

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2009

(Argued: November 30, 2009

Decided: July 14, 2010)

Docket No. 09-2335-pr

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JOHNNY GUEITS,

Petitioner-Appellee

-- v. --

ROBERT KIRKPATRICK,

Respondent-Appellant,

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Before: WALKER, McLAUGHLIN, and RAGGI, Circuit Judges.

Respondent Robert Kirkpatrick, Superintendent of New York State's Wende Correctional Facility, appeals from the judgment of the United States District Court for the Eastern District of New York (Brian M. Cogan, Judge) granting Johnny Gueits's petition for a writ of habeas corpus. Exercising de novo review, we hold that Gueits has failed to demonstrate that the New York Supreme Court, Appellate Division, was unreasonable in its application of the ineffective assistance of counsel standard set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Accordingly,

1 we REVERSE the district court's judgment and REMAND with  
2 instructions to dismiss the petition.

3 REVERSED and REMANDED.

4 LYNN W.L. FAHEY,  
5 Appellate Advocates, New  
6 York, N.Y., for  
7 Petitioner-Appellee.  
8

9 EDWARD D. SASLAW,  
10 Assistant District  
11 Attorney, Queens County  
12 (Gary S. Fidel, Jill  
13 Gross-Marks, on the  
14 brief), for Richard A.  
15 Brown, District Attorney,  
16 Queens County, Kew  
17 Gardens, N.Y., for  
18 Respondent-Appellant.  
19

20 JOHN M. WALKER, JR., Circuit Judge:

21 Respondent Robert Kirkpatrick, Superintendent of New York  
22 State's Wende Correctional Facility, appeals from the judgment of  
23 the United States District Court for the Eastern District of New  
24 York (Brian M. Cogan, Judge) granting Johnny Gueits's petition  
25 for a writ of habeas corpus. Exercising de novo review, we hold  
26 that Gueits failed to demonstrate that the New York Supreme  
27 Court, Appellate Division, was unreasonable in its application of  
28 the ineffective assistance of counsel standard set forth in  
29 Strickland v. Washington, 466 U.S. 668, 687 (1984). Accordingly,  
30 we reverse the district court's order granting Gueits's petition  
31 and remand with instructions that the petition be dismissed.  
32

1 **BACKGROUND**

2 In the early hours of July 4, 2001, a woman was assaulted in  
3 the Harvard playground at 179th Place and Jamaica Avenue in  
4 Queens County, New York. Police officers and emergency medical  
5 personnel arrived at the scene at approximately 5:30 a.m. after  
6 Sunnita Jagpal called 911, from her apartment overlooking the  
7 playground, to report an ongoing assault. Police found the  
8 victim lying on the ground, naked, and seriously injured. At  
9 trial, an emergency medical technician testified that the victim  
10 told him that she had been raped by the same man who had beaten  
11 her; in a deposition, the arresting officer stated that the  
12 victim said the same thing to the nurse who treated the victim  
13 when she arrived at the hospital.<sup>1</sup>

14 Moments after finding the victim, police saw Gueits in  
15 another part of the playground with blood - later determined to  
16 be the victim's - on his shoes. An officer brought Gueits to the  
17 victim as she was awaiting transport to a hospital and asked her  
18 if Gueits was the man who had attacked her. The victim responded  
19 affirmatively by nodding her head. Gueits was arrested and taken  
20 to a police precinct where he agreed to answer questions. Gueits  
21 said that he had spent the evening of July 3 and the early

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<sup>1</sup> At trial, the victim denied having made these statements and testified that she only indicated to the police that Gueits "was there" during the attack. Trial Tr., 589:6-19, Apr. 2, 2002.

1 morning of July 4 at a bar with a friend, and that he and his  
2 friend went to the Harvard playground some time after 1:30 a.m.  
3 Gueits stated that, while he and his friend were there, an  
4 Hispanic woman entered the playground with a black man. He  
5 stated that the man attacked the woman. The woman then ran to  
6 Gueits, but Gueits pushed her away. After making that statement,  
7 Gueits provided the police with a sample of his DNA and his  
8 clothing.

9 Gueits was originally charged with both rape and assault.  
10 The prosecution later dropped the rape charge for lack of  
11 evidence. In particular, the DNA from semen found on the victim  
12 did not match Gueits's DNA. Thus, the state tried Gueits solely  
13 on the assault charge. He was convicted of first degree assault  
14 and sentenced to fifteen years of incarceration.

15 Gueits appealed his conviction to the New York Supreme  
16 Court, Appellate Division, claiming: insufficient evidence to  
17 support his conviction, erroneous admission of impeachment  
18 evidence, the use of impeachment evidence as evidence-in-chief,  
19 prosecutorial misconduct, and ineffective assistance of counsel.  
20 His ineffective assistance claim was based on the following  
21 claims that his trial counsel: 1) failed to present evidence of  
22 the DNA match between the semen found on the victim and that of a  
23 black male wanted for the rape of a thirteen-year-old girl in  
24 Maryland, notwithstanding trial counsel's awareness of this

1 evidence prior to trial; 2) failed to properly object to grand  
2 jury testimony that the prosecution used to impeach Sunnita  
3 Jagpal's credibility; 3) failed to request a limiting instruction  
4 with respect to the introduction of this impeachment evidence;  
5 and 4) failed to object to alleged prosecutorial misconduct.<sup>2</sup>

6 The Appellate Division denied Gueits's appeal in a brief order.  
7 People v. Gueits, 781 N.Y.S.2d 916 (N.Y. App. Div. 2004).

8 Gueits then sought leave to appeal to the New York Court of  
9 Appeals on two grounds. First, he argued that the prosecution  
10 should not have been permitted to impeach Jagpal with her prior  
11 grand jury testimony. Second, he argued that his trial counsel  
12 had been ineffective in: 1) failing to present the DNA match  
13 evidence; 2) failing to properly object to the introduction of  
14 the grand jury impeachment evidence; and 3) acquiescing in the  
15 jury's consideration of that impeachment evidence as evidence-in-  
16 chief. Leave to appeal was denied. People v. Gueits, 824 N.E.2d  
17 58 (N.Y. 2004).

18 Gueits then filed a timely habeas corpus petition in the

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<sup>2</sup> With respect to prosecutorial misconduct, Gueits claimed that the prosecutor 1) suggested that Jagpal had been threatened by Gueits and his family; 2) knowingly advocated for a false position, i.e., Gueits's guilt; 3) suggested that Gueits was obligated to testify in his defense; 4) interjected his personal disbelief in Gueits's version of events; 5) suggested that Gueits was guilty of rape; 6) misrepresented the law to the jury in suggesting that Gueits could be convicted for failing to intervene in the attack on the victim; and 7) attempted to inflame the jury.

1 U.S. District Court for the Eastern District of New York, arguing  
2 that the Appellate Division had unreasonably applied the  
3 Strickland standard for determining ineffective assistance of  
4 counsel. Reiterating his previous arguments, Gueits claimed that  
5 his trial counsel was ineffective in failing to put forth  
6 evidence of the DNA match, in failing to properly object to the  
7 impeachment of Jagpal, and in failing to request a limiting  
8 instruction with respect to the impeachment testimony.  
9 Magistrate Judge Orenstein found that these grounds for relief  
10 were properly exhausted and warranted habeas relief. Gueits also  
11 claimed that his trial counsel was ineffective in failing to  
12 object to the prosecutor's injection of his personal views on  
13 Jagpal's credibility during Jagpal's examination and in failing  
14 to object to improper statements made by the prosecutor in  
15 summation. The magistrate judge assumed that these last two  
16 grounds were properly exhausted, but found that, standing alone,  
17 they did not warrant the requested relief. The district court  
18 adopted the magistrate judge's report and recommendation in full,  
19 issued the writ, and ordered the State to retry Gueits within  
20 forty-five days or release him from custody. Gueits v.  
21 Kirkpatrick, 618 F. Supp. 2d 193, 198 (E.D.N.Y. 2009).

22 The respondent appealed.  
23  
24



1 performance was deficient and that prejudice resulted from the  
2 deficient performance. Id. at 687. To establish the former, the  
3 petitioner must show that "counsel's representation fell below an  
4 objective standard of reasonableness." Id. at 668. We have  
5 recognized, however, that "[u]nder Strickland, there is a 'strong  
6 presumption that counsel's conduct falls within the wide range of  
7 reasonable professional assistance.'" Palacios, 589 F.3d at 561  
8 (quoting Strickland, 466 U.S. at 689). To establish prejudice,  
9 the petitioner "must show that there is a reasonable probability  
10 that, but for counsel's unprofessional errors, the result of the  
11 proceeding would have been different." Strickland, 466 U.S. at  
12 694. "Furthermore, on habeas appeal it is not enough for  
13 [Gueits] to show a constitutional violation. He must also show  
14 that the state court's application of Strickland was not merely  
15 incorrect, but objectively unreasonable." Palacios, 589 F.3d at  
16 561-62 (internal quotation marks omitted); see also Brisco v.  
17 Ercole, 565 F.3d 80, 87-88 (2d Cir. 2009) ("A federal habeas  
18 court cannot issue the writ simply because that court concludes,  
19 in its independent judgment, that the state court applied clearly  
20 established federal law erroneously or incorrectly; conflating  
21 'unreasonableness' with 'clear error' is improper because [t]he  
22 gloss of clear error fails to give proper deference to state  
23 courts." (internal quotation marks and citations omitted,  
24 alteration in original)).

1 For the reasons that follow, we find that the Appellate  
2 Division's denial of Gueits's ineffective assistance claims did  
3 not constitute an unreasonable application of the Strickland  
4 standard for each of his trial counsel's alleged failures.

5  
6 **I. Trial Counsel's Failure to Object to the Use of Impeachment**  
7 **Evidence**  
8

9 The respondent argues that the Appellate Division reasonably  
10 applied Strickland with respect to Gueits's claim that his trial  
11 counsel failed to properly object to the introduction of grand  
12 jury testimony used to impeach the prosecution's witness, Sunnita  
13 Jagpal. The district court determined that Jagpal's grand jury  
14 testimony prejudiced Gueits's defense by undermining her trial  
15 testimony that she was unable to identify Gueits as the victim's  
16 attacker.

17 At trial, Jagpal testified that she did not know the  
18 defendant or his family. She testified that, on July 4, 2001,  
19 she saw a woman and two men sitting in the playground when she  
20 arrived home around 4:00 a.m. Jagpal testified that around 5:00  
21 a.m. she heard screaming from the playground, and that from her  
22 apartment window she saw "someone there . . . kicking" the  
23 victim. Trial Tr., 433:5-6, Apr. 2, 2002. She testified that  
24 there was one person kicking the victim, that she could no longer  
25 see a second man, and that she saw the attacker kick the victim  
26 four or five times, but was unable to describe the attacker

1 because the playground was dark.

2 After eliciting that testimony, the prosecution attempted,  
3 over objections by Gueits's counsel, to contradict portions of  
4 Jagpal's trial testimony with statements she made to the grand  
5 jury. Specifically, while Jagpal testified at trial that she had  
6 not known anyone named John Gueits, before the grand jury she  
7 indicated that she did know someone by that name. The  
8 prosecution then read to Jagpal a portion of her grand jury  
9 testimony in which, contrary to her trial testimony, she stated  
10 that she saw "John Gueits" kick the victim about "7, 10 times."  
11 Id., 445:12-16. Finally, Jagpal's trial testimony that she was  
12 unsure if the man she saw sitting on a park bench in the  
13 playground was the same man that had attacked the victim was  
14 contradicted by grand jury testimony in which she stated that she  
15 had told the 911 dispatcher that she was observing the police  
16 speaking to the attacker as he sat on a park bench.

17 New York Criminal Procedure Law § 60.35(1) states:

18 When, upon examination by the party who called him, a  
19 witness in a criminal proceeding gives testimony upon a  
20 material issue of the case which tends to disprove the  
21 position of such party, such party may introduce  
22 evidence that such witness has previously made either a  
23 written statement signed by him or an oral statement  
24 under oath contradictory to such testimony.  
25

26 Gueits's counsel, after having reviewed the language of that  
27 statute with the trial court, objected to the introduction of  
28 Jagpal's grand jury testimony on the ground that there was no

1 "contradiction to her testimony." Trial Tr., 440:15, Apr. 2,  
2 2002. The trial court disagreed, stating that "[i]f she now  
3 gives testimony [that] she doesn't know whatever, can't see, that  
4 is material testimony which tends to disprove the People's  
5 position . . . that the defendant was the person [who attacked  
6 the victim]." Id., 441:6-9. Gueits's counsel argued that the  
7 witness's reluctance to testify was insufficient to establish a  
8 basis for impeachment under § 60.35(1), but the trial court  
9 rejected this argument. Id., 441:22-442:7.

10 Gueits argues that his trial counsel failed to lodge the  
11 proper objection to Jagpal's impeachment, namely that Jagpal's  
12 trial testimony did not "tend to disprove" the prosecution's  
13 position. As Gueits asserts, § 60.35(1) only permits impeachment  
14 where the trial testimony of a witness "affirmatively damage[s]"  
15 the case of the party calling that witness. Gueits Br. at 45  
16 (citing People v. Fitzpatrick, 40 N.Y.2d 44, 52 (1976) (holding  
17 that the testimony of a witness who states that he cannot recall  
18 the events in question does not "tend to disprove" the  
19 prosecution's case)).

20 The propriety of the trial court's decision to admit  
21 Jagpal's grand jury testimony is not the issue before us on  
22 habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)  
23 ("[I]t is not the province of a federal habeas court to reexamine  
24 state-court determinations on state-law questions."); Hawkins v.

1 Costello, 460 F.3d 238, 244 (2d Cir. 2006). Our inquiry is  
2 limited to 1) whether Gueits's trial counsel failed to raise a  
3 proper objection on the basis of applicable state law; 2) if so,  
4 whether that failure was objectively unreasonable and prejudicial  
5 to Gueits's defense; and 3) whether the Appellate Division  
6 unreasonably applied Strickland in answering those questions in  
7 the negative.

8 Assuming that Gueits's counsel in fact failed to properly  
9 object on the grounds that Jagpal's trial testimony had not  
10 tended to disprove the prosecution's position, the Appellate  
11 Division reasonably concluded that such a failure did not  
12 prejudice Gueits's defense. This is so because it was reasonable  
13 to conclude that any such objection would have been overruled by  
14 the trial court in this case. The trial court, after reading  
15 § 60.35(1) aloud to Gueits's trial counsel at sidebar, concluded  
16 that Jagpal's trial testimony met the standard provided in that  
17 statute. Specifically, the trial court noted that Jagpal's trial  
18 testimony that she was unable to see into the playground and did  
19 not know whether Gueits was the attacker was contradicted by her  
20 grand jury testimony. Trial Tr., 441:6-11, Apr. 2, 2002. It is  
21 clear from the trial record that the trial court understood the  
22 requirements of § 60.35(1), and, specifically, its prerequisite  
23 of trial testimony tending to disprove the case of the party  
24 attempting the impeachment. Thus, although Gueits's counsel

1 never voiced the specific objection on which Gueits now relies,  
2 it is apparent that had such an objection been made, it would  
3 have been overruled. Assessing the propriety of such a ruling is  
4 a task left to the state courts, see Hawkins, 460 F.3d at 244,  
5 and for that reason we cannot conclude that the Appellate  
6 Division unreasonably applied Strickland's prejudice prong with  
7 respect to any failure by counsel to object to the admission of  
8 Jagpal's grand jury testimony.

9  
10 **II. Gueits's Counsel's Failure to Request a Limiting Instruction**  
11 **With Respect to Impeachment Evidence**

12  
13 Gueits was entitled to a limiting instruction that Jagpal's  
14 grand jury testimony was to be considered by the jury only with  
15 respect to its impeachment value and not as direct evidence of  
16 Gueits's guilt. See N.Y. Crim. Proc. Law, § 60.35(2).<sup>3</sup> Gueits's  
17 counsel, however, did not request such an instruction at the time  
18 of the introduction of Jagpal's grand jury testimony or prior to  
19 the trial court's final jury charge. The district court  
20 determined that the Appellate Division unreasonably failed to  
21 conclude that this lapse by trial counsel - in not requesting a

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<sup>3</sup> "Evidence concerning a prior contradictory statement introduced pursuant to [§ 60.35(1)] may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury." N.Y. Crim. Proc. Law, § 60.35(2).

1 limiting instruction - constituted ineffective assistance under  
2 Strickland.

3 Although Gueits was entitled to a limiting instruction under  
4 state law, we cannot conclude that the Appellate Division  
5 unreasonably applied Strickland's prejudice prong with respect to  
6 trial counsel's failure to request such an instruction, either at  
7 the time of the testimony's presentation or prior to the final  
8 jury charge. Considerable direct evidence inculpated Gueits in  
9 the charged crime. Specifically, police responding to the 911  
10 call testified that Gueits was the only other person in the  
11 playground when the body of the beaten victim was found. At that  
12 time, the victim's blood was on Gueits's shoes. Before leaving  
13 the playground, the victim identified Gueits as her assailant.<sup>4</sup>  
14 Further, in a post-arrest statement, Gueits admitted knowledge of  
15 the beating and interacting with the victim in the playground,  
16 though his exculpatory account of his own actions and explanation  
17 for how he came to have the victim's blood on him did not comport  
18 even with Jagpal's trial testimony, much less with her grand jury  
19 testimony. In light of this record strongly signaling Gueits's  
20 guilt, it was not unreasonable for the Appellate Division to  
21 conclude that failure to give a limiting instruction about the  
22 proposed use of Jagpal's grand jury testimony was not a

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<sup>4</sup> The reliability of this identification was challenged at trial, but not the fact that it was made.

1 sufficiently serious omission "as to deprive the defendant of a  
2 fair trial, a trial whose result is reliable." Strickland, 466  
3 U.S. at 687.

4 Although, as Gueits argues, New York law recognizes that  
5 jurors can understand the importance of distinguishing  
6 impeachment evidence from evidence in chief, see § 60.35(2), we  
7 reiterate that our review is not focused on the proper  
8 application of New York law. Our task is limited to assessing  
9 whether the Appellate Division unreasonably applied Strickland in  
10 determining that the absence of a limiting instruction was not  
11 prejudicial, even assuming that the state courts erroneously  
12 applied state law. See Hawkins, 460 F.3d at 244; see also  
13 Brisco, 565 F.3d at 87-88. We believe the Appellate Division's  
14 application of Strickland to trial counsel's failure to request  
15 this limiting instruction was reasonable.

16  
17 **III. Trial Counsel's Alleged Failure to Present DNA Match**  
18 **Evidence**

19  
20 The respondent challenges the district court's holding that  
21 the Appellate Division unreasonably failed to find that his trial  
22 counsel was constitutionally ineffective in failing to present  
23 evidence that the DNA recovered from the victim matched that of  
24 an unknown black male suspected of having committed a rape in  
25 Maryland. Gueits argues that this evidence would have been  
26 exculpatory in that Sunnita Jagpal had testified that she saw

1     only one man attacking the victim,<sup>5</sup> and that the victim had made  
2     two statements indicating that the same person who had assaulted  
3     her had also raped her. Gueits also argues that this evidence  
4     would have corroborated his initial statement to the police that  
5     he had seen the victim enter the Harvard playground accompanied  
6     by a black male.

7             Prior to trial, Gueits's counsel learned from the  
8     prosecution that the DNA in the semen recovered from the victim  
9     matched that of a man wanted for rape in Maryland. Counsel for  
10    each side thereafter agreed to a stipulation that "the result [of  
11    the DNA test] is that the semen that is recovered does not match  
12    [Gueits's DNA]." Trial Tr., 354:16-21, March 25-27, 2002. The  
13    prosecution, during a conference regarding the instructions and  
14    stipulations to be read to the jury, reaffirmed this stipulation  
15    when it further stipulated that Gueits's friend with whom he  
16    spent the morning of July 4, 2001 was not the source of the DNA.  
17    The prosecution, however, refused to stipulate that the DNA was  
18    that of a black male wanted for rape in Maryland despite  
19    information from Maryland investigators that the DNA matched that  
20    of such a person. Trial Tr., 676-77, Apr. 2, 2002. Despite  
21    having knowledge of the existence of this evidence, Gueits's

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<sup>5</sup> As explained above, supra Part I, Jagpal was impeached on the stand through the use of her prior grand jury testimony, but that impeachment did not contradict her statement that only one person attacked the victim. Trial Tr., 444-50, Apr. 2, 2002.

1 counsel made no attempt to contact the Maryland authorities and  
2 made no preparations to present that evidence in the event the  
3 prosecution refused to stipulate to the DNA match.

4 Even assuming that unjustified reliance on the possibility  
5 of a stipulation as to the DNA evidence, coupled with the absence  
6 of any attempt to independently present such evidence,  
7 constitutes a constitutionally deficient performance by trial  
8 counsel, we hold that the Appellate Division reasonably applied  
9 Strickland's prejudice prong with respect to the DNA match  
10 evidence. In order for Gueits's trial counsel's deficient  
11 performance to have prejudiced Gueits, the DNA match evidence  
12 would have to have been admissible under New York's evidentiary  
13 rules. Hawkins, 460 F.3d at 243-44. Under New York law, the  
14 admissibility of evidence of third-party culpability is reviewed  
15 "under the general balancing analysis that governs the  
16 admissibility of all evidence," which takes into account risks of  
17 "prejudice, delay and confusion," People v. Primo, 753 N.E.2d  
18 164, 168 (N.Y. 2001); see also id. at 169 ("The admission of  
19 evidence of third-party culpability may not rest on mere  
20 suspicion or surmise."), and lies within the discretion of the  
21 trial judge, id. at 167.

22 The Appellate Division could have reasonably concluded that  
23 the DNA match evidence would not have been admitted under this  
24 balancing test. Initially, any advantage to Gueits of presenting

1 the fact of the DNA match would have been incremental in light of  
2 the stipulation actually presented to the jury that the DNA  
3 recovered from the victim belonged to someone other than Gueits.  
4 This factual overlap consequently lowers the probative value of  
5 an independent introduction of the DNA match evidence.

6 Gueits also suggests that the match of the DNA with that of  
7 a suspected rapist makes more likely his claim that another man  
8 raped the victim. The DNA match evidence, however, implicated a  
9 person who, while suspected of rape, had not been convicted,  
10 again lowering its probative value. In addition, the parties  
11 presented conflicting evidence as to whether the victim here was  
12 raped and assaulted by the same man: police reports and emergency  
13 medical technician testimony indicating that the victim stated  
14 that she was raped by the same person who assaulted her; the  
15 victim's trial testimony that she did not make those statements  
16 and that she had meant to indicate only that Gueits was present  
17 when she was raped; and, finally, the victim's trial testimony  
18 that she had no memory of having been raped.

19 Lastly, the admissibility of the Maryland evidence was  
20 reasonably in doubt on the basis of jury confusion, particularly  
21 when coupled with its questionable probative value in a case that  
22 charged only assault. The evidence could have exculpated Gueits  
23 only if he established that a single person had both assaulted  
24 and raped the victim. As indicated above, however, the evidence

1 was nowhere conclusive on this point.

2 Jagpal testified to hearing screams while the victim was  
3 with two men, and, while the victim's blood was on Gueits's  
4 shoes, it was stipulated that semen recovered from the victim was  
5 not Gueits's. In this situation, the trial court faced a  
6 significant possibility of jury confusion as to the facts  
7 necessary for a conviction of the assault. Specifically, the  
8 jury could have been confused as to whether it needed to find  
9 that Gueits was implicated in a contemporaneous rape of the  
10 victim, even though the prosecution was under no obligation to  
11 establish that such a rape occurred and the evidence at trial  
12 admitted to the possibility, indeed the probability, of Gueits  
13 having assaulted the victim and another having had intercourse  
14 with her, forcibly or otherwise. Additional confusion could  
15 reasonably have arisen from the fact that the DNA match was to a  
16 person who was only accused of rape; admission of that evidence  
17 would have invited an argument in rebuttal that in fact there had  
18 been no rape in Maryland, leading to a confusing and cumbersome  
19 de facto trial of that issue within this case.

20 Given the broad discretion available to a trial court in  
21 properly balancing the probative value of proffered evidence  
22 against the risks of confusion and prejudice, there is no basis  
23 to conclude that the DNA match evidence necessarily would have  
24 been admissible at trial. See Hawkins, 460 F.3d at 243 ("[T]he

1 range of judgments that can be deemed reasonable may vary with  
2 the nature of the rule in question. The more general the rule,  
3 the more leeway courts have in reaching outcomes in case by case  
4 determinations.” (internal quotation marks and citations  
5 omitted)). In light of the considerable leeway inherent in  
6 assessing a state court’s balancing determination, viewed through  
7 the prism of the deference appropriately accorded to state courts  
8 on federal habeas review, we cannot conclude that the Appellate  
9 Division’s application of Strickland was unreasonable with  
10 respect to trial counsel’s failure to present independent  
11 evidence of the DNA match.

#### 13 **IV. Gueits’s Remaining Challenges**

14 Gueits’s habeas petition further claims that his trial  
15 counsel was ineffective in failing to object to the prosecutor’s  
16 statement of his personal views of the evidence during his  
17 examination of Jagpal and to improper statements made by the  
18 prosecutor during summation. Neither ground for relief was  
19 presented in Gueits’s letter seeking review by the New York Court  
20 of Appeals, and, therefore, each is procedurally defaulted. See  
21 28 U.S.C. § 2254(b)(1); Jimenez v. Walker, 458 F.3d 130, 148-49  
22 (2d Cir. 2006). A petitioner may overcome procedural default  
23 only with a demonstration of “cause and prejudice” or a  
24 “fundamental miscarriage of justice,” see Murray v. Carrier, 477

1 U.S. 478, 495-97 (1986), neither of which is met in this case.

2  
3 **CONCLUSION**

4 For the foregoing reasons, we REVERSE the district court's  
5 judgment granting Gueits's petition for a writ of habeas corpus  
6 and REMAND with instructions to dismiss the petition.