No. 07-1415

In The Supreme Court of the United States

JAMAR CAMPBELL,

Petitioner,

v.

PERRY PHELPS, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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Respondent, Perry Phelps, Warden of the Vaughn Correctional Center, respectfully asks this Court to deny the petition seeking review of the February 14, 2008 judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is officially published in the Federal Reporter at 515 F.3d 172 and is reproduced at Pet. App. 1a-26a. The decision of the United States District Court for the District of Delaware is not officially reported but is available at 2005 WL 2917466 and is reproduced at Pet. App. 27a-45a. The order of the Delaware Supreme Court in petitioner's case, affirming his convictions on direct appeal, is not officially reported but is available at 2002 WL 1472283 and is reproduced at Pet. App. 47a-57a.

JURISDICTION

The judgment of the court of appeals was entered February 14, 2008. The petition for a writ of certiorari was filed May 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner was convicted in 2001 of two drug offenses. After unsuccessfully seeking state post-conviction relief, petitioner applied for federal habeas relief in September 2003. The district court denied the petition, rejecting the seven claims for relief advanced by petitioner. On appeal, the court of appeals affirmed.

1. In the early morning hours of December 16, 1999, a city police officer and a state probation officer, in an unmarked patrol car, saw petitioner engaged in what appeared to be a drug transaction near the corner of 24th and Carter Streets in Wilmington, Delaware. Petitioner and a woman were extending a hand to each other and seemed to be exchanging some items. The officers stopped the patrol car near the two. As the officers got out of the car, petitioner began walking away, and the probation officer saw petitioner toss an object into the street where it landed behind the front wheel of a parked car. At this point, another patrol car arrived on the scene and the officers in that car stopped petitioner. The probation officer who had seen petitioner discard the object then retrieved the item from the street; it was a plastic bag containing a number of smaller plastic bags, each of which contained a white chunky substance. Petitioner was arrested and charged with possession of cocaine with intent to deliver and possession of cocaine within 300 feet of a park. Subsequent testing by the state Medical Examiner determined that the chunky

substance was crack cocaine, with a total weight of 2.45 grams. Pet. App. 18a, 49a-51a.

At trial, petitioner denied selling drugs the night of his arrest. As he described events, after finishing work that night, he had been dropped off in the area by a co-worker. When officers saw him, he had been going to the house of his aunt and uncle, and his own house was only three blocks away. According to petitioner, he did not know the woman with whom officers had seen him; as he walked down the street, the woman approached him and asked for a light. Not having one, he had simply continued walking. On cross-examination, petitioner explained that his co-worker had dropped him off a few blocks from his house because his co-worker did not like the neighborhood, though he could not recall where he and his co-worker had parted. Petitioner also had difficulty remembering his uncle's surname. The jury convicted petitioner of the two charged drug offenses. Pet. App. 53a.

On direct appeal, defense counsel moved to withdraw from the case, and as allowed by state appellate procedure, petitioner advanced nine separate issues for consideration by the state supreme court.[1] Petitioner's contention that trial counsel had provided ineffective assistance was summarily rejected, claims

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[1] Pet. App. 47a-49a. *See generally* Del. Supr. Ct. R. 26(c) (setting out procedure for appellate counsel to withdraw from case under *Anders v. California*, 386 U.S. 738 (1967)).

of ineffective assistance, under state law, to instead only be considered in state post-conviction proceedings. Pet. App. 54a. *See* Pet. App. 17a ("when it decides not to consider ineffective assistance of counsel claims for the first time on appeal, the Delaware Supreme Court . . . rel[ies] on a different and independent rule – such claims are generally best heard in the first instance in a post-conviction relief proceeding. . . ."). Petitioner's other claims of error, all of which involved the trial proceedings, also had not been raised at trial. Thus, the state supreme court reviewed those claims under Delaware Supreme Court Rule 8, the state plain error rule. Pet. App. 54a ("We review this claim, as well as the rest of [petitioner]'s claims, for plain error, since he raises them for the first time in this appeal."). *See* Pet. App. 66a (reproducing text of rule). Concluding that there was no plain error, the court affirmed petitioner's convictions. Pet. App. 54a-57a. Petitioner subsequently applied for state post-conviction relief, contending *inter alia* that trial counsel had provided ineffective assistance. The state courts denied the motion. Pet. App. 58a-61a.

2. The district court denied petitioner's application for federal habeas relief. Petitioner contended that trial counsel had been ineffective, but the district court held that the state courts had reasonably applied this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) in denying relief. Pet. App.

36a-41a.[2] In turn, petitioner's claims of trial error could not be considered because he had procedurally defaulted those claims by presenting them for the first time on direct appeal, having failed to first raise the issues at trial. The district court concluded that the state supreme court, "by basing its rejection of [petitioner's] claims on Rule 8 was making a plain statement that its decision rested on state law grounds." Pet. App. 43a (citing cases). Applying district precedent, the district court then held that Rule 8 was "an independent and adequate state ground precluding federal habeas review." Pet. App. 43a (citing cases). Petitioner had not established cause for the default, and he had not made any showing of actual innocence that would justify review of the claims despite his default. Pet. App. 43a-45a.

3. The court of appeals affirmed. Pet. App. 1a-26a. Delaware Supreme Court Rule 8 constituted an independent and adequate state law ground that was sufficient to preclude federal habeas review of petitioner's claims of trial error. In the first instance, the state supreme court had "expressly invoked Rule 8 in the disposition" of those claims, holding "that all . . . of [those] claims failed to pass the 'plain error' test." Pet. App. 4a. The court of appeals rejected petitioner's

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[2] The district court also determined that petitioner had procedurally defaulted three allegations of ineffective assistance because he had not presented the particular contentions to the state supreme court in his post-conviction appeal. Pet. App. 41a-42a.

contention that the state supreme court had "'actually reviewed' the merits of his federal claims. . . ." Pet. App. 6a. The state court had made "a 'plain statement' that Rule 8 applied to each of those claims and then proceeded to examine each under the standards applicable to Rule 8's 'interests of justice' exception. The [state supreme court] concluded that each claim, in turn, did not involve 'plain error.'" Pet. App. 7a. That the state court had written that "[petitioner]'s appeal [was] 'wholly without merit'" did not "detract from the independence of the 'no plain error' ruling on each of [petitioner]'s claims." Instead, when the state supreme court conducts plain error review, the court

> is applying state, not federal, law and it can apply that state law without resolving the merits of the federal constitutional issue. Delaware case law establishes that the issue of whether the alleged error in the context of this particular case "was apparent on the face of the record" and "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process" are issues governed by Delaware law. And those issues may be resolved by assuming *arguendo* the merit of the federal claim.

Pet. App. 7a-8a. Invocation of plain error review "in order to mitigate the effect of a state procedural default rule [did not] deprive a state court ruling of its 'independent' character," and the reading of Rule 8 in petitioner's case was consistent with the result

reached by several other federal courts of appeals. Pet. App. 9a-11a.[3]

REASONS FOR DECLINING REVIEW

1. Most of the States "recognize the authority of an appellate court to reverse on the basis of a plain error even though that error was not properly raised and preserved at the trial level." 7 Wayne R. LaFave, *et al.*, CRIMINAL PROCEDURE 87-88 (3d ed. 2007). As presented by petitioner, the decision below "is in direct conflict with decisions of" five other courts of appeals and the courts of appeals are divided on the issue. Pet. 6-15. The conflict, however, is not as clear as petitioner would have it.

a. The merits of a federal claim that was procedurally defaulted by the prisoner in the state courts can not be considered on federal habeas review if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The state court's decision is not independent if the resolution of

[3] The court of appeals also rejected petitioner's argument that Rule 8 was not "adequate" to preclude federal habeas review. Pet. App. 12a-18a. In addition, the court decided that the application of *Strickland* by the state supreme court in rejecting petitioner's claims of ineffective assistance was reasonable. Pet. App. 18a-26a. Petitioner does not challenge these determinations by the court of appeals.

the state procedural question depends "on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Unless a state court's decision "fairly appears" to rest primarily upon federal law, a federal court should not assume that the state judgment failed to rely exclusively on its own sovereign principles. *Coleman*, 501 U.S. at 737 ("In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds.").

b. Plain error review generally entails two inquiries: did an error actually occur in the trial and did the error affect the outcome of the trial. *See generally United States v. Olano*, 507 U.S. 725, 732-33, 734 (1993); *United States v. Young*, 470 U.S. 1, 16 n.14 (1985). A state court, conducting plain error review, thus may decide that the particular claim lacks merit under federal law and that there is, perforce, no plain error. The resolution of the state procedural law question in that situation has turned on a federal constitutional ruling, and the state procedural law decision is thus not independent. But a state court can also assume, without deciding, that an error occurred, but that any error did not affect the outcome of the trial. The resolution of the state procedural law question then has nothing to do with the federal claim advanced by the prisoner, and the

state law decision is accordingly independent. *Cargle v. Mullin*, 317 F.3d 1196, 1205-06 (10th Cir. 2003).

c. Because deciding whether plain error review by a state appellate court is "independent" of federal law turns on the nature of the state rule, the conflict identified by petitioner (and the court of appeals) is better explained by the varying scope of plain error review among the states (or the particular scope of the plain error analysis by the state court), not by the existence of an irreconcilable split among the courts of appeals. *See Willis v. Aiken*, 8 F.3d 556, 565 (7th Cir. 1993), *cert. denied*, 511 U.S. 1005 (1994). Thus, for example, in *Daniels v. Lee*, 316 F.3d 477 (4th Cir.), *cert. denied*, 540 U.S. 851 (2003), the prisoner had not objected to alleged errors in the prosecutor's closing argument, and the state supreme court on direct appeal only considered whether the prosecutor's comments had affected the outcome of the trial. 316 F.3d at 487. Similarly, in *Gunter v. Maloney*, 291 F.3d 74 (1st Cir. 2002), the prisoner had failed to raise at trial an argument that the claim that the felony murder charge merged with the underlying felony of assault against the same victim. But according to the state supreme court, there was no miscarriage of justice because even if the indictment and instructions had specified the correct theory, the prisoner would have been convicted anyway. 291 F.3d at 78-80. In *Gutierrez v. Moriarty*, 922 F.2d 1464 (10th Cir.), *cert. denied*, 502 U.S. 844 (1991), the state courts held the prisoner's speedy trial claim to be forfeited, the prisoner having presented insufficient proof on the

issue. 922 F.2d at 1468. In each of these cases, because the decision of the respective state courts did not turn on a resolution of federal law, the state law ruling was independent of federal law. *See, e.g., Willis,* 8 F.3d at 565-66 (Indiana law); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir.), *cert. denied*, 488 U.S. 960 (1988) (noting state court wrote that there were no "prejudicial errors.") (Alabama law).

In contrast, the state appeals court in *Brown v. Greiner*, 409 F.3d 523 (2d Cir. 2005), *cert. denied*, 547 U.S. 1022 (2006), had concluded that the prisoner's failure to object to his persistent offender sentence on *Apprendi*[4] grounds barred consideration of the claim on appeal, but the court reached that conclusion based on its resolution of the *Apprendi* claim. 409 F.3d at 529. Similarly, in *Roy v. Coxon*, 907 F.2d 385 (2d Cir. 1990), the state supreme court held that the prisoner's challenge to the jury instructions was forfeited, but in coming to that result, the state court had expressly relied on decisions of this Court. 907 F.2d at 388. In these cases, the court of appeals concluded that because the resolution of the state procedural law question turned on a federal constitutional ruling, the state procedural law decision was not independent. *See, e.g., Spears v. Mullin*, 343 F.3d 1215, 1236 n.21 (10th Cir. 2003) (Oklahoma law). That some of the courts of appeals have written that the lower federal courts appear to be divided on the

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[4] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

issue, *e.g.*, *Cargle*, 317 F.3d at 1205 & n.7, is not germane: "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). In short, the conflict posited by petitioner is not as obvious as he suggests, and further review of the issue is not warranted.

2. Petitioner contends that the court of appeals was wrong in its construction of Rule 8. As he sees it, the state supreme court in his case did not "explicitly state[] that Rule 8 procedurally barred [his] claims." Pet. 16. In turn, he reads Rule 8 to only reach constitutional claims; from that, he urges that when the Delaware Supreme Court holds that there is no plain error, that determination rests on an antecedent ruling of federal law. Thus, when the state supreme court decides that there is no plain error, that ruling, in petitioner's view, is not independent of federal law. Pet. 16.

a. This Court ordinarily "accept[s], and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). The general presumption that courts of appeals correctly decide questions of state law reflects a judgment that the lower federal courts are better suited to the task of deciding questions of state procedural law, because those courts "are more familiar than [this Court] with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518,

525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980); *County Court of Ulster County v. Allen*, 442 U.S. 140, 153-54 (1979)); *see id.* at 547 (O'Connor, J., dissenting). *See, e.g., Selvage v. Collins*, 494 U.S. 108, 110 (1990) ("the Court of Appeals for the Fifth Circuit is more familiar with Texas law than we are, and we therefore . . . remand the case to it for determination whether petitioner's *Penry* claim is presently procedurally barred under Texas law."); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) ("This Court's resolution of such a state-law question [of procedural default] would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law."). *See generally* Catherine T. Struve, DIRECT AND COLLATERAL FEDERAL COURT REVIEW OF THE ADEQUACY OF STATE PROCEDURAL RULES, 103 Colum. L. Rev. 243, 283-301 (2003). There is no occasion to set aside the construction by the court of appeals of Rule 8. Petitioner has offered no reason for the Court to depart from its normal practice of deferring to decisions of the lower federal courts involving questions of state procedure. Moreover, the Court does not disturb a court of appeals' construction of state law unless it is unreasonable or plainly wrong. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 345-46 & n.10 (1976) (collecting cases); *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959). The court of appeals' decision here is neither.

b. As explained by the Court in *Harris v. Reed*, 489 U.S. 255 (1989), "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." 489 U.S. at 263 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983))). But the "predicate" to the clear and express statement rule "is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." *Coleman,* 501 U.S. at 735. In petitioner's case, the Delaware Supreme Court unambiguously invoked Rule 8 in the disposition of petitioner's claims: the court's express citation to Rule 8 and its repeated reference to "plain error" (Pet. App. 54a-57a) make that clear. That the state supreme court, as petitioner describes the situation, did not expressly state that Rule 8 procedurally barred his claims is of no import:

> We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular

> language in every case in which a state prisoner presents a federal claim – every state appeal, every denial of state collateral review – in order that federal courts might not be bothered with reviewing state law and the record in the case.

Coleman, 501 U.S. at 739. *See Willis,* 8 F.3d at 555-56 ("After *Coleman*, we believe that the formalism of which we spoke in *Rogers-Bey* [*v. Lane*, 896 F.2d 279 (7th Cir.), *cert. denied*, 498 U.S. 831 (1990)] is no longer the controlling factor.").

c. The judgment of the state supreme court in petitioner's case is independent of federal law. The state supreme court must "be cognizant" of the nature of the federal claim, but deciding whether the alleged error in the context of the particular case before it amounted to "plain error" rests on Delaware law. Pet. App. 7a. That observation by the court of appeals accurately reflects the state plain error doctrine:

- Under the doctrine, there must first be an "error." *See Capano v. State*, 781 A.2d 556, 659-60, 663 (Del. 2001), *cert. denied*, 536 U.S. 958 (2002).
- Next, the error must be "plain" or "obvious" under the law at the time of the appeal. *Johnson v. State*, 813 A.2d 161, 165-66 (Del. 2001); *Capano*, 781 A.2d at 663 & nn.466-67.
- The third requirement is that the absence of any objection by the defense must be due to oversight. *E.g., Smith v. State*, 902 A.2d 1119, 1123 n.2 (Del. 2006); *Keyser v. State*, 893 A.2d 956, 961 (Del.

2006); *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989).

- The fourth requirement is that the error be apparent on the face of the record. *E.g., Diaz v. State*, 508 A.2d 861, 866 (Del. 1986) ("Because the question was not fairly presented to the trial court, the record is incomplete and inadequate as to the reasons for the error. The issue, therefore, may not be raised now for the first time.").

- Finally, the error must have affected the outcome of the trial. *E.g., Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Keyser*, 893 A.2d at 959, 960, 963; *Ortiz v. State*, 869 A.2d 285, 299 (Del.), *cert. denied*, 546 U.S. 832 (2005); *Flowers v. State*, 858 A.2d 328, 332 (Del. 2004); *Johnson*, 813 A.2d at 165; *Capano*, 781 A.2d at 660, 664 & nn.471-72.

Given the elements of the state plain error rule, all of which must be satisfied by the defendant (*e.g., Swan v. State*, 820 A.2d 342, 355 (Del.), *cert. denied*, 540 U.S. 896 (2003)), a holding that the defendant has not established plain error means that he has failed to meet at least one part of the rule. The decision of the court of appeals, against this backdrop of state law, that Rule 8 does not depend on an antecedent ruling of federal law is hardly unreasonable,[5] and review of the question is not warranted.

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[5] *Cf.* Jeffrey L. Lowry, PLAIN ERROR RULE – CLARIFYING PLAIN ERROR ANALYSIS UNDER RULE 52(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, 84 J. Crim. L. & Criminology 1065, 1083-84 (1994) (observing that this Court's decision in *United*

(Continued on following page)

Finally, petitioner's claim that the court of appeals misapprehended the operation of Rule 8 in his own particular case does not have widespread national importance, instead being solely dependent on the particular facts of his case. There is accordingly no national significance to this contention that justifies review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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States v. Olano, 507 U.S. 725 (1993), reinforced "the case-by-case nature of plain error review").