AEDPA: HABEAS PETITIONS

By: Mark M. Baker[1]

Gauging by the sheer volume of relevant decisions of the federal courts in this Circuit, it appears to be well known -- by practitioners and *pro se* litigants alike -- that owing to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[1] petitions for federal *habeas corpus* review of state convictions are now governed, for the most part, under a far more onerous standard than had existed prior to AEDPA's enactment.[2] Yet, what seemingly remains unappreciated is that this new standard is not mandated in all instances, and that the earlier, less stringent mode of analysis may still be applicable on occasion. This article discusses those instances when pre-AEDPA rules are controlling.

The AEDPA Standard of Review

Under AEDPA, *habeas corpus* applications filed after April 24, 1996, the effective date of the Act,[3] are required to overcome a "high degree of deference"[4] which the federal courts must afford their state counterparts. In so doing, a petition must demonstrate, by clear and convincing evidence,[5] that a federal constitutional claim, which had been *adjudicated on the merits* in state court, "resulted in a decision that was either contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[6]

AEDPA's specific incorporation of rulings by the Supreme Court means just that: a petition which merely demonstrates an unreasonable application of Second Circuit law will not warrant relief.[7] Moreover, clearly established federal law includes only holdings of Supreme Court decisions and not dicta,[8] and a decision is contrary to clearly established federal law if it "contradicts

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the governing law" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from" the Supreme Court.[9]

Alternatively, an unreasonable application of federal law involves more than an incorrect application of Supreme Court holdings. A federal court should review a state court's interpretation of federal law using a standard of "objective reasonableness,"[10] which "includes an unreasonable refusal 'to extend a clearly established, Supreme Court defined, legal principle to situations which that principle should have, in reason, governed.'"[11] The "increment of incorrectness beyond error ... need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence."[12] In practice, these are difficult, if not insurmountable hurdles to overcome.

Contrastingly, when the last state court has **not** "adjudicated" the federal claim "on the merits," these rules go by the wayside. In such event, the federal courts are not required to give deference to state rulings and, instead, they retain the pre-AEDPA power to "review both questions of law and mixed questions of law and fact *de novo.*"[13] Therefore, depending on the mode of analysis employed by the last state court -- in New York, more often than not, the Appellate Division of Supreme Court[14] -- AEDPA may or may not apply.

Adjudicated on the Merits

Analysis of a few select cases demonstrates that the Second Circuit's view of what constitutes an "adjudicat[ion] on the merits" has evolved to the point where the inclusion or exclusion of one or two words in the state court's order may be dispositive. In Washington v. Schriver,[15] the Court had originally held that "adjudicated on the merits" meant that federal "deference [to a state appellate court was only] due when [it], for example, discuss[ed] or at least

cite[d] Supreme Court case law or state court decisions which refer to federal law."[16] This standard, however, was short-lived.[17]

The question was soon revisited in Sellan v. Kuhlman.[18] There, the Court of Appeals concluded that a state court "adjudicate[s]" a claim on the merits "when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment ... even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."[19] In such event, federal courts will

> "determine whether a state court disposition is on the merits by considering (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits."[20]

This revised standard was said to be consonant with the disinclination of federal courts to impose upon state courts "'the responsibility for using particular language in every case in which a state prisoner presents a federal claim.'"[21] Thus, in Sellan, by virtue of the Appellate Division's terse order which indicated that the motion for a writ of error *coram nobis*[22] was "denied," the Second Circuit determined that the petitioner's Sixth Amendment-based ineffective assistance of counsel claim had been adjudicated on the merits. Crucially, acknowledging that the petitioner's claim had validity, the Sellan Court conceded that had the petition been brought in a pre-AEDPA time frame, and hence, were it to have been subject to *de novo* review, it "might well be inclined to grant the writ."[23]

In Jenkins v. Artuz,[24] the District Court, having engaged in a *de novo* review of the state judgment upon its finding that there had not been an adjudication on the merits, found a violation of due process based on the prosecutor's knowing use of false evidence. On appeal, however, applying the new Sellan rule, the Second Circuit found that although the Appellate

Division had ignored the Petitioner's due process claim in affirming the judgment of conviction, nonetheless, by its having rejected all remaining contentions as "without merit," there had indeed been an "adjudicat[ion] on the merits." Jenkins still prevailed, however, because the federal appeals court found that even applying the more stringent AEDPA deference, the manifest due process violation mandated allowance of the writ.

Just a few days ago, in Ryan v. Miller,[25] the Court of Appeals employed an analysis which combined a reading of the Appellate Division's order with a review of the record. Thus, although the Appellate Division had stated that "[t]he defendant's remaining contentions are *either* unpreserved for appellate review *or* without merit[]," (emphasis in original), the court determined that AEDPA deference was owing because the specific claim in issue clearly was among those which had been properly preserved.

Not Adjudicated on the Merits

On the other hand, in Rudenko v. Costello,[26] the Circuit Court observed that "[i]f it cannot be determined from the state-court opinion whether the denial of a given claim was based on a procedural ground rather than on the merits, no AEDPA deference is due the state-court decision on that claim." Therefore, a federal "court should review *de novo* rather than give AEDPA deference to state court on evidentiary determination[s] where it was 'impossible to discern the Appellate Division's conclusion on [the] issue.'"[27]

Manifesting this concept, and in striking contrast to the results reached in Sellan and Jenkins, is the recent case of Norde v. Keane.[28] Acting *pro se*, Petitioner Alfred Norde raised several issues that had been exhausted in state court. Included, was the contention that the state trial judge's denial of his attorney's request for an adjournment to consult with him upon his removal from the courtroom for disruptive behavior, and the judge's communication with Petitioner through a court

officer rather than through counsel as to whether he wished to return to the courtroom, was an impermissible denial of the prisoner's right to counsel. The Appellate Division, only addressing the other issues, had affirmed the judgment without even making reference to this Sixth Amendment claim.[29]

The District Court denied the subsequently filed petition for a writ of *habeas corpus*. On appeal, however, the Second Circuit found, *inter alia*, that "[b]ecause the Appellate Division never indicated in any way that it had considered Norde's Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA's new, more deferential standard of review does not apply."[30] Instead, the Court ruled that "because the merits of Norde's Sixth Amendment claims were not adjudicated in the state courts on direct review or otherwise, we review his claims *de novo.*"[31]

Based on this far less rigorous standard, the Court found that there had indeed been a "denial of counsel at a critical stage of the proceedings."[32] Thus, because "Norde was deprived of both his right to participate in jury selection and his opportunity to make an informed decision as to whether to return to the courtroom[],"[33] the Court of Appeals, reversing, granted the writ.

Conclusion

For purposes of determining whether pre- or post-AEDPA analysis will control the determination of a *habeas* petition, careful examinations of the record, the state court's decision, and certainly the decretal paragraph of the order of affirmance, are crucial. Although a state appellate court's finding of constitutional issues to be "meritless" will impel subsequent federal deference, an unclear determination of the issue's being "either meritless or unpreserved" will preclude the invocation of AEDPA's provisions.

Moreover, with the high volume of litigation in the several departments of the

Appellate Division, there are frequent instances when crucial issues are simply overlooked, with any review thereof remaining completely unreflected in the court's order. In such event, deference is not owed to state courts and the federal *habeas* courts remain empowered to conduct *de novo* reviews. As Norde well demonstrates, such a lack of any due deference very well dictate whether a petitioner remains incarcerated or is set free.

1. Pub.L. No. 104-132, 110 Stat. 1214

2. *See* 28 U.S.C. §2254(d).

3. *See* Pavel v. Hollins, 261 F.3d 210, 215 (2d Cir.2001).

4. Brown v.Artuz, 283 F.3d 492, 497 (2d Cir. 2002)

5. Yung v. Walker, ___F.3d___, __, 2002 WL 1393902, *4 (2nd Cir. June 27, 2002)

6. *Id.*, citing 28 U.S.C. §2254(d)(1).

7. Yung v. Walker, *supra*, citing Mask v.McGinnis, 252 F.3d 85, 90 (2d Cir. 2001).

8. Williams v. Taylor, 529 U.S. 362 (2000)

9. *Id.*, 519 U.S. at 405-06.

10. *Id.,* 519 U.S. at 409-12.

11. Yung v. Walker, *supra*, quoting Kennaugh v. Miller, 289 F.3d 36, 45 & n. 2 (2d Cir.2002).

12. Yung v. Walker, *supra*, quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir.2000) (internal quotation marks omitted).

13. Norde v. Keane, 294 F.3d 401, 409 (2nd Cir. 2002).

14. According to the 2001 Annual Report of the Court of Appeals, of the 2840 CPL §460.20(2)(a)(i) Criminal Leave Applications decided by the seven judges, there were 43 grants, amounting to 1.5%.

15. 240 F.3d 101, 108-09 (2d Cir.2001), *withdrawn*, 255 F.3d 45 (2d Cir. 2001).

16. Jenkins v. Cruz, 294 F.3d 284,291 (2d Cir. 2002), quoting Washington v. Schriver, *supra*, 240 F.3d at 109.

17. Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001).

18. 261 F.3d 303, 312 (2d Cir.2001).

19. *Id*.

20. 261 F.3d at 314, quoting Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir.1999).

21. 261 F.3d at 312, quoting Coleman v. Thompson, 501 U.S. 722, 739 (1991).

22. *See gen.* People v. Bachert, 69 N.Y.2d 593, 516 N.Y.S.2d 623 (1987).

23. 261 F.3d at 310.

24. 294 F.3d 284 (2d Cir. 2002).

25. __F.3d__, 2002 WL 1980445 (2nd Cir. Aug. 28, 2002).

26. 286 F.3d 51, 69 (2d Cir.2002).

27. *Id.*, quoting Boyette v. Lefevre, 246 F.3d 76, 89, 91 (2d Cir.2001).

28. 294 F.3d 401, 2002 WL 483488 (2nd Cir. 2002).

29. People v. Norde, 186 A.D.2d 456 , 589 N.Y.S.2d 32 (1st Dept. 1992), *lv. denied*, 81 N.Y.2d 844, 595 N.Y.S.2d 744 (1993), *reh. denied,* 81 N.Y.2d 974, 598 N.Y.S.2d 776 (1993).

30. Norde v. Keane, *supra*, 294 F.3d at 410.

31. *Id.*

32. Norde v. Keane, *supra*, 294 F.3d at 415.

33. *Id.*