NO: 22-6001

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Even accepting the State's division of procedural defaults into two distinct "types," there nonetheless remains a 3-to-1 circuit split on the question presented.

The State asserts that this case does not implicate a circuit split because there are two distinct types of procedural default, this case involves the "first" type of default, and all three of circuit court decisions involving defaults of this "first" type – those of the Second, Tenth, and Eleventh Circuits – agree 28 U.S.C. § 2254(b)(3) requires any waiver by the State of this "first" type of default to be express. BIO: 2; *id.* at 9 (citing *Carvajal v. Artus*, 633 F.3d 95, 105 (2d Cir. 2011); *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005); *Ellis v. Hargett*, 302 F.3d 1182, 1189 (10th Cir. 2002)). According to the State, this "first" type of default exists when "an inmate fails to timely exhaust his federal claim in state court" and, as a result, the claim is procedurally barred. BIO: 2.

Petitioner does not concede that the question of whether § 2254(b)(3) requires the express waiver of a procedural default turns on the type of default involved. Nonetheless, even were the Court to accept the State's division of defaults into two distinct types, and limit its consideration of whether a conflict exists to only those cases involving defaults the State describes as being of the "first" type, there remains a 3-to-1 split in the circuit courts.

The Ninth Circuit confronted what the State calls the "first" type of default in *Franklin v. Johnson*, 290 F.3d 1223 (9th Cir. 2002). There, the state argued Franklin's claim was procedurally defaulted because he previously failed to present his claim to the state courts and was now barred from doing so by a state procedural rule. *Id*. at 1229; *see id*. at 1238 (O'Scannlain, J., concurring in part and concurring in the judgment) ("At bottom, the State argues that Franklin failed to exhaust his claim in state court, and, therefore, by function of Oregon law, it is procedurally barred from our consideration.") (internal footnote omitted). Despite Franklin's default being the exact same "type" as that in *McNair*, *Carvajal*, and *Ellis*, the Ninth Circuit held that § 2254(b)(3) did not apply and the state waived the procedural default by failing to raise it in the district court. *Id*. at 1229-1234. The Ninth Circuit's ruling is therefore directly contrary to those of the Second, Tenth, and Eleventh Circuits.

The State implicitly concedes that *Franklin* involved what it calls the "first" type of default, but relies on Judge O'Scannlain's *Franklin* concurrence in an attempt to characterize the majority opinion as *dicta*. BIO: 12-13 (citing *Franklin*, 290 F.3d at 1238 (O'Scannlain, J., concurring in part and concurring in the judgment)). That attempt fails. Alternative holdings are binding precedent. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1989) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*"); *Massachusetts v. United States*, 333 U.S. 611, 623 (1948). And the holding that a claim is procedurally

defaulted is a binding alternative holding to the disposition of that claim on its merits. *See Will v. Lumpkin*, 978 F.3d 933, 939-40 (5th Cir. 2020); *Reichmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 580 (11th Cir. 2019). *Cf. Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (requiring federal habeas courts to honor state court's invocation of state procedural bar as binding even if state court reaches merits of the claim in an alternative holding). Indeed, the Eleventh Circuit in *McNair* did not view *Franklin*'s default ruling as *dicta*. Rather, it expressly disagreed with "the contrary view" adopted by the Ninth Circuit. *See McNair*, 416 F.3d at 1306 (citing *Franklin*, 290 F.3d at 1231).

The State incorrectly asserts that "[n]o subsequent published opinion from the Ninth Circuit has enshrined [*Franklin*'s purported] *dictum* in a holding." BIO: 13. In fact, the Ninth Circuit followed that so-called *dictum* as controlling authority in at least two cases involving the "first" type of default. *See Slovik v. Yates*, 556 F.3d 747, 751 n.4 (9th Cir. 2009) (citing *Franklin*, 290 F.3d at 1229-32) and *Vang v. Nevada*, 329 F.3d 1069, 1073 (9th Cir. 2003) (citing *Franklin*, 290 F.3d at 1229). District courts in the Ninth Circuit also routinely cite *Franklin* for the proposition that a state may waive the procedural default defense by failing to raise it in the district court, even as to defaults the State would label as being of the "first" type. *See, e.g., Barnett v. Kernan*, 2017 WL 3721691, *12 (S.D. Cal. 2017) (citing *Franklin*, 290 F.3d at 1231, 1232-33); *Duncan v. Ryan*, 2015 WL 13735818, *22 & n.7 (D. Ariz.

Aug. 7, 2015) (citing *Franklin*, 290 F.3d at 1231); *Melgoza v. Kirkland*, 2014 WL 4809005, *3 (N.D. Cal. Sept. 26, 2014) (citing *Franklin*, 290 F.3d at 1229).

Accordingly, even if the Court were to accept the State's division of procedural defaults into two types, and limit its consideration of whether a conflict exists to only those cases involving defaults the State describes as of the "first" type, there is nonetheless a well-established and well-considered 3-to-1 circuit split. This Court's intervention is required.

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

The State argues this case is a poor vehicle for resolving the question presented because the State did not waive the procedural default defense in the district court. BIO: 16. Specifically, the State asserts that in its answer to the petition, it "noted that petitioner failed to raise the claim underlying Ground 15 in state court," 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." *Id.* (citing DE 31: 18, 23-24). As a result, the State argues, the district court "reasonably would have understood Ground 15 to be procedurally defaulted." *Id.* The State's argument is disingenuous.

Petitioner raised seventeen grounds for relief in his federal petition. In the section of its answer entitled "Exhaustion/Procedural Bar," the State conceded Grounds 1 through 14 and Ground 17 were exhausted because they had been fairly

presented to the state courts. DE 31: 17, 27. A comparison of the State's arguments with respect to the two remaining claims – Grounds 15 and 16 – makes clear that the State did *not* assert the procedural default defense as to Ground 15 – the jury instruction claim at issue here. *Compare id.* at 22-24 *with id.* at 24-26. Rather, while the State clearly asserted a procedural default defense as to Ground 16, it argued only that Ground 15 was unexhausted because not fairly presented to the state courts.

As to Ground 16, there is no doubt that the State expressly raised procedural default as a defense. In the "Exhaustion/Procedural Bar" section of its answer, the State concluded its discussion of Ground 16 with the statement that the federal habeas court could not reach the merits of that claim because it was "procedurally barred from federal habeas corpus review." *Id.* at 26. The State's argument with respect to Ground 16 stated, *en toto*:

> Petitioner contends he raised ground 16 in his State Habeas Corpus Petition filed with the Third Judicial Circuit in and for Suwannee County, Florida (DE#1, p. 30). Because as above argued that petition should have been **dismissed as unauthorized** and was, therefore, not properly filed, the petition was dismissed on state's procedural grounds. It is well-settled that federal courts are barred from reaching the merits of a state prisoner's federal habeas claim where the petitioner has failed to comply with an independent and adequate state procedural rule. *Wainwright v. Sykes*, 433 U.S. 72, 85-86, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977). *See also Siebert v. Allen*, 455 F.3d 1269, 1271 (11th Cir. 2006), *cert. denied*, 549 U.S. 1286, 127 S. Ct. 1823, 167 L.Ed.2d 331 (2007); *Harmon v. Barton*, 894 F.2d 1268, 1270 (11th Cir. 1990). To apply an express procedural bar, the state procedural rule must be regularly followed. *See Baldwin v. Johnson*, 152 F.3d 1304, 1317 (11th Cir. 1998) (finding that federal courts may not review a claim that a petitioner procedurally defaulted under state law if the

> last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief), *cert. denied*, 526 U.S. 1047, 119 S. Ct. 1350, 143 L.Ed.2d 512 (1999).
>
> Thus, while ground sixteen ***may*** be considered exhausted, the State habeas corpus petition, based on an "illegal **detention**" basis, has expressly been held to be procedurally barred by the state courts. *See, Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (when petitioner fails to first raise his federal claims in state court in compliance with relevant state procedural rules, federal habeas review is procedurally barred); *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991) (same).
>
> A state procedural bar **precludes** consideration of an issue on federal habeas review when the last state court rendering a judgment on the issue in question rests on a clear and unambiguous state procedural bar. *See Coleman v. Thompson, supra; Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L.Ed.2d 706 (1991); *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 103 L.Ed.2d 308 (1989); *Harmon v. Barton*, 894 F.2d 1268 (11th Cir. 1990). Accordingly, the claim[] raised by Petitioner in Ground Sixteen of the instant petition is procedurally barred from federal habeas corpus review. A discussion on the merits of the procedurally defaulted claim is, therefore, not appropriate, see, *O'Sullivan v. Boerckel*, 526 U.S. 838, 848-49 (1999); *Coleman v. Thompson*, 501 U.S. at 750-51; *United States v. Frady*, 456 U.S. 152, 168 (1982); and *Wainwright v. Sykes*, 433 U.S. 72 (1977).

DE 31: 24-26 (emphasis in original).

In sharp contrast to the State's explicit invocation of procedural default as to Ground 16, the "Exhaustion/Procedural Bar" section of the State's answer for Ground 15 asserted only that the claim was unexhausted. *Id*. at 22-24. With respect to Ground 15, the answer states, *en toto*:

> In his Federal Habeas Petition (DE# 1), Petitioner claims he exhausted Ground 15 by raising same in his State habeas petition alleging ineffective assistance of appellate counsel (Ex. 8), see DE# 1, p. 29. Respondent, however, submits that a review of exhibits 8 and 9 demonstrate that this claim: "GROUND FIFTEEN. Trial Court

committed fundamental error when they instructed the jurors on the element of 1) intentional caused, and 2) culpable negligence, for the element of Manslaughter" was in fact not raised in Petitioner's state habeas allegations of ineffective assistance of appellate counsel (Ex. 8 and 9). Rather, this ground seems to be a duplicate of Ground 13, which was raised in the sole issue raised on direct appeal (see Ex. 5 and 6).

In order to ensure that state courts have the first opportunity to hear all claims, state prisoners are required "to present the state courts with the same claim [they urge] upon the federal courts." *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 Dept. of Corr.*, 377 F.3d 1317, 1343-44 (11th Cir. 2004) (*citing Picard*, 404 U.S. at 275-76 and *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Rather, a habeas petitioner must have presented the *federal constitutional claims* in such a way that the state courts were alerted to the issues and had an opportunity to rule on them. *Picard*, 404 U.S. at 275-77; *Jimenez v. Fla. Dep't of Corr.*, 481 F.3d 1337 (11th Cir. 2007). This requirement is met when the claims are presented to the state court "such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelley*, 377 F.3d at 1344-45 (*citing Picard*, 404 U.S. at 277). For instance, a habeas petitioner wishing to raise a federal issue in state court can do so "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *see also McNair v. Campbell*, 416 F.3d 1291, 1302 (11th Cir. 2005) (the exhaustion requirement must be applied with common sense and in light of its underlying purpose; that is, to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary). However, the exhaustion doctrine requires a habeas petitioner to do more than "scatter some makeshift needles in the haystack of the state court record." *McNair*, 416 F.3d at 1302-03. Moreover, "[c]ursory and conclusional" sentences (unaccompanied by citations to federal law) ordinarily will not suffice. *Zeigler v. Crosby*, 345 F.3d 1300, 1308 n.5 (11th Cir. 2003). 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 (Ex. 8), the State submits that

> Ground Fifteen of the instant petition, see DE# 1, p. 29, was **not** exhausted before the State Courts.

DE 31: 22-24 (emphasis in original). Nowhere in that lengthy discussion of Ground 15 did the State mention default. *See id*. Rather, it focused entirely on exhaustion.

Despite the stark contrast between the its clear assertion of default as to Ground 16 and utter failure to do so as to Ground 15, the State argues that the district court "would have reasonably understood Ground 15 to be procedurally defaulted" because the answer asserted that Ground 15 was unexhausted and "elsewhere" noted that "the Eleventh Circuit treats an unexhausted claim as procedurally defaulted if a state-court petition would now be deemed untimely." BIO: 16 (citing DE 31: 18). But nowhere does the State's answer argue that the Florida courts would deem a state-court petition raising Ground 15 untimely. *See* DE 31: *passim*. Without that logical link, there would be no reason for the district court to conclude that contained within that the argument that Ground 15 was not exhausted was the argument it was also procedurally defaulted.

Additionally, all indications here are that the district court reasonably understood the State's argument to be premised only on a lack of exhaustion. *See* App. A-3: 45 n.4 (Magistrate Judge's Report determining that "Respondent . . . submits Ground Fifteen was not properly exhausted."); App. A-2: 1 (affirming Report in its entirety). In its consideration of Ground 15, the district court never mentioned procedural default, declined to resolve the exhaustion question, and instead

addressed the claim on its merits pursuant to 28 U.S.C. § 2254(b)(2). *See* App. A-3: 45-48 & n.4; App. A-2: 1.

Thus, before the district court, the State argued only that the jury instruction claim in Ground 15 was unexhausted, and the district court understood that exhaustion was the only defense the State raised as to that claim. Despite the State's failure to assert the procedural default defense as to Ground 15 in the district court, the court of appeals found the claim procedurally defaulted, and denied relief. App. A-1 at 8. The circuit split is squarely presented by the facts of this case.

CONCLUSION

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

Respectfully submitted,

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