No. 21-6202

In the Supreme Court of the United States

CHARLES GREGORY CLARK,
Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The trial court required Charles Gregory Clark to be visibly restrained during his entire capital murder trial, without a hearing and making no requisite findings regarding their necessity. At trial, the only issue in dispute was whether Mr. Clark had the specific intent to kill required to make the murder capital. The defense psychologist testified that he did not intend to kill. The prosecution psychologist testified that it was "equally possible, or perhaps more so," that Mr. Clark did not intend to kill. Postconviction counsel failed to interview jurors and abandoned an ineffectiveness/shackling claim before the postconviction evidentiary hearing. Federal habeas counsel obtained affidavits from two jurors that they had seen the restraints and affidavits from three other jurors who did not believe Mr. Clark had the specific intent to kill.

The district court found the shackling claim "substantial" under *Martinez v. Ryan*, but erroneously concluded that failing to appeal following abandonment of the claim placed it outside *Martinez*. Without mentioning the weakness of the specific intent evidence, the Eleventh Circuit found the overwhelming evidence that Mr. Clark *killed* Mr. Ewing made it impossible to establish prejudice for his *capital* murder conviction, and thus, declared the claim not "substantial" under *Martinez*. The questions presented are:

I. Under *Strickland v. Washington*, may a circuit court sustain denial of relief by determining a claim is not substantial, where, to do so, it ignores evidence regarding the central issue, thus ignoring the totality of the circumstances as to prejudice?

II. Should this Court grant certiorari to resolve the circuit split created when the Eleventh Circuit adopted a stringent "cause" requirement irreconcilable with *Martinez*'s holding that, whether a claim is substantial is governed by the *Miller-El v. Cockrell* standard?

III. Given this Court's holdings in *Holbrook v. Flynn* and *Illinois v. Allen*, may a circuit court, ignoring the central evidence undergirding the claim, hold an ineffective assistance of counsel shackling claim not substantial when the district court, having addressed thoroughly the underlying strength of the claim, found it substantial and granted a certificate of appealability?

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I. The State fails even to address the Eleventh Circuit's violation of *Strickland*'s requirement that courts consider the "totality of the circumstances" when reviewing claims of ineffective assistance,[1] instead attempting to distract this Court by misstating the law and record and mischaracterizing both parties' positions below.

From its inception, this case revolved around the requisite element of intent. That Mr. Clark killed Mr. Ewing was never in dispute. Rather, the issue at trial was whether Mr. Clark intended to kill Mr. Ewing, as required for the crime to qualify as capital. *Kennedy v. State*, 472 So. 2d 1092, 1105 (Ala. Crim. App. 1984); Ala. Code §§ 13A-5-40 (b)-(c), 13A-6-2(a)(1). Yet, the Eleventh Circuit merely held that the evidence Mr. Clark committed *murder* was overwhelming, not once mentioning the central issue of intent, nor the weakness of the State's case on that crucial element. Pet. App. 5a-6a (*Clark v. Comm'r, Ala. Dep't of Corrs.*, 988 F.3d 1326, 1332-33 (11th Cir. 2021)).

In its brief in opposition ("BIO"), the State declines even to mention the Eleventh Circuit's failure to consider this key circumstance. Instead, to distract this Court and confuse the issues, the State sets forth a series of red herrings. It misstates the law, mischaracterizes the nature of the claims in the proceedings below, and misstates the articulated bases for granting certiorari. Further, it takes positions contrary to, and irreconcilable with, its representations to both the district court and the Eleventh Circuit.

[1] *Strickland v. Washington*, 466 U.S. 668, 682, 694-95 (1984).

A. The State attempts to sow confusion by making it appear as though postconviction counsel raised the claim at issue in the initial post-conviction proceeding, and only thereafter failed to appeal it. This is belied by both the record and the State's prior admissions.

The State claims that "Mr. Clark's position before the Eleventh Circuit was that [*Martinez*] should apply to cases, such as his, where collateral counsel raised an issue in the initial postconviction review proceeding, and then failed to raise or pursue the issue during the subsequent appeal." BIO at 6. This is a complete misrepresentation of Mr. Clark's claim, what transpired in the Alabama courts, and of how the courts below, and the State itself, recognized the claim.

Postconviction counsel initially raised a claim that trial counsel was ineffective for failing to object to Mr. Clark having to wear a shock belt and leg brace during trial.[2] However, having conducted no investigation and, thus, being unable to demonstrate that any jurors saw the leg shackle, postconviction counsel officially dropped this claim from the petition before the evidentiary hearing.[3] Thus, as the claim was not part of the petition, it was never presented to any state court. Before the district court, the State emphatically agreed, conceding: "[Mr.] Clark has never presented this claim to *any* state court."[4] The State maintained the same position in its briefing to the Eleventh Circuit.[5]

The State's misrepresentation highlights its worry that this case is ripe for

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[2] (Vol. 24, Tab # J-58, p. 70) (As in the petition, record and appendices citations are provided in footnotes).

[3] (Vol. 30, Tab # J-66, R. 3 (expressly dropping the "first two issues" of the state habeas petition, including the claim at issue (*see*, Vol. 24, Tab # J-58, pp. 54, 70)).

[4] (Doc. 52 at 69 (emphasis in the original)).

[5] Br. of Appellee at 1, *Clark v. Comm'r, Ala. Dep't of Corrs.*, No. 19-11443-P (11th Cir. 2021) (Mr. Clark "has never presented his ineffective assistance of counsel claim to any state court."); *id.* at 11 n.3 (noting both parties agree the claim was never been presented to any state court).

certiorari. Because the claim was never presented to *any* state court, *Martinez*'s applicability is patent, and the Eleventh Circuit merely engaged in contortions to, yet again, avoid applying *Martinez* in the circuit.[6] For example, though most circuits have done so, the Eighth Circuit recently articulated the difference between claims to which *Martinez* would, and would not, apply. *Thomas v. Payne*, 960 F.3d 465, 472-73 (8th Cir. 2020). The Eighth Circuit first addressed a claim that *had* been presented to the first state habeas court, but was *thereafter* abandoned on appeal. *Id.* The court correctly determined *Martinez* would not apply in such a situation because *Martinez*'s central concern was satisfied: at least one court heard the claim. *Id.* However, it clarified that if, as here, the claim had not been presented at all, *Martinez would* apply. *Id.* at 472, 474.

The State also attempts to distract from the Eleventh Circuit's patently erroneous legal analysis, by painting Mr. Clark as a dangerous person and a risk of flight, intimating this is a fact-intensive issue, and that the trial court's unobjected to decision to shackle Mr. Clark was inherently reasonable. This, however, ignores that the trial court made no findings supporting the veracity of the "facts" the State now proclaims as true. Further, the State cherry-picks numerous "facts," which were mere allegations absent a hearing and fact-finding, while ignoring other aspects of the report from which they arise. BIO at 1-2, 8. The State alleges Mr. Clark engaged in fights in jail, was held without bond, hid a key in to escape, etc. BIO at 1-2, 8. The State conveniently omits that the same report also described Mr. Clark as a "[m]odel

[6] The Eleventh Circuit has never applied *Martinez* in favor of a habeas petitioner.

inmate; respectful, quiet; polite," and that it "[t]akes a lot to provoke him."[7] Additionally, although it is unremarkable that inmates regularly issue hollow threats to fellow inmates, one would presume a serious threat would result in disciplinary action. Yet, as to the "fight" and supposed threat to another inmate, the staff merely separated the two.[8] No disciplinary action was taken.[9]

The State fails to recognize that this case remains, legally, at the pleading stage. At an evidentiary hearing, which is all Mr. Clark seeks, the State would be free to put on evidence regarding these contentions and make arguments as to the purported reasonableness of trial counsel's inaction. However, although aware of the record before it, the district court nonetheless properly found the underlying claim "substantial," on every level.[10] Thus, none of these purported "facts" undermine, nor are even relevant to, the Eleventh Circuit's myriad legal errors, creation of a circuit split, and wholesale disregard for this Court's decisions.[11]

B. The State erroneously asserts juror affidavits are *per se* inadmissible for any reason. This fails to recognize that the district court declined the State's effort to strike them, broadly mischaracterizes the purposes for which they would be relevant and admissible, and yet again ignores that their admissibility is irrelevant to the Eleventh Circuit's *legal* contravention of this Court's precedents and creation of a circuit split.

The State alleges Mr. Clark relies on juror affidavits "to discuss the jury's deliberations and voting as a means of impeaching the verdict," in violation of the

[7] (Doc. 15-6 at 37).
[8] (Doc. 25-1 at 24-25).
[9] *Id.*
[10] (Doc. 61 at 15-18).
[11] Although the remainder of the State's mischaracterizations relate globally, they apply more to the other two reasons for granting the writ, and are addressed in conjunction with those sections.

rules of evidence. BIO at 17. This fails to recognize that, while juror affidavits are inadmissible to explore and impeach the *deliberations*, they are not *per se* inadmissible for any reason. The district court recognized this when it denied the State's motion to strike the affidavits.[12] Further, neither Mr. Clark nor the district court utilized the affidavits for impermissible purposes. For example, the affidavits establish that two of the jurors *saw* the leg shackles. Such information would be necessary to establish any possible prejudice, and the mere fact they observed them while in the courtroom does not strike at the heart of deliberations. The affidavits do not delve even into whether the shackles were *discussed* during deliberations.

The affidavits also demonstrate, as the district court emphasized, that postconviction counsel "did not contact the jurors to find out, even though [new federal] habeas counsel some ten years later located two jurors that recalled the petitioner's leg brace—one of whom still lived at the same address as at the time of the 1999 trial."[13] Again, this does not impermissibly delve into *juror deliberations*, but merely demonstrates facts a petitioner would be required to demonstrate to prove postconviction counsel's ineffectiveness.

II. The Ninth Circuit's revision of its contribution to the circuit split only further highlights the continued existence of the split, and the need for this Court to resolve it, as does the State's attempt to distinguish the Third and Seventh Circuits' decisions.

As detailed in Mr. Clark's petition, a clear circuit split exists. The State's contentions do nothing to undercut the existence of the split. Instead, the Ninth

[12] (Docs. 4, 7).
[13] (Doc. 61 at 18 (citations omitted) (emphasis added)).

Circuit's back-and-forth on the question highlights the need for this Court to take up the issue to provide guidance and resolve the split.

The Eleventh Circuit denied the substantiality of Mr. Clark's claim based upon its determination that Mr. Clark could not demonstrate prejudice. Pet. App. 4a-6a (*Clark*, 988 F.3d at 1332-34). This not only contravened *Strickland*'s requirement that it consider the totality of the circumstances, but the Third, Seventh, and Ninth Circuits have all held that a finding of deficient performance *alone* satisfies a petitioner's threshold burden of showing *Martinez* "cause" to excuse a procedural default. *Workman v. Superintendent, Albion SCI*, 915 F.3d 928, 940-41 (3d Cir. 2019); *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013).

The State correctly notes that the Ninth Circuit last year receded from this analysis, limiting its holding to cases where the state habeas petitioner was proceeding without counsel. BIO at 15-16 (citing *Hooper v. Shinn*, 985 F.3d 594, 627 n.29 (9th Cir. 2021)). However, this highlights the confusion among the circuits on this issue, and the need for this Court to settle the issue. Moreover, the original reasoning of *Detrich*, adopted by the Third and Seventh Circuits, was premised on Justice Breyer's discussion of the differences between the threshold question of "cause" for purposes of *Martinez*, and the ultimate "cause and prejudice" needed to prove the underlying trial counsel ineffectiveness. *See Detrich*, 740 F.3d at 1245-46 (citing *Gallow v. Cooper*, 977 U.S. 933 (2013)). Finally, the State's attempts to distinguish *Clark* from *Brown* and *Workman* are unavailing.

A. The Ninth Circuit's recent limitation of *Detrich* highlights the confusion surrounding the issue, and the Third and Seventh Circuits' decisions, with which the Eleventh Circuit splits, remain precedent.

As detailed in the petition, in *Detrich*, the Ninth Circuit relied largely on Justice Breyer's distinguishing, in *Gallow*, 977 U.S. 933, between "cause" under *Martinez* and "cause and prejudice" under *Strickland*. *See Detrich*, 740 F.3d at 1245-46. As Justice Breyer, the author of *Trevino v. Thaler*, 569 U.S. 413 (2013),[14] has explained, "cause and prejudice under *Strickland* are determined separately from, and after, a determination of 'cause' under *Martinez*." *Gallow*, 977 U.S. at 933.

The Ninth Circuit's recent limitation of *Detrich* to cases where the petitioner was without counsel does nothing to alter that the Seventh, then Third, Circuits adopted *Detrich*'s reasoning. *Brown*, 847 F.3d at 513 ("To demonstrate cause under *Martinez-Trevino*, the petitioner must show deficient performance by counsel on collateral review as required under the *first* prong of the *Strickland* analysis . . . ." (emphasis added)); *Workman*, 915 F.3d at 940-41 (adopting the reasoning of *Detrich* and *Brown*, and holding: "This rule is sensible, workable, and a proper reading of *Martinez*.").

Because *Brown* and *Workman* independently analyzed the issue, and comport with Justice Breyer's reasoning in *Gallow* — that "cause and prejudice under *Strickland* are determined separately from, and after, a determination of 'cause' under *Martinez*"—they (and the circuit split) do not rely on *Detrich*'s continued

[14] *Trevino* applied *Martinez* to states, like Alabama, where postconviction proceedings are the first realistic pleading stage where ineffective assistance of trial counsel claims can be raised. 569 U.S. at 417.

viability. Thus, the Eleventh Circuit's decision here patently split from the Third and Seventh Circuits.

B. The State's further efforts to distinguish this case from *Workman* and *Brown* are also unavailing. The State confuses the threshold question of substantiality under *Martinez* with the ultimate question of *Strickland* prejudice, and displays a fundamental misunderstanding of the interplay between *Martinez* and *Strickland*.

Essentially, the State confuses the ultimate question of ineffectiveness (which requires showing both deficient performance and prejudice) with the lesser standard this Court has set for the *threshold* finding of substantiality under *Martinez*. Mr. Clark does not contest that the *ultimate* findings of ineffectiveness must include both deficient performance and prejudice (nor could he). But, as Justice Breyer explained in *Gallow*, the *threshold* finding of substantiality is a separate, lesser burden. 977 U.S. at 933. *Martinez* set forth, as the *threshold* question, the much lower standard of that required for certificates of appealability: "some merit." *Martinez*, 566 U.S. at 14 (adopting the COA standard set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

As to the process of determining whether that threshold has been met, the circuit split is palpable. Here, the Eleventh Circuit dodged application of *Martinez*, failing to consider the totality of the circumstances, and finding merely that Mr. Clark could not demonstrate prejudice because the evidence he committed a lesser-included offense was overwhelming. Pet. App. 5a-6a (*Clark*, 988 F.3d at 1332-33). Thus, the Eleventh Circuit based its determination on the prejudice prong. If Mr. Clark's case had been filed in either the Third or Seventh Circuits, this would not have happened. Thus, the Eleventh Circuit split from the Third and Seventh Circuits.

The State's Kafka-esque attempt to distinguish the decision below from the other circuits by claiming the Eleventh Circuit, unlike the Third and Seventh, was not addressing *post-conviction counsel's* ineffectiveness, but rather only *trial counsel's* ineffectiveness is unsupportable. BIO at 14-15. As an initial matter, *Martinez* established that a petitioner may demonstrate cause to excuse the procedural default of an underlying substantial claim of *trial counsel* ineffectiveness, by demonstrating *postconviction counsel's* ineffectiveness in failing to raise the claim. 566 U.S. at 9. Thus, any discussion of a federal habeas claim that postconviction counsel was ineffective for failing to raise a trial counsel IAC claim involves, by necessity, the question of both postconviction and trial counsels' ineffectiveness.

Additionally, the State makes the strange contention the Eleventh Circuit viewed Mr. Clark's claim only as being that "his *trial* counsel should have objected," and was thus ineffective. BIO at 14 (quoting Pet. App. 4a-6a (*Clark*, 988 F.3d at 1331-33) (emphasis in original)). The State further contends this distinguishes *Brown* and *Workman* because, it asserts, they addressed only *postconviction counsel's* ineffectiveness. BIO at 14. Both propositions are incorrect.

The State's argument ignores that the Eleventh Circuit recognized that Mr. Clark's claim was "that *Martinez* excuses his procedural default because his *postconviction counsel* was ineffective." Pet. App. 3a (*Clark*, 988 F.3d at 1330). The Third and Seventh Circuits also discussed both postconviction *and trial counsel* ineffectiveness. *Workman*, 915 F.3d at 941 ("trial counsel's failure to present a cogent defense, and . . . state post-conviction counsel's performance was deficient under the

'performance' prong of *Strickland*. We therefore conclude that Workman has satisfied the requirements of *Martinez*); *Brown*, 847 F.3d at 513-515 (also discussing both postconviction and trial counsel ineffectiveness). Again, any such claim *necessarily* requires examination of both postconviction and trial counsel ineffectiveness. The State's assertions notwithstanding, that is what each circuit did.

The State creates a straw-man by mis-stating Mr. Clark's argument, making it seem as though Mr. Clark contended *trial* counsel should have been aware of the juror affidavits, which it classifies as "quintessential hindsight." BIO at 8. The State's confusion is bound up with its incorrect contention the Eleventh Circuit was addressing merely trial counsel's ineffectiveness, rather than postconviction counsel's. Again, any *Martinez* claim, by necessity, must involve both. By the State's logic, no evidence that jurors saw shackles could ever be raised in a postconviction challenge to trial counsel's ineffectiveness, because trial counsel could not know jurors saw shackles during trial at the time (before trial) the objection should have been made. But no part of the claim—or the Eleventh Circuit's decision—rested on whether trial counsel should have been aware of then-non-existent affidavits. Rather, they relate to the *ultimate* prejudice inquiry by demonstrating the requisite condition that some jurors saw the shackles.

Finally, the State argues there is no circuit split because other courts in "the circuits to which Clark cites" have done what the Eleventh Circuit did here. BIO at 15 (citations omitted). But the State cites no case from the Seventh Circuit, and only two *unpublished* Third Circuit cases which did not overturn (and could not have

overturned) *Workman*. Thus, the State's contortions surrounding *Brown* and *Workman* lack any merit. The circuit split is palpable, and this Court should grant certiorari to resolve it before it deepens or ossifies.

III. The decision below effectively eviscerates *Holbrook v. Flynn*[15] and *Illinois v. Allen*.[16] As with the circuit split, the State's contentions to the contrary fundamentally misinterpret or misstate the law.

As argued in the petition, should this Court not address the Eleventh Circuit's misapplication, and avoidance, of this Court's precedents, *any* claim of ineffective assistance for failing to object to physical restraints will be dead-on-arrival there, rendering *Holbrook* and *Allen* effectively inapplicable in Alabama, Florida, and Georgia.

The State first incorrectly contends this represents "a 'crystal ball' claim; [Mr. Clark] faulted trial counsel for actions taken in 1999 based on this Court's 2005 decision in *Deck* [*v. Missouri*, 544 U.S. 622 (2005)]. . . ." BIO at 7. Although Mr. Clark discussed *Deck* in his petition, he pleaded post-conviction counsel's failure to raise the claim of trial counsel IAC for failing to object to the leg shackle was an unreasonable application of the "clearly established principles of *Holbrook* and *Allen* . . . ."[17]

The State next argues that Mr. Clark "does not explain how these cases help his cause . . . ." BIO at 17. This is also incorrect. As detailed more thoroughly in the petition, the district court noted both precedents were not only clearly established,

[15] 475 U.S. 560 (1986).
[16] 397 U.S. 337 (1970).
[17] (Doc. 13 at 75-78, Pet. at 65-68).

but had also been interpreted by the Eleventh Circuit in a manner consistent with *Deck*, well before it.[18] And *Holbrook* alone clearly established that shackling, as opposed to other security measures such as the mere presence of uniformed officers, would not be viewed by a jury as a "normal" security measure. 475 U.S. at 568-69. Rather, this Court emphasized that shackling is "inherently prejudicial." *Id.*

Throughout its BIO, the State repeats the mantra that trial courts *may* employ shackling and other security measures, and intimates that the burden of demonstrating that physical restraints are unnecessary rests with trial counsel. *See*, *e.g.*, BIO at 8, 18. Mr. Clark does not deny trial courts *may* employ an array of security measures. However, employment of something as "inherently prejudicial," *Holbrook*, 475 U.S. at 568, as shackling should only happen after a hearing and findings of fact demonstrating necessity, and that using a particular form of restraint is the least restrictive measure necessary to address the extreme circumstance.

As this Court has emphasized, because shackling or binding is "inherently prejudicial," it should be used only in "certain *extreme* situations," such as with "a particularly obstreperous and disruptive defendant." *Holbrook* 475 U.S. at 568 (citing *Allen*, 397 U.S. at 344) (emphasis added). This Court emphasized that "[n]ot only is it possible that the sight of shackles" could significantly affect a juror's opinions of the defendant, but that such shackling "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id*

[18] (Doc. 61 at 14).

Additionally, there the trial court held a thorough hearing before allowing the security measure. *Id.* at 564-65.

The State also argues Mr. Clark's "petition pleaded no facts (or law) that would establish his counsel performed unreasonably under the law that existed in 1999." BIO at 12. This contention is specious. The State first parses language from *Holbrook* and *Allen* to imply this Court did not mean what it said when it described shackling as "inherently prejudicial." BIO at 10-11. For the reasons detailed in the petition, and those outlined by the Eleventh Circuit in *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987) and *Zygadio v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983), *Holbrook* and *Allen* clearly meant what they said. As to the existence of such Eleventh Circuit cases before Mr. Clark's trial, the State remarkably contends that because Mr. Clark's case was tried in State court, and the Alabama courts were not bound by the Eleventh Circuit, the Eleventh Circuit cases were irrelevant. BIO at 17-18. This is also incorrect. The Alabama courts were not bound by the Eleventh Circuit. However, they were bound by the United States Constitution and, therefore, the decisions of *this* Court. The Eleventh Circuit cases the State contends are irrelevant were premised upon *Holbrook* and *Allen*. Both Mr. Clark and the district court noted those cases not to demonstrate that the trial court was bound by the Eleventh Circuit, but rather to further demonstrate trial counsel should have known the "inherent prejudice" of shackling, and objected. As the district court emphasized, "it is difficult to understand why trial counsel did not object." Pet. App. 108a.

IV. The State's argument that failure to exhaust represents a valid alternate basis upon which the Eleventh Circuit could have denied relief is without merit.

The State concludes by arguing Mr. Clark's claim could have been denied on the alternate basis it was not sent back to the state courts for exhaustion. BIO at 19. This is an interesting take, given that earlier in its BIO, the State attempted to make it appear the claim *was* raised in state court, but only thereafter not raised on appeal.[19] BIO at 6. Yet, it concludes by arguing the claim was not exhausted. BIO at 19. This again demonstrates the State's fundamental misunderstanding of the interplay between exhaustion and procedural default. As set forth fully in Section I(A), both cannot be true. And all parties agreed the claim was unexhausted, and thus procedurally barred, absent *Martinez*-based "cause" to excuse the procedural default.[20]

The State's contention also contravenes this Court's longstanding explanation that "[a] habeas petitioner who has defaulted his federal claims in state court *meets the technical requirements for exhaustion*; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (citation omitted). Courts have long recognized this "*familiar* principle that federal courts may treat unexhausted claims as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at

[19] As discussed in Section I(A), this blatantly misrepresents both the record, and the State's unwavering position to the contrary in the courts below.

[20] (Doc. 52 at 69 ("[Mr.] Clark has never presented this claim to *any* state court.") (emphasis in the original)); Br. of Appellee at 1, (Mr. Clark "has never presented his ineffective assistance of counsel claim to any state court."); *id.* at 11 n.3 (noting both parties agree the claim was never been presented to any state court).

exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (emphasis added) (citations omitted); *see also Workman*, 915 F.3d at 937 (recognizing unraised claims are technically exhausted and remanding to district court to determine if *Martinez* could provide cause to excuse the default, with no requirement to return to state court for further exhaustion).

There is no question the Alabama courts would not entertain Mr. Clark's claim were it sent back for exhaustion. *Dean v. City of Dothan*, 516 So. 2d 854, 855 (Ala. Crim. App. 1987); *Davis v. State*, 331 So. 2d 807, 808 (Ala. Crim. App. 1976). The State has never argued to the contrary. Thus, the State's final contention that, "Where, as here, an asserted misapplication of a properly stated rule of law was an alternate reason a claim could not prevail, such review [is not worthy of certiorari]," BIO at 19, is without merit.[21]

CONCLUSION

For the reasons set forth in his petition for certiorari, and herein, Mr. Clark respectfully requests this Court summarily grant, vacate, and remand. Alternatively, he respectfully requests that this Court grant certiorari and order briefing on the merits.

[21] The State also misrepresents a material fact, claiming Mr. Clark did not seek the alternative of having the claim sent back to the Alabama courts, should the district court find that doing so would not be futile. BIO at 4. Technically, the State there asserted Mr. Clark did not make the request in his *petition*. *Id.* However, this is deceptive given the State's history of making this unfounded assertion below. First, the State should know such a request would normally be made only in a *reply* to a preclusion defense, which occurred here. Second, the State made this same assertion at oral argument. In rebuttal, counsel directed the panel to Mr. Clark's pleading (Doc. 55 at 28-29) where he did request this alternative. After the argument, in a footnote responding to a F.R.A.P. 28(j) letter, the State admitted Mr. Clark had made the request. The State's retreat from that concession is inexplicable.

Respectfully submitted,

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