Edict v. Dicta: Rolling Back Rights in the Second Circuit Under the Clearly Established Clause of the AEDPA Amended Habeas Statute

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I. INTRODUCTION

In recent years, DNA testing of American prisoners has led to revelations that a great many citizens are wrongly convicted by the criminal courts of this country every year.¹ At this very moment, the statistics suggest that thousands of Americans, most of them indigent, and many of them black, face serious prison time or even death sentences for crimes that they did not commit.²

At the same time that awareness of wrongful convictions has grown, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996³ has

1. The Innocence Project proclaims that 156 wrongfully convicted defendants have been exonerated by DNA evidence thus far. Innocence Project Web Site at http://www.innocenceproject.org/ (last visited Feb. 16, 2005). See also Brett Barrouquerre, Number of wrongful convictions in La. immense, BATON ROUGE ADVOCATE, November 23, 2003, at 1 (reporting that wrongful convictions are being uncovered in ever greater numbers in recent years and stating, “Nationally, there have been about 700 people freed from prison in the last 25 years after judges found them wrongfully convicted.”).

2. See C. RONALD HUFF, ET. AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 10-11, 55-62 (1996) (taking a conservative approach by surveying mostly prosecutors and law enforcement officials in Ohio’s criminal justice system (rather than public defenders), but nonetheless estimating in the range of 10,000 wrongful convictions each year in the United States, based upon an error rate of 0.5 percent applied to a total of 1.9 million annual FBI index convictions).

Summing up the inequitable effect of our criminal justice system on the young black population of this country, one attorney has remarked:

In the Innocence Project’s latest study of wrongful convictions uncovered by DNA analysis, 36% of the wrongful convictions derived from Whites misidentifying Blacks . . . . The startlingly elevated rates of incarceration for Black adolescents could indicate that throwing a young Black life away is perceived to be less likely to be a mistake or that the mistake matters less than it might with a White adolescent. Providing inadequate defense counsel and investigative services to indigent Black defendants, incarcerating the young Black male population at a lavish rate for exaggerated terms, imposing a draconian system of mandatory minimum drug sentences with disparate impact on Blacks, executing Black murderers of Whites at a rate 13 times the rate of White murderers of Black victims—all of these inequities continue to mount long after claw-and-fang racism in the Ku Klux Klan style has gone out of fashion.


steadily worked to limit the habeas corpus rights of state prisoners who seek to appeal their convictions in federal courts.4 Perhaps because the public and press have been focused on the subsequent passage and ramifications of the 2001 Patriot Act,5 and because the amended habeas statute of the AEDPA ostensibly impacts on the appeals of convicted criminals rather than on the lives of “ordinary” Americans, the great effect the amended habeas act has had on civil rights has not received much attention outside legal circles.6

Nonetheless, the vast majority of criminal convictions in this country occur at state trials in which defendants are represented by appointed counsel who, overworked and underfunded as they are, may not be equipped to adequately defend their clients.7 Federal habeas review, long

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4. As the situation has been characterized by one legal scholar:
   At the same time that Congress was curtailing the ability of federal courts to review a state prisoner’s conviction and sentence, a number of organizations—such as the American Bar Association—and governmental leaders—including former governors of Illinois and Maryland—were raising significant concerns about the process by which states impose the death penalty. Among the concerns is the disquieting evidence that there are the number of innocent people who until recently were awaiting execution on death row in a number of different states; the likelihood that there remain innocent people on death row; chilling accounts of incompetent, drunk, or sleeping counsel “representing” individuals charged with capital murder; and mounting evidence regarding the racial disparity involved in the way the death penalty is administered.


6. As one measure of the comparative attention paid to the two Acts, a February 16, 2005 Google search on the words “Patriot Act” produced roughly 2,510,000 results, while the words “Antiterrorism and Effective Death Penalty Act” produced just 41,000 results. (The acronym “AEDPA” produced 37,700 results).

7. See Stacey L. Reed, A Look Back at Gideon v. Wainwright After Forty Years: An Examination of the Illusory Right to Counsel, 52 DRAKE L. REV. 47, 60-61 (2003) (discussing how underpaid and underfunded public defenders tend to encourage defendants with weaker cases to plead guilty so that the defenders can focus on stronger cases, and how upon meeting certain clients just prior to trial, if public defenders “cannot convince the client to plead guilty, they will then struggle through a short trial that they are not fully prepared to conduct”). As an indication of the widespread nature of this problem, a May 6, 2004 Westlaw search on the key words, “overworked” and “public defender” (within the same paragraph) applied to the “all state and federal cases” database produced 82 results, including numerous cases in which defendants made this assertion as a part of an
considered a safeguard against inequities and irregularities occurring at the state level, has largely been eviscerated by the AEDPA and the Supreme Court's cases interpreting that Act. Should an "ordinary" American be wrongly convicted in a state criminal trial and exhaust his state appeals, he may find that his claims of constitutional violations will likely receive minimal additional consideration in a federal court adhering to the AEDPA.

This article focuses on the intersection of the AEDPA with two discrete areas of criminal trial procedure—waiver of the right to counsel at trial, and prosecutorial introduction of perjury at trial. The article discusses how the AEDPA has affected Second Circuit defendants' rights in these areas by dictating the outcome in two important Second Circuit cases, Dallio v. Spitzer and Drake v. Portuondo.

Through a review of these two recent decisions, the author points to how § 2254 of the AEDPA amended habeas statute often leads to formalistic, sometimes undisciplined analyses that turn away from the crucial question that should be at the heart of the habeas inquiry—whether or not the defendant was accorded a fair trial under our nation's Constitution. Additionally, the Dallio and Drake opinions provide examples of how habeas decisions under the AEDPA, though often addressing crucial areas of well-established constitutional law, tend to be devoid of any policy discussion or consideration of precedential effects. Like Frankenstein
monsters, AEDPA cases such as *Dallio* and *Drake* take on a life of their own, erasing long-standing defendants' rights to seek relief from wrongful state convictions, setting destructive precedents along the way that may impact state and federal jurisprudence beyond the boundaries of habeas law.

Finally, *Dallio* and *Drake* provide examples of how habeas review under the AEDPA inexorably leads to a bifurcated system of constitutional rights. These two cases show how, with each passing year, the AEDPA ensures that state and federal defendants will receive different levels of protection in various areas of criminal procedure. Sadly, the amended AEDPA statute over its eight-year life has demolished much of the national uniformity of constitutional protections established by federal courts over decades of habeas jurisprudence.12

The author has chosen to focus on Second Circuit AEDPA cases because, while generally known as a "liberal" court,13 the Second Circuit Court of Appeals oversees the four judicial districts of New York, with their tremendous caseload of habeas appeals arising from state criminal convictions,14 many of them for the most serious felonies.15 Thus, the

enforce federal constitutional rights in the often emotionally-charged context of criminal law.

*Id.*

12. *See id.* at 535-39. The author, Chen, employs the metaphor of "shadow ball," used by some sports commentators to describe the Negro baseball leagues' relationship to Major League Baseball, to characterize a parallel system of federal and state adjudications under the AEDPA:

In several contexts, the law establishes parallel, but segregated, arenas for resolution of important federal constitutional questions. It prohibits or inhibits individuals from pursuing federal adjudication of claims that government officials have violated their constitutional rights because specified (but often speculative) social costs outweigh the benefits of perfect constitutional enforcement . . . It ensures that state court interpretations and applications of the United States Constitution exist in the shadow of "real" federal law, substantive constitutional doctrine that is developed and articulated by federal courts in a procedural context that allows enforcement of those rights.

*Id.*

13. *See* Tania Cruz, Comment, *Scrutiny of National Security*, 2 SEATTLE J. SOC. JUST. 129, 151 (Fall/Winter 2003) (calling the Second Circuit "one of the more liberal circuits in the country" and theorizing that the executive branch sought to remove Jose Padilla from the Second Circuit's jurisdiction to the conservative Fourth Circuit's jurisdiction in order to sustain its denial of Padilla's right to counsel under the "enemy combatant" designation).

14. *See* Asherman v. Meachum, 957 F.2d 978 (2d Cir. 1992), a pre-AEDPA habeas case, in which a concurring judge, decrying the lack of judicial economy caused by remanding issues undecided by the en banc Second Circuit to panels, described the stress on
Second Circuit may be a prime candidate for severely limiting habeas appeals, promoting law and order justice, and rolling back defendants' rights.

Indeed, the Second Circuit, conducting habeas inquiries under the AEDPA, has already upheld: trial closure during the testimony of undercover police officers, a procedure commonplace in New York State and nowhere else;\(^{16}\) a state court determination that a defendant was not in custody for the purposes of \textit{Miranda} after the police rode in the ambulance with the wounded man and questioned him in his hospital room;\(^{17}\) and the "minimal" disguising of a state prosecution witness in sunglasses during her eyewitness testimony at a murder trial, a procedure heretofore unheard of in any other jurisdiction.\(^{18}\) The author has chosen to examine the Second Circuit's \textit{Dallio} and \textit{Drake} decisions in particular because they are representative of numerous AEDPA habeas cases which have contributed to the erosion of standards of conduct for prosecutors and judges in our

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the Second Circuit occasioned by an onslaught of appeals:

The demands of our ever-increasing caseload are well known and need not be recounted here. Suffice it to say, the caseload in the Second Circuit Court of Appeals has been trending upward for many years. Over the past three years alone, the number of cases filed has increased from 2,942 in 1988 to 3,172 in 1989, to 3,424 in 1990, to 3,511 in 1991.... Every member of the Court is aware of the fact that 1992 filings already are outpacing 1991 filings by a large margin. This is no time to make extra work for the Court.

\textit{Id.} at 985 (Miner, J., concurring). \textit{See also} Arthur D. Hellman, \textit{Legal Problems of Dividing a State Between Federal Judicial Circuits}, 122 U. PA. L. REV. 1188, 1190-91 (1974) (discussing Congress' consideration of proposed plans in the 1970s to divide New York State between two circuit courts due to the overwhelm-

“flood-tide of appellate filings” handled by the Second Circuit).

15. Though violent crime in New York State declined in the period from 1994 to 2001, the statistics for serious violent crimes in the state are still daunting. In 2001, the most recent year for which statistics are available, there were a reported 649 murders, 1530 rapes and 28,202 robberies in New York City alone. New York State Division of Criminal Justice Services, \textit{at} http://criminaljustice.state.ny.us/crimnet/ojsa/crmrnd01/nyc.htm (last visited Oct. 17, 2005). In 1998, there were a total of 53,961 felony convictions in New York State. \textit{Id.} at http://criminaljustice.state.ny.us/crimnet/ojsa/cja_98/sec4/iss-conv.htm (last visited May 4, 2004).

16. \textit{See} Sevencan v. Herbert, 342 F.3d 69, 77-78 (2d Cir. 2003) (upholding, under the AEDPA, the exclusion of the public from the courtroom, including the petitioner's wife, during the testimony of two undercover police officers); \textit{See Robin Zeidel, Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard, 4 J.L. & POL.'Y 659, 663 (1996) (noting that courtroom closure to protect the identity of undercover police officers is "strictly a New York phenomenon").

17. \textit{See} Gren v. Greiner, 89 F. App'x 754, 756 (2d. Cir. 2004) (noting that the court "might reach a different conclusion if the question were presented ... on direct appeal").

nation's courts—both in the manner trials are adjudicated, and in the way they are subsequently reviewed.

Section II of this article provides background on the Writ of Habeas Corpus and the judicial history leading up to the passage of the AEDPA.

Section III discusses the most significant addition made to the Habeas Corpus Act by passage of the AEDPA—subsection 2254(d)—and illuminates key provisions of 2254(d) as interpreted by the Second Circuit in light of the Supreme Court's 2000 Williams v. Taylor decision. Further analysis shows how these provisions have functioned in certain Second Circuit cases.

Section IV provides background on the Sixth Amendment right to counsel and the law of attorney waiver at trial, then reviews the Second Circuit's recent decision in Dallio v. Spitzer, which the author sees as a precedent contributing to judicial laxity in the administration of state trials and an erosion of legal protections for state defendants.

Section V provides background on the law of wrongful conviction by state-introduced perjury, followed by an analysis of Drake v. Portuondo, a precedent which signals increased judicial tolerance for the use of perjured testimony as a tool to convict defendants. As an example of the effect Drake is likely to have in the Second Circuit, the section ends with a brief review of Grant v. Ricks, a Second Circuit district court habeas case involving state-introduced perjury, which follows Drake.

The author concludes that an examination of cases like Dallio and Drake shows that the Writ of Habeas Corpus—once rightfully called the "Great Writ"—under the AEDPA no longer assures a petitioner a meaningful review on the constitutionality of his imprisonment. Rather, the Habeas Act as amended by the AEDPA has become a tool for undoing venerable habeas law and well-reasoned constitutional precedents established in the federal circuits' pre-AEDPA cases.

II. BACKGROUND—THE WRIT OF HABEAS CORPUS AND AEDPA

The writ of habeas corpus, by which a prisoner can challenge the legality of his imprisonment, "is of immemorial antiquity." Though its

20. 343 F.3d 553 (2d Cir. 2003).
roots reach back still further, the writ’s place in English law was secured by the Habeas Corpus Act of 1679. Since that time, habeas corpus has come to be known as “the most important writ known to the constitutional law of England . . .” and “a cornerstone of [American] democracy.” As such, the United States Constitution assures that “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

The proper role for habeas corpus in the bifurcated state/federal American system of justice since the passage of the Habeas Corpus Act in 1867 has long been a matter of debate. In the years leading up to the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), disagreement over the writ’s purpose and scope intensified.

On one end of the spectrum were those who argued that the history of habeas corpus in American jurisprudence supported a widening of the federal writ toward adoption of what has been called a “full-review model.” On the other end of the spectrum were those who read jurisprudential history to support adoption of an “institutional competence model.”

The “full-review model,” which from 1953 until the mid-1970s “was in acknowledged ascendancy,” advocates federal de novo review of all federal constitutional claims properly raised and preserved by a petitioner convicted in state court. The policy and principles advanced in

24. Id.
26. GARBUS, supra note 8, at 57.
30. Id.
31. In 1953, the Supreme Court decided Brown v. Allen, in which the Supreme Court concluded that a federal habeas court could hear the constitutional claims of a petitioner even if the claims were fully considered and adjudicated at the state level. Brown v. Allen, 344 U.S. 443, 511 (1953).
32. The expansion of habeas review under the Warren Court came to an end with the advent of the Burger Court, which “in a series of decisions in the 1970s . . . narrowed the range of claims that [could] be raised in habeas petitions by defendants who pleaded guilty, barred consideration of claims that were not properly raised before the state court, and barred Fourth Amendment claims already litigated in state courts.” Comment, Rachel Myers, Mixed Questions and the Scope of Federal Habeas Review: Consideration of Miranda Claims in Thompson v. Keohane, 24 HASTINGS CONST. L.Q. 803, 811 (Spring 1997).
33. Woolhandler, supra note 29 at 577.
34. Id.
support of this view include: protection of constitutional rights such as the liberty interest,\textsuperscript{35} reliance on the superiority of federal courts in deciding issues of federal constitutional law;\textsuperscript{36} "the importance of federal court, appellate style review of constitutional questions given the impracticality of Supreme Court direct review";\textsuperscript{37} as well as the capacity to "address the internal biases, overlapping of functions, and misconduct which may occur within a state system."\textsuperscript{38}

By contrast, the "institutional competence model" provides that as long as a convicted defendant had a "full and fair opportunity" to contest constitutional issues of federal law in state court, in most cases a federal court would be precluded from reconsidering that prisoner's claims on habeas review.\textsuperscript{39} Policies cited in support of this view include: protecting "the State's significant interest in repose for concluded litigation"\textsuperscript{40} as well as preserving the State's capacity to punish certain deserving offenders;\textsuperscript{41} conserving limited judicial resources;\textsuperscript{42} and encouraging federalist principles of reduced friction and enhanced comity between state and federal governments.\textsuperscript{43}

In 1992, in \textit{Wright v. West}, a divided Supreme Court clashed over both the history of habeas corpus in American constitutional law and the proper scope of the writ in future adjudications. While the Court unanimously agreed that there was "sufficient evidence to support [the instant petitioner's] conviction,"\textsuperscript{44} and that his application for a writ of habeas corpus should be denied,\textsuperscript{45} Justice Thomas's opinion advocating a highly deferential standard of habeas review was joined only by Chief Justice Rehnquist and Justice Scalia.\textsuperscript{46} Of the six remaining Justices, Justice O'Connor wrote a concurring opinion, joined by Justices Blackmun and

\textsuperscript{35}. \textit{Id.} at 578.
\textsuperscript{36}. \textit{Id.}
\textsuperscript{37}. \textit{Id.} at 578-79.
\textsuperscript{39}. Woolhandler, \textit{supra} note 29 at 577.
\textsuperscript{41}. \textit{Id.}
\textsuperscript{42}. Woolhandler, \textit{supra} note 29 at 579.
\textsuperscript{43}. \textit{Id.}
\textsuperscript{44}. \textit{West}, 505 U.S. at 297.
\textsuperscript{45}. \textit{Id.}; \textit{id.} (White, J., concurring); \textit{id.} (O'Connor, J., concurring); \textit{id.} at 310 (Kennedy, J., concurring); \textit{id.} (Souter, J., concurring).
\textsuperscript{46}. \textit{Id.} at 291.
Stevens, comprehensively attacking Justice Thomas's position, while Justices White, Kennedy, and Souter wrote separate concurring opinions.

Though the conservative wing of the Court ultimately admitted that the Court did not need to decide the "far-reaching issues" of what standard of habeas review should apply, Justice Thomas's opinion clearly advanced the petitioner's argument that *Teague v. Lane* effectively established a deferential standard of habeas review on state determinations of purely legal questions; that the habeas statute itself mandated that pure questions of fact decided by state courts be "presumed correct"; and that it did not make sense that state decisions involving mixed questions of law and fact should be reviewed *de novo* rather than being accorded the "absolute respect" Justice Thomas claimed they received before 1953.

The O'Connor-Blackmun-Stevens opinion disputed Justice Thomas’s characterization of *Teague*, asserting that *Teague* established no deferential standard of review but rather "simply require[d] that a state conviction on federal habeas be judged according to the law in existence when the conviction became final." O'Connor's opinion further opined that "a move away from *de novo* review of mixed questions of law and fact" would upset established habeas law and did not have to be decided "in order to resolve [the] case." Justice Kennedy, in his separate concurring opinion, agreed with Justice O'Connor that *Teague* did not establish a deferential standard for habeas review nor overrule established Supreme Court law dictating *de novo* review for mixed questions of law and fact.

Thus a plurality in *West* agreed that *de novo* habeas review on mixed questions of law and fact remained the judicially-decided law of the land. Moreover, Justice O'Connor noted in her opinion that Congress had considered establishing a deferential standard of habeas review on

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47. Justice O'Connor offered a nine-point critique, assailing everything from Justice Thomas's description of pre-1953 habeas law, *id.* at 297-99 (O'Connor, J., concurring), to his characterization of various Supreme Court cases shaping the scope and meaning of the writ, *id.* at 299-305, to his position that granting weight and respect to state court decisions was not compatible with *de novo* review, *id.* at 305, as well as his failure to mention that Congress had rejected adopting a deferential habeas corpus standard of review on numerous occasions. *Id.*

48. *Id.* at 297 (White, J., concurring); *id.* at 306-10 (Kennedy, J., concurring); *id.* at 310-16 (Souter, J., concurring).

49. *Id.* at 295.


52. *Id.* at 304 (O'Connor, J., concurring).

53. *Id.* at 305-06 (O'Connor, J. concurring).

54. *Id.* at 307 (Kennedy, J. concurring).
numerous occasions and had rejected such proposals. Perhaps this fact and "the surprisingly fractured and inconclusive result in West" led at least one commentator to state, possibly overoptimistically, "that the zeal of some of the Justices for stripping federal jurisdiction may have reached its limit." After the Oklahoma City bombing on April 19, 1995, however, the mood in Congress was ripe for change.

In 1996, after heavy lobbying by Chief Justice Rehnquist, Congress passed an amended habeas statute as part of the AEDPA. For many years frustrated by the federal appeals process, which he felt allowed prisoners and their lawyers to stretch out "endless appeals" by way of "frivolous claims," the Chief Justice scored a remarkable coup, further narrowing the right of federal habeas appeal beyond what the conservative wing of the Court had already managed to do in previous cases.

After the passage of the AEDPA, the Federal court system, once "the venue toward which every innocent or guilty defendant looked," was no longer the safeguard it had formerly been for defendants' rights, guiding state compliance with federal constitutional law. Federal habeas review in the nation's district and circuit courts became a forum narrowly circumscribed, severely restricted in its ability to conform state adjudications to well-established federal interpretations of constitutional law, and "effec-

55. Id. at 305 (O'Connor, J., concurring).
56. Woolhandler, supra note 29 at 576.
57. Several bills were passed by Congress in response to terrorism soon after the Oklahoma City bombing, for example the Comprehensive Terrorism Prevention Act. S. 735, 104th Cong. (1995), reprinted in 141 CONG. REC. S7857 (daily ed. June 7, 1995) (enacted by the United States Senate on June 7, 1995). On April 24, 1996, roughly a year after the Oklahoma City bombing, President Clinton signed the AEDPA into law. Jennifer A. Beall, Note, Are We Only Burning Witches?: The Antiterrorism and Effective Death Penalty Act's Answer to Terrorism, 73 IND. L.J. 693, 695 (Spring 1998).
58. GARBUS, supra note 8, at 56-57.
59. See id. at 57 (discussing then Justice Rehnquist's role in authoring Wainwright v. Sykes in 1977, "which held that federal courts were barred from considering an issue that was not raised at the appropriate time of the state criminal proceedings," and his authorship, as Chief Justice, of the Brecht v. Abrahamson 1993 opinion, "which held that for a conviction to be reversed by a federal court on a writ of habeas corpus, the prisoner had the burden of showing not only that there were constitutional errors, but that those errors had a 'substantial and injurious effect or influence in determining the jury's verdict'—a nearly impossible standard to meet."). Garbus further noted that in the view of Justices O'Connor and Kennedy, the Court, by deciding cases such as these, "had already done such a fine job of curtailing habeas corpus, and could further eviscerate it if it chose to do so, that Congress should at that point have left a good thing alone." Id.
60. Id.
tively . . . off limits for convicted defendants looking at a state death sentence."

III. THE AMENDED HABEAS STATUTE—SECTION 2254(d)

The Antiterrorism and Effective Death Penalty Act of 1996 substantially amended Title 28 § 2254 of the U.S. Code, entitled “State custody; remedies in Federal courts.” This article primarily concerns § 2254(d), an entirely new provision added by the AEDPA which now stands at the heart of the federal habeas inquiry and severely curtails federal courts’ power to review the convictions of state prisoners. Subsection 2254(d) reads in its entirety:

(d) 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—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The following discussion explains how the statutory language of § 2254(d) has been construed and applied by the Second Circuit Court of Appeals in light of the Supreme Court’s holdings, in particular those expressed in Williams v. Taylor, the most important case interpreting subsection 2254(d). In accord with how a typical habeas inquiry proceeds, the statute’s key phrases are examined separately in the following order: (1) “adjudicated on the merits”; (2) “clearly established Federal law, as determined by the Supreme Court of the United States”; (3) “contrary to, or . . . unreasonable application of” (clearly established Supreme Court law);

61. Id.
and (4) "unreasonable determination of the facts" (derived from the evidence adduced at the state court proceeding).

Though this article's central concern is with §2254(d)'s "clearly established" phrase, a discussion of the other key clauses in the subsection may provide the reader with a better overall understanding of how the federal habeas inquiry is now structured. Additionally, such discussion may help demonstrate how the various clauses of §2254(d), as interpreted by the Supreme Court, often work together to produce a formalistic, almost perfunctory habeas review rather than a meaningful adjudication on whether a state defendant was accorded his rights under the Constitution.

A. ADJUDICATED ON THE MERITS

A federal court conducting habeas review of a state court determination is bound by the highly deferential standard mandated under §2254 as long as the petitioner's claim was "adjudicated on the merits," rather than on procedural grounds. In Sellan v. Kuhlman, the Second Circuit Court of Appeals held that, "[f]or the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment." Under this plain, somewhat tautological reading of the statute, the Sellan court perceived no requirement that the state court "explicitly refer to either the federal claim or to relevant federal case law" or provide any reasoning behind its determination at all. The court asserted that to read any such requirements into the language of the statute would be to "ignore a clear Congressional mandate." Though the Sellan court opined that it would "ease [the] burden" on the federal court if the state court provided some reasoning for its decision, the court emphasized, "[W]e are determining the reasonableness of the state court's decision, not grading their papers." In support of this hands-off approach, the court pointed to substantial, but not complete, agreement among the majority of sister circuits on the issue.

64. 261 F.3d 303 (2d. Cir. 2001).
65. Id. at 312.
66. Id. at 311.
67. Id.
68. Id. at 312.
69. Id. at 312.
70. Sellan, 261 F.3d at 312 (quoting Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001)) (citation and internal quotations omitted).
71. Id.
the court cited the Supreme Court's pre-AEDPA language in *Coleman v. Thompson*,
encouraging state courts to clearly articulate the grounds for their determinations when addressing a prisoner's federal claims, but stressing that the Court would not impose a requirement for any particular language to be used. As the Second Circuit summed up the import of *Coleman*, 
"[t]he Supreme Court... pointedly instructed us that 'we have no power to tell state courts how they must write their opinions.'"

Consistent with its constrained, highly deferential interpretation of the "adjudicated on the merits" provision, the Second Circuit has held that "a single sentence reference" to a petitioner's substantive constitutional claim by a state appellate court was sufficient to indicate that the petitioner's appeal was rejected on the merits. In another case, the Second Circuit ruled that even where the state appellate court summarily affirmed the lower court's ruling without an opinion, AEDPA nonetheless applied. The court reasoned that the petitioner presented substantive arguments to the state appellate court and "nothing in the record" gave the Second Circuit reason to think that the petitioner's constitutional claims were rejected on anything but substantive grounds. Thus, for all intents and purposes, the Second Circuit Court of Appeals presumes that a state court disposed of a petitioner's federal constitutional claims on the merits unless it has reason to believe otherwise.

B. CLEARLY ESTABLISHED FEDERAL LAW

As a matter of logic, in order to determine whether a state court determination "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law," a federal court conducting habeas review must determine whether the Supreme Court has set forth any clearly established law regarding the petitioner's particular constitutional claim. If the court decides that the Supreme Court has not provided any precedents relating to the petitioner's claim, the petitioner's claim necessarily fails.

73. Sellan, 261 F.3d at 312 (citing *Coleman*, 501 U.S. at 739).
74. Id. (quoting Cappellan v. Riley, 975 F.2d 67, 72 (2d Cir. 1992) (citing *Coleman*, 501 U.S. at 739)).
75. Rossney v. Travis, 93 F. App'x 285, 287 (2d Cir. 2004).
76. Herrera v. Senkowski, 77 F. App'x. 549, 551 (2d Cir. 2003).
77. See, e.g., Gilchrist v. O'Keefe, 260 F.3d 87, 94 (2d Cir. 2001) discussed infra notes 97-102 and accompanying text.
In *Williams v. Taylor*, the Supreme Court held that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" referred only "to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." The court, however, provided no guidance as to how narrowly or broadly the circuit courts should define dictum, or how holdings, in contrast to dictum, should be identified.

The Second Circuit has not, to date, engaged in much discussion on the proper definitions of the terms "holding" or "dictum" in the habeas context. Rather, the court has turned to Black's Law Dictionary in order to define "holding" as "'[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision';" and quoted definitions for "dictum" which can vary across different editions of Black's and provide a different gloss on the term. For example, in a 2002 habeas case, the Second Circuit reached back more than twenty years to Black's 1979 Fifth Edition Dictionary which defines "dictum" as "'[A]n observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily essential to its determination...'." By contrast, the concurrence in *Dallio v. Spitzer*, disagreeing with the majority's characterization of a Supreme Court statement as dictum, cited the 1999 Seventh Edition definition as "'[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" This second, more current Black's definition would appear to set a higher bar for finding that language in a given case was dictum, since a court would have to assert that the statements were actually unnecessary. By contrast, a standard classifying dictum as something "not necessarily... essential" would seem to be more inclusive.

Very recently, in conducting a habeas review of a state petitioner's claim, the District Court for the Eastern District of New York asserted that the Second Circuit in *United States v. Bell*, a 1975 decision, "recognized

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79. Dallio v. Spitzer, 343 F.3d 553, 566 (2d Cir. 2003) (Katzmann, J., concurring) (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)).
80. Sevencan v. Herbert, 316 F.3d 76, 84 n.4 (2d Cir. 2002) (quoting BLACK'S LAW DICTIONARY 408 (5th ed. 1979)) (emphasis added).
81. See infra notes 159-171 and accompanying text (reviewing Judge Katzmann's concurrence).
82. Dallio, 343 F.3d at 566 (Katzmann, J., concurring) (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)) (emphasis added).
'that a distinction should be drawn between “obiter dictum,” which constitutes an aside or an unnecessary extension of comments, and considered or “judicial dictum” . . . to guide the future conduct of inferior courts."

The district court noted that Bell relied on Chief Justice Marshall’s language in Cohens v. Virginia, which suggested that the potential lack of full consideration given a statement uttered as dictum was the primary reason for rejecting its use as precedent:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Though the district court’s notion of varying weights to be accorded different types of dicta is intriguing, it must be noted that Bell was a pre-AEDPA habeas case. The district court did not point to any recent habeas decisions by the Second Circuit which contained any similar views. Although it remains to be seen how the Second Circuit will react to the district court’s language on dicta, the Second Circuit’s generally strict adherence to the dictates of § 2254 makes it unlikely that it would entertain any form of Supreme Court dicta in reviewing habeas cases. Consequently, long-established and long relied-upon Supreme Court declarations, set forth by the Supreme Court precisely for the purpose of guiding future decisions by the lower courts, will be deemed irrelevant for the purpose of habeas inquiries in the Second Circuit. In similar fashion, years of jurisprudence built by the Second Circuit and other circuits upon the foundations of Supreme Court dicta (or derived from dissenting Supreme Court language) will continue to be bulldozed by the AEDPA.

84. Id. (quoting Bell, 524 F.2d at 206 n.4 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821))).
In stark contrast, federal direct appeals jurisprudence relying on Supreme Court dicta stands removed from this destructive process. When conducting direct appeals of federal prisoners’ constitutional claims, federal circuit courts are free to adopt Supreme Court dicta or at least accord it great weight. Moreover, circuit courts reviewing direct appeals from federal convictions are at liberty to employ constitutional standards established by district and circuit court rulings—even those suggested in dicta.

A recent Second Circuit case, United States v. Nelson, demonstrates this principle. In Nelson, the court adhered to its own “powerful dicta that [indicated] that [a criminal defendant’s] right to an impartial fact finder might be inherently unwaivable.” The court maintained that this language, established in the 1962 Second Circuit habeas case United States v. Fay, “remain[ed] as powerful and relevant today as when it first issued,” despite the fact that the holding of that case was “superceded by a new and very different habeas regime.”

A statement from another direct appeal in a Ninth Circuit search and seizure case also shows the degree of latitude that a circuit court can exercise in choosing to follow Supreme Court dicta or not, and the weight given Supreme Court pronouncements, regardless of their classification as holdings or dicta:

We do not treat considered dicta from the Supreme Court lightly. Rather, we accord it appropriate deference... As we have frequently acknowledged, Supreme Court dicta “have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold”; accordingly, we do “not blandly shrug them off because they were not a holding.”

Thus it happens that the United States now has a system of justice in which the constitutional protections for a state criminal defendant may be radically different and significantly diminished from those accorded a

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85. 277 F.3d 164 (2d Cir. 2002).
86. Id. at 205.
87. 300 F.2d 345 (2d Cir. 1962).
88. Nelson, 277 F.3d at 205 n.50.
89. Id.
90. U.S. v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (quoting Zal v. Steppe, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting)).
federal defendant. Numerous Second Circuit habeas opinions since the
passage of the AEDPA make explicit reference to this inconsistency,
stating that the judges in those cases "might well" have found a constitu-
tional violation if they had been ruling on direct appeal.

Aside from any potential loss of protection from Supreme Court pro-
nouncements classified as dicta, state prisoners seeking a writ of habeas
corpus from the Second Circuit may also find that the way in which their
claims are characterized brands them undeserving of constitutional
protection. That is, although the Supreme Court may have established clear
precedent in regard to the constitutional right the defendant claims was
violated by the state court, if the state succeeds in characterizing the claim
as one to be analyzed under another area of law, as yet undetermined by the
Court, the petitioner will not be accorded protection from the established
precedent.

For example, in *Morales v. Artuz*, the Second Circuit recently held
that a criminal defendant's Sixth Amendment right to confrontation was
not violated by the partial disguising of a state prosecution witness with
dark, eye-concealing sunglasses, after the witness refused to testify against
the defendant without this protection. Though the district court applied
the Supreme Court's established confrontation law in holding that the

91. A circumstance that accords with the federalistic notions of justice promoted by
the conservative wing of the Court, as articulated by Justice Thomas in *Wright v. West:*
"Indeed, the notion that different standards should apply on direct and collateral review runs
throughout our recent habeas jurisprudence." *West*, 505 U.S. at 292.

92. *See, e.g.,* Cotto v. Herbert, 331 F.3d 217, 233 (2d Cir. 2003) (stating that a trial
court's admitting of out-of-court statements by witnesses based on "weak evidence" that the
defendant allegedly threatened the witnesses "might well" have constituted a constitutional
violation on *de novo* review, but "require[d] a different conclusion" under 28 U.S.C. §
2254); *Gren*, 89 F. App'x at 756 (concluding in a *Miranda* habeas inquiry that the
interrogation of a state defendant in his hospital room did not violate the defendant's
constitutional rights, though the court noted "we might reach a different conclusion if the
question were presented to us on direct appeal"); *Gilchrist* v. *O'Keefe*, 260 F.3d 87, 89 (2d
Cir. 2001) (opining in a right to counsel habeas inquiry that, had the case been a direct
appeal from a federal conviction, the court "might well have agreed with petitioner" that
his constitutional rights were violated); *James* v. *Walker*, No. 99-CV-6191(JBW), 2003 WL
22952861, at *5 (E.D.N.Y. Aug. 28, 2003) (The court noted in this *Miranda* continuous
interrogation case that, "[w]here this court permitted to review the case *de novo*, it might well
find that the initial pre-*Miranda* confession so tainted the post-*Miranda* confession as to
make its admission constitutionally suspect. Under AEDPA, however, this court owes
substantial deference to the determinations of the state courts."); *Guzman* v. *Duncan*, 74 F.
App'x 76, 78 (2d Cir. 2003) (mentioning that the district court rejected the petitioner's
*Batson* claim but at the same time that court noted "that its judgment might have been
different if it had reviewed the case *de novo*").

93. 281 F.3d 55 (2d Cir. 2002).

94. *Id.* at 58-59.
defendant’s confrontation rights were not violated by the procedure,95 the Second Circuit held that because the Supreme Court had never spoken on the issue of witness disguise, it was doubtful the Supreme Court’s confrontation cases applied.96

Similarly, in *Gilchrist v. O’Keefe*,97 a habeas petitioner who punched his appointed attorney in the head, causing the attorney to withdraw from representing him at sentencing, could not show a constitutional violation resulting from the trial court’s refusal to appoint another attorney for sentencing proceedings.98 The Second Circuit Court of Appeals accepted the state’s argument that the Supreme Court’s established law on attorney waiver did not apply in the defendant’s case because the defendant had *forfeited*, rather than *waived*, his right to an attorney.99 The state successfully argued that there was “no Supreme Court precedent deciding the specific circumstances if any, under which a defendant [might] forfeit the right to appointed counsel.”100 As the Second Circuit explained its decision:

Having thus established that Supreme Court precedent recognizes a distinction between waiver and forfeiture of constitutional rights, and that there is no Supreme Court holding either that an indigent defendant may not forfeit (as opposed to waive) his right to counsel through misconduct nor a general Supreme Court holding that a defendant may not forfeit a constitutional right, we conclude that the state court rulings were not “contrary to” clearly established federal law as determined by the Supreme Court.101

The court expressed its discomfiture with its AEDPA habeas determination as follows:

Although, of course, under no circumstances do we condone a defendant’s use of violence against his attorney, *had this been a direct appeal from a federal conviction we

97. 260 F.3d 87 (2d Cir. 2001).
98. *Id.* at 89-90.
99. *Id.* at 94-95.
100. *Id.* at 94.
101. *Id.* at 97.
might well have agreed with petitioner that the constitutional interests protected by the right to counsel prohibit a finding that a defendant forfeits that right based on a single incident, where there were no warnings that a loss of counsel could result from such misbehavior, where there was no evidence that such action was taken to manipulate the court or delay proceedings, and where it was possible that other measures short of outright denial of counsel could have been taken to protect the safety of counsel. Nevertheless, we cannot say, under the deferential standard applied in habeas review, that the state courts here acted in a manner that was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.102

At the risk of oversimplifying, these last quotes suggest that if a New York State defendant punches his attorney in the head, he may be denied counsel for sentencing because the Supreme Court has not spoken precisely on attorney forfeiture, but if a federal defendant punches his counsel in the head, he may nonetheless be accorded the Sixth Amendment right to counsel at sentencing. Whether one believes that a client who assaults his appointed attorney deserves representation at sentencing or not, this difference in constitutional protection represents an incongruous and seemingly arbitrary result all too typical under the AEDPA.

C. CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, ESTABLISHED SUPREME COURT LAW

No portion of the AEDPA has created more controversy or generated more judicial and scholarly discussion than the "contrary to" and "unreasonable application" clauses of § 2254(d). Though a divided Supreme Court in Williams v. Taylor announced its interpretation of these clauses, this somewhat confusing opinion only sowed division among the circuits.103

Under Williams, as expressed by Justice O'Connor, a state court decision is "contrary to" clearly established Supreme Court law if "the state court arrives at a conclusion opposite to that reached by [the

102. Id. at 89-90 (emphasis added).
103. Francis S. v. Stone, 221 F.3d 100, 110-11 (2d Cir. 2000).
Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." An "unreasonable application" of clearly established Supreme Court law occurs after Williams when a state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of [a] prisoner's case." Justice O'Connor cautioned in Williams that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

Interpreting Williams, the Second Circuit in Francis S. v. Stone expressed some degree of frustration with Justice O'Connor's explanations of the statute's language. The court apparently found Justice O'Connor's "virtually tautological statement" regarding the "unreasonable application" clause unenlightening, stating: "Justice O'Connor took some comfort in the fact that 'unreasonable' is 'a common term in the legal world and, accordingly, federal judges are familiar with its meaning.' The difficulty, of course, is that we are familiar with its many meanings in the different contexts in which the word (or its antonym) is used."

In response to the confusion created by Williams, the Francis S. court provided its own reading on what constituted an "unreasonable application" in the Second Circuit by stating: "Some increment of incorrectness beyond error is required. We caution, however, that 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.'"

Regardless of exactly how "contrary to" or "unreasonable application" are defined in the Second Circuit, it is clear that even if a state prisoner can identify "clearly established law" that applies to his case, the standard for a finding that the state court contradicted that law or misapplied that law is extremely high. It will be the rare case in which the reviewing federal

105. Id. (quoting Williams, 529 U.S. at 413).
106. Williams, 529 U.S. at 411.
107. Francis S., 221 F.3d at 111.
108. Francis S., 221 F.3d at 109 n.12 (quoting Williams, 529 U.S. at 410).
109. Id. at 111 (quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 889 (3d Cir. 1999)).
court will find that the state court addressed "a set of materially indistinguishable facts," or came to an "opposite" conclusion from the Supreme Court on the governing law. Additionally, though it might not be necessary in the Second Circuit for a prisoner to show that a state judge's interpretation of the constitutional issue was "incompetent" in order to sustain a claim that the judge misapplied Supreme Court law, a showing that the judge interpreted the law wrongly will not be sufficient. Thus, working in combination with the "clearly established" clause of subsection 2254(d)(1), the "contrary to" and "unreasonable application" clauses, as interpreted by Williams, erect formidable barriers to a habeas petitioner's claims that his constitutional rights have been violated on the law.

D. UNREASONABLE DETERMINATION OF THE FACTS

Under § 2254(d)(2), a habeas petitioner may also establish a constitutional violation if he can show that the state's determination of a factual issue was unreasonable based on the evidence presented at trial. However, the "unreasonable" requirement under § 2254(d) is governed by the amended habeas statute's provision § 2254(e)(1) which reads:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. 110

No doubt, a standard which presumes state courts are correct on factual determinations and requires petitioners to rebut that presumption through clear and convincing evidence makes it extremely unlikely that in all but the most egregious cases a petitioner can succeed in challenging his conviction on factual grounds. Recently, however, the Supreme Court has revisited its habeas corpus jurisprudence in two important death penalty cases, Wiggins v. Smith and Miller-El v. Cockrell, and taken the rare step of granting relief. In Miller-El, the Court opined that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. . . . A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the

decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."  

This language signals an apparent shift in approach by the Court regarding factual review under the AEDPA—strenuously objected to by Justice Thomas in *Miller-El*, and by Justices Scalia and Thomas in *Wiggins v. Smith*—and suggests that the Court

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112. In *Miller-El*, a *Baton* (racially-motivated peremptory jury strikes) claim, the Court did not actually decide whether the state’s determination on the facts was unreasonable but rather whether the district court improperly denied the petitioner a certificate of appealability (COA) in a threshold determination whether the circuit court should hear the petitioner’s appeal. *Miller-El*, 537 U.S. at 335-36. The Court held that for a petitioner to merit a COA under 28 U.S.C. § 2253, in addition to the petitioner having to make a substantial showing that he was denied a constitutional right, he would have to “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* at 338 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). The Court held that it would not require the petitioner to meet the “clear and convincing” standard of § 2254(e)(1), explaining, “[w]e do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338.

Justice Scalia agreed with the Court’s resolution of the law on the COA issue under § 2253 but reluctantly concurred in the Court’s result, calling the decision “a very close case.” *Id.* at 348 (Scalia, J., concurring).

Justice Thomas declared that, even in a COA determination, § 2254(e)(1)’s stringent standard should control: “Title 28 U.S.C. § 2254(e)(1) requires that a federal habeas court ‘presum[e]’ the state court’s findings of fact ‘to be correct’ unless petitioner can rebut the presumption ‘by clear and convincing evidence.’ The majority decides, without explanation, to ignore § 2254(e)(1)’s explicit command. I cannot.” *Id.* at 354 (Thomas, J., dissenting).

113. In *Wiggins v. Smith*, the Court held that the petitioner was denied effective assistance of counsel by his state-appointed attorneys’ failure to expand their search for mitigating evidence of the petitioner’s horrendous childhood experiences beyond the PSI (pre-sentence investigation) report they already had available to them. 539 U.S. at 522-33. The court concluded that the petitioner had met the *Strickland* standard for a showing of ineffective assistance of counsel by demonstrating “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 534 (quoting *Strickland*, 466 U.S. at 692). The Court further held that the Maryland Court of Appeals not only unreasonably applied *Strickland*, but also partially based its decision “on an erroneous factual assumption”—that Wiggins’ counsel had adequately investigated his background. *Id.*

Justice Scalia, joined by Justice Thomas objected that the Court was “ignoring § 2254(e)(1)’s requirement that federal habeas courts respect state-court factual determinations.” *Id.* at 541-42 (Scalia, J., Thomas, J., dissenting). Justice Scalia complained, “The decision sets at naught the statutory scheme we once described as a ‘highly deferential standard for evaluating state-court rulings.’” *Id.* at 538 (Scalia, J., Thomas, J., dissenting) (quoting Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997)).
may be recognizing that, at least in regard to death penalty cases, a more meaningful review of state adjudications may be in order.

Reaction by news sources such as the Washington Post and New York Times to the Court's recent habeas decisions was that the Court might be "opening up habeas corpus review and that greater protection will be extended to capital defendants who are saddled with incompetent lawyers or who are subject to racial discrimination during their capital proceedings."114 This may be an overly simplistic and optimistic view, however. As one legal scholar puts it:

This assessment of the Court's position is debatable. At the very least, it would be incautious to predict that the Rehnquist Court is swinging open the federal court doors to convicted state criminals . . . 115 The Supreme Court refuses to allow the AEDPA to shut down federal habeas review completely, or simply make it a perfunctory, meaningless step on the road to execution. However, even in light of Wiggins and Miller-El, federal courts do not provide a safety net under the AEDPA protecting the innocent, the wrongfully convicted, or the wrongfully sentenced. While the Supreme Court is signaling the importance of federal review of death sentences and raising concerns about the reliability and appropriateness of the death penalty as currently imposed, the Court has not assured that our federal habeas system will protect those who are wrongfully sentenced to death or those who are actually innocent.116

As a review of the following two Second Circuit cases Dallio and Drake shows, as long as the current Supreme Court habeas jurisprudence remains in place, § 2254 determinations will continue to be formalistic exercises that frustrate individual defendants' attempts to obtain meaningful review of their convictions. Moreover, cases such as Dallio and Drake signal an unrestrained and continuing erosion of constitutional protections accorded defendants in the conduct of their state trials.

115. Id.
116. Id. at 73.
IV. VALID ATTORNEY WAIVER AND THE SECOND CIRCUIT'S
DALLIO V. SPITZER DECISION

The following section briefly summarizes the Supreme Court's cases on the right to self-representation at trial as well as the responsibility on the part of courts to ensure that a defendant's waiver of representation does not violate the Sixth Amendment. A critical review of the Second Circuit's recent habeas decision, Dallio v. Spitzer, exposes the highly formalistic yet undisciplined nature of that case, casts doubt upon its reading of both Supreme Court and Circuit Court precedent, and questions its utter lack of policy analysis.

A. ATTORNEY WAIVER

A criminal defendant does not exert complete control over every aspect of his defense. It is generally understood that there are three trial decisions that are wholly within a criminal defendant's province to make alone: (1) whether to plead guilty; (2) whether to waive the right to a jury trial; and (3) whether to testify.\(^{117}\) By contrast, a criminal defendant's right to waive the "assistance of counsel" provided by the Sixth Amendment\(^ {118}\) is not absolute because "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."\(^ {119}\)

The Supreme Court's benchmark attorney waiver case is Johnson v. Zerbst,\(^ {120}\) which sought to delimit the scope of a criminal defendant's right to waive assistance of counsel and discussed the trial court's responsibility to assure the constitutional validity of such a waiver. The Supreme Court established in Johnson that a defendant's waiver of the right to representation by an attorney was only proper if it was "intelligent and competent."\(^ {121}\)

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118. U.S. CONST. amend. VI.
120. 304 U.S. 458 (1938).
121. Johnson's "intelligent and competent" language was the basis for the "knowingly and intelligently" language later adopted by the Court. See Faretta v. California, 422 U.S. 806, 835 (misquoting Johnson, 304 U.S. at 464-65). Johnson is now cited in support of a constitutional standard of "knowing and intelligent" waiver. Dallio, 343 F.3d at 561 (citing Johnson, 304 U.S. at 464-65).

In Godinez v. Moran, 509 U.S. 389 (1993), the Supreme Court, in an opinion by Justice Thomas, rejected the proposition that the standard for competency to waive representation should be set higher than the competency to stand trial. 509 U.S. at 397. The Court noted, however, that a determination of a defendant's competence to stand trial was
Additionally, the Court stated that a trial court owed a “protecting duty” to the defendant to “clearly determine[]” that the waiver was proper.\footnote{122} Writing generally, the Court stated that “‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights,”\footnote{123} and specifically suggested that for a waiver of counsel to be effective, it “should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.”\footnote{124}

In \textit{Carnley v. Cochran},\footnote{125} the Supreme Court transformed Johnson’s “fitting and appropriate” suggestion into a mandate. Writing for the majority, Justice Brennan stated, “[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”\footnote{126}

In \textit{Von Moltke v. Gillies}, Justice Black, writing for four Justices of a majority of six, extended Johnson’s “protecting duty” language, providing a still more profound view of a judge’s responsibility to engage in colloquy with the defendant when determining the validity of a waiver of counsel at trial:

To discharge this duty [of assuring the intelligent nature of the waiver] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge’s responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, not in itself enough to support a valid waiver of the right to counsel: “a trial court must satisfy itself that the waiver [of] constitutional rights is knowing and voluntary. In this sense, there is a ‘heightened’ standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.”\footnote{509 U.S. at 400-01.} \textit{See Yale Kamisar et al., Criminal Procedure 1099} (10th ed. 2002) (explaining that the Court made a distinction between the ability to simply understand the nature of the proceedings inherent in a general competency determination and the higher standard for a “knowing and voluntary” waiver—that the defendant actually understand the “significance and consequences” of his decision) (quoting \textit{Godinez}, 509 U.S. at 401 n.12).

\footnotesize{\begin{itemize}
\item \textit{Johnson}, 304 U.S. at 465.
\item \textit{Id.} at 464 (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).
\item \textit{Id.} at 465.
\item 369 U.S. 506 (1962).
\item \textit{Id.} at 516.
\end{itemize}}
the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused’s professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.\textsuperscript{127}

Nearly forty years after Johnson's 1938 holding, in Faretta v. California,\textsuperscript{128} the Court considered the waiver issue from another side, holding that the right to self-representation was implied in the Sixth Amendment.\textsuperscript{129} The Court reasoned that the explicit rights enumerated in the Amendment—for example, “to be informed of the nature and cause of the accusation” and “to be confronted with [accusatory] witnesses”—were the defendant’s rights, not his counsel’s.\textsuperscript{130}

The Court cautioned, however, that for a defendant to make a constitutionally valid waiver of representation he needed to do so “knowingly and intelligently.”\textsuperscript{131} The Court’s opinion further declared that the trial judge should inform the defendant “of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”\textsuperscript{132}

B. \textit{DALLIO V. SPITZER}

Despite the Supreme Court’s pronouncements in Johnson, Carnley, Von Moltke, and Faretta, the Second Circuit Court of Appeals recently held in Dallio v. Spitzer\textsuperscript{133} that a state court did not violate a criminal

\footnotesize{\textsuperscript{127} Von Moltke v. Gillies, 322 U.S. 708, 723-24 (1948). Though this language in Von Moltke was endorsed by a plurality rather than a majority of the Court, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court’s majority opinion cited this passage, presaging it with the words, “The Court was even more explicit in Von Moltke v. Gillies...” Id. at 244 n.32 (emphasis added).}

\footnotesize{\textsuperscript{128} 422 U.S. 806 (1975).}

\footnotesize{\textsuperscript{129} Id. at 819-20.}

\footnotesize{\textsuperscript{130} Id.}

\footnotesize{\textsuperscript{131} Id. at 835. (quoting Johnson, 304 U.S. at 464-65).}

\footnotesize{\textsuperscript{132} Id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).}

\footnotesize{\textsuperscript{133} 343 F.3d 553 (2d Cir. 2003).}
defendant’s constitutional right to counsel by failing to explicitly warn him of the dangers inherent in self-representation at a suppression hearing.\textsuperscript{134} The court concluded that the Supreme Court’s statement in \textit{Faretta v. California}, “that a defendant waiving his right to counsel ‘should be made aware of the dangers and disadvantages of self-representation,’”\textsuperscript{135} was dictum in that case.\textsuperscript{136} As a consequence, the Second Circuit ruled that the Supreme Court’s language was not “clearly established law” for the purposes of federal habeas review on the issue. Accordingly, the court, under a highly formalistic AEDPA analysis, rejected the petitioner’s § 2254(d) claim,\textsuperscript{137} despite a hearing record indicating a complete absence of waiver warnings by the trial judge.\textsuperscript{138}

The circuit court’s ruling rejected the reasoning of what it called the “thoughtful and detailed decision” of the United States District Court for the Eastern District of New York on the attorney waiver issue,\textsuperscript{139} in which the district court concluded that “‘[a]lthough . . . there is no rigid procedure for advising a defendant about the ramifications of proceeding \textit{pro se}, \textit{Faretta} requires, at a minimum, that there must be an explanation of the attendant dangers and disadvantages.’”\textsuperscript{140} Based upon a finding that the trial court had offered no such warnings, the district court determined that a constitutional violation had occurred, though it nonetheless deemed the error harmless and denied the petitioner’s § 2254(d) habeas claim.\textsuperscript{141} While affirming the district court’s ultimate denial of the petitioner’s habeas petition, the Second Circuit diplomatically rejected the district court’s holding, drawing a distinction between the rights that might be due a defendant on original jurisdiction at the federal district court trial level and those due at the state court level for the purposes of federal habeas review as follows:

\begin{itemize}
  \item \textsuperscript{134} \textit{Id.} at 561.
  \item \textsuperscript{135} \textit{Dallio}, 343 F.3d at 561 (quoting \textit{Faretta}, 422 U.S. at 835).
  \item \textsuperscript{136} \textit{Id.} at 561-62.
  \item \textsuperscript{137} \textit{Id.} at 564-65.
  \item \textsuperscript{138} \textit{Id.} at 556-57. The defendant Dallio was permitted by the judge to proceed \textit{pro se} with his lawyer as “stand-by counsel.” Though Dallio addressed the court concerning his reasons for wanting to represent himself, there apparently was no discussion between the judge and Dallio concerning the dangers of this approach. \textit{Id.} at 557.
  \item \textsuperscript{139} \textit{Id.} at 558. The petitioner also appealed on the state court’s denial of a suppression motion. The district court found this claim meritless and the Second Circuit denied appeal, granting a certificate of appealability on the attorney waiver issue only. \textit{Id.} at 558, 559.
  \item \textsuperscript{140} \textit{Id.} at 558-59 (quoting \textit{Dallio v. Spitzer}, 170 F.Supp.2d 327, 336 (E.D.N.Y. 2001)).
  \item \textsuperscript{141} \textit{Dallio}, 170 F.Supp.2d at 336-37.
\end{itemize}
To the extent [the Second Circuit's] precedent appeared to send mixed signals, the able district judge concluded that Faretta warnings were a "minimum" requirement to ensuring a knowing and intelligent waiver of counsel. Such a cautionary approach to counsel waivers would certainly be understandable, even laudable, were a district court itself addressing a criminal defendant intent on proceeding pro se. But in this case, our focus is only on whether a state court's contrary ruling falls within the narrow scope of 28 U.S.C. § 2254(d).\footnote{142. \textit{Dallio}, 343 F.3d at 563-64 (emphasis added).}

In support of its conclusion, the Second Circuit opined that Faretta's "should be made aware of the dangers" language was "[t]he only Supreme Court support for [the] proposition" that explicit warnings need be given by a trial court.\footnote{143. \textit{Id.} at 561.} Moreover, the Second Circuit reasoned that the Faretta language was dictum because the Sixth Amendment violation addressed by the Faretta Court concerned state denial of a defendant's right to waive counsel, not the propriety of the waiver itself.\footnote{144. \textit{Id.} at 561-62. Specifically, the Faretta Court vacated the judgment of the California Supreme Court, which had denied review of the California Court of Appeal's affirmance of a trial court decision denying a defendant's request to represent himself at trial. \textit{Faretta}, 422 U.S. at 811-12, 836.} Hence, the court declared that for the purposes of § 2254(d) review, the Supreme Court's "general expressions" in Faretta might "well merit respect,"\footnote{145. \textit{Id.} at 562 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-402 (1821)).} but were not "clearly established Federal law . . . [derived from] the holdings, as opposed to the dicta, of [the] Court's decisions."\footnote{146. \textit{Id.} at 562 (quoting \textit{Williams}, 529 U.S. at 412) (alterations added).}

Additionally, the Second Circuit suggested that the Faretta Court's use of the word "should" rather than "shall" in its statement on waiver warnings constituted something less than "a clear establishment of a legal mandate."\footnote{147. \textit{Id.} at 562.} Although the court admitted that in common parlance "the word 'should' [was] simply the past tense of 'shall,'"\footnote{148. \textit{Dallio}, 343 F.3d at 562.} it nonetheless opined that the relative strength of the word was "legally variable,"\footnote{149. \textit{Id.} (quoting United States v. Anderson, 798 F.2d 919, 924 (7th Cir. 1986)).} since some circuit decisions deemed the word compulsory based upon its "common interpretation,"\footnote{146. \textit{Id.} at 562 (quoting \textit{Williams}, 529 U.S. at 412) (alterations added).} while others characterized it as "permissive rather than
mandatory." Therefore, reasoned the court, *Faretta* did not "clearly establish[] that explicit warnings about the dangers and disadvantages of self-representation [were] a minimum constitutional prerequisite to every valid waiver of the right to counsel." The court characterized its own Second Circuit jurisprudence on "'knowing and intelligent'" waiver as being a "'totality of the circumstances'" approach, in which factors such as "'defendant's education, family, employment history, general conduct, and any other relevant circumstances'" were to be considered. While admitting that the Second Circuit had previously stated that a trial court "'should conduct a full and calm discussion with defendant during which he is made aware of the dangers and disadvantages of proceeding *pro se*," the court stated that such *Faretta* warnings were only "'strongly endorsed . . . as a factor important to the knowing and intelligent waiver of counsel,'" and not a requirement. The court implied that a requirement of minimum warnings would amount to the "'rigid waiver formulas or scripted procedures'" that the Second Circuit had hitherto rejected.

The court asserted that its totality of the circumstances methodology (and by implication disavowal of explicit warnings) found support in "'[a] number of our sister circuits [which] follow a similar approach," citing compatible statements from a majority of the federal circuit courts. As will be discussed later in this Article, however, these extracts were sometimes inaccurate, devoid of essential facts, and as a totality, wholly misleading if presented for the proposition that a majority of the circuits

150. *Id.* (quoting *Culbert v. Young*, 834 F.2d 624, 628 (7th Cir. 1987)). The court also cited *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 347 (8th Cir. 1985) for the proposition that "'should' was "'a preferential rather than mandatory word.'" *Dallio*, 343 F.3d at 562.

151. *Id.* at 564.


153. *Id.* (quoting *Fore*, 169 F.3d at 108).

154. *Id.* (quoting *Fore*, 169 F.3d at 108).

155. *See id.*

156. *Id.* The court, however, offered no citation in support of the notion that requiring the trial judge to provide *some* type of warning to the defendant, that is, *any* type of warning, was tantamount to imposing a rigid framework on the trial court. *Id.* On the contrary, the court quoted its earlier *Fore* decision for the proposition that "'district courts are not required to follow a *formulaic* dialogue with defendants wishing to waive their Sixth Amendment rights to counsel . . . ." *Id.* (emphasis added) (quoting *Fore*, 169 F.3d at 107). At least to this author, the *Fore* court's statement logically suggests that some minimum of dialogue *should be required.*

157. *Dallio*, 343 F.3d at 563 n.4.
had disavowed requiring trial judges to make substantial, perhaps explicit, waiver warnings on the record under anything but highly unusual circumstances.\footnote{158. See infra notes 175-210 and accompanying text (providing a critical review of the \textit{Dallio} court's citation to circuit authority).}

In a concurring opinion, Judge Katzmann disagreed with the majority holding, concluding that the trial court had violated the petitioner's Sixth Amendment right to counsel, though like the district court, he deemed the error harmless.\footnote{159. \textit{Dallio}, 343 F.3d at 565 (Katzmann, J., concurring).} The judge challenged both bases relied upon in the majority opinion for denying a constitutional violation.\footnote{160. \textit{Id.}}

First, the judge asserted that the Supreme Court's \textit{Faretta} pronouncements on waiver warnings were not dictum.\footnote{161. \textit{Id.}} The judge opined that an assessment of the defendant Faretta's "knowing and intelligent" waiver of his right to counsel was integral and essential to the Court's holding that Faretta's right to self-representation had been violated.\footnote{162. \textit{Id.} at 566.} In other words, "[i]t was only because Faretta validly waived the right to counsel that the Court found that the trial court violated his right to counsel by not honoring that waiver."\footnote{163. \textit{Id.}} Thus Judge Katzmann found it "inescapable" that had the Supreme Court doubted the quality of Farreta's "knowing" exercise, it would not have vacated the judgment of the California Supreme Court.\footnote{164. \textit{Id.}} Accordingly, the judge asserted that the \textit{Faretta} Court's statements on warnings were in no way "unnecessary to the decision in the case," but part of its holding.\footnote{165. \textit{Dallio}, 343 F.3d at 566 (Katzmann, J., concurring) (quoting BLACK'S LAW DICTIONARY 110 (7th ed. 1999)).}

Second, Judge Katzmann called into question how the majority equated a requirement of warnings with a "rigid formula for a colloquy between the trial judge and the defendant."\footnote{166. \textit{Id.} at 566-67 (Katzmann, J., concurring).} While the judge agreed that \textit{Faretta} did not mandate any scripted warnings, he nonetheless maintained that \textit{Faretta} did require "some basis in the record" that a defendant had been made aware of the substantial dangers of self-representation.\footnote{167. \textit{Id.} at 567 (Katzmann, J., concurring).}

Judge Katzmann went on to assert that "[t]he transcripts of the suppression hearing [were] devoid of any indication that [the defendant] knowingly and voluntarily waived his right to counsel," and even further,
that "[n]owhere in the record . . . [was] there even a glimmer" confirming such awareness on the part of the defendant.\textsuperscript{168} Though the majority in answering this characterization pointed to: the defendant's long criminal history, his knowledge of the importance of an attorney as evidenced by an earlier motion for reassignment of counsel, his pursuit of a college degree in prison, his articulateness in presenting to the court his reasons for proceeding \textit{pro se}, as well as his detailed conversation with his former counsel, the majority could not cite a single word of warning uttered by the judge to the defendant.\textsuperscript{169}

Before presenting his ultimate conclusion that the constitutional violation of the defendant's right to counsel was harmless, Judge Katzmann also voiced his disagreement with the majority that the dangers posed to the defendant in proceeding \textit{pro se} were minimal, as the judge put it, "trivial in this case."\textsuperscript{170} The judge pointed out that "[s]uppression hearings often involve complex legal and evidentiary issues unfamiliar to the layperson," and that although the dangers of self-representation at a suppression hearing were perhaps not comparable to proceeding \textit{pro se} before a jury at trial, they were nonetheless substantial and could require knowledge of "the proper evidentiary objections to make and legal arguments and strategies to advance."\textsuperscript{171}

Though Judge Katzmann's somewhat deferential concurrence presented a critique of the majority's reasoning, it failed to expose the precedential, even radical nature of the \textit{Dallio} decision. In addition, it did not point out the lack of circuit support for the majority's approach to attorney waiver determinations.

When the Second Circuit characterized as dictum the \textit{Faretta} Court's discussion on attorney waiver warnings, its highly formalistic, narrow reading of the law broke new ground—no other circuit court has suggested that these statements by the Court were dictum. Quite to the contrary, \textit{Faretta}'s statements on warnings are so well established that the term "\textit{Faretta} warnings" is of common usage in the cases, as is the term "\textit{Faretta} hearing" for a proceeding to determine the propriety of allowing a defendant to carry on \textit{pro se}.

\textsuperscript{168}Id. (Katzmann, J., concurring).
\textsuperscript{169}Id. at 564 n.5.
\textsuperscript{170}Id. at 567 (Katzmann, J., concurring).
\textsuperscript{171}Dallio, 343 F.3d at 567 (Katzmann, J., concurring) On this point, the judge could well have cited to the Supreme Court's statement in \textit{Waller v. Georgia} that "suppression hearings often are as important as the trial itself," 467 U.S. 39, 46 (1984), particularly since "in many cases, the suppression hearing [is] the only trial, because the defendants thereafter plead[ ] guilty pursuant to a plea bargain." \textit{Waller}, 467 U.S. at 47.
Additionally, when the Second Circuit took as its starting point the proposition that "[t]he only Supreme Court support" for a requirement of explicit waiver warnings was to be found in *Faretta*, this was not a fair statement of the Court's waiver jurisprudence. A more forthright review of the Supreme Court's attorney waiver cases contextualizing the strength of *Faretta*’s language was provided by the D.C. Circuit in *United States v. Bailey*:

[T]he Court's stance on effective waiver of counsel has been longstanding . . . . In [its] earl[y] pronouncements the Court went beyond the mere assertion that the defendant must "intelligently" waive his right, to discuss the Government’s burden of proof in showing an intelligent waiver . . . [Here the Court quoted language from *Johnson v. Zerbst* and *Von Moltke v. Gillies* reviewed earlier in this Comment]. From these cases a general principle emerged. No court has ever apparently gone so far as to require that Justice Black's lengthy litany of questions [recited in *Von Moltke*] be followed to the letter, in a fashion similar to the "Miranda" warning, but pre-*Faretta* courts have uniformly required that the record, by reason of judicial inquiry or otherwise, contain evidence of a defendant's knowing and informed waiver.

Besides providing an incomplete and biased review of the Supreme Court's cases, the *Dallio* majority contextualized federal circuit court authority in a misleading fashion. A closer examination of the cases, undertaken below, suggests that, while it is true that the majority of circuit courts have held that a trial judge need not issue scripted or formulaic

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172. *Dallio*, 343 F.3d at 561. As discussed *supra* note 127, although Justice Black's language in *Von Moltke* was uttered in the context of the plurality portion of his opinion, it was echoed in *Schneckloth v. Bustamonte*, and referred to by the Supreme Court in *Schneckloth* as if it were the opinion of the Court. While the *Dallio* court ignored *Von Moltke* completely, the court cited *Edwards v. Arizona*, 451 U.S. 477 (1981), and *North Carolina v. Butler*, 441 U.S. 369 (1979), both police interrogation-attorney waiver cases which did not bear on waiver of counsel during court proceedings. *See Dallio*, 343 F.3d at 563. One has to question why the Second Circuit discounted the Supreme Court's language in *Faretta*, ignored Justice Black's plurality language in *Von Moltke*, but nonetheless cited Supreme Court cases outside the proceedings context in support of its totality of the circumstances approach.

warnings and that courts should consider a range of circumstances in determining the propriety of a particular waiver, the cases do not support the general proposition that a judge is not required to provide some type of meaningful warning to a criminal defendant who wishes to proceed pro se.

It would prove too lengthy a critique to expose in detail how the court’s grouping of the citations without individual contextualization was misleading and shifted the weight of the cited authority. Instead, a general overview of the cases cited by the court, as well as a few pertinent examples of distortions may suffice.

The court cited eight waiver cases in support of its approach, one each from the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.174 The court also cited contrary Third, Sixth, and D.C. Circuit decisions in which those courts held that trial judges must provide explicit and fully detailed waiver warnings in order to insure the constitutionality of a defendant’s waiver.175 The following discussion examines the eight ostensibly compatible circuit cases cited by the Dallio court.

As a preliminary observation, in five of the eight cases the Second Circuit claimed were reviewed by its “sister circuits” under a “similar approach,”176 the record indicated that the trial judge did provide some kind of warning to the defendant, including one case in which the record was “replete with admonitions.”177 In all of these cases, the warnings went

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174. Dallio, 343 F.3d at 563 n.4. The presumably compatible cases the court cited were: Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002); United States v. Davis, 269 F.3d 514 (5th Cir. 2001); United States v. Lopez-Osuna, 242 F.3d 1191 (9th Cir. 2001); United States v. Kind, 194 F.3d 900 (8th Cir. 1999); United States v. Hughes, 191 F.3d 1317 (10th Cir. 1999); United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997); United States v. Bell, 901 F.2d 574 (7th Cir. 1990); and United States v. Hafen, 726 F.2d 21 (1st Cir. 1984). Dallio, 343 F.3d at 563 n.4.

175. Dallio, 343 F.3d at 563 n.4. The court noted that the Third Circuit required “specific forewarning of the risks that foregoing counsel’s trained representation entails,” and that the D.C. and Sixth circuits had actually invoked their supervisory powers to require judges to provide Faretta warnings in the future. See id. In the case of the Sixth Circuit, the court directed judges to henceforth strictly adhere to model federal bench book inquiries. Id.

176. Id.

177. Lopez-Ozuna, 242 F.3d at 1199. In United States v. Lopez-Osuna, the Ninth Circuit noted, “[the defendant] does not dispute that he was made aware of the dangers of self-representation or the possible penalties he could face if convicted, and the record is replete with admonitions by the district court on both issues.” Id. In United States v. Kind, the Eighth Circuit quoted the trial record as follows:

THE COURT: . . . I will also tell you, though that there is an old adage around here that a person that represents [himself] has a fool for a client. And you have got to be pretty careful about this. Remember, this legal business is very complex and there are a lot of procedures and there are
beyond the colloquy recorded in *Dallio*, in which the court provided no explicit warnings whatsoever. Thus, when those five circuit courts reviewed the totality of circumstances surrounding the waivers in those cases, they did not review the surrounding factors in isolation, but in the context of explicit warnings.\(^{178}\)

Moreover, in the three supporting cases cited by the Second Circuit where the trial court, as in *Dallio*, did not warn the defendant at trial, the relevant facts differed significantly from those in *Dallio*. Although it is

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\(^{178}\) See supra note 178.
true that the circuit courts in those cases upheld the waivers of counsel based solely upon the totality of circumstances surrounding the waivers, the records of those trials clearly indicated both exceptional circumstances surrounding the waivers, as well as a wealth of legal experience possessed by the defendants far in excess of the defendant's in Dallio.

First, in *Nelson v. Alabama*, the Eleventh Circuit noted that the trial judge had already provided the defendant with a full *Faretta* hearing in a previous case and had made repeated references to this prior *Faretta* hearing on the record.\(^\text{179}\) In addition, the trial judge apparently relied on the fact that the defendant had made "oral and written presentations to the court contemporaneously and for the last ten years."\(^\text{180}\) By contrast, in *Dallio* the Second Circuit could only point to the defendant Dallio's "considerable criminal history . . . which presumably gave him an above-average knowledge of his right to counsel,"\(^\text{181}\) a couple of written *pro se* motions the defendant submitted concerning his current trial,\(^\text{182}\) and the fact that he was pursuing a college degree while in prison.\(^\text{183}\)

Second, though not mentioned by the Second Circuit in its citation to *United States v. Hughes*, the defendant in that case was himself a practicing attorney.\(^\text{184}\) Furthermore, the Tenth Circuit in *Hughes* noted that the attorney/defendant's "conduct consist[ed] of tactics designed to delay the proceedings."\(^\text{185}\)

Third, in the Seventh Circuit's *United States v. Bell* decision, it was noted by the court that the defendant in that case had earlier represented himself at several proceedings resulting from a bank robbery charge.\(^\text{186}\) The Seventh Circuit deemed it significant that the defendant had acquitted himself passably, in fact, "better than a lot of lawyers."\(^\text{187}\)

Thus, it is apparent that in none of the eight decisions the Second Circuit claimed took "a similar approach," did a circuit court uphold a counsel waiver made by a defendant who received no waiver warnings from the judge and had no significant legal experience in the courtroom. Perhaps not surprisingly, the Second Circuit, in reviewing the factors to be...

\(^{179}\) 292 F.3d at 1295-96.

\(^{180}\) *Id.* at 1296.

\(^{181}\) *Dallio*, 343 F.3d at 564 n.5.

\(^{182}\) *Id.* See infra note 190 (explaining these motions).

\(^{183}\) *Dallio*, 343 F.3d at 564 n.5.

\(^{184}\) 191 F.3d at 1324.

\(^{185}\) *Id.* at 1323-24.

\(^{186}\) 901 F.2d at 578 (citing United States v. Bell, 572 F.2d 579, 580 (7th Cir. 1978)).

\(^{187}\) *Id.* at n.4 (quoting Trial Record at 335-36).
considered in a totality of the circumstances approach, did not reference a defendant’s legal experience as a factor.\textsuperscript{188}

In addition to providing no factual context for the statements of law it culled from the circuits, the court’s presentation of these statements was, in a number of instances, extremely misleading. For example, the Second Circuit’s parenthetical in citation to the Tenth Circuit’s decision in *Hughes*, in its entirety, was as follows:

*United States v. Hughes*, 191 F.3d 1317, 1323-24 (10th Cir. 1999) (holding that waiver of counsel “may be valid absent an inquiry by the court where the surrounding facts and circumstances, including the defendant’s background and conduct demonstrate that [he] actually understood his right to counsel and the difficulties of pro se representation and knowingly and intelligently waived his right” (internal quotation marks omitted)).\textsuperscript{189}

This truncated quote was not a fair representation of what the Tenth Circuit held in *Hughes* because it omitted the Tenth Circuit’s key limiting language preceding this quote, namely that, “In such a situation, a waiver may be valid absent an inquiry by the court . . . .”\textsuperscript{190} The “situation” referred to by the *Hughes* court was one in which a defendant engaged in improper conduct “designed to delay the proceedings,”\textsuperscript{191} “play[ed] a cat and mouse game with the court,”\textsuperscript{192} or “trifl[ed] with the court,”\textsuperscript{193} as the defendant in that case, a practicing attorney, had allegedly done.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{188} The court quoted its earlier *Fore* decision for the factors to be considered, namely, “‘defendant’s education, family, employment history, general conduct, and any other relevant circumstances.’” *Dallio*, 343 F.3d at 563 (quoting *Fore*, 169 F.3d at 108). The only reference made to the defendant’s legal experience was provided by the court in a footnote in rebuttal to the concurrence’s charge that there was not “even a glimmer” of evidence in the record demonstrating a knowing and voluntary waiver. *Id.* at 564 n.5. The court cited two motions apparently filed pro se by the defendant, one for reassignment of counsel and another “seeking dismissal of his indictment on speedy trial grounds.” *Id.*
\item \textsuperscript{189} *Dallio*, 343 F.3d at 563 n.4 (quoting *Hughes*, 191 F.3d at 1323-24).
\item \textsuperscript{190} *Hughes*, 191 F.3d at 1323-24 (emphasis added).
\item \textsuperscript{191} *Id.* at 1323.
\item \textsuperscript{192} *Id.* at 1323 (quoting United States v. Allen, 895 F.2d 1577, 1578 (10th Cir. 1990)).
\item \textsuperscript{193} *Id.* at 1324 (quoting United States v. Mitchell, 777 F.2d 248, 258 (5th Cir. 1985)).
\item \textsuperscript{194} *Id.* at 1324.
\end{itemize}
What the Tenth Circuit clearly articulated in *Hughes* was that “a thorough and comprehensive formal inquiry of the defendant on the record” was required by that circuit except in “certain limited situations,” where the defendant’s improper conduct precluded the necessity for such an inquiry. This is a far cry from what the Second Circuit’s uncontextualized parenthetical suggests.

Similarly, the court’s citation to the Ninth Circuit’s *Lopez-Osuna* decision was misleading, quoting out of context that court’s language “rejecting [the] ‘use [of] a particular script’ to assess knowing and intelligent waiver of counsel,” and its statement that “‘the focus should be on what the defendant understood, rather than on what the court said.’” In point of fact, the Ninth Circuit in *Lopez-Osuna* reaffirmed that “[i]n order for a waiver of the right to counsel to be knowing and intelligent, the defendant must be made aware of the ‘three elements’ of self-representation: (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation.” Indeed, the defendant in *Lopez-Osuna* did not deny that he had been repeatedly warned by the court concerning the latter two elements, claiming only, against the procedural evidence, “that he did not understand the charges he was facing at trial.”

Finally, the court’s citation to the Fifth Circuit’s language in *United States v. Davis* was perhaps the most disingenuous of the court’s parentheticals. The court’s citation to that case, in its entirety, was as follows:

*United States v. Davis*, 269 F.3d 514, 518-19 (5th Cir. 2001) (noting that although court “has consistently required . . . *Faretta* warnings,” there is “no sacrosanct litany for warning defendants against waiving the right to counsel,” and district courts must exercise discretion

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196. *Id.*
199. *Id.* Though the Ninth Circuit in rejecting the petitioner’s claim conceded that the defendant told the trial court “that he did not know what charges were pending against him,” it cited to the records of earlier hearings where the charges and the elements of proof for those charges were fully explained to the defendant. *Id.*
"[d]epending on the circumstances of the individual case").\textsuperscript{200}

The court framed the last of the quotes in the parenthetical such that it excised what the Fifth Circuit was actually referring to that was subject to an "exercise of discretion." What the Fifth Circuit actually stated was, "Depending on the circumstances of the individual case, the district court must exercise its discretion in determining the \textit{precise nature of the warning}."\textsuperscript{201} In a lengthy footnote immediately following this statement, the court noted, "The Benchbook for U.S. District Court Judges . . . provides a guide for questions the judge can ask to convey the disadvantages the defendant will likely suffer if he proceeds per se [sic]."\textsuperscript{202} The court then proceeded to quote the Benchbook's numerous and comprehensive warnings \textit{in their entirety},\textsuperscript{203} a clear indication that the court, while not

\begin{itemize}
\item[200.] \textit{Dallio}, 343 F.3d at 563 n.4 (quoting \textit{Davis}, 269 F.3d at 518-19).
\item[201.] \textit{Davis}, 269 F.3d at 519 (emphasis added).
\item[202.] \textit{Id.} at 519 n.11.
\item[203.] The Benchbook's questions, quoted by the court, are as follows:
\begin{itemize}
\item (1) Have you ever studied law? (2) Have you ever represented yourself in a criminal action? (3) Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]? (4) Do you understand that if you are found guilty of the crime charged in Count I the court must impose an assessment of \$50 and could sentence you to as many as ___ years in prison and fine you as much as \$___? [Ask defendant a similar question for each crime with which he or she may be charged in the indictment or information.] (5) Do you understand that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another? (6) Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty? (7) Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case. (8) Are you familiar with the \textit{Federal Rules of Evidence}? (9) Do you understand that the \textit{Federal Rules of Evidence} govern what evidence may or may not be introduced at trial and that, in representing yourself, you must abide by those rules? (10) Are you familiar with the \textit{Federal Rules of Criminal Procedure}? (11) Do you understand that those rules govern the way a criminal action is tried in federal court? [Then say to defendant something to this effect:] (12) I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself. (13) Now, in light of the penalty that you might suffer if you are found
\end{itemize}
requiring a judge to follow the "sacrosanct litany" of the benchbook, at least required the judge to provide something approaching it in function.

As an overall opinion, the Davis decision was in no way ambiguous. The issue was clearly presented as follows: "The question here is whether [the defendant] made a sufficiently knowing and intelligent choice to represent himself, and this turns on whether the judge sufficiently warned [the defendant] of the dangers of waiving his right to counsel."204 The Fifth Circuit held that the district court "was required to warn [the defendant] of the perils and disadvantages of representation," and that the judge had failed to adequately do so,205 in spite of the fact that the defendant’s counsel had explicitly warned the defendant, and the judge had permitted "hybrid" representation where the defendant and his attorney alternately questioned witnesses.206

Despite the Second Circuit’s claim that Davis, like the other cases the court cited, took a similar “totality of the circumstances” approach to its own, the Fifth Circuit’s analysis for its holding provided not a single factual reference to the defendant’s background, age, or experience.207 The Fifth Circuit’s opinion made reference only to the facts surrounding how the self-representation unfolded at trial.208

Clearly then, the thrust of the Davis court’s opinion was not that a “sacrosanct litany” of warnings could give way to a discretionary totality of the circumstances test, but that explicit Faretta warnings were required, and that the surrounding circumstances should be considered by the judge in determining what sort of Faretta warnings were required.209 There was absolutely no suggestion whatsoever in Davis that a trial judge could forego explicitly warning a defendant wishing to proceed pro se because surrounding circumstances showed his waiver was knowing and intelligent.210

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guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer? (14) Is your decision entirely voluntary? [If the answers to the two preceding questions are yes, say something to the following effect:] (15) I find that the defendant has knowingly and voluntarily waived his right to counsel. I therefore permit the defendant to represent himself [herself].

204. Davis, 269 F.3d. at 518 (emphasis added).
205. Id. at 520.
206. Id. at 517.
207. Id. at 516-20.
208. Id.
209. Id. at 518-20.
210. Davis, 269 F.3d. at 516-20.
Fairly cited, Hughes, Lopez-Osuna, and Davis were actually negative authority for the Dallio opinion, more properly to be grouped with the Third, Sixth and D.C. Circuit's opinions. Thus, six of the eleven circuit cases cited by the court quite strongly presented contrary law, while the remaining five decisions presented starkly different factual contexts in which compatible law was stated.

Even if the court's review of relevant circuit law was accurate, it would not change the precedential, destructive nature of the Dallio decision. Dallio not only stands for the fact that the Supreme Court's Faretta pronouncements on the necessity for waiver warnings were dictum, but it also substantially diminishes the standard for a valid waiver warning. After Dallio, it appears that a state trial court within the Second Circuit need not provide any waiver warnings whatsoever to a criminal defendant to effect a valid constitutional waiver of counsel as long as there is evidence in the record that the defendant: has a lengthy criminal record, has written a couple of pro se motions, possesses intelligence and some education, and has reached his decision after consulting with the attorney he wishes to replace.

The Dallio decision is a good example of how a federal court, in making a habeas determination under § 2254(d) of the AEDPA, can significantly erode a constitutional protection, while appearing to merely conform to the dictates of that statute under a purely formal inquiry. Yet the Second Circuit's legal interpretation in characterizing Faretta's pronouncements on warnings as dictum was just that—an interpretation, and a highly questionable one at that. Therefore, it would be a stretch indeed to say that the Dallio court was constrained under § 2254(d) to disavow Faretta's pronouncements in order to resolve its habeas determination.

The Second Circuit could simply have upheld the district court's holding, finding a constitutional violation of the defendant's Sixth Amendment right to counsel yet deeming it harmless error, as the concurrence would have done. It seems very unlikely that had the Second Circuit found a constitutional violation, the Supreme Court would have granted certiorari, much less reversed a determination relying on Faretta's pronouncements as a holding rather than dictum. As it is, however, the Second Circuit did not find a constitutional violation, and the Supreme Court has now denied certiorari, foreclosing any further chance of appeal.211

Consequently, as typically happens when federal circuit courts review alleged constitutional violations under § 2254(d), the Second Circuit in Dallio was the final arbiter of Supreme Court law in a discrete area of

defendants' constitutional rights. The court acted as the ultimate constitutional authority for its own jurisdiction, and no doubt set a persuasive precedent for other jurisdictions. Yet, because of the highly formalistic nature of the § 2254(d) inquiry, and the presumed procedural posture that the federal courts are constrained by what is an exceedingly deferential standard, circuit courts typically provide no policy or even rationale behind their interpretation of Supreme Court law. Indeed, the Second Circuit in Dallio provided not a shred of policy or any discussion on the relative advantages or disadvantages of validating attorney waivers in the absence of warnings from the trial judge.

The closest the court got to establishing any rationale for its holding was by its quoting of the Supreme Court's statement in Adams v. United States ex rel. McCann, that "[t]he task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow."212 However, a review of the explicit, highly pertinent waiver questions suggested by The Benchbook for U.S. District Court Judges gives the lie to the notion that a judge who would be conscientious enough to conduct such an in-depth inquiry would be doing so in order to shirk the task of judging a defendant's competence. On the contrary, questions from the judge such as:

(5) Do you understand that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another? (6) Do you understand that the U.S. Sentencing Commission has issued sentencing guidelines that will affect your sentence if you are found guilty? (7) Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case. (8) Are you familiar with the Federal Rules of Evidence? (9) Do you understand that the Federal Rules of Evidence govern what evidence may or may not be introduced at trial?213

actually seem likely to stimulate meaningful colloquy with the defendant. In addition, warnings such as:

212. Dallio, 343 F.3d at 563 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 277 (1942)).
(12) I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself. 214

seem likely to make all but the most assured defendants think twice before proceeding on their own. Indeed, field studies have indicated that "where trial judges were painstakingly careful in providing counsel and explaining the important role that a defense lawyer may play, only one or two percent [of defendants] waived counsel." 215

Such statistics are not surprising. After all, common sense suggests that warnings from a judge are of an altogether different character from those from an attorney who may "no longer [be] trusted." 216 Even the most stubborn of defendants understands that although defense counsel may have a vested interest in continuing representation, a judge's advice is delivered with greater impartiality on the issue. Additionally, the defendant likely recognizes the judge as a figure of authority whose grave advice against self-representation signals the likelihood of an unfavorable result. Thus the advice of an attorney cannot adequately substitute for the gravity of warnings from a presiding judge. 217

Similarly, the Dallio court's assertion that the defendant's "considerable criminal history" gave him "an above-average knowledge of his right to counsel" 218 is a doubtful substitute for explicit warnings from a judge. Particularly if the defendant has been consistently convicted during his lengthy criminal history, his experience with the criminal justice system may not have imbued him with a full appreciation for the importance of counsel. 219 Furthermore, those who watch any skilled activity long enough

214. Id.
216. Davis, 269 F.3d at 520.
217. See id. at 517 n.1 (quoting from a trial record showing that the judge confirmed that the defendant was disregarding the advice of his attorney in proceeding pro se, and holding that "[the court's reliance on the warnings against self-representation given by [the defendant's] counsel . . . was not sufficient").
218. Dallio, 343 F.3d at 564 n.5.
219. One commentator has offered numerous reasons that explain why an experienced defendant might embark on self-representation, many of which, it would seem, might be dispelled by proper warnings:
may begin to think that they themselves could do better at it, even if such thoughts are delusive.\textsuperscript{220} Therefore, it is possible that some defendants with longer criminal records are actually in need of an even more grave and comprehensive warning.\textsuperscript{221}

Concern about the public defender's heavy caseload . . . . a perception that the public defender lacks independence from the prosecutor . . . . a judgment that the defendant himself has greater experience than appointed counsel . . . . an expectation that the court will provide aid . . . . a suspicion that the prosecutor will be less than zealous in dealing with a pro se defendant . . . . the recognition that a pro se defendant may, by calculated lapses from the role of attorney into that of witness, testify without fear of cross-examination . . . . a hope that his performance will elicit the sympathy of the jury . . . . a fear that acceptance of counsel will force a loss of control over presentation of the case . . . . an unwillingness to be represented by an attorney of a different color or political philosophy . . . . a belief that the facts of the case are too complex to be mastered by an attorney . . . . or simply a desire to save legal fees.

\textsc{const. rts. of the accused} § 8:1 (June 2003) (quoting Comment 86 \textit{Yale L.J.} 292, 293-94 n.7 (1976)).

\textsuperscript{220} One legal scholar has probed the mindset of a pro se defendant as follows:
The question of why people wish to represent themselves is not easily resolved. Some have suggested that innocent individuals accused of a crime have such blind faith in their own innocence and the infallibility of justice that they entertain the beliefs that they will be acquitted no matter what. Many individuals, in addition, apparently feel that a self-inflicted burden of defending themselves will evoke the sympathy of the court or jury. Moreover, there are those who have become so involved with television’s criminal defense series syndrome that they in fact feel capable of handling their own defense.


Another commentator has suggested that those who often watch litigation on television may be more inclined to choose self-representation in a civil case.

Frequent viewers may also be inclined to represent themselves pro se. After all, though they may not be lawyers, they’ve seen it all on TV. Syndi-court presents average people litigating their own disputes without the aid of a lawyer, almost half of whom win. Thus, viewers may come to believe that either pro se representation is not very difficult or that pro se representation still ensures a 50 percent likelihood of success. It may also cause viewers to believe that judges will assist them, as this is what occurs on television.

Kimberlianne Podlas, \textit{Should We Blame Judge Judy? The Messages TV Courtrooms Send Viewers}, 86 \textsc{judicature} 38, 42 (July-August 2002).

\textsuperscript{221} Even experienced attorneys in civil cases, if allowed the economic incentive to do so, may make the questionable choice to represent themselves. The Supreme Court, in affirming a Sixth Circuit Court of Appeals decision that an attorney representing himself was not entitled to fees under the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C.A. § 1988, strongly outlined the policy behind discouraging self-representation by an attorney in
Although *Faretta* established that a defendant has a constitutional right to self-representation, in practice it is *exceedingly rare* that a defendant can obtain a better result by representing himself.\(^{222}\) Moreover, outside of protecting against encroachment on this limited individual right, there do not appear to be any counterbalancing societal policy interests in favor of allowing defendants to proceed *pro se* without benefit of warnings or discouragement.\(^{223}\)

Though a comprehensive discussion on the policy interests supporting discouragement of self-representation goes beyond the scope of this Article, it may do to note that in addition to strong equitable interests in assuring fair trials for criminal defendants, at least two "pragmatic" concerns are weighty. First, trials at which defendants represent them-

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a civil trial, listing the factors that made such representation potentially less effective:

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.


\(^{222}\) One survey of defendant self-representation in the Chicago Criminal Courts made the following finding: "[T]he figures for self-represented defendants are sobering. Many judges remarked that they could not remember a victorious pro se defendant in a felony case and virtually all of the rest put the success rate at less than five percent." CONST. RTS OF THE ACCUSED § 8:1 (June 2003) (quoting Comment, 64 J. CRIM. L. & CRIMINOLOGY 240, 249 (1972)).

The Second Circuit itself has remarked: "It seems to us that no matter how intelligent or educated a layman might be, he lacks the skill and knowledge to defend himself adequately." *Id.* quoting United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971). The District Court for the Northern District Court of New York has remarked: "I am familiar with the right to defend pro se, but wonder whether it is not akin to allowing a layman to perform his own surgery." *Id.* quoting United States ex rel. DiBlasi v. McMann, 236 F.Supp. 592, 593 (N.D.N.Y. 1964), aff'd 348 F.2d 12 (2d Cir. 1965).

Additionally, the Sixth Circuit has opined that the *Faretta* court itself recognized that pro se representation was rarely a successful strategy on the part of a defendant: "The *Faretta* Court assumed that the overwhelming majority of laymen who defend themselves in a criminal action will fair worse than those represented by skilled counsel." *Id.* (quoting United States v. McDowell, 814 F.2d 245, 350 (6th Cir. 1987)).

\(^{223}\) Unless perhaps one promotes the morally indefensible and cynical interest in seeing more overall convictions of "wily" defendants despite the heightened possibility for false convictions of the innocent.
selves are far more difficult to conduct, both for judges and prosecutors.\textsuperscript{224} Second, the conviction may be suspect and create more litigation and appeals.\textsuperscript{225}

A reasoned consideration of policy interests suggests that self-representation is to be discouraged. Yet, reasoned policy interests do not come into play when federal courts conduct habeas inquiries under § 2254(d). Under the dictates of that law, convictions of criminals are to be reviewed with dispatch and consideration of broader implications to be discouraged, regardless of the costs in diminished standards for the conduct of future criminal trials.

V. \textbf{WRONGFUL CONVICTION THROUGH STATE-INTRODUCED PERJURY: }\textit{DRAKE V. PORTUONDO}

The following section summarizes Supreme Court and Second Circuit jurisprudence on violation of Fourteenth Amendment due process through state-introduced witness perjury. A critical analysis follows on the Second Circuit’s recent habeas decision, \textit{Drake v. Portuondo},\textsuperscript{226} which, while shedding light on the inequities that occurred at the petitioner’s trial, as a mechanistic AEDPA precedent, worked to remove federal constitutional restraints on state prosecutorial misconduct. The section concludes with a brief review of \textit{Grant v. Ricks},\textsuperscript{227} a district court decision that relied on \textit{Drake} in addressing a claim of state-introduced perjury. \textit{Grant} provides a good example of how precedents established under the AEDPA in cases like \textit{Drake} will help to produce formalistic and inequitable habeas reviews well into the future.

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\textsuperscript{224} \textit{See Bailey}, 675 F.2d at 1300 (stating, “It is obviously in the interest of all participants in a criminal proceeding, including the prosecutor, to be familiar with [the] requirement [that the court make clear on the record the awareness by defendants of the dangers and disadvantages of self-representation] . . . .); \textit{See also Dallio}, 343 F.3d at 557 (mentioning the prosecutor’s “exasperation” with the defendant and quoting the prosecutor’s statement that: “I think the questions that the defendant is asking illustrates his inability to go pro se in this matter.” \textit{Id.} (quoting Trial Record at 76-77)).

\textsuperscript{225} \textit{See Bailey}, 675 F.2d at 1300 (stating, “The most efficient dispatch of judicial business occurs when a short discussion [on the dangers and disadvantages of self-representation] on the record in the trial court can effectively limit both the number of appeals and the problems presented by those that are nevertheless filed.”).

\textsuperscript{226} 321 F.3d 338 (2d Cir. 2003).

A. STATE-INTRODUCED PERJURY

As long ago as 1935, the Supreme Court in *Mooney v. Holohan*\(^{228}\) held that a state’s “contrivance” to obtain a conviction through the use of perjured testimony was a violation of a criminal defendant’s right to due process under the Fourteenth Amendment to the United States Constitution.\(^{229}\) The Court declared that “deliberate deception of court and jury by the presentation of testimony known to be perjured” was unquestionably “inconsistent with the rudimentary demands of justice.”\(^{230}\)

Roughly twenty years later, in *Napue v. Illinois*,\(^{231}\) the Court enlarged upon *Mooney* in holding that when the state allowed testimony that it knew to be false to go uncorrected, the same result was mandated as when the state knowingly intended to introduce perjury.\(^{232}\) The Court further held that false testimony was no less tainted simply because it impacted only on the credibility of the witness.\(^{233}\) The Court explained that when an individual’s “life or liberty” hung in the balance, “subtle factors” such as an accusing witness’s self-interest in testifying against the defendant could be of the utmost importance to the jury in weighing that witness’s testimony.\(^{234}\)

Though these earlier decisions stressed the degree of prosecutorial knowledge in the presentation of the perjury, the Supreme Court’s landmark decision *Brady v. Maryland*\(^{235}\) established a different standard. In *Brady*, the Supreme Court held that a new trial was required when the prosecution suppressed evidence requested by the defense that was “material either to guilt or to punishment” of the accused.\(^{236}\) In stirring language by Justice Douglas, the Court made clear that determining whether the defendant had received due process and fair treatment at trial did not hinge on “the good faith or bad faith of the prosecution”:

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the

\(^{228}\) 294 U.S. 103 (1935).
\(^{229}\) U.S. CONST. amend. XIV; *Mooney*, 294 U.S. at 112-13.
\(^{230}\) *Mooney*, 294 U.S. at 112.
\(^{231}\) 360 U.S. 264 (1959).
\(^{232}\) *Id.* at 269.
\(^{233}\) *Id.*
\(^{234}\) *Id.* at 269-70.
\(^{235}\) 373 U.S. 83 (1963).
\(^{236}\) *Id.* at 87.
guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the [Maryland] Court of Appeals.\footnote{Id. at 87-88 (quoting Brady v. State, 174 A.2d 167, 169 (Md. 1961)).}

The effect of Brady, then, was to shift the focus from the conduct of the prosecutor to the materiality of the exculpatory evidence suppressed.

In United States v. Agurs,\footnote{427 U.S. 97 (1976).} the Supreme Court enlarged upon the materiality principle established in Brady, conceiving of it as an umbrella rule for several situations "involv[ing] the discovery, after trial of information which had been known to the prosecution but unknown to the defense."\footnote{Id. at 103.} The Court suggested that there were three types of cases where the Brady rule "arguably applie[d]": (1) where "the undisclosed evidence demonstrate[d] that the prosecution's case include[d] perjured testimony and that the prosecution knew, or should have known, of the perjury";\footnote{Id. at 104.} (2) where the defense made a specific request for evidence which was suppressed by the prosecution;\footnote{Id. at 107.} or (3) where the defense made a general request for information that might exculpate the defendant, that is, any so-called "Brady material."\footnote{Id. at 104, 107.} The court indicated that a due process violation in each of these categories might require a different standard of materiality.

The Court noted that in a series of previous rulings it had "consistently held that a conviction obtained by the knowing use of perjured testimony [was] fundamentally unfair, and [had to] be set aside if there
[were] any reasonable likelihood that the false testimony could have affected the judgment of the jury." The Court concluded that this "strict standard of materiality" did not necessarily apply to the other two categories discussed in *Agurs*—the suppression of exculpatory evidence specifically or generally requested—since in those cases prosecutorial misfeasance was not necessarily implicated.

It was in regard to the suppression of generally requested exculpatory information that the *Agurs* Court actually ruled. However, the Court’s "known or should have known" language in regard to the first category, state-introduced perjury, broadened the definition of prosecutorial "knowledge" and precipitated a split among the circuits. While the First, Second, Third, Fourth, Eighth, and Ninth Circuits adopted the "should have known" language of *Agurs*, the Fifth, Sixth, Seventh, and Eleventh Circuits generally applied standards requiring actual knowledge of perjury by the prosecution.

In 1988, the Second Circuit Court of Appeals actually went beyond *Agurs*, holding in *Sanders v. Sullivan* that a habeas petitioner’s conviction could not stand "when a credible recantation of [perjurious] testimony . . . would most likely change the outcome of the trial." Based upon its weighing of equitable principles, the court stated, "[i]t is simply intolerable in our view that under no circumstance will due process be violated if a

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245. *Id.* at 104, 107.

246. The Court held that the prosecution had a duty to disclose exculpatory Brady evidence even if not requested with specificity, but only "if the omitted evidence create[d] a reasonable doubt that did not otherwise exist." *Id.* at 111-12.


248. U.S. v. Flaherty, 668 F.2d 566, 587 (1st Cir. 1981); U.S. v. Wallach, 979 F.2d 912, 914 (2d Cir. 1992); U.S. v. Biberfeld, 957 F.2d 98, 102 (3d Cir. 1992); United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994); U.S. v. Runge, 593 F.2d 66, 73 (8th Cir. 1979); Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002).

249. United States v. Blackburn, 9 F.3d 353, 357 (5th Cir. 1993) *cert. denied*, 530 U.S. 830 (1994) (citing United States v. Chagra, 735 F.2d 870, 874 (5th Cir. 1984)) (reversal only justified where "contested statements were actually false, . . . material, and . . . the prosecution knew that they were false"); United States v. O’Dell, 805 F.2d 637, 641 (6th Cir. 1986) *cert. denied*, 484 U.S. 859 (1987) (also citing *Chagra*, 735 F.2d 870) (same); Shore v. Warden, Stateville Prison, 942 F.2d 1117, 1122 (7th Cir. 1991) *cert. denied*, 504 U.S. 922 (1992) (due process violated only where prosecution "knowingly or intentionally" introduced perjured testimony); U.S. v. Michael, 17 F.3d 1383, 1385 (11th Cir. 1994) ("It is axiomatic that only the knowing use of false testimony constitutes a due process violation.").

250. 863 F.2d 218 (2d Cir. 1988).

251. *Id.* at 222.
state allows an innocent person to remain incarcerated on the basis of lies.”

Recognizing that a due process violation had to “have a state action component,” and could not solely result from a wrong committed by a witness, the Second Circuit looked to Justice Douglas’s 1956 dissent in *Durley v. Mayo*. In that case, the majority ruled 5-4 that a habeas petitioner’s appeal on a cattle rustling conviction was barred by *res judicata*. However, Justice Douglas, joined by Chief Justice Warren and Justices Black and Clark, contended that the court should have ruled on the merits of the case. Justice Douglas, expressing the view of the dissent, stated:

> It is well settled that to obtain a conviction by the use of testimony known to the prosecution to be perjured offends due process. While the petition did not allege that the prosecution knew that the petitioner’s codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witness against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process of law.

Adopting the view expressed by the dissent in *Durley*, the Second Circuit established precedent in *Sanders* that state action could be found in state knowledge of a credible recantation even after trial.

The Second Circuit in *Sanders* emphasized that the court was not opening the door wide to retrials since it was maintaining a high materiality standard. The court declared that perjured testimony constituting a denial of due process had to “be of an extraordinary nature,” engendering “a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.” On the one hand, *Sanders* broadened the range of prosecutorial-introduced perjury that could potentially

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252. *Id.* at 224.
253. *Id.*
255. *Sanders*, 863 F.2d at 223.
257. *Sanders*, 863 F.2d at 223.
258. *Id.* at 225-26.
259. *Id.* at 226.
implicate a due process violation to include perjury of which the prosecution was neither aware nor should have been aware. On the other hand, Sanders maintained a high standard of materiality for perjury not implicating prosecutorial knowledge. The Second Circuit thus attempted to strike a balance between protecting the basic due process rights of convicted defendants, and maintaining finality and stability in the system.

The principles announced in Sanders remained established federal habeas law in the Second Circuit for close to fifteen years. At the time that Sanders was decided, more than seven years before the advent of the AEDPA, probably no judge could have imagined that such a weighty decision, affecting the most fundamental aspects of due process at trial, would one day be overturned without a word of discussion regarding fairness, constitutional rights, or policy. Yet, as the following review of the Second Circuit’s recent decision in Drake v. Portuondo demonstrates, courts conducting a § 2254 inquiry are not compelled to provide discussion on fundamental principles of justice. Under § 2254’s dictates, cases at hand are adjudicated and well-established precedents erased with equal formal dispatch.

B. Drake v. Portuondo

In Drake, a convicted murderer, Robie Drake, more than a dozen years after his conviction and “years after exhausting his direct appeals,” discovered through his own in-prison research that an “expert” prosecution witness who testified against him at trial was a fraud who lied about his credentials. Because the only issue at Drake’s trial was whether he manifested the requisite intent to sustain a charge of second degree murder, the expert’s testimony was crucial, because it provided a psychological motive tying together various pieces of the prosecution’s evidence.

260. Id. at 225. The court noted that prior to 1975 it had applied “the less stringent test of Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), which . . . grant[ed] a new trial if the court determine[d] that the new evidence [of perjury] ‘might’ alter the verdict of the jury.” Id. After 1975, however, the court noted that it had “limited the application of Larrison to cases alleging the prosecutor’s knowing use of false testimony.” Id.

261. 321 F.3d 338 (2d Cir. 2003).

262. Drake was convicted in 1982. He first moved to vacate his conviction based on newly-discovered evidence of perjury in 1995. Id. at 340, 343.

263. Id. at 342.

264. Id.

265. Id. at 341-42.
The facts of Drake's crime are not the type that engender sympathy for the defendant. Shortly after midnight on a December night in 1981, Robie Drake, a high school student dressed in battle fatigues and carrying two loaded rifles, extra ammunition, and two hunting knives, went to a junkyard nearby a factory parking lot in North Townawanda, New York, where he claimed he liked to practice shooting at abandoned cars. Drake came across a rusted Chevy Nova in the factory parking lot with its windows steamed up. He claimed that he believed the car was uninhabited because the engine was off and no sound came from within. Drake fired into the passenger's side window, unloading all nineteen rounds of his semi-automatic rifle's clip.

Inside the car were two high school teenagers who were using the secluded spot as a lovers' lane. Drake claimed that when he inspected the car after firing into it, he discovered that he had shot a young man and woman multiple times and that the man was fully clothed and the woman in a state of undress. He claimed that he then stabbed the male victim to stop him from groaning, but that he "didn't mean to kill him or anything." Drake then drove the Nova to two secluded locations. At the first, he put the male victim's body in the car's trunk. At the second location, he was in the process of putting the female victim's body in the trunk when he was apprehended by police.

At Drake's trial, the prosecution presented its theory that the murder was an intentional sex crime. The prosecution argued that because the windows of the car were steamed up, Drake must have known there were people in the car. Additionally, Drake and the two victims attended the same high school, and according to the testimony of one witness, Drake had had an argument with the male victim in the hallway of the school a few weeks before the shooting. Moreover, the emergency room doctor testified that after pronouncing the female victim dead, he discovered

266. Drake, 321 F.3d at 341.
267. Id.
268. Id.
269. Id.
270. Id.
271. Id.
272. Drake, 321 F.3d at 341 (quoting Trial Record at 267).
273. Id.
274. Id.
275. Id.
276. Id.
277. Id.
278. Drake, 321 F.3d at 341.
Finally, the state's forensic experts found bite marks on each of the female victim's breasts, inflicted post-mortem.280

Prior to Drake's trial, the judge notified the parties that he had an upcoming "out-of-town judicial commitment" and that the trial had to be wrapped up by the Tuesday following the week of the trial's commencement, at the latest.281 On Thursday night of the first week of trial, two working days before the close of the trial, the prosecution informed the defense of its intention to call an expert psychological profiler, Richard D. Walter, to testify.282 The next day, Friday, Walter qualified as an expert based upon his testimony that he had:

- extensive experience in the field of psychological profiling, including: work on 5000 to 7500 cases over several years in the Los Angeles County Medical Examiner's Office; an adjunct professorship at Northern Michigan University; more than four years as a prison psychologist with the Michigan Department of Corrections; and expert testimony given at hundreds of criminal trials in Los Angeles and Michigan.283

Walter, without having examined the defendant, and based entirely "on his review of grand jury testimony, medical evidence and the police record,"284 testified that the defendant had committed "'lust-murder,'" gratifying sexual urges derived from a condition he called "'picquerism.'"285 He explained that "'picquerism,'" a term with origins in the French word "'piquer,'" meaning "'to stick or poke'" was a condition whereby the "'picquerist'" would obtain sexual gratification through "'biting, shooting, stabbing, and [/or] sodomizing [his] victims.'"286

The prosecution later admitted it offered Walter's testimony, which "dovetailed" nicely with the prosecution's physical evidence, "to reinforce
what it perceived as weaknesses in the evidence supporting its theory of intent.\textsuperscript{287} Though unaware that Walter was a fraud, the defense argued that Walter's testimony should be stricken from the record on the grounds that his statement that, as a fact, the defendant had committed "lust-murder" invaded the province of the jury in deciding the one issue at trial—whether Drake acted with intent.\textsuperscript{288} Left with only a weekend to find a witness to rebut Walter's testimony, defense counsel searched in vain for an expert who had even heard of "picquerism" and on the following Monday reported as much to the judge.\textsuperscript{289} The defense asked the judge for a two-week continuance in order to have more time to find a psychologist who could rebut Walter, but after the prosecution argued in opposition to the motion, the judge denied the request.\textsuperscript{290} Consequently, the last witnesses were called, summations were made, and the trial ended as scheduled.\textsuperscript{291} Drake was thereafter convicted of second-degree murder on both counts and received two consecutive sentences of twenty years to life.\textsuperscript{292}

Drake’s prison research concerning Walter’s credentials yielded some extraordinary revelations. Walter, contrary to his claims to have profiled 5000 to 7500 cases for the Los Angeles County Medical Examiner’s Office, had never profiled a single case for that employer.\textsuperscript{293} Rather, his duties at that office were simply to clean and maintain the forensic lab.\textsuperscript{294} Additionally, Walter apparently was never employed at all by Northern Michigan University, let alone employed as an adjunct professor.\textsuperscript{295} Moreover, his assertion that he gave expert testimony at scores of criminal trials in Los Angeles between October 1975 and May 1978 was equally bogus—the Los Angeles County District Attorney’s Office found not a single record of Walter having testified at any criminal trial during that period of time.\textsuperscript{296} As if these fabrications were not enough, numerous credentials and forms of experience seemingly tailored to the facts of the Drake case, assiduously brought out by the prosecution for the jury, were

\textsuperscript{287} Id.
\textsuperscript{288} Brief for the Petitioner-Appellant at 13, Drake v. Portuondo, 321 F.3d 338 (2d Cir. 2003) (No. 01-2217).
\textsuperscript{289} Drake, 321 F.3d at 342.
\textsuperscript{290} Id.
\textsuperscript{291} Id.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
\textsuperscript{295} Drake, 321 F.3d at 343.
\textsuperscript{296} Id.
lies.\textsuperscript{297} Worst of all, the "picquerism" syndrome proposed by Walter was "referenced nowhere but in a true-crime paperback."\textsuperscript{298}

In 1995, upon discovering this evidence of Walter's perjury, Drake moved to vacate his conviction.\textsuperscript{299} Without a hearing, the Supreme Court, Niagara County, New York, denied Drake's motion.\textsuperscript{300} The Supreme Court Appellate Division affirmed the Supreme Court's order, and the New York Court of Appeals denied leave to appeal.\textsuperscript{301}

Pursuant to § 2254, Drake filed an application for a writ of habeas corpus in the United States District Court for the Western District of New York.\textsuperscript{302} The district court affirmed the Report and Recommendation of a federal magistrate judge that Drake's petition "be denied in its entirety."\textsuperscript{303} The court stated, "as found by both [the magistrate judge] and in prior state court proceedings, there is nothing in the record indicating that the prosecution knew or should have known, that Walter was, or may have been, perjuring himself with respect to his credentials as an expert."\textsuperscript{304}

The court further stated, "Even assuming that petitioner is correct in his assertion that Walter perjured himself in testifying as an expert witness and that the prosecution acted as a willing participant, habeas relief is still not warranted."\textsuperscript{305} Citing the Supreme Court's \textit{Agurs} standard, the court reasoned that Drake failed to demonstrate "'any reasonable likelihood'" Walter's perjury "'affected the judgment of jury'" and therefore the perjury

\textsuperscript{297} For example, Walter testified that 5000 of the cases he profiled for the State of California were homicides in which he fully took part in reviewing everything from "police reports, crime photo lab results, the deceased's body, the autopsy reports, witness statements, and evidence collected in the cases." Brief for Petitioner-Appellant at 10, \textit{Drake}, (No. 01-2217). After this extensive review of the evidence, Walter claimed not only to have helped the pathologist and investigators figure out how the crimes happened but the motives behind the crime that would help the authorities catch the killer. \textit{Id.} He further testified that he was involved in twenty-five cases, both in Michigan and in California, involving bite marks left on the victim. \textit{Id.}

\textsuperscript{298} \textit{Drake}, 321 F.3d. at 340.

\textsuperscript{299} \textit{Id.} at 343.

\textsuperscript{300} \textit{Id.}

\textsuperscript{301} \textit{Id.}


\textsuperscript{303} \textit{Id.} The district court supplemented its affirmance by approving the magistrate judge's denial of Drake's request for further discovery in the case. \textit{Id.} The court reasoned that since there was no evidence in the record supporting Drake's claim that the prosecution was aware or should have been aware of the perjury, Drake was "not entitled to pursue a fishing expedition in hopes of finding some heretofore unknown damaging evidence." \textit{Id.}

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} \textit{Id.} at *2.
did not justify a reversal of his conviction. The court concluded by stating that the evidence without Walter’s testimony was still “overwhelming” against the petitioner and that “[n]o rational trier of fact could have found differently.”

Drake appealed to the Second Circuit Court of Appeals, claiming (a) that his Fourteenth Amendment due process rights as well as his right to compulsory process under the Sixth Amendment were violated through the prosecution’s use of surprise testimony and the judge’s refusal to grant a continuance, which in combination “deprived him of the opportunity to present a meaningful defense”; and (b) that his Fourteenth Amendment due process rights were violated when the prosecution presented testimony it “knew or should have known” was perjured.

The Second Circuit began its discussion with a standard recitation of the applicable standards for a habeas inquiry under § 2254. Next, the court swiftly dismissed Drake’s claim that he was denied a meaningful defense as a result of the judge’s refusal to grant him a continuance. The resolution of Drake’s meaningful defense claim, though not the focus of this Comment and perhaps less important as a legal precedent, was nonetheless highly representative of the formalistic and inequitable outcomes produced by AEDPA habeas reviews. After the court

307. Id.
308. Drake, 321 F.3d at 340.
309. Id. at 343-44.
310. Id. at 344.
311. The court’s resolution of this claim was not only divorced from fundamental constitutional notions of fair play and due process at trial, but was also seemingly undisciplined, even as a formalistic analysis operating within § 2254(d)’s dictates.

The Second Circuit began its discussion of Drake’s denial of meaningful defense claim by noting that “Drake’s disadvantage flowed from a refusal to grant a continuance,” and that such refusal was “a matter ‘traditionally within the discretion of the trial judge.’” Id. (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)). The court seemed to be providing clearly established Supreme Court law when it quoted the Court for the proposition that, “[o]nly an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the [Constitution].” Id. (quoting Morris v. Slappy, 461 U.S. 1, 12 (1983) (quoting Ungar, 376 U.S. at 589)) (internal quotation marks omitted).

The court then noted that the New York Supreme Court Appellate Division had affirmed the trial judge’s ruling, and stated, “[w]e are constrained under AEDPA to assume that the Appellate Division’s decision was the product of considered judgment.” Id. Though the Appellate Division’s memorandum opinion did not reference Drake’s meaningful defense argument whatsoever, nor the trial judge’s denial of a continuance, People v. Drake, 684 N.Y.S. 2d 102 (App. Div. 1998), the Second Circuit nonetheless opined, “[t]he Appellate Division presumably decided that the denial of [Drake’s continuance] motion did not deprive Drake of his rights under the Sixth and Fourteenth Amendments.” Drake, 321
dispatched the denial of meaningful defense claim, it turned to a more extensive analysis of Drake’s state-introduced perjury claim.

The Second Circuit first noted that the Supreme Court analyzed claims for wrongful conviction resulting from perjured testimony under the Fourteenth Amendment’s Due Process Clause. The court then asserted that Agurs’ “knew or should have known” standard in regard to state-introduced perjury was “in the nature of dictum” because the case actually before the Court in Agurs involved facts indicating actual knowledge by the prosecution of suppressed evidence. In the very same paragraph, the

F.3d at 344.

The Second Circuit provided virtually no reasoning for its rejection of Drake’s meaningful defense claim beyond its formalistic adherence to the dictates of the AEDPA. The court seemed to demand that the petitioner provide tailor-made Supreme Court law when it asserted, “Drake identifies no Supreme Court authority that would command either the two-week continuance in a jury trial, or a new trial by reason of its denial.” The court then admitted that the trial judge could have granted something less than a two week continuance, but nonetheless stated, “[i]t does not appear to be an unreasonable application of federal constitutional law to fail to provide a shorter continuance than requested.” To this author, at least, the court seemed to be using the specific fact that the judge denied a two-week continuance to obscure the fact that the judge denied a continuance request that under the circumstances was eminently reasonable.

The Second Circuit’s analysis was curious. Inexplicably, the Second Circuit did not explicitly identify the established Supreme Court law that would govern its inquiry. It assumed that the state courts did not unreasonably apply established Supreme Court law without ever addressing the question of whether the trial judge’s denial of the continuance was “an unreasoning and arbitrary ‘insistence upon expeditiousness,’” or whether Drake’s motion represented “a justifiable request for delay.” (quoting Morris, 461 U.S. at 12 (quoting Ungar, 376 U.S. at 589)) (internal quotation marks omitted).

One has to wonder why the judge’s refusal to grant the Drake defense a continuance was not arbitrary and unreasoning. Drake’s trial was to end no later than Tuesday, solely because the judge had an out-of-town commitment. The prosecution introduced its surprise witness, Walter, on Friday, providing the defense notice on Thursday night. The defense was left with no more than a weekend to search for an expert to rebut Walter’s theory or to prepare a cross-examination. On the following Monday, the last day of the trial, the defense informed the judge that an expert could not be found who had even heard of “picquerism.” Though defense counsel’s request for a continuance would seem by any standard fully justified under the circumstances, the judge not only refused to grant a continuance of any length but apparently offered no good reason for refusing to do so.

What this portion of the Second Circuit’s Drake opinion seems to suggest is that under a § 2254(d) habeas inquiry, it is well nigh impossible for a state judge in the Second Circuit to offend federal constitutional principles of due process by denying a continuance at trial. Regardless of whether the denial was unfair or unjustified, the Second Circuit signaled its refusal to thoroughly apply even a deferential standard of “unreasoning and arbitrary” to the state court determination.

312. Drake, 321 F.3d at 344-45 (citing Napue, 360 U.S. at 269).
313. Id. at 345.
Second Circuit provided a footnote which rejected defense reliance on *Sanders* for the proposition that habeas relief could be granted “even in the absence of prosecutorial knowledge of perjury." The court explained simply that the *Sanders* opinion expressly relied upon the dissenting Justices’ opinion in *Durley*, rather than on clearly established Supreme Court precedent as mandated by the AEDPA.

Consequently, the *Sanders* opinion, along with all of its reasoning, policy, and concern for justice and fair play, was summarily overruled for the purposes of habeas review, wiped away by a perfunctory footnote simply noting the legal standard set by the AEDPA. The Second Circuit was no longer a jurisdiction in which federal courts were charged with reviewing the constitutionality of state convictions compromised by perjury, irrespective of prosecutorial knowledge or lack of knowledge. It was now a circuit in which the federal power to review the constitutionality of trials marred by testimony the prosecution “should have known” was perjured was no longer fully assured.

Despite the fact that the Second Circuit characterized *Agurs*’ state-introduced perjury language as dictum, the court stopped short of abandoning the “should have known” standard, noting only that it had “not yet considered what it [took] to show that the prosecution ‘should have known’ it was sponsoring perjury.” The court stressed that it had no intention to “draw the contours of the phrase” including whether or not the phrase suggested a “standard [that] entail[ed] an exercise of due diligence,” until it was met with a case that necessitated an interpretation.

The court explained that the case before it did not as yet demand an interpretation of the standard, since the New York Appellate Division, in summarily denying the petitioner’s motion to vacate his conviction, offered no findings of fact supporting its conclusion “that the prosecutor neither knew nor should have known of [the witness’s] perjury.” Therefore, the circuit court concluded that it had no basis upon which to determine whether the state courts had “unreasonably applied federal law” under § 2254(e)(1), requiring the defendant to demonstrate a constitutional violation by “a showing of ‘clear and convincing evidence.’”

The Second Circuit remanded the case to the district court for “limited discovery on the circumstances surrounding Walter’s perjured testi-

314. *Id.* at 345 n.2.
315. *Id.*
316. *Id.* at 345.
317. *Id.*
318. *Drake*, 321 F.3d at 345.
319. *Id.* (quoting 28 U.S.C. § 2254(e)(1)).
mony,"320 noting that although permitting discovery on habeas review was somewhat unusual, the Supreme Court had held it could "be granted upon a showing of 'good cause.'"321 The court, in deeming it proper to allow the defendant further exploration, contradicted the district court's assertion that Drake was "not entitled to pursue a fishing expedition" to uncover "heretofore unknown damaging evidence."322 The court stated that after developing the record, Drake might be able to show "that the prosecution knew or should have known" of Walter's perjury and "establish a 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'"323

While noting that the New York Supreme Court Appellate Division found "'no reasonable probability that the verdict would have been different had the evidence [of perjury] been available to defendant and used by him to impeach the expert,'"324 the court nonetheless opined that Walter's lies concerning his qualifications were significant, gave "force" to his presentation, and bolstered "his testimony [which] was, medically speaking, nonsense."325

The Second Circuit also noted that no AEDPA deference would be required on the issue of harmless error, since the state courts, finding no constitutional error, had not reached the question.326 The court, having already indicated that the perjury was probably material enough to satisfy Agurs' "reasonable likelihood" standard,327 now strongly signaled that under the Supreme Court's Brecht v. Abrahamson harmless error standard, Drake could probably show "that the perjured testimony would have had a substantial and injurious effect on the jury's verdict."328

Thus the Second Circuit reduced the habeas question in Drake to a single determinative issue to be decided after discovery (and if the district court deemed it necessary, a hearing)—whether Drake could show that the prosecutor "knew or should have known" of its expert's perjury. No doubt, to the extent that the petitioner won a chance to develop the record in regard to the prosecution's awareness of its expert's perjury, and the opportunity to prove that the prosecution "closed its eyes to that which it

320. Id. at 346.
321. Id. (citing Bracy v. Gramley, 520 U.S. 899, 904 (1997)).
322. See Drake, 2001 WL 266021, at *1 (denying the petitioner's request for discovery on the circumstances surrounding Walter's perjury).
323. Drake, 321 F.3d at 346 (quoting Agurs, 427 U.S. at 103)).
324. Id. (quoting Drake, 684 N.Y.S.2d at 102).
325. Id. at 346.
326. Id. at 347.
327. Id. at 346.
328. Id. at 347.
did not want to see, the Drake decision was a victory for the defense. By not determining the "contours" of the phrase "knew or should have known," however, the circuit court left open the possibility that the phrase might ultimately be defined by the district and circuit court quite narrowly, placing the burden on the defense to show prosecutorial awareness approaching actual knowledge rather than requiring the prosecution to show some minimal exercise of diligence.

Given the Second Circuit's statements suggesting the perjury at Drake's trial was material, the Drake decision could be seen as a negative outcome, if not for Drake, then certainly for defendants' constitutional trial rights. True, the decision finally gave judicial attention to the inequities arising at the Drake trial, a somewhat reassuring result in itself. Yet the underlying standard of proof for demonstrating unfairness at trial resulting from state-introduced perjury was unquestionably raised by the Drake decision.

First of all, had the Second Circuit not been bound by the dictates of the AEDPA to abandon its former Sanders standard, which it apparently was, then according to the court's materiality analysis, the court would have been compelled to grant a writ of habeas corpus to the defendant without need for remand. This follows because the only issue remaining (the extent of the prosecutor's knowledge) would have been irrelevant to the inquiry.

Moreover, the court's assertion that it was not required by the Drake case to "draw the contours of the phrase 'should have known'" due to the

330. See Drake, 321 F.3d at 345 (musing on "whatever degree of complicity or negligence (or worse) [the] phrase [might] entail").
331. The dissent in Durley has never been explicitly adopted by a majority of the Supreme Court as a part of a holding. However, two Supreme Court opinions, one of them dissenting, have positively cited its reasoning.

In Edwards v. People of the State of New York, Justice Harlan, writing for the Court stated: "I am not unmindful that in the recent case of Durley v. Mayo, four justices of this court indicated that in some circumstances the innocent use of perjured testimony might involve a denial of due process. The circumstances in Durley, however, bear no resemblance to the situation presented here." Edwards v. People of New York, 76 S.Ct. 1058, 1062 n.2 (1956) (citations omitted).

In Jacobs v. Scott, Justice Stevens joined by Justice Ginsburg dissented against the Court's denial of a writ of certiorari and stay of execution to a defendant slated for death, citing the Durley dissent's assertion that punishing a defendant when a recantation by the state's only witness left no credible evidence against the defendant was a denial of due process. Jacobs v. Scott, 115 S.Ct. 711, 712 (1995) (mem.) (Stevens, J., dissenting). The dissent also cited Sanders. Id.
“lack [of] a sufficient factual record,” as well as its decision to remand to the district court, were not particularly helpful for Drake or future defendants harmed by egregious state-introduced perjury. The court could have instead held that while declining to articulate a precise standard for “should have known,” the combined facts of the Drake case already established in the record indicated prosecutorial malfeasance of a sufficient degree to warrant issuance of the writ under any reasonable standard.

The court, in making such a ruling, could have pointed to facts such as: the prosecution’s “bringing [Walter] into the jurisdiction on the night prior to his trial testimony”; the prosecution’s complete failure to conduct even the most minimal inquiry into Walter’s background or his theories; the clear impossibility that Walter could have conducted as many investigations as he claimed to have done within the claimed period of time; the way in which “on summation the prosecution capitalized upon [the defense’s inadequate time to refute Walter] and played upon the image that Walter projected”; as well as the way in which Walter’s theories happened to be tailor-made for the case at hand.

Alternatively, the court could have looked to other related contexts in which the Supreme Court has used the language “should have known” and,

332. Drake, 321 F.3d at 345.
333. Brief for Petitioner-Appellant at 24, Drake (No. 01-2217).
334. Id. at 25.
335. See id. (noting that if the prosecution “had . . . exerted some minimal level of inquiry it would have realized” Walter’s claim to have conducted 5000 to 7500 complete, in-depth profiling investigations over a period of two and a half years was clearly impossible since this meant he would have been wrapping up 178 in-depth investigations per month).
336. Id. at 23. The prosecution’s exact words to the jury regarding Walter were that he:

was called in here to tell you about a condition, a pathological psychological condition that he’s aware of from his experience called picquer-ism. You didn’t hear anybody else come in here and tell you, picquerism isn’t a real thing. It isn’t a valid psychological profile. Nobody said that. . . . When we can put an expert on the stand that nobody laid a glove on, in cross examination. That’s where you find out if there’s anything wrong with his opinion.

Id. at 23-24 (quoting Trial Record at 1083).
337. See id. at 12-13. (arguing, “Walter inflicted grave and inestimable damage to the petitioner’s case by tailoring the parameters of his syndrome to the facts of this case,” and noting that Walter’s theory encompassed all circumstances of the crime including the shooting and stabbing of both victims as well as the bite marks and anal penetration inflicted post-mortem on the female victim.).
while not necessarily articulating a permanent standard, drawn sufficient
guidance by analogy to decide the case.\textsuperscript{338}

At the writing of this Article, it remains to be seen how the Drake case
will play out. It is altogether possible that after discovery the district court
will simply find that Drake cannot present sufficient evidence to show that
the prosecutor either had actual knowledge or should have known of
Walter's perjury. In so doing, the district court will likely be forced to
articulate some sort of interpretation of the Agurs standard. The defendant
would then no doubt appeal, and the machinery of justice would most
likely grind to its ultimate conclusion with a final determination at the
circuit court level.

The question of how the Second Circuit Court of Appeals would de-
define the phrase "should have known" or even whether it would choose to
give the standard credence at all, given its statement on dictum, is
intriguing. In the meantime, however, the underlying question, too often
lost in the formalistic preoccupations of the AEDPA habeas inquiry,
remains unanswered—did the defendant receive a fair trial?

The Drake decision, besides having erased Sanders as habeas law, has
cast doubt on Agurs' knew or should have known language, and has
therefore proved to be an influential and much-cited precedent. Labeling
Agurs' language as dictum has already had a significant effect on cases
within the Second Circuit and at least one case within the First Circuit as
well.\textsuperscript{339} An examination of a post-Drake Second Circuit case, Grant v.
Ricks,\textsuperscript{340} provides a pertinent example of how the application of the
AEDPA standard to state-introduced perjury claims, as set forth in Drake,

\textsuperscript{338} Examples of the ample cases in which the Court has addressed a "knew or
should have known" standard, most of them qualified immunity cases concerning alleged
(prison rights context); Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (unlawful
military discharge context); \textit{Id.} at 820-21 (Brennan, J., concurring); Procunier v. Navarette,

\textsuperscript{339} In Bader v. Warden, a murder case, petitioner claimed that the prosecution at
his trial "was reckless or closed its eyes" to the falseness of its star witness's testimony, and
then spirited the witness out of the country after he allegedly recanted his testimony. No.
holding that the "should have known" language of Agurs was "mere dictum," the court
entertained the "should have known" standard as clearly established Supreme Court law for
the purposes of "analysis only." \textit{Id.} The court then held that the fact that the prosecution
might have rushed the witness out of the country "[did] not support [the petitioner's]
inference that the prosecution should have known of [the witness's] false testimony at trial.
..." \textit{Id.}

\textsuperscript{340} Nos. 00-CV-6861 JBW, 03-MISC-0066 JBW, 2003 WL 21847238 (E.D.N.Y.
may now lead to formalistic, undisciplined analyses of facts and unsettling determinations on fairness at trial.

C. GRANT V. RICKS

In Grant v. Ricks, a habeas petitioner convicted of burglary appealed his conviction based upon interrelated claims of insufficiency of evidence and lack of a fair trial flowing from perjured testimony introduced against him at trial. Specifically, the petitioner asserted that the victim of the burglary, Bailey, who lost two video cassette recorders and various other items, testified falsely "that he hardly knew" the defendant when, in fact, he and the defendant "were close social acquaintances."

The prosecution’s case was based on two primary pieces of evidence. First, a neighbor of Bailey’s testified that he had seen the defendant knocking on Bailey’s door, and later disappearing around the corner of the house with a red cart, also stolen from Bailey’s apartment, stuffed with items. In addition to this eyewitness testimony, the prosecution presented evidence of a fingerprint, matching the defendant’s, found on the underside of a cable receiver in the victim’s apartment.

In response, the defense asserted that although the fingerprint was a match, it could easily have been left by the defendant on numerous occasions socializing at Bailey’s apartment or at a previous apartment where Bailey had lived, or when helping Bailey move from one apartment to the other. Additionally, the petitioner pointed to a gaping factual inconsistency in the prosecution’s case concerning Bailey’s claim that he was not on familiar terms with the defendant. Right after the burglary, Bailey showed the neighbor/eyewitness a photograph of the defendant and asked him if the person in the photograph was the one he had seen knocking on the door and hurrying away from the house with the red cart. The neighbor replied that he “thought, but was not certain, that the photograph might be of the man he had seen earlier.”

341. Id. at *2.
342. Id. at *1.
343. Id. at *5.
344. Id. at *4.
346. Id.
347. Id. at *1, *3.
348. Id. at *1.
349. Id.
The United States District Court for the Eastern District of New York, in rejecting the defendant's legal insufficiency claim, acknowledged that "the fact that Bailey had a picture of petitioner which he showed to [the neighbor] would seem to indicate that Bailey and the petitioner knew each other fairly well." Nonetheless, under the applicable standard, the court concluded that, "[c]onstruing all of the evidence in the light most favorable to the People, a reasonable juror could have found petitioner guilty of burglary," because "the fingerprint was [not] the sole piece of evidence."

The court reasoned that the neighbor's testimony that he had seen the defendant, and that "[a] red cart was stolen from Bailey's house," in conjunction with the fingerprint evidence was sufficient to support a verdict of guilty beyond a reasonable doubt. In coming to this conclusion, the court made no mention of the detail, noted earlier in the court's statement of facts, that the neighbor had "thought, but was not certain" of his identification. Nor did the court address anywhere in its opinion the palpable unreliability of the identification due to the fact that it was the victim himself who had shown a single photograph to the neighbor following the crime.

Turning to the petitioner's due process claim on the ground of state-introduced perjury, the court cited the Agurs should have known/ reasonable likelihood standard, yet noted that the Second Circuit in Drake had "declined to draw the contours of the phrase 'should have known.'" The court also noted that the Drake court had "decreed" that Sanders was no longer effective precedent under the AEDPA, and that therefore a habeas writ could not be granted "in the complete absence of prosecutorial knowledge of perjury."

Addressing the facts of Grant, the court declared, quite incredibly and seemingly without much conviction, "[i]t is not obvious that there was any perjury by a prosecution witness: his characterization of the relationship

350. Id. at *3.
351. The court set forth the standard for a showing of insufficient evidence: "Whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Grant, 2003 WL 21847238, at *4 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).
352. Id.
353. Id.
354. Id. at *1.
355. Id. (quoting Drake, 321 F.3d at 345).
356. Id.
might have been, in his own mind, accurate." Alternatively, the court, entertaining arguendo the falsity of Bailey's statement, and the possibility "that petitioner ha[rd] shown that the prosecutor had real or constructive knowledge of the falsity," nonetheless asserted that "petitioner fail[ed] to show that [the] falsity affected the jury's decision." The court dismissed the petitioner's argument that Bailey's alleged perjury was material. That is, if the jury had known Bailey was lying about his relationship with the petitioner, it might have believed that the fingerprint impression was made on a social visit to Bailey's apartment. The court simply responded, "a juror could nonetheless find that the fingerprint was left during the course of the burglary." The court concluded its analysis on the perjury/due process claim by once again stating that there was other evidence besides the fingerprint on which the jury could have relied, namely the eyewitness testimony of the neighbor.

The district court's analysis of the state-introduced perjury claim seemed to turn the Agurs standard on its head. In the aftermath of the Drake ruling, which left the Second Circuit bereft of both a clearly defined "should have known" standard, as well as a clear materiality standard, the district court seemed to be applying the same standard to both the sufficiency of evidence and state-introduced perjury claims—namely, that "a jury could find" that despite the perjury, the petitioner was still guilty. The standard set forth in Agurs, however, and seemingly endorsed by the Second Circuit in Drake, was one of "any reasonable likelihood that the false testimony could have affected the judgment of the jury," not whether the jury could have found as they did despite the perjury.

The Grant decision provides a textbook example of how the application of AEDPA to habeas claims leads not only to formalistic opinions and analyses devoid of policy discussion but also decisions rendered under fuzzy standards. Moreover, in Grant the central question of whether the defendant received basic fairness at trial once again went unanswered. This question could only have been answered by the court if it looked the

358. Id.
359. Id.
360. Id.
361. The Second Circuit cited the "reasonable likelihood" standard twice in Drake, without questioning its applicability, both in laying out the Agurs standard at the onset of its analysis, Drake, 321 F.3d at 345, and in concluding, "[i]f Drake can successfully establish that the prosecution knew or should have known of the perjured testimony, he may be able to establish a 'reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 346 (quoting Agurs, 427 U.S. at 103).
362. Id. at 345 (quoting Agurs, 427 U.S. at 103).
question of perjury squarely in the eye, and, based upon the available
evidence, came to a determination whether perjury occurred.

The evidence of perjury was extremely strong. Under its analysis of
the petitioner's additional third claim for ineffectiveness of counsel, the
court acknowledged that the petitioner had produced affidavits from both
Bailey's current landlord, and from Bailey's former landlord (also
petitioner's landlord when Bailey and the petitioner lived in the same
building) stating that the petitioner and Bailey "were close friends and that
petitioner frequently visited Bailey."363 The court noted that Bailey's
current landlord even went so far as to aver "that petitioner was a 'constant
visitor' to Bailey's apartment."364 The court, though rejecting the
petitioner's ineffectiveness claim under "the high standard enunciated in
Strickland,"365 further acknowledged that the petitioner's attorney's
decision not to interview the landlord witnesses was "perhaps ill-advised in
hindsight."366

Thus, there appears to be little doubt that, far from being a matter that
"might have been, in his own mind, accurate," Bailey's testimony that "he
hardly knew" the petitioner was simply a lie. As a matter of logic, the fact
that Bailey had a photo of the defendant close at hand and was eager to
show it to his neighbor made it exceedingly unlikely that "he hardly knew"
the defendant. Despite this obvious logic, the prosecution presented
Bailey's highly questionable testimony in conjunction with fingerprint
evidence, the relevance of which would have been seriously undermined by
truthful testimony that Bailey knew the defendant very well.

It is likely, then, that under either Sanders or a clearly-defined Agurs
standard, the petitioner in Grant would have had solid grounds for the
issuance of a writ of habeas corpus. After Drake, however, it appears that
there are no clearly-defined federal constitutional restraints on state
prosecutors in the Second Circuit regarding the introduction of perjured
testimony. At least for now, it seems that those prosecutors who choose to
present highly improbable testimony that greatly bolsters their theory of a
case may do so without concern that a resulting conviction will be vacated
on AEDPA review.367

364. Id. (emphasis added).
365. Id. at *6.
366. Id.
367. At the time of this article's publication, the Second Circuit issued an
unpublished decision affirming the district court's dismissal of Grant's habeas petition,
No. 03-2640-CV, 2005 WL 2460121 (2d Cir. Oct. 5, 2005), limited to review of
whether Grant was deprived of his Sixth Amendment right to effective assistance of
counsel, the only issue granted a certificate of appealability by the district court. 2005
VI. CONCLUSION

Under the AEDPA, the "Great Writ" of habeas corpus, once "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,"\(^{368}\) appears to be largely a thing of the past. The notion that "the central mission of the Great Writ should be the substance of 'justice,' not the form of procedures,"\(^{369}\) seems not only antiquated but irrelevant after the amended habeas statute's passage and its subsequent interpretation under the Supreme Court's \textit{Williams} decision.

How hollowly the Warren Court's pre-AEDPA edicts must ring in the ears of federal judges today! For example, what court could now claim: (1) "[Habeas Corpus] is not now and never has been a static, narrow, formalistic remedy,"\(^{370}\) or (2) "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected",\(^{371}\) or (3) "[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements"?\(^{372}\)

WL 2460121, at *1. In its two-page summary order, the Second Circuit did not address Grant's state-introduced perjury claim. Id. at *1-2. The court, in addressing the ineffective counsel claim, stated in regard to non-familial witnesses that Grant's attorney did not call: "[A]lthough their testimony, if believed, would have discredited [the victim's] assertion that he and the petitioner had not socialized since 1989, it would not have established that petitioner had been present in [the victim's] apartment prior to the burglary. . . . these two witnesses were not able to testify as to the petitioner's presence in [the victim's] new apartment prior to the burglary; thus, their testimony was of limited usefulness in providing an innocent explanation for the presence of the petitioner's fingerprint inside [the victim's] new apartment." Id. Curiously, while the court added a fact that the district court chose to leave out, namely that the victim claimed he had not socialized with Grant since 1989, the court omitted the key fact that the lone fingerprint was found on the underside of a cable receiver in the victim's new apartment—not, for example, on a cabinet, windowsill, wall, or other permanent fixture of the apartment. The court also did not mention Grant's argument at trial that the fingerprint could have been left on the receiver when it was in the old apartment, or during the move to the new apartment, which he claimed he helped the victim make. Thus the court's summary order was misleading in suggesting that Grant had to prove he had been in the new apartment in order to explain the presence of the lone fingerprint. In fact, one has to wonder why, if Grant did not wear gloves during the burglary, he would not have left more than one print somewhere in the apartment.

\(^{371}\) Harris, 394 U.S. at 291.
Sadly, there is not much “Great” about the “Writ” anymore, because the federal habeas inquiry, even in the “liberal” Second Circuit, has largely been reduced to a formalistic, even perfunctory exercise in federalist deference. Section 2254(d) cases like *Dallio* and *Drake* demonstrate the amended habeas statute’s narrow and static focus on what the “clearly established” law is, at the expense of reasoned and principled analyses of what the body of constitutional law suggests, recommends, and calls for. Though setting habeas precedents that no doubt will impact the conduct of future state trials, Second Circuit judges seem to be like spectators watching their own decisions unfold—whether they are reluctantly denying relief on habeas review when they “might well have” granted relief on direct appeal, or mechanically carrying out the dictates of § 2254 with surgical dispatch.

Dissenting in *Brown v. Allen*, Justice Black endorsed “the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.” 373 Unfortunately, in this era in which we have become aware that substantial numbers of defendants are being wrongly convicted in state courts, the habeas inquiry itself functions as a rigid “procedural screen,” and the federal courts rarely look beyond that screen to the substantive issues of whether a petitioner was accorded justice under our nation’s Constitution.

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