NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

MEDGAR SAMUEL,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender

JANICE L. BERGMANN
Counsel of Record
Assistant Federal Public Defender
One E. Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Janice_Bergmann@fd.org

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether, after enactment of 28 U.S.C. § 2254(b)(3) as part of the Antiterrorism and Effective Death Penalty Act of 1996, a State can forfeit the affirmative defense of procedural default by failing to assert it in the district court.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

Federal Proceedings:

United States District Court (S.D. Fla.):

Medgar Samuel v. Secretary, Fla. Dept. of Corr.,
No. 17-80722-Civ-Marra
(Mar. 31, 2020)

United States Court of Appeals (11th Cir.):

Medgar Samuel v. Secretary, Fla. Dept. of Corr.,
No. 20-12002
(Aug. 4, 2022)

State Proceedings:

Florida Circuit Court (15th Cir.):

State v. Medgar Samuel,
No. 07 CF 005216 AMB
(Judgment following trial – Nov. 1, 2007)
(Order denying motion to correct illegal sentence – Feb. 17, 2011)
(Order denying first motion for postconviction relief – July 15, 2014)
(Order denying second motion for postconviction relief – Apr. 19, 2017)

Florida Circuit Court (3d Cir):

Medgar Samuel v. Julie Jones,
No. 2016-33-CA
(June 29, 2016)

Florida District Court of Appeal (4th Dist.):

Medgar Evans Samuel v. State,
No. 4D07-4587
(Sept. 16, 2009)

Medgar Evans Samuel v. State,
No. 4D10-4540
(Mar. 31, 2011)

Medgar Evans Samuel v. State,
No. 4D11-1319
(May 30, 2012)

Medgar Evans Samuel v. State,
No. 4D14-3597
(Aug. 20, 2015)

Medgar Samuel v. State,
No. 4D17-1673
(Dec. 7, 2017)

Florida District Court of Appeal (1st Dist.):

Medgar Evans Samuel v. Julie Jones,
No. 1D16-3533
(Oct. 19, 2016)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

No:

MEDGAR SAMUEL,
Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Medgar Samuel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-12002 in that court.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished but reported at 2022 WL 3104925, and reproduced in Appendix A-1. The district court's decision and the magistrate judge's report adopted by the district court are both unpublished and reproduced in Appendix A-2 and A-3, respectively.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On August 4, 2022, the court of appeals affirmed the district court's grant of Petitioner's habeas corpus petition. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

28 U.S.C. § 2254(b)(3)

> A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

Florida Statutes, § 782.07(1) (2005)

> (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony in the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

In 2007, Florida charged Petitioner Medgar Samuel with second degree murder, and the case proceeded to trial. The trial court instructed the jury on the lesser-included offense of manslaughter using the then-standard jury instruction. Florida law establishes three forms of manslaughter – by act, by procurement, or by culpable negligence. *See State v. Montgomery*, 39 So.3d 252, 256 (Fla. 2010); Fla. Stat. § 782.07(1) (2005). The instruction informed the jury that Petitioner could be convicted of manslaughter if it found that he caused the victim's death either (a) intentionally, or (b) by Petitioner's culpable negligence. During deliberations, after the jury asked whether it need find both that the victim's death was caused intentionally *and* by culpable negligence, the trial court clarified that it need only find either cause. App. A-3 at 46. Ultimately, the jury found Petitioner guilty of manslaughter, and the trial court imposed a 25-year sentence.

In 2017, Petitioner filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. The petition raised seventeen claims. App. A-3 at 2-3. In its response, the State asserted that only two of those claims – Grounds Fifteen and Sixteen – were not properly exhausted in the state courts. *Id.* at 18. The district court therefore found that "with the exception of Grounds Fifteen and Sixteen, [the State] waived its affirmative defense." *Id.*

The district court[1] liberally construed[2] Ground Fifteen as contending that the trial court erred when it instructed the jury as to the *mens rea* requirement of manslaughter. *Id.* The petition asserted that Ground Fifteen was exhausted because it had been presented to the state courts in a state habeas corpus petition. The State's response argued that the claim could not be found in the state habeas petition, and therefore was unexhausted. Response to Petition for Writ of Habeas Corpus, *Samuel v. Inch*, No. 17-80722-Civ-Marra, ECF No. 31, p.24 (S.D. Fla. Apr. 16, 2018) ("Because the factual and legal basis for Ground Fifteen does not appear to have been presented by Petitioner in his State habeas petition alleging ineffective assistance of appellate counsel, the State submits that Ground Fifteen of the instant petition was not exhausted before the State Courts.") (internal citations and emphasis omitted) (hereinafter "Response"). However, the State's response also conceded that Ground Fifteen "seems to be a duplicate of Ground 13, which was raised in the sole issue raised on direct appeal." *Id.* at 22. And the State expressly conceded that Ground Thirteen was exhausted. App. A-3 at 18. Moreover, although the State expressly argued that Ground *Sixteen* was procedurally defaulted, *see* Response at 24-26, it made no such argument with respect to Ground Fifteen.

---

[1] The district judge denied the petition for the reasons stated in the magistrate judge's report. *See* App. A-2.

[2] Allegations in *pro se* pleadings are held "to less stringent standards than formal pleadings drafter by lawyers." *Haines v. Kerner*, 404 U.S. 519, 596 (1972).

The district court found that Grounds Thirteen and Fifteen were raised on direct appeal as one combined claim. *See* App. A-3 at 45. The district court also found that the State "agree[d]" that Ground Fifteen was raised on direct appeal. *Id.* at 45 n.4. However, the district court declined to resolve the exhaustion issue under 28 U.S.C. § 2254(b)(2), which allows a district court to deny a habeas corpus petition notwithstanding the lack of exhaustion. *Id.* Rather, it considered the merits of Grounds Thirteen and Fifteen together, and held that any error in the manslaughter instruction was harmless. App. A-3 at 45-48.

The United States Court of Appeals for the Eleventh Circuit granted a certificate of appealability (COA) on whether the district court erred in finding harmless any error in the state trial court's manslaughter instruction. App. A-1 at 2. After Petitioner briefed the issued on which a COA had been granted, the State argued not only that the manslaughter instruction claim was unexhausted, but also that it was procedurally defaulted. Ultimately, however, the court of appeals declined to address the issue on which it granted a COA. Instead, it affirmed the district court's denial of the petition because it found the manslaughter-instruction claim to be unexhausted, and conclusorily stated that "Samuel would be barred from presenting the claim[] in state court because the remedy is no longer available in a [postconviction motion] . . . and his claim is therefore procedurally barred." *Id.* at 8. Without discussing, much less considering, whether Petitioner's procedural default was excused by "cause and

prejudice" or "a fundamental miscarriage of justice," the Eleventh Circuit held that the claim was unexhausted, and affirmed the district court's denial of the petition with prejudice. *Id*.

REASONS FOR GRANTING THE WRIT

I. There is a split in the circuits as to whether, post-AEDPA, a State forfeits the affirmative defense of procedural default by failing to assert it in the district court.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEPDA), Congress altered many of the provisions governing federal court consideration of habeas corpus petitions filed under 28 U.S.C. § 2254 by state prisoners. Section 2254(b), which requires the exhaustion of state remedies, was among those provisions altered by enactment of the AEDPA. "[U]nder pre-AEDPA law, exhaustion . . . could be waived based on the State's litigation conduct," but with the adoption of 28 U.S.C. § 2254(b)(3), "AEDPA forbids a finding that exhaustion has been waived unless the State expressly waives the requirement." *Banks v. Dretke*, 540 U.S. 668, 705 (2004).

Little more than a year after enactment of the AEDPA, this Court held that if a State fails to apprise the federal courts in a timely fashion of a state procedural bar, the procedural default rule does not bar habeas corpus relief. *Trest v. Cain*, 522 U.S. 87, 89 (1997) ("procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e], if it is not to 'lose the right to assert the defense thereafter'" (quoting *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996)). And post-AEDPA, the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have all concluded that a State can forfeit the procedural default defense by failing to raise it in proceedings before the district court. *See, e.g., Eichwedel v. Chandler*, 696 F.3d

660, 669 (7th Cir. 2012) ("There is no question that the State has forfeited the procedural default defense by not raising it before the district court."); *Cheeks v. Gaetz*, 571 F.3d 680, 685-86 (7th Cir. 2009) (state forfeited a procedural default defense in this case by not timely asserting it before the district court); *Carver v. Straub*, 349 F.3d 340, 345-46 (6th Cir. 2003) (rejecting, as waived, state's assertion of procedural default which was made for first time on appeal after state lost on merits in the district court); *Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002) ("state waived procedural default argument" by failing to invoke defense in district court); *Rojem v. Gibson*, 245 F.3d 1130, 1142 (10th Cir. 2001) (state waived procedural default by failing to assert it in district court); *Dubria v. Smith*, 224 F.3d 995, 1000-01 (9th Cir. 2000) (*en banc*) (state "waived its right to claim procedural default" by "failing to raise the issue [in the district court] in its response to the habeas petition"); *Fisher v. Texas*, 169 F.3d 295, 300-02 (5th Cir. 1999) (even assuming court of appeals has discretion to consider procedural default defense raised by state on appeal notwithstanding state's failure to invoke the defense in the district court, court of appeals declines to do so because "petitioner has had absolutely no notice that procedural bar would be an issue for consideration by this court . . . [and] therefore has had no reasonable opportunity to argue . . . that one of the exceptions to the doctrines applies"); *Tucker v. Johnson*, 115 F.3d 276, 281 n.5 (5th Cir. 1997) (state waived procedural default defense by failing to assert it in district court).

The Eleventh Circuit, however, has held that in light of the express waiver of exhaustion required post-AEDPA by § 2254(b)(3), the close conceptual relationship between the doctrines of procedural default and exhaustion suggests that express waiver should be required for both. It has explicitly held that, although § 2254(b)(3) by its language applies only to exhaustion, the section "applies with full force in cases . . . where the procedural bar arises only as a direct result of the petitioner's failure to exhaust his state law remedies." *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005). The Eleventh Circuit reasoned that "[b]ecause § 2254(b)(3) provides that the State can waive [petitioner's] failure to properly exhaust his claim only by expressly doing so, it logically follows that the resulting procedural bar, which arises from and is dependent upon the failure to properly exhaust, can only be waived expressly." *Id.* The Fifth and Ninth Circuits, however, have expressly rejected the notion that the AEDPA's enactment of § 2254(b)(3) means that a state can only waive its procedural default defense expressly. *See Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) ("[Section] 2254(b)(3)'s reference to exhaustion has no bearing on procedural default defenses."); *Jackson v. Johnson*, 194 F.3d 641, 652 n. 35 (5th Cir. 1999) ("Although a 'State shall not be deemed to have waived the exhaustion requirement . . . unless the State, through counsel, expressly waives the requirement,' *see* 28 U.S.C. § 2254(b)(3), the exhaustion requirement is related but distinct from that of procedural default.").

This split in the circuits is therefore well-established and well-considered. This Court's intervention is required.

II. This case presents a good vehicle for the Court to consider the circuit split.

The straightforward facts of this case allow this Court a clean look at the question presented. The State never expressly asserted the procedural default defense in the district court, but the Eleventh Circuit nonetheless concluded that Petitioner's manslaughter instruction claim was procedurally defaulted. Indeed, although the State expressly argued that other claims in the petition were procedurally defaulted, it did not do so as to Ground Fifteen. Rather, it argued only that the manslaughter instruction claim in Ground Fifteen was unexhausted. Nonetheless, the court of appeals found the claim not only unexhausted but also procedurally defaulted, and denied relief. App. A-1 at 8. And it cited to its prior precedent in *McNair* in its decision. *See id*. at 4. The circuit split is squarely presented.

III. The Eleventh Circuit is wrong.

Section 2254(b)(3) does not undermine *Trest*, *Gray*, or circuit precedent holding that a state can implicitly waive the procedural default defense by failing to raise it in the district court. That section specifies that "[a] state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement." § 2254(b)(3). The statutory language mentions exhaustion alone as

a defense that the state can only waive expressly. As the Ninth Circuit correctly explained, "There is no basis for discerning in AEDPA's complete silence on the question an implicit change in the law regarding waiver of procedural default arguments. Exhaustion and procedural default are distinct concepts in the habeas context." *Franklin*, 290 F.3d at 1230.

Indeed, it has long been understood that the doctrines of exhaustion and procedural default "developed independently and on different grounds, apply in different situations, and lead to different consequences." *Id.* *See Engle v. Isaac*, 456 U.S. 107, 125 n. 28, (1982) ("[T]he problem of waiver is separate from the question whether a state prisoner has exhausted state remedies."); *Thomas v. Woolum*, 337 F.3d 720, 731 (6th Cir. 2003) ("Procedural default is . . . distinct from the exhaustion requirement, an additional requirement added on top of exhaustion."); *Jackson*, 194 F.3d at 652 n.35 ("the exhaustion requirement is related but distinct from that of procedural default").

Given § 2254(b)(3)'s silence regarding the doctrine of procedural default, and the long-standing recognition that exhaustion and procedural default are distinct doctrines, the Eleventh Circuit erred when found Petitioner's manslaughter-instruction claim procedurally defaulted notwithstanding the State's failure to raise that defense in the district court.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Janice L. Bergmann*
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
November 2, 2022