UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH ASSADOURIAN,

Petitioner,

-against-

WILLIAM D. BROWN, Superintendent,

Respondent.

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08 Civ. 4732

OPINION

A P P E A R A N C E S:

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Sweet, D.J.

Petitioner Joseph Assadourian ("Assadourian" or the "Petitioner") has petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 asserting a violation of his federal constitutional rights arising out of the ineffective assistance of counsel. Respondent William D. Brown, Superintendent of the Eastern New York Correctional Facility (the "People"), has opposed the petition. Upon the facts and conclusions set forth below, a further hearing is required.

I. PRIOR PROCEEDINGS

By New York County Indictment Number 3213/01, filed on June 11, 2001, Petitioner was charged as a second felony offender with three counts of Assault in the First Degree (intentional, depraved indifference, and felony-assault), two counts of Attempted Robbery in the First Degree (in violation of Penal Law §§ 110/160.159(2), (4)), and one count of Criminal Possession of a Weapon in the Second Degree (in violation of Penal Law § 265.03(2)) which carried a minimum sentence of 10 years. Petitioner's status as a second felony offender was based on a prior New

Jersey felony conviction. At Petitioner's arraignment, the District Attorney offered to accept a guilty plea to the 10 year minimum sentence. This offer was refused. At a pretrial Sandoval hearing, the state court denied Petitioner's application to preclude the introduction of the New Jersey felony conviction at Petitioner's trial for the instant offense.

On November 13, 2001, Petitioner proceeded to a jury trial in New York Supreme Court before the Honorable Budd Goodman. Petitioner did not testify on his behalf. On November 20, 2001, the jury found Petitioner guilty on all the assault counts and the criminal possession of a weapon charge. On December 17, 2001, after being adjudicated a second felony offender based on the prior New Jersey felony, Petitioner was sentenced to a determinate prison term of fifteen years.

In November 2004, Petitioner's appellate attorney moved the Appellate Division, First Department, to vacate Petitioner's conviction, claiming that (1) the evidence was legally insufficient to support the conviction for Assault in the First Degree because there was insufficient evidence that the victim suffered serious physical injury; and (2)

Petitioner was improperly adjudicated a second felony offender because his New Jersey conviction did not qualify as a New York felony. Petitioner also submitted a pro se supplemental brief claiming that his trial attorney was ineffective. The People submitted a brief in opposition.

By order of June 16, 2005, the Appellate Division found Petitioner's sentencing claim unpreserved, but vacated Petitioner's sentence in the interest of justice, finding that Petitioner's New Jersey conviction could not be relied upon as the predicate for his sentencing as a second felony offender in New York. The Appellate Division remanded the matter to the trial court to review defendant's predicate felon status. The Appellate Division also considered and rejected Petitioner's remaining claims, including those raised in Petitioner's pro se supplemental brief. People v. Assadourian, 796 N.Y.S.2d 913 (App. Div. 2005).

On June 23, 2005, with the aid of counsel, Petitioner sought leave to appeal to the New York Court of Appeals on his legal sufficiency and ineffective counsel claims. On July 29, 2005, Petitioner's application for leave to appeal was denied.

Counsel for Petitioner then moved the trial court on August 26, 2005 to vacate his conviction pursuant to New York Criminal Procedure Law ("C.P.L.") § 440.10, claiming that: (1) the evidence of assault in the first degree was legally insufficient; and (2) trial counsel was ineffective during plea negotiations because he was unaware that Petitioner was not a second felony offender. Petitioner claims that had trial counsel been aware of Petitioner's correct felony offender status, he would have challenged the prosecution's plea offer of ten years' imprisonment which was based on an incorrect assumption that Petitioner was a second felony offender. According to Petitioner, had he been offered the minimum sentence permitted by law for his offense as a first offender, he would have accepted the offer and not have gone to trial.

In opposing Petitioner's motion, the People argued that Petitioner's claims were procedurally barred and without merit. The People asserted that even if Petitioner had been treated as a first offender, he would not have been offered a more favorable plea bargain because of his prior record and the nature of the instant offense. In support, the People submitted an unsworn affirmation,

dated October 14, 2005, by the Assistant District Attorney who prosecuted Petitioner.

By decision and order dated November 10, 2005, (the "November 10 Order"), Judge Goodman denied Petitioner's motion to vacate, rejecting the claims that the evidence was legally insufficient and that counsel was ineffective in not realizing that Petitioner's New Jersey conviction did not qualify as a felony in New York. Noting that the People stated that Petitioner would not have been offered a plea of less than a ten year sentence because of his record of violence, Judge Goodman concluded that (1) there was no reasonable probability that Petitioner would have been offered a different plea had his true predicate felony status been known; and (2) that there was no indication in the record that Petitioner would have accepted a lesser sentence.

The Appellate Division, First Department subsequently denied Petitioner's request for leave to appeal the denial of his motion to vacate the judgment. Judge Goodman resentenced Petitioner to three fourteen-year determinate prison terms on the first-degree assault counts

and a seven year determinate sentence on the weapons counts, all to run concurrent to each other.

In June 2006, Petitioner appealed his re-sentencing to the Appellate Division, First Department, claiming that Petitioner's sentence was harsh and excessive. On December 14, 2006, the Appellate Division affirmed, without opinion, Petitioner's sentence. On January 10, 2007, Petitioner's application for leave to appeal to the New York Court of Appeals was denied.

On April 28, 2006, Petitioner moved pro se, pursuant to C.P.L. § 440.10, to vacate his conviction on the ground that trial counsel provided ineffective assistance by denying Petitioner his right to testify on his own behalf and by failing to recognize Petitioner's "actual sentencing exposure," which, Petitioner claimed, denied him the opportunity to accept an available plea offer. The motion was denied by the Honorable Edward J. McLaughlin on September 19, 2006.

Petitioner then sought leave to appeal the denial of his motion to the Appellate Division, First Department.

On December 1, 2006, the Appellate Division denied Petitioner's application.

On May 29, 2007, Petitioner moved in the Appellate Division, First Department, for a writ of error coram nobis, on the ground that he received the ineffective assistance of appellate counsel. On July 19, 2007, the Appellate Division denied Petitioner's motion, and on February 29, 2008, the New York Court of Appeals denied Petitioner's application for leave to appeal.

In the instant petition, filed May 20, 2008, Petitioner claims that: (1) he was deprived of his right to the effective assistance of counsel during the Sandoval hearing when counsel failed to discover that Petitioner was not a second felony offender, which ultimately led counsel to deny Petitioner his right to testify; (2) he was denied the right to the effective assistance of counsel because counsel's ignorance about Petitioner's predicate status deprived Petitioner of his right to receive the most favorable plea offer possible as a first felony offender; and (3) he was deprived the right to the effective assistance of appellate counsel. The petition was marked fully submitted on December 12, 2008.

The Trial on the Indictment

The People's Case:

On May 24, 2001, Adam Lublin, a 25 year old talent manager and promoter, and Yannis Pappas, his 26 year old employee and friend, were working at Club NV, located at 29 Spring Street, between Hudson and Varick Streets. Lublin was managing a party at the club, as he had done every Wednesday night for the previous year. Pappas worked for Lublin, collecting the cover charge from the club's patrons.

At approximately 3:40 in the morning, Pappas and Lublin left the club together and walked to Lublin's car, a 2001 black Jeep Grand Cherokee, parked at the northwest corner of Varick Street, a car length or so from Spring Street. At the time, Lublin had "[m]aybe a thousand dollars or so" on him, as he typically did when he promoted shows at clubs. Trial Transcript ("Tr.") 269-70. Pappas had $150 - his salary for working that night.

Lublin got into the driver's side of the Jeep. Pappas was about to open the passenger door adjacent to the

curb when he looked over his shoulder and noticed Petitioner step out from one of the "dark vestibules" or storefronts along Varick Street. Tr. 270, 298, 349, 350, 361, 363, 365. Petitioner was wearing a bandana over his face, and although he was still "a little far away," Pappas "had a feeling something was wrong." Tr. 349. As Pappas hurried to get into the car, he heard Petitioner's footsteps speed up behind him. Pappas was about to close the door, but Petitioner got there before he could do so. Petitioner put his body in between the door and the car, preventing Pappas from closing it all the way.

Petitioner brandished a gun in his right hand and pointed it at eye-level, five or six inches from Pappas's face. Pappas could not hear anything Petitioner said as his attention was focused on the gun, a silver revolver. Lublin, however, heard Petitioner order Pappas to "[g]et out" of the car. Tr. 273. In order to "get away from the gun," Pappas turned his body to the right. Tr. 353-54. Petitioner also turned and Pappas was afraid Petitioner was going to shoot him. Pappas thus grabbed Petitioner's forearm and pushed it down. At no time did Pappas touch the gun. At that point, Petitioner fired once and shot Pappas in the upper inner thigh of his right leg. After

Petitioner shot Pappas, Pappas stood up and struggled with him, trying to hold down Petitioner's arms. Petitioner punched Pappas with his left hand. Because Pappas was scared, he let go of Petitioner and "went down" to the ground, face down. Tr. 352-53, 356-57.

Petitioner and Pappas struggled for less than a minute, during which time Lublin watched in shock. Lublin did not see the gun, but he saw a "big flash" and heard the gunshot. Tr. 269, 271, 273, 337. At that point, realizing that Pappas had been shot, Lublin jumped out of the car, "fearing for [his] life." Tr. 269, 273. He ran west on Spring Street, back toward Club NV, screaming for someone to call the police and an ambulance.

Police Officers Joseph Cosaluzzo and Maryann Dean, and Sergeant Michael Dimino, who were patrolling the neighborhood to monitor club activity, heard the gun shot and began pursuing Petitioner in their van when a sanitation worker pointed in Petitioner's direction and shouted, "he shot somebody." Tr. 394-98, 445, 447, 483, 521-24, 568. Dimino had his gun drawn and repeatedly ordered Petitioner to stop, shouting, "Police. Don't move. Show me your hands." Tr. 399, 453, 526-28, 571.

Petitioner glanced over his shoulder at the marked police van but did not break stride. The officers eventually lost sight of Petitioner after he turned behind a dumpster but continued the pursuit on foot. Another officer, Lieutenant Michael Mohan, arrived at Sixth Avenue and Vandam Street and joined the original officers in search of Petitioner. As Cosaluzzo and Mohan checked the fence line along Sixth Avenue, they observed Petitioner, "crouched down" low in a "fetal position," hiding beneath the shrubbery that hung down from the top of the fences. Tr. 404-05, 433, 440-42, 458, 621-22, 625.

Meanwhile, Pappas was taken by ambulance to St. Vincent's Hospital for treatment. X-rays were taken and a Doppler study performed to determine the bullet's location and assess the performance of the blood vessels in Pappas's lower extremities. The bullet had entered the upper part of Pappas's inner right thigh, passed through a "good portion of the large muscle group" in his inner right thigh and buttocks, and then lodged in the center of the buttocks, near his rectum. Tr. 693-94. Because Pappas was in no immediate danger from the bullet, and because removing it could have "cause[d] more harm than good," the bullet was left in Pappas's body. Tr. 369, 693.

Pappas stayed in the hospital overnight and was released on May 25, 2001. Pappas was bedridden for approximately one week after the shooting and was sore and "couldn't really walk that well" for one to two weeks. Tr. 368. As a result, Pappas was unable to work at the clubs for "a little white." Tr. 369-70. As of the time of trial, some six months after he was shot, the area still got "very sore" and hurt whenever Pappas ran or played sports. Tr. 370. He also had a scar on his upper right thigh where the bullet had entered.

The Defense Case

Albert DeLeon, a 22 year old criminal justice major at the University of Southern Florida, had known Petitioner since 1991. They were "very close friends" and saw each other socially once or twice a week. Tr. 649, 665, 669, 681.

At approximately 12:15 a.m. on May 24, 2001, Petitioner and DeLeon stopped at a "little bar," and then proceeded to Club Shine, a "big club" with music and

dancing. Tr. 651-52. Petitioner and DeLeon knew people at the club and stayed there until close to 3:00 a.m.

At about 3:15 a.m., Petitioner and DeLeon drove to Club NV. DeLeon parked his car two to three blocks away from the club, somewhere on Varick Street. He and Petitioner walked to the club. A bouncer advised them that the club was closed. Petitioner and DeLeon were walking back to their car and were on the corner of Spring and Varick Streets, when DeLeon heard a gunshot "four [or] five feet away." Tr. 657-58, 671-72. DeLeon saw a dark green or black truck, "like a Jeep Cherokee, a Wrangler." Tr. 658-59, 675.

Although DeLeon never saw a gun, he saw a "spark go off" and "started running" north up Varick Street toward his car. Tr. 659, 672, 680. There were approximately five other people around at the time and everyone "just started scattering, running." Tr. 659. Petitioner had been to his right, but then "disappeared." DeLeon did not know where Petitioner went. Tr. 662, 672-73.

DeLeon ran two or three blocks up Varick Street to where his car was parked. Although DeLeon was scared

that either he or Petitioner might get shot, DeLeon did not call the police. After waiting near his car for approximately ten minutes, DeLeon went back to the location where he hard the gunshot. Police officers and an ambulance had arrived. There was a man "laying on the floor" with twenty or so people standing around him in a circle. Tr. 660, 676. Petitioner was not among them. DeLeon looked for Petitioner for twenty to thirty minutes, but did not find him. DeLeon also tried Petitioner's cell phone two or three times, but Petitioner did not answer. DeLeon then returned to his car and waited for Petitioner "for a while," but Petitioner did not return. Tr. 661.

Owen Lamb, an entertainment lawyer, knew Adam Lublin and Yannis Pappas for approximately two years and was Lublin's friend and business associate. On the night of May 23, 2001, Lamb was at Club NV, as he had been every Wednesday night since "start[ing] that nightclub" two years ago. Tr. 713-14. At about 3:30 a.m., Lamb and four acquaintances walked to Lamb's car, which was parked outside the club's entrance on Spring Street. Lamb was about to "pull out" of the space, when he saw Lublin "running down the block" toward Lamb with his "hands sort

of flailing." Lublin was yelling, "Help. Help." Tr. 707-08, 715-16.

As Lublin neared the club, Lamb heard him yell, "They got Yannis. They got Yannis." Tr. 709. Concerned, Lamb got out of his car and asked Lublin, "What's going on?" Tr. 709, 717, 719. Lublin again replied, "They got Yannis." Tr. 709, 719. When Lamb asked Lublin, "How many of them are there?" and "Who is it?," Lublin told Lamb he did not know. Tr. 710, 719. Lamb also asked Lublin what "they" looked like, but Lamb replied, "I don't know. I couldn't see." Tr. 711, 717. Lublin also mentioned that the man's face was "covered." Tr. 713, 724. Lublin was "frantic" as he spoke. Tr. 716-17.

At that point, Lamb "figure[d]" Pappas was being beaten "or something like that." Tr. 711. Lublin was pointing down Spring Street saying, "[w]e got to help him." Tr. 711-12, 716. There were "a couple" of bouncers outside the door of the club, and Lamb tried to get one of them to go with him to help Pappas. Tr. 709-11. However, when Lublin said, "But he's got a gun," Lamb and the bouncer stopped because neither of them had a gun. Tr. 711-12, 718, 719.

Lamb got back in his car and "ease[d]" down Spring Street in the direction Lublin had been pointing, "trying to figure out what to do." Tr. 712. As he did so, Pappas came limping around the corner and sat down on the steps of a nearby furniture store; Pappas was grabbing his leg and "writing in pain." Tr. 718. Lamb saw a police car "coming on the other way" and flashed his lights at it to get its attention. Tr. 719, 721-22. Once the police arrived, Lamb left the scene. He did not wait for the ambulance to arrive, nor did he speak with the police.

A week or so before trial, Lamb had spoken with another prosecutor and told her that "maybe [he's] not accurate" about what happened that night. Tr. 720.

II. DISCUSSION

A. The Petition Is Timely

28 U.S.C. § 2244(d)(1) requires that a federal habeas corpus petition be filed within one year of the date on which the Petitioner's state court criminal conviction becomes final. For purposes of this petition, the

conviction became final upon the expiration of the time in which Petitioner could seek a writ of certiorari from the United States Supreme Court. See 28 U.S.C. § 2244(d)(1)(A) ("The limitation period shall run from the latest of -- the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."); Williams v. Artuz, 237 F.3d 147, 151 (2d Cir.), cert. denied, 534 U.S. 924 (2001). Petitioner's conviction was affirmed by the Appellate Division on December 14, 2006, and Petitioner's application for leave to appeal was denied by the New York Court of Appeals on January 10, 2007. Accordingly, Petitioner's conviction became final on April 10, 2007, and he was required to file his habeas petition by April 10, 2008.

Although Petitioner failed to file his habeas petition by the required date, his petition remains timely. The statute of limitation for a habeas petition may be tolled during the pendency of a properly filed application for state post-conviction relief. See 28 U.S.C. § 2244(d)(2) ("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 toward any period of

limitation under this subsection."); Smith v. McGinnis, 208 F.3d 13, 15-16 (2d Cir.) (observing tolling provision "applies to both the statute of limitations and one-year grace period"), cert. denied, 531 U.S. 840 (2000). Here, Petitioner filed a coram nobis petition on May 29, 2007, only 48 days into the one-year grace period. That petition remained pending until the Court of Appeals denied leave on February 29, 2008. Accordingly, Petitioner's May 20, 2008 application for a writ of habeas corpus was timely.

B. The Claim Has Been Exhausted

Prior to seeking review in this Court, Petitioner must exhaust all state-provided remedies. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 515 (1982). A claim will be deemed exhausted only after the Petitioner fairly presents the same federal constitutional claim that he now urges upon the federal courts to the highest state court which can hear his claim. O'Sullivan, 526 U.S at 848; Picard v. Connor, 404 U.S. 270, 275-76 (1971); United States ex rel. Kennedy v. Taylor, 269 U.S. 13, 17 (1925) ("In the regular and ordinary course of procedure, the

power of the highest state court in respect of such question should first be exhausted.").

Petitioner has exhausted all of his ineffective assistance of counsel claims. Petitioner claimed in his first motion to vacate judgment that counsel provided ineffective assistance of counsel during plea negotiations because he was unaware that Petitioner was not a second felony offender, and Petitioner raised that claim in federal constitutional terms. After the motion was denied, Petitioner sought, and was denied, leave to appeal to the Appellate Division.

Similarly, in his second motion to vacate the judgment, Petitioner claimed that counsel was ineffective during the Sandoval hearing by waiving Petitioner's right to testify at trial without informing Petitioner that the decision whether to testify was his to make. Petitioner again raised the claim in federal constitutional terms and then sought, and was denied, leave to appeal to the Appellate Division.

Finally, Petitioner's claim regarding appellate counsel's performance are likewise exhausted. Petitioner

raised the claim that he currently raises, in a motion for a writ of error coram nobis, in federal constitutional terms and then sought, and was denied, leave to appeal to the New York Court of Appeals.

The Petitioner's claims are exhausted.

C. Legal Standards

1. Standard of Review

Pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), habeas corpus relief may be obtained if Petitioner demonstrates that the state-court adjudication "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." 28 U.S.C. § 2254(d)(1); see Sacco v. Cooksey, 214 F.3d 270, 273 (2d Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)). The requirements of § 2254(d)(1) are met if "one of the following two conditions is satisfied - the state-court adjudication resulted in a decision that (1) was contrary to . . . clearly established Federal law, as determined by

the Supreme Court of the United States, or (2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 412 (citing 28 U.S.C. § 2254(d)(1)) (internal quotations omitted). A state-court decision is "contrary to" established federal law if the state court "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." Id. at 412-13. A state-court decision represents an "unreasonable application" of established federal law if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.

In conducting the required analysis, any determination of a factual issue made by a state court is presumed correct unless the Petitioner can demonstrate by clear and convincing evidence that the state court's determination was erroneous. See 28 U.S.C. § 2254(e)(1); Leka v. Portuondo, 257 F.3d 89, 98 (2d Cir. 2001). Conclusions of law made by the state court, however, are

subject to de novo review. See Boria v. Keane, 99 F.3d 492, 498 (2d Cir. 1996).

2. Standard for Ineffective Assistance of Counsel

Under the framework established in Strickland v. Washington, 466 U.S. 668 (1984), a defendant who collaterally attacks his sentence or plea by alleging ineffective assistance of counsel must prove (1) cause, i.e., "counsel's representation fell below an objective standard of reasonableness" as determined by reference to "prevailing professional norms," id. at 688; and (2) prejudice, i.e., "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 Murden v. Artuz, 497 F.3d 178, 198 (2d Cir. 2007). When applying the Strickland test, "[j]udicial scrutiny of counsel's performance must be highly deferential," and the Court must make every effort "to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689-90; see also United States v. Aguirre, 912 F.2d 555, 563 (2d Cir. 1990) ("The question is not whether some other course would have been more successful . . . [but] whether counsel's

conduct of the defense was a reasonable course at the time and came within the standards for acceptable representation.").

As to cause, a reviewing court "'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' bearing in mind that 'there are countless ways to provide effective assistance in any given case' and that 'even the best criminal defense attorneys would not defend a particular client in the same way.'" Aguirre, 912 F.2d at 560 (quoting Strickland, 466 U.S. at 689). Strickland directs the Court "to consider all the circumstances counsel faced at the time of the relevant conduct and evaluate the conduct from counsel's point of view." Davis v. Greiner, 428 F.3d 81, 88 (2d Cir. 2005) (citing Strickland, 466 U.S. at 688-89). A defendant cannot prevail on a claim of ineffective assistance of counsel merely because he believes that his counsel's strategy was inadequate. Mason v. Scully, 16 F.3d 38, 42 (2d Cir. 1994) ("Actions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance." (internal quotes omitted)); United States v. Sanchez, 790 F.2d 246, 253 (2d Cir. 1986).

As to prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. Id.; Williams, 529 U.S. at 393 n.17 (2000) ("[T]he 'prejudice' component of the Strickland test . . . focuses on the question [of] whether counsel's deficient performance renders the result of the . . . proceeding unreliable or the proceeding fundamentally unfair."). When considering the effect of counsel's deficient performance on the petitioner's sentence, no minimum increase must be shown in order to establish prejudice. Glover v. United States, 531 U.S. 198, 203-04 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."). The magnitude of the difference in sentencing exposure may, however, be considered when determining the whether prejudice existed. Id.

With respect to a petition for habeas relief pursuant to 28 U.S.C. § 2254(d)(1), "[i]t is past question that the rule set forth in Strickland qualifies as clearly

established Federal law, as determined by the Supreme Court of the United States." Williams, 529 U.S. at 391 (internal quotes omitted).

D. Ineffective Assistance of Counsel Due to Failure to Determine Correct Predicate Felony Status

1. Performance of Petitioner's Trial Counsel Was Not Reasonable

The right to counsel is the right to an effective counsel. Evers v. Lucey, 469 U.S. 387, 395-96 (1985). The right to counsel attaches "when the government's role shifts from investigation to accusation [and] the assistance of one versed in the intricacies . . . of law is needed to assure that the prosecution's case encounters the crucible of meaningful adversarial testing." Moran v. Burbine, 475 U.S. 412, 430 (1986) (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)) (internal quotes and cites omitted). Thus, the right to counsel includes the right to effective counsel during plea negotiations following the initiation of formal charges. See, e.g., United States v. Gordon, 156 F.3d 376, 379 (2d Cir. 1998) (noting right to counsel attaches "after the initiation of formal charges" and includes plea negotiations); Boria, 99 F.3d at 496-97 (2d Cir. 1996) (granting habeas petition

where defense counsel failed to inform defendant of consequences of rejecting plea offer).

When determining what constitutes reasonable performance of counsel, Strickland provides that reference may be made to "[p]revailing norms of practice," such as the American Bar Association Standards for Criminal Justice ("ABA Standards"). Strickland, 466 U.S. at 688. ABA Standard § 4-4.1 (Duty to Investigate) states:

> a. Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Standard § 4-4.1 (2d ed. 1980). The Supreme Court has set forth a similar mandate, stating that "[p]rior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); see also Purdy v. United

States, 208 F.3d 41, 45 (2d Cir. 2000) ("As part of this advice, counsel . . . should usually inform the defendant of the strengths and weaknesses of the case against him . . ." (internal cites omitted)); Boria, 99 F.3d at 496 ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears desirable." (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases 339 (1988))).

In contrast to the duty to investigate described in ABA Standard § 4-4.1(a) and Von Moltke, Petitioner's trial counsel failed to make a basic inquiry into the nature of the Petitioner's prior offense to determine whether it qualified as a predicate felony for purposes of New York criminal law. It is common knowledge that states differ in their classification of crimes, and the fact that the predicate felony arose from a conviction in another state signaled that an examination of the details of Petitioner's previous felony conviction was appropriate before accepting the People's treatment of the conviction. The lack of inquiry and investigation in connection with the plea negotiation rendered Petitioner's counsel unable to "advise his client fully on whether a particular plea to a charge appears desirable," Boria, 99 F.3d at 496, and

cannot be said to have fallen "within the range of competence demanded of attorneys in criminal cases," Strickland, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)) (internal quotes omitted). The performance of Petitioner's trial counsel therefore cannot be said to have met the "objective standards of reasonableness" under "prevailing norms of practice." See Mask v. McGinnis, 28 F. Supp. 2d 122, 125 (S.D.N.Y. 1998) (finding defense counsel's representation fell below prevailing norms due to failure to correctly identify defendant's felony status), aff'd 233 F.3d 132 (2000); see also, People v. Thomson, 847 N.Y.S.2d 682, 684 (App. Div. 2007) (finding first prong of Strickland test satisfied where defense counsel failed to determine prior New Jersey conviction did not qualify as a predicate felony for purposes of defendant's second felony status); People v. Garcia, 795 N.Y.S.2d 216, 219 (App. Div. 2005) (finding first prong of Strickland test satisfied where defense counsel failed to correct prosecution's mistaken characterization of defendant's felony status during plea negotiations).

Petitioner has satisfied the first prong of the Strickland test for ineffective assistance of counsel.

2. A Hearing Is Required to Determine the Existence of Prejudice

In seeking to demonstrate that a reasonable probability exists that the outcome of the plea negotiations would have been different but for the ineffective assistance of his trial counsel, Petitioner cites a sworn affidavit contained in the record stating that he would have been willing to accept a plea of between five and eight years, rather than go to trial, had one been offered to him. Exh. Q to Declaration of Allison J. Gill in Opposition to Petition for a Writ of Habeas Corpus ("Gill Decl."). That such a statement may be seen as self-serving does not require its rejection; rather, the nature of the statement is to be considered along with all relevant circumstances. Purdy v. Zeldes, 337 F.3d 253, 259 (2d Cir. 2003).

The question remains, however, whether the District Attorney would have offered a lower sentence during plea negotiations had Petitioner's correct felony status been known. The People argue that even had Petitioner's correct felony status been known at the time of the plea negotiations, no lower plea would have been

offered given Petitioner's criminal history. In support of this assertion, the People have submitted an unsworn affidavit by the Assistant District Attorney handling Petitioner's original criminal case stating that she would not have offered a lower sentence even had she been aware that Petitioner was not a second-time felony offender. Gill Decl. Exh. I. No file entry or other contemporaneous document is offered in support. Petitioner, however, argues that it is standard practice during New York Supreme Court arraignments for the People's initial plea offer to be higher than its final offer.

Based on the submitted evidence, factual questions remain as to whether a lower plea would have been available to Petitioner had his correct felony status been known. As set forth, infra, an evidentiary hearing is required to determine whether the People would have offered Petitioner a lower sentence as part of a negotiated plea agreement had Petitioner been correctly classified as a first felony offender.

3. State Court's Rejection of Petitioner's Claim Is Not Entitled to Deference

In challenging the November 10 Order, Petitioner asserts that the state court unreasonably applied established Federal law as set forth in Strickland, and therefore determinations by the state court concerning the performance of Petitioner's counsel are not entitled to deference by this Court.

In rejecting Petitioner's claim that counsel's failure to correctly identify Petitioner's felony status constituted ineffective assistance, the November 10 Order distinguished Mask v. McGinnis, 233 F.3d 132 (2d Cir. 1996), upon which Petitioner relied. In Mask, the Second Circuit Court of Appeals upheld the district court's grant of habeas relief based on the petitioner's claim of ineffective assistance of counsel. The district court found that petitioner's counsel rendered ineffective assistance by failing to correct the prosecutor's mistaken belief during plea negotiations that the defendant was a violent persistent felon under New York State law. See id. at 137-39.

The November 10 Order distinguished Mask from Petitioner's claim on the grounds that unlike in Mask, Petitioner's status was not "apparent simply from a perusal

of his print sheet" but "was dependent on an out-of-state conviction the nature of which was difficult to ascertain." November 10 Order at 2. However, simply because a client's defense requires more than a cursory effort does not justify the failure to exercise the diligence required of defense counsel in the representation of a client. Rather, such diligence falls within the "prevailing norms of practice" for a criminal defense attorney. See Mask, 28 F. Supp. 2d at 125. As noted supra, the fact that the predicate felony arose from a conviction in another state should have signaled that an examination of Petitioner's prior felony conviction was appropriate. That some effort on the part of Petitioner's trial counsel may have been required in order to conduct the necessary inquiry cannot serve to distinguish Petitioner's claim from Mask or excuse counsel's inaction.

The November 10 Order also cited People v. Esquiled, Ind. No. 8693-97, 2001 N.Y. Misc. LEXIS 424 (Sup. Ct. Aug. 17, 2001), in holding that the relative ease of identifying the mistake in the defendant's felony status in Mask distinguished it from the error committed by Petitioner's counsel. Esquiled, however, presents a set of facts distinctly different from those of Petitioner's

situation. Esquiled involved an erroneous prior felony conviction arising from a mistaken belief that the defendant was above the age of criminal responsibility at the time of the conviction. Id. at *17. The Esquiled court denied the petitioner's request for habeas relief on the ground that neither the defendant nor the "rap sheet" provided any specific indication that the conviction may have been in error and that further investigation was required. Id. at *17-18. Furthermore, at least four other attorneys and two judges had reviewed the conviction in the course of sentencing the defendant on another felony conviction, indicating that the conviction was likely legally correct. Id. at *18. In contrast, the very circumstances of Petitioner's prior conviction served to provide notice to counsel that some degree of investigation into the nature of Petitioner's criminal history was appropriate. Moreover, unlike in Esquiled, there was no indication here that the People's treatment of Petitioner's prior conviction was necessarily correct. The circumstances upon which Petitioner bases his ineffective assistance of counsel claim are far different than the facts of Esquiled.

"While the precise method for distinguishing objectively unreasonable decisions from merely erroneous ones is somewhat unclear, it is well established in this Circuit . . . that Petitioner must identify some increment of incorrectness beyond error in order to obtain habeas relief." Sorto v. Herbert, 497 F.3d 163, 169 (2d Cir. 2007) (quoting Torres v. Berbary, 340 F.3d 63, 68 (2d Cir. 2003)(internal quotes omitted)). The conclusions of the November 10 Order meet the standard for the unreasonable application of "clearly established federal law" to the facts of a case, Williams, 529 U.S. at 412, and this Court is not required to defer to the state court's conclusions concerning the failure of Petitioner's trial counsel to determine Petitioner's correct felony status.

The November 10 Order also concluded that even had Petitioner's correct felony status been known, there was no reasonable possibility that the People would have offered a lower sentence or that, if offered, Petitioner would have accepted. However, the state court declined to hold an evidentiary hearing on the matter, instead relying solely on the unsworn affidavit from the Assistant District Attorney. November 10 Order at 3. While a state court's findings of fact are normally presumed correct, see 28

U.S.C. § 2254(e)(1), no such deference is required when the state court did not permit the development of a factual record. See Savinon v. Mazucca, 2009 WL 835735 (2d Cir. Mar. 31, 2009) ("[T]his deferential standard of review does not apply where the state courts did not permit adequate development of the factual record."); Drake v. Portuondo, 553 F.3d 230, 239 (2d Cir. 2009) (holding that no deference to state courts' conclusions is required because state courts did not permit the development of the factual record); Drake v. Portuondo, 321 F.3d 338, 345 (2d Cir. 2003) (same). Consequently, this Court is not bound by the conclusions of the state court concerning whether a reasonable probability exists that Petitioner would have been offered a lower sentence had his trial counsel's performance been adequate.

E. A Hearing Is Appropriate To Determine What Plea the People Might Have Offered

"A district court has broad discretion to hear further evidence in habeas cases." Nieblas v. Smith, 204 F.3d 29, 31 (2d Cir. 1999) (citing Townsend v. Sain, 372 U.S. 293, 318 (1963)). "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to

demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (ellipsis in original) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)). Although a "habeas petitioner, unlike the usual civil litigant in federal court is not entitled to discovery as a matter of ordinary course," discovery may be granted upon a showing of "good cause." Id. at 904; Rule 6(a), Rules Governing § 2254 Cases, 28 U.S.C. Foll. § 2254.

In addition, a petitioner who "failed to develop the factual basis of a claim in State Court proceedings" is ordinarily barred from seeking an evidentiary hearing in federal court. 28 U.S.C. § 2254(e)(2). "However, a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission." Drake v. Portuondo, 321 F.3d 338, 347 (2d Cir. 2003) (quoting McDonald v. Johnson, 139 F.3d 1056, 1059 (5th Cir. 1998) (internal quotes omitted)). "Where, as here, a habeas petitioner has diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so, § 2254(e)(2) does not apply."

Id. (quoting Miller v. Champion, 161 F.3d 1249, 1253 (10th Cir. 1998)).

In light of his trial counsel's failure to provide reasonable assistance and the possibility that Petitioner may have been offered a lower sentence during plea negotiations had his correct felony status been established, good cause is found to hold an evidentiary hearing to resolve the questions of fact concerning what plea Petitioner might have been offered. Because the state court declined Petitioner's request to hold an evidentiary hearing on this issue, see November 10 Order at 3, § 2254(e)(2) does not bar Petitioner from seeking the hearing before this Court.

F. Petitioner's Remaining Ineffective Assistance of Counsel Claims Are Denied

Petitioner also argues that trial counsel's failure to determine his correct felony status under New York law is further compounded by counsel's failure to advise him of his right to testify on his own behalf at trial. This claim was rejected by Judge McLaughlin, who determined that, upon a review of the evidence presented at trial, no prejudice arose from counsel's error. People v.

Assadourian, Ind. No. 3213/01, slip op. at 5 (N.Y. Sup. Ct. Sept. 19, 2006). Judge McLaughlin's findings of fact concerning the likely effect Petitioner's testimony would have had on his defense, based as it was on a fully developed record, is entitled to deference by this Court. 28 U.S.C. § 2254 (e)(1). Because Judge McLaughlin's decision does not constitute a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d), deference to the state court's determination is required. Petitioner's claim for habeas relief on this ground is denied.

Finally, Petitioner argues that his appellate counsel was ineffective for failing to challenge his trial counsel's performance with respect to various allegedly deficient jury instructions. This ground for habeas relief also fails. As an initial matter, the New York Appellate Division's summary rejection of Petitioner's writ for error corum nobis, People v. Assadourian, M-2189, 2007 N.Y. App. Div. LEXIS 8701 (July 19, 2007), constitutes an adjudication on the merits of Petitioner's claim for purposes of § 2254. See Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001) (holding summary denial of writ of corum nobis constituted an adjudication "on the merits" for

purposes of 28 U.S.C. § 2254). Consequently, the state-court decision is entitled to deference unless Petitioenr demonstrates that denial of his writ of corum nobis was "contrary to, or involved an unreasonable application of, clearly established Federal law." No such showing has been made, and Petitioner's request for habeas relief on this ground is therefore barred by § 2254(d)(1).

Moreover, the performance of Petitioner's appellate counsel cannot be said to be "objectively unreasonable." See Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001) (applying Strickland to analysis of appellate counsel performance). In order to satisfy the first prong of Strickland, it is not enough for petitioner to show that appellate counsel omitted a non-frivolous argument. Aparicio, 269 F.3d at 95. Counsel is not required to raise all potentially meritorious claims on appeal. Id.; see also Jones v. Barnes, 463 U.S. 745, 751 (1983). Nor is counsel required to raise all issues that the defendant requests be raised. See Jameson v. Coughlin, 22 F.3d 427, 429 (2d Cir. 1994). Rather, counsel may winnow out weaker arguments on appeal and focus on the one or two issues that represent "the most promising issues for review," Jones, 463 U.S. at 752, and a "[f]ailure to make a meritless

argument does not amount to ineffective assistance." United States v. Arena, 180 F.3d 380, 396 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000). Petitioner has not offered any reason why his appellate counsel's decision not to raise the arguments relating to the jury instructions on appeal was unreasonable, nor are the arguments cited in Petitioner's brief sufficiently meritorious to render appellate counsel's performance "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690.

Petitioner's claim of ineffective assistance of appellate counsel is denied.

III. CONCLUSION

For the reasons set forth above, a hearing will be held at the convenience of counsel to determine whether the People would have offered a lower sentence during plea negotiations had Petitioner's correct felony status been known.

It is so ordered.

New York, N.Y.
July 8 , 2009

ROBERT W. SWEET
U.S.D.J.