No. _____

# In the Supreme Court of the United States

LLOYD RAPELJE, PETITIONER

v.

TYRIK MCCLELLAN

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether a state-court order denying a request for relief on a constitutional claim "for lack of merit in the grounds presented" constitutes a merits adjudication of that claim for purposes of the Antiterrorism and Effective Death Penalty Act of 1996.

2. Whether a federal habeas court may, consistent with AEDPA, delve into the internal procedures of a state court to support its speculation that an order denying relief "for lack of merit" is not, in fact, a merits adjudication.

## PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Lloyd Rapelje, warden of a Michigan correctional facility. The Respondent is Tyrik McClellan, an inmate.

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## OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, Pet. App. 1a–34a, is reported at 703 F.3d 344 (6th Cir. 2013). The opinion of the district court denying the State's motion for reconsideration, Pet. App. 35a–45a, is not reported. The opinion of the district court granting habeas relief, Pet. App. 46a–82a, is not reported but is available at 2011 WL 2447999. The order of the Michigan Court of Appeals denying McClellan's delayed application for leave for "lack of merit in the grounds presented," Pet. App. 84a, is not reported. The Michigan trial court's decision denying McClellan's motion, Pet. App. 85a–89a, is not reported.

## JURISDICTION

The Sixth Circuit's opinion was entered on January 11, 2013, and the Sixth Circuit denied rehearing with a suggestion for review en banc on March 21, 2013. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in relevant part:

> (d) 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.

## INTRODUCTION

Under AEDPA, state-court "merits" decisions are entitled to deference. But the Sixth Circuit here held that an order denying an appeal for "lack of merit in the grounds presented" did not mean the state court *actually* resolved the matter on the merits. This is so even though the Michigan courts consider such orders to be merits decisions subject to the law-of-the-case doctrine, *People* v. *Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984), and even though this Court has said that such an order "necessarily entails some evaluation of the merits of the applicant's claims," *Halbert* v. *Michigan,* 545 U.S. 605, 618 (2005). This curiosity of lexicon, logic, and law in the Sixth Circuit contradicts this Court's jurisprudence and offends comity.

More specifically, the Sixth Circuit panel majority reviewed the Michigan Court of Appeals online docket for this case. Although parts of that docket are not publicly available, the majority saw no indication that the trial-court record had been transmitted to the Court of Appeals. Disregarding the plain language of the order, the order's precedential value as a matter of Michigan law, and the reality that courts can make merits determinations without the record, see *Baldwin* v. *Reese,* 541 U.S. 27, 31–32 (2004), the majority speculated that the record's absence on the publicly available docket necessarily meant that the state court could *not* have made a merits ruling. This speculation meant that AEDPA deference did not apply, and the federal courts could consider new evidence elicited at a federal evidentiary hearing that *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), would otherwise prohibit.

The Sixth Circuit's speculation was not warranted. The words of the order itself—"for lack of merit in the grounds presented"—should have ended the inquiry: the adjudication was on the merits, and the evidentiary hearing was barred. There was no reason to even reach the rebuttable presumption that the order was merits-based under *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), because the order was plain and unambiguous on its face. Comity, federalism, and respect for the finality of state-court judgments form the core of federal habeas corpus law, as AEDPA and this Court's habeas jurisprudence make clear. The Sixth Circuit's decision disrespects Michigan courts by holding that an order does not mean what it says, instead looking behind the order to determine what the state-court panel may have thought. This game of judicial ESP has no place in the federal habeas process.

This Court should grant certiorari or peremptorily reverse because the Michigan Court of Appeals' order explained in plain terms the reason for its denial of leave to appeal: "lack of *merit*." Such an order is entitled to more than a mere presumption that it is a merits adjudication. The order is not unexplained; it gives the reason for the judgment. Additionally, this Court should grant certiorari to disapprove the practice of the Sixth Circuit in this case of looking into the internal procedures of the state court and using speculation based on that information to support second-guessing the state court's orders.

## STATEMENT OF THE CASE

One winter night in 2001, tensions ran high between two groups of men at a downtown Detroit bar. Tensions escalated to an altercation within the bar, and the bar management asked both groups of men to take things outside. Once outside, the fight continued. As the two groups fought, Tyrik McClellan shot Iva Nathan Auld four times. Three shots entered Auld's legs. The killing shot entered Auld's back and exited his chest.

Michigan charged McClellan with first-degree premeditated murder. McClellan claimed that he had acted in self-defense. He chose not to testify at trial, and no witnesses were called on his behalf. A Wayne County jury found him guilty. On direct appeal, the Michigan Court of Appeals affirmed his conviction, and the Michigan Supreme Court denied leave to appeal.

Fifteen months later, McClellan returned to the trial court and filed a motion for relief from judgment raising several claims of ineffective assistance of trial counsel, including a claim that counsel performed ineffectively by failing to call witnesses—his brothers and cousins—to support McClellan's self-defense theory. The trial court held the claims barred on procedural grounds, because McClellan could have raised them on direct appeal, and had not shown good cause and actual prejudice to excuse his failure to do so. Pet. App. 88a. It also discussed the merits of each claim, and held each meritless. Pet. App. 87a–88a. Following its merits and procedural discussions, the trial court order concluded by denying McClellan's motion "[f]or all the reasons stated." Pet. App. 88a.

McClellan sought leave to appeal in the Michigan Court of Appeals, which denied his delayed application "for lack of merit in the grounds presented." Pet. App. 84a. The Michigan Supreme Court also denied leave to appeal. Pet. App. 83a.

McClellan filed a petition for federal habeas relief, claiming that his trial counsel was ineffective for failing to call witnesses to support his self-defense theory, and asking the district court to hold an evidentiary hearing on the claim. Michigan responded that the claim was procedurally defaulted, barring federal review. The State mistakenly believed that the appellate court had rejected the delayed application under Michigan Court Rule 6.508(D).

The district court found that McClellan had shown cause and prejudice to excuse the default, and it held the requested evidentiary hearing. On the basis of the evidence adduced at that hearing, the district court reviewed the claim *de novo*, and granted habeas relief. The State then recognized its error, and filed a motion for reconsideration. The motion explained that the Michigan Court of Appeals order actually denied leave "for lack of merit in the grounds presented." Because this order was a merits adjudication, it barred a federal evidentiary hearing. The district court, following Sixth Circuit precedent then in place, held that a Michigan court order denying leave "for lack of merit in the grounds presented" "gives no indication as to the basis for the decision," and thus is an unexplained order. The district court also held that, because the state trial court denied McClellan's claims on procedural grounds, it did not rule on the merits of those claims.

The State appealed, and a two-judge panel majority agreed with the district court that the Michigan Court of Appeals had not adjudicated McClellan's claims on the merits. Pet. App. 9a–16a. The majority affirmed the district court's grant of habeas relief. Pet. App. 16a. It agreed with the district court that the trial court had not ruled on the merits of the claim. It construed the words "the grounds presented" in the Michigan Court of Appeals' order to refer only to the procedural default argument, not to the substantive Sixth Amendment claim. And it examined the Michigan Court of Appeals' docket entries and concluded that that court did not have the trial court record before it when it denied McClellan's delayed application.

For these reasons, the majority held that the state appellate court "could not have denied McClellan's petition on the merits of the ineffectiveness claim." Pet. App. 14a. The majority therefore held that the evidence adduced at the federal evidentiary hearing was properly considered, and agreed with the district court that, on the strength of that evidence, McClellan had shown entitlement to habeas relief. Pet. App. 16a. Writing in dissent, JUDGE MCKEAGUE opined that it was "probably inappropriate" to inquire into the internal procedures of the Michigan Court of Appeals, and that McClellan had failed to overcome the presumption that the state-court order was merits-based. Pet. App. 19a, 27a.

## REASONS FOR GRANTING THE PETITION

### I. This Court should grant the petition to vindicate the principle of comity that a habeas court treats a state-court order to mean what it says.

One of the central purposes of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2241 *et seq*., is to further the principles of comity, finality, and federalism. *Williams* v. *Taylor,* 529 U.S. 420, 437 (2000). The meaning and application of a state appellate court's standard merits order implicates these principles in a basic way. Here, the Sixth Circuit disregarded (1) a state-court order's language, (2) this Court's precedent construing such orders, and (3) the state court's own understanding of its orders. And the Sixth Circuit did so to circumvent the deference owed to state-court decisions, offending comity, finality, and federalism in the process. This Court should grant leave to rectify this distortion of the interplay between the federal and state courts in the circuit.

#### A. "Lack of merit" means lack of merit.

An unexplained state-court order denying relief must be presumed to be a merits adjudication "in the absence of any indication or state-law procedural principles to the contrary." *Harrington* v. *Richter*, 131 S. Ct. 770, 784–85 (2011). In *Richter,* this Court reviewed a summary state court order that denied relief with no further explanation. *Richter,* 131 S. Ct. at 784. The issue was whether such an order was entitled to deference as a merits decision under AEDPA. *Id.* The resolution—that such an unexplained order should be presumed to be on the merits—was

consistent with the principles of comity underlying federal habeas law. See *id.*

An unexplained order is "an order whose text or accompanying opinion does not disclose the reason for the judgment." *Ylst* v. *Nunnemaker*, 501 U.S. 797, 802 (1991). But the order in this case discloses the reason for the judgment: "for lack of merit in the grounds presented." There is no need to *presume* that this explained order is a merits adjudication; it simply *is* one.

The district court and Sixth Circuit erred in second-guessing the Michigan Court of Appeals order denying relief "for lack of merit in the grounds presented." If the lower courts had treated this order as a merits adjudication, they would not have been able to consider the evidence adduced at a federal evidentiary hearing. Without the evidence from the hearing, McClellan could not have carried his burden of showing entitlement to habeas relief. To avoid this result, the lower courts relied on the rebuttable nature of the presumption in *Richter* to find that the order here was not a merits one. Pet. App. 11a, citing *Werth* v. *Bell*, 692 F.3d 486, 493 (6th Cir. 2012).

Unlike the summary order in *Richter,* 131 S. Ct. 783, which merely provided the petition for review was "denied," the order at issue here denied the application "for lack of merit in the grounds presented." The Sixth Circuit did not even need to reach the presumption of *Richter*. Where the state court purports to resolve the issue on the merits, and says so, that is the end of the inquiry. Cf. *Ylst,* 501 U.S. at 802 (defining an "unexplained order"). The order means what it says.

### B. *Halbert* provides the same principle: the state court considered the merits.

This Court's own examination of the identical form order in the same posture—an application for leave to appeal—yields the same answer. The order "necessarily includes" an evaluation of the claims' merits. *Halbert,* 545 U.S. at 618.

In *Halbert*, the question was whether an indigent Michigan criminal defendant who pled guilty, and therefore could appeal only by leave of the court, had a constitutional right to appointed counsel on appeal. *Id.* at 609. This Court examined whether Michigan's system of first-tier appellate review by leave fell within the rule of *Douglas* v. *California*, 372 U.S. 353 (1963), "that a State is required to appoint counsel for an indigent defendant's first-tier appeal as of right." *Halbert*, 545 U.S. at 611. The *Halbert* Court pointed out "[t]wo considerations [that] were key to" the *Douglas* holding: "First, such an appeal entails an adjudication on the merits. . . . Second, first-tier review differs from subsequent appellant stages 'at which the claims have once been presented by [appellate counsel] and passed upon by an appellate court.'" *Id.* (citations omitted).

The *Halbert* Court held that *Douglas* controlled the question, in part because "in determining how to dispose of an application for leave to appeal, Michigan's intermediate appellate court looks to the merits of the claims in the application." 545 U.S. at 617. The *Halbert* Court recognized that "[w]hen the court denies leave using the stock phrase 'for lack of merit in the grounds presented,' its disposition may not be equivalent to a 'final decision' on the merits, . . . ."

545 U.S. at 618. In other words, even though such an order constitutes *some* type of adjudication on the merits (as it must to fall within the rule of *Douglas*), it may or may not qualify as a "final decision." See Mich. Ct. R. 7.215(E)(1) ("[a]n order denying leave to appeal is not deemed to dispose of an appeal."). But the order does examine the merits even it does not have the same finality as an affirmance following leave granted.

The grounds that McClellan presented to the Michigan Court of Appeals on collateral review included his Sixth Amendment claim. And the Michigan Court of Appeals found that the grounds, including the Sixth Amendment claim, lacked merit. No presumption is required; the plain language of the order is sufficient. "There is no text in [AEDPA] requiring a statement of reasons." *Richter*, 131 S. Ct. at 784.

Thirty years ago, this Court held that a state-court decision on a federal question should not be found to be grounded in state law unless the decision "clearly and expressly" states that it is so grounded. *Michigan* v. *Long*, 463 U.S. 1032, 1040–41 (1983); accord *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). The rule was applied in the habeas context when this Court held that there was a strong presumption *against* a finding of procedural default. *Harris* v. *Reed*, 489 U.S. 255, 263 (1989). Recent decisions continue this trend requiring a presumption of a merits adjudication. *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013). Now, the Sixth Circuit has turned the presumption against procedural default upside down: in this case, the state trial court discussed the merits of McClellan's claims, found them meritless, and said that it was denying his motion for

that reason (in addition to the procedural default). The Michigan Court of Appeals did not engage in a lengthy analysis, but explained "clearly and expressly" that it was denying relief on the merits.

### C. The Michigan courts hold that such orders are ones that have resolved the merits.

Although these summary orders are not the same as affirmances for all purposes, the decisions are given effect under the law-of-the-case doctrine to preclude relitigating the issue. *Hayden*, 348 N.W.2d at 684; *People* v. *Douglas*, 332 N.W.2d 521, 529–30 (Mich. Ct. App. 1983); *People* v. *Wiley*, 315 N.W.2d 540, 541 (Mich. Ct. App.1981). The doctrine applies because the orders resolve the merits of the claim:

> [T]his Court has consistently held that denial of an application "for lack of merit in the grounds presented" is a decision on the merits of the issues raised, which precludes subsequent review of those issues pursuant to the law of the case doctrine.

*People* v. *Collier*, 2005 WL 1106501, *1 (Mich. Ct. App. 2005). The state courts are the final authority on the meaning of their orders. The Sixth Circuit's grant of habeas relief conflicts with this Court's decisions, and should be reversed. Certiorari is warranted.

## II. This Court should grant the petition because speculation about the internal procedures of a state court cannot overcome the presumption that the state court has adjudicated a claim on the merits.

In applying the *Richter* presumption to this "unexplained order," the Sixth Circuit went to unprecedented lengths to determine that the order was based only on procedural considerations: (1) it neglected the fact that the state trial court had resolved the claims on the merits; (2) it applied a strained interpretation to "the grounds presented" in order to show that McClellan's substantive claims had not been presented; and (3) most important, it inquired into the internal workings of the state appellate court and concluded—based on speculation—that that court could not have ruled on the merits of McClellan's Sixth Amendment claim because the state trial court record had not been transferred to the Michigan Court of Appeals. This third error is no ordinary mistake. One would expect this kind of inquiry from a court exercising superintending control, not a court in the federal judicial system examining the decision of a state court for extremely limited habeas review.

Never before has a federal circuit examined state-court docket entries to determine whether the state trial-court record had been forwarded to the state appellate court before its decision. Never before has a federal court directed a state to explain "what physical record did the Michigan Court of Appeals have before it" at the time it reached its decision. Letter from Clerk, dated October 4, 2012. This is a profound intrusion into the state courts' internal processes.

### A. It was improper for the Sixth Circuit to intrude into the state courts' internal processes.

At oral argument, the panel asked the advocates to submit supplemental letter briefs detailing their positions with respect to what record was before the state appellate court. Michigan's letter explained that the state-court panel deciding McClellan's delayed application for leave "did not have the lower court record when it rendered its decision."[1] The panel majority relied on the State's response to its inquiry regarding the lower-court record. Pet. App. 13a. Based on this fact, the majority concluded that "the Michigan Court of Appeals could not have denied McClellan's petition on the merits of the ineffectiveness claim." Pet. App. 14a. This action offends AEDPA principles in two respects.

First, it demonstrates a lack of respect for the Michigan courts. The obvious but unstated suggestion is that the Sixth Circuit is skeptical that state appellate judges are meeting their obligations. That is, only if the state judges actually had the lower court record on collateral review could they have properly done their job in resolving the ineffective-assistance-of-counsel claim on the merits.

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[1] The letter also pointed out that the state appellate court had access to a report it prepared during McClellan's direct appeal. That report contained a summary of the lower-court factual record.

There is no requirement, of course, that the court review the lower-court record. As recognized by this Court, briefs themselves may be adequate:

> Appellate judges, of course, will often read lower court opinions, but they do not necessarily do so in every case. Sometimes an appellate court can decide a legal question on the basis of the briefs alone. That is particularly so where the question at issue is whether to exercise a discretionary power of review, *i.e.*, whether to review the merits of a lower court decision. In such instances, the nature of the issue may matter more than does the legal validity of the lower court decision. And the nature of the issue alone may lead the court to decide not to hear the case.

*Baldwin,* 541 U.S. at 31. McClellan's delayed application for leave for appeal here thoroughly examined the Sixth Amendment claim substantively. McClellan's Delayed Application for Leave, dated July 10, 2007.

But even if this were not the case, this effort to identify precisely what exactly the State appellate judges considered interposes itself into the internal deliberative process of the state court. Such an action is diametrically opposed to deference. If such an inquiry is proper, the next question whether the judges or law clerks actually reviewed the lower court record will be equally relevant. For a federal habeas court to sit in judgment of the adequacy of a state court's internal procedures is irreconcilable with principles of comity and federalism.

Second, a habeas court's look behind the curtain *always* entails speculation. In this case, the docket entries do not show that the Michigan Court of Appeals had the lower-court record. Ordinarily, there is no way to know whether the court got the record in a way that was not reflected in the docket. The Michigan appellate court had access to a court-prepared report summarizing the lower-court factual record. State letter, dated Oct. 25, 2012, p. 1. This kind of rank speculation should not undermine the deference that state court merits decisions enjoy. *Richter,* 131 S. Ct at 785. In dissent, JUDGE MCKEAGUE deplored this kind of scrutiny. Pet. App. 20a ("This is precisely the kind of 'theoretical possibility' and 'pure speculation' the Supreme Court admonished habeas courts to avoid in an effort to circumvent the deference owed to state court summary orders.").

Once a habeas court starts down this path, the presumption that the state-court order is merits-based dwindles to a suggestion, as the habeas court may carefully choose which information to credit and which to disregard, and allow itself to speculate about the significance of the information and to review the adequacy of the state court's procedures.

### B. In applying the *Richter* presumption, the state-court decision was a merits one.

Even assuming that the order was unexplained and applying the *Richter* presumption, the decision was a merits decision.

The state trial court rejected McClellan's claim both on the merits and on procedural grounds. The state trial court provided a significant merits analysis

embedded in its decision that otherwise ruled on procedural grounds, a point the panel majority ignored. The trial court substantively rejected the claim that McClellan's counsel was ineffective:

> Defendant claims counsel fell below this reasonableness standard by failing to call witnesses to support that Defendant acted in self-defense. The decision of what witnesses to call at trial is legal strategy. *People* v. *Rockey*, 237 Mich. App. 74, 76; 601 N.W.2d 887, 890 (1999). The court will not substitute its own judgment for that of defense counsel. *Rockey*, *supra*. Any actions by defense counsel, which can be attributed to legal strategy, will not be grounds for ineffective assistance of counsel. *Rockey*, *supra*. Therefore, counsel forgoing the opportunity to call witnesses to support that Defendant acted in self-defense is not grounds for ineffective assistance of counsel.

Pet. App. 87a.[2]

The trial court's merits adjudication of the claim supports the presumption that the state appellate court's order was merits-based. The Sixth Circuit's procedure in this case minimizes respect and maximizes speculation, contrary to this Court's decisions.

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[2] The panel majority did not review the state trial court decision for its merits analysis because it concluded that the State "conceded" it was a procedural decision. Pet. App. 14a n.3. But this conclusion overlooks the fact that a court may provide alternative merits analysis even where it rules on procedural grounds. *Fleming* v. *Metrish,* 556 F.3d 520, 524 (6th Cir. 2009). That is what occurred here.

The Sixth Circuit majority also erred by construing "the grounds presented" to refer *not* to McClellan's Sixth Amendment claim, but *only* to McClellan's argument that his claim was not barred by procedural default. Pet. App. 15a. But of course, the Sixth Amendment claim *was* presented to all levels of the state courts. Were it otherwise, the lower courts would have erred by granting habeas relief on an unexhausted claim. 28 U.S.C. § 2254(b)(1)(A).

If the Sixth Circuit had been correct that the Michigan Court of Appeals' order in this case was only entitled to a presumption that it was merits-based, then it should have followed *Richter* to see if there was "any indication or state-law procedural principles to the contrary." *Richter,* 131 S. Ct. at 785. The law in Michigan provides that such a decision is on the merits. *Collier,* *1. That alone should be determinative. Even without that basis, consistent with *Ylst*, the fact that the trial court's opinion and order included an analysis of the merits demonstrates that McClellan failed to rebut the *Richter* presumption. Instead, the panel majority looked elsewhere to justify *de novo* review, most troublingly when it engaged in speculation based on the Michigan Court of Appeals' internal docket entries. Such actions are the antithesis of comity, federalism, and respect for state courts and their decisions.

Certiorari is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted, or, in lieu of a grant of certiorari, the Sixth Circuit's decision should be peremptorily reversed.

Respectfully submitted,

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