

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

3
4 August Term, 2013

5
6 (Argued: June 19, 2014 Decided: March 17, 2015)

7
8 Docket No. 13-3022

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12 BRIAN FISCHER, Superintendent,

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14 *Respondent-Appellant,*

15
16 v.

17
18 PATRICK SMITH,

19
20 *Petitioner-Appellee.*
21
22 _____
23

24 Before:

25
26 CALABRESI, LYNCH, and LOHIER, *Circuit Judges.*
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28 Petitioner-appellee Patrick Smith was convicted in State court of two
29 counts of second-degree murder based largely on the testimony of a jailhouse
30 informant. The State Court denied Smith's motion to vacate his conviction on
31 ineffective assistance grounds. Smith then filed a federal habeas petition,
32 which the District Court granted after determining that the State Court
33 decision was not an "adjudication on the merits" entitled to significant
34 deference under the Antiterrorism and Effective Death Penalty Act of 1996
35 and that Smith's counsel failed to provide effective assistance. We **REVERSE**.

LLOYD EPSTEIN, Epstein & Weil LLC,
New York, NY, *for Petitioner-Appellee.*

ORRIE A. LEVY (Joseph N. Ferdenzi, *on the brief*), *for*
Robert T. Johnson, District Attorney, Bronx County,
Bronx, NY, *for Respondent-Appellant.*

LOHIER, *Circuit Judge:*

The principal issue on appeal is whether the State Court decision denying Patrick Smith’s application to vacate his conviction on ineffective assistance of counsel grounds is an “adjudication on the merits” to which we must defer under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). The United States District Court for the Southern District of New York granted Smith’s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 after determining that the State Court decision rested on procedural grounds and that Smith’s trial counsel had provided ineffective assistance when he failed to move to suppress the testimony of a jailhouse informant. We conclude that the State Court decision was, to the contrary, an adjudication on the merits entitled to AEDPA deference and not so lacking in justification as to warrant habeas relief. Accordingly, we reverse the decision of the District Court.

BACKGROUND

1
2 In June 2002 Patrick Smith was charged in the Bronx with first- and
3 second-degree murder (among other crimes) for his role in a 1996 armed
4 robbery that resulted in the death of a payroll delivery worker. On the eve of
5 trial, the prosecutor informed the Bronx County Supreme Court that the
6 Government intended to call an incarcerated witness, William Ferguson, to
7 whom Smith had made incriminating statements while in jail awaiting trial
8 post-indictment. The State Court asked the prosecutor whether Ferguson was
9 a government agent. The prosecutor said no. At trial, defense counsel
10 requested an offer of proof regarding Ferguson’s testimony and asked
11 whether he was a government agent. This time the prosecutor responded
12 that Ferguson had not been sent by the government to gather incriminating
13 statements from Smith, but rather that Ferguson had independently contacted
14 and relayed information to a Brooklyn detective named Danny Dellasandro.
15 The prosecutor agreed to get more information about Ferguson’s interactions
16 with government officials.

17 The next day, the prosecutor reported that Ferguson had reached out to
18 Detective Dellasandro and revealed the details of Smith’s robbery homicide.
19 The prosecutor acknowledged that Ferguson had provided information to

1 law enforcement prior to contacting Detective Dellasandro but stated that,
2 according to Ferguson, the information had never been pursued. Based on
3 the prosecutor's representations, the State Court determined that there was
4 no basis to believe that Ferguson was a government agent.

5 Ferguson thereafter testified that he met Smith four times on Rikers
6 Island and that each time Smith made inculpatory statements regarding the
7 crimes for which he had been indicted. On cross-examination, Ferguson
8 admitted that he had served as a paid informant for another narcotics
9 detective, Jimmy Irving, who had not previously been mentioned by the
10 prosecutor. Defense counsel moved to strike Ferguson's testimony, arguing
11 that the government had failed to provide any discovery relating to
12 Ferguson's role as a paid informant. The court denied the motion but allowed
13 defense counsel to question Ferguson outside the presence of the jury about
14 his relationship with the government. Defense counsel did so while pressing
15 his position that the prosecution had to disclose more information about
16 Ferguson's history and his relationship with Detective Irving. Nothing came
17 of the questioning or the demand for more discovery, and defense counsel
18 never moved pursuant to Massiah v. United States, 377 U.S. 201 (1964), to
19 suppress Smith's incriminating statements to Ferguson. The jury ultimately

1 returned a guilty verdict on two counts of murder in the second degree.
2 Smith was sentenced principally to two concurrent indeterminate terms of
3 twenty years' to life imprisonment.

4 Following trial, Smith's new defense counsel uncovered previously
5 undisclosed evidence that Ferguson had collaborated with law enforcement
6 for four years prior to Smith's trial. In 2005 Smith, through counsel, filed a
7 direct appeal of his conviction, claiming that inadequate discovery abridged
8 his right to confront Ferguson at trial. As relevant here, the Appellate
9 Division affirmed the conviction, and Judge Graffeo of the New York Court of
10 Appeals denied leave to appeal.

11 In 2007 Smith, now proceeding pro se, filed a motion in the Bronx
12 County Supreme Court to vacate his conviction pursuant to New York
13 Criminal Procedure Law § 440.10. The State Court ultimately denied the
14 motion because his claims were unsupported by the record.

15 In 2009 Smith, through counsel, filed a second § 440.10 motion, arguing
16 for the first time that his trial counsel was ineffective for failing to move
17 pursuant to Massiah to suppress the incriminating statements made to
18 Ferguson. The State Court denied Smith's § 440.10 motion on February 8,
19 2010. After extensively reciting Smith's various claims of ineffectiveness of

1 trial counsel, denial of a fair trial, and assorted trial errors, the court wrote the
2 following in its conclusions of law:

3 This court declines to reach the merits of
4 Defendant's counsel claims. The People are
5 correct in their assertion that the instant motion is
6 procedurally barred and meritless. The
7 defendant was in the position to adequately raise
8 all issues he now makes in the previous motion
9 but chose not to. Moreover, defendant has
10 failed to establish sworn allegations supporting
11 defendant's claim of ineffective assistance of
12 counsel. In evaluating ineffective assistance of
13 counsel claims, New York's Court of Appeals has
14 consistently applied a "flexible" approach. "So
15 long as the evidence, the law, and the
16 circumstances of a particular case, viewed in the
17 totality and as of the time of the representation,
18 reveal that the attorney provided meaningful
19 representation," a defendant's constitutional right
20 to the effective assistance of counsel will have
21 been met. Thus, the standard in New York has
22 long been whether the defendant was afforded
23 "meaningful representation". The Court of
24 Appeals has clarified "meaningful
25 representation" to include a prejudice component
26 which focuses on the "fairness of the process as a
27 whole rather than [any] particular impact on the
28 outcome of the case".

29
30 Moreover, the defendant's bare claims of
31 ineffective assistance do not meet the Strickland
32 [standard]. Strickland v. Washington, 466 U.S.
33 688 (1984). In Strickland, the Supreme Court
34 adopted a two-part test for evaluating claims of
35 ineffective assistance of counsel. A "defendant

1 must show that counsel’s performance was
2 deficient,” and “that the deficient performance
3 prejudiced the defense”. The first prong of the
4 Strickland test is a restatement of attorney
5 competence, which requires a showing that
6 counsel’s representation fell below an objective
7 standard of reasonableness. The second prong,
8 also known as the prejudice prong, “focuses on
9 whether counsel’s constitutionally ineffective
10 performance affected the outcome of the plea
11 process”. In order to satisfy this prong, a
12 “defendant must show that there is a reasonable
13 probability that, but for counsel’s errors, he
14 would not have pleaded guilty and would have
15 insisted on going to trial”. In the case at bar,
16 defendant has failed to provide any evidence
17 showing that counsel was ineffective.
18

19 Joint App’x at 12-13 (citations omitted).

20 After additional State court litigation, Smith filed a counseled habeas
21 petition under 28 U.S.C. § 2254, reasserting the ineffective assistance claim
22 raised earlier in his counseled § 440.10 motion. The District Court initially
23 denied the petition, holding that Smith’s ineffective assistance claim was
24 procedurally defaulted. It then reconsidered the default and granted the writ
25 in light of Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012), which held that the
26 lack of counsel at a defendant’s first opportunity to appeal a conviction based
27 on a claim of ineffective assistance at trial may establish cause to excuse a
28 procedural default on that claim. The District Court read the Bronx County

1 Supreme Court’s decision as resting on procedural grounds and applied de
2 novo review. Proceeding to the merits, the District Court held that Smith’s
3 trial counsel provided ineffective assistance by failing to make a motion
4 under Massiah to suppress Ferguson’s testimony. It also held that Smith
5 would prevail even if AEDPA deference applied because the Bronx County
6 Supreme Court’s decision rejecting Smith’s ineffective assistance of counsel
7 claim involved an unreasonable application of Strickland.

8 This appeal followed.

9 **DISCUSSION**

10 I. AEDPA Deference

11 Where a State court decision adjudicates a petitioner’s claim “on the
12 merits,” AEDPA demands that the decision be accorded substantial
13 deference. Dolphy v. Mantello, 552 F.3d 236, 238 (2d Cir. 2009). We have
14 described an “adjudication on the merits” as one that “(1) disposes of the
15 claim ‘on the merits,’ and (2) reduces its disposition to judgment.” Sellan v.
16 Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001). “To determine whether a state
17 court disposition is ‘on the merits,’ this Court examines (1) the state court’s
18 opinion, (2) whether the state court was aware of a procedural bar, and (3) the

1 practice of state courts in similar circumstances.” Spears v. Greiner, 459 F.3d
2 200, 203 (2d Cir. 2006).

3 In Zarvela v. Artuz, we treated as an adjudication on the merits a State
4 court decision that determined “petitioner’s claim to be unpreserved, and, in
5 any event, without merit.” 364 F.3d 415, 417 (2d Cir. 2004) (emphasis added).

6 Here, the Bronx County Supreme Court initially stated that it “decline[d] to
7 reach the merits” of Smith’s ineffective assistance claim. Joint App’x at 12.

8 Had it stopped there, we would regard the decision as resting on procedural

9 grounds rather than the merits. But the court did not stop there. The very

10 next sentence described Smith’s claim as “procedurally barred and meritless.”

11 Id. (emphasis added). And the remainder of the decision clearly and in

12 considerable detail addressed the merits of Smith’s ineffective assistance of

13 counsel claim. See id. (“Moreover, [Smith] has failed to establish sworn

14 allegations supporting [his] claim of ineffective assistance of counsel.”

15 (emphases added)); id. at 13 (“Moreover, the defendant’s bare claims of

16 ineffective assistance do not meet the Strickland [standard].” (emphases

17 added)). Therefore, in the particular circumstances of this case, we view the

18 decision as addressing the merits of Smith’s claim in the alternative rather

19 than declining to reach them altogether.

1 II. The Merits of Smith’s Ineffective Assistance Claim

2 We turn, then, to the State Court’s adjudication of the merits of Smith’s
3 ineffective assistance claim — an adjudication which we accord significant
4 deference under AEDPA.

5 Where a State court decision adjudicates a petitioner’s claim on the
6 merits, a district court may grant habeas relief only if the decision was
7 “contrary to, or involved an unreasonable application of, clearly established
8 Federal law, as determined by the Supreme Court of the United States.” 28
9 U.S.C. § 2254(d)(1); Harrington v. Richter, 562 U.S. 86, 98 (2011).

10 “Establishing that a state court’s application of Strickland was unreasonable
11 under § 2254(d) is all the more difficult. The standards created by Strickland
12 and § 2254(d) are both highly deferential, and when the two apply in tandem,
13 review is doubly so.” Richter, 562 U.S. at 105 (citations omitted) (quotation
14 marks omitted). On habeas review “[a] federal court may reverse a state
15 court ruling only where it was so lacking in justification that there was
16 . . . [no] possibility for fairminded disagreement.” Vega v. Walsh, 669 F.3d
17 123, 126 (2d Cir. 2012) (second alteration in original) (quotation marks
18 omitted).

1 As an initial matter, Smith pointed out at oral argument that in
2 discussing the prejudice prong of Strickland the State Court applied the
3 wrong standard, mistakenly suggesting that Smith had pleaded guilty rather
4 than been convicted after a jury trial. Because Smith has not raised this
5 argument in his briefing, it is not properly presented to us. See Vincent v.
6 Yelich, 718 F.3d 157, 175 (2d Cir. 2013).

7 In any event, the argument is unpersuasive. True, Smith's case
8 obviously involved a trial, not a guilty plea. And insofar as the State Court
9 citations to plea bargain cases suggested otherwise, that suggestion was
10 simply wrong. But the State Court correctly cited the Strickland standard as
11 the rule of constitutional law governing Smith's claim, and its elaboration of
12 the performance prong of that standard was fully applicable to the present
13 case. Moreover, the State Court's reference to the guilty plea in the
14 conclusions of law appears to have been a clerical or drafting error rather
15 than a substantive or legal error. Indeed, prior to its conclusions of law, the
16 court detailed at length the procedural history of the case with explicit
17 references to the jury trial. See Joint App'x at 9-12. These references show
18 that the trial judge understood the claims Smith was actually making and did
19 not believe that the case concerned ineffective advice leading to a guilty plea.

