

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 AMENDED SUMMARY ORDER

4 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
5 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER
6 COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER
7 COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN
8 ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.
9

10 At a stated term of the United States Court of Appeals for the
11 Second Circuit, held at the Thurgood Marshall United States
12 Courthouse, Foley Square, in the City of New York, on the 2nd day
13 of May, two thousand and six.
14

15 PRESENT:

16
17 Hon. John M. Walker, Jr.,
18 Chief Judge,
19 Hon. Amalya L. Kearse,
20 Hon. J. Clifford Wallace,*
21 Circuit Judges.
22

23 -----X
24 KNOWLEDGE DOWTIN,

25
26 Petitioner-Appellant,

27
28 - v. -

No. 04-6181-pr

29
30 ARTHUR COHEN, Superintendent of Greene
31 Correctional Facility,
32

33 Respondent-Appellee.
34 -----X

35 APPEARING FOR PETITIONER-
36 APPELLANT:

SALLY WASSERMAN, New York, New
York.

* The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1 **APPEARING FOR RESPONDENT-**
2 **APPELLEE:**

**SHOLOM J. TWERSKY, Assistant
District Attorney (Charles J.
Hynes, District Attorney for
Kings County, Leonard Joblove,
Amy Appelbaum, Victor Barall,
Assistant District Attorneys, on
the brief), Brooklyn, New York.**

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4
5 Appeal from a judgment of the United States District Court for
6 the Eastern District of New York.

7
8 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
9 **DECREED** that the district court's judgment is **AFFIRMED**.

10
11 Petitioner-appellant Knowledge Downtin appeals from a judgment
12 of the United States District Court for the Eastern District of New
13 York (Jack B. Weinstein, Judge) denying his petition for a writ of
14 habeas corpus. The district court granted a certificate of
15 appealability ("COA") on "the issue of lack of adequate
16 identification." This phrase can plausibly describe more than one
17 of Downtin's claims—either his claim that pretrial identification
18 procedures were unconstitutionally suggestive or his claim that the
19 state's evidence was legally insufficient to prove his identity—
20 and the district court never identified "which specific issue," 28
21 U.S.C. § 2253(c)(3), satisfied the standard for a COA. But Downtin
22 explicitly informs us that "[t]he only issue before this Court
23 concerns the suggestive manner by which the police [secured] the
24 identification evidence in this case," and the state discusses only
25 this claim as well, so we understand the issue certified for appeal
26 to be the suggestibility claim. We assume the parties' familiarity
27 with the facts and procedural history.

28
29 We affirm the district court's judgment because regardless of
30 whether the pretrial identification procedures were unconstitutionally
31 suggestive, Downtin has procedurally defaulted this claim. Downtin
32 did not raise the suggestiveness claim on direct appeal to the New
33 York Supreme Court, Appellate Division, and thus has not properly
34 presented it to the state courts. See O'Sullivan v. Boerckel, 526
35 U.S. 838, 845 (1999). State-court remedies for this claimed
36 violation are no longer available because Downtin has already taken
37 his one direct appeal and this claim is procedurally barred from
38 consideration on a collateral attack on his conviction. See N.Y.
39 Crim. Proc. Law § 440.10(2)(c); People v. Downtin, No. 273/95, slip
40 op. at 3 (N.Y. Sup. Ct. July 28, 2003) (finding Downtin's
41 suggestiveness claim procedurally barred on collateral review of
42 the conviction under § 440.10(2)(c) because it was unjustifiably
43 not raised on direct appeal). Downtin's claim is therefore
44 procedurally defaulted, and Downtin can obtain federal habeas relief

1 only by showing either cause and prejudice for the default or a
2 fundamental miscarriage of justice. Murray v. Carrier, 477 U.S.
3 478, 485, 495-96 (1986).

4
5 Downtin has not attempted to show cause for his procedural
6 default of this claim in the Appellate Division. Downtin does argue
7 that any procedural default must be excused because a fundamental
8 miscarriage of justice would result otherwise. To prove a
9 fundamental miscarriage of justice, Downtin must show that a
10 constitutional violation probably resulted in his conviction
11 despite his actual innocence. See Schlup v. Delo, 513 U.S. 298,
12 321-25 (1995) (linking miscarriages of justice to actual
13 innocence); United States v. Olano, 507 U.S. 725, 736 (1993) ("In
14 our collateral-review jurisprudence, the term 'miscarriage of
15 justice' means that the defendant is actually innocent."); Carrier,
16 477 U.S. at 496.

17
18 Downtin argues that he is actually innocent of the crimes at
19 issue here, claiming that he could have been at the scene of the
20 shooting as an innocent bystander. But eyewitness Rodrigue Kelly
21 had an unobstructed view of the shooter while pulling his car out
22 of his shop, and Pascal Kelly's recognition of Downtin as the
23 shooter was based the clothes that Downtin was wearing that day
24 (which matched the clothes that Rodrigue Kelly saw on the shooter),
25 evidence that would be untainted by a suggestive lineup. Further,
26 the victim of the shooting also confirmed that the shooter was
27 wearing the type of jacket that Rodrigue Kelly and Pascal Kelly
28 saw. Finally, Downtin has not supported his claim of actual
29 innocence with any "new reliable evidence — whether it be
30 exculpatory scientific evidence, trustworthy eyewitness accounts,
31 or critical physical evidence—that was not presented at trial."
32 Schlup, 512 U.S. at 324. For all these reasons, we find that no
33 fundamental miscarriage of justice excuses the procedural default.
34 Accordingly, federal habeas relief is precluded.

35
36 For the foregoing reasons, the district court's judgment is
37 **AFFIRMED.**

38
39 FOR THE COURT:
40 Roseann B. MacKechnie, Clerk

41
42
43 By: _____
44 Lucille Carr, Deputy Clerk