No. 09-357 SEP 23 2009

In The
Supreme Court of the United States

BRENT SMITH,

Petitioner,

v.

KURT JONES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 23, 2009

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QUESTIONS PRESENTED

I. Where a State Court has reviewed the merits of a petitioner's federal claim for plain error, is the decision of the Sixth Circuit in a habeas corpus action that there was procedural default of that claim contrary to the decisions of this Court.

II. Whether the decision of the Sixth Circuit conflicts with the decisions of other circuits that hold a state court's plain-error review of a federal claim is not a procedural default.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Rules of this Court, there are no other parties to this proceeding whose names do not appear on the caption.

Petitioner Brent Smith was a state court prisoner, the petitioner in the district court and the appellee in the Sixth Circuit.

Respondent Kurt Jones was the warden holding Mr. Smith, the respondent in the district court, and the appellant in the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brent Smith, respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (App. 1a-26a) is unreported and the denial of rehearing (App. 65a-66a) is unreported. The District Court's Opinion (App. 27a-62a) is unreported. The Michigan Court of Appeals Opinion (App. 67a-99a) is unreported. The Michigan Supreme Court order denying leave (App. 100a-101a) is reported at 471 Mich. 870, 685 N.W.2d 672 (2004).

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Sixth Circuit was entered on April 10, 2009, and an order denying a timely motion for rehearing en banc was entered on June 26, 2009 (App. 1a). Jurisdiction in the Sixth Circuit was invoked pursuant to 28 U.S.C. §2253.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. §2254(b)(1)(A) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; * * * ."

28 U.S.C. §2254(d) provides that "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--**(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

The Petitioner sought habeas corpus relief from his Michigan convictions of criminal sexual conduct and his prison sentences of four to fifteen years by filing a petition pursuant to 28 U.S.C. § 2254(a) in the Eastern District of Michigan. App. 27a-28a. On September 25, 2007, the district court judge granted the petition, and ordered that the State take action to afford the Petitioner a new trial within ninety days of the court's order, or that the Petitioner be released. App. 27a-64a.

The Respondent appealed the decision of the district court to the Sixth Circuit Court of Appeals,

and on April 10, 2009, the Sixth Circuit reversed the granting of the writ and remanded this case to the district court for consideration of issues not addressed by the district court in its opinion and order of September 25, 2007. App. 1a-26a. The Sixth Circuit subsequently denied a motion for rehearing en banc on June 26, 2009. App. 65a.

The facts underlying this case were adequately stated by the district court:

> Smith's convictions arise from an incident occurring in the early hours of December 23, 2000, in the City of Berkley, Michigan. During a routine patrol of the rear of the Berkley Front Bar, Smith, a Berkley police officer, investigated two allegedly intoxicated minors, Shannon Sargent and Peter Marinelli, in a parked car. Sargent, who admitted that she was intoxicated and an under-age drinker, claimed that Smith improperly searched her underneath her clothes in the back of his scout car, touching intimate areas of her body. Smith denied searching Sargent improperly at any time.
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> * * * *
>
> Sargent, the complainant in this case, testified that there was not one search, but rather, there were two searches. She testified that she did not object to the first search; rather, it was the second search, where Smith went under her clothing and touched intimate areas, that was objectionable, though she consented at the time.

* * * *

Regarding the second search, Sargent testified that Smith said, "I hate doing this. Do you want a woman cop?" Sargent said that she didn't know whether she wanted a female officer to conduct the search, rather, she testified that she just wanted to get it over.

* * * *

According to Sargent's testimony, she never refused Officer Smith permission to search under her clothing. No one else who was present at the Berkley Front Bar witnessed the second search.

* * * *

Before the trial commenced, the trial court ruled, over objections by defense counsel, that the prosecution could also present two other female witnesses, Corrine Steinbrenner and Kristin Oliver, as similar acts witnesses.

* * * *

Oliver became aware of this case because of its publicity. She testified that once she became aware, she then filed a federal lawsuit against the Berkley police department and Smith.

* * * *

When Smith was questioned about the alleged incident with Oliver, he confirmed that he had

arrested her, after she made an illegal turn, and ran a red light. He testified that she blew .12 on the PBT. Smith also confirmed that he searched her when he placed her in the holding cell, but he said that he searched her the same way he had searched her on the road, and that the search was in the presence of other officers. Smith denied any improper search of Oliver's intimate areas. He also testified that there were videotapes of the area where the search was conducted, which were kept for several months, but were no longer available.

* * * *

Steinbrenner * * * testified that in June 1998, at about 3:00 a.m., she was driving her friend's car when she was stopped by Smith for failing to stop at a stop sign and failing to use her turn signal. Steinbrenner was sixteen years old at the time, and she did not have a driver's license. However, when stopped and asked by Smith if she had a driver's license, Steinbrenner lied and said that she had a license, but that it was at her house. Smith arrested her for driving without a license.

According to Steinbrenner's testimony, Smith searched her over her clothing outside her car at the scene of the arrest. * * * * It was Steinbrenner's testimony that Smith searched her a second time, groping her breast for about five seconds during the search. * * * * During cross examination, Steinbrenner admitted to making inconsistent statements as to how many

times Smith grabbed her breasts or when he grabbed her breasts.

* * * *

Smith admitted that he arrested Steinbrenner after she ran a stop sign and turned without signaling. He said that he took her to the patrol car and searched her, but said that he never cupped or grabbed her breasts.

* * * *

During the prosecution's closing argument, and during rebuttal, the prosecutor asked the jury to rely on the testimonies of the "similar-acts" witnesses to determine that Petitioner had the propensity to commit the offenses as charged. The prosecutor stated, "He's done it before. He started off with Kristin." [citation to the record omitted] The prosecutor argued that if Kristin Oliver had complained at the time of her arrest, then Sargent would not have had to go through this trial.

The prosecutor also claimed that * * * the whole Berkley police department, wished they had done something more when the Steinbrenner complaint was filed against Smith, "after three girls were now attacked by Petitioner." [citation to record omitted] She argued that Sargent "hit the lottery" when she accused Petitioner, that Sargent should play the lottery because she picked a defendant who had three complaints in two and one half year, and Sargent "just

happened to pick the right guy." [citation to record omitted]

The prosecutor also emphasized the fact that there were no other complaints against other Berkley officers. She told the jury that they should vote not guilty only if they did not believe all three women. The prosecutor reminded the jury of Steinbrenner's statement that the "pervert," Smith, should be taken off the road. [citation to record omitted] She told the jury to decide in favor of the defendant (Petitioner) only if they would be comfortable with their daughters being stopped at three o'clock in the morning by Smith.

The prosecutor also stated "this is not about going after a person who's not guilty. That would be every prosecutor's worst nightmare." [citation to record omitted] She said that if the complainant had changed her story to say that there had been sexual penetration "we would believe her" and would have charged the crime differently. [citation to record omitted] Although no expert witness had testified at trial, the prosecutor argued to the jury that it is common for victims in sex crimes to repress the most significant thing, in this case digital penetration by Smith. [footnote omitted]

Additionally, during the trial, there was extensive questioning of Sargent and her family as to whether they planned on suing Smith. Sargent and her family admitted to hiring an attorney, but said that the attorney had been contacted for legal advice only, and was not

> hired to file a civil suit against Smith. However, only two days after Smith was sentenced, that same lawyer filed a lawsuit against Smith on behalf of Sargent.
>
> App. 28a-39a.

The district judge found that Smith was entitled to habeas corpus relief because of the prosecutor's misconduct, found that the misconduct was flagrant, and that counsel was ineffective for failing to object to the misconduct. App. 47a-61a. He found that the Michigan Court of Appeals had addressed the merits of Petitioner's prosecutorial misconduct claims, that there was no procedural default of the issue, and that the state court's decisions denying relief to Smith were "contrary to, or an unreasonable application of, clearly established Supreme Court precedent * * *." *See, e.g.,* App. 44a, 47a, 50a and 61a.

The Sixth Circuit reversed the granting of the writ, finding that the state court's plain-error review of the merits of Petitioner's prosecutorial misconduct claims was an acknowledgment of a procedural default, that there was no cause or prejudice to excuse the default, and that the ineffective assistance claim was without merit. App. 14a.

REASONS FOR GRANTING THE PETITION

I. Where a State Court has reviewed the merits of a petitioner's federal claim for plain error, the decision of the Sixth Circuit in a habeas corpus action that there was procedural default of that claim is contrary to the decisions of this Court.

"[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935), quoted in *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). This Court also has concluded that where a state court refuses to hear a claim of a defendant, based on an adequate and independent state-law *procedural* foundation, then federal review of a state court's decision is also precluded in federal habeas corpus cases challenging the legality of detention of a state prisoner brought pursuant to 28 U.S.C. § 2254. *Wainwright v. Sykes.*

This Petition asks for review of a Sixth Circuit decision where the state court recognized that a defendant had failed to object in the trial court to prosecutorial misconduct, but did not refuse to address the claim of a defendant, and instead extensively reviewed the claim of prosecutorial misconduct for plain error and reversible error, even finding one claim meritorious but not sufficient to warrant reversal. That plain-error review of prosecutorial misconduct by the state court was not a refusal to consider a claim based on state law procedure, and the decision of the Sixth Circuit in this case finding procedural default precluding federal review was contrary to the decisions of this Court.

In *Wainwright v. Sykes* this Court concluded that federal habeas review of a federal question, absent a showing of cause and prejudice, was precluded where the state courts had refused to address the question because of the lack of an objection in the trial court. 483 U.S. at 87. The Court held that, where a habeas petitioner in federal court had been found by the state

court to have waived the issue of the voluntariness of his confession by his failure to object at trial, and the state court had not addressed the merits of that issue, a federal court was precluded from reviewing the issue of voluntariness for the first time pursuant to a habeas corpus petition. 433 U.S. at 90-91. The Court limited its decision to "contentions of federal law *which were not resolved on the merits* in the state proceeding due to respondent's failure to raise them there as required by state procedure." 433 U.S. at 87 (emphasis added).

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court held that where a defendant in a state court case had his appeal dismissed because it was filed late, there was no presumption that the court reached the merits of the defendant's case. Rather, the dismissal of an appeal because it was not timely filed was a decision of a state court based on adequate and independent state grounds that foreclosed review of federal issues in the defendant's case.

This Court announced a rule for determining whether there has been a decision on the merits: "If the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." 501 U.S. at 735.

In *Mullaney v. Wilbur*, 421 U.S. 684, 688 (1975), this Court found that there was no procedural default of an issue in state court, where the Maine Supreme Court, recognizing that there had been no objection to

a claimed error in the trial court, nonetheless reviewed the claim because it had "constitutional implications."

In *County Court of Ulster v. Allen*, 442 U.S. 140, 146-148, (1979), this Court found that a claim raised the first time after a jury verdict, where the state appellate courts summarily rejected the claim on appeal without explicit reasoning, was nonetheless decided on the merits and there was no procedural default.

In *Harris v. Reed*, 489 U.S. 255 (1989), this Court applied the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), and required that, for a state court's ruling to be based on an adequate and independent finding of waiver of a federal issue, the state court must make a "plain statement" that its decision was based on a state procedural rule enforcing waiver. In the case before it in *Harris*, this Court found that where a state court noted that a federal issue could have been raised on direct appeal, but was not, and then went on to consider and reject the claim on the merits, the state court decision of the federal issue was a decision on the merits, and not a decision that rested on an adequate and independent grounds of a procedural default.

In *Engle v. Isaac,* 456 U.S. 107 (1982), this Court found that a defendant's failure to make a contemporaneous objection to an error in a self defense instruction at trial, which caused the state court of Ohio to refuse consideration of the error on appeal, was an adequate and independent state finding that precluded federal review of a claimed error in the self defense instruction. But this Court noted in a footnote that *plain error review by the Ohio courts would have*

been considered a review on the merits. 456 U.S at 135, n. 44. Because the State of Ohio permits the appellate courts to "overlook a procedural default if the trial defect constituted plain error. * * *If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review." *Id.* But since the Ohio courts "declined to exercise this discretion to review the type of claim pressed here" procedural default was recognized by this Court. *Id.*

This case presents to the court the issue addressed by the court in *Harris* and in footnote 44 of *Engle v. Isaac* – where a state court recognizes that there was no objection to an error at trial, but goes on to consider the merits of the claim pursuant to a plain-error standard of review, that review should be considered a review on the merits and not a procedural default. A review of the merits is a review of the merits.

In the instant case, trial counsel's failure to object to prosecutorial misconduct did not prevent the Michigan Court of Appeals from extensively reviewing the petitioner's claims of prosecutorial misconduct on appeal. Rather, the court addressed several of the prosecutorial misconduct claims raised by the petitioner in his appeal. App. 80a-83a, 84a-88a.

The Michigan Court of Appeals noted at the outset of its discussion of claims of the prosecutor's misconduct that appellate review of prosecutorial misconduct is to determine "whether the defendant was deprived of a fair and impartial trial." App. 81a. This standard for prosecutorial misconduct is the same standard as the federal standard for considering prosecutorial misconduct. *See, Donnelly v.*

DeChristoforo, 416 U.S. 637, 643 (1974) (prosecutorial misconduct requires relief when it "so infected the trial with unfairness * * * .") Prosecutorial misconduct is a due process violation that warrants relief on habeas corpus if it is so egregious "as to render the trial fundamentally unfair * * * ." *Washington v. Hofbrauer,* 228 F.3d 689, 708 (6th Cir. 2000)

First, the Michigan Court of Appeals addressed the claimed misconduct of the prosecutor as to whether the prosecutor improperly used the similar acts evidence to argue propensity – "a forbidden purpose" of similar acts evidence under Mich R. Evid. 404(b). App. 80a. As to that claimed misconduct, the court concluded that since the trial court gave a proper limiting instruction as to the use of the similar acts evidence, and an instruction that argument of counsel is not evidence, then a review of the issue was not required to prevent a miscarriage of justice. App. 82a. The Michigan court concluded that the failure to object to the remarks was not ineffective assistance of counsel, and unlikely that the verdict was the result of any improper argument. App. 82a-83a.

The court then considered the defendant's claims that the prosecutor's remarks appealing to civic duty, her statements of personal belief of defendant's guilt, her testifying, and her impeachment of defendant with his silence "deprived defendant of a fair trial, due process, and his right to remain silent." App. 84a. As to these claims of prosecutorial misconduct, the court concluded "We find no reversible error." (*Id.*)

The court noted that since the defendant did not object to the remarks challenged, the court's review was for plain error, which included an error that

"seriously affected the fairness . . . of the proceedings." App. 85a.

As to the first claim of prosecutorial misconduct, the court found that a timely objection and resulting instruction could have cured any prejudicial effect, as to the second claimed error, the court found that it was in response to a defense argument, and any prejudicial effect could have been cured by an instruction, as to the third claimed error, the court found that the remarks of the prosecutor were not improper, and as to the fourth claimed error, the court found that the remarks of the prosecutor were an improper appeal to civic duty, but that the prejudicial effect could have been cured by an instruction, and that the jury did not convict based on an improper argument. App. 85a-87a.

As to the fifth claim of prosecutorial misconduct, the court concluded that the trial court's impromptu interruption of the prosecutor's examination of the witness and his instruction to the jury cured any prejudicial effect the witness's answers would have had. App. 87a-88a.

The court then went on to address additional claims of prosecutorial misconduct, finding that they were unobjected to "and would not warrant reversal." App. 88a.

The district judge in this case found that:

> Although the Michigan Court of Appeals acknowledged Petitioner's prosecutorial misconduct claims were not properly preserved for appeal, it nonetheless addressed each act that Petitioner asserted substantiated the

> alleged prosecutorial misconduct on the merits and concluded that Petitioner was not entitled to relief."
>
> App. 46a.

The district judge found that the Michigan Court of Appeals, when it addressed each issue of prosecutorial misconduct and concluded that the claims "were without merit," did not enforce a procedural sanction and therefore there was no procedural default of the issues. App. 47a.

The Sixth Circuit's reversal of the district judge did not include a review of how the Michigan Court of Appeals reviewed the misconduct of the prosecutor, but simply was an application of a Sixth Circuit rule: "Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits." App. 6a, quoting from *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006))

The Sixth Circuit decision in this case was contrary to *Harris v. Reed, Engle v. Isaac, Mullaney v. Wilbur, County of Ulster v. Allen, Wainwright v. Sykes*, and *Coleman v. Thompson*. The common thread in all of those cases is that a *refusal* of a state court to consider the merits of a petitioner's claim recognizes procedural default based on a state rule, but where the court *considers the merits of the claim*, regardless of any procedural default rule, and the consideration is interwoven with the federal claim presented, then the federal court is not precluded from reviewing the claim in a petition for habeas corpus.

II. The decision of the Sixth Circuit conflicts with the decisions of other circuits, and with other decisions of the Sixth Circuit, that hold a state court's plain-error review of a federal claim is not a procedural default.

A. The conflict with other circuits.

The split among the circuit courts, as to whether plain-error review by a state court is to be considered a review on the merits, has been recognized by several circuits. In *Cargle v. Mullin*, 317 F.3d 1196, 1205, n. 7 (10th Cir. 2003), the Tenth Circuit noted the different methods in the circuits for analyzing plain error review in the context of procedural default. The Third Circuit has also observed:

> [I]t is an open question as to whether the invocation of fundamental error, or similar exception, to mitigate the effect of a state waiver rule always will suffice to avoid the structures of *Wainwright v. Sykes* [citation omitted]. The ultimate answer to this quandary can, of course, only be supplied by the Supreme Court.
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> *Campbell v. Burris*, 515 F.3d 172, 178 (3rd Cir.), *cert. denied sub nom. Campbell v. Phelps*, ___ U.S. ___, 129 S.Ct. 71 (2008)

Many circuit courts have applied a different rule than the Sixth Circuit, holding that if the state court reviews the merits of a federal issue, whether by plain error review or by other review, the issue reviewed is not procedurally defaulted.

In *Roy v. Coxon*, 907 F.2d 385 (2nd Cir. 1990), the Second Circuit held that a state court's plain error review of an issue, where the state court applied a federal standard of due process in the course of that review, was a merits review that precluded a finding of procedural default of the issue raised. *Id.* at 391. The court found that "[w]here, however, the state court has elected to disregard the procedural default and to decide the claim on its merits, the federal court should likewise decide the claim on its merits." *Id.* at 390.

For another Second Circuit case that found a merits review where procedural default had been acknowledged by the state court, *see also, Brown v. Greiner,* 409 F.3d 523, 532-533 (2nd Cir. 2005), *cert. denied, sub nom. Rosen v. Walsh and Brown v. Ercole,* 547 U.S. 1022 (2006), (the district court had erred in finding procedural default where the state court's ruling, although on procedural grounds, was "interwoven" with the state court's rejection of a federal claim).

The Eighth Circuit has also followed the rule that plain error review by a state court is a review on the merits. In *Mack v. Caspari*, 92 F.3d 637, 641 (8th Cir. 1996), *cert. denied,* 520 U.S. 1109 (1997), the court found that a review by the Missouri Court of Appeals for plain error meant that there was no procedural default that blocked review, and that "this court may also review for plain error." In *Sweet v. Delo,* 125 F.3d 1144, 1150 (8th Cir.1997), *cert. denied,* 523 U.S. 1010 (1998), the Eighth Circuit found that a federal court can reach one issue decided on the merits by the state court despite a finding of procedural default, but not those issues the court refused to consider. *See also, James v. Bowersox,* 187 F.3d 866, 869 (8th Cir. 1999),

cert. denied, 528 U.S. 1143 (2000), holding that a federal court could consider issues disposed of in state court pursuant to plain error review.

In *Walker v. Endell*, 850 F.2d 470 (9th Cir. 1987), *cert. denied,* 488 U.S. 926 (1988), the Ninth Circuit has held unambiguously that: "A state appellate court reviewing for plain error reaches the merits of a petitioners claim." *Id.* at 474. The court relied on footnote 44 of *Engle v. Isaac*, discussed above, where this Court recognized that had there been a plain error review by the Ohio Courts, there would have been no procedural default, and relied on this Court's decision in *County Court of Ulster.* The Ninth Circuit found the footnote in *Engle v. Isaac* "a clear statement that plain error review by a state appellate court negates the defendant's procedural default." *Id.*

For another Ninth Circuit case, *see, Huffman v. Ricketts,* 750 F.2d 798 (9th Cir. 1984), relied on by the court in *Walker v. Endell.* In *Huffman*, the Ninth Circuit reviewed a habeas claim of a petitioner who had not made a contemporaneous objection to a jury instruction in an Arizona trial. The Ninth Circuit held that the petitioner's claim was not barred because even though the Arizona Court of Appeals observed that "[n]o objection was made below to the instruction," the state court went on to decide that "no fundamental error" had been committed. *Id.* at 801 and n. 2. The court relied on *County Court of Ulster County. Id.* at 474.

The Tenth Circuit, in *Cargle v. Mullin*, uses an analytical approach, where plain error review can be an adequate and independent state ground, or, where a state court denies relief "for a federal claim on plain-

error review because it finds the claim lacks merit under federal law," then a federal court may consider the issue reviewed and there has been no decision on an adequate and independent state ground. 317 F.3d at 1206.

Other circuits have followed a different rule, the rule applied by the Sixth Circuit panel in the instant case: that when a state court conducts a plain-error review of issues presented, there is an application of a procedural rule that prevents federal review of the issue. *Gunter v. Maloney*, 291 F.3d 74, 80 (1st Cir. 2002) (a discretionary review under a miscarriage of justice analysis does not indicate that a state court has waived an independent state procedural rule for affirming the convictions); *Campbell v. Burris, Id.* (3rd Cir.), (plain error review of violations of the federal constitution will not deprive a state court ruling of its "independent" character); *Willis v. Aiken*, 8 F.3d 556, 567, (7th Cir. 1993), *cert. denied sub nom. Willis v. DeBruyn*, 511 U.S. 105 (1994) (review by Indiana courts for "fundamental error," where there has been no objection to the error in the trial court, is an independent finding of procedural default that precludes federal habeas review);[1] *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir.), *cert. denied* 488 U.S. 960 (1988) (existence of plain error rule does not preclude a finding of procedural default, nor does an independent review of the record by a state appellate court).

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[1] The conclusion reached by the Seventh Circuit that review for fundamental error is a recognition of procedural default is the exact opposite of the conclusion reached by the Ninth Circuit in *Huffman v. Ricketts* that a review for fundamental error is a merits review.

B. The conflict within the Sixth Circuit

The district judge in the instant case relied on the Sixth Circuit case of *Manning v. Hoffman*, 269 F.3d 720 (6th Cir. 2001), where the court found that when the Ohio Court of Appeals had found an issue defaulted, but reopened the case to consider the issue of ineffectiveness of appellate counsel, and, in considering the merits of that claim, found that trial counsel was not ineffective, then because the court "addressed the question of whether [the petitioner's] trial counsel rendered ineffective assistance, it is clear that this issue was not disposed of on procedural grounds." 269 F.3d at 724.

In a case decided about two months before the instant case, another panel of the Sixth Circuit in *Fleming v. Metrish*, 556 F.3d 520, 529-533 (6th Cir. 2009) *Pet. for Cert. pending sub nom. Fleming v. Rapelje,* No. 08-10545, reached the exact opposite conclusion as the panel in this case - deciding that plain-error review of a *Mosely*[2] claim by the Michigan Court of Appeals *was* a review on the merits.[3] In *Fleming,* the panel found that the test for determining whether there is a review on the merits or a procedural default of a claim in state court is to examine "the legal reasoning provided by the state court in disposing of a claim . . . not the standard of review through which that claim is viewed." 556 F.3d

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[2] *Michigan v. Mosely,* 423 U.S. 96 (1975)

[3] A petition for rehearing en banc was filed in this case to ask the full Sixth Circuit to reconcile the conflict between the instant case and *Fleming v. Metrish*, but the court denied the petition. App. 65a-66a.

at 531. Judge Clay dissented, believing that the plain-error review by the Michigan courts constituted a finding of procedural default, citing some of the Sixth Circuit precedent relied on by the panel in the instant case. 556 F.3d at 537-544. The Tenth Circuit opinion of *Cargle v. Mullin* was cited by Judge Clay for the proposition that "there is a split among the circuits" as to whether or when plain-error review is a review on the merits. 556 F.3d at 540.

Only this court, by granting this petition, can resolve the split among the circuits as to whether a state court's plain-error review of a federal claim is a review of the merits of that claim that permits review of the claim under 28 U.S.C. § 2254(a).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

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