

07-0664-pr; 09-2041-pr
Mannix v. Phillips; Archer v. Fischer

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT

4
5
6 August Term, 2009

7
8 (Argued: July 12, 2010 Decided: August 30, 2010)

9
10 Docket Nos. 07-0664-pr; 09-2041-pr

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12
13 JOHN MANNIX,

14
15 *Petitioner-Appellant,*

16
17 -v.-

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19 WILLIAM PHILLIPS,

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21 *Respondent-Appellee.*

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24 JERMAINE ARCHER,

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26 *Petitioner-Appellant,*

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28 -v.-

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30 BRIAN FISCHER,

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32 *Respondent-Appellee.*

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34
35 Before: RAGGI, WESLEY, HALL, Circuit Judges.

36
37 Appeals from judgments of the United States District
38 Courts for the Southern and Eastern Districts of New York,
39 denying petitioners' petitions, brought pursuant to 28
40 U.S.C. § 2254, for writs of habeas corpus.

1 WESLEY, *Circuit Judge*:

2 John Mannix appeals from a judgment of the United
3 States District Court for the Southern District of New York
4 (Richard Conway Casey, Judge) denying his petition for a
5 writ of habeas corpus. Jermaine Archer appeals from a
6 judgment of the United States District Court for the Eastern
7 District of New York (Joseph F. Bianco, Judge) denying his
8 petition for a writ of habeas corpus. We heard the appeals
9 in tandem because both petitioners argue that, at the time
10 their convictions became final, the definition of depraved
11 indifference murder under New York law, see N.Y. Penal Law
12 § 125.25(2), was unconstitutionally vague. Mannix further
13 argues that the evidence was legally insufficient to support
14 his conviction.¹

15 The New York state courts' rejection of petitioners'
16 vagueness claims was not contrary to, or an unreasonable
17 application of, clearly established Supreme Court precedent.
18 28 U.S.C. § 2254(d)(1). At the times petitioners'

¹ To the extent the district court reached a contrary result based on a report and recommendation from Magistrate Judge Gabriel W. Gorenstein to which it appeared Mannix did not object, Mannix here invokes the prison mailbox rule to argue that he satisfied his objection obligation even if the objections were not received by the district court.

1 convictions became final, New York's depraved indifference
2 murder statute, N.Y. Penal Law § 125.25(2), provided them
3 with notice that their conduct was prohibited. And, the
4 statute did not authorize or encourage arbitrary
5 enforcement.

6 Petitioners argue that, at the time that each of their
7 convictions became final, the depraved indifference murder
8 statute, *id.* § 125.25(2), was constitutionally defective
9 because the differences between that statute and the statute
10 governing reckless manslaughter, or manslaughter in the
11 second degree, *id.* § 125.15(1), were indiscernible or non-
12 existent. In support, petitioners cite two decisions by a
13 former judge of the United States District Court for the
14 Southern District of New York granting habeas corpus relief
15 from convictions on this ground. See *St. Helen v.*
16 *Senkowski*, No. 02 Civ. 10248, 2003 WL 25719647 (S.D.N.Y.
17 Sept. 22, 2003), *rev'd on other grounds*, 374 F.3d 181 (2d
18 Cir. 2004); *Jones v. Keane*, No. 02 Civ. 1804, 2002 WL
19 33985141 (S.D.N.Y. May 22, 2002), *rev'd on other grounds*,
20 329 F.3d 290 (2d Cir. 2003). We conclude that the argument
21 lacks merit. The depraved indifference murder and reckless
22 manslaughter statutes were distinct at the times that

1 petitioners' convictions were finalized. And, in any event,
2 an act may violate more than one criminal statute, and the
3 government may prosecute a defendant under either one
4 without raising constitutional vagueness concerns under the
5 Due Process Clause. What the Constitution's Equal
6 Protection Clause demands is that the government not
7 discriminate against a class of defendants in the exercise
8 of its prosecutorial discretion.

9 We also hold that legally sufficient evidence supports
10 Mannix's conviction. Finally, we need not resolve the
11 question of whether or not, pursuant to the prison mailbox
12 rule, Mannix's objections to the magistrate judge's report
13 and recommendation are properly presented to this Court.
14 Even if this claim is properly before us, Mannix is not
15 entitled to any relief on this basis because the
16 magistrate's report and recommendation were not in error.

17 **I. BACKGROUND**

18 **A. Petitioner John Mannix**

19 In the early morning hours of February 26, 2000, in a
20 Manhattan bar, Mannix got into a heated exchange with an
21 individual named Matthew Torruella. *Mannix v. Phillips*, 390
22 F. Supp. 2d 280, 283 (S.D.N.Y. 2005). Eventually, the two

1 men ended up in a physical altercation. *Id.* The dispute
2 appeared to come to an end when Mannix pinned Torruella up
3 against a wall and the two men then separated. *Id.*
4 However, as Mannix was backing away, Torruella "sucker-
5 punched" him in the face. *Id.* Apparently recognizing that
6 Mannix was angry, Torruella's companion pulled Torruella
7 into the ladies' room at the back of the bar - a one-person
8 restroom, approximately four feet by eight feet in size -
9 and locked the door. *Id.* Moments later, Mannix followed.
10 *Id.*

11 According to witnesses, Mannix kicked and pounded the
12 bathroom door for between thirty seconds and two minutes.
13 *Id.* At this point, as least one witness indicated that she
14 heard something that sounded like a gunshot while Mannix was
15 still in front of the door. *Id.* at 283-84. Others
16 testified to hearing loud pounding noises and something that
17 sounded like someone throwing himself against a door. *Id.*
18 Mannix fatally shot Torruella in the chest through the
19 bathroom door. *Id.* at 284. Mannix then left, but later
20 called the bar and asked if he had "hit anyone." *Id.* When
21 he was told that he had, he responded, "good," and hung up.
22 *Id.* An investigating officer determined that the bullet

1 hole in the bathroom door was "dead center in the middle of
2 the door at approximately chest level." *Id.* (internal
3 quotation marks omitted).

4 Mannix was charged with depraved indifference murder,
5 N.Y. Penal Law § 125.25(2), and the lesser included offense
6 of reckless manslaughter, *id.* § 125.15(1). The court
7 explained to the jury that, if it was "satisfied beyond a
8 reasonable doubt of the guilt of the defendant," it could
9 "find him guilty of only one of these crimes." Trial Tr.
10 1067:17-19. The judge informed the jury that a person is
11 guilty of depraved indifference murder "when under
12 circumstances evincing a depraved indifference to human life
13 he recklessly engages in conduct which creates a grave risk
14 of death to another person, and thereby causes the death of
15 that person."² Trial Tr. 1068:9-12. The court made it

² The judge provided the jury with the following definition of recklessness:

A person [acts] recklessly with respect to another person's death, when that person engages in conduct which creates a substantial, unjustifiable and grave risk that another person's death will occur, and when he is aware of and consciously disregards that risk.

And when that risk is of such nature and degree that disregard of it constitutes

1 clear that in order for the jury to find Mannix guilty of
2 depraved indifference murder, it had to "decide whether the
3 circumstances surrounding his reckless conduct when
4 objectively viewed, made it so uncaring, so callous, so
5 dangerous and so inhuman as to demonstrate an attitude of
6 total and utter disregard for the life of the person or
7 persons endangered." Trial Tr. 1069:17-21. The judge
8 further instructed:

9 Under our law a crime committed
10 recklessly is generally regarded as less
11 serious and blameworthy than a crime
12 committed intentionally. But when reckless
13 conduct is engaged in under circumstances
14 evincing a depraved indifference to human
15 life, the law regards that conduct as so
16 serious, so egregious as to be the
17 equivalent of intentional conduct.

18 Conduct evincing a depraved
19 indifference to human life is much more
20 serious and blameworthy than conduct which
21 is merely reckless. It is conduct which
22 beyond being reckless is so wanton, so
23 deficient of moral sense and concern, so
24 devoid of regard for life or lives of
25 others, as to equal in blameworthiness
26 intentional conduct, which produces the
27 same result. Trial Tr. 1069:1-14.
28

a gross deviation from the standard of
conduct that a reasonable person would
observe in the situation.

Trial Tr. 1068:16-25; see also N.Y. Penal Law § 15.05(3).

1 The judge instructed that if the jury did not find Mannix
2 guilty of depraved indifference murder, it should next
3 consider whether the government proved beyond a reasonable
4 doubt that he was guilty of reckless manslaughter. The
5 judge explained that "a person is guilty of [reckless]
6 manslaughter . . . when that person recklessly causes the
7 death of another person." Trial Tr. 1070:17-19. On
8 November 13, 2000, the jury found Mannix guilty of depraved
9 indifference murder.³ N.Y. Penal Law § 125.25(2).

10 Mannix appealed, and the appellate division affirmed
11 his conviction. *People v. Mannix*, 756 N.Y.S.2d 33, 34 (1st
12 Dep't 2003). The appellate division held that, "[c]ontrary
13 to [Mannix's] contention, Penal Law § 125.25(2), which
14 defines 'depraved indifference' murder, is not
15 unconstitutionally vague." *Id.* The court stated that
16 depraved indifference murder and reckless manslaughter were
17 "separate crimes, both facially and as interpreted." *Id.*
18 The appellate division further noted that, "[i]n any event,
19 the Supreme Court of the United States 'has long recognized

³ Petitioner Mannix was sentenced to a term of imprisonment of eighteen years for the depraved indifference murder charge on which he was convicted.

1 that when an act violates more than one criminal statute,
2 the [g]overnment may prosecute under either so long as it
3 does not discriminate against any class of defendants.'"
4 *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 123-
5 24 (1979)). The appellate division also found that "[t]he
6 verdict convicting [Mannix] of depraved indifference murder
7 was based on legally sufficient evidence and was not against
8 the weight of the evidence." *Id.* The New York Court of
9 Appeals denied Mannix's application for leave to appeal.
10 *People v. Mannix*, 100 N.Y.2d 622 (2003).

11 Mannix filed a *pro se* petition for a writ of habeas
12 corpus in the Southern District of New York. *Mannix*, 390 F.
13 Supp. 2d at 282. Judge Casey referred the matter to
14 Magistrate Judge Gorenstein, to whom Mannix argued that "the
15 difference between depraved indifference murder and reckless
16 manslaughter is no longer 'well understood' in New York,"
17 that the depraved indifference murder statute "does not
18 prohibit the proscribed conduct 'with sufficient
19 definiteness,'" and that, therefore, the depraved
20 indifference murder statute is unconstitutionally vague.
21 *Id.* at 288. Mannix also maintained that his conviction for
22 depraved indifference murder was not supported by legally

1 sufficient evidence. *Id.* at 293-295.

2 In a report and recommendation dated May 25, 2005, the
3 magistrate rejected Mannix's argument that the alleged
4 congruence between the depraved indifference murder and the
5 reckless manslaughter statutes rendered his conviction
6 constitutionally infirm. *Id.* at 292. The judge reasoned
7 that, "[e]ven assuming *arguendo* that there is no distinction
8 at all between the conduct covered by the depraved
9 indifference murder statute and the conduct covered by the
10 manslaughter statute, there is no clearly established
11 federal constitutional principles permitting [the district
12 court] to grant habeas relief." *Id.* The court further held
13 that the appellate division's conclusion that legally
14 sufficient evidence supported Mannix's conviction was "not
15 an unreasonable application of Supreme Court law." *Id.* at
16 295. Accordingly, the magistrate recommended that the
17 petition for habeas corpus be denied.

18 The magistrate judge provided notice to the parties
19 that they had ten days during which they could object to his
20 report. *Id.* at 296; see also *id.* at 282. No objections
21 were filed within that period. The district court, finding
22 no clear error, accepted the magistrate's report and

1 recommendation. *Id.* at 282.

2 On May 18, 2007, Mannix filed a motion for a
3 certificate of appealability in this Court, and included a
4 document entitled "Petitioner's Objections to the
5 Magistrate's Report and Recommendation." The document, and
6 an accompanying certificate of service – never docketed in
7 the district court – are dated June 3, 2005. Had Mannix's
8 objections been received by the district court on that date,
9 they would have been considered timely.

10 On July 9, 2009, a panel of this Court granted, in
11 part, Mannix's motion for a certificate of appealability and
12 certified three questions for appeal: (1) whether the
13 depraved indifference murder statute was unconstitutionally
14 vague at the time petitioner's conviction became final; (2)
15 whether petitioner properly objected to the magistrate's
16 report when the district court did not refer to his
17 objections, but where petitioner attached a copy of his
18 objections to his certificate of appealability papers; and
19 (3) whether petitioner's conviction rests on legally
20 sufficient evidence.⁴

⁴ Mannix raised a number of other issues before the
appellate division and before the district court. We do not

1 **B. Petitioner Jermaine Archer**

2 On July 20 and 21, 1997, Petitioner Jermaine Archer had
3 several brief street confrontations with Carlos Bethune and
4 Reynaldo Niles. On the night of July 21, 1997, Bethune was
5 driving his car with Reynaldo's brother, Patrick Niles, in
6 the passenger seat. At one point, Bethune slowed down and
7 noticed a van to the right of his car. According to
8 Bethune, Archer then emerged from around the van, pulled a
9 gun from his waist, and fired three or four shots, in quick
10 succession, into Bethune's car before Bethune could drive
11 away. One of these shots struck Patrick Niles in the back
12 of the neck and killed him. *Archer v. Fischer*, No. 05 Civ.
13 4990 (JFB), 2009 WL 1011591, at *1-2 (E.D.N.Y. Apr. 13,
14 2009).

15 Archer was charged with intentional murder, N.Y. Penal
16 Law § 125.25(1), depraved indifference murder, *id.* §
17 125.25(2), manslaughter in the first degree, *id.* §
18 125.20(1), and manslaughter in the second degree, also known
19 as reckless manslaughter, *id.* § 125.15(1). Archer was tried
20 before a jury. At the close of the trial, the judge

discuss these issues here; we address only the issues on
which our Court granted a certificate of appealability.

1 instructed the jury that it should consider the intentional
2 murder charge first, and consider the offense of depraved
3 indifference murder only if it found petitioner Archer not
4 guilty of intentional murder. Similarly, the judge
5 instructed that the jury should consider the charge of
6 manslaughter in the first degree only if it concluded Archer
7 was not guilty of depraved indifference murder, and it
8 should consider the reckless manslaughter charge last and
9 only if it found Archer not guilty of all previously
10 considered charges.

11 With respect to the depraved indifference murder
12 charge, the court explained:

13 A person is guilty of depraved
14 indifference murder in the second degree
15 when, under circumstances evincing a
16 depraved indifference to human life, he
17 recklessly creates a grave and
18 unjustifiable risk of death to another
19 person and thereby causes that person's
20 death.

21 A grave risk of death means a very
22 substantial, very great risk of death. A
23 person acts recklessly regarding a grave
24 and unjustifiable risk of death when he is
25 aware of and consciously disregards a very
26 substantial and unjustifiable risk that
27 death will result from his actions. The
28 risk must be of such [a] nature and degree
29 that the defendant's disregard of it was a
30 gross deviation, meaning a very great,
31 flagrant, obvious departure from the

1 standard of conduct that a reasonable
2 person would have followed in the same
3 situation.

4 Although this charge is called murder,
5 it does not require proof of the
6 defendant's intent to kill or even intent
7 to murder anyone. In depraved indifference
8 murder, taking the place of an intent to
9 kill are the defendant's creation of a very
10 great and unjustifiable risk of death, plus
11 his reckless state of mind regarding that
12 risk, plus circumstances evincing a
13 depraved indifference to human life.

14
15 Trial Tr. 516:2-25, 517:1. In further explicating the
16 meaning of depraved indifference, the court stated that "it
17 relates to the dangerous circumstances alleged to have been
18 created by the defendant." Trial Tr. 518:24-25, 519:1. The
19 court noted that "[a] depraved indifference to human life is
20 much more serious and blameworthy than conduct that is
21 merely reckless, because the conduct is much more
22 dangerous." Trial Tr. 519:2-5. The court instructed:

23 Circumstances evincing a depraved
24 indifference to human life exist[] when, in
25 the judgment of the jury, beyond a
26 reasonable doubt, the defendant's conduct,
27 beyond being reckless, was so highly and
28 immediately dangerous to life and so
29 wanton, without regard for or caring about
30 the results to human life, and deficient in
31 moral sense or concern, that it warrants
32 the same level of criminal blame as the law
33 imposes on someone who intentionally causes
34 a person's death even though there is no
35 intent to kill.

1 Trial Tr. 519:5-14. Later in the instructions provided to
2 the jury, the court explained the charge of reckless
3 manslaughter. The judge stated:

4 A person is guilty of manslaughter in
5 the second degree when he recklessly causes
6 another person's death. A person acts
7 recklessly regarding someone's death in
8 manslaughter in the second degree when he
9 is aware of and consciously disregards a
10 substantial and unjustifiable risk of death
11 from his actions, and the risk is of such
12 nature and degree that disregarding it is
13 a gross deviation from the standard of
14 conduct of a reasonable person.

15
16 Trial Tr. 521:24-25, 522:1-7. The court then explicitly
17 contrasted reckless manslaughter with depraved indifference
18 murder. The court acknowledged that the crimes might be
19 viewed as "similar" in that they both required proof that
20 the defendant recklessly caused someone's death. Trial Tr.
21 522:14. However, the court made it clear to the jury that
22 the crimes are distinct because "manslaughter in the second
23 degree does not require proof of circumstances evincing a
24 depraved indifference . . . to human life." Trial Tr.
25 522:17-19.

26 Archer was convicted of depraved indifference murder.⁵

⁵ Petitioner Archer was sentenced to an indeterminate term of imprisonment of twenty-two years to life for the

1 N.Y. Penal Law § 125.25(2). Archer appealed his conviction
2 to the appellate division.⁶ While his appeal to the
3 appellate division was pending, Archer made a motion in
4 state supreme court, pursuant to New York Criminal Procedure
5 Law § 440.10, to vacate the judgment of conviction.⁷ One of
6 the grounds for this motion was Archer's contention that the
7 depraved indifference murder statute was unconstitutionally
8 vague. The state trial court denied his § 440.10 motion,
9 holding that the depraved indifference murder statute was
10 not unconstitutionally vague. Petitioner applied for leave
11 to appeal the denial of his § 440.10 motion; this motion was

depraved indifference murder charge.

⁶ A complicated procedural history ensued between the time of Archer's conviction and the affirmance by the appellate division. These proceedings are summarized in the opinion of the district court. *Archer*, 2009 WL 1011591, at *4-5. Because this procedural history does not bear on our decision, there is no need to recite it here.

⁷ New York Criminal Procedure Law § 440.10(1) provides:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that: (h) The judgment was obtained in violation of a right of the defendant under the constitution of [New York] [S]tate or of the United States.

N.Y. Crim. Proc. Law § 440.10(1)(h).

1 denied by the appellate division. On October 25, 2004, the
2 appellate division affirmed Archer's conviction. *People v.*
3 *Archer*, 784 N.Y.S.2d 567, 567 (2d Dep't 2004).⁸ Archer
4 sought leave to appeal to the New York Court of Appeals,
5 which was denied. *People v. Archer*, 4 N.Y.3d 741 (2004).

6 Archer then petitioned for a writ of habeas corpus in
7 the Eastern District of New York. *Archer*, 2009 WL 1011591,
8 at *5. The court held that Archer's vagueness challenge to
9 New York's depraved indifference murder statute was without
10 merit. *Id.* at *24-26. The court concluded that the
11 "statute gives the accused fair warning that his conduct was
12 criminal and proscribed since ordinary people would
13 understand that shooting at someone at short range in the
14 vicinity of others would be criminal and put them at risk of
15 a homicide conviction." *Id.* at *25 (internal quotation
16 marks omitted). The court further reasoned that the
17 language of the statute was adequate to prevent arbitrary
18 and discriminatory enforcement. *Id.* at *26. The district

⁸ Petitioner also moved in the appellate division for a writ of error *coram nobis*, which was denied. *People v. Archer*, 795 N.Y.S.2d 899 (2d Dep't 2005). He applied for leave to appeal this denial to the New York Court of Appeals, which was also denied. *People v. Archer*, 5 N.Y.3d 803 (2005).

1 judge determined that "the jury instructions administered in
2 this case gave the jury sufficient guidelines to prevent
3 arbitrary or discriminatory application of the statute."
4 *Id.*

5 On October 13, 2009, this Court granted, in part,
6 Archer's motion for a certificate of appealability. The
7 certificate issued by this Court was limited to the issue of
8 whether New York's depraved indifference murder statute was
9 unconstitutionally vague as compared to New York's reckless
10 manslaughter statute at the time Archer's conviction became
11 final.⁹

12 **II. STANDARD OF REVIEW**

13 The Antiterrorism and Effective Death Penalty Act of
14 1996 ("AEDPA") provides that persons in state custody
15 because of a state court conviction may petition for federal
16 habeas corpus relief if their custody is "in violation of
17 the Constitution or laws or treaties of the United

⁹ As is the case with Mannix, Archer raised numerous other issues before the state and district courts. We limit our discussion to the issue on which we granted a certificate of appealability.

1 States."¹⁰ 28 U.S.C. § 2254(a); see *Hawkins v. Costello*,
2 460 F.3d 238, 242 (2d Cir. 2006). We review *de novo* the
3 district courts' decisions to deny the petitions for habeas
4 corpus. *Jenkins v. Artuz*, 294 F.3d 284, 290 (2d Cir. 2002).
5 However, we review the district courts' factual findings
6 only for clear error.¹¹ *Id.*

7 In order to obtain relief, the petitioners must show
8 that the resolutions of the merits of their claims in the
9 state courts were "contrary to, or involved an unreasonable

¹⁰ Before a federal court can consider a petition for a writ of habeas corpus, the petitioner must have exhausted all available state judicial remedies. 28 U.S.C. § 2254(b)(1)(A). Exhaustion requires that a petitioner "fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotation marks and brackets omitted). "[I]t is not sufficient merely that the federal habeas applicant has been through the state courts." *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). A claim is regarded as "procedurally defaulted for the purposes of federal habeas review where the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Reyes v. Keane*, 118 F.3d 136, 140 (2d Cir. 1997) (internal quotation marks and emphasis omitted).

¹¹ Moreover, the state courts' factual findings are presumed correct unless petitioners rebut the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

1 application of, clearly established Federal law, as
2 determined by the Supreme Court of the United States," or
3 that they were "based on an unreasonable determination of
4 the facts in light of the evidence presented in the State
5 court proceeding[s]."¹² 28 U.S.C. § 2254(d)(1)-(2). A
6 decision is contrary to Supreme Court precedent if the state
7 court "applie[d] a rule that contradicts" that precedent, or
8 reached a different result than the Supreme Court on facts
9 that are "materially indistinguishable." *Williams v.*
10 *Taylor*, 529 U.S. 362, 405-06 (2000). We are charged with
11 evaluating whether the states courts' applications of
12 clearly established federal law were "objectively
13 unreasonable." *Id.* at 409. Applying these standards, we
14 conclude that neither Mannix nor Archer is entitled to
15 relief from his state court conviction.

¹² For purposes of AEDPA, a claim is deemed to have been "adjudicated on the merits," 28 U.S.C. § 2254(d), if the state court rendered "a decision finally resolving the [petitioner's] claim[], with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001). A state court decision will be deemed an adjudication on the merits as long as "there is nothing in its decision to indicate that the claims were decided on anything but substantive grounds." *Aparicio v. Artuz*, 269 F.3d 78, 94 (2d Cir. 2001).

1 mailbox rule applies in the context of objections to a
2 report and recommendation, *cf. Noble v. Kelly*, 246 F.3d 93,
3 97 (2d Cir. 2001), or whether Mannix's objections were
4 waived through lack of diligence on his part, *compare Huizar*
5 *v. Carey*, 273 F.3d 1220, 1223 (9th Cir. 2001), *with Allen v.*
6 *Culliver*, 471 F.3d 1196, 1198 (11th Cir. 2006), because the
7 waiver rule is "nonjurisdictional," *Spence v.*
8 *Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162,
9 174 (2d Cir. 2000), and we conclude, in any event, that
10 Mannix's claims fail on the merits.

11 As to Archer, respondent asserts that his claim should
12 be deemed exhausted and procedurally defaulted. *See, e.g.,*
13 *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). Archer
14 maintains that the state waived its procedural default
15 defense by failing to raise it in the district court.
16 Before AEDPA, it was well established that "procedural
17 default is normally a defense that the State is obligated to
18 raise and preserve if it is not to lose the right to assert
19 the defense thereafter." *Trest v. Cain*, 522 U.S. 87, 89
20 (1997) (internal quotation marks and brackets omitted).
21 Under AEDPA, however, "[a] State shall not be deemed to have
22 waived the exhaustion requirement or be estopped from

1 reliance upon the requirement unless the State, through
2 counsel, expressly waives the requirement." 28 U.S.C.
3 § 2254(b)(3); see also *Lurie v. Wittner*, 228 F.3d 113, 123
4 (2d Cir. 2000).

5 Again, we need not decide whether AEDPA disfavors a
6 state's waiver of its procedural default defense when that
7 default is based on petitioner's failure properly to
8 exhaust, compare *Franklin v. Johnson*, 290 F.3d 1223, 1231
9 (9th Cir. 2002), with *McNair v. Campbell*, 416 F.3d 1291,
10 1305-06 & n.13 (11th Cir. 2005), because, Archer's claim,
11 like Mannix's, fails in any event on the merits, see 28
12 U.S.C. § 2254(b)(2); see also *Zarvela v. Artuz*, 364 F.3d
13 415, 417 (2d Cir. 2004).

14 **B. Petitioners' Vagueness Challenges to their Convictions**
15 **for Depraved Indifference Murder**

16
17 Both Mannix and Archer contend that their convictions
18 for depraved indifference murder should be vacated on the
19 ground that the statute under which they were convicted was
20 void for vagueness. Petitioners cannot demonstrate that the
21 state courts unreasonably applied clearly established
22 federal law in concluding that New York's depraved
23 indifference murder statute was not void for vagueness as

1 applied to them. 28 U.S.C. § 2254(d).

2 **i. The Vagueness Doctrine**

3 The void-for-vagueness doctrine derives from the
4 constitutional guarantee of due process, which requires that
5 a penal statute define a criminal offense “[1] with
6 sufficient definiteness that ordinary people can understand
7 what conduct is prohibited and [2] in a manner that does not
8 encourage arbitrary and discriminatory enforcement.”

9 *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010)
10 (alterations in original) (quoting *Kolender v. Lawson*, 461
11 U.S. 352, 357 (1983)). The “touchstone” of the notice prong
12 “is whether the statute, either standing alone or as
13 construed, made it reasonably clear at the relevant time
14 that the defendant’s conduct was criminal.” *United States*
15 *v. Lanier*, 520 U.S. 259, 267 (1997). The arbitrary
16 enforcement prong requires that a statute give “minimal
17 guidelines” to law enforcement authorities, so as not to
18 “permit a standardless sweep that allows policemen,
19 prosecutors, and juries to pursue their personal
20 predilections.” *Kolender*, 461 U.S. at 358 (internal
21 quotation marks and brackets omitted). Although a law must
22 provide “explicit standards,” it “need not achieve

1 meticulous specificity, which would come at the cost of
2 flexibility and reasonable breadth.” *Dickerson v.*
3 *Napolitano*, 604 F.3d 732, 747 (2d Cir. 2010) (internal
4 quotation marks omitted).

5 The Supreme Court has made it clear that when the law
6 “unambiguously specif[ies] the activity proscribed,” the
7 fact that this proscribed conduct may violate more than one
8 statute does not render the statute void for vagueness.
9 *United States v. Batchelder*, 442 U.S. 114, 123 (1979). To
10 the contrary, “when an act violates more than one criminal
11 statute, the [g]overnment may prosecute under either so long
12 as it does not discriminate against any class of
13 defendants.” *Id.* at 123-24 .

14 When, as here, the challenged law does not threaten
15 First Amendment interests, we generally evaluate a vagueness
16 claim only as applied to the facts of the particular case.
17 *See Maynard v. Cartwright*, 486 U.S. 356, 361 (1988); *United*
18 *States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993); *see also*
19 *Dickerson*, 604 F.3d at 743-45. Because “[a] plaintiff who
20 engages in some conduct that is clearly proscribed cannot
21 complain of the vagueness of the law as applied to the
22 conduct of others,” *Vill. of Hoffman Estates v. Flipside*,

1 *Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982), we will
2 uphold a statute against an as-applied challenge if “the
3 particular enforcement at issue [is] consistent with the
4 core concerns underlying the [statute],” *Dickerson*, 604
5 F.3d at 748 (alterations in original) (quoting *Farrell v.*
6 *Burke*, 449 F.3d 470, 493 (2d Cir. 2006)). Put another way,
7 “[o]ne to whose conduct a statute clearly applies may not
8 successfully challenge it for vagueness.” *Parker v. Levy*,
9 417 U.S. 733, 756 (1974).

10 **ii. New York’s Depraved Indifference Murder Statute**

11 New York’s depraved indifference murder statute
12 provides that a person is guilty of murder in the second
13 degree when: “Under circumstances evincing a depraved
14 indifference to human life, he recklessly engages in conduct
15 which creates a grave risk of death to another person, and
16 thereby causes the death of another person.” N.Y. Penal Law
17 § 125.25(2). At the times of petitioners’ trials, and at
18 the times that each of their convictions became final,
19 recklessness was the required mental state for depraved
20 indifference murder. *People v. Register*, 60 N.Y.2d 270, 274
21 (1983). Depravity and indifference were assessed by the
22 jury, based on its review of the circumstances of the crime.

1 *Id.* at 274-75. In other words, a jury was required to
2 evaluate the facts attendant to the crime, and the
3 defendant's behavior in committing the crime, to make a
4 determination as to whether those facts and behavior evinced
5 a depraved indifference to human life. As the New York
6 Court of Appeals explained, it was within the jury's
7 province "to make a qualitative judgment whether defendant's
8 act was of such gravity that it placed the crime upon the
9 same level as the taking of life by premeditated design. It
10 had to determine from the evidence if defendant's conduct,
11 though reckless, was equal in blameworthiness to intentional
12 murder." *Id.*

13 During the relevant time period, "depraved
14 indifference" referred to "objective circumstances"
15 surrounding the offenses committed. *Id.* at 276. And, the
16 definition of depraved indifference murder was "well
17 understood." *Id.* at 279 (internal quotation marks
18 omitted); see also *People v. Johnson*, 87 N.Y.2d 357, 361
19 (1996); *People v. Cole*, 85 N.Y.2d 990, 992 (1995). In
20 *Register*, which governs petitioners' appeals, the New York
21 Court of Appeals explained that depraved indifference murder
22 "is not and never has been considered as a substitute for

1 intentional homicide." 60 N.Y.2d at 279. Moreover, it
2 reasoned, depraved indifference murder "is distinguishable
3 from manslaughter . . . by the objective circumstances in
4 which the act occurs." *Id.* at 278.

5 Subsequent to petitioners' convictions becoming final,
6 this interpretation of the depraved indifference murder
7 statute changed. The New York Court of Appeals overturned
8 its prior precedent and held that "depraved indifference to
9 human life is a culpable mental state." *People v. Feingold*,
10 7 N.Y.3d 288, 294 (2006). As now understood by the New York
11 Court of Appeals, "'a one-on-one shooting or knifing (or
12 similar killing) can almost never qualify as depraved
13 indifference murder.'" *Policano v. Herbert*, 7 N.Y.3d 588,
14 601 (2006) (quoting *People v. Payne*, 3 N.Y.3d 266, 272
15 (2004)). *But see People v. Sanchez*, 98 N.Y.2d 373, 383
16 (2002) (observing that requirements that conduct causing
17 death be "aimed at no one in particular" and must "endanger
18 indiscriminately the lives of many" were "entirely obsolete"
19 under then-existing New York law (internal quotation marks
20 and alteration omitted)). Contrary to the assertions of
21 petitioners, this change in construction is of little import
22 in evaluating these petitions for habeas corpus relief based

1 on vagueness, for on habeas review, we must look to New York
2 law as it existed when Mannix and Archer's convictions
3 became final. See *Henry v. Ricks*, 578 F.3d 134, 141 (2d
4 Cir. 2009); see also *Policano v. Herbert*, 453 F.3d 79, 83
5 (2d. Cir. 2006) (Raggi, J., dissenting from denial of
6 rehearing *en banc*).

7 **iii. Petitioners' Vagueness Challenges Lack Merit**

8 We have no difficulty concluding that Mannix and Archer
9 were both on notice that their conduct – shooting into an
10 enclosed space when each petitioner knew people were inside
11 – was criminal. *Grayned v. City of Rockford*, 408 U.S. 104,
12 108 (1972). It cannot be said that the depraved
13 indifference murder statute, as interpreted at the relevant
14 time, could “trap the innocent by not providing fair
15 warning.” *Id.* And, it certainly cannot be said that there
16 was any risk that either man was unaware that his conduct
17 was proscribed, such that their vagueness challenges would
18 survive as-applied review. See *Vill. of Hoffman Estates*,
19 455 U.S. at 495; accord *Nadi*, 996 F.2d at 550.

20 Through the time petitioners' convictions became final,
21 New York courts consistently held that firing into a crowd
22 or enclosed space is a “quintessential” case of depraved

1 indifference murder. See *People v. Suarez*, 6 N.Y.3d 202,
2 214 (2005) (observing that “[q]uintessential examples” of
3 depraved indifference murder include “firing into a crowd”
4 (citing *People v. Jernatowski*, 238 N.Y. 188, 192 (1924)
5 (upholding depraved indifference murder conviction where
6 “defendant fired two or more shots into the house where he
7 knew there were human beings”)); accord *Payne*, 3 N.Y.3d at
8 271; *People v. Gonzalez*, 1 N.Y.3d 464, 467 (2004); see also
9 *People v. Brown*, 575 N.Y.S.2d 460, 460 (1st Dep’t 1991)
10 (upholding depraved indifference murder conviction where
11 defendant fired shot through closed door).

12 Relying on two decisions from the Southern District of
13 New York, Mannix and Archer argue that the depraved
14 indifference murder statute, as applied to them, encouraged
15 arbitrary enforcement because their conduct was
16 indistinguishable from conduct proscribed by the reckless
17 manslaughter statute. See *St. Helen*, 2003 WL 25719647, at
18 *8; *Jones*, 2002 WL 33985141, at *5. At the outset, we
19 reject the premise of petitioners’ argument. Under
20 *Register*, depraved indifference murder was defined as
21 distinct from, and requiring an element in addition to, the
22 lesser included offense of reckless manslaughter. See

1 *Sanchez*, 98 N.Y.2d at 380 (“*Register* requires a
2 significantly heightened recklessness, distinguishing it
3 from manslaughter”); see also *Payne*, 3 N.Y.3d at 271
4 (“[T]he reckless conduct must be ‘so wanton, so deficient in
5 a moral sense of concern, so devoid of regard for the life
6 or lives of others, and so blameworthy as to warrant the
7 same criminal liability as that which the law imposes upon a
8 person who intentionally causes the death of another.’”
9 (quoting *Gonzalez*, 1 N.Y.3d at 469)); *Register*, 60 N.Y.2d at
10 276 (holding that “the depraved mind murder statute requires
11 in addition [to reckless manslaughter] not only that the
12 conduct which results in death present a grave risk of death
13 but that it also occur ‘[u]nder circumstances evincing a
14 depraved indifference to human life’” and construing the
15 latter as an “additional requirement” (second alteration in
16 original) (quoting N.Y. Penal Law § 125.25(2))).

17 “[I]t is not the province of a federal habeas court to
18 reexamine state-court determinations on state-law
19 questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).
20 “[S]tate courts are the ultimate expositors of state law.”
21 *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). As we are
22 bound by the New York Court of Appeals’ construction of

1 state law at the time petitioners' convictions became final,
2 we conclude that the depraved indifference murder and
3 reckless manslaughter statutes define distinct offenses.

4 Even if Mannix and Archer were right that they could
5 have properly been convicted under either statute, their
6 vagueness claims would still fail. As the district courts
7 correctly recognized, no clearly established constitutional
8 prohibition of statutory vagueness is violated when two
9 statutes proscribe the same conduct and a defendant is
10 charged under the one subjecting him to greater punishment.
11 Quite to the contrary, the Supreme Court has held that even
12 if two statutes overlap and have "identical standards of
13 proof," this, in and of itself, would not render them void
14 for vagueness. *Batchelder*, 442 U.S. at 124. Rather, "when
15 an act violates more than one criminal statute, the
16 [g]overnment may prosecute under either so long as it does
17 not discriminate against any class of defendants," an equal
18 protection, not due process, concern. *Id.* at 123-24.
19 Petitioners raise no such discrimination claim here. Thus,
20 we conclude that their vagueness arguments are foreclosed by
21 *Batchelder's* clear holding that "a defendant has no
22 constitutional right to elect which of two applicable . . .

1 statutes shall be the basis of his indictment and
2 prosecution." *Id.* at 125; see also *United States v. Carmel*,
3 548 F.3d 571, 579 (7th Cir. 2008) (stating that "Congress
4 may lawfully punish the same action under two separate
5 statutes without running afoul of the Due Process Clause");
6 *United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004)
7 (concluding that "[w]hen the same acts violate multiple
8 laws, the prosecutor is free to choose the one with the
9 highest sentence").¹³

10 Petitioners nevertheless submit that when the New York
11 Court of Appeals overruled *Register*, and declared "depraved
12 indifference" to be a culpable mental state in *Feingold*, the
13 court conceded that the interpretation of the depraved
14 indifference murder statute was unconstitutionally vague at
15 the time their convictions were finalized. As applied to

¹³ The Supreme Court has never suggested that the classic example of overlapping crimes - greater and lesser included offenses - raises any due process vagueness concerns. Rather, it is the Double Jeopardy Clause that protects a defendant from conviction of both such crimes. See *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977) (treating greater and lesser offenses as the same for purposes of double jeopardy); *Aparicio v. Artuz*, 269 F.3d 78, 96 (2d Cir. 2001) (holding that double jeopardy proscribes multiple prosecutions not only for "same offense" but "when one offense is a lesser included offense of the other").

1 these habeas petitioners, the change in the interpretation
2 of the statute warrants no such conclusion. Indeed, this
3 change – which does not apply retroactively, see *Henry*, 578
4 F.3d at 139-41 – neither diminished the notice given to
5 petitioners that their conduct was proscribed by New York
6 law nor authorized arbitrary enforcement of the depraved
7 indifference statute, see generally *Farrell*, 449 F.3d at
8 484-85. Moreover, although we are of the view that the
9 meaning of New York’s depraved indifference murder statute
10 was clear at the relevant time, it is also true that “some
11 ambiguity in a statute’s meaning is constitutionally
12 tolerable.” *United States v. Chestaro*, 197 F.3d 600, 605
13 (2d Cir. 1999); accord *Grayned*, 408 U.S. at 110 (declining
14 to require “mathematical certainty” or “meticulous
15 specificity” for statutes to survive vagueness review).
16 Even if we were to consider petitioners’ conduct under the
17 law as it now stands, a rational jury could reasonably have
18 found each man guilty of depraved indifference murder.
19 Shooting into an enclosed space – whether a small bathroom
20 or a car – knowing that people are inside, is conduct that
21 evinces a mental state of depraved indifference to human
22 life. *Feingold*, 7 N.Y.3d at 294; see also *Register*, 60

1 N.Y.2d at 282 (Jasen, J., dissenting).

2 Accordingly, we hold that the state courts did not
3 unreasonably apply federal law in concluding (1) that, at
4 the time their convictions became final, petitioners Mannix
5 and Archer were on notice that their shootings were
6 proscribed by law; and (2) that the depraved indifference
7 murder statute did not encourage arbitrary enforcement.

8 Petitioners have failed to identify any principle of clearly
9 established federal law suggesting that New York's depraved
10 indifference murder statute was void for vagueness as
11 applied to their cases. To the contrary, *Batchelder* compels
12 the conclusion that the state's decision to charge
13 petitioners for depraved indifference murder, rather than
14 only reckless manslaughter, does not warrant habeas relief.

15
16 **C. Legal Sufficiency of the Evidence Supporting Petitioner**
17 **Mannix's Conviction**

18
19 Mannix's challenge to the legal sufficiency of the
20 evidence supporting his conviction is plainly without
21 merit.¹⁴ Mannix cannot demonstrate that "no rational trier

¹⁴ As we have noted on countless occasions, "we must consider the evidence in the light most favorable to the prosecution and make all inferences in its favor. Moreover, petitioner bears a very heavy burden in convincing a federal habeas court to grant a petition on the grounds of

1 of fact could have found proof of guilt beyond a reasonable
2 doubt." *Einaugler v. Supreme Court of State of N.J.*, 109
3 F.3d 836, 839 (2d Cir. 1997) (internal quotation marks
4 omitted). Nor can Mannix rebut – by clear and convincing
5 evidence – our presumption that the state court's
6 determination of this factual issue was correct. See *Leslie*
7 *v. Artuz*, 230 F.3d 25, 31 (2d Cir. 2000).

8 At trial, the people's theory was that Mannix was angry
9 at Torruella because he "sucker-punched" him in the face and
10 that, bent on retaliation, he recklessly fired the fatal
11 shot through the bathroom door. As the appellate division
12 found, "[t]he evidence warranted the conclusion that
13 [petitioner] knowingly and deliberately fired a pistol
14 through a door into a small, enclosed space containing the
15 victim and a bystander." *Mannix*, 756 N.Y.S.2d at 34.

16 Mannix bases his sufficiency challenge, in part, on the fact
17 that "no one saw the gun discharge" and no one saw him
18 "point the gun at the door or fire it." *Mannix Br.* at 55.
19 However, shortly after he shot Torruella and left the bar,
20 Mannix called the bar, inquired if he had "hit anyone," and

insufficiency of the evidence." *Fama v. Comm'r of Corr.*
Servs., 235 F.3d 804, 811 (2d Cir. 2000) (citation omitted).

1 when he learned that he had, replied: "good." *Mannix*, 756
2 N.Y.S.2d at 34.

3 We agree with the district court that "the evidence was
4 easily sufficient for a jury to conclude that Mannix fired
5 the shot into the ladies' room recklessly and not
6 accidentally." *Mannix*, 390 F. Supp. 2d at 294. Indeed,
7 evidence adduced at trial revealed that the bullet that
8 killed Torruella was fired through the center of the door at
9 chest level. Accordingly, we find that legally sufficient
10 evidence supports Mannix's conviction. Mannix is not
11 entitled to habeas relief on this basis.

12 **IV. CONCLUSION**

13 We have considered all of petitioners' arguments on
14 appeal, and find them to be without merit. Accordingly, the
15 judgments of the United States District Courts for the
16 Southern and Eastern Districts of New York, denying the
17 petitions for writs of habeas corpus, 28 U.S.C. § 2254, are
18 hereby affirmed.