AN AEDPA PRIMER

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I. INTRODUCTION – COMITY AND FEDERALISM UNDER AEDPA

The Antiterrorism and Effective Death Penalty Act (the "Act" or "AEDPA"), applicable to all federal *habeas corpus* petitions filed after April 24, 1996, "created a tumultuous sea change in federal *habeas* review." *Aparicio v. Artuz*, 269 F.3d 78, 89 (2d Cir. 2001). As interpreted by the U.S. Supreme Court, the Act placed a significant "new constraint" on federal courts' power to grant *habeas* writs to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399, 412 (2000). More precisely, the Act "modified a federal *habeas* court's role in reviewing state prisoner applications" to "prevent federal *habeas* 'retrials'" and "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, No. 01-400, _ S. Ct. _, 2002 WL 1050365, at *_ (May 28, 2002); *see Francis S. v. Stone*, 221 F.3d 100, 101, 108 n.10, 117 (2d Cir. 2000) (noting that AEDPA "restricted the scope" of federal *habeas* review).

Central to the Act is amended 28 U.S.C. § 2254(d), which directs federal *habeas* courts to apply a deferential standard of review to federal constitutional claims that have been "adjudicated on the merits in State court." *See*, *e.g.*, *Rudenko v. Costello*, Nos. 99-2242(L) *et al.*, _ F.3d _, slip op. at 8556-59 (2d Cir. March 20, 2002). Specifically, § 2254(d) provides as follows:

> An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was **adjudicated on the merits** in State court proceedings unless the adjudication of the claim –
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> (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
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> (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 proceedings.

(Emphasis supplied)

This provision raises two fundamental questions – one substantive, the other procedural. **First**, exactly what standard of review does AEDPA prescribe and just how deferential is it? Or, to put it in statutory terms, when and how does a state court issue a decision that is "contrary to" law, or represents an "unreasonable application" of the law or an "unreasonable determination" of the facts? **Second**, when and how does a state court "adjudicate[]" a claim "on the merits" so as to qualify for this amorphous new standard – however deferential it might be? We examine these questions in turn.

II. SUBSTANTIVE REVIEW UNDER AEDPA

A. THE "CLEARLY ESTABLISHED FEDERAL LAW" REQUIREMENT

The initial or "threshold" inquiry under § 2254(d) is whether the petitioner "seeks to apply a rule of law that was clearly established" when his conviction "became final." *Kennaugh v. Miller*, No. 01-2281, __ F.3d __, slip op. at 1608 (2d Cir. April 12, 2002) (citation and internal quotes omitted); *see*, *e.g.*, *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001); *Jenkins v. Artuz*, Nos. 01-2355, -2328, _ F.3d _, 2002 WL 483547, at *6 (2d Cir. April 1, 2002). "If not," the petition must be denied and the conviction sustained unless the state courts have unreasonably determined the facts – a rarity indeed. *Sellan v. Kuhlman*, 261 F.3d 303, 309 (2d Cir. 2001).

Several considerations inform the "clearly established" analysis, which can sometimes prove "complex." *Id.* They include the following:

First, on its face, § 2254(d)(1) "restricts the source of clearly established law" to the "jurisprudence" of the U.S. Supreme Court. *Williams*, 529 U.S. at 412; *accord Francis S.*, 221 F.3d at 108.

Second, the phrase "clearly established Federal law" refers solely to the Supreme Court's holdings, as opposed to its *dicta*, at the time of the relevant state court decision(s). *See, e.g., Kennaugh*, slip op. at 1607; *Jenkins*, 2002 WL 483547, at *6; *Brown v. Artuz*, 283 F.3d 492, 501 (2d Cir. 2002).

Third, despite the latter principles, the "determination" whether a given Supreme Court precedent was clearly established "will ordinarily be made by the lower federal courts" – **not** the Supreme Court itself – pursuant to their "independent obligation to say what the law is." *Kennaugh*, slip op. at 1608 (citation and internal quotes omitted). Thus, one can expect a sizable body of district and circuit court authority to develop as to when particular Supreme Court holdings became "clearly established" for AEDPA purposes.

Fourth, and finally, a rule of law may be clearly established by either a general standard enunciated in the Supreme Court's cases or its specific application in a particular context. *See id.* at 1608-11. For example, in *Gilchrist v. O'Keefe*, the petitioner challenged a state court's refusal to assign new counsel after he assaulted his court-appointed lawyer. *See* 260 F.3d 87 (2d Cir. 2001), *cert. denied*, No. 01-8995, __ S. Ct. __, 2002 WL 971360 (May 13, 2002). The Second Circuit evaluated the claim under **both** the general requirement of *Gideon v. Wainwright*, 372 U.S. 336 (1963), that waivers of counsel be knowing and intelligent, **and** the specific prerequisites for self-representation outlined in *Faretta v. California*, 422 U.S. 806 (1975). Though the Supreme Court had never faced the precise scenario before the Second Circuit, the appellate court concluded that the right to counsel, through general precedents like *Gideon*, was fundamental and clearly established. *See also Lainfiesta v. Artuz*, 253 F.3d 151, 154 (2d Cir. 2001) ("qualified right to counsel of choice," while not itself clearly established, "emerges out of a defendant's broader right to control the presentation of his defense"), *cert. denied*, 122 S. Ct. 1611 (2002); *but see Morales*

v. Artuz, 281 F.3d 55, 58-59 (2d Cir.) (though clearly established where accused and witness are physically separated, face-to-face confrontation right probably was **not** so established in the "precise context" of a disguised witness testifying in defendant's presence), *petition for cert. filed*, No. 01-10169 (May 8, 2002).

Similarly, the petitioner in *Kennaugh* attacked an **initial** in-court identification as impermissibly suggestive. As in *Gilchrist*, the Supreme Court had never confronted that precise issue. Still, the Second Circuit assessed the petitioner's claim under **both** the general due process standard of *Manson v. Brathwaite*, 432 U.S. 98 (1977), prohibiting the admission of unreliable eyewitness testimony, **and** the specific reliability test imposed by *Neil v. Biggers*, 409 U.S. 188 (1972), for a particular kind eyewitness testimony – namely, testimony tainted by suggestive **pretrial** identification techniques. *See Kennaugh*, slip op. at 1607-18. The Court found each of these cases – *Manson* and *Biggers* – to constitute clearly established federal law, collectively demonstrating that "tainted [identification] testimony must be excluded to preserve the defendant's due process rights." *Id.* at 1610-11; *see also Jones v. Stinson*, 229 F.3d 112, 119-20 (2d Cir. 2000) (noting that the Supreme Court "has not decided the specific circumstances under which a criminal defendant must be allowed to introduce evidence of prior non-criminal conduct," but finding it generally and clearly established that "the opportunity to present a defense" is constitutionally required).

In sum, the foregoing cases – *Kennaugh*, *Gilchrist*, *Lainfiesta* and *Jones* – teach that a petitioner's "particular theory" of unconstitutionality need **not** be "clearly established" to satisfy § 2254(d)(1). *See Aparicio*, 269 F.3d at 95 n.8; *Sellan*, 261 F.3d at 309. Rather, it is enough if the broader constitutional principle he urges meets that criterion. Any case-specific concerns "obviate neither the clarity of the [general] rule nor the extent to which the rule must be seen as 'established' by" the Supreme Court. *Williams*, 529 U.S. at 391.

Other examples of rights deemed clearly established include the right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) (reversal required where counsel's deficient performance prejudices trial's outcome, in that result might have been different but for counsel's errors);[1] the right to material exculpatory and impeachment evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972);[2] the right not to be convicted by prosecutorial misconduct under *Darden v. Wainwright*, 477 U.S. 168 (1986), or by the knowing use of false testimony under *Napue v. Illinois*, 360 U.S. 264 (1959);[3] the right to be

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[1] *See, e.g., Aparicio*, 269 F.3d 95 & n.8; *Sellan*, 261 F.3d at 309; *Bell*, 2002 WL 1050365; *Lindstadt*, 239 F.3d at 198.

[2] *Cf., e.g., Kennaugh*, slip op. at 1618-20; *Jenkins*, 2002 WL 483547, at *6; *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001).

[3] *See Jenkins*, 2002 WL 483547, at *6.

present with counsel at all material trial stages, including jury selection;[4] the right to a public trial under *Waller v. Georgia*, 467 U.S. 39 (1984);[5] the right to call witnesses in order to present a meaningful defense;[6] and, through several disparate cases, the right against reinstatement of a greater offense that was not pending when defendant pled to a lesser included offense without objection.[7] *Cf. Davis v. Strack*, 270 F.3d 111, 134-35 (2d Cir. 2001) (since justification is not a defense to second degree weapon possession under New York law, denial of justification instruction with respect to that charge did not violate clearly established Supreme Court precedent); *Lolisco v. Goord*, 263 F.3d 178, 184-85, 191 (2d Cir. 2001) (while Sixth Amendment right to trial on evidence alone was clearly established, Fourteenth Amendment right to particular form of jury inquiry was not); *Leslie v. Artuz*, 230 F.3d 25, 32 (2d Cir. 2000) ("no Supreme Court case" has addressed whether accused's rights were violated "when he was represented at trial by both a *bona fide* attorney and a nonattorney"), *cert. denied*, 531 U.S. 1199 (2001).

B. SECTION 2254(d)(1) – THE "CONTRARY TO"/"UNREASONABLE APPLICATION" TEST

Assuming a clearly established legal principle and a state court merits adjudication (*see infra* **POINT III**), "*habeas* relief is available" under § 2254(d)(1) "only when the state court judgment is contrary to, or involved an unreasonable application of," the rule of law at issue. *Kennaugh*, slip op. at 1607 (citation and internal quotes omitted); *accord*, *e.g.*, *Norde*, slip op. at 1385 ("a federal court may not grant a *habeas* petition" under § 2254(d)(1) unless these strictures are satisfied); *Brown*, 283 F.3d at 498 (*habeas* writ "may not issue" under § 2254(d)(1) absent the requisite showing); *Jones*, 126 F.3d at 415 (writ "will not be granted" under § 2254(d)(1) unless "contrary to"/"unreasonable application" test is met). We address these disjunctive clauses, which have "independent meaning," in turn. *Bell*, 2002 WL 1050365, at *__.

1. THE "CONTRARY TO" PRONG

Section 2254(d)(1)'s "contrary to" phrase is relatively straightforward and presents little interpretive difficulty. *See Francis S.*, 221 F.3d at 108. "Contrary" means "diametrically different," "opposite in nature or character" or "mutually opposed." *See Williams*, 529 U.S. at 405. It follows that a state court acts "contrary to" clearly established federal law when it uses an incorrect legal

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[4] *Cf.*, *e.g., Cohen v. Senkowski*, No. 00-2362, _ F.3d _, slip op. at 1894-95 (2d Cir. May 13, 2002); *Norde v. Keane*, No. 01-2049, _ F.3d _, slip op. at 1388-89, 1392-96 (2d Cir. March 29, 2002); *Jones v. Vacco*, 126 F.3d 408 (2d Cir. 1997).

[5] *Cf. Brown*, 283 F.3d at 498-502.

[6] *Cf. Washington v. Schriver*, 255 F.3d 45, 56-57 (2d Cir. 2001); *Noble v. Kelly*, 246 F.3d 93 (2d Cir.), *cert. denied*, 122 S. Ct. 197 (2001).

[7] *Morris v. Reynolds*, 264 F.3d 38, 48 (2d Cir.), *petition for cert. filed*, No. 01-820 (Nov. 27, 2001).

standard – one that differs from or contradicts the governing law set forth in the Supreme Court's cases. *See Francis S.*, 221 F.3d at 108-09; *Bell*, 2002 WL 1050365, at *_. A state court also violates the "contrary" prong if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law. *See, e.g., Kennaugh*, slip op. at 1607. Finally, a state court ruling is "contrary to" clear federal law if it decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *See, e.g., Sellan*, 261 F.3d at 314-15 n.6. For example, if a state court denied an ineffective assistance claim for failure to show prejudice by a **preponderance of the evidence**, its holding would be "contrary to" *Strickland v. Washington*, which requires only a **reasonable probability** of a different result. *See Francis S.*, 221 F.3d at 108-09.

As one might expect, cases involving the "contrary" clause are relatively sparse, with reversals – *i.e.*, instances of state court decisions that squarely flout Supreme Court precedent – even scarcer. *See Williams*, 529 U.S. at 406 ("run-of-the-mill" state court decisions applying the correct legal rule to the facts of a prisoner's case do not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause"). In *Lindstadt* and *Lolisco*, the Second Circuit found that the New York ineffective counsel test – requiring a denial of "meaningful representation" – was not "contrary to" *Strickland*'s deficient performance plus prejudice test. *See Lindstadt*, 239 F.3d at 198; *Lolisco*, 263 F.3d at 192-93. In both cases, the Court reasoned that the tests were not "diametrically different, opposite in character or nature, or mutually opposed." *Id*. at 193 (citations and internal quotes omitted). Nor were *Lindstadt*'s facts "materially indistinguishable" from those in *Strickland* or any other Supreme Court decision. *Lindstadt*, 239 F.3d at 198 (citation and internal quotes omitted); *compare Bell*, 2002 WL 1050365, at *__ (where state court correctly identified *Strickland* as "governing" ineffective assistance claim, its adjudication was not "contrary to ... clearly established law"); *and Sellan*, 261 F.3d at 314-15 n.6 (similar); *with Mask v. McGinnis*, 233 F.3d 132, 140 & n.5 (2d Cir. 2000) (state court unreasonably applied *Strickland* in demanding certain, rather than probable, prejudice), *cert. denied*, 122 S. Ct. 322 (2001).[8]

In *Kennaugh*, a case involving an **initial** in-court identification that was allegedly suggestive, the Second Circuit noted that the most analogous Supreme Court precedents – *Neil v. Biggers* and *Manson v. Brathwaite* – concerned eyewitness testimony derived from tainted "**pretrial** procedures." Slip op. at 1611 (emphasis supplied). Conversely, the Supreme Court had never considered a case where the "only [offending] identification occurred in open court." *Id.* Nor, *a fortiori*, had the Court extended *Biggers* or *Manson* to that context. *Id.* As such, the facts at issue were not "materially indistinguishable" from those in *Biggers*, *Manson* or any other Supreme Court opinion, and the state court's decision was not "contrary to clearly established federal law." *Id.* (emphasis omitted); *see Brown*, 283 F.3d at 500-01 (decision to close courtroom during undercover

[8] Despite *Mask*'s "unreasonable application" language, the state court's ruling was actually "contrary to" *Strickland*. *See Williams*, 529 U.S. at 405-06 (hypothetical denial of ineffective assistance claim for failure to show prejudice by even a **preponderance** would contradict *Strickland*). Indeed, *Mask* itself expressly cited and relied on the *Williams* hypothetical. *See* 233 F.3d at 140. As such, its "unreasonable application" language appears to be in error.

officer's testimony "was not bottomed on a view of the law 'contrary to' the rule established in *Waller*[*v. Georgia*] or in any other Supreme Court decision").

On the other hand, the Second Circuit in *Leka v. Portuondo* found that the state courts had, *inter alia*, acted "contrary to" clear federal law in rejecting a prisoner's *Brady* claim. 257 F.3d at 107. The Court made this determination rather summarily, with little explication of AEDPA in general or the "contrary" clause in particular. In essence, the Court disagreed with the state courts' conclusions – express or implied – as to (a) the adequacy of certain incomplete and misleading disclosures made by the prosecution on the eve of trial, and (b) the potential impact and materiality of the suppressed information. So viewed, and with no indication that the state courts misapprehended *Brady*, *Leka* is best understood as involving an "unreasonable application" of the law or an "unreasonable determination of the facts" – "contrary" parlance notwithstanding. *See* 28 U.S.C. § 2254(d)(1)-(2); *Williams*, 529 U.S. at 406 ("contrary" prong ill-suited to "run-of-the-mill" state court decisions applying the correct legal rule to the facts of a prisoner's case); *infra* **SUBPOINTS II(B)(2)-(C)**.

A purer "contrary" case is *Jones v. Vacco*, where the petitioner challenged an overnight ban on consultation with trial counsel that lasted through the ensuing weekend. The Second Circuit found the state courts' rejection of the claim "contrary to" *Geders v. United States*, 425 U.S. 80, 91 (1976), which explicitly held that such bans violate the Sixth Amendment and constitute "reversible error." 126 F.3d at 416-17; *see Morris*, 264 F.3d at 50-51 (Court of Appeals' implied holding that jeopardy bar arises after **sentencing**, rather than **conviction**, contravened Supreme Court precedent in circumstances at hand).

2. THE "UNREASONABLE APPLICATION" PRONG

To prevail on a *habeas* petition, a prisoner also may "show that the state court decision involved an unreasonable application of clearly established federal law." *Brown*, 283 F.3d at 501 (citation and internal quotes omitted). The "unreasonable application" clause is "more troublesome" than its "contrary" counterpart, *see Francis S.*, 221 F.3d at 109, because the Supreme Court "has not defined the term," *Lindstadt*, 239 F.3d at 198 n.1, offering "little guidance as to [its] meaning." *Aparicio*, 269 F.3d at 94. Accordingly, as the Second Circuit recently acknowledged, the law of unreasonableness is "not yet fully formed" and continues to emerge. *Kennaugh*, slip op. at 1612; *see Williams*, 529 U.S. at 410 (conceding that the term "'unreasonable' is no doubt difficult to define"). Nonetheless, the existing cases provide some basic parameters.

First, and rather "tautologically," *Aparicio*, 269 F.3d at 94, a state court ruling is unreasonable if it correctly identifies the governing legal principle from the Supreme Court's decisions but unreasonably applies it to the facts of the prisoner's case. *See*, *e.g.*, *Bell*, 2002 WL 1050365, at *__.

Second, the proper inquiry is objective rather than subjective, focusing on whether the state courts applied federal law in an "objectively unreasonable" way. *Id.* at *_.

Third, and "most important," *Williams*, 529 U.S. at 410, an unreasonable application differs from – and "sets a higher bar to relief than" – an incorrect or erroneous one. *Lindstadt*, 239 F.3d at 198 n.1. To this end, a writ may not issue just because a federal *habeas* court, "in its independent judgment," would have decided the case differently. *See, e.g., Aparicio*, 269 F.3d at 94; *Brown*, 283 F.3d at 501. For as the Second Circuit has colorfully explained, federal courts are charged with determining the reasonableness of state court decisions – not with "grading their papers." *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001). Consequently, a state court ruling must reflect "some additional increment of incorrectness," beyond mere error, to reach the unreasonable level. *Aparicio,* 269 F.3d at 94; *accord, e.g., Sellan*, 261 F.3d at 315. Still, "the increment need not be great; otherwise, *habeas* relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Francis S.*, 221 F.3d at 111 (citation and internal quotes omitted); *see, e.g., Jenkins*, 2002 WL 483547, at *6.

Fourth, *habeas* relief is also warranted when a state court either "unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* (citation, internal quotes and brackets omitted). Put another way, "a state court determination is reviewable under AEDPA" if it "unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to a situation which that principle should have, in reasoned, governed." *Kennaugh*, slip op. at 1613 (footnote omitted).

Fifth, and finally, while the appropriate AEDPA inquiry is "whether the state courts reasonably applied clearly established **Supreme Court** law," *habeas* judges continue to look to lower **federal courts** for guidance in this regard. *Cruz*, 255 F.3d at 85 (emphasis supplied). That is, in making their reasonableness determinations, *habeas* courts still examine how "the federal courts of appeals" – not just the Supreme Court – "have analyzed the issue" under consideration. *Id.*; *accord Gilchrist*, 260 F.3d at 97 (finding additional support for reasonableness ruling in the analyses of "other Circuits"); *Kennaugh*, slip op. at 1615 & n.3 (deeming the "views of Circuit Courts" in similar cases "relevant" to the reasonableness determination); *but see id.* at 1611, 1614 (state courts not unreasonable in failing to use standards and procedures employed by lower federal courts and Second Circuit – but not Supreme Court – in the very context at issue).

Applying the foregoing principles, federal courts have found unreasonable state court rulings, granted *habeas* writs and reversed convictions where, for example, a prosecutor introduced known false testimony and exploited it in summation, *see Jenkins*, 2002 WL 483547; where a combination of four critical trial errors rendered a defense lawyer's performance deficient and prejudicial, *see Lindstadt*, 239 F.3d 191; where a prosecutor withheld material information – or made belated, incomplete and misleading disclosures – regarding a potential exculpatory witness, *see Leka*, 257 F.3d 89; where suppressed evidence would have impeached a damning identification, *see Boyette v. Lefevre*, 246 F.3d 76, 91-93 (2d Cir. 2001); and where a defense lawyer failed to investigate or

present substantial mitigating evidence during a capital sentencing proceeding, *see Williams*, 529 U.S. 362.[9]

On the other hand, state court rulings and convictions have survived reasonableness challenges where, for example, a trial judge adequately supported his decision to close the courtroom during the testimony of an undercover police officer, *see Brown*, 283 F.3d 492; where a defense attorney called no witnesses and waived final argument during a capital sentencing proceeding, *see Bell*, 2002 WL 1050365; where an appellate lawyer defaulted an apparently meritorious state law claim, *see Sellan*, 261 F.3d 303; where defense counsel failed to argue multiplicity or double jeopardy and neglected to seek an identification charge, *see Aparicio*, 269 F.3d 78; where a jury was exposed to extrajudicial information and a defense lawyer eschewed a novel scientific test and elicited his client's confession, *see Lolisco*, 263 F.3d 178; and where a prosecutor allegedly withheld *Brady* material and a judge refused to suppress an open court identification based on a particular pretrial identification decision (*Neil v. Biggers*), *see Kennaugh*, slip op. at 1612-14, 1618-20.

As this synopsis illustrates, "unreasonable application" cases are more common, varied and fact-specific than "contrary to" cases, making it difficult to discern any general themes or unifying features.

C. SECTION 2254(d)(2) – UNREASONABLE FACTUAL DETERMINATIONS

Under amended § 2254(d)(2), a *habeas* writ "shall not be granted" absent a state court merits adjudication (*see infra* **POINT III**) resulting from "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." The Second Circuit has expressed "some doubt" whether this "negative constraint" affirmatively **mandates** relief when the provision's terms are satisfied. *See Francis S.*, 221 F.3d at 115 & n.15 ("When ruling that a state court finding was not sufficiently supported to be entitled to deference ..., the Supreme Court has usually focused not on an ultimate finding ... but on some subsidiary historical fact") (citations omitted). Regardless, given the presumption of correctness accorded state court factual findings – which the petitioner must rebut by clear and convincing evidence (*see* 28 U.S.C. § 2254(e)(1)) – one would expect few cases to be brought or decided under the "unreasonable determination" prong, and even fewer reversals. *See Francis S.*, 221 F.3d at 114-15 (conclusions as to dangerous mental illness, fitness for trial and competence to waive collateral review are factual findings entitled to presumption). While the former supposition has proven true, the latter is more the exception than the rule in the post-AEDPA Second Circuit. Several recent cases demonstrate the point.

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[9] In *Kennaugh*, the Second Circuit suggested without deciding that a state court unreasonably failed to extend the general due process protections of *Manson v. Brathwaite*, a **pretrial** identification case, when it did nothing to ensure the reliability of a dubious **in-court** identification. *See* slip op. at 1614, 1617, 1620.

In *Leslie v. Artuz*, a state prisoner argued that his Sixth Amendment right to counsel was violated because one of his two trial "lawyers" was not an attorney. 230 F.3d at 27. The state courts rejected the claim, finding that the second lawyer "was present throughout the trial" and "played the dominant role." *Id.* at 31. Because the petitioner cited "no evidence" – much less clear and convincing evidence – to overcome the presumption of correctness, the Second Circuit held that the state courts' "assessment" was hardly "unreasonable." *Id.* at 31-32. This is precisely the result one would expect under § 2254(d)(2). *See also Kennaugh*, slip op. at 1619 ("We agree with the district court that the state judge's finding – that no evidence existed to connect the men who bought the cigarettes with the men who perpetrated the crime – was not based upon an unreasonable determination of the facts.").

In *Davis v. Strack*, however, the petitioner argued that the trial court violated due process by refusing to instruct the jury on the defense of justification. *See* 270 F.3d 111. Due to an intervening change in the law, the Appellate Division "implicitly rejected" the trial court's reasoning and, based on its own findings, concluded that the evidence did not warrant a justification charge. *Id.* at 128-29. **Without even acknowledging the presumption of correctness**, the Second Circuit ruled that the Appellate Division's findings were "without reasonable basis," and that the case therefore "fit[] comfortably under" § 2254(d)(2). *Id.* at 129-33; *cf. Leka*, 257 F.3d at 103 ("We conclude ... that Garcia's testimony was suppressed by the prosecution ... and to the extent that state court factual findings can be read to the contrary," Leka has rebutted them by "clear and convincing evidence") (citations and internal quotes omitted); *Morris*, 264 F.3d at 47-48 (clear and convincing evidence rebuts presumption that felony charge was pending when defendant pled to lesser included misdemeanor, and proves reinstatement order was backdated). Arguably, the Second Circuit's true complaint was that the Appellate Division unreasonably applied the law under § 2254(d)(1), as it rebuked that court for failing to construe the evidence "in the light **most favorable to** Davis as New York law [allegedly] requires." *Id.* at 129 (citations omitted) (emphasis supplied). Indeed, the Second Circuit expressly invoked the "unreasonable application" prong as an alternate ground for its holding. *See id.* at 133. But even that rationale is suspect since (i) New York justification law is not "clearly established federal law" as determined by the U.S. Supreme Court (*see* § 2254(d)(1)); (ii) § 2254(d) generally compels deference to state court legal conclusions; and (iii) as the *Davis* court recognized elsewhere, "'it is not the province of a federal *habeas* court to reexamine state-court determinations of state-law questions.'" *Id.* at 123 (quoting *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

Another curious case is *Mask v. McGinnis*. There, the petitioner argued that defense counsel's miscalculation of his sentencing exposure led to a trial and oppressive prison term instead of a favorable guilty plea. *See* F.3d 132. Because the state trial court applied the wrong legal standard to the petitioner's *Strickland* claim – and because its factual determinations were "closely intertwined" with that "erroneous" standard – the Second Circuit found, "[i]n this particular instance," "no independent factual issues to which we should defer." *Id.* at 140 (citation omitted). Though the Appellate Division later used the correct standard, it could not "transform the lower court's inapposite determinations" into legitimate findings "requir[ing] deference under 28 U.S.C. §§ 2254(d)(2), (e)(1)." *Id.* at 140 n.5.

How much deference is owed when the Appellate Division reverses lower court credibility determinations and substitutes its own findings? In *Boyette v. Lefevre*, the motion court concluded, after an evidentiary hearing, that the prosecution committed multiple *Brady* and *Rosario* violations by suppressing a number of exculpatory items. 246 F.3d at 86. The Appellate Division reversed, vaguely stating that "the defendant failed to demonstrate that he had, in fact, been denied certain materials to which he was entitled." *Id.* at 87 (citation and internal quotes omitted). At the outset, the Second Circuit noted that under pre-AEDPA law, deference is due both Appellate Division decisions affirming lower court findings and findings made by the Appellate Division in the first instance – *i.e.*, findings on issues "not explicitly addressed by the trial court." *Id.* at 88-89 n.7 (citations omitted). Under AEDPA, however, the deference level for appellate rulings **rejecting** hearing court findings is an open question. *Id.* This being so, and because the Appellate Division "did not specify which documents Boyette failed to show were suppressed," there were no "discernable" appellate findings to which the Second Circuit might defer. *Id.* at 88; *cf. Morris*, 264 F.3d at 48 (reviewing "ambiguous" Court of Appeals findings under deferential AEDPA standard). And deference to the "hearing court's findings," which had been partly reversed, was similarly "inappropriate." *Id.* at 89. "In this very unusual situation" – where an appellate court rejected "certain" hearing court findings "without specifying" which ones – the Second Circuit reviewed the facts *de novo*. *Id.*; *see Boyette*, 233 F.3d at 140 n.5 (when AEDPA commands strict deference to "state court factual determinations ..., we can only [comply] when we know that the state court had, in fact, considered the [decisive] factual issue"); *Galarza v. Keane*, 252 F.3d 630, 640 (2d Cir. 2001) (presumption of correctness yields when state courts fail to resolve outstanding factual issues) (applying pre-AEDPA law and collecting pre-AEDPA cases).

In sum, while state court factual determinations would seem to demand the most deference of all, the preceding cases show that the Second Circuit will not hesitate to reverse them as it deems necessary. To avoid this result, an appellate court faced with erroneous or insufficient lower court findings should take care to articulate clear findings of its own or, better yet, remit the case for new ones.

III. PROCEDURAL REVIEW UNDER § 2254(d)

By the Act's plain terms, AEDPA deference is **only** compelled when a petitioner's claim has been "adjudicated on the merits" in state court. *See Kelly*, 246 F.3d at 98. In other words, § 2254(d)'s "contrary to," "unreasonable application" and "unreasonable determination" tests are **only** triggered when the state courts reject a federal claim on substantive grounds. *See Rudenko*, slip op. at 8557; *Sellan*, 261 F.3d at 311. In short, a state court merits adjudication is a "necessary predicate" to "deferential review" under AEDPA. *Aparicio*, 269 F.3d at 93.

In a close case, ascertaining whether a claim has been adjudicated on the merits – and thereby deciding what standard of review and level of deference to apply – can be crucial, if not "outcome-determinative." *Sellan*, 261 F.3d at 310; *compare, e.g., id.* at 310, 317 ("[W]ere we to review Sellan's Sixth Amendment claim *de novo*, we might well be inclined to grant the writ. By contrast, were we to review the relevant state court decision under the deferential standards now prescribed by AEDPA," Sellan plainly cannot prevail); *and Francis S.*, 221 F.3d at 113, 117

("unconstrained by section 2254(d)(1), we might well rule [as an initial matter] that an equal protection violation has been shown."); *and Williams*, 529 U.S. at 402 ("If today's case were governed by the ... *habeas* statute prior to ... AEDPA ..., I would agree ... that Williams' petition ... must be granted") (O'Connor, J., concurring); *with, e.g., Cohen*, slip op. at 1893-94 (declining to decide "what level of deference to apply" because prisoner loses under any circumstance); *and Leka*, 257 F.3d at 97-98 (same where petitioner would **win** under any circumstance); *and Noble*, 246 F.3d at 98 (unnecessary "to determine whether AEDPA applies here, as our conclusion is the same under [any] standard of review.") (footnote omitted).

Why is the latter inquiry so important? The answer is simple: if a state court fails to reach the merits – or if a federal court cannot identify the basis for the state court's holding – "AEDPA's more stringent standard does **not** apply," *Norde*, slip op. at 1385 (emphasis supplied), and **no** "deference is due." *Rudenko*, slip op. at 8559. Instead, the federal court will conduct a searching, pre-AEDPA review, considering "questions of law and mixed questions of law and fact" *de novo*. *Brown*, 283 F.3d at 498; *accord*, *e.g.*, *Aparicio*, 269 F.3d at 93; *Boyette*, 246 F.3d at 91 (court should apply *de novo* rather than deferential review to state court evidentiary ruling where it was "impossible to discern the Appellate Division's conclusion on [the] issue"). Conversely, if a state court **does** reach the merits, the *habeas* court is "**required** to apply the deference **mandated** under AEDPA." *Sellan*, 261 F.3d at 309-10 (emphasis supplied).

How, then, does a state court issue a merits adjudication and thereby avail itself of AEDPA's benefits? "'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, **rather than** on a procedural, or other, ground." *Id.* (emphasis supplied); *see, e.g., Semtek Int'l v. Lockheed Martin Corp.*, 121 S. Ct. 1021, 1025 (2001) (merits adjudication "actually passes directly on the substance of a particular claim before the court") (alterations and internal quotation marks omitted). Accordingly, as the Second Circuit recently instructed:

> A state court "adjudicates" a petitioner's federal constitutional claims "on the merits" when "it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment." *Sellan*, 261 F.3d at 312. In applying this two-part test, we consider: "(1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits." *Id.* at 314 (quoting *Mercandel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999)) (internal quotation marks omitted). In this regard, **we have given a broad reading to state court dispositions**, noting that "[a] state court need only dispose of the petitioner's federal claim on substantive grounds, and reduce that disposition to judgment. **No further articulation of its rationale or elucidation of its reasoning process is required**." *Aparicio*, 269 F.3d at 93-94 (citing *Sellan*, 261 F.3d at 312). Furthermore, **an issue raised may be considered adjudicated "on the merits" for AEDPA purposes even when the state court does not specifically mention the**

claim but uses general language referable to the merits. *Id.* at 94; *Sellan*, 261 F.3d at 312-14.

Norde, slip op. at 1386 (emphasis supplied).

In sum, to decipher whether a state court has adjudicated a federal claim on the merits, *habeas* courts in the Second Circuit "inquire, *inter alia*, whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits." *Rudenko*, slip op. at 8558 (citation and internal quotes omitted). If not, the federal court "**must** defer in the manner prescribed by ... § 2254(d)(1)," even if the state court "does not explicitly refer to either the federal claim or to relevant" case law – federal, state or otherwise. *Sellan*, 261 F.3d at 312 (emphasis supplied); *accord Aparicio*, 269 F.3d at 94 (because petitioner's claims "have been 'adjudicated on the merits' by a state court, we **must** review that decision under AEDPA's deferential standards") (emphasis supplied).[10]

Long before AEDPA's advent, the Supreme Court had cautioned federal *habeas* courts not to tell state courts how to "write their opinions." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Following suit, the Second Circuit refused to "dictat[e]" precise language state courts should use to avoid federal "second guessing." *Capellan v. Riley*, 975 F.2d 67, 72 (2d Cir. 1992). Though paying lip service to these tenets (*see*, *e.g.*, *Sellan*, 261 F.3d at 312; *Washington*, 255 F.3d at 53), the post-AEDPA Second Circuit has taken a more categorical approach. In a set of bright line rules, it has decreed that some common state court dispositions amount to merits adjudications as a matter of law, while others do not. For example:

- When the Appellate Division expressly identifies, discusses and decides the substance of a claim or claims, each claim so addressed has been "adjudicated on the merits" and is entitled to AEDPA deference. *See, e.g., Rudenko*, slip op. at 8565.

- Similarly, when the Appellate Division expressly identifies and summarily "denies" a given claim, without further explanation or elaboration, that claim – absent some contrary indication in the record – has also been "adjudicated on the merits" and is likewise entitled to AEDPA deference. *See, e.g., Aparicio*, 269 F.3d at 87, 94 (finding merits adjudication where Appellate Division denied *coram nobis* relief "without mentioning the Sixth Amendment or relevant case law," stating only, "appellant has failed to establish that he was denied the effective assistance of appellate counsel") (citation and internal quotes omitted); *Sellan*, 261 F.3d at 308,

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[10] It should be noted that the Second Circuit's views on this issue are not universally accepted. To the contrary, whether a summary dismissal constitutes an adjudication on the merits is a "difficult question" that has provoked intense debate among the federal circuits. *See Sellan*, 261 F.3d at 309-11, *Washington*, 255 F.3d at 52-55. As such, it seems destined for review by the U.S. Supreme Court.

314 (one word "deni[al]" of "ineffective assistance of appellate counsel" claim triggered AEDPA deference) (citation and internal quotes omitted).

- When a state defendant raises multiple claims on appeal, the Appellate Division discusses one or more of the claims in detail and summarily rejects the others as "meritless" or "without merit" – with or without expressly identifying them – **all** of the claims raised have been "adjudicated on the merits" and are subject to AEDPA deference. *See, e.g., Jenkins*, 2002 WL 483547, at *4, *6; *Rudenko*, slip op. at 8564-66; *Brown*, 283 F.3d at 497-98.

- Conversely, when the Appellate Division discusses some claim(s) in detail and ignores the others – neither mentioning nor explicitly resolving them – **only** the claims expressly considered are deemed "adjudicated on the merits" and command AEDPA deference. The remaining contentions have **not** been "adjudicated on the merits" and are reviewed *de novo*. *See*, *e.g., Norde*, slip op. at 1382, 1386-88 ("Because the Appellate Division never indicated in any way that it had considered Norde's Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that AEDPA ... does not apply."); *Rudenko*, slip op. at 8564-67 ("Because the Appellate Division opinion neither mentioned these claims nor contained any wrap-up sentence referring to claims other than those with which it dealt expressly, there is no indication that the Appellate Division decided Johnson's claims of ineffective ... counsel or the right to present evidence at ... sentencing").

- When the Appellate Division discusses some claim(s) in detail and summarily rejects the others as, *e.g.*, "either unpreserved for appellate review **or** without merit," or as "either meritless **or** procedurally barred," **only** the claims expressly considered are deemed "adjudicated on the merits" and command AEDPA deference. Again, the remaining contentions have **not** been "adjudicated on the merits" and are reviewed *de novo*. *Id.* at 8559-63 (citations, internal quotes and some emphasis omitted) (other emphasis supplied).[11]

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[11] Nor would such formulations render the remaining claims procedurally barred, and thus unreviewable absent a showing of actual innocence or cause (*e.g.,* attorney incompetence) and prejudice – a nearly impossible burden. *See, e.g., Dixon v. Miller*, No. 99-2432, _ F.3d _, 2002 WL 1041394 (2d Cir. May 23, 2002); *Aparicio*, 269 F.3d at 90-93. As the Second Circuit "explicitly h[e]ld" in *Fama v. Commissioner of Correctional Svces.*:

> [W]hen a state court uses language such as "[t]he 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. When it uses such language, the state court has not adequately indicated that its judgment rests on a state procedural bar, and its reliance on local law is not clear from the face of the opinion.

(continued...)

- By contrast, when the Appellate Division discusses some claim(s) in detail and summarily rejects the others as, *e.g.*, "unpreserved for appellate review **and**, in any event, ... without merit," **all** of the claims raised have been "adjudicated on the merits" and are subject to AEDPA deference. *Id.* at 8565-66 (citations and internal quotes omitted) (emphasis supplied).[12]

In sum, an overworked appellate court need not write lengthy opinions articulating its rationale or elucidating its reasoning to ensure deference in a federal collateral proceeding. *See Norde*, slip op. at 1386; *Washington,* 255 F.3d at 52 ("federal courts are to evaluate the state court result, not the reasoning process"). To the contrary, at least in the Second Circuit – and unless the Supreme Court declares otherwise – it appears that merely identifying the claim raised and appending a bare one word denial will suffice. *See Aparicio*, 269 F.3d at 94; *Sellan*, 261 F.3d at 314. Alternatively, AEDPA's benefits may be invoked simply by "packag[ing]" a litigant's claims in a "bulk dismissal" or "boilerplate roster" and labeling them "unpreserved **and** meritless." *Rudenko*, slip op. at 8559-60, 8565-66, 8581.

But despite these liberal parameters, and given the import and intricacy of the "adjudicated on the merits" inquiry (witness *Rudenko*'s obscure "and/or" distinction), a state court wishing to guarantee AEDPA deference should heed the Second Circuit's warning: "a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to" tests, ... avoid the risk that we might misconstrue the basis for the determination, and consequently diminish the risk that we might conclude the action unreasonable." *Sellan*, 261 F.3d at 312 (citation and internal quotes omitted). Plainly, then, some exposition of the court's reasoning is the "far preferable" course. *Washington*, 255 F.3d at 54 (ambiguous state court opinion "forces [us] to guess as to the reasoning behind a determination") (citation and internal quotes omitted).

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[11](...continued)
235 F.3d 804, 810 (2d Cir. 2000) (citations and footnote omitted) (emphasis supplied).

Ironically, then, it appears that potentially forfeited claims are reviewed **more generously** – *i.e.*, *de novo* – than claims that are simply "denied" or summarily rejected as "meritless," which command deference. Put another way, in dismissing a claim as "**either** unpreserved **or** without merit," a state court actually **deprives** itself of deference on **both** counts. To avoid this anomalous result, courts should abandon such cryptic locutions altogether.

[12] This formulation would also render the remaining claims procedurally barred, and thus unreviewable absent the heightened showing described *supra* n.11. *See Fama*, 235 F.3d at 810-11 n.4 ("where a state court says that a claim is 'not preserved for appellate review' and then rule[s] 'in any event' on the merits, such a claim is not preserved") (citing *Glenn v. Bartlett*, 98 F.3d 721, 724-25 (2d Cir. 1996), *cert. denied*, 520 U.S. 1108 (1997); *Velasquez v. Leonardo*, 898 F.2d 7, 9 (2d Cir. 1990)).

At an absolute minimum, and to dispel any possible doubt, a state court should clearly indicate that baseless claims have been rejected on substantive grounds and expressly recite their denial on the merits – if only in a "concise," shorthand sentence. *See Jenkins*, 2002 WL 483547, at *6.

IV. ADDITIONAL AEDPA HIGHLIGHTS

AEDPA revamped and restricted federal *habeas* law in other significant ways, including the following:

A. ONE YEAR LIMITATIONS PERIOD & STATUTORY TOLL

Under amended 28 U.S.C. § 2244(d), a state prisoner must file for federal *habeas* relief within one year of the date when (i) his conviction became final by the denial of *certiorari* or the expiration of the time to seek it, *see Williams v. Artuz*, 237 F.3d 147 (2d Cir.), *cert. denied*, 122 S. Ct. 279 (2001), (ii) the Supreme Court recognized a new retroactive rule of constitutional law or (iii) new evidence supporting the petition could have been discovered with due diligence. The one year period runs from the latest of the foregoing dates, and is tolled by pending application(s) for state post-conviction relief (*e.g.,* CPL 440 motions and appeals therefrom). *See Artuz v. Bennett*, 531 U.S. 4 (2000).[13] Prisoners whose convictions became final before AEDPA's effective date were given a one year grace period – until April 24, 1997 – in which to file their petitions. *See Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998).

B. RESTRICTIONS ON SECOND OR SUCCESSIVE PETITIONS

Under amended 28 U.S.C. § 2244(b), a New York prisoner may not file a second or successive federal *habeas* petition unless he obtains permission from the U.S. Court of Appeals for the Second Circuit. Permission shall be denied unless the prisoner *prima facie* shows that the petition relies on (i) a new retroactive rule of constitutional law or (ii) previously unavailable evidence which clearly and convincingly demonstrates that, but for constitutional error, "no reasonable factfinder" would have convicted. The decision on the leave application is unappealable by rehearing or *certiorari* petition. If leave is granted, the district court shall deny the petition unless the prisoner satisfies criterion (i) or (ii) on the merits. In essence, § 2244(b) encodes and augments the "abuse of the writ" doctrine developed in pre-AEDPA *habeas* jurisprudence. *Cf. Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

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[13] There is currently a circuit split, which may be resolved this term (*see Newland v. Saffold*, *cert. granted*, No. 01-301, 122 S. Ct. 393 (October 15, 2001)), as to whether the interval between disposition and appeal of a state post-conviction application is included in the toll or counts against the limitations period. The Second Circuit includes the interval in the toll and exempts it from the one year statute of limitations. *See Bennett v. Artuz*, 199 F.3d 116 (2d Cir. 1999), *aff'd on other grounds*, *Artuz v. Bennett, supra.*

C. RESTRICTED EVIDENTIARY HEARINGS

Under amended § 2254(e)(2), federal evidentiary hearings are unavailable to prisoners who "fail[] to develop the factual basis of a claim" in state court unless the petition satisfies criterion (i) or (ii) in **SUBPOINT IV(B)**, above. "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence" in this context "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend ... upon whether those efforts would have been successful." *Id.* at 435. In any event, "lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain ... and there is a convincing claim of innocence." *Id.* (citing 28 U.S.C. §§ 2254(e)(2)(A)(ii)-(B)).

D. MERITS DENIAL OF UNEXHAUSTED CLAIMS

Under amended § 2254(b)(2), a federal *habeas* court is now authorized to deny (but not grant) a petition "on the merits," notwithstanding the prisoner's failure to exhaust state remedies. **Denying** an unexhausted claim "differs crucially from a **dismissal** for failure to exhaust." *Aparicio*, 269 F.3d at 90 (citation and internal quotes omitted) (emphasis supplied). Unlike the latter (*see*, *e.g., Slack*, 529 U.S. at 486-87), the former is "regarded as a disposition ... on the merits. This means that any future [submission] would be a second or successive *habeas* petition," triggering the onerous "authorization" requirements described *supra* **SUBPOINT IV(B)**. *Aparicio*, 269 F.3d at 90 (citation omitted). Thus viewed, § 2254(b)(2) works a major change in the law – one of vital consequence to an unsuspecting, and typically uncounseled, *habeas* petitioner.

E. RESERVATION OF EXHAUSTION DEFENSE

Amended § 2254(b)(3) abolishes implied waivers of the "exhaustion requirement," which now inheres unless the state "expressly waives" it "through counsel."

F. ENHANCED PRESUMPTION OF CORRECTNESS

As noted, amended § 2254(e)(1) fortifies the presumption of correctness accorded state court factual findings, which the petitioner must now rebut by "clear and convincing evidence." *See, e.g., Morris*, 264 F.3d at 45 & n.6, *Leka*, 257 F.3d at 98, 103; *Boyette*, 246 F.3d at 88.

G. CERTIFICATE OF APPEALABILITY REQUIREMENT

Amended § 2253(c) and Fed.R.App.P. 22(b) require a prisoner to obtain a certificate of appealability (COA), formerly a certificate of probable cause, from a district or circuit judge in order to appeal the denial of a *habeas* petition. To secure a COA, the prisoner must "ma[k]e a substantial showing of the denial of a constitutional right." In essence, § 2253(c) codifies the holding of *Barefoot v. Estelle*, 463 U.S. 880 (1983), and makes no substantive change in the law, except that

the COA must specify the issue(s) for which permission to appeal has been granted. *See Slack*, 529 U.S. at 483-84; 28 U.S.C. § 2253(c)(3).

To pass the "substantial showing" test, the petitioner must establish that "the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997) (citation, internal quotes and alteration omitted). In the Second Circuit, this requirement reduces to a simple demonstration that a non-frivolous issue "deserv[es] appellate review." *Dory v. Commissioner of Corrections*, 865 F.2d 44, 46 (2d Cir. 1989). When the district court denies relief on procedural grounds without reaching the merits, the prisoner also must show that "jurists of reason would find it debatable" whether the procedural ruling was correct. *Slack*, 529 U.S. at 484. Finally, an appellate court's refusal of a COA is itself appealable by *certiorari* petition. *Id.* at 480.

H. PERFORMANCE OF POSTCONVICTION COUNSEL NOT A GROUND FOR RELIEF

Lastly, amended § 2254(i) provides that the ineffectiveness of postconviction counsel, during federal or state collateral proceedings, is not a ground for *habeas* relief.