

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13525

Non-Argument Calendar

TABORIS ROSSELL,

Petitioner-Appellant,

versus

MACON SP WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 3:21-cv-00056-TCB

Before ROSENBAUM, GRANT, and TJOFLAT, Circuit Judges.

PER CURIAM:

Petitioner Taboris Rossell, a Georgia prisoner serving a sentence of life plus 50 years imprisonment, appeals the denial of his 28 U.S.C. § 2254 petition, which was based on a claim that the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to provide him with a document, namely a booking report, that was entered following his arrest for the offenses for which he was convicted. Petitioner argues the District Court erred in denying his petition when it agreed with the state court that he procedurally defaulted his claim and failed to overcome that default. We affirm on the ground that Rossell failed to state a *Brady* claim.

I.

In 2014, a jury in the Superior Court of Spalding County, Georgia, convicted Taboris Rossell of two counts of aggravated battery, two counts of aggravated assault, two counts of battery, one count of armed robbery, one count of possession of a firearm during the commission of a felony, and one count of possession of a firearm by a convicted felon; he was sentenced to life plus 50 years imprisonment. He appealed his convictions to the Court of Appeals of Georgia, contending that the trial court erred by denying his pre-trial motion to sever. The Court of Appeals affirmed his conviction. *Rossell v. State*, 799 S.E.2d 34, 35 (Ga. Ct. App. 2017). The Supreme Court of Georgia denied Rossell's petition for writ of

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certiorari. *Rossell v. State*, 799 S.E.2d 34, *cert. denied*, No. S17C189 (Ga. Oct. 2, 2017).

Following denial of his cert petition, in August 2018 Rossell applied for a writ of habeas corpus in the Superior Court of Macon County, Georgia, citing four grounds for relief. He later amended his habeas application. As relevant here, the amended application detailed an alleged *Brady* violation.

Rossell claimed the State violated its *Brady* obligation by failing to disclose his booking report and the booking report was material because it contradicted police reports that showed “a ten, two fives, and five ones were recovered from Mr. Rossell.” According to Rossell, the booking report showed that he was *not* arrested with \$20 in the same denominations as the armed robbery alleged; it showed he was arrested with \$19 in his pocket.

The Superior Court of Macon County denied the petition in its entirety, but specifically rejected the *Brady* claim as procedurally defaulted under O.C.G.A. § 9-14-48(d) because Rossell did not raise the *Brady* claim at trial or on direct appeal of his convictions.¹ The

¹ The text of O.C.G.A. § 9-14-48(d) reads, in pertinent part: “The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas

Court further found that Rossell had not shown cause to overcome the procedural default. Rossell applied to the Supreme Court of Georgia for a certificate of probable cause to appeal the denial of his habeas petition. The Supreme Court of Georgia denied his application.

Following that denial, Rossell initiated the proceedings now before us by filing a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia. His petition raised three grounds for relief. As relevant here, Rossell claimed that the State violated *Brady v. Maryland* by failing to disclose the booking report, and that the Superior Court of Macon County's decision denying the *Brady* claim was an unreasonable interpretation of existing federal and constitutional law.

The District Court referred the petition to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the magistrate judge issued a report and recommendation ("R&R") pursuant to 28 U.S.C. § 636(b)(1)(C). The magistrate judge found that the Superior Court of Macon County properly applied the Georgia procedural default rule and that Rossell failed to show sufficient cause or prejudice to overcome that default. The R&R recommended that the District Court deny the *Brady* claim as procedurally defaulted. The R&R also recommended that the District Court deny the

corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice."

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ineffective assistance of counsel and due process claims, and a certificate of appealability.

The District Court adopted the R&R and denied the petition for writ of habeas corpus. However, the District Court disagreed with the R&R with respect to the certificate of appealability. Believing that “jurists of reason could debate whether the prosecution violated Rossell’s rights under *Brady* by failing to disclose the [booking] report,” the District Court granted a certificate of appealability as to: “(1) whether Petitioner’s *Brady* claim is procedurally defaulted; and (2) whether the District Court must defer under 28 U.S.C. § 2254(d) to the state court’s determination that the [booking] report did not constitute *Brady* material.” Order Adopting R&R at 14, ECF No. 12.

II.

Section 2254 of Title 28 of the U.S. Code provides the remedy for a state prisoner who claims that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), federal courts are precluded from granting habeas relief on claims that were previously adjudicated on the merits in state court, unless the adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d); *Bishop v. Warden, GDCP*, 726 F.3d 1243, 1254 (11th Cir.

2013). However, a “state court’s rejection of a federal constitutional claim on procedural grounds will only preclude federal review if the state procedural ruling rests upon independent and adequate state grounds.” *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). If no state court has adjudicated the merits of a claim that was properly presented, federal habeas review is not subject to the deferential standard, and the claim is reviewed *de novo*. *Brewster v. Hetzel*, 913 F.3d 1042, 1051 (11th Cir. 2019).

Under the doctrine of procedural default, when a state prisoner fails to present his claim to the state courts in the time and manner state law requires, the federal habeas court is precluded from hearing the merits of the claim absent a showing of cause and resulting prejudice from the default, or a showing that the failure to consider the claim would result in a fundamental miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72, 81–88, 97 S. Ct. 2497, 2503–2507 (1977).

When a claim is procedurally defaulted, a federal court may still address the merits if the petitioner can show cause for the default and prejudice from it. *Wainwright*, 433 U.S. at 87, 97 S. Ct. at 2506. As a general matter, cause for procedural default exists if the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986).

III.

The first question we must answer is whether Rossell's *Brady* claim was procedurally defaulted. We review the District Court's determination that the Superior Court of Macon County correctly applied Georgia's procedural default rule *de novo*. *Borden v. Allen*, 646 F.3d 785, 808 (11th Cir. 2011); *see also Judd*, 250 F.3d at 1313. We may affirm the denial of habeas relief on any ground supported by the record. *Trotter v. Sec'y, Dep't of Corr.*, 535 F.3d 1286, 1291 (11th Cir. 2008).

Under Georgia law, a habeas court may not consider a claim the defendant failed to present at trial or on direct appeal unless the defendant can show cause for the failure and actual prejudice from the alleged error. *See* O.C.G.A. § 9-14-48(d); *Turpin v. Todd*, 493 S.E.2d 900, 905 (Ga. 1997). Because Rossell failed to raise his *Brady* claim before the trial court or on direct appeal, it was procedurally defaulted under Georgia law. The District Court was correct in determining that the Superior Court properly applied Georgia's procedural default rule.

Because his *Brady* claim was procedurally defaulted, Rossell needed to show cause and prejudice to overcome that default. The Superior Court found that he had not done so. The District Court agreed. We agree as well.

Applying the cause and prejudice analysis to a *Brady* claim is closely intertwined with reviewing the merits of the *Brady* claim. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948–49

(1999). The suppression of evidence constitutes cause for the failure to assert the *Brady* claim in the state courts. *Id.* Prejudice exists if the suppressed evidence was material for *Brady* purposes. *Id.*

Therefore, resolving the merits of a *Brady* claim is essentially required to resolve the procedural default challenge. To prevail on a *Brady* claim, a petitioner must show: (1) the government possessed evidence favorable to the defense; (2) the defendant did not possess the evidence and could not obtain it with any reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. *Spivey v. Head*, 207 F.3d 1263, 1283 (11th Cir. 2000); *see also State v. Hill*, 763 S.E.2d 675, 679 (Ga. 2014).

Rossell's cause and prejudice argument is that (1) the state suppressed his booking report and (2) the suppression of the booking report prejudiced him because it was material. That is, Rossell argues that if the booking report had not been suppressed by the State, there is a reasonable probability that the result of his trial would have been different. This argument, however, fails.

Rossell's booking report was not suppressed. Our case law is clear: where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government. *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983). There is no suppression if the defendant knew of the information or had equal access to obtaining it. *Downs v. Sec'y, Fla. Dep't of*

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Corr., 738 F.3d 240, 259–60 (11th Cir. 2013); *see also State v. James*, 738 S.E.2d 601, 603 (Ga. 2013). Under Georgia law, a booking report is a public record and is available even while a prosecution is pending. O.C.G.A. § 50-18-72(a)(4).² There can be no *Brady* violation, then, because Rossell or his counsel could easily have obtained it with reasonable diligence. *See Propst v. State*, 788 S.E.2d 484, 493 (Ga. 2016)

The Superior Court of Macon County properly applied Georgia’s procedural default statute to Rossell’s claim. Rossell’s *Brady* claim was procedurally defaulted under Georgia law because he failed to raise it in the trial court and on direct appeal. The Superior Court correctly determined that Rossell had not shown sufficient cause and prejudice to overcome that default. But our review of the claim is only precluded under the procedural default doctrine if the state’s procedural default ruling rests on adequate and independent state grounds. *See Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001); *Harris v. Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 1043 (1989). And when “resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law.” *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 1092 (1985).

² “Public disclosure shall not be required for records that are . . . (4) [r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, *other than initial police arrest reports and initial incident reports.*” O.C.G.A. § 50-18-72(a)(4) (emphasis added).

A state court's procedural ruling rests on an adequate and independent state ground if: (1) the last state court rendering judgment in the case clearly and expressly stated that it was relying on state procedural rules to resolve the claim without reaching the merits of that claim; (2) the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law; and (3) the state procedural rule must not have been applied in an arbitrary or unprecedented manner. *Judd*, 250 F.3d at 1313 (citing *Card v. Dugger*, 911 F.2d 1494, 1516–17 (11th Cir. 1990)).

The Superior Court of Macon County's order denying Rossell's *Brady* claim as procedurally defaulted does not meet the second criteria. The Superior Court's order is undoubtedly "intertwined with an interpretation of federal law" because it is necessary to look to federal law and examine the merits of the *Brady* claim to resolve the state procedural law question.

Ultimately, then, the District Court correctly determined that the Superior Court properly applied Georgia's procedural default rule. But because the Superior Court's decision was intertwined with federal law, our review of Rossell's *Brady* claim is not precluded by the doctrine of procedural default.

IV.

Because our review of Rossell's *Brady* claim is not barred under the doctrine of procedural default, we must next determine whether the Superior Court's *Brady* ruling is entitled AEDPA

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deference. If a state court adjudicated Rossell's *Brady* claim on the merits, we must defer to that ruling. But if the state court did not adjudicate the merits of his claim, deference is not appropriate and we review Rossell's *Brady* claim *de novo*. *Brewster*, 913 F.3d at 1051.

The Superior Court dismissed the claim as procedurally defaulted. As discussed above, however, determining whether a *Brady* claim has been procedurally defaulted necessarily involves looking at the merits of the claim itself. While the state court certainly *considered* the merits of Rossell's *Brady* claim, asking whether they *adjudicated* the merits of his claim is a more difficult question.

We decline to answer that question, however, because when a habeas petitioner's claim would not be entitled to relief even under *de novo* review, we may affirm the district court's "denial of relief under that standard without resolving whether AEDPA deference applies." *Conner v. GDCP Warden*, 784 F.3d 752, 767 (11th Cir. 2015); *see also Wellons v. Warden*, 695 F.3d 1202, 1213 (11th Cir. 2012).

Rossell's *Brady* claim fails under *de novo* review. Under this Court's precedent, there is no suppression by the government if the defendant has within their knowledge information by which they could have ascertained the *Brady* material or had equal access to it. *See* part III, *supra*; *see also Griggs*, 713 F.2d at 674; *Downs*, 738 F.3d 259–60. Under Georgia law, the booking report was public record.

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Rossell could easily have accessed it. Because there was no suppression, there is no *Brady* claim.

Because Rossell failed to state a *Brady* claim, the District Court's judgment denying habeas relief is

AFFIRMED.