No. 17-5055

IN THE

SUPREME COURT OF THE UNITED STATES

RODNEY CLEMONS,

PETITIONER,

vs.

RANDY PFISTER, WARDEN,

RESPONDENT.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After telling the Seventh Circuit that "resolving the procedural-default issue would arguably require this Court to wade into a circuit split," CA7 Br. 19 n.6, and encouraging *en banc* review, the State now claims there is no circuit split and, therefore, no reason for this Court's review. That is wrong. There is a circuit split and it directly impacts Mr. Clemons' case. If Mr. Clemons had been convicted in a state falling within the Eleventh Circuit his ineffective assistance of counsel claim would have been deemed fairly presented to the state court through his *pro se* briefs. Additionally, the Eleventh Circuit would have found the state court's refusal to consider the *pro se* brief due to a rule disfavoring hybrid-representation an inadequate basis on which to find a procedural default. Because Mr. Clemons "did everything he could to exhaust his federal claim[] in state court," the Eleventh Circuit would have found Illinois' ban on hybrid-representation "exorbitant" and "pointlessly severe." *Hitchcock v. Secretary Dept. of Corrections*, 360 Fed.App'x 82, 87 (11th Cir. 2010). District courts in the Eleventh Circuit have repeatedly applied *Hitchcock* in just this manner in cases factually identical to Mr. Clemons'. The Seventh Circuit did exactly the opposite, finding Illinois' refusal to consider Mr. Clemons' *pro se* brief an adequate state court rule resulting in Mr. Clemons' claim being procedurally defaulted. This Court's review is needed to ensure national uniformity in habeas corpus proceedings.

I. This Court Should Resolve Whether a State Prisoner Properly Exhausts His Federal Constitutional Claim By Fairly Presenting the Claim in a *Pro Se* Brief Making Any State Rule Refusing to Consider Pro Se Briefs Inadequate.

The State asserts this case has nothing to do with exhaustion and the admitted circuit split that exists on that issue but rather concerns only the independent and adequate state grounds doctrine. BIO 6-7. That is wrong. The exhaustion doctrine and the independent and adequate state grounds doctrine work together to ensure a state prisoner presents his federal constitutional claim to the state courts at a time when the state court has the ability to remedy the alleged violation. *Coleman v. Thompson*, 501 U.S. 722, 730-731 (1991). As the Eleventh Circuit recognizes, when a prisoner raises a federal constitutional claim in a *pro se* brief because his counsel refuses to raise the claim, he has satisfied both doctrines. The Seventh Circuit reached the opposite conclusion in this case creating a clear circuit split.

1. The State does not deny there is a circuit split on the exhaustion issue but claims that is irrelevant as the Seventh Circuit decided this case based on the independent and adequate state ground doctrine and there is no circuit split on that issue. BIO 8-10. The State claims the Eleventh Circuit's opinion in *Hitchcock v. Secretary Dept. of Corrections*, 360 Fed.App'x 82, 87 (11th Cir. 2010), is distinguishable, claiming the opinion rested solely on the Eleventh Circuit's finding that Florida's appellate court did not have a firmly established rule

against considering claims raised in *pro se* briefs. BIO 9 n.4. That claim is wrong. *Hitchcock* squarely holds that presenting a claim to a state appellate court in a *pro se* brief filed in addition to a counseled brief properly exhausts the claims raised in the *pro se* brief *and* even if the state had a firmly established rule against considering claims raised in *pro se* briefs such a rule *would not* provide an independent and adequate state court ground supporting the state court's judgment.

The facts of *Hitchcock* mirror Mr. Clemons' case. Hitchcock's state habeas appellate counsel refused to raise all of Hitchcock's federal constitutional claims on appeal to the Florida appellate court. Upon receiving a copy of his counsel's brief Hitchcock immediately contacted the Florida appellate court informing it of his counsel's failure to raise all of his claims, submitted a *pro se* brief, and filed a motion asking the Florida appellate court to "either file the supplemental brief asserting the omitted claims *pro se*, or for an order directing his counsel to do so." *Hitchcock*, 360 Fed.App'x at 83. The Florida appellate court denied the motion, citing to Florida case law holding the appellate court had the discretion to reject *pro se* briefs filed in addition to counseled briefs. *Id*.

When Hitchcock moved to federal court, raising in his federal habeas petition claims contained only in his *pro se* brief, the district court dismissed the

petition with prejudice, finding claims had not been properly exhausted. *Id*. The Eleventh Circuit granted a certificate of appealability on the following issue:

> Whether the district court properly dismissed [Hitchcock's claims] as procedurally defaulted for Hitchcock's failure to fairly present them in state court, where Hitchcock raised those claims in his state habeas petition, instructed counsel to appeal the state trial court's denial of those claims, and requested permission from the state appellate court to file a *pro se* supplemental brief raising the claims counsel refused to raise in the initial brief. *See Clemmons v. Delo*, 124 F.3d 944, 948-49 (8th Cir.1997).

Id. at 84. Of course, the issue presented in Mr. Clemons' petition is identical.

The Eleventh Circuit found Hitchcock's claims were not procedurally defaulted. The Eleventh Circuit questioned whether the Florida appellate court's rule against considering claims in *pro se* briefs was firmly established and regularly followed. *Id*. Regardless the Eleventh Circuit held "even if there were a Florida [appellate court] rule prohibiting *pro se* briefs by counseled petitioners, its application on the facts of this case would be 'exorbitant,' *see Lee* [*v. Kemna*], 534 U.S. [362] at 367, 122 S.Ct. 877 [(2002)], and pointlessly severe. *See NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Hitchcock did everything he could to exhaust his federal claims in the state courts. Rejection of them now would work an injustice." *Id*. at 87.

2. Following *Hitchcock*, district courts in the Eleventh Circuit have repeatedly held that claims only raised on in *pro se* briefs filed in addition to counseled briefs are properly exhausted regardless of any local rule disfavoring

or disallowing *pro se* briefs. *Bester v. Patterson*, 2013 WL 6191520, * 8 (N.D. Ala. 2013) (relying on *Hitchcock* to find ineffective assistance of counsel claim raised in supplemental *pro se* brief to Alabama Court of Criminal Appeals because counsel refused to raise issue was properly exhausted despite that court's refusal to consider claims raised in *pro se* briefs); *Farmer v. McNeil*, 2010 WL 1957502, *6 (N.D. Fla. 2010) (same with regard to Florida appellate court); *Clark v. Secretary, Fla. Dep't of Corr.*, 2014 WL 4059131, *29 (M.D. Fla. 2014) (relying on *Hitchcock* claim not procedurally barred because it was raised in *pro se* briefs filed in addition to counseled brief); *Martinez v. Secretary, Dept. of Corrections*, 2013 WL 212702, *5 (M.D. Fla. 2013) (same); *Ferrell v. Secretary, Department of Corrections*, 2016 WL 5719472, *1 n.4 (M.D. Fla. 2016) (following *Hitchcock* but distinguishing the case because the Florida court struck the *pro se* brief without prejudice and gave the defendant the opportunity to either proceed *pro se* or continue to have counsel and the defendant chose to keep his attorney).

Prior to the Seventh Circuit's ruling in this case, district courts in the Seventh Circuit relied upon *Hitchcock* to find the Illinois appellate court's rule disfavoring hybrid-representation did not provide an independent and adequate state court ground to find claims raised in *pro se* briefs filed in addition to counseled briefs procedurally defaulted. *See Hollis v. Lamb*, 2016 WL 6217089, *5 (N.D. Ill. 2016); *US. Ex rel. Parker v. Chandler*, 2011 WL 221834, *8 (N.D. Ill. 2011).

Following the opinion in this case those courts have been forced to reach the opposite conclusion. *Baggett v. Pfister*, 2017 WL 4339793, *9 (N.D. Ill. 2017). Accordingly, the Seventh Circuit's opinion in this case has had a dramatic effect on the availability of habeas relief within the Seventh Circuit.

3. If Mr. Clemons had been convicted in the state courts of Alabama, Georgia, or Florida, his ineffective assistance of counsel claim would have been properly exhausted through his presentation of that claim in his *pro se* brief and reviewed on the merits on federal habeas review. This is true regardless of whether the state appellate court refused to consider the claim due to a state rule barring *pro se* briefs filed in addition to counseled briefs. Because "[Mr. Clemons] did everything he could to exhaust his federal claims in the state courts" any state rule rejecting his claim because it was raised in a *pro se* brief would be rejected as "exorbitant," and "pointlessly severe" and its application "would work an injustice." *Hitchcock*, 360 Fed. Appx. at 87.

II. Since States Can Force Litigants to be Represented by Counsel on Appeal and Ineffective Assistance of Postconviction Appellate Counsel Can Never Provide "Cause" to Excuse Procedural Default, the Seventh Circuit's Rule Allows States to Make it Impossible For Prisoners To Have Their Claims of Federal Constitutional Error Reviewed by Any Court.

The State's response implies there is some way Mr. Clemons could have tried to show his postconviction appellate counsel's ineffective assistance provided cause to excuse any procedural default that resulted from counsel's

ineffectiveness. BIO 14-15. The State never actually explains how that process would work which is not surprising since this Court's case law specifically rejects that proposition.

1. The State points out that this Court's precedents establish that abandonment by postconviction counsel can constitute, in extreme circumstances, "cause" to excuse a procedural default, citing *Maples v. Thomas*, 565 U.S. 266 (20012). BIO 14-15. True, but irrelevant. Mr. Clemons was not abandoned by his lawyer, a fact the State makes immediately after citing *Maples*. BIO 15. Mr. Clemons received ineffective assistance of appellate counsel from a lawyer that refused to raise a meritorious claim despite Mr. Clemons' request the claim be made. But this Court has specifically held that ineffective assistance of postconviction appellate counsel can *never* establish cause to excuse procedural default. *Davila v. Davis*, 137 S.Ct. 2058 (2017).

2. Not only is the State's halfhearted attempt to rely on *Maples* frivolous, it distracts from the true issue: Illinois can, and does, force counsel on appellants and then refuses to hear any issue the appellant tries to raise *pro se* because the lawyer forced on him refuses to make the claim.

3. There is no federal constitutional right to self-representation on appeal. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152 (2000). Accordingly, state and federal courts can force litigants to accept counsel

on appeal. Illinois' appellate courts routinely deny motions to proceed *pro se* on appeal. *People v. Jackson*, 841 N.E.2d 1098, 1198-99 (Ill.App.Ct. 4 Dist. 2006) (denying motion for self-representation on postconviction appeal because there is no federal constitutional right to self-representation on appeal); *People v. Kelley*, 2016 IL App (1st) 143452-U, 2016 WL 4426041, *2 (Ill.App.Ct. 1st Dist. 2016) (same).

If the State can refuse to allow a prisoner to proceed *pro se* on appeal and can then refuse to consider claims filed by the prisoner in supplemental *pro se* briefs, and the State's rule refusing to consider *pro se* briefs is considered an independent and adequate state court rule, the State has been allowed to prevent *any* court from reviewing the claims appointed counsel refuses to raise. This despite the fact the prisoner has done everything in his power to present the claims to the State court—even going so far as specifically telling the State court that the reason he wants the claims considered is so they will not be deemed waived in federal court. It is worth examining again what Mr. Clemons told the Illinois appellate court when he filed his supplemental *pro se* brief.

> The Appellate Attorney done a assessment of my assue's and chose one out of the hole brief to use, in these situation normally the issues in the petitioner appeal are waived without being ruled on at the appeal stage, which is why attorney Fisher has to file **Inefective assistance on my last Appellate attorney in order to bring the issue she used to the court attention becuase she did the samething by egnoring issue only cuases problem such as waiver, and I the Petitioner do not want any of my issues waived.**

> I Rodney Clemons ask this court to reviewe the Argument in this brief and allow them to be supplemented to the brief that Stephanie A. Fisher has prepared for the defendant, so that they will not be waived. Or allow Petitioner to add them pro se.

Pet. App. 22a (misspellings and emphasis in original).

In response to Mr. Clemons begging the Illinois courts to consider his claims the State filed a motion urging the Illinois appellate court *not* to consider Mr. Clemons' claims. App. 44a-46a. After the State was successful in convincing the Illinois appellate court not to consider the merits of Mr. Clemons' *pro se* issues it went to federal court and complained that Mr. Clemons had deprived the Illinois appellate court of the opportunity to review the merits of his *pro se* issues therefore the issues were procedurally defaulted. The State's actions bring to mind the man who kills both his parents and then begs the court for mercy because he's an orphan. Alex Kozinski & Eugene Volokh, *Lawsuit, Shmawsuit*, 103 Yale L.J. 463, 467 (1993) (defining chutzpah).

4. It is not only Mr. Clemons' case in which the State has engaged in this litigation tactic. In *Wallace v. Pfister*, No. 14-488 (S.D. Ill.), the defendant's appellate counsel in his postconviction proceedings did not raise on ineffective assistance of counsel claim on appeal that the defendant wanted raised. The defendant filed a *pro* se motion to file a supplemental brief and a supplemental brief raising the issue specifically stating he did not want the issue waived for

further review. Docket Entry 11, Exhibits J and K. The Illinois state appellate prosecutor's office filed a response urging the appellate court not to consider the *pro se* brief, *Id*. Exhibit L, and the appellate court refused to consider the claim. *Id*. Exhibit M. When the defendant filed the claim in his federal habeas petition Illinois argued the claim was procedurally defaulted as it had not been presented to the appellate court in the postconviction proceedings. *Id*. Docket Entry 10 at 14-15. The district court found the claim procedurally defaulted, citing the Seventh Circuit's opinion in this case. *Wallace v. Melvin*, 2017 WL 1282872 (S.D. Ill. 2017).

In *Golden v. Pfister*, No. 15 C 8538 (N.D. Ill.), the counseled defendant filed a *pro se* supplemental brief with the Illinois Appellate Court and the Court originally allowed the brief to be filed. *Id*. at Docket Entry 23 at 4-5. The State moved to reconsider, arguing the defendant had no right to hybrid representation. The court granted the motion to reconsider and struck the *pro se* brief. When the defendant then raised the issues presented in his *pro se* brief in a federal habeas petition, the state argued to the district court that the issues were procedurally defaulted because the *pro se* brief had been struck. *Id*. at 7-10. The district court agreed *Id.* Docket Entry 29 at 7-8. When the defendant sought a certificate of appealability from the Seventh Circuit, that court denied the application because "[t]hose claims that were not considered by the state

appellate court were defaulted because the rule against hybrid representation is an independent and adequate state ground. *See Clemons v. Pfister*, 845 F.3d 816 (7th Cir. 2017)." *Golden v. Pfister*, 2017 WL 3725363, *1 (7th Cir. 2017).

In *Baggett v. Pfister*, No. 14 C 2798, 2017 WL 4339793 (N.D. Ill. 2017), the counseled defendant filed a *pro se* supplemental brief on direct appeal to the Illinois Appellate Court. 2017 WL 4339793 at * 3. The appellate court refused to allow the *pro se* brief to be filed. *Id*. When the defendant raised the issues contained in the *pro se* brief in his federal habeas petition the State argued the issues were procedurally defaulted because they had not been fairly presented to the appellate court. Relying on the Seventh Circuit's opinion in this case, the district court reluctantly agreed, noting that before the Seventh Circuit's opinion in this case the district court had found such claims were properly exhausted and therefore not procedurally defaulted. *Id*. at *8.

In *Cumbee v. Hardy*, No. 11-50118 (N.D. Ill. 2011) the State again argued, after convincing the Illinois appellate court not to consider claims raised in the petitioner's *pro* se brief filed in addition to counsel's brief, that the claims raised in petitioner's *pro se* briefs were procedurally defaulted. Docket Entry 19, attachment 1. The district court agreed. Docket Entry 22 at 2.

III. The State Never Addresses The Fact That Its Rule Turns the Exhaustion Doctrine From a Shield Into a Sword.

The exhaustion requirement is grounded in comity concerns. State prisoners should give the state courts in which they were convicted the first opportunity to remedy federal constitutional errors. When a petitioner fails to properly raise his federal claims in state court, he deprives the State of "an opportunity to address those claims in the first instance" and frustrates the State's ability to honor his constitutional rights. *Coleman*, 501 U.S., at 732. "Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's ability to enforce its procedural rules.' *Engle* [*v. Isaac*], 456 U.S. [107], at 129, 102 S.Ct. [1558], 1572 [(1982)]." *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Mr. Clemons has no quarrel with these rules. They shield the state court systems from sandbagging by the defendant. *Id*. at 492.

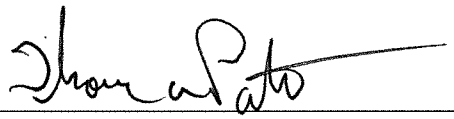
The Seventh Circuit's ruling in this case turns the rules on their heads, allowing sandbagging by the State. Rather than a shield against sandbagging the Seventh Circuit's rule provides the State with a sword to kill any chance a state prisoner has to have his federal constitutional claim heard by any court. Mr. Clemons made this point in his petition. Pet. 16-17. The State's response avoids the issue entirely. Given the success the State has had in convincing federal courts that claims raised in *pro* se briefs are procedurally defaulted after it has

convinced the Illinois appellate court not to consider those claims it is not surprising the State has no response. It enjoys having this weapon in its arsenal.

CONCLUSION

Habeas corpus relief should be hard to obtain. It should not be impossible. For the foregoing reasons, the petition for a writ of certiorari should be granted.

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