No. 22-6150

In the Supreme Court of the United States

WALTER RAGLIN,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

In a taped confession, Walter Raglin admitted to killing Michael Bany during a robbery. After the trial court deemed the confession admissible, Raglin's attorneys understood that the jury was highly likely to return a guilty verdict. With that in mind, they focused their defense on the penalty phase of Raglin's capital murder trial. Counsel candidly told potential jurors, as part of *voir dire*, that the case would likely reach a penalty phase. This allowed them to press prospective jurors on their likelihood of recommending the death penalty.

At trial, counsel disputed whether Raglin possessed the requisite *mens rea* for the crime of aggravated murder. But the jury convicted him anyway. The same jury, despite counsel's efforts, returned a death sentence, which the trial court imposed.

Throughout state-postconviction proceedings, Raglin claimed that his attorneys—by acknowledging Raglin's likely guilt during *voir dire* but then arguing innocence at trial—violated his right to effective assistance of counsel. But because Raglin never raised this argument in his direct appeal, the Ohio courts held that *res judicata* barred the argument. Raglin again raised this ineffective-assistance theory in his federal habeas case. The District Court rejected the claim as procedurally defaulted. The Sixth Circuit rejected the claim as substantively meritless.

Raglin's petition presents two questions:

1. Were Raglin's attorneys constitutionally ineffective?

2. Is Ohio's doctrine of *res judicata* an adequate and independent state-law basis for rejecting a federal claim of ineffective assistance of counsel?

LIST OF PARTIES

The Petitioner is Walter Raglin, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Raglin's petition for a writ of certiorari does not comply with Supreme Court Rule 14.1(b)(iii). The petition does not contain "a list of all proceedings in state and federal trial and appellate courts … that are directly related" to this case. The Warden, therefore, identifies the following directly related cases:

1. *State of Ohio v. Raglin*, No. B-9600135 (Ohio Ct. Comm. Pls. Hamilton Cnty.) (sentence entered on November 6, 1996)

2. *State of Ohio v. Raglin*, No. C-9700009 (Ohio Ct. App. 1st Dist.) (entry striking notice of appeal on January 10, 1997)

3. *State v. Raglin*, Nos. 96-2872 & 97-141, 83 Ohio St. 3d 253 (Ohio) (conviction and sentence affirmed on September 30, 1998)

4. *Raglin v. Ohio*, No. 98-7376, 525 U.S. 1180 (1999) (certiorari denied on March 1, 1999)

5. *State of Ohio v. Raglin*, No. B-9600135 (Ohio Ct. Comm. Pls. Hamilton Cnty.) (petition for postconviction relief dismissed on April 17, 1998)

6. *State v. Raglin*, No. C-980425, 1999 WL 420063 (Ohio Ct. App. 1st Dist.) (dismissal of petition for postconviction relief affirmed on June 25, 1999)

7. *State v. Raglin*, No. 99-1467, 87 Ohio St. 3d 1430 (Ohio) (discretionary review declined on October 27, 1999)

8. *Raglin v. Mitchell*, No. 1:00-cv-767, 2018 WL 1417325 & 2019 WL 1317870 (S.D. Ohio) (federal habeas case closed on March 22, 2018; certificate of appealability granted in part on March 22, 2019)

9. *Raglin v. Shoop*, No. 19-3361, 2020 U.S. App. LEXIS 21035, 2022 WL 1773719, & 2022 U.S. App. LEXIS 18265 (6th Cir.) (motion to expand certificate of appealability denied on July 7, 2020; denial of federal habeas relief affirmed on June 1, 2022; petition for rehearing en banc denied on June 30, 2022)

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INTRODUCTION

Decades ago, Walter Raglin shot and killed Michael Bany. Based in part on Raglin's own confession, a jury convicted Raglin of aggravated murder. It recommended a death sentence, and the trial court imposed that sentence. Raglin failed to win relief from that sentence in the state courts. And he has fared no better in federal habeas proceedings. Relevant here, Raglin requested habeas relief on the ground that his trial attorneys were constitutionally ineffective because of strategy decisions they made during jury selection and the trial's guilt phase. The District Court held that Raglin procedurally defaulted that claim by failing to adequately present it to Ohio's state courts. And the Sixth Circuit held that the claim was meritless, regardless of any procedural defect.

Raglin's petition presents two questions relating to his ineffective-assistance claim. But neither question presents a split, and Raglin's underlying arguments are meritless under settled precedent. What is more, this is a poor vehicle for addressing either of the questions presented individually because the Court, should it disagree with Raglin on either of the two questions presented, will have no reason to reach the other.

STATEMENT

1. On a late night in December 1995, Walter Raglin and a friend walked the streets of Cincinnati, looking for someone to rob. Pet.App.160a–61a. They talked about robbing a drug dealer. But Raglin, wearing a ski mask and toting his friend's .380 caliber pistol, thought it best to find an easier target. *Id.* The pair eventually came across a local musician, Michael Bany. Bany, who had finished a late-night gig,

was carrying a guitar and other equipment to his car. Pet.App.161a. As Bany unlocked the car, Raglin approached from behind, drew his friend's gun, and demanded money. *Id.* Bany gave Raglin $60. But at that point, Raglin wanted Bany's car as well. He repeatedly asked Bany whether the car was an automatic or a stick shift. *Id.* Bany did not respond to these questions and instead reached down to pick up his equipment. As Bany turned back to face Raglin, Raglin shot him in the neck at close range, killing him. *Id.* After the shooting, Raglin and his friend fled to a nearby house, where Raglin cleaned his fingerprints off the murder weapon. *Id.*

A few days later, the police received an anonymous call reporting that Raglin was involved in Bany's death. *Id.* The police apprehended Raglin who, after waiving his *Miranda* rights, confessed on tape to robbing and killing Bany. *Id.* Describing the moment of the shooting, Raglin said: "An' as soon as he ha' turned aroun' I looked at 'im in his eye an' he looked at me an' then I jus' shot 'im an' ran." State's Ex.3, R.336-3, PageID#7887. When the police later asked Raglin why he shot Bany, Raglin said that he was scared and that he panicked because he had "never shot" or "jumped" anyone before. *Id.*, PageID#7905. Raglin admitted, however, that Bany did nothing to threaten him during the encounter. *Id.* Raglin further stated: "I fired the gun at 'im. I didn't know where I hit 'im at. I wasn' tryin' to kill 'im or nuttin' like that." *Id.*

2. A grand jury indicted Raglin for aggravated murder and the case proceeded to trial, with the State seeking a death sentence. To prove Raglin guilty of aggravated murder, the State needed to show that Raglin acted with the specific intent to kill Bany. *See* Pet.App.167a. As part of pretrial proceedings, Raglin's attorneys moved

to suppress Raglin's confession. But the trial court denied the motion. *Id.* As a result, Raglin's attorneys knew before trial—and, indeed, before jury selection—that the jury would likely return a guilty verdict.

During jury selection, Raglin's attorneys explained that capital trials consist of a guilt phase and, if the defendant is convicted, a penalty phase. *See* Pet.App.6a. Counsel further explained that, during any penalty phase, the jury weighs aggravating and mitigating evidence and decides whether to recommend a death sentence. *See id.* Speaking to the entire jury pool, Raglin's attorneys stressed that the State bore the burden of proving its case beyond a reasonable doubt at both phases. Tr., R.336-1, PageID#4779. But they candidly acknowledged that the case would likely reach the penalty phase. *See e.g., id.*, PageID#4774. That candor helped Raglin's attorneys gauge, during their *voir dire*, whether prospective jurors would impose the death penalty based solely on a guilty verdict. *See, e.g.*, *id.* at PageID#4775, 4786–87, 4844, 4894, 4950, 5005, 5058–59, 5136–38, 5186–87, 5270, 5299–302; Tr., R.336-2, PageID#5435, 5471.

At the start of the guilt phase, Raglin's lead attorney outlined the anticipated defense to the jury. He admitted that the defense did not dispute much of the State's case. He acknowledged, for example, that "there was an aggravated robbery" and that "there was a murder." Tr., R.336-2, PageID#5547. But, he stressed, the State would need to prove "a *purposeful* murder" for the jury to return a guilty verdict. *Id.* (emphasis added). Raglin's attorney submitted that, at day's end, the evidence would

show that Raglin had *not* intended to kill anyone—he simply panicked while committing a robbery. *Id.*, PageID#5550.

Raglin's lead attorney pressed the same defense at the close of the guilt phase. He stressed that, while Raglin did not challenge much of the State's case, he did contest the State's ability to prove a purposeful killing. *Id.*, PageID#5816. The key evidence of intent, the argument went, was Raglin's own confession. And that confession reflected that Raglin acted out of panic rather than a specific purpose to kill. *Id.*, PageID#5823–26.

Notwithstanding the defense's efforts, the jury found Raglin guilty of aggravated murder. The case proceeded to the penalty phase, at which time the defense called several witnesses to testify in mitigation. Pet.App.169a–72a. Those witnesses included a court-appointed psychologist, who testified for the defense about Raglin's troubling childhood and mental-health problems. *Id.* But the jury ultimately recommended a death sentence, and the trial court accepted that recommendation.

Raglin directly appealed his conviction and sentence to the Ohio Supreme Court. That court upheld Raglin's conviction and sentence in 1998. Pet.App.162a. One fact about Raglin's direct appeal proves critical later: though he was represented by new counsel on appeal, Raglin never argued that his trial attorneys provided him with ineffective assistance. *See* Pet.App.174a–77a.

3. Raglin sought postconviction relief in state court. At that point, Raglin claimed that his trial attorneys provided constitutionally ineffective assistance by acknowledging Raglin's likely guilt during jury selection and then urging his innocence

during the guilt phase. *See* Pet.App.184a–85a, 194a–95a. In support of this claim, Raglin submitted a short affidavit: he said that his trial attorneys did not obtain his consent to concede guilt to jurors or prospective jurors. Aff., R.336-4, PageID#8238. But Raglin did not claim within the affidavit that he ever objected to his trial attorneys' strategy. Nor did he claim that his attorneys failed to consult with him during his case.

Raglin's ineffective-assistance claim faced a procedural barrier. Under Ohio law, defendants are required, when possible, to raise ineffective-assistance claims on direct appeal. Consequently, ineffective-assistance claims not raised on direct appeal are generally barred by *res judicata*. *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012) (citing *State v. Cole*, 2 Ohio St. 3d 112 (Ohio 1982)). Ohio law recognizes two exceptions. *First*, *res judicata* does not apply to ineffective-assistance claims if the same attorney who represented the defendant at trial represents the defendant on appeal. *Id.* at 614 n.8. That exception is irrelevant to this case, as a new attorney represented Raglin on appeal. Pet.App.32a n.6. *Second*, an ineffective-assistance claim may be litigated through postconviction proceedings if the claim can "only be reasonably determined by reference to evidence that would necessarily fall outside the trial record." *Hanna*, 694 F.3d at 614.

Applying this framework, the state trial and appellate courts held that *res judicata* barred Raglin's ineffective-assistance claim. Pet.App.181a–87a, 191a–200a. Ohio's First District Court of Appeals held that Raglin did not need evidence outside the record to challenge his attorneys' strategic decisions during jury selection and the

trial's guilt phase. Pet.App.184a–85a. Thus, because Raglin could have raised this ineffective-assistance claim on direct appeal, he could not belatedly raise the claim during postconviction proceedings. The Supreme Court of Ohio declined to review the First District's postconviction decision. *State v. Raglin*, 87 Ohio St. 3d 1430 (Ohio 1999).

4. Raglin next sought habeas relief in federal court. He raised several ineffective-assistance claims. Most relevant here, he again argued that the strategy his attorneys employed during jury selection and the guilt phase of his trial amounted to ineffective assistance. As Raglin sees it, his attorneys conceded his guilt during jury selection, but then made conflicting arguments to the jury during the guilt phase. *See* Pet.App.23a.

The District Court denied Raglin habeas relief. It rejected Raglin's ineffective-assistance claims, including the one just discussed, on procedural-default grounds. Pet.App.25a–34a. By way of background, federal courts reviewing habeas petitions of state prisoners may not normally consider "procedurally defaulted" claims—in other words, claims that failed in the state courts because the prisoner did not adequately present them. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). The District Court concluded that, because Raglin's ineffective-assistance claims could have been raised on direct appeal, the state courts properly applied Ohio's *res judicata* rules to reject those claims during postconviction proceedings. Pet.App.27a–28a. As a result, Raglin's claims were procedurally defaulted and provided no grounds for federal habeas relief.

Attempting to save his defaulted claims, Raglin made a related argument that his current petition repeats. The procedural-default doctrine applies only to claims rejected on a state-procedural ground that is both "independent and adequate." *Johnson v. Lee*, 578 U.S. 605, 606 (2016) (*per curiam*) (quotation marks omitted). Raglin argued that Ohio's doctrine of *res judicata* is an "inadequate" procedural rule of the sort that does not preclude federal habeas review. The District Court rejected that argument. Pet.App.28a. And it denied Raglin a certificate of appealability on that issue, holding it beyond reasonable debate that Ohio's doctrine of *res judicata* constituted an "adequate and independent state ground" for rejecting Raglin's claims. Pet.App.70a.

5. Raglin moved to the Sixth Circuit. Like the District Court, the Sixth Circuit denied Raglin a certificate of appealability to appeal whether Ohio's doctrine of *res judicata*—as applied to ineffective-assistance claims—is an "inadequate ground to preclude federal review." *Raglin v. Shoop*, No. 19-3361, 2020 U.S. App. LEXIS 21035 at *4–5 (6th Cir. July 7, 2020). The Sixth Circuit, however, allowed Raglin to proceed on appeal with some narrower arguments, including Raglin's claim that his attorneys were ineffective because they "conceded [his] guilt" and "presented conflicting arguments to the jury." *Id.* at *7.

The Sixth Circuit ultimately affirmed the District Court's denial of habeas relief. Pet.App.1a. But it did so on alternative grounds. Rather than engaging in the "unavoidably convoluted analysis" regarding whether Raglin had defaulted his ineffective-assistance claims, the court "cut to the merits." Pet.5a. And it concluded that

Raglin's claims were "meritless." Pet.App.7a. Of particular note, it held that Raglin's trial attorneys made a "reasonable," and thus constitutionally permissible, decision to "largely concede[] Raglin's guilt of aggravated murder in favor of a more vigorous defense in the penalty phase." Pet.App.6a–7a. The attorneys' focus was "obviously strategic," the Sixth Circuit explained, since the attorneys "knew that the jury would hear the recording of Raglin himself saying that he had looked Bany in the eye and then shot him at near point-blank range." Pet.App.7a.

6. Raglin timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Raglin's petition presents two questions. The first asks this Court to perform a fact-bound review of Raglin's ineffective-assistance claim. The second asks whether, for purposes of the procedural-default doctrine, Ohio's *res judicata* doctrine serves as an adequate basis for rejecting an ineffective-assistance claim. Settled law answers both questions, the lower courts correctly resolved each, and neither deserves this Court's attention.

But before diving into each question, two points deserve immediate emphasis. *First*, Raglin's petition identifies no split of authority that his case implicates. The absence of a circuit split weakens the already-weak arguments for review. *See* S. Ct. R. 10(a)-(b).

Second, this case is a poor vehicle for individually deciding either of the two issues presented. Again, Raglin presents two questions—the first about the merits of his ineffective-assistance claim, the second relating to whether Raglin procedurally defaulted that claim. As the decisions below illustrate, the Court can affirm *either* on

the merits *or* by deeming Raglin's ineffective-assistance claim procedurally defaulted. Thus, Raglin's bid for habeas relief fails unless the Court resolves *both* questions presented in Raglin's favor.

I. Faced with Raglin's damaging confession, Raglin's attorneys made reasonable strategic decisions.

A. The Sixth Circuit correctly held that Raglin's ineffective-assistance claim is meritless under well-settled law.

The Sixth Amendment says, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right to counsel, this Court has held, includes a "right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). But to succeed on an ineffective-assistance claim, a convicted defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Judicial review of such claims "must be highly deferential" to defense attorneys and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, because there are "countless ways to provide effective assistance," defense attorneys must receive "wide latitude" to make the various "tactical decisions" any case requires. *Id.*

Critically, in *Florida v. Nixon*, 543 U.S. 175 (2004), this Court already provided guidance as to how *Strickland* applies in capital cases, where trials are separated into guilt and penalty phases. *Nixon* involved a defense attorney who, in a capital case, chose "to concede, at the guilt phase of the trial, the defendant's commission of

murder, and to concentrate the defense on establishing, at the penalty phase, cause for sparing the defendant's life." 543 U.S. at 178. The Court held that, when a defendant "neither consents nor objects to" such a strategy, "counsel is not automatically barred from pursuing that course." *Id.* Capital cases, the Court stressed, naturally force defense attorneys to consider "both the guilt and penalty phases in determining how best to proceed." *Id.* at 192. Given the interaction of the two phases, attorneys "may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." *Id.* at 191. Said another way, the Sixth Amendment does not require defense counsel to take "a counterproductive course" during the guilt phase that damages the client's chances at the penalty phase. *Id.* Counsel may instead "satisf[y] the *Strickland* standard" by trying "to impress the jury" with "candor" at the guilt phase so as to establish credibility for the penalty phase. *Id.* at 192. And when counsel's balancing of the two phases satisfies *Strickland*'s deferential standard, "that is the end of the matter; no tenable claim of ineffective assistance" remains. *Id.*

In this case, applying *Nixon* and *Strickland*, the performance of Raglin's attorneys falls well within constitutional bounds. Recall that the trial court denied a pretrial motion to suppress Raglin's confession. Pet.App.167a. Thus, any defense strategy needed to account for the fact that jurors would hear a damaging confession, in which Raglin admitted to looking Bany in the eye and shooting him at close range. State's Ex.3, R.336-3, PageID#7887. (The Sixth Circuit described the shot as occurring "at near point-blank range." Pet.App.7a. Raglin quibbles with that

characterization, Pet.13, but Raglin's confession indicates that he shot Bany from a relatively short distance, *see* State's Ex.3, R.336-3, PageID#7887.)

Raglin's attorneys adopted a reasonable strategy, tailored to the facts they faced. During jury selection, they candidly acknowledged to potential jurors that the case would likely reach the penalty phase. The goal of that candor is obvious from the record: Raglin's attorneys were trying to weed out any prospective juror inclined to think that a guilty verdict should automatically lead to the death penalty. *See* Tr., R.336-1, PageID#4775, 4786–87, 4844, 4894, 4950, 5004–05, 5058–59, 5061, 5136–38, 5186–87, 5239, 5268, 5299–302, 5342; Tr., R.336-2, PageID#5435, 5468. Acknowledging the likelihood of a penalty phase made the inquiry more concrete, and thus made *voir dire* potentially more productive. At the same time, Raglin's attorneys held the State to its burden of proof. Although admitting at jury selection that the case would likely reach a penalty phase, Raglin's attorneys made clear to potential jurors that the State would bear the burden of proof at *both* stages. Tr., R.336-1, PageID#4779. And, during the guilt phase of trial, they argued that the State failed to prove that Raglin acted with the requisite *mens rea*. Tr., R.336-2, PageID#5550, 5823–26. In sum, given the challenging nature of Raglin's case, Raglin's attorneys focused on maintaining their credibility and picking good jurors for the penalty phase; but, even with that focus, they mounted a colorable burden-of-proof defense at the guilt phase of Raglin's trial.

The above strategy readily passes constitutional muster under *Strickland*'s objective framework. Raglin's attorneys "reasonably decide[d] to focus on the trial's

penalty phase" when deciding "how best to proceed" in Raglin's case. *See Nixon*, 543 U.S. at 191–92. But that "focus" did not mean Raglin's attorneys had to completely surrender at the guilt phase of trial. Rather, because the performance of Raglin's attorneys satisfies *Strickland*'s deferential standard, "that is the end of the matter" and "no tenable claim of ineffective assistance" remains. *Id.* at 192.

B. Raglin's contrary arguments are unpersuasive. He submits that his case presents an unsettled question under the Court's current precedent. Pet.10–11; *see also* S. Ct. R. 10(c). But that portrayal does not withstand scrutiny.

First, some background. *Nixon* stressed that "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." 543 U.S. at 187 (quoting *Strickland*, 466 U.S. at 688). The defendant in *Nixon*, however, was unresponsive when his attorney discussed trial strategy with him. The Court thus held that, when a defendant "neither consents *nor objects to*" the strategy his attorney recommends, the attorney may decide to focus on the penalty phase of a capital case, so long as that strategic focus "satisfies the *Strickland* standard." *Id.* at 178, 192 (emphasis added). Contrast the facts in *Nixon* with the facts in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). The defendant there "adamantly objected" to the strategy his counsel pursued. *McCoy*, 138 S. Ct. at 1505. In that scenario, the Court held that the Sixth Amendment requires counsel to follow "the defendant's prerogative." *Id.*

Now turn to this case. According to Raglin, his case "falls somewhere between *Nixon* and *McCoy*" because it is unclear from the record how much Raglin's attorneys

consulted with him about their strategy. Pet.11. Raglin is only half right. It is true that this case is not *McCoy*, as Raglin makes no claim that his attorneys acted "over his express objections." *Id.* But Raglin's attempts to distinguish *Nixon* are unconvincing. Indeed, this case and *Nixon* are quite similar: Raglin, like the defendant in *Nixon*, neither expressly consented *nor objected* to his trial attorneys' strategy. In Raglin's view, the difference is that, in *Nixon*, the record showed that the defense attorney had attempted to consult with his client about trial strategy. The snag with that distinction is this: Raglin has not preserved any claim that his attorneys failed to consult with him about trial strategy. Instead, he has consistently argued that his attorneys' strategy—in itself—amounted to "sheer incompetence." Pet.4. It follows that, from what one can tell on this record, this case occupies the same space as *Nixon*: because Raglin "neither consent[ed] nor object[ed] to" his attorneys' trial strategy, the controlling question is whether the strategy "satisfies the *Strickland* standard." 543 U.S. at 178, 192. And the answer to that question is "yes," as laid out above. At bare minimum, this case is a poor vehicle for providing further guidance as to *Nixon*, since the record here gives "no indication" about whether any breakdown in consultation occurred. Pet.11.

Another sizeable problem with the first question presented is that Raglin's argument does not match the facts of his case. Raglin's argument is premised on the idea that counsel "completely changed course" and offered "contradictory arguments" as the case progressed from jury selection (where counsel said there would likely be a penalty phase) to the guilt phase (where counsel argued the State had failed to

prove guilt). *See* Pet.4, 12. But the various statements of Raglin's attorneys are easy to reconcile. As mentioned already, Raglin's attorneys explained during jury selection that, even though a penalty phase was likely, the State would still have to prove its case at the guilt phase. Tr., R.336-1, PageID#4779. Further, though Raglin's attorneys made general statements during jury selection about the likely results of the trial's guilt phase, they never specifically conceded that Raglin *purposely* killed Bany. And lack of specific intent was the central point of their defense at the guilt phase. During his opening statement, Raglin's lead attorney stressed that the State would need to prove that Raglin had a specific intent to kill. Tr., R.336-2, PageID#5547. And, during his closing statement, Raglin's attorney argued that the State had failed to prove specific intent. Tr., R.336-2, PageID#5823–26. Viewing counsel's statements as a whole, there is little if any tension between those statements—let alone a direct contradiction.

II. Ohio's doctrine of *res judicata* is an adequate procedural rule for purposes of rejecting a federal claim of ineffective assistance.

A. Raglin's second question presented asks whether, for purposes of procedural default in federal habeas cases, Ohio's approach to *res judicata* qualifies as an adequate state-law grounds for rejecting a federal claim. Notably, the Sixth Circuit did not grant a certificate of appealability on this issue. *Raglin v. Shoop*, No. 19-3361, 2020 U.S. App. LEXIS 21035 at *4–5 (6th Cir. July 7, 2020). Thus, before deciding the question, the Court would need to decide whether it is "proper" "at this juncture" to jump to a full analysis. *See Buck v. Davis*, 580 U.S. 100, 118 (2017). But even assuming that full consideration would be proper, the Court should still decline

review. As with Raglin's first question, this Court's existing precedent already supplies the answer to Raglin's second question.

Begin with some background principles about the scope of federal habeas review. When reviewing state-court decisions in habeas, federal courts are generally barred from addressing a federal claim if "a state court declined to address" the claim because the prisoner "failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). To overcome this "prohibition on reviewing procedurally defaulted claims," habeas petitioners must show "cause" for their failure to present the claim in state court along with "actual prejudice resulting from the alleged constitutional violation." *Davila v. Davis*, 137 S. Ct. 2058, 2064–65 (2017) (quotation marks omitted). The procedural-default doctrine "is grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. After all, on direct appeal from a state-court judgment, "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question." *Id.* at 729. Thus, without a procedural limit on federal habeas review, "habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Id.* at 730–31. "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Johnson v. Lee*, 578 U.S. 605, 612 (2016) (*per curiam*).

The procedural-default doctrine applies, however, only if the state court's rejection of the "defaulted" federal claim rests on an "independent and adequate state procedural rule." *Coleman*, 501 U.S. at 750. This case concerns the "adequacy" prong of the independent-and-adequate test. "To qualify as an 'adequate' procedural ground, a state rule must be firmly established and regularly followed." *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quotation marks omitted). The Court's decision in *Johnson*, 578 U.S. 605, illustrates this test in action. In *Johnson*, the Court examined a California rule that required "criminal defendants to raise available claims on direct appeal." *Id.* at 606. It held that California's rule was adequate, and it summarily reversed the Ninth Circuit for holding otherwise. *Id.* California's rule was "firmly established," this Court explained, because it had been part of the California Supreme Court's precedent for decades before the case in question. *Id.* at 608. And California's rule was "regularly followed," the Court went on, because the California Supreme Court had repeatedly cited the rule in its cases. *Id.* at 608–09.

With the above principles in mind, turn to Ohio's doctrine of *res judicata*. In Ohio, as in other States, *res judicata* bars convicted defendants from raising arguments that they could have raised during earlier proceedings. *State v. Perry*, 10 Ohio St. 2d 175, 180 (Ohio 1967). The doctrine applies to Ohio postconviction proceedings. *Id.* at 176 (paragraphs 6 thru 9 of syllabus). And for decades, the Supreme Court of Ohio has applied the doctrine of *res judicata* to ineffective-assistance claims, with certain exceptions. *See State v. Cole*, 2 Ohio St. 3d 112, 113–14 (Ohio 1982). More precisely, under Ohio law, *res judicata* bars a postconviction claim of ineffective

assistance unless: (1) the petitioner had the same attorney during the criminal trial and the appeal; or (2) the ineffective-assistance claim requires reference to evidence outside the record for a fair determination. *See id.* As the above citations reflect, Ohio's rules in this area are not of recent vintage. The Supreme Court of Ohio's 1982 decision in *Cole* is the "seminal case on this issue." *State v. Blanton*, __ Ohio St. 3d __, __, 2022-Ohio-3985 ¶30 (Ohio 2022); *accord State v. Lentz*, 70 Ohio St. 3d 527, 529 (Ohio 1994). Ohio courts, moreover, have regularly applied and followed *Cole*'s framework in the 40 years since the decision. *See, e.g.*, *Byrd v. Collins*, 209 F.3d 486, 521–22 (6th Cir. 2000) (collecting authority).

Given Ohio's long track record in this area, Ohio's approach to *res judicata* undoubtedly qualifies as a firmly established and regularly followed state procedural rule. That holds true regardless of whether the Court views the doctrine generally or focuses specifically on the ineffective-assistance context. Unsurprisingly, the Sixth Circuit has repeatedly held that Ohio's doctrine of *res judicata* is an "adequate" basis for rejecting a federal claim of ineffective assistance of counsel. *Gerth v. Warden*, 938 F.3d 821, 830 (6th Cir. 2019) (collecting authority). Raglin, for his part, does not even attempt a counterargument as to whether Ohio's doctrine of *res judicata* is firmly established and regularly followed. *See* Pet.14–18.

B. Rather than applying the adequacy test set forth by this Court's precedents, Raglin's petition tries to change the subject. He says that Ohio's *res judicata* doctrine is inadequate because of this Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003). But Raglin overstates the nature and implications of that decision.

Massaro was about what procedures federal courts should follow when reviewing *federal* convictions under 28 U.S.C. §2255. The question presented was whether, and to what extent, federal convicts must raise ineffective-assistance claims on direct appeal. *Massaro*, 538 U.S. at 503. No federal statute or procedural rule dictated an answer to the question. And the circuits were split on whether federal convicts needed to raise ineffective-assistance claims on direct appeal when "the basis for the claim [was] apparent from the trial record." *Id.* As a result, the Court needed to set a uniform rule for federal courts in §2255 cases. It held that "an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding *under § 2255*, whether or not the petitioner could have raised the claim on direct appeal." *Id.* at 504 (emphasis added). That approach was justified, in the Court's view, because ineffective-assistance claims are often easier to litigate separately from the direct appeal. *Id.* at 505–06. At the same time, the Court acknowledged that some ineffective-assistance claims are "apparent from the record" and capable of being raised on direct appeal. *Id.* at 508.

Key to this case, *Massaro* said nothing about the adequacy of state procedural rules taking different approaches. *See Gomez v. Jaimet*, 350 F.3d 673, 678 (7th Cir. 2003); *Sweet v. Bennett*, 353 F.3d 135, 140–41 (2d Cir. 2003); *cf. also In re Lyles*, No. 11-1288, 2011 U.S. App. LEXIS 26920 at *4 (6th Cir. Aug. 17, 2011); *Ayala v. Workman*, 116 F. App'x 989, 991–92 (10th Cir. 2004). That makes sense, because no state procedural rule was at stake in *Massaro*. What is more, federal courts' review of federal convictions under §2255 differs in important ways from federal courts' review

of state convictions under 28 U.S.C. §2254. For one thing, state convicts challenging their convictions are statutorily required to exhaust their claims in state court. 28 U.S.C. §2254(b)(1)(A). For another, when a federal court is reviewing a state conviction in habeas, the rules governing procedural default are "grounded in concerns of comity and federalism." *Coleman*, 501 U.S. at 730. The Court in *Massaro* did not have to grapple with such concerns.

Putting all this together, *Massaro*'s analysis is materially different from analysis required in the state-procedural-default context. In *Massaro*, this Court needed to announce a single rule for federal courts in §2255 cases. But, as discussed at length already, the adequacy of a state procedural rule turns on whether the state rule is firmly established and regularly followed. Federal courts do not go on to second-guess whether the state procedural rule is the best approach as a matter of policy. As an aside, even if adequacy analysis did involve a policy inquiry, the efficacy of the rule this Court set in *Massaro* is debatable. As the Supreme Court of Ohio recently noted, the *Massaro* rule "creates its own inefficiencies by forcing trial courts to conduct additional proceedings (and appellate courts to review additional appeals) to address claims that could have been resolved as part of a direct appeal." *Blanton*, 2022-Ohio-3985 ¶39.

Two final points on Raglin's second question presented. *First*, in addition to *Massaro*, Raglin cites *Trevino v. Thaler*, 569 U.S. 413 (2013), in support of his argument. But *Trevino* is also inapposite. That case did not address whether a state procedural rule was adequate for purposes of procedural default. It instead addressed

whether a petitioner's procedural default could be forgiven for "cause" based on a lack of effective counsel during postconviction proceedings. *Trevino*, 569 U.S. at 416–17. This case presents no comparable situation: Raglin is seeking to avoid procedural default altogether; he is not trying to establish cause and prejudice that would justify forgiving his procedural default.

Second, this Court has said that under "exceptional" circumstances, an "exorbitant application of" a state procedural rule may render "a generally sound" rule "inadequate" for purposes of a particular case. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). Here, though Raglin's petition at times speaks in terms of his specific case, *see* Pet.16, his second question presented does not ask for a case-specific exception. (And any Raglin-specific presentation would make the second question even less important to other cases.) Rather, the second question asks the more general question whether Ohio's doctrine of *res judicata* is adequate as applied to *all* "claims of ineffective assistance of trial counsel." Pet.ii. Regardless, there is nothing "exorbitant" about the application of *res judicata* to Raglin's ineffective-assistance claim. The basis for the claim, and the reasons why it fails, were both apparent from the trial record.

CONCLUSION

The Court should deny Raglin's petition for a writ of certiorari.

Respectfully submitted,

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