No. 21-

IN THE

Supreme Court of the United States

RONDELL SLAUGHTER,

Petitioner,

v.

SUPERINTENDENT PHOENIX SCI ET AL.,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a claim of ineffective assistance of appellate counsel is exhausted when the state-court pleading asserted that appellate counsel rendered ineffective assistance by failing to object to an error.

II. Whether a court of appeals is bound by a mistaken concession on a legal issue by the petitioner's counsel at oral argument.

LIST OF ALL PROCEEDINGS

1. Court of Common Pleas of Philadelphia County, 0108-0973 2/3 *Commonwealth of Pa. v. Rondell Slaughter* (June 19, 2003)

2. Superior Court of Pa., 1974 EDA 2003 *Commonwealth of Pa. v. Rendell Slaughter a/k/a Rondell Slaughter* (May 16, 2006)

3. Court of Common Pleas of Philadelphia County, CP-51-CR-0809732-2001 *Commonwealth of Pa. v. Rondell Slaughter* (April 8, 2010)

4. Court of Common Pleas of Philadelphia County, CP-51-CR-0809732-2001 *Commonwealth of Pa. v. Rondell Slaughter* (July 8, 2011)

5. Superior Court of Pa., 2036 EDA 2011 *Commonwealth of Pa. v. Rondell Slaughter* (Oct. 26, 2012)

6. Superior Court of Pa., 367 EDA 2013 *Commonwealth of Pa. v. Rondell Slaughter* (Jan. 25, 2016)

7. Supreme Court of Pa., 100 EAL 2016 *Commonwealth of Pa. v. Rondell Slaughter* (July 19, 2016)

8. U.S. District Court E.D. Pa., 216-cv-4143 *Rondell Slaughter v. Cynthia Link et al.* (April 30, 2018)

9. U.S. Court of Appeals Third Circuit, *Rondell Slaughter v. Superintendent Phoenix SCI et al.* (Sept. 8, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rondell Slaughter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion, Pet. App. 1a–24a, is published at 816 F. App'x 658. The memorandum opinion of the district court is unpublished.

JURISDICTION

The judgment of the court of appeals was filed June 10, 2020. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on August 28, 2020. Pet. App. 25a. This Court's March 19, 2020, order extended the deadline to file any petition for certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This petition is being filed electronically and by postmark on or before that extended date. Rules 13.1, 13.3, 29.2, 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Title 28, United States Code, provides in relevant part:

§ 2254. State custody; remedies in Federal courts.

* * * *

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State;

* * * *

STATEMENT OF THE CASE

Petitioner Rondell Slaughter's case has been anything but typical. At his trial, the jury deadlocked twice. After he was convicted on all counts and sentenced to 30 to 70 years, the Pennsylvania Superior Court first granted him a new trial, then, after being reversed, ruled against him by divided panel. It is plain that the trial court failed to follow Pennsylvania law when it replaced a juror during deliberations, and equally plain that his appointed lawyers failed him repeatedly then and in the 17 years since. Over Judge Krause's vigorous dissent, the Third Circuit denied habeas corpus relief without reaching the merits of a claim that Judge Hardiman aptly described at oral argument as "a whopper."

The Third Circuit oral argument was itself unusual. The lawyer arguing for Slaughter conceded that an issue on which that court had granted a certificate of appealability—the issue that his predecessor had made the first issue of Slaughter's opening brief—was not a "live" issue because it had not been fairly presented in state court. Judge Krause described this concession as

perplexing, but the panel majority treated it as binding.

If left un-remedied, Judge Krause correctly observed, "this case will represent a deeply unfortunate—and, I hope, rare—instance of attorney errors costing a defendant a clearly meritorious claim." Pet. App. 24a. Certiorari is warranted.

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This petition arises from the denial of habeas corpus relief from Slaughter's Pennsylvania conviction for arson and other offenses. The key issues arose from the substitution of a juror after deliberations were well under way. Pennsylvania law required trial courts to question replacement jurors before seating them to ensure that they had not been exposed to improper influences, and failure to follow this procedure triggered a presumption of prejudice. *See Commonwealth v. Saunders*, 686 A.2d 25, 27 (Pa. Super. Ct. 1986). It is undisputed that the trial court did not follow the procedure, that trial counsel did not object, and that appellate counsel did not raise the issue on appeal.

Slaughter alleges two ineffective-assistance claims: of *trial* counsel for not objecting properly, and of *appellate* counsel for not raising it on direct appeal. For the trial-ineffectiveness claim, the main hurdle to relief is prejudice. For the appellate-ineffectiveness claim, prejudice is presumed, and the main hurdle is exhaustion—specifically, whether Slaughter fairly presented the appellate-ineffectiveness issue in his appeal from the denial of his state-

postconviction petition.

After the Third Circuit granted a certificate of appealability on both claims, Slaughter briefed both in his opening brief. Slaughter's opening brief argued that the appellate-ineffectiveness claim was exhausted because he presented it clearly in state court. In both the summary and the argument, it argued the appellate-ineffectiveness claim first.

But after Slaughter filed his Third Circuit opening brief and appendix, the attorney who had signed it, Stephen Kirsch, withdrew his appearance, and new counsel from the same office, Joel Mandelman, entered the case. New counsel signed the reply brief and orally argued the appeal. New counsel radically changed course.

In the reply brief, counsel argued only the trial-ineffectiveness claim, presenting no argument in support of the appellate-ineffectiveness claim. Then, at oral argument, counsel agreed that the trial-ineffectiveness claim was the only "live" claim, Oral Arg. at 1:28, 3:08, based on his "concerns about fair presentation" of the appellate-ineffectiveness claim, *id.* at 3:25. Asked if his position was that the appellate claim was not fairly presented in state court, counsel replied, "From this record I think I'm constrained to concede that." *Id.* at 6:32. Questioned again about this position at the end of his argument, he replied, "We'd be grateful if the court felt it could reach it on this record." *Id.*

at 12:50.[1]

During the Commonwealth's argument, Judge Hardiman observed, "it seems clear that trial counsel did make a mistake by not asking for a *Saunders* instruction. Trial counsel had a winning argument on that, right?" *Id.* at 16:20. When the Commonwealth disagreed and stated that this was one error, Judge Hardiman responded, "Yeah, but this was a whopper. This was a whopper. There was … caselaw that gave this lawyer a really good argument, had it been made." *Id.* at 20:08.

Affirming the denial of relief, the Third Circuit panel-majority opinion authored by Judge Hardiman noted that Slaughter's counsel conceded that the appellate-ineffectiveness issue was not fairly presented. Pet. App. 5a. It stated that Slaughter's ineffective-assistance claim in the Superior Court mentioned appellate counsel twice, once in the heading and once at the end of the argument, and both were inapposite because the asserted error, failing to object, applied only to trial counsel. *Id.* at 9a–10a. It noted counsel's concession at oral argument, and, in a footnote, disagreed with the dissent's view that the Court was not bound by counsel's concession. *Id.* at 11a & n.2. Acknowledging precedent that courts are not bound by legal concessions, it stated the concession here was markedly different because he effectively withdrew the claim. *Ibid.* Finally, the panel majority concluded that Slaughter also failed to

[1] The audio recording of the Third Circuit oral argument is available at https://www2.ca3.uscourts.gov/oralargument/audio/18-2062SlaughtervSuptPhoenixSCIetal.mp3.

pursue the appellate-ineffectiveness claim in his habeas petition and his request for a certificate of appealability, both pro se. *Id.* at 11a–12a.

Judge Krause's dissent argued that the appellate-ineffectiveness claim was fairly preserved and warranted habeas relief on its merits. It observed that Pennsylvania's juror-replacement procedure was plainly violated at Slaughter's trial, that the case was a close one given the prosecution's far-from-overwhelming evidence and the jury's deadlocks. Pet. App. 13a–14a. It stated that fair presentation of the appellate-ineffectiveness claim was the "crux" of its disagreement with the majority, and that under a straightforward application of circuit precedent it was fairly presented. *Id.* at 15a–17a. And it argued that the Court was not bound to accept counsel's erroneous concession at oral argument and should not do so. *Id.* at 20a–22a. It described the concession as "perplexing," "legally incorrect [and] last-minute," "improvident," and "startling." *Id.* at 15a, 20a.

Slaughter petitioned for rehearing by the panel or en banc, which the Third Circuit denied on August 28, 2020, with four judges noting that they would grant rehearing en banc. *Id.* at 25a.

REASONS FOR GRANTING THE WRIT

The decision below warrants review because it conflicts with the holding of *Vasquez v. Hillery*, 474 U.S. 254 (1986), by affirming denial as unexhausted of a claim that was fairly presented in state court. The decision also conflicts with the decisions of other circuits on the important question of whether a

court of appeals are bound by counsel's mistaken concessions on dispositive issues of law.

I. The decision below conflicts with this Court's precedent establishing that a claim is exhausted if it was fairly presented in state court.

The Third Circuit's holding that Rondell Slaughter did not exhaust his claim is contrary to this Court's exhaustion precedent. In his relevant state-court brief, Slaughter asserted that he was denied effective assistance of counsel by counsel's failure to object to the error. That assertion was more than sufficient to the state court on notice that he was raising an appellate-ineffectiveness claim. Under this Court's precedent, a claim is exhausted if it was fairly presented to the state courts. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). The claim here meets that test.

The Third Circuit's conclusion that Slaughter did not fairly present his appellate-ineffectiveness issue rested on the proposition that the claim articulated in the brief, for failure to *object*, is cognizable only against trial counsel. Pet. App. 9a–10a. It reasoned that, because it would be a "magical feat" for appellate counsel to object to the trial court's error, Slaughter's allegation was a *non sequitur* and his attempt to assert appellate-ineffectiveness failed. *Ibid.* The Commonwealth had not advanced this narrow reading of "object" in its brief or at oral argument—the Third Circuit adopted it sua sponte and without citing supporting legal authority.

The basis for the Third Circuit's ruling was incorrect. It is an accepted and common legal usage to refer to appellate counsel's raising an issue on appeal as objecting. This Court did just that when it explained, "Frady claims that he had 'cause' not to object at trial or on appeal because those proceedings occurred before the decisions of the Court of Appeals disapproving the erroneous instructions." *United States v. Frady*, 456 US 152, 168 n.16 (1982). Federal courts frequently articulate appellate-ineffectiveness claims like Slaughter's in terms of appellate counsel's failure to object. *See, e.g.*, *Bullard v. United States*, 937 F. 3d 654, 657 (6th Cir. 2019) ("Bullard also argues that he received ineffective assistance of counsel because his trial and appellate counsel failed to object to his status as a career offender."); *United States v. Aguiar*, 894 F. 3d 351, 354 (D.C. Cir. 2018) ("Carlos Aguiar contends the district court erred in denying the motion because his trial and appellate counsel failed to object to the closure of *voir dire,* in violation of his Sixth Amendment right to a public trial . . . ."); *Gardner v. Galetka*, 568 F.3d 862, 869 (10th Cir. 2009) ("Mr. Gardner sought to amend his petition to raise a new ineffective assistance claim based on appellate counsel's failure to object to the jury instruction that defined the meaning of the term 'knowingly.'"); *Pietri v. Florida Dep't of Corrs.*, 641 F. 3d 1276, 1288 (11th Cir. 2011) ("Pietri contends that the district court erred in finding unexhausted his claim that appellate counsel failed to object to the trial court's judicial bias."); *Wright v. Hopper*, 169 F. 3d 695, 708 (11th Cir. 1999) ("As to his claim that counsel should have

objected on appeal to the trial court's grant of the State's motion in limine, Wright fails to demonstrate how the result of his appeal would have been different had counsel objected."). Outside the appellate-ineffectiveness context, courts also do so routinely. *United States v. Napout*, __ F.3d __, No. 18-2750 at n.2 (2d Cir. June 22, 2020); *Owens v. Republic of Sudan*, 864 F. 3d 751, 786 (D.C. Cir. 2017); *Karlson v. Action Process Serv. & Private Investigations*, LLC, 860 F.3d 1089, 1093 (8th Cir. 2017); *United States v. Klemis*, 859 F.3d 436, 445 (7th Cir. 2017).

This usage is not just common, it is correct. *See* "Object," Bryan Garner, Garner's Dictionary of Legal Usage 623 (3d ed. 2011) ("Each of these verbs relates to opposing something, such as a proposal or a policy, usually by making arguments against it. To *object* is simply to register one's disagreement, usually while stating grounds.").

In prior cases, the Third Circuit itself had referred to asserting an appellate claim as objecting. For example, it stated, "The defendant did not object to the admission of guns at the time, but he later objected on appeal." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F. 3d 240, 250 (3d Cir. 2013); *see also Woessner v. Air Liquide Inc.*, 242 F. 3d 469, 472 (3d Cir. 2001) ("It is the District Court's application of this governmental-interest analysis to which Woessner objects on appeal."); *Honeywell, Inc. v. American Standards Testing Bureau, Inc.*, 851 F. 2d 652, 656 (3d Cir. 1988) (stating, "American Standards objects on appeal to the expert's expression of opinion").

This widespread usage makes plain that Slaughter's assertion that his appellate counsel was ineffective by failing to "object" to the trial court's error was not, in fact, an inapposite *non sequitur*. The Third Circuit's erroneously narrow reading of "failure to object" was the essential basis for its fair-presentation holding. As Judge Krause's dissent accurately explained, the brief explained the underlying error and asserted, both in the heading and in the body, that appellate counsel's failure to object to it deprived Slaughter of due process and effective assistance of counsel. Pet. App. 16a–17a. That readily meets this Court's standard requiring only presentation sufficient to put the state court on notice that the federal claim is being asserted. Fair presentation is not a high bar and, once freed of the too-narrow reading of "object," Slaughter's briefs clear it.

II. The decision below conflicts with decisions of the other circuits by treating counsel's erroneous legal concession at oral argument as binding.

Even though the Third Circuit had already granted a certificate of appealability on the appellate-ineffectiveness issue, and even though the opening brief argued that the issue was fairly presented, new counsel for Slaughter conceded at oral argument before the Third Circuit that the issue was not fairly presented. Nothing in the record shows that, when counsel made this concession, he was aware that objection is commonly used to mean assertion on appeal. Nor does the record indicate that he was aware of the relevant parts of Slaughter's pro se brief or the Commonwealth's brief. And

nothing in the record indicates he discussed this stunning concession with his client. The Third Circuit majority treated counsel's erroneous legal concession at oral argument as binding. Pet. App. 11a n.2.

The Third Circuit's ruling creates a circuit split on the significant question of whether circuit courts are bound by counsel's erroneous legal concessions. At least two circuits have taken the contrary position that appellate courts are not bound by a party's erroneous concession on a point of law. In *United States v. Castillo*, the Second Circuit held that it was not bound by the government's mistaken concession in district court that a sentencing-guidelines residual clause was void for vagueness. 891 F.3d 417, 425–26 (2d Cir. 2018). Similarly, in *United States v. Ball*, the First Circuit held that the government had not waived reliance on a sentencing-guidelines residual clause by failing to raise any such argument in district court or in its main brief because appellate courts are not necessarily bound by a concession by a party in a criminal case as to a legal conclusion. 870 F.3d 1, 4 (1st Cir. 2017).

As the dissent observed, the panel majority's decision also conflicted with the Third Circuit's own precedent holding that erroneous legal concessions are not binding. Pet. App. 21a (citing, inter alia, *United States v. Engler*, 806 F.2d 425, 433 (3d Cir. 1986)). While the panel majority acknowledged that parties' legal concessions are not binding, it distinguished counsel's concession here as "markedly different because he effectively withdrew" the claim, and it stated, "we know of no authority allowing us to, sua sponte, resuscitate withdrawn

claims." *Id.* at 11a n.2. But the panel-majority opinion cited no authority for any effective-withdrawal exception to the settled legal-concession rule, and Slaughter is aware of none. To the contrary, the Third Circuit previously had declined to treat legal concessions as binding even when they would have been fatal to the party's position on that claim. *See Anderson v. Comm'r*, 698 F.3d 160, 167 (3d Cir. 2012); *Gov't of Virgin Is. v. Josiah*, 641 F.2d 1103, 1107 n.1 (3d Cir. 1981).

CONCLUSION

This is an uncommon case, and review by this Court is warranted to correct the uncommon error upon which the Third Circuit's decision rested and to avoid creating a circuit split. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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