.” *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). To prevail on such a claim, petitioner must “establish that the jury that convicted him was not impartial.” *United States v. Rubin*, 37 F.3d 49, 54 (2d Cir. 1994).

XXI. Right to Counsel at Pre-Indictment Identification

The right to counsel at a post-indictment line-up classification is clearly established under Supreme Court precedent. *See United States v. Wade*, 388 U.S. 218, 236–37 (1967) (“Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that . . . the post-indictment lineup [is] a critical stage of the prosecution at which [defendant is] ‘as much entitled to such aid [of counsel] . . . as at the trial itself.’” (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932); footnote omitted)). The right to counsel at a pretrial identification does not attach, however, before “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *United States v. Kirby*, 406 U.S. 682, 687 (1971) (no

counsel necessary at preindictment show-up).

XXII. Joinder and Severance

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.*

Under New York law, “Two or more defendants may be jointly charged in a single indictment provided that: . . . (b) all the offenses charged are based upon a common scheme or plan; or (c) all the offenses charged are based upon the same criminal transaction as that term is defined in subdivision two of section 40.10” N.Y. Crim. Pro. Law § 200.40(1). A “criminal transaction” is defined as “conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.” *Id.* § 40.10(2).

XXIII. Speedy Trial

The right to a speedy trial is guaranteed by the Sixth Amendment. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”). This right is fundamental and thus imposed on the states by the Due Process Clause of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

A petitioner must first demonstrate that he was presumptively prejudiced by the delay. *See Doggett v. United States*, 505 U.S. 647 (1992). A delay of over a year is sufficient to establish presumptive prejudice. *See, e.g., United States v. Vassell*, 970 F.2d 1162, 1164 (2d Cir. 1992) (noting “a general consensus that a delay of over eight months meets this standard”). Next, determination of whether there has been a constitutional violation requires this court to consider “(1)

whether the ‘delay before trial was uncommonly long’ . . . ; (2) ‘whether the government or the criminal defendant is more to blame for that delay;’ (3) ‘whether, in due course, the defendant asserted his right to a speedy trial’ . . . ; and (4) the prejudice sustained by the defendant as a result of the delay. *United States v. Gutierrez*, 891 F. Supp. 97, 100 (E.D.N.Y. 1995) (quoting *Doggett*).

The right is to a speedy *trial*, and the Supreme Court “has never held . . . that a prisoner subject to a probation-violation detainer has a constitutional right to a speedy probation-revocation hearing . . . [and] it is not clear that the purpose of vindicating a prisoner’s constitutional right to a speedy trial is applicable at all in the context of probation-violation detainees.” *Carchman v. Nash*, 473 U.S. 716, 731 n.10 (1985).

XXIV. *Miranda*

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 v. Arizona*, 384 U.S. 436, 444 (1966); *see also Dickerson v. United States*, 530 U.S. 428 (2000). “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.”).

The focus of the *Miranda* inquiry in the instant case should thus have been on the objective question of whether an individual in petitioner’s circumstances would have felt at liberty to terminate the interrogation and leave.

XXV. Alternative *Miranda*

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 v. Arizona*, 384 U.S. 436, 444 (1966); *see also Dickerson v. United States*, 530 U.S. 428 (2000). 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.

XXVI. Evidentiary Error

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).

XXVII. Curative Instructions

“We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an ‘overwhelming probability’ that the jury will be unable to follow the court’s instructions, *Richardson v. Marsh*, 481 U.S. 200, 208 (1987), and a strong likelihood that the effect of the evidence would be ‘devastating’ to the defendant, *Bruton v. United States*, 391 U.S. 123, 136 (1968).” *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987).

XXVIII. Constitutionality of Plea Bargaining

To the degree petitioner asserts that plea offers are *per se* coercive, his claim is without merit. *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))).

XXIX. Consequences of Guilty Plea: Deportation

Petitioner claims that trial counsel was ineffective for failing to inform him of the possible deportation consequences of a guilty plea. Even assuming to be true petitioner’s allegation that he was not informed of the deportation consequences of his plea, habeas relief on this ground would not be warranted. 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”); *People v. McDonald*, No. 110, 2003 N.Y. LEXIS 3970 (N.Y. Ct. App. Nov. 24, 2003) (incorrect advice concerning deportation consequences of plea may constitute ineffective assistance).

XXX. Plea Must be Voluntary

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).

XXXI. Wade Issues

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.

The Court has set forth a two-step inquiry for evaluating the constitutional permissibility of in-court identification testimony based on out-of-court identification procedures, “requiring a determination of whether the identification process was impermissibly suggestive and, if so, whether it was so suggestive as to raise ‘a very substantial likelihood of irreparable misidentification.’” *Jackson v. Fogg*, 589 F.2d 108, 111 (2d Cir. 1978) (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968))). “If pretrial procedures have been unduly suggestive, a court may nonetheless admit in-court identification testimony if the court determines it to be independently reliable.” *United States v. Wong*, 40 F.3d 1347, 1359 (2d Cir. 1994) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Jarrett v. Headley*, 802 F.2d 34, 42 (2d Cir. 1986).

In *Manson*, Court stated that “reliability is the linchpin in determining the admissibility of

identification testimony,” and that the factors to be considered in determining reliability include “[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.” 432 U.S. at 114.

XXXII. New York Statute on *Wade* Issues

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.”).

There is no state law requirement for an independent source, however, “absent some showing of impermissible suggestiveness.” *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990).

XXXIII. Grand Jury Claims

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). Nonetheless, claims of deficiencies in state grand jury proceedings are generally not cognizable in a habeas corpus proceeding in federal court because any deficiencies have been rendered harmless by conviction at trial by a petit jury assessing petitioner's guilt under a heightened standard of proof. *See Lopez v. Riley*, 865 F.2d 30, 32 (2d Cir. 1989).

XXXIV. Sandoval (Impeachment of Defendant with Prior Bad Acts/Convictions)

Because 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”).

XXXV. 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).

XXXVI. Habeas Relief for Errors of State Law

A federal court may not grant a writ of habeas corpus simply because a state court incorrectly interpreted or applied a matter of state law. *Jelinek v. Costello*, 99-CV-2327, 2003 U.S. Dist. LEXIS 2775, at *152 (E.D.N.Y. February 27, 2003). The Supreme Court has “repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.” *Vitek v. Jones*, 445 U.S. 480, 562 (1980). Such state-created rights may not be “arbitrarily abrogated.” *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *see also Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (Due Process Clause guarantees a state criminal defendant the effective assistance of counsel on his first appeal as of right *if* the state grants appeals as of right, which the Constitution does not require); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (although a state may choose whether to institute a welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause); *Saldana v. New York*, 665 F.Supp. 271, 275 (S.D.N.Y. 1987) (once a state creates a right for a defendant to testify before a Grand Jury, “it cannot cause that right to be forfeited in a manner which is arbitrary or fundamentally unfair”), *rev'd on other grounds*, 850 F.2d 117 (2d Cir. 1988)

XXXVII. Alternative Language 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) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

XXXVIII. 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*, No. 01-2299, 2002 U.S. App. LEXIS 28137 (2d Cir. Aug. 1, 2003) (amended opinion).

XXXIX. 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)).

Although a defendant has the right to be present at a sidebar conference, the New York Court of Appeals has held that it is the responsibility of the defendant to assure that an adequate record is preserved to allow for appellate review of a violation. *People v. Velasquez*, 2 NO. 117, Oct. 24, 2003 N.Y.L.J. at 18 (N.Y. Oct. 23, 2003).

XL. Mentally Ill Prisoners

There is little doubt that petitioner has suffered from psychiatric problems. But so do a large number of those who are incarcerated. *See, e.g.,* Fox Butterfield, *Study Finds Hundreds of Thousands of Inmates Mentally Ill*, N.Y. Times, Oct. 22, 2003 at A14 (study by Human Rights Watch shows that “[a]s many as one in five of the 2.1 million Americans in jail and prison are seriously mentally ill, far outnumbering the number of mentally ill who are in mental hospitals”); Sally Satel, *Out of the Asylum, Into The Cell*, N.Y. Times, Nov. 1, 2003 at A15 (noting that “16 percent of American inmates have serious psychiatric illnesses like schizophrenia, manic-depressive illness and disabling depression” and that Riker’s Island functions as the second largest psychiatric in-patient institution in the United States); *Treating Mental Illness in Prison*, N.Y. Times, Nov. 2, 2003 at § 4, p.10 (study by Human Rights Watch suggests that 25% of inmates in New York State are mentally ill)

XLI. Fourth Amendment Claims and *Stone v. Powell*

Under *Stone v. Powell*, 428 U.S. 465 (1976), a federal habeas court is barred from reviewing the merits of a Fourth Amendment claim so long as the state has provided petitioner with the opportunity for a full and fair litigation of his claim. Fourth Amendment claims in habeas petitions may be undertaken “in only one of two instances: (a) if the state has provided no corrective procedures at all to redress the alleged fourth amendment violations; or (b) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process.” *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992).

In contrast, an ineffective assistance of counsel claims premised on a failure related to the Fourth Amendment is cognizable on habeas. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

XLII. Multiplicitousness

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).

XLIII. Rosario Claims

Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Because a *Rosario* claim is purely a state right, embodying “policy considerations grounded in state common law, not constitutional principles,” the prosecutorial failure to turn over *Rosario* material is not subject to habeas review by a federal court. *Whittman v. Sabourin*, 2001 U.S. Dist. LEXIS 8049, at *12 (S.D.N.Y. June 12, 2001) (quoting *Southerland v. Walker*, 1999 U.S. Dist. LEXIS 19327, at *9 (S.D.N.Y. Dec. 10, 1999)).

XLIV. Ineffective Assistance Claim Premised on Rosario Failure

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).

XLV. 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, 645 (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).

XLVI. Claim Raised on 440 But Not Appealed and Now Time Barred is NOT Exhausted

Petitioner claims that _____. This claim is unexhausted because, although it was raised in petitioner’s motion to vacate judgment and denied, petitioner did not appeal that denial. Petitioner would be barred by the statute of limitations from now appealing the denial, meaning that he is statutorily barred from raising the claim in state court. Ordinarily, this court would treat a claim in this posture as exhausted but procedurally barred, and address it accordingly. *See Bossett v. Walker*, 41 F.3d 825, 828–29 (2d Cir. 1994) (because it would be “fruitless” to require petitioners to return to state court to raise unexhausted claims that are procedurally barred, such claims are deemed exhausted). The exception to this general rule applies in circumstances like that presented here, where a motion to vacate judgment has not been appealed and the time for doing so in state court has expired.

The Court of Appeals for the Second Circuit has explicitly held that, in such circumstances, “[w]hile that statutory limit may ultimately be held by state courts to preclude them from reaching the merits of [an] ineffective assistance claim, [petitioner] must still present that claim to the highest state court,” because “[w]e have no authority to declare as a matter of state law that an appeal from the denial of [an] original Section 440.10 motion is unavailable or that he cannot raise the ineffective assistance claim in a new Section 440.10 motion.” *Pesina v. Johnson*, 913 F.2d 53, 54 (2d Cir. 1990). The *Pesina* rule clearly cuts against the grain of *Bossett* and mandates fruitless, time-consuming and expensive litigation. Nonetheless, the case is on all fours with the instant matter, has never been explicitly overruled, and must therefore be followed. See *Priester v. Senkowski*, No. 01-CIV-3441, 2002 U.S. Dist. LEXIS 11981 (S.D.N.Y. July 3, 2002) (critiquing *Pesina* but concluding that it was constrained to follow its holding).

XLVII. 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.

XLVIII. Jurors Presumed to Follow Jury Instructions

See, e.g., United States v. Gallo, 668 F. Supp. 736, 752 (E.D.N.Y. 1987) (“[T]he 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.”).

XLIX. Juror Misconduct

A jury's verdict may be overturned on the grounds of juror misconduct only in the most egregious of circumstances. *See Anderson v. Miller*, No. 02-2451, slip op. at 6423 (2d Cir. Oct. 10, 2003) (“[B]ecause the jurisprudence of our system of trial by jury allows us to overturn a jury's verdict only when it's [*sic*] deliberations have taken the most egregious departures from rational discourse, we cannot say that [petitioner] received an unfair one.”).

L. Jury Instruction that Shifts Burden with Mandatory Presumption (“The law presumes . . .”)

“The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.” *Sandstrom*, 442 U.S. at 514. The court must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference. *See Ulster County Court v. Allen*, 442 U.S. 140, 157–63. “Mandatory presumptions . . . violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested

conclusion should be inferred based on the predicate facts proved.” *Francis v. Franklin*, 471 U.S. 307, 314 (1985) (citations omitted).

In *Sandstrom*, the Supreme Court explicitly held that an instruction stating that “the law presumes that a person intends the ordinary consequences of his voluntary acts” could easily be viewed by a reasonable juror as a mandatory presumption, and that such an instruction therefore violates the Fourteenth Amendment requirement that the state prove each element of the criminal offense beyond a reasonable doubt. 442 U.S. at 512. It is “well established that, while a jury instruction in a criminal case that the law *presumes* that a person intends the ordinary consequences of his voluntary acts violates due process, an instruction that merely *permits* a jury to infer that an accused intends such consequences of such acts is acceptable.” *United States v. Nelson*, 277 F.3d 164, 197 (2d Cir. 2002) (citing *Sandstrom* and *Francis*).

Even “if a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in the context of the charge as a whole,” because other instructions “might explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption.” *Francis*, 471 U.S. at 315. Nonetheless, general instructions on the government’s burden of persuasion and the defendant’s presumption of innocence are insufficient to “dissipate the error in the challenged portion of the instructions.” *Id.* at 319. In sum, an instruction is constitutionally infirm if “a reasonable juror could have understood the challenged portions of the jury instruction . . . as creating a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent, and [if] the charge read as a whole does not explain or cure the error.” *Id.* at 325.

LI. Probable Cause

The Supreme Court has stated that “the substance of all the definitions [of *probable cause*] is a reasonable ground for belief of guilt . . . [a]nd this means less than evidence which would justify condemnation or conviction Probable cause exists where the facts and circumstances . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quotation marks and citations omitted).

LII. Extreme Emotional Disturbance

Extreme emotional disturbance is a statutory affirmative defense to second degree murder in New York:

A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. . . .

N.Y. Penal Law § 125.25.

The New York Court of Appeals has recently explained that the defense “allows a defendant charged with the commission of acts which would otherwise constitute murder to demonstrate the existence of mitigating factors which indicate that, although [] not free from responsibility for [the]

crime, [defendant] ought to be punished less severely’ [*People v Casassa*, 49 N.Y.2d 668]. As we recently observed in *People v Harris* (740 N.E.2d 227 [2000] [quoting *Casassa*, 49 N.Y.2d at 680–681] [internal quotations omitted]), the Legislature recognized when it created the extreme emotional disturbance defense that some homicides are worthy of mitigation because they ‘result from an understandable human response deserving of mercy.’” *People v. Roche*, 772 N.E.2d 1133, 1138 (N.Y. 2002).

There are two components to an extreme emotional disturbance defense, one objective and one subjective:

The first, subjective element is met if there is evidence that defendant’s conduct at the time of the incident was actually influenced by an extreme emotional disturbance. The second is an objective element and requires proof that defendant’s emotional disturbance was supported by a reasonable explanation or excuse. This is “determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse for [the] emotional disturbance was reasonable” *Harris*, 95 N.Y.2d at 319 [quoting *Casassa*, 49 N.Y.2d at 679] [internal quotation marks omitted].

Id. A defendant may pursue inconsistent defenses at trial—such as outright denying involvement in the crime—and still be entitled to an instruction on extreme emotional disturbance. *Id.*

LIII. 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); *but see Dallio v. Spitzer*, No. 01-2718, slip op. at 5595 (2d Cir. Sept. 9, 2003) (“it is not clearly established federal law as determined by the Supreme Court” that “explicit warnings as to the dangers and disadvantages of self-representation” must be given). “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).

LIV. Alternative *Faretta* Self-Representation Claims

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).

The trial court’s decision not to allow petitioner to represent himself was not improper. After trial has begun, a trial court faced with such an application to proceed pro se 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). The trial court reasonably determined that the potential disruption caused by this eleventh hour request would outweigh petitioner’s interest in self-representation.

LV. Bruton Claims

Pursuant to *Bruton v. United States*, post-arrest statements made by a non-testifying co-defendant that incriminate the defendant are inadmissible because they pose “a substantial threat to petitioner’s right to confront the witnesses against him,” notwithstanding any limiting instructions that the trial court might provide to the jury. 391 U.S. 123, 136–37 (1968). The Court has subsequently limited the reach of *Bruton*, holding, for example, in *Richardson v. Marsh* that limiting instructions could be sufficient to forfend a Confrontation Clause violation where a co-defendant’s statement is not “facially incriminating” of the defendant. 481 U.S. 200, 211 (1987). The Court made explicit that direct incrimination of the defendant by a co-defendant’s statements is to be treated differently from statements that are inferentially incriminatory:

Specific testimony that “the defendant helped me commit the crime” is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it is assessing the defendant’s guilt; whereas with regard to inferential incrimination the judge’s instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*’s exception to the general rule.

Id. at 208.

LVI. 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 trial court has an independent duty to assure that a defendant is competent to stand trial and to order a hearing, *sua sponte*, on the question of a defendant’s fitness to stand trial where doubt is raised. *Pate v. Robinson*, 383 U.S. 375 (1966). 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.

LVII. 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). The Supreme Court has rejected any distinction between impeachment evidence and exculpatory evidence. *See Bagley*, 473 U.S. at 676. Impeachment evidence “is ‘evidence favorable to an accused,’ *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” *Id.* The “individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.” *Kyles*, 514 U.S. at 437; *see also Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (assuming that state child protective agency files could be *Brady* material).

LVIII. Missing Witness Charge

“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. The decision whether to give a missing witness charge rests within the sound discretion of the trial court. See *United States v. Torres*, 845 F.2d 1165, 1170-71 (2d Cir. 1988). “Its decisions in this area will rarely support reversal or habeas relief since reviewing courts recognize the aura of gamesmanship that frequently accompanies requests for a missing witness charge as to which the trial judge will have a surer sense than any reviewing court.” *Malik v. Kelly*, No. 97 CV 4543, 1999 U.S. Dist. LEXIS 7942, at *21–*22 (E.D.N.Y. Apr. 6, 1999) (quotations omitted).

The trial court acted within its discretion in refusing to give a missing witness charge in the instant case. Under New York law, the party seeking the missing witness charge must sustain an initial burden of showing that the opposing party has failed to call a witness who could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the opposing party. The burden then shifts to the opposing party, in order to defeat the request, “to account for the witness’ absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the witness is not knowledgeable about the

issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not 'available,' or that the witness is not under the party's 'control' such that he would not be expected to testify in his or her favor.”

People v. Macana, 639 N.E.2d 13 (N.Y. 1991) (quoting *People v Gonzalez*, 502 N.E.2d 583, 586 (N.Y. 1986); further citations omitted); *see also Graves v United States*, 150 U.S. 118, 121 (1893) (“The rule . . . in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”).

LIX. Attorney Conflict of Interest

The Court of Appeals has explained:

While a defendant is required to demonstrate prejudice to prevail on most claims of ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984), the same showing is not necessary when a defendant's counsel is burdened by an actual conflict of interest because, under such circumstances, prejudice is usually presumed. *Id.* at 692. This presumption is not conclusive. In order for a defendant to prevail on a claim that he was denied effective assistance of counsel based on counsel's actual conflict, the defendant must still establish that (a) counsel actively represented conflicting interests, and (b) such conflict adversely affected his lawyer's performance. *Id.*; *see also Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (discussing standard for obtaining relief from conviction based on an actual conflict); *accord*

Schwarz, 283 F.3d at 91.

We have held previously that “an attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney’s and defendant’s interests diverge with respect to a material factual or legal issue or to a course of action.” *Id.* at 91. An actual conflict of interest does not present grounds for a new trial if it does not rise to more than “a mere theoretical division of loyalties.” *See Mickens v. Taylor*, 535 U.S. 162, 171 (2002). To obtain a new trial, a defendant must prove that the conflict manifested itself as “an actual lapse in representation.” *See Cuyler*, 446 U.S. at 349. To prove the lapse in representation “a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.” *Schwarz*, 283 F.3d at 92; *see also Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993). With respect to the substance of the plausible alternative strategy, the defendant need not show that the defense would necessarily have been successful had it been used, only that “it possessed sufficient substance to be a viable alternative.” *Winkler*, 7 F.3d at 309.

United States v. Feyrer, No. 01-1543, 2003 U.S. App. LEXIS 12035 at *13–*15 (2d Cir. June 18, 2003) (parallel citations omitted).

LX. 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").

LXI. Concurrent Sentence Doctrine

As an initial matter, respondent contends that the court should decline to review petitioner's claims under the "concurrent sentence doctrine." The concurrent sentence doctrine by definition "permits an appellate court, within its discretion, to affirm summarily a conviction for which an appellant's sentence runs concurrently with that for another, valid conviction." *United States v. Vargas*, 615 F.2d 952, 956 (2d Cir. 1980). It has been applied by courts hearing habeas petitions. *See, e.g., United States ex rel. Weems v. Follette*, 414 F.2d 417 (2d Cir. 1969). Application of the concurrent sentence doctrine is now disfavored, and is the exception rather than the rule. *See Rutledge v. United States*, 517 U.S. 292, 302 (1996) ("The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.") (quoting *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *see also Abdur-Raheem v. Kelly*, 257 F.3d 122 (2d Cir. 2001) (reversing district court decision noting the concurrent sentence doctrine as an alternative ground for denying the petition; remanding for judgment granting the writ while noting because petitioner "is serving concurrent

prison terms of 25 years to life on the basis of other convictions as well, the judgment in this case does not require his release"). The court declines to rely on it here.

LXII. 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.

LXIII. Dying Declaration

A “dying declaration” is recognized as an exception to the hearsay rule under both New York and federal law. *See People v. Nieves*, 67 N.Y.2d 125, 131–32 (1986); Fed. R. Evid. 804(b)(2). In *People v. Allen*, the New York Court of Appeals explained the parameters of the exception under New York law:

There are writings innumerable stating and applying the rules for admission of dying declarations. All of them emphasize, in one form of words or another, the absolute and unvarying necessity for these two showings, at least: that “the declarant was in extremis” and “was under a sense of impending death, without any hope of recovery” (Richardson on Evidence [7th ed.], § 304). “The principle upon which dying declarations are received in evidence is that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. * * * Safety in receiving

such declarations lies only in the fact that the declarant is so controlled by a belief that his death is certain and imminent that malice, hatred, passion and other feelings of like nature are overwhelmed and banished by it. The evidence should be clear that the declarations were made under a sense of impending death without any hope of recovery” (*People v. Sarzano*, 212 N.Y. 231, 234-235). . . . Thus, two of the unyielding requirements are that the dying declaration must be the product of a considered certainty of death near at hand, not a mere “suspicion or conjecture” (*People v. Bartelini*, 285 N.Y. 433, 440), and that the statement must be made under, and result from, a present sense of that impending death.

300 N.Y. 222, 227–28 (1949).

LXIV. Child Sexual Abuse Cases

This matter involves a conviction for the serial sexual abuse of minors. In general, such cases present special problems concerning the susceptibility of young complainants to suggestive questioning and false memories. Also to be considered is the possibility of community hysteria sparked by law-enforcement investigation into the crimes. The Court of Appeals for the Second Circuit and this court have recognized that matters involving the sexual abuse of children are a special class of case requiring special protections—beginning at the investigatory stage, continuing through trial and appeal, and persisting in a habeas corpus proceeding. These cases require particular scrutiny, though in terms the same rules apply to this class of cases as to all others. *See, e.g., Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001); *Eze v. Senkowski*, 321 F.3d 110 (2d Cir. 2003); *Jelinek v. Costello*, 247 F. Supp. 2d 212 (E.D.N.Y. 2003) (all addressing the special problems arising in child sexual abuse cases).

LXV. Proof Beyond Reasonable Doubt / Verdict Against Weight of 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.

LXVI. Abuse of Discretion in Sentencing

The assertion that a sentencing judge abused his or her discretion in sentencing is generally not a 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). Federal courts have traditionally deferred to state legislature with respect to sentencing matters. *See Ewing v. California*, 123 S. Ct. 1179 (2003) (sentence of 25 years to life in prison for stealing three golf clubs by a recidivist not cruel and unusual); *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (sentence of 25 years to life in prison for stealing \$150-worth of videotapes not cruel and unusual).

LXVII. 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).

LXVIII. More Exhaustive Harmless Error Analysis

When a claim was never adjudicated on the merits in the state courts and there is no ruling which commands AEDPA deference, it is unclear what the standard for review for harmlessness should be in a collateral attack when a federal court finds constitutional error. Should it proceed under the “beyond a reasonable doubt” standard of *Chapman v. California*, 386 U.S. 18 (1967) (conviction infected by constitutional error must be overturned unless “harmless beyond a reasonable doubt”) or under the “substantial and injurious effect or influence” standard of *Brecht* (for cases on collateral review, an error is generally considered harmless if it did not have a “substantial and injurious effect or influence in determining the jury’s verdict”)? The correct standard of review is an open question in this circuit. *See Cotto v. Herbert*, No. 01-2694, 2003 U.S. App. LEXIS 8326, at *92 (2d Cir. May 1, 2003).