

CAPITAL CASE  
No. 22-6150  
October Term, 2022

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*IN THE SUPREME COURT OF THE UNITED STATES*

WALTER RAGLIN,  
*Petitioner,*

v.

TIM SHOOP, WARDEN,  
*Respondent.*

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

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**REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

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January 26, 2023

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## REPLY

The Warden's arguments lack merit and this Court should reject them. This Court should grant certiorari, reverse the Sixth Circuit's decision, and remand for further proceedings that protect Walter Raglin's federal constitutional rights.

### **I. Trial counsel were ineffective.**

The Warden argues at length that trial counsel were not ineffective in conceding to the jury that Raglin was guilty of aggravated murder because there was no dispute at trial that Raglin shot Bany. (BIO at 9–12.) If Raglin were unquestionably guilty of aggravated murder that argument might have some force. But as is evident from Raglin's certiorari petition, the jury could have very easily concluded that Raglin did not purposefully kill Bany as required for an aggravated murder conviction under Ohio law. (Pet. at 13.) “[I]n his confession Raglin made clear that he simply panicked when he fired the shot, he'd never shot anyone else before, he didn't know exactly where the shot had struck Bany, he didn't intend to kill Bany, and that he wasn't even aware that Bany had died until he saw it later on the news.” (*Id.*) The Ohio Supreme Court found that the shot was fired from at least three feet away. (*Id.*) Furthermore, it was late at night and dark outside, and Raglin had been drinking alcohol and smoking marijuana. Given all of these facts the jury could have easily believed Raglin's confession that he had no specific intent to kill Bany. Trial counsel nevertheless essentially invited the jury to conclude that their own client was a liar, and then undermined their own credibility by presenting

completely contradictory arguments in their guilt phase closing. The Warden's argument that counsel were not ineffective lacks merit and this Court should reject it.

**II. *Florida v. Nixon*, 543 U.S. 175 (2004), does not control this case.**

The Warden argues that Raglin's claim is governed by *Florida v. Nixon*, 543 U.S. 175 (2004). (BIO at 12–13.) But the Warden's analysis falls short. As Raglin explained in his petition, unlike in *Nixon*, there is no indication in the record that Raglin's trial lawyers ever discussed conceding guilt with Raglin, and Raglin's affidavit that was attached to his state post-conviction petition suggests that they didn't. (Pet. at 11.) The Warden argues that *Nixon* controls because Raglin never objected to his trial attorneys' concession of guilt (BIO at 13), but if trial counsel never discussed their plans with Raglin he wouldn't have had an opportunity to object. The Warden's argument lacks merit.

**III. Trial counsel's concessions of guilt clearly cannot be reconciled with their closing argument.**

The Warden claims that “the various statements of Raglin's attorneys are easy to reconcile.” (BIO at 14.) Raglin's trial lawyers told seated jurors, among other things, “[a]nd you understand we've been talking about the fact that there are going to be actually two separate trials here?” and “rest assured I think that there will be a second phase and that you'll move on to the mitigation phase[.]” (Pet. at 6–7.) During opening arguments, trial counsel told the jury there was “no dispute there was a murder[.]” (Pet. at 7.) During closing arguments, trial counsel nevertheless argued for an acquittal. (Pet. at 7-8.) Those two statements to the jury, asserted on

Raglin's behalf but without his consent, clearly cannot be reconciled and the Warden's argument to the contrary should be rejected.

The Warden further argues “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.” (BIO at 14 (emphasis in original).) But the Warden's argument is specious word play: the truth of the matter is that the only way for Raglin's case to get to the mitigation phase—which counsel conceded was what would happen—would be for the jury to find him guilty of aggravated murder, and the only way the jury could do that would be to find that Raglin acted purposefully. Furthermore, as already explained, trial counsel told the jury during opening arguments that there was “no dispute there was a murder[.]” (Pet. at 7.) By conceding Raglin was guilty, trial counsel necessarily conceded that he had acted purposefully, and the Warden's suggestion otherwise should be rejected.

#### **IV. Ohio's *res judicata* doctrine is not an adequate and independent state ground as applied to claims of ineffective assistance of trial counsel.**

The Warden argues at length that Ohio's *res judicata* doctrine is an adequate and independent state procedural bar as applied to claims of ineffective assistance of trial counsel. (BIO at 14–20.) Raglin's case exemplifies why it isn't. Raglin's trial lawyers repeatedly conceded that he was guilty of aggravated murder during voir dire and opening arguments, completely reversed course during closing arguments and asked the jury to return an acquittal, and Raglin's post-conviction affidavit made clear that he never consented to any of this. This is a claim where Raglin obviously should have been provided with some kind of factual development in state court so

that his trial lawyers could be questioned under oath about their conduct in representing him. It is axiomatic that crucial evidence regarding trial counsel's conduct could only have been developed outside the record, and therefore a claim of this type would not have been suitable for resolution on direct appeal. "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Massaro v. United States*, 538 U.S. 500, 504–05 (2003). The Ohio Court of Appeals nevertheless held that Raglin was required to litigate his claim on direct review based solely on the trial record without any kind of factual development to help support it. Forcing criminal defendants to litigate claims of ineffective assistance of trial counsel in this manner is simply indefensible. As this Court explained when rejecting the same rule for the federal system in *Massaro*:

The most to be said for the rule in the Second Circuit is that it will speed resolution of some ineffective-assistance claims. For the reasons discussed, however, we think few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution. And the benefits of the Second Circuit's rule in those rare instances are outweighed by the increased judicial burden the rule would impose in many other cases, where a district court on collateral review would be forced to conduct the cause-and-prejudice analysis before turning to the merits. The Second Circuit's rule, moreover, does not produce the benefits of other rules requiring claims to be raised at the earliest opportunity — such as the contemporaneous objection rule — because here, raising the claim on direct appeal does not permit the trial court to avoid the potential error in the first place.

538 U.S. at 507–08.

*Massaro* demonstrates that there is absolutely no legitimate interest served by applying *res judicata* to claims of ineffective assistance of trial counsel, and a state procedural bar is not adequate to preclude federal review unless a legitimate state interest is furthered. *Douglas v. Alabama*, 380 US 415, 422–23 (1965). This Court should grant certiorari and hold that Ohio’s *res judicata* doctrine is not an adequate and independent state procedural bar as applied to claims of ineffective assistance of trial counsel. The Warden’s arguments to the contrary lack merit, and they should be rejected.

### CONCLUSION

The Ohio courts continue to deny defendants that which this Court has held must be afforded—at least one meaningful opportunity for a meaningful review of federal constitutional violations, particularly claims asserting ineffective assistance of counsel violating the Sixth Amendment. *See Trevino v. Thaler*, 569 U.S. 413, 425, 428–29 (2013) (emphasizing that state courts may not use state procedural rules to deny a “meaningful opportunity” for “meaningful review” of claimed constitutional violations). Consequently, this Court’s corrective guidance is crucial. This Court should grant Raglin’s petition for a writ of certiorari, reverse the judgment of the Sixth Circuit, and remand the case for further proceedings that ensure Raglin’s federal constitutional rights are protected.



Respectfully submitted this 26th day of January, 2023,

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