No.

IN THE
SUPREME COURT OF THE UNITED STATES

Franklin McPherson,

PETITIONER

v.

William Keyser, Jr., Superintendent, Sullivan Correctional Facility,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

Jamesa J. Drake
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com
Counsel of Record

Questions Presented

1. Does de novo review or AEDPA deference apply when a habeas petitioner advances a claim of ineffective assistance of counsel as cause to excuse a procedural default?

2. When a state court rules that a claim is procedurally defaulted and "in any event" not meritorious, will this Court presume that the claim was adjudicated on the merits?

List of Parties

All parties appear in the caption of the case on the cover page.

Petition for a Writ of Certiorari

Petitioner Franklin McPherson respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Opinion Below

The summary order of the Second Circuit under review is reported at 2021 WL 4452078 (2d Cir. Sept. 29, 2021).

Statement of Jurisdiction

The Second Circuit issued its summary order on September 29, 2021. On October 13, 2021, McPherson timely filed a petition for rehearing, or in the alternative, for rehearing *en banc*. (CA2 Dkt. No. 108). On November 19, 2021, the Second Circuit summarily denied McPherson's petition. The time within which to file a petition for certiorari extends until February 17, 2022.

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Statement of the Case

I. The Island Rock nightclub

In the early morning hours of October 19, 2007, McPherson and his cousin, Roman Taylor, traveled in McPherson's Lexus to the Rock Island nightclub in Hempstead, New York. (Tr. 838, 847). There, they met up with McPherson's girlfriend, Crystal Green, and Green's friend, Delroy McCalla. (Tr. 833).

At around 3:15 a.m., the group went outside to the parking lot. (Tr. 850-851). McCalla testified that McPherson looked "okay" and he "didn't seem drunk." (Tr. 853). Taylor, on the other hand, looked "pretty wasted" and McCalla and McPherson had to help him walk. (Tr. 851, 853-54).

Soon thereafter, McPherson realized he lost something, searched for it, and grew angry when he was unable to find what he was looking for. (Tr. 857, 859, 863). Things started to unravel from there, and McCalla decided it was time to leave. (Tr. 865). The group put Taylor in the backseat of McPherson's car. (Tr. 870-74). McCalla got into his own car, and he waited for Green, who was arguing with McPherson. (Tr. 866-67, 869, 873). At the time, McPherson was searching for something in the trunk of his car. (Tr. 866-67). McCalla heard three gunshots, but

never saw anything in McPherson's hands. (Tr. 874-75, 880). McCalla and Green left. (Tr. 877-79). Eventually, the police went to the nightclub to investigate a report about shots being fired, and they found five 9-millimeter shell casings in the parking lot. (Tr. 884-88).

II. The driving

At around 3:30 a.m., several witnesses saw McPherson's Lexus driving westbound on the eastbound lane of Southern State Parkway. (*See e.g.* Tr. 1026, 1065, 1150). Witnesses said that the driver of the car maintained its lane, while driving anywhere from 70 to 80 miles per hour. (*See e.g.* Tr. 432, 1152-53, 1167, 1216; 1044, 1069, 1167). One witness missed being hit by the Lexus by mere inches, and he had to swerve to get out of the way; the Lexus appeared to make no effort to slow down or avoid other cars. (Tr. 1153, 1167-68, 1273). One witness, who was driving a Mack truck, blew his air horn, but the Lexus made no adjustment; it didn't slow down. (Tr. 1058, 1074-75).

The record is devoid of any evidence about precisely how the Lexus entered the Southern State Parkway, but on the exit ramp nearest the nightclub, there are "Do Not Enter" signs and two "Wrong-Way" signs. (Tr. 1208). On the Parkway, between that ramp and the location of the

accident, there were eight "Wrong-Way" signs. (Tr. 988-89). On that route, the Lexus would have driven by the blank, gray backs of 21 large signs intended for eastbound drivers. (Tr. 988-94).

Near Exit 13 on the eastbound side of the Parkway, witnesses driving behind a Jeep Grand Cherokee saw the Jeep explode and flip airborne in front of them. (Tr. 442, 1216-17). An accident reconstructionist determined that the crash was consistent with a head-on collision, and there was no evidence of breaking by either the operator of the Jeep or the Lexus. (Tr. 1116). The Jeep caught fire, and was quickly engulfed in flames. (Tr. 446, 506). In due course, Patricia Burgess identified the badly burned remains of her brother, Leslie Burgess, as the decedent driver of the Jeep. (Tr. 670).

The Lexus was badly damaged, as well. McPherson was in the driver's seat, trapped by the dashboard and steering column, which pushed against his lap; he was bloody and barely conscious. (Tr. 479, 482). Taylor was in the backseat, conscious, but not "getting up." (Tr. 880). The car smelled of alcohol; McPherson smelled of alcohol, too. (Tr. 965-66, 1265, 1308). McPherson's blood alcohol content, about an hour after the accident, measured .19%. (Tr. 701). This works out to about

ten drinks for the "average" person (for a male, that's someone who is five foot ten inches, and one hundred and eighty pounds). (Tr. 707-8). A person McPherson's size, which is larger than "average," would take about "eleven or twelve" drinks to reach a .19% blood alcohol content. (Tr. 708, 1208).[1]

The jury also heard uncontroverted evidence from the prosecution's expert witness, Dr. Closson. According to Dr. Closson, a blood alcohol content of .19% would negatively affect a person's "cognitive abilities, meaning the thought process, the ability to think clearly and respond to questions…. The person's psychomotor functions, such as moving muscles and responding to various stimuli, would be negatively affected. The ability to perceive objects in the environment would be negatively affected. And then the ability to respond to those objects would be negatively affected." (Tr. 710-11).

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[1] Police inventoried the contents of the car at the scene; in the trunk, they found 41 nine-millimeter bullets, eight of which were in a partially loaded magazine; in the front passenger seat area, they found a functioning 9 millimeter handgun with an unloaded magazine. (Tr. 557-560). Forensic testing on the weapon suggested that bullet casings recovered from the Island Rock Club parking lot could have been fired by the gun recovered from McPherson's car. (Tr. 886-888, 941-947). The police also found a small bag of cocaine under the front passenger seat. (Tr. 618). No drugs were found in McPherson's blood sample. (Tr. 701).

There's more. Dr. Closson explained that an intoxicated person's vision becomes blurred and he or she develops "tunnel vision," meaning he or she cannot see as effectively to either side," but essentially sees only "straight ahead." (Tr. 712-13). An intoxicated person's perception and responses to stimuli are delayed; whereas a sober person might respond to stimuli in "a fraction of a second," an intoxicated person responding to the same stimuli might take one to three seconds to react. (Tr. 713-14).

Also, an intoxicated person's ability to perform "divided attention tasks," such as driving, is "most affected" by alcohol. (Tr. 717). Driving requires equal attention to steering, acceleration, braking, direction signals, and responding to objects in the environment, but an intoxicated person may devote all of his or her attention to only one or two of those tasks. (Tr. 717-18). An intoxicated person "may concentrate on just the steering wheel, may concentrate on just the road directly ahead of him or her, at the expense of how fast they're going, other objects and the environment." (Tr. 718).

McPherson drove into oncoming traffic at a high rate of speed for about five miles, during which time he passed eight "wrong way" signs and the backs of 21 large signs that could only be read by drivers heading

in the proper direction. *Heidgen*, 22 N.Y.3d at 273. The prosecution posited that during this time, McPherson maintained his lane position without swerving. (Tr. 432, 1152-53, 1167, 1216; but see Tr. 1039). Nothing in the record suggests that McPherson did these things because he was aware of other motorists and didn't care whether they lived or died. All of the evidence – most notably, the evidence that the prosecution introduced through Dr. Closson – supports a very different conclusion:

- in his intoxicated state, McPherson's thought process was negatively affected, which may have caused him to enter the roadway going the wrong direction;

- the effects of alcohol limited his field of vision, so that he was "not able to effectively see objects to either side of him," such as road signs;

- the effects of alcohol made it so that McPherson could not effectively devote his attention equally to the divided tasks inherent in driving, so he concentrated on maintaining his lane at the expense of how fast he was going, or other objects in the environment.

III. The verdict and sentence

A jury found McPherson guilty of, *inter alia*, murder in the second degree, N.Y. Penal Law § 125.25(2), "depraved indifference murder," but it plainly struggled to decide whether McPherson possessed a culpable mental state. During deliberations, the jurors asked for, *inter alia*, a read-back of Dr. Closson's testimony on the effects of alcohol and the elements of depraved indifference murder. (Tr. 1455-46, 159). McPherson was principally sentenced to serve 25 years to life in prison.

IV. The Appellate Division's opinion

McPherson appealed his depraved indifference murder conviction to the Appellate Division, which affirmed it, concluding that McPherson's insufficiency-of-the-evidence argument was unpreserved for appellate review. *McPherson* 89 A.D.3d at 754. The court went on to decide that "[i]n any event, viewing the evidence in the light most favorable to the prosecution…[the evidence] was legally sufficient to establish [McPerson's] guilt…beyond a reasonable doubt." *Id.* at 754. In reaching this conclusion, the court surveyed its extensive case-law about the meaning of "depraved indifference," and it catalogued the trial evidence that it believed supported that mental state. *Id.* at 754-58. Without

elaboration, the court summarily concluded that McPherson "was not deprived of the effective assistance counsel, as defense counsel provided meaningful representation." *Id.* at 758-59. Judge Belen dissented on the ground that "[t]he majority's attempt to distinguish" its prior depraved indifference case-law "is unavailing." *Id.* at 763.

V. The Court of Appeals' decision

McPherson further appealed to the Court of Appeals, again arguing both that he received ineffective assistance from his trial attorney, who failed to move to dismiss the depraved indifference charge, and that the evidence was insufficient to support that conviction. The Court of Appeals agreed with McPherson that his attorney "should have moved to dismiss the charge of depraved indifference." *Heidgen*, 22 N.Y.3d at 278. However, the court concluded that counsel wasn't ineffective because "a motion to dismiss would not have been successful." *Id.* at 279. The court reasoned:

> The People established that defendant became enraged after losing something and fired off several gunshots. He then drove at excessive speed, in the wrong direction on the parkway for about five miles. During that time – more than four minutes – defendant did not appear to apply his brakes

> and several oncoming cars swerved to avoid him. He also passed numerous signs that should have alerted him that he was traveling in the wrong direction. In addition, he did not slow down or pull over in response to a truck driver sounding his air horn. There was, under the circumstances, ample evidence supporting the conclusion that defendant was aware that he was driving on the wrong side of the road and continued to do so with complete disregard for the lives of others. Therefore, although the motion to dismiss should have been made, we are persuaded that defendant was not prejudiced and otherwise received meaningful representation.

Id. at 279. The court held: "Since there was no reasonable probability that the result would have been different, [McPherson's] claim also fails under the federal standard (*see Strickland*)." *Id.* at 279 (full citation to *Strickland* omitted).

In the very next breath, the court lamented that:

> [T]he most difficult aspect of all these cases is whether there was sufficient evidence that the defendants were aware of and appreciated the risks caused by their behavior – specifically...McPherson, that [he] knew [he was] driving on the wrong side of the parkway and proceeded regardless.

Id. at 279. The court observed that "depraved indifference can be proved circumstantially," and that:

> Here, in each case, a rational jury could have found that the defendant, emboldened by alcohol…, appreciated that he…was engaging in conduct that presented a grave risk of death and totally disregarded that risk, with catastrophic consequences.

Id. at 279.

Judge Smith dissented. He began by observing both that "depraved indifference to human life is a very unusual state of mind," and that "experience shows that juries, especially in cases with inflammatory facts, will often find depraved indifference where the evidence does not support it." *Id.* at 281. Consequently, the court has "reversed many convictions in recent years because the proof of this *mens rea* was insufficient." *Id.* at 281. Here, he believed, evidence of a depraved indifferent mindset was lacking:

> [McPherson] became extremely drunk, drove for miles the wrong way on a divided highway, and caused a fatal accident. The simplest and likeliest inference from the evidence is that [he was] so drunk that [he] did not know what

> [he was] doing. Why, after all, would anyone do such a dangerous thing on purpose?

Id. at 281. He continued:

> Anyone who drives the wrong way on a divided highway must either have chosen a bizarre way of committing suicide or else by prey to some grandiose illusion that all the other cars will get out of his way. These records contain no more than hints that…McPherson was in such an extraordinary state of mind.

Id. at 282. Instead, "[i]t is much more likely that, in his drunken rage, [McPherson] did not focus on his surroundings after he started driving." *Id.* at 283. According to Judge Smith, the fact that McPherson drove the wrong way for miles, ignoring signs and things that should have alerted him, did not support an inference that he knew what he was doing; rather, "it supports more strongly the inference that – as the blood test proved – [he] was very drunk." *Id.* at 283.

Judge Read also dissented on the ground that the evidence was insufficient to prove that McPherson had the requisite culpable mental state. She argued that the majority "has resurrected the *Register* standard for cases in which intoxicated drivers kill innocent people, or at least it has done so here in order to salvage [McPherson's] conviction[]."

Id. at 285 (citing *People v. Register*, 60 N.Y.2d 270 (1983), discussed in greater detail, *infra*).

VI. The district court's Memorandum & Order

McPherson renewed his ineffectiveness and insufficiency arguments in a petition for writ of habeas corpus. The district court decided that McPherson's insufficiency argument was procedurally bared because the Appellate Division and Court of Appeals rejected them as unpreserved, and that even if counsel's ineffectiveness could establish cause to overcome the bar, McPherson could not demonstrate prejudice because any motion for dismissal was not well-taken. (ECF # 19, p. 11-12). Applying AEDPA[2] to the merits of McPherson's insufficiency claim, the district court concluded that the Court of Appeals determination that "defendant, emboldened by alcohol…appreciated that he…was engaging in conduct that presented a grave risk of death and totally disregarded that risk, with catastrophic consequences," was "not objectively reasonable." (ECF # 13, p. 18). The district court denied McPherson's request for a certificate of appealability. The Second Ciruit granted that

[2] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA is discussed in much greater detail, *infra*.

request, limited to the issues of ineffectiveness and insufficiency regarding McPherson's depraved indifference murder conviction.

VII. The Second Circuit's summary order

On the issue of insufficiency-of-proof, the Second Circuit observed that, "at the conclusion of state proceedings, both state appellate courts had concluded that the insufficiency claims were procedurally defaulted, but both had also given the merits of those claims substantial consideration – the Appellate Division in the form of an alternative holding, and the Court of Appeal as part of its prejudice analysis under McPherson's ineffective assistance of counsel claim." *McPherson*, 2021 WL 4452078, *2. Citing to *Harris v. Reed*, 489 U.S. 255, 262 (1989), the Second Circuit concluded that even though the state courts reached the merits of the claim as an alternative holding, McPherson's claim was procedurally barred because of the state courts' adequate and independent finding of procedural default. *Id.* Taking a belt-and-suspenders approach to the issue, the Second Circuit clarified that "even if we were to ignore the procedural bar, we would reject McPherson's insufficiency claim" because:

> [M]ultiple items of evidence adduced at McPherson's trial could have led a juror to rationally conclude that he possessed the required mens rea, including: that he helped place a more intoxicated friend in a car; and that he ignored multiple indications he was driving the wrong way, such as wrong way signs, backward signs, near-misses with oncoming traffic, and a truck that blew its airhorn at him for several seconds.

Id. at *3.

On the issue of trial counsel's ineffectiveness, the Second Circuit recognized that the state courts found that counsel performed deficiently for failing to move to dismiss the depraved indifference murder charge, but that McPherson was not prejudiced because "a motion to dismiss would not have been successful." *Id.* at *4.

Importantly, the Second Circuit held:

> [W]e analyze McPherson's ineffective assistance claim under the AEDPA standard explicitly, since we are evaluating it as an independent ground for habeas relief. That is, we ask not merely whether the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) was incorrect, but whether "[the state court] applied *Strickland* to the facts…in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685,

699 (2002). The parties disagree as to "whether de novo review or AEDPA deference applies when a habeas petitioner advances a claim of ineffective assistance as cause to excuse procedural default (rather than as an independent grounds for habeas relief)." *Tavarez v. Larkin*, 814 F.3d 644, 650 (2d Cir. 2016). **This is a matter about which our sister Circuits have disagreed, and on which we have not yet spoken definitively. *See id.* at 650 n.3 (summarizing the circuit split).** It is unnecessary for us to explicitly invoke one standard of review or another here. We find in this case that whether the ineffective assistance claim is evaluated *de novo* or with AEDPA deference, it fails or the same reason: McPherson is unable to establish that he was prejudiced by his trial attorney's alleged ineffectiveness. *Id.* at 650.

McPherson v. Keyser, 2021 WL 4452078, *2, n.1 (2d Cir. Sept. 29, 2021).

Reasons for Granting the Writ

I. The Circuits are divided as to whether de novo review or AEDPA deference applies when a habeas petitioner advances a claim of ineffective assistance as cause to excuse a procedural default (rather than as independent grounds for habeas relief).

If McPherson's insufficiency argument was not decided on the merits by the Appellate Division, but rather was decided on a state law

procedural ground "independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729, then McPherson must demonstrate "cause for the procedural default and prejudice attributable thereto." *Harris*, 489 U.S. at 262.

To establish cause sufficient to excuse a procedural default, McPherson pointed to his trial attorney's ineffectiveness in failing to preserve the sufficiency claim. *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000). McPherson exhausted his IAC claim in the state courts, and the state courts all rejected that claim on the merits. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

On habeas review, a court may consider a petitioner's IAC claim as cause to overcome a procedural default without the application of AEDPA's limitations on relief. This is so for three reasons.

One, the plain language of the statute supports that view. The text of § 2254(d) makes clear that it applies to a "claim adjudicated on the merits in State court." A federal habeas court's cause-and-prejudice analysis is something markedly different than a "claim adjudicated on the merits in State court." *See Johnson*, *supra* (defining "claim adjudicated on the merits"); *Fry v. Pliler*, 551 U.S. 112, 119 (2007)

(Section 2254(d)(1) "sets forth a precondition to the grant of habeas relief."); *see also Fischetti v. Johnson*, 384 F.3d 140, 154-55 (3d Cir. 2004) ("AEDPA does not establish a statutory high hurdle for the issue of cause."); *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2017) (same). There is no justification for construing the statutory text to apply to something other than a "claim adjudicated on the merits" and McPherson can conceive of none.

Two, this Court has repeatedly reviewed IAC claims to determine whether they justify excusing a procedural default, and this Court has never once applied an AEDPA-style "unreasonable application" test to determine the existence of cause. Rather, this Court has made its cause determination based on whether the denial of counsel was "an independent constitutional violation." *Coleman*, 501 U.S. at 755; *Davila v. Davis*, 137 S.Ct. 2058, 2065 (2017). This is true even when the IAC claim is not attached to a constitutional right, as in the case of ineffectiveness in a collateral proceeding. *See Trevino v. Thaler*, 569 U.S. 413, 423-24 (2013) (applying *Martinez* without mention of an AEDPA test for determining cause); *Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (outlining the criteria for when ineffectiveness of a petitioner's attorney in his first

state collateral proceeding excuses a procedural default, without mention of an AEDPA test).[3]

Three, application of the independent and adequate state ground doctrine is "grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. Insofar as an IAC cause-and-prejudice analysis is concerned, there are no federalism or comity interests to abide. This is so because "[w]here a petitioner defaults on a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm of state interests that federal habeas review entails." *Id.* at 754. "A different allocation of costs" applies when the failure to follow state procedural rules is attributable to something other than counsel's ineffectiveness, or in cases where the State "has no responsibility" for the Sixth Amendment deprivation. *Id.* at 754; U.S. CONST. amend. VI. But that has no application here because McPherson relies on IAC by trial counsel as cause to excuse a default, and as *Coleman* makes clear, this implicates interests different than

[3] *Coleman*, *Trevino*, and *Martinez* make plain that IAC in violation of the Sixth Amendment establishes cause to excuse the procedural default *on some claim other than a stand-alone IAC claim*.

those that motivate the strictures of AEDPA. *Id.* at 753-55; *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (ineffective assistance of counsel that rises to the level of a Sixth Amendment violation constitutes an "action of the State.").

Notwithstanding the foregoing, the federal appellate courts have observed – for at least a decade – that they are divided on the issue of whether AEDPA deference applies in the cause and prejudice context. *See e.g. Janosky v. St. Amand*, 594 F.3d 39, 44-45 (1st Cir. 2010) (recognizing the split); *Winston v. Kelly*, 624 F.Supp.2d 478, 497 n.6 (W.D.Va. 2008) (same).

A. Multiple federal courts have recognized the split; the majority view is that *de novo* review applies.

Multiple federal appellate courts have recognized their disagreement on this issue. The First and Eleventh Circuits have refused to enter the fray. *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1365 n.16 (11th Cir. 2020) (noting the split, but refusing to "address the conflict"); *Janosky v. St. Amand*, 594 F.3d 39, 45 (1st Cir. 2010) (recognizing the split and asumming without deciding that *de novo* review applies). Now, in the instant case, the Second Circuit has added itself to that mix.

The Third, Sixth, and Ninth Circuits have squarely decided that IAC claims in the cause-and-prejudice context are "in no way affected by AEDPA." *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016); *Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006) ("Although [petitioner] must satisfy the AEDPA standard with respect to his independent IAC claim, he need not do so to the claim of ineffective assistance for the purpose of establishing cause."); *Fischetti v. Johnson*, 384 F.3d 140, 154-55 (3d Cir. 2004) (same).

B. The minority view is that de novo review does not apply.

In *Wrinkles v. Buss*, 537 F.3d 804, 813 (7th Cir. 2008), the Seventh Circuit applied the AEDPA standard to an IAC claim for purposes of establishing cause. The Seventh Circuit has continued to adhere to that view, while recognizing the disagreement with its sister courts. *Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014); *Gray v. Hardy*, 598 F.3d 324, 330-31 (7th Cir. 2010). The Seventh Circuit has even intimated that the Tenth Circuit has agreed with its approach. *Roberson v. Rudek*, 446 Fed.Appx. 107, 109 (10th Cir. 2011) (affirming the district court's invocation of AEDPA deference in the context of a denial of a certificate of appealability).

Guidance from this Court is needed to resolve the division. Disagreement has existed for over a decade, with no sign of movement from the Seventh Circuit. And, in light of the split, appellate courts have noted their own reluctance to stake a position. This is untenable in light of the frequency with which state inmates seek federal habeas review on procedurally defaulted claims and accompanying IAC claims as an asserted basis for excusing the default.

II. The Second Circuit's conclusion that McPherson's insufficiency claim was procedurally barred is at odds with this Court's case-law.

McPherson's insufficiency argument was grounded in federal law, *i.e.* his entitlement under the Due Process Clause to evidence legally sufficient to sustain a conviction. A judgment denying a federal claim is presumed to have been "adjudicated on the merits." *Johnson v. Williams*, 568 U.S. 289, 293 (2013). This presumption may be rebutted, but only if the state court has "clearly and expressly stated that its judgment rested on a procedural bar." *Garner v. Lee*, 908 F.3d 845, 859 (2d Cir. 2018) (cleaned up). As this Court explained in *Coleman v. Thompson*, 501 U.S. 722, 734-35 (1991):

> [F]ederal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-1 (1983). In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

(Full citation to *Long* added).

The Sixth Circuit recognized this rule in *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003), where the Kentucky Supreme Court, in its decision, noted that Bowling's claims were raised only in struck supplemental pleadings, but then went on to consider the merits of those claims, stating, "Notwithstanding that his supplemental motion was struck by the trial court, in the interests of judicial economy we will review the seven additional claims of ineffective assistance of counsel

raised in the motion." *Id.* at 498 (quoting *Bowling v. Commonwealth*, 981 S.W.2d 545, 551 (Ky. 1998)).

The Sixth Circuit noted that "[t]here are two reasonable interpretations to which [the Kentucky Supreme Court's] statement is susceptible." *Id.* at 498. The court may have been relying on the procedural default, in which case, the dismissal of the claims on the merits would be considered an alternative holding, or the court may have been using the word "notwithstanding" to ignore the issue of procedural default and consider the claims on the merits. *Id.* at 498. Both interpretations, the Sixth Circuit said, are "eminently plausible." *Id.* This ambiguity led the Sixth Circuit to conclude: "Ultimately, the fact that both interpretations are sensible settles the issue in Bowling's favor, for there must be unambiguous state-court reliance on a procedural default for it to block our review." *Id.* at 499.

So, too, here. The Appellate Division's "in any event" ruling did not indicate unambiguous reliance on a state procedural rule to resolve the claim, and neither did the Court of Appeals' consideration of the issue, cloaked as an ineffective-assistance-of-counsel claim, rather than insufficiency-of-the-evidence. The Second Circuit erred by concluding

that McPherson's insufficiency claim was procedurally barred in light of the presumption articulated in *Coleman v. Thompson*.[4] Correction by this Court is necessary to prevent a rift from developing between, at a minimum, the Second and Sixth Circuits.

III. This case is an excellent vehicle for resolving both issues.

McPherson has a genuinely compelling claim that the prosecution failed to present legally sufficient evidence to sustain a conviction, which only reinforces the significance of the procedural lens through which his claim is evaluated.

In New York, in order to convict of depraved indifference murder, the prosecution must first prove that the defendant was thinking about the lives of others. *People v. Feingold*, 7 N.Y.3d 288, 295-96 (2006). The jurors could not infer that McPherson was thinking about others from the manner in which he drove. McPherson ignored other motorists, and he seemed impervious to the blast of a loud air horn. This does not equate with indifference as to whether or not *others* lived or died. "Ignoring

[4] Second Circuit noted that even if it were to "ignore the procedural bar," it would still reject McPherson's insufficiency claim on the merits. *McPherson*, 2021 WL 4452078, at *3. However, McPherson respectfully submits that reconsideration remains appropriate given that the issue is likely to arise in future cases.

warnings that would alert a sober person is what drunk people do." *Heidgen*, 22 N.Y.3d at 287 (Smith, J., dissenting).

On top of that, the evidence showed that McPherson had a blood alcohol content more than twice the legal limit which, as the prosecution's expert explained, impacted McPherson's ability to perceive and respond to objects in the environment. (*See* Blue Br. 50). According to the prosecution's expert, intoxication causes "tunnel vision" such that a motorist may concentrate on just the steering wheel, or it may cause the driver to concentrate on just the road directly ahead of him or her, at the expense of how fast they're going or other objects in the environment. This is nothing new: the law recognizes that voluntary intoxication adversely impacts a person's ability to form a culpable mental state. McPherson's poor driving establishes extreme recklessness, but that alone is insufficient to establish the requisite *mens rea.*

Nothing in the record, viewed in the light most favorable to the prosecution, could support (beyond a reasonable doubt) the inference that McPherson was thinking about others. *Feingold*, 7 N.Y.3d at 293 (quoting *Payne,* 3 N.Y.3d at 272). McPherson was laser-focused on himself, his troubles, and his own self-preservation.

The closeness of this question is underscored by the splintered nature of the state court decisions. His case drew strong dissenting decisions on the sufficiency-of-the-evidence issue and ineffectiveness issues in both the Appellate Division and the Court of Appeals. *See People v. McPherson*, 932 N.Y.S.2d 85 (2d Dep't 2011), *aff'd sub nom. People v. Heidgen*, 22 N.Y.3d 259 (2013).

Conclusion

This Court should grand the writ of certiorari.

Respectfully submitted,
FRANKLIN McPHERSON
By his attorney:

/s/ Jamesa J. Drake
Jamesa J. Drake
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

Appendix

2021 WL 4452078
Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

Franklin MCPHERSON, Petitioner-Appellant,
v.
William KEYSER, Jr., Superintendent, Sullivan Correctional Facility, Respondent-Appellee.

20-161-pr
|
September 29, 2021

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Sandra J. Feuerstein, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of the District Court be and hereby are **AFFIRMED**.

Attorneys and Law Firms

FOR PETITIONER-APPELLANT: Jamesa J. Drake, Drake Law, LLC Auburn, ME.

FOR RESPONDENT-APPELLEE: Maureen McCormick, Assistant District Attorney, (Tammy J. Smiley, Judith R. Sternberg, Jason R. Richards, Assistant District Attorneys, of counsel), for Joyce A. Smith, Acting District Attorney, Nassau County, Mineola, NY.

PRESENT: José A. Cabranes, Rosemary S. Pooler, Joseph F. Bianco, Circuit Judges.

SUMMARY ORDER

***1** Petitioner Franklin McPherson ("McPherson") appeals from a November 15, 2019 order and a November 19, 2019 judgment of the District Court denying his petition for a writ of habeas corpus. In September 2008, following a jury trial in New York state court, McPherson was convicted of, *inter alia*, murder in the second degree ("depraved indifference murder"). He appealed to the New York Supreme Court, Appellate Division, Second Judicial Department, where his conviction was affirmed, with one justice dissenting. He then appealed to the New York Court of Appeals, where his conviction was affirmed with two judges dissenting. He sought and was denied review in the United States Supreme Court. McPherson then petitioned for a writ of habeas corpus in the District Court. His petition was denied and the District Court declined to issue a certificate of appealability. We granted a certificate of appealability, limiting our review to two issues: (1) "whether the evidence at trial was sufficient to establish beyond a reasonable doubt that [McPherson] acted with the mens rea necessary to support his conviction for second-degree murder," and (2) "whether ... [McPherson's] counsel was ineffective in failing to move to dismiss his second-degree murder count." Resp't Suppl. App. 1. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a district court's denial of a petition for a writ of habeas corpus *de novo*. *Lynch v. Dolce*, 789 F.3d 303, 310–11 (2d Cir. 2015). Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we review a claim that was decided on the merits in a state court only for an "objectively unreasonable" application of clearly established federal law. *Rivas v. Fischer*, 780 F.3d 529, 546 (2d Cir. 2015); *see* 28 U.S.C. § 2254(d).

(1)

McPherson argues that there was insufficient evidence to establish the required mens rea of depraved indifference necessary to sustain his second-degree murder conviction.

McPherson first raised this argument on direct appeal to the Appellate Division, and that court held that the claim was procedurally defaulted, since McPherson had not preserved it for appellate review at trial. *People v. McPherson*, 932 N.Y.S.2d 85, 87 (2d Dep't 2011), *aff'd sub nom. People v. Heidgen*, 22 N.Y.3d 259 (2013). "In any event," the Appellate Division held, the evidence at trial "was legally sufficient to establish the defendant's guilt ... beyond a reasonable doubt." *Id.* at 87. The Court of Appeals subsequently recognized that McPherson had failed to preserve his

insufficiency claim. *See* *Heidgen*, 22 N.Y.3d at 274, 278. However, the Court of Appeals did analyze the merits of the insufficiency argument in the context of McPherson's ineffective assistance of counsel claim, concluding that "there was no reasonable probability that the result would have been different" had counsel filed a motion to dismiss the depraved indifference murder charge, because "[t]here was, under the circumstances, ample evidence supporting" the jury's mens rea finding. *Id.* at 279. Therefore, the Court of Appeals held, McPherson "was not prejudiced" by his trial counsel's failure to raise the insufficiency claim. *Id.*

***2** In other words, at the conclusion of state proceedings, both state appellate courts had concluded that the insufficiency claims were procedurally defaulted, but both had also given the merits of those claims substantial consideration—the Appellate Division in the form of an alternate holding, and the Court of Appeals as part of its prejudice analysis under McPherson's ineffective assistance of counsel claim.

"[A]n adequate and independent finding of procedural default will bar federal habeas review" of the underlying claim. *Velasquez v. Leonardo*, 898 F.2d 7, 9 (2d Cir. 1990) (quoting *Harris v. Reed*, 489 U.S. 255, 262 (1989)). This is true even where, as in the instant case, the state court "reach[es] the merits of a ... claim in an *alternative* holding." *Id.* (emphasis in original) (quoting *Harris*, 489 U.S. at 264 n.10). The New York courts' application of their rules regarding the preservation of legal issues for appellate review in criminal cases—codified at N.Y. Crim. Proc. Law § 470.05[2]—constitute independent and adequate state grounds for their rejection of McPherson's insufficiency claim. *See* *Jimenez v. Walker*, 458 F.3d 130, 136 (2d Cir. 2006) ("[F]ederal courts may not review the judgment of a state court that 'rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.' " (quoting *Harris,* 489 U.S. at 260)); *see also* *Garvey v. Duncan*, 485 F.3d 709, 720 (2d Cir. 2007) ("[T]he procedural bar of § 470.05(2) constitutes an independent and adequate state ground for the Appellate Division's holding.").

In light of this, the District Court found McPherson's insufficiency claim procedurally barred. We agree that it is.

McPherson argues that he can overcome this procedural bar through his ineffective assistance of counsel claim. That is, separate from the ineffective assistance claim that McPherson advances on its own merits as grounds for habeas relief (addressed in the next Part of this order), McPherson also argues that his counsel's ineffective assistance "demonstrate[s] cause for his state-court default ... and prejudice therefrom," allowing a "federal habeas court [to] consider the merits of [his] claim." *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 633 (2d Cir. 2001) (quoting *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000)). We disagree. McPherson's ineffective assistance claim itself fails as we discuss in Part 2 of this order.[1] And "ineffective assistance can establish cause for a procedural default only if it is itself a valid constitutional claim." *Aparicio v. Artuz*, 269 F.3d 78, 99 n.10 (2d Cir. 2001) (citing *Edwards*, 529 U.S. at 451). It therefore is of no help to McPherson in overcoming his procedural bar.

***3** Moreover, even if we were to ignore the procedural bar, we would reject McPherson's insufficiency claim. "[W]e may affirm the district court's denial of [McPherson's] habeas petition on any ground available in the record. *Tavarez*, 814 F.3d at 650 n.4 (citing *Cornell v. Kirkpatrick*, 665 F.3d 369, 378 n.6 (2d Cr. 2011)). Here, the Appellate Division found that although McPherson's insufficiency claim was procedurally barred, it was, "[i]n any event," without merit. *McPherson*, 932 N.Y.S. 2d at 87. In addition, as noted, the Court of Appeals did indicate that the insufficiency claim lacked merit in rejecting McPherson's ineffective assistance of counsel claim. *See* *Heidgen*, 22 N.Y.3d at 279. "[B]ecause the [appellate courts'] ruling[s] ... indicate[ ] 'merits' consideration, we [may] assume without deciding that there was an 'adjudication on the merits' in the state courts, and ... analyze whether habeas relief is warranted under the deferential § 2254(d) standard." *Cotto v. Herbert*, 331 F.3d 217, 231 (2d Cir. 2003). Applying that standard, we can readily conclude that McPherson has failed to establish that the Court of Appeals' rejection of his insufficiency claim on the merits was an unreasonable

application of clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d).

"[A] defendant challenging the sufficiency of the evidence bears a heavy burden. On such a challenge, we view the evidence in the light most favorable to the government, drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." *United States v. Rojas*, 617 F.3d 669, 674 (2d Cir. 2010) (internal quotation marks omitted). Evaluating the totality of the evidence, we "uphold the jury's verdict as long as '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Therefore, were we to decide the insufficiency claim on its merits, we would ask whether any rational juror could find that McPherson acted with "depraved indifference to human life." *See* N.Y. Penal Law § 125.25[2]; *People v. Feingold*, 7 N.Y.3d 288, 296 (2006) ("[A] depraved and utterly indifferent actor is someone who does not care if another is injured or killed[.] ... [D]epraved indifference to human life is a culpable mental state." (internal quotations marks omitted)).

In the early morning of October 19, 2007, McPherson drove five miles down the Southern State Parkway in the wrong direction, causing a car crash that killed the driver of an oncoming car. Blood drawn from him approximately an hour later showed that he had a blood alcohol content of .19. McPherson essentially argues that under New York law, he was too intoxicated to form a mens rea of deliberate indifference. Appellant's Br. 31-43. But multiple items of evidence adduced at McPherson's trial could have led a juror to rationally conclude that he possessed the required mens rea, including: that he recognized the need to flee the nightclub after allegedly discharging his firearm there; that he helped place a more intoxicated friend in a car; and that he ignored multiple indications he was driving the wrong way, such as wrong way signs, backwards signs, near-misses with oncoming traffic, and a truck that blew its airhorn at him for several seconds.

In sum, McPherson's insufficiency claim is procedurally barred, and we therefore reject it on that basis, but even if the claim were not barred, it would not succeed as grounds for habeas relief.

(2)

We turn next to McPherson's ineffective assistance of counsel claim.

To make out a claim for ineffective assistance of counsel, a defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. When an ineffectiveness claim is advanced as a grounds for habeas relief under AEDPA, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell,* 535 U.S. at 698-99. Instead, a petitioner must show "that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.*; *see also* *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (explaining that *Strickland* review under AEDPA is "doubly deferential" to both counsel's performance and the state court's decision).

***4** We have no trouble concluding, like the District Court, that the state court correctly applied *Strickland* when it rejected McPherson's ineffectiveness claim. As the New York Court of Appeals explained, while McPherson's trial counsel "should have moved to dismiss the charge of depraved indifference murder" because that argument was not "so weak as to be not worth raising," nonetheless, "a motion to dismiss would not have been successful." *Heidgen*, 22 N.Y.3d at 278-79 (internal quotation marks omitted). In sum, McPherson was not prejudiced by his counsel's failure to move to dismiss the second-degree murder charge.

McPherson faults the Court of Appeals for stating—in the context of explaining why McPherson was not prejudiced—that "a motion to dismiss would not have been successful." *Id.* at 279. To McPherson, this demonstrates that the court held him to a higher standard than *Strickland* allows, since *Strickland* only requires a "reasonable probability" of

success. Appellant's Br. 61-66. But this argument ignores the clear language of the Court of Appeals' holding later in the same paragraph: "Since there was no *reasonable probability* that the result would have been different, defendant's claim also fails under the federal standard." *Heidgen,* 22 N.Y.3d at 279 (emphasis added) (citing *Strickland,* 466 U.S. at 694). The court clearly knew the correct standard and applied it.

In sum, New York's highest court did not apply *Strickland* incorrectly or unreasonably. We therefore agree with the District Court that McPherson cannot obtain habeas relief based on his ineffective assistance of counsel claim.

CONCLUSION

We have reviewed all of the arguments raised by McPherson on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the November 15, 2019 order and November 19 judgment of the District Court.

All Citations

Not Reported in Fed. Rptr., 2021 WL 4452078

Footnotes

1 In Part 2 of this order, we analyze McPherson's ineffective assistance claim under the AEDPA standard explicitly, since we are evaluating it as an independent ground for habeas relief. That is, we ask not merely whether the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) was incorrect, but whether "[the state court] applied *Strickland* to the facts ... in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). The parties disagree as to "whether de novo review or AEDPA deference applies when a habeas petitioner advances a claim of ineffective assistance as cause to excuse procedural default (rather than as independent grounds for habeas relief)." *Tavarez v. Larkin*, 814 F.3d 644, 650 (2d Cir. 2016). This is a matter about which our sister Circuits have disagreed, and on which we have not yet spoken definitively. *See id.* at 650 n.3 (summarizing the circuit split). It is unnecessary for us to explicitly invoke one standard of review or the other here. We find in this case that whether the ineffective assistance claim is evaluated *de novo or* with AEDPA deference, it fails for the same reason: McPherson is unable to establish that he was prejudiced by his trial attorney's alleged ineffectiveness. *Id.* at 650; *see also infra* Part 2.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty-one.

Franklin McPherson,

Petitioner - Appellant,

v.

William Keyser, Jr., Superintendent, Sullivan Correctional Facility,

Respondent - Appellee.

ORDER

Docket No: 20-161

Appellant, Franklin McPherson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk