No. 22-6001

IN THE

Supreme Court of the United States

MEDGAR SAMUEL,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Before a federal district court may award habeas relief to a state inmate, the inmate must have exhausted his state-court remedies. 28 U.S.C. § 2254(b)(1)(A). In such proceedings, a state may be "deemed to have waived" the exhaustion defense only if it does so "expressly." *Id.* § 2254(b)(3). Here, the State argued—and petitioner does not dispute—that petitioner had failed to timely exhaust one of the 17 claims he raised in his federal habeas petition. Petitioner also does not dispute that, as a result, he is procedurally barred from raising that claim. Instead, petitioner contends that the court of appeals should have held the State's argument forfeited because the State did not raise the procedural bar in district court.

The question presented is whether, notwithstanding the alleged forfeiture, the court of appeals correctly held that § 2254(b)(3) required it to consider the State's exhaustion argument on the merits.

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1. Under the Antiterrorism and Effective Death Penalty Act of 1996, a person in custody under a state conviction may apply for federal habeas relief from a state court decision that is (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

But before proceeding to federal court, the inmate must "exhaust[]" his claim by presenting it to the state courts. *Id.* § 2254(b)(1); *see also Picard v. Connor,* 404 U.S. 270, 275 (1971). "It is not sufficient merely that the federal habeas petitioner has been through the state courts"; "nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made." *Kelley v. Sec'y for Dep't of Corr.,* 377 F.3d 1317, 1343–44 (11th Cir. 2004) (citing *Picard,* 404 U.S. at 275–76). Instead, the inmate "must present his claims to the state courts such that they are permitted the 'opportunity to apply controlling legal principles to the facts bearing upon [the] constitutional claim.'" *Id.* at 1344 (quoting *Picard,* 404 U.S. at 277).

The exhaustion requirement advances the important interests of federalism and comity; it ensures that before a federal court grants habeas relief, the state courts have the opportunity to correct any mistakes in a criminal judgment. *Picard,* 404 U.S. at 275. To that end, a state responding to a federal habeas pe-

tition "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." 28 U.S.C. § 2254(b)(3).

Separately, a federal habeas claim may also be procedurally defaulted. The term procedural default "can encompass two different scenarios." *See Franklin v. Johnson*, 290 F.3d 1223, 1238 (9th Cir. 2002) (O'Scannlain, J., concurring in part and concurring in the judgment). The first arises when an inmate fails to timely exhaust his federal claim in state court. If an inmate fails to do so, then the inmate has both failed to exhaust his claim and is procedurally barred from raising the claim in the future, since "[a]s a result [of the failure to timely exhaust], his claim is procedurally barred." *Id.* The second scenario occurs where "[a] state court will not hear his claim due to [some other] state procedural bar." *Id.* For example, if an inmate failed to object to the admission of evidence at trial and state law requires a contemporaneous objection, the inmate is procedurally barred from raising the evidence claim on direct appeal or in a state habeas petition. *Id.*

As explained below, this case involves the interplay between exhaustion and the first type of procedural default, not the second.

2. Petitioner Medgar Samuel was charged with and tried for second-degree murder for stabbing and killing a man during a fight. Pet. App. A-3 at 7–9. The jury was also instructed on a lesser-included offense, manslaughter, and the standard jury instructions at the time provided that petitioner could be convicted of

manslaughter if he caused the victim's death either intentionally or by culpable negligence. Pet. 3. During deliberations, the jury asked whether it needed to find that petitioner caused the victim's death both intentionally *and* by culpable negligence. Pet. App. A-3 at 46. With the agreement of the parties, the trial court responded that the jury need find only one or the other. Pet. App. A-3 at 46. The jury found petitioner guilty of manslaughter, and the court sentenced petitioner to 25 years' imprisonment. Pet. App. A-3 at 10.

On direct appeal, petitioner argued that the trial court erred in failing to reread the manslaughter instruction when the jury asked for clarification. *Samuel v. Fla. Dep't of Corr.,* No. 17-cv-80722, DE32-1:24–26 (S.D. Fla. Apr. 16, 2018). The court of appeal affirmed. *Samuel v. State*, 19 So. 3d 326 (Fla. Dist. Ct. App. 2009).

3. In his first state habeas motion, petitioner argued that his trial counsel was ineffective for accepting the culpable-negligence jury instruction, DE32-1:228–30, but the state postconviction court denied relief, finding that (1) the jury instruction was proper, (2) his jury-instruction claim should have been raised on direct appeal, and (3) he failed to show prejudice, *Samuel v. Fla. Dep't of Corr.,* No. 17-cv-80722, DE32-3:190 (S.D. Fla. Apr. 16, 2018). The court of appeal affirmed. *Samuel v. State*, 173 So. 3d 984 (Fla. Dist. Ct. App. 2015). Petitioner then filed a *pro se* petition in the Florida court of appeal, arguing that his appellate counsel prejudiced him by failing to raise two claims not relevant here. DE32-1:50–68. The court of appeal denied the petition. DE32-1:123.

Years later, petitioner filed a successive state postconviction motion, relying on two intervening decisions from the Florida Supreme Court. *Samuel v. Fla. Dep't of Corr.*, No. 17-cv-80722, DE32-4:21 (S.D. Fla. Apr. 16, 2018). In *State v. Montgomery*, the Florida Supreme Court held that, as a matter of state law, instructing a jury that intent to kill is an element of manslaughter constitutes fundamental error where the defendant was convicted of the greater offense of second-degree murder. 39 So. 3d 252, 254, 259–60 (Fla. 2010). Following *Montgomery*, the court held that under state law a manslaughter instruction including intent to kill was not cured by inclusion of a subsequent instruction on manslaughter by culpable negligence. *Haygood v. State*, 109 So. 3d 735, 740–41 (Fla. 2013). Petitioner argued only that under *Montgomery* and *Haygood*, his jury instructions—which instructed the jury that he could be found guilty of manslaughter if he intended to kill the victim or if he was culpably negligent—constituted "fundamental error." DE32-4:23–31. Petitioner did not argue that his jury instructions violated any federal rights. Nor did *Montgomery* or *Haygood* establish any federal rights.

The state postconviction court denied petitioner's motion as untimely under Florida Rule of Criminal Procedure 3.850(b)(2); concluded that *Montgomery* and *Haygood* did not apply retroactively to his conviction, which had become final before they were issued; and even if they did apply retroactively, that he had failed to file his motion within two years of the decision announcing retroactive application, as required under Rule 3.850(b)(2). DE32-4:38–39. The court of appeal affirmed without an opinion. *Samuel v. State*, 236 So. 3d 1089 (Fla. Dist. Ct. App. 2017).

4. Petitioner then filed a *pro se* federal habeas petition asserting 17 grounds for relief. *Samuel v. Fla. Dep't of Corr.,* No. 17-cv-80722, DE1 (S.D. Fla. June 9, 2017). Only Grounds 13 and 15 are relevant here. In Ground 13 he argued that the trial court erred "in not giving the jury a complete definition of manslaughter in response to the jury's request for clarification." DE1:27. In Ground 15 he argued that the "[t]rial court committed fundamental error when [it] instructed the jurors on the element of: (1) intentional/caused, and (2) culpable negligence, for the elements of manslaughter." His "supporting facts" for Ground 15 state in full:

> Instead of the court administering the instructions as the statu[t]e provides which requires (2) two elements; 1) the victim is dead; and 2) give either a, b, or c depending on proof of allegations. Instead the trial court gave three elements, in which culpable negligence didn't fit, nor was it argued, and intentional/caused [sic] was deemed fundamentally erroneous. The court was even given an opp[o]rtunity to correct the erroneous jury instructions, but no one; the court, defense counsel, nor the state knew they could recall the jurors to correct the erroneous instructions. Now, with a man[']s liberty at stake, no one would take the time to find out if and/or how. This violated the petitioner's 14th Amend. Right to the U.S. Constitution.

DE1:29. Petitioner indicated that he had previously raised Ground 13 on "direct appeal" and had raised Ground 15 when he previously argued "ineffective assistance of appellate counsel." DE1:27, 29.

In its response to the habeas petition, the State combined its merits response to Grounds 13 and 15, arguing that petitioner had not shown how the trial court's instructions to the jury were contrary to, or involved an unreasonable application of, clearly established *federal* law. *Samuel v. Fla. Dep't of Corr.,* No. 17-cv-80722, DE31:77–80 (S.D. Fla. Apr. 16, 2018). The State also argued that Ground 13 was exhausted but Ground 15 was not. DE31:27. Specifically, the State asserted that "Ground Fifteen of the [federal habeas] petition was not exhausted" "[b]ecause the factual and legal basis for [it] does not appear to have been presented by Petitioner in his State habeas petition alleging ineffective assistance of appellate counsel." DE31:23–24. And it explained elsewhere in its response that "unexhausted claims [are] procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." DE31:18.

A magistrate judge issued a report on the petition, Pet. App. A-3, which the district court adopted in its entirety, Pet. 4 n.1; Pet. App. A-2. The district court declined to resolve the exhaustion issue. It instead ruled on the merits of Grounds 13 and 15 together after finding them related, focusing on Ground 13 and not addressing *Montgomery* or *Haygood*. Pet. App. A-3 at 45–48. The district court interpreted petitioner to be arguing that the state trial court—instead of clarifying that manslaughter could be committed by either an intentional act or culpable negligence—should have repeated the whole definition of manslaughter because it included instructions on justifiable and excusable homicide. Pet. App. A-3 at 46–47. But the district court denied the claims, finding that any error

was harmless, because "the jury was instructed on excusable and justifiable homicide . . . [and] . . . the jury's narrow request for clarification does not suggest the jury failed to consider Petitioner's self-defense theory." Pet. App. A-3 at 48.

Petitioner applied for a certificate of appealability on 16 of his claims, including Grounds 13 and 15. *Samuel v. Fla. Dep't of Corr.,* No. 17-cv-80722, DE64 (S.D. Fla. May 29, 2020). The Eleventh Circuit granted a certificate of appealability only for Ground 15, as to whether the district court erred "in finding that any error in the state trial court's manslaughter instruction, which included an intent-to-kill element, was harmless." *Samuel v. Fla. Dep't of Corr.,* No. 20-12002, DE12:13–14 (11th Cir. Feb. 3, 2021). The Eleventh Circuit construed Ground 15 as alleging that the trial court erred in instructing the jury that it could find the mens rea element satisfied by an intent to kill rather than mere culpable negligence. DE12:13. In granting the certificate of appealability, the court of appeals acknowledged that "it is not clear whether *Montgomery* applies in a case where the defendant is ultimately convicted of manslaughter." DE12:14.

Along with refuting petitioner's claim on the merits, the State argued in the Eleventh Circuit that petitioner's federal habeas claim was "procedurally barred" because it was "not exhausted in state court." *Samuel v. Fla. Dep't of Corr.,* No. 20-12002, DE36:34 (11th Cir. Dec. 6, 2021).

The Eleventh Circuit affirmed. Instead of reaching the merits, the Eleventh Circuit held that petitioner "failed to properly exhaust his claim by failing to fairly

present his federal claim" in any state filing. Pet. App. A-1 at 7. The court of appeals observed that neither petitioner's direct appeal nor his two state habeas motions had raised the claim that the jury instruction violated a *federal* right. Pet. App. A-1 at 7–8. In his direct appeal, "he argued only that the court erred in not rereading the instruction when the jury asked for clarification," without referencing any federal right. Pet. App. A-1 at 7. In his first state habeas motion, he had raised only an ineffective assistance of counsel claim for accepting an erroneous jury instruction. Pet. App. A-1 at 7. In his second state habeas motion, "while he referred to 'fundamental error,' he pointed only to state law cases in support and did not refer to the constitution or any federal rights"; and his citations to *Montgomery* and *Haygood* had not exhausted any federal claim because "neither of those cases talk about constitutional error." Pet. App. A-1 at 7–8.

The Eleventh Circuit further concluded that the claim was procedurally barred. Petitioner "would be barred from presenting the claims in state court," it reasoned, "because the remedy is no longer available in a [Florida state habeas] motion, as more than two years passed since *Montgomery* and *Haygood* were decided." Pet. App. A-1 at 8.

REASONS FOR DENYING THE PETITION

Petitioner, a state inmate, contends that the court of appeals erred in considering on the merits the State's argument that he had failed to timely exhaust his state-court remedies on one of the seventeen claims he raised in his federal habeas corpus petition. But the court of appeals correctly entertained the

State's argument—which petitioner does not dispute on the merits—because the federal habeas statute provides that a state responding to a federal habeas petition "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." 28 U.S.C. § 2254(b)(3). The court of appeals correctly rejected the suggestion that this express waiver requirement is inapplicable to the State's argument simply because petitioner's failure to timely exhaust also results in the claim being procedurally barred. And every other circuit to address the question in a binding holding has agreed.

Further review is unwarranted.

I. THIS CASE DOES NOT IMPLICATE A CIRCUIT SPLIT.

Petitioner argues that the Court should resolve a "split in the circuits" on whether "a State forfeits the affirmative defense of procedural default by failing to assert it in the district court." Pet. 7 (identifying the "Fifth, Sixth, Seventh, Ninth, and Tenth Circuits" as favoring his rule).

In fact, all three circuits with a binding opinion addressing these circumstances agree with the court of appeals' holding: "[W]hen a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure also constitutes a procedural bar," and the State waives that defense only if it does so expressly. *McNair v. Campbell*, 416 F.3d 1291, 1305–06 (11th Cir. 2005); *see Carvajal v. Artus*, 633 F.3d 95, 105 (2d Cir. 2011) ("We are persuaded that

when a state's procedural default argument is predicated on a habeas applicant's failure to exhaust . . . we may consider such an argument for the first time on appeal unless it was *expressly* waived in the district court."); *Ellis v. Hargett*, 302 F.3d 1182, 1189 (10th Cir. 2002) ("[Petitioner's] federal due process claim has not been exhausted. Since the State has not expressly waived the exhaustion requirement, it applies to this claim. Because [petitioner] has already applied once for state postconviction relief, he is clearly procedurally barred from raising this claim[.]" (citations omitted)). Each of those circuits invokes § 2254(b)(3) as the basis for that rule.

Most of the cases on which petitioner relies involve a type of procedural bar not at issue here. And the only circuits to address the circumstances of this case while suggesting a different result—the Sixth, Seventh, and Ninth Circuits—either failed to address § 2254(b)(3) or examined the issue only in dicta.

1. As noted, procedural default "can encompass two different scenarios." *See Franklin*, 290 F.3d at 1238 (O'Scannlain, J., concurring in part and concurring in the judgment). The first, at issue here, results from a state inmate's failure to exhaust the claim in state court within the period permitted by the state's rules of procedure—with the result that any attempt to assert the claim would now be procedurally barred as untimely. *Id.* The second arises where the inmate did timely present the claim to the state courts but was turned away because of some "state procedural bar,"—for example, when a prisoner attempts to raise an unpreserved claim in the state appellate court. *Id.*

In this second scenario, the exhaustion requirement "does not come into play." *Id.*

This case involves the first type of procedural default: As the Eleventh Circuit concluded, petitioner never attempted to raise his claim in the Florida courts, with the result that any such claim would now be untimely. Pet. App. at 8. Yet most of the cases petitioner identifies as part of the purported split, Pet. 8–9, deal with the *second* type of procedural default, and thus have no bearing on the dispute:

- *Tucker v. Johnson*, 115 F.3d 276, 281 n.5 (5th Cir. 1997) (State waived argument that inmate failed to request jury instruction at trial, barring the claim under Texas's contemporaneous-objection rule).
- *Fisher v. Texas*, 169 F.3d 295, 300–01 (5th Cir. 1999) (State waived argument that inmate failed to object during jury selection to a peremptory strike).
- *Jackson v. Johnson*, 194 F.3d 641, 650–52 (5th Cir. 1999) (State waived defense that inmate failed to contemporaneously object to prosecutor's statements at trial).
- *Dubria v. Smith*, 224 F.3d 995, 1000–01 (9th Cir. 2000) (en banc) (State waived defense that inmate failed to contemporaneously object to admission of police interview at trial).
- *Rojem v. Gibson*, 245 F.3d 1130, 1142 (10th Cir. 2001) (State waived defense that inmate failed to object to prosecutor's remarks at trial).

2. Petitioner identifies cases from three circuits involving the first type of procedural default. Pet. 8–9. But none of those cases include a binding holding. The Sixth Circuit, in *Caver v. Straub*, refused to consider the state's argument that the inmate procedurally defaulted because of lack of exhaustion, finding that the state did not raise the issue in the district court. 349 F.3d 340 (6th Cir. 2003). The Sixth Circuit did not, however, take a position on whether § 2254(b)(3) applies in that circumstance—indeed, it did not mention that statute at all. *See id.* at 345–46. Under circuit precedent, then, *Caver* would not bind future panels. *See United States v. Paulk*, 46 F.4th 399, 403 (6th Cir. 2022) (refusing to apply a prior decision as binding precedent because it "did not consider the specific issue presented here").[1]

Contrary to petitioner's suggestion (Pet. 8), the Ninth Circuit's decision in *Franklin* likewise does not hold that the first type of procedural default can be waived impliedly. Though the majority opinion in that case includes a "discussion of the waiver matter,"

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[1] A subsequent panel of the Sixth Circuit, without citing *Caver*, reasoned from first principles when concluding that § 2254(b)(3) did not absolve the state's failure to raise the exhaustion defense below, but the Sixth Circuit sitting *en banc* later vacated that decision. *Garner v. Mitchell*, 502 F.3d 394, 401 n.1 (6th Cir. 2007), *vacated en banc* (Jan. 3, 2008). The en banc court then affirmed the denial of habeas relief on the merits alone, without addressing the waiver issue. *Garner v. Mitchell*, 557 F.3d 257, 258–71 (6th Cir. 2009) (en banc); *see also id.* at 271 (Daughtrey, J., concurring in result only) (observing that the waiver issue "has somehow disappeared from the discussion at the current stage of the litigation"). As a result, no Sixth Circuit precedent on how to apply § 2254(b)(3) in this circumstance exists.

Franklin, 290 F.3d at 1233, that discussion was "dictum," *id.* at 1239 (O'Scannlain, J., concurring in part and concurring in the judgment). As Judge O'Scannlain observed in a concurring opinion, the majority's treatment of the waiver question was "unnecessary" to the outcome because the majority nevertheless affirmed the district court's denial of the habeas petition on the merits. *Id.* at 1239. No subsequent published opinion from the Ninth Circuit has enshrined that dictum in a holding.

Finally, petitioner cites (Pet. 8) *Cheeks v. Gaetz*, 571 F.3d 680 (7th Cir. 2009), where the question was whether a district court could decline to consider a procedural bar arising from the failure to exhaust. But rather than address the question presented, the Seventh Circuit acknowledged in *Cheeks* that it had not yet decided the circumstance at issue in this case: "as to whether section 2254(b)(3) applies to procedural default as well as to exhaustion . . . [w]e decline[] to take a position on that issue." *Id.* at 686 n.1 (citations omitted); *see also Eichwedel v. Chandler*, 696 F.3d 660, 700 (7th Cir. 2012) ("We have not yet taken a position on this question, and we need not do so in this case." (footnote omitted)). At any rate, the discussion in *Cheeks* giving weight to the State's failure to raise procedural default at the district court was dicta for the same reason that *Franklin*'s was—the inmate's request for relief was denied on the merits.

In sum, there is no disagreement among the circuits about whether § 2254(b)(3) applies to procedural defaults arising from lack of exhaustion.

II. The Eleventh Circuit correctly held that a state cannot forfeit a procedural-default defense caused by an inmate's failure to exhaust.

Certiorari is similarly unwarranted because the Eleventh Circuit's approach is correct. Underscoring the importance of AEDPA's exhaustion requirement, Congress has specified that, in federal habeas proceedings seeking review of a state-court conviction, "[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*." 28 U.S.C. § 2254(b)(3) (emphasis added).

Based on that text, the Eleventh Circuit correctly reasoned that a state cannot impliedly waive a procedural bar that results from the inmate's failure to exhaust. *McNair*, 416 F.3d at 1305. "Because § 2254(b)(3) provides that the State can waive [a petitioner's] failure to properly exhaust his claim only by expressly doing so," that court has said, "it logically follows that [a] resulting procedural bar[] which arises from and is dependent on the failure to properly exhaust[] can only be waived expressly." *Id.* Indeed, in such an instance "[t]here *could be no* procedural bar argument . . . without [the petitioner's] failure first to exhaust his claim." *Franklin*, 290 F.3d at 1238 (O'Scannlain, J., concurring in part and concurring in the judgment). "Thus, [where] the State's argument is based upon [the petitioner's] failure to exhaust his claim, which, *as a by-product*, renders it procedurally barred . . . the State [cannot] waive this argument by failing to raise it below." *Id.* (emphasis added). Any

other approach would "elevate[] form over substance." *Id.* at 1238.

Put differently, when the procedural default arises from the inmate's failure to exhaust, the State is still enforcing "the exhaustion requirement," even though that requirement has resulted in a procedural default. That defense thus must be waived expressly or not at all. *See* 28 U.S.C. § 2254(b)(3).

In dicta arguing the contrary, the *Franklin* majority thought that such a procedural default is *not* predicated on lack of exhaustion. It argued that "[i]f a petitioner failed to present his claims in state court and can no longer raise them through any state procedure, state remedies are no longer available, and are thus exhausted." *Franklin*, 290 F.3d at 1231 (citing *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982)). In other words, by delaying so long that state remedies become unavailable, the inmate had "exhausted" the remedies available in state court and rendered § 2254(b)(3) inapplicable.

But part of the "exhaustion requirement," 28 U.S.C. § 2254(b)(3), this Court has held, is that the claims must be "*properly* exhausted." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Were it otherwise, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Id.* (citation omitted). "To avoid this result, and thus 'protect the integrity' of the federal exhaustion rule, [this Court] ask[s] not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies[.]" *Id.* (citation omitted). And

that requirement includes complying with the time limits for presenting a claim to the state court. *See id.*

III. This case is a poor vehicle.

Finally, this is a poor vehicle for resolving the question presented because the State *did* raise the exhaustion/procedural-default defense in the district court. In its response in the district court, the State noted that petitioner failed to raise the claim underlying Ground 15 in state court, DE31:23–24; and further noted elsewhere in its response that the Eleventh Circuit treats an unexhausted claim as procedurally defaulted if a state-court petition for postconviction relief would now be deemed untimely, DE31:18. The district court thus reasonably would have understood Ground 15 to be procedurally defaulted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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