No. 12-___

IN THE

Supreme Court of the United States

GERALD L. WERTH,

Petitioner,

v.

THOMAS BELL, WARDEN,

Respondent.

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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QUESTION PRESENTED

Whether, when a state court declines to hear a discretionary appeal, a federal habeas court is required by *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), to treat the order denying leave to appeal as if the state court had issued a reasoned decision on the merits of the habeas petitioner's federal claims, as the Sixth Circuit held, contrary to the reasoning of *Greene v. Fisher*, 132 S. Ct. 38 (2011), and in conflict with several other Circuits.

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PETITION FOR A WRIT OF CERTIORARI

Gerald L. Werth respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is published at 692 F.3d 486. Its order denying rehearing (Pet. App. 54a) is unreported. The order of the district court adopting the magistrate judge's report and recommendation (Pet. App. 52a) is not reported in the Federal Supplement but is available at 2010 WL 3419817. The magistrate judge's report and recommendation (Pet. App. 26a) is also not reported in the Federal Supplement but is available at 2010 WL 3419818.

The order of the Michigan Supreme Court (Pet. App. 56a) denying Mr. Werth's application for leave to appeal is published at 762 N.W.2d 489 (2009) and 483 Mich. 916 (2009). The order of the Michigan Court of Appeals (Pet. App. 55a) denying Mr. Werth's application for leave to appeal is not reported in the North Western Reporter or the Michigan Appeals Reports, nor is it available through Westlaw.

JURISDICTION

The Sixth Circuit entered judgment on August 28, 2012 (Pet. App. 1a), and denied panel rehearing and rehearing en banc on October 11, 2012 (Pet. App. 54a). The jurisdiction of this Court is timely invoked under 28 U.S.C. §§ 1254(1) and 2101.

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, provides, in pertinent 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.

STATEMENT OF THE CASE

Five years after facing trial in a Michigan courtroom, Petitioner Gerald L. Werth seeks judicial consideration of his claim that the state-court trial judge violated his right to represent himself, as guaranteed by the Sixth Amendment to the United States Constitution. Mr. Werth has exhausted his state appellate opportunities and pursued federal habeas relief—all with scrupulous adherence to procedural rules—but to date no court has engaged the merits of his self-representation claim. Far from deciding the merits of Mr. Werth's claim, the

Michigan appellate courts instead issued *pro forma* orders denying his requests for leave to pursue discretionary appeals. The district court erred by limiting itself to deferential review, as if a Michigan appellate court had considered and rejected Mr. Werth's claim on the merits. And the Sixth Circuit compounded this error, creating conflicts with the conclusions of several other Circuits, when it held that Mr. Werth's claim had been "adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d).

1. In November 2007, Mr. Werth was temporarily staying on the couch of a long-time family friend. (*See* Pet. App. 29a.) That friend, Crystal Davidson, shared her mobile home with her boyfriend, Keith Finley. (*See id.*) After investigating a report that someone in the mobile home community was selling stolen cigarettes, police found property in Ms. Davidson's home that matched the descriptions of items recently stolen from Khirfan's Blue Collar Market in nearby Flint Township. (*See id.* 29a-30a.) Earlier that day, Mr. Finley had sold four cartons of allegedly stolen cigarettes to a neighbor. (*See id.* 29a.) Though Mr. Finley had sold allegedly stolen property similar to that found in Ms. Davidson's home, both told the police, and later the court, that Mr. Werth had stolen the items without their involvement. (*See id.* 30a.)

Prosecutors charged Mr. Werth with two felonies: breaking and entering a building with intent to commit larceny, and possession of burglar's tools. (*See id.* 3a.) Because Mr. Werth had previous felony convictions, Michigan law called for sentencing enhancements that could increase the maximum

sentence on either charge to life imprisonment. (*See id.*)

2. From his first court appearance, Mr. Werth respectfully but repeatedly insisted that he wished to represent himself in this matter. During his first pre-trial conference in the Circuit Court of the County of Genesee, Mr. Werth informed the court, "I want to represent myself." (*Id.* 59a.) Though the proceedings lasted only fifteen minutes, Mr. Werth repeatedly and clearly requested permission to represent himself. His court-appointed lawyer noted that Mr. Werth had drafted several motions, the first of which was "to dismiss me from the case." (*Id.* 63a.) Though the court did not consider his motion, Mr. Werth explained to the Court, "I do not want Mr. Lange representing me." (*Id.* 65a.) He then reiterated his initial request, saying both "I'll represent myself, your Honor" and "I do want to represent myself." (*Id.* 65a, 68a.)

The trial judge denied Mr. Werth's requests to represent himself, saying "I'm not prepared to allow that to happen at this time." (*Id.* 68a.) She properly noted that "there's a test involved" in determining whether a defendant can represent himself, but asserted, without explanation or analysis, "I don't think that you're going to meet the test." (*Id.* 65a.)

On March 17, 2008, Mr. Werth drafted and sent to the court a motion in which he renewed his request to represent himself. (*See id.* 84a.)

At the next court date, Mr. Werth's lawyer made clear that the defendant had not changed his mind: "We did discuss it this morning. He indicated at that time that he wanted to tell the court that he wanted to represent himself. I indicated to him that I would

be happy to abstain my counsel and assist him in whatever way I could." (*Id.* 85a.) Later in that proceeding, Mr. Werth himself reiterated his request in clear terms:

> THE DEFENDANT: Then I have one more request, your Honor.
>
> THE COURT: Hmm?
>
> THE DEFENDANT: I have [a] constitutional right and a state right to represent myself. Also, Michigan Court Rule 6.005 states that I have a right to court appointed counsel. I also have a right under that court rule to waive that counsel.

(*Id.* 88a.)

When the court did not respond directly, Mr. Werth persisted: "So, your Honor, you're saying that I—I can't exercise my constitutional right to represent myself?" (*Id.* 90a.) The court confirmed that it was denying his request:

> THE COURT: No, I'm not going to do it. Let me first tell you, I'm required under the court rule. As you're so familiar with it. So you understand that right—
>
> THE DEFENDANT: I'm not saying I'm familiar with it, your Honor. I just want to represent myself. I have that right. And I'm asking to exercise that right. That's all.
>
> THE COURT: That's only if I can count on you not to behave improperly and I can't.
>
> THE DEFENDANT: How am I going to—your Honor, I have a right to do this.

> THE COURT: … And then of course, as you're clearly aware, there are multiple risks involved with self representation including—
>
> THE DEFENDANT: And I'm willing to take those risks, your Honor.
>
> THE COURT: —lack of knowledge of the rules of evidence and the court rules. There are no ways that I can give you special training overnight. Nor can I give you any special treatment once we go to trial. You'd be held to the same standards [the prosecutor] is expected to do in here to with respect to the court rules and the rules of evidence. And the Court is not in a position under the circumstances, to allow you to represent yourself. Now that's the ruling of the Court, denied.

(*Id.* 90a-91a.)[1] In denying Mr. Werth's request to represent himself, the court did not apply the required test, to which the court had earlier referred. (*See id.*) Moreover, in emphasizing Mr. Werth's lack of formal training as a significant rationale for its answer, the court ignored his lawyer's earlier representation that he "would be happy to abstain [his] counsel and assist [Mr. Werth] in whatever way [he] could." (*Id.* 85a.)

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[1] Despite the trial court's suggestion at this juncture, the record contains no instances of Mr. Werth behaving inappropriately. As the magistrate judge noted, Mr. Werth "'was respectful and compliant and did not provide a basis to conclude a trial could not have gone forward had he been allowed to press his own claims.'" (Pet. App. 37a (quoting *Indiana v. Edwards*, 554 U.S. 164, 186 (2008) (Scalia, J., dissenting).)

3. The court was initially more responsive to Mr. Werth's requests for discovery, but ultimately the denial of his requests to represent himself stymied Mr. Werth on that front as well because his lawyer failed to obtain the information Mr. Werth sought. Mr. Werth believed that Ms. Davidson—who rented the trailer where the stolen property was found—had lied when she denied attempting to sell some of the allegedly stolen property. To develop evidence to challenge her testimony and to undermine her credibility, Mr. Werth wanted to examine Ms. Davidson's cell phone records. The court granted Mr. Werth's request to delay the trial to subpoena those records. (*See id.* 64a, 68a.) Yet, when the trial date arrived, neither Mr. Werth nor his lawyer had received Ms. Davidson's phone records. Neither the Court nor Mr. Werth's lawyer mentioned the outstanding subpoenas on the record. Mr. Werth felt that, without those phone records, his lawyer was not prepared to cross-examine Ms. Davidson in the manner he deemed essential to his defense.

4. Mr. Werth was exasperated that his attorney was resistant to the defense strategies he wanted to deploy. He was despondent that he had never obtained Ms. Davidson's phone records, which he believed would undermine her denial that she had tried to join her boyfriend in selling the allegedly stolen property. And he was frustrated that the court was unwilling to allow him to represent himself despite his repeated requests. On top of all this, he feared that, under Michigan's sentencing enhancements, a guilty verdict could result in him going to prison for the rest of his life. When the prosecutor offered to reduce the sentencing enhance-

ment so that he could be sentenced to no more than fifteen years—rather than life—in prison, Mr. Werth agreed to plead guilty. (*See id.* 31a.)

5. After entering his plea but prior to sentencing, Mr. Werth apprised the court that he had agreed to the plea "[u]nder duress" because the Court had "denied a request by the Defendant to act as his own attorney," because the trial "proceeded without the phone records … belonging to witness [Ms.] Davidson," and because, as he judged his attorney's defense "ineffective," he "became fearful of drawing a long prison sentence … even though [he] was innocent of the charges against him." (*Id.* 109a.) Mr. Werth's trial counsel also filed a motion seeking to withdraw the plea. (*See id.* 111a-113a.)

On the morning of sentencing, the court held a hearing on both pending motions to withdraw Mr. Werth's plea. Mr. Werth asked to be heard and received the same kind of curt dismissal that had greeted each of his prior requests to represent himself:

> THE DEFENDANT: Your Honor, if you would give me the opportunity please to speak on my behalf so that I can also—
>
> THE COURT: But I denied the motion. Thank you. I'll see you at 2:00 for sentencing.

(*Id.* 96a.) The record shows that the court had not announced a final ruling on either of the pending motions prior to Mr. Werth's request to be heard. (*See id.* 93a-96a.)

That afternoon, at sentencing, defense counsel cited Mr. Werth's attempts at "asserting his rights." (*Id.* 101a.) When the Court offered Mr. Werth the

opportunity to speak for himself before imposition of the sentence, his sole concern was preserving for appeal the argument that his rights had been violated. (*See id.* 103a.) The court's only response was an ambiguous statement that in no way advised Mr. Werth that his guilty plea might extinguish his self-representation claim. (*See id.*) The court sentenced Mr. Werth to two concurrent terms of imprisonment for a maximum period of fifteen years. (*See id.* 104a.)

6. Assisted by a public defender, Mr. Werth timely filed an application for leave to appeal to the Michigan Court of Appeals.[2] (*See id.* 116a.) Mr. Werth's application outlined claims that the trial court erred in: (1) denying his motion to withdraw his guilty plea because the government failed to demonstrate substantial prejudice in reliance on the plea; (2) denying his requests to represent himself; and (3) denying his motion to withdraw his guilty plea because of ineffective assistance of counsel. (*See id.*) The Michigan Court of Appeals denied leave for appeal. (*See id.* 55a.) Mr. Werth then applied *pro se* for leave to appeal to the Michigan Supreme Court. (*See id.* 116a.) That Court also denied his application. (*See id.* 56a.)

Under Michigan law, neither denial constitutes a decision on the merits. As this Court has recognized,

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[2] Mr. Werth did not have an appeal as of right because his "conviction [was] based on a plea of guilty." Mich. Ct. R. 7.203(A)(1)(b); *see also Halbert v. Michigan*, 545 U.S. 605, 609 (2005) (quoting MICH. CONST. art. I, § 20) ("In 1994, Michigan voters approved a proposal amending the State Constitution to provide that 'an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.'").

"the [Michigan] Court of Appeals, in its orders denying properly filed applications for leave, uniformly cites 'lack of merit in the grounds presented' as the basis for its decision." *Halbert v. Michigan*, 545 U.S. 605, 612 (2005). Such *pro forma* "denials of leave do not constitute rulings on the merits of a case." *People v. Hines*, 276 N.W.2d 550, 552 (Mich. Ct. App. 1979). *Accord, e.g.*, Mich. Ct. R. 7.215(E)(1) ("When the Court of Appeals disposes of an … appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment. An order denying leave to appeal is not deemed to dispose of an appeal."). The same principle applies to denials for leave to appeal to the Michigan Supreme Court. *See, e.g.*, *Beasley v. Michigan*, 765 N.W.2d 608, 608 (Mich. 2009) (Kelly, C.J., concurring) ("When the court denies leave to appeal, it does not comment on the merits of a case. Likewise, it is well settled that nothing of precedential significance should be deduced from an order of this Court denying leave."); Mich. Ct. R. 7.321 ("The reasons for [the Supreme Court] denying leave to appeal … are not to be published and are not to be regarded as precedent.").

7. After the Michigan courts refused to consider his claims, Mr. Werth filed a federal habeas petition in the United States District Court for the Eastern District of Michigan. (*See* Pet. App. 114a.) Acting *pro se*, Mr. Werth raised several claims, including that the trial court violated his constitutional right to self-representation and that his defense was prejudiced by ineffective assistance of counsel. (*See id.* 120a-127a.) He requested "Remand to the Trial Court for re-Trial with the opportunity to represent [him]self at Trial." (*Id.* 132a.)

Magistrate Judge Paul J. Komives concluded that Mr. Werth "presented a strong claim that the trial court committed constitutional error in denying his requests to represent himself." (*Id.* 49a.) Nonetheless, proceeding under the highly deferential standard of review set out in AEDPA, the magistrate recommended denying Mr. Werth's habeas petition but granting a Certificate of Appealability with respect to his self-representation claim "because the resolution of that claim is reasonably debatable and petitioner has made a substantial showing of a denial of a constitutional right." (*Id.*)

Mr. Werth, still proceeding *pro se*, timely filed objections to the Magistrate's recommendations. (*See id.* 139a-144a.) District Court Judge John Corbett O'Meara adopted the magistrate's Report and Recommendation in full, without additional comment. (*See id.* 52a.)

8. After Mr. Werth filed a timely Notice of Appeal, the Sixth Circuit *sua sponte* ordered the appointment of counsel to represent Mr. Werth. (*See id.* 148a-149a.) The Sixth Circuit had jurisdiction to review the district court judgment pursuant to 28 U.S.C. §§ 1291 and 2253.

The Sixth Circuit affirmed the district court's ruling. (*See* Pet. App. 25a.) In so doing, it held that the district court had properly applied the highly deferential standard of review set out in AEDPA. (*See id.* 16a.)

Mr. Werth's primary argument on appeal was that the AEDPA standard is inapplicable here because no state court ever adjudicated his self-representation claim: the state trial court failed to hold the constitutionally mandated hearing to decide

whether Mr. Werth could represent himself, *see Faretta v. California*, 422 U.S. 806, 835 (1975); *Moore v. Haviland*, 531 F.3d 393, 402 (6th Cir. 2008), and the state appellate courts declined to hear Mr. Werth's claim on appeal. Nonetheless, the district court engaged in a limited and deferential review, without identifying the state-court decision to which it was according deference.

In rejecting this argument, the Sixth Circuit held that this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), abrogated the Sixth Circuit's prior understanding that the Michigan appellate courts' *pro forma* denials of permission for discretionary appeal did not constitute adjudications on the merits. (*See* Pet. App. 13a.) The Sixth Circuit did not address the critical fact that *Harrington* neither involved nor considered a state court's denial of leave for discretionary appeal. The court dismissed *Greene v. Fisher*, 132 S. Ct. 38 (2011), as inapposite in a two-sentence footnote. (*See* Pet. App. 15a n.10.) The Sixth Circuit concluded that AEDPA deference applies to this case because no principal of Michigan law or circumstance of the case displaces *Harrington*'s presumption that a state court's summary disposition constitutes a merits adjudication of the claims presented. (*See id.* 14a-15a.)

Mr. Werth petitioned for rehearing on the basis that the Sixth Circuit panel had misapplied *Harrington*, contravened the reasoning of this Court's decision in *Greene*, and created splits of authority between its decision and those of other Circuits, as well as within its own habeas jurisprudence. The panel denied rehearing, and the Sixth Circuit denied rehearing en banc. (*See id.* 54a.)

REASONS FOR GRANTING THE PETITION

Granting certiorari in this case would resolve conflict among the Circuits over the applicability of AEDPA deference to state-court orders denying leave for discretionary appeals and, in so doing, would clarify the scope of both *Harrington* and *Greene*.

The Sixth Circuit's reading of *Harrington* is overly broad and ignores the reasoning of this Court's decision in *Greene*. It departs from the judgment of several Circuits that have determined *Harrington* does not reach a state-court order denying leave for discretionary appeal. As the Ninth Circuit explained, "[a] state court's decision to deny *discretionary* review is entirely different" from summary disposition of a case presented on its merits and that such a denial "is decidedly not a decision on the merits." *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011), *cert. granted on other grounds sub nom. Johnson v. Williams*, 132 S. Ct. 1088 (2012). And it conflicts with the rulings of additional Circuits that have concluded that this Court's reasoning in *Greene* requires distinguishing denials of discretionary appeal from "adjudicat[ions] on the merits in State court proceedings," 28 U.S.C. § 2254(d).

The proper treatment under AEDPA of orders denying leave for discretionary appeal is a question of fundamental importance, recurring frequently—and often decisively—in federal habeas review. By erroneously applying AEDPA deference to orders that did not result from a merits adjudication, the Sixth Circuit short-circuits AEDPA's statutory scheme and deprives habeas petitioners who have not received state-court review of federal collateral

claims from having those claims ever considered in the first instance.

For all of these reasons, this Court should grant Mr. Werth's petition for a writ of certiorari.

I. THE SIXTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THIS COURT'S AEDPA JURISPRUDENCE.

Under AEDPA, a federal habeas court must grant substantial deference to prior denials of appellate relief if the habeas petitioner's claim "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). This Court has characterized § 2254(d) as "impos[ing] a highly deferential standard for evaluating state-court rulings and demand[ing] that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (internal quotation marks and citations omitted). Where deference is inapplicable, the federal court reviews the petitioner's claims *de novo*. *See, e.g.*, *Cone v. Bell*, 556 U.S. 449, 472 (2009). Thus, determining whether a state-court merits adjudication occurred—and concomitantly whether AEDPA deference applies—is a crucial step in deciding whether to grant a federal habeas petition.

In *Harrington*, this Court held that a state court's summary disposition of a case presented on the merits presumptively constitutes a merits adjudication subject to AEDPA deference. 131 S. Ct. at 786-87. In *Greene*, this Court did not apply *Harrington* to a state appellate court's order declining to hear a discretionary appeal. 132 S. Ct. at 44-45. As the unanimous *Greene* opinion

explained, deciding whether the state court reached an adjudication on the merits under "§ 2254(d)(1) requires federal courts to focus on what a state court knew and did." *Id.* at 44 (internal quotation marks omitted). For that reason, there can be no merits adjudication in "a decision by the state supreme court not to hear the appeal—that is, not to decide at all." *Id.* at 45.

The decision below disregarded this Court's guidance in *Greene* to treat a denial of leave for discretionary appeal as a decision "not to decide at all." *Id.* In flouting this directive, the Sixth Circuit impermissibly broadened the scope of *Harrington* and improperly applied AEDPA deference.

A. *Harrington* Held that Summary Dispositions of Cases Presented on Their Merits Should Presumptively Be Considered Merits Adjudications Subject to AEDPA Deference.

Harrington considered whether a state court's summary disposition of a claim constituted a merits adjudication sufficient to trigger AEDPA deference. *See Harrington v. Richter*, 130 S. Ct. 1506, 1506-07 (2010) (granting certiorari and instructing the parties to address this additional question). Specifically, the case asked the Court to decide whether AEDPA deference applied to the California Supreme Court's denial of Richter's federal claim for ineffective assistance of counsel, even though that court had denied relief in a one-sentence summary order. *See Harrington*, 131 S. Ct. at 783. California law permits a prisoner seeking state habeas relief to file an original petition with the California Supreme Court. *See Carey v. Saffold*, 536 U.S. 214, 221-22

(2002) (explaining California's "original writ" system). As a matter of judicial efficiency, the California Supreme Court does not write opinions for each such petition it denies. *See Harrington*, 131 S. Ct. at 784 (noting that the "issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed"). Under California law, "summary denial of a habeas petition on the merits reflects [the California Supreme C]ourt's determination that 'the claims made in the petition do not state a prima facie case entitling the petitioner to relief.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1402 n.12 (2011) (quoting *In re Clark*, 855 P.2d 729, 741-42 (Cal. 1993)).

Applying *Harrington* requires a federal habeas court reviewing a state-court's summary disposition to engage in a two-step analysis. First, as long as the case was presented to the state court on the merits, the federal habeas court should presume that the state court's unexplained order denying collateral relief is a merits adjudication for purposes of AEDPA. 131 S. Ct. at 784. The *Harrington* Court noted that AEDPA "refers only to a 'decision,' which resulted from an 'adjudication,'" and contains "no text … requiring a statement of reasons." *Id.* (quoting 28 U.S.C. § 2254(d)). The Court also rejected Richter's argument for a magic-words requirement under which a summary denial of relief could be considered a merits adjudication only if the state court specifically stated that it was denying a claim "on the merits." *See id.* at 784-85.

Under the second step, a habeas petitioner can rebut the presumption that a state-court's summary disposition adjudicated his claim on the merits. *See id.* at 785. To do so, the petitioner must show that "there is reason to think some other explanation for the state court's decision is more likely." *Id.* Such a showing could include an applicable rule or other source of law demonstrating that, as a matter of state law, the summary order did not represent an adjudication on the merits of all claims presented. *See id.*

B. The Reasoning of *Greene* Shows that the *Harrington* Presumption Is Inapplicable to an Order—Like the Ones at Issue Here—Declining Leave for Discretionary Appeal.

This Court unanimously held in *Greene* that AEDPA deference did not apply to a state supreme court's dismissal of a discretionary appeal on the grounds that leave was improvidently granted, but, rather, applied to the previous affirmance of the underlying conviction by the state intermediate appellate court. 132 S. Ct. at 44-45. While *Greene* did not reach the general question of whether a state-court order denying leave to appeal is a merits adjudication, the decision's reasoning shows that such an order differs in kind from the summary disposition of a case submitted on its merits, as in *Harrington*.

Greene appealed from convictions for murder, robbery, and conspiracy, claiming that the admission into evidence of redacted confessions from his non-testifying codefendants violated his rights under the Sixth Amendment's Confrontation Clause. *See id.* at 42-43. The Pennsylvania Superior Court affirmed

his convictions. *See id.* at 43. Then, while Greene's petition for allowance to file a discretionary appeal was pending before the Pennsylvania Supreme Court, this Court decided *Gray v. Maryland*, 523 U.S. 185 (1998), which changed the legal rule applicable to his Sixth Amendment claim. *See Greene*, 132 S. Ct. at 43. In the wake of this decision, the Pennsylvania Supreme Court initially granted leave to appeal and then, after the parties had completed merits briefing, reversed course and "dismissed the appeal as improvidently granted." *Id.* When Greene sought federal habeas relief, the district court deferred to the Superior Court's opinion, on the theory that, at the time that court rendered its decision, it applied the then-applicable precedents of this Court. *See id.* A divided panel of the Third Circuit affirmed on the same basis. *See id.*

Before this Court, Greene argued that he was entitled to habeas relief because the Pennsylvania Supreme Court's decision not to review his case came *after* this Court altered the governing legal standard. *See id.* at 44. In Greene's view, because this Court's decision in *Gray* changed the prevailing legal rule, it also rendered the Pennsylvania Supreme Court's subsequent dismissal order "contrary to … clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Greene's argument, then, could succeed only if the Pennsylvania Supreme Court's dismissal order qualified as an "adjudicat[ion] on the merits in State court proceedings," *Id.* § 2254(d).

A unanimous Court dismissed Greene's argument as "implausible," because § 2254(d) applies only to "a decision *resulting from* [a] merits adjudication."

Greene, 132 S. Ct. at 45. The Court distinguished such an adjudication from both "[a] later affirmance … on alternative procedural grounds" and "(what is at issue here) a decision by the state supreme court not to hear the appeal—that is, not to decide at all." *Id.* Because the Pennsylvania Supreme Court's dismissal of Greene's appeal was not a merits adjudication under § 2254(d), the district court had properly looked through that order and deferred to the last state court to adjudicate Greene's claim on the merits under the law applicable at the time. Thus, under the reasoning of *Greene*, the *Harrington* presumption is inapplicable to a state-court order declining to hear a discretionary appeal.

C. The Sixth Circuit Has Disregarded this Court's Guidance.

The Sixth Circuit opinion below applied *Harrington* to a situation that neither its facts nor its reasoning reaches, crediting as merits adjudications the *pro forma* orders denying Mr. Werth's applications for leave to file discretionary appeals in the Michigan Court of Appeals and the Michigan Supreme Court. Doing so, however, conflicts with the logic of *Harrington* and rejects the reasoning of *Greene* that denials of leave for discretionary appeal constitute nothing more than "decision[s] … not to decide at all." 132 S. Ct. at 45.

1. The *Harrington* presumption does not apply to *pro forma* denials of leave for discretionary appeal.

Harrington does not apply in this case because *Greene* teaches that the Michigan appellate courts made no adjudication here. *Harrington* held that a summary adjudication *can* be a merits adjudication sufficient to trigger AEDPA deference. 131 S. Ct. at

784. But *Greene*, decided after *Harrington*, recognized that when a state court decides not to decide a case, it has not adjudicated the case at all. 132 S. Ct. at 45. Thus, the threshold question facing a federal habeas court is whether a state-court has already adjudicated the petitioner's claims. The answer to that question must be affirmative for the federal habeas court to next consider whether that adjudication reached the merits of the petitioner's claims.

Despite the Sixth Circuit's dismissal of *Greene* in a footnote (*see* Pet. App. 15a n.10), there is no reason to disregard the logic of that case here. If the Pennsylvania Supreme Court's decision not to hear Greene's appeal did not qualify as a merits adjudication for purposes of § 2254(d), then the Michigan appellate courts' denials of Mr. Werth's requests for leave to appeal similarly cannot trigger AEDPA deference. In *Greene*, the Pennsylvania Supreme Court was fully apprised of the merits, which the parties had briefed in full before the court reversed course and decided not to hear the case. *See* 132 S. Ct. at 43. In the instant case, by contrast, the Michigan appellate courts never agreed to hear Mr. Werth's appeal, never received merits briefing, and declined to hear Mr. Werth's case without a complete picture of the claims asserted. As this Court recognized in *Greene*, the state courts' refusals to hear the appeals mean that they opted not to adjudicate the merits and that their orders do not, therefore, warrant AEDPA deference.

To support its contention that the *pro forma* orders denying Mr. Werth leave to appeal comprised merits adjudications subject to deference under *Harrington*, the Sixth Circuit discussed Michigan

law at length. (*See* Pet. App. 13a-16a.) Indeed, the panel decided that *Harrington* invalidated a prior Sixth Circuit decision recognizing the *pro forma* nature of such denials of leave and deeming them non-precedential. (*See id.* 13a (holding that *Harrington* abrogated *Dorn v. Lafler*, 601 F.3d 439 (6th Cir. 2010).) But, rather than following *Greene* to determine if *Harrington*'s rebuttable presumption was applicable in the first instance, the Sixth Circuit dismissed *Greene* as inapposite to criminal cases arising from the Michigan courts and focused on whether there was sufficient Michigan law to rebut that presumption. (*See id.* 15a n.10.)

The Sixth Circuit thus held that state-law principles trumped this Court's analysis in *Greene*. (*See id.*) That rationale is odd, given that *Greene* is fundamentally a decision about the construction and meaning of AEDPA, a federal statute. *Greene* makes no use of Pennsylvania laws or procedural rules in concluding that the Pennsylvania Supreme Court's decision not to hear the appeal, far from being a merits adjudication, was instead "a decision … not to decide at all." 132 S. Ct. at 45. While *Harrington* expressly allows that state-law precepts could rebut the presumption that a state court's summary disposition of a case presented on the merits constituted an adjudication subject to AEDPA deference, *Greene*—which poses a question that logically must precede the *Harrington* analysis—gives no similar indication. Moreover, whereas *Harrington* is deeply rooted in the details of the California procedural regime from which the case arose, *Greene* is based entirely on the structure and wording of AEDPA itself. *See id.* at 43-45.

In distinguishing *Greene* solely on the basis of Michigan law, the Sixth Circuit misreads the decisions both in that case and in *Harrington*. Even if the panel construed Michigan law correctly—and Mr. Werth maintains that it did not—the panel's approach put the cart before the horse. By starting at the second step of the *Harrington* analysis and trying to show that Mr. Werth could not rebut an inapposite presumption, the Sixth Circuit ignored the logic of *Greene*, in which this Court deemed it "implausible" to consider a state court's decision to deny leave for discretionary appeal as a merits adjudication. 132 S. Ct. at 45. AEDPA authorizes deference only to "a decision resulting from a merits adjudication," 28 U.S.C. § 2254(d), and "requires federal courts to focus on what a state court knew and did," *Greene*, 132 S. Ct. at 44 (internal quotation marks omitted). The Michigan appellate court orders in this case merely announced that Mr. Werth had been denied leave to appeal; these announcements were not the results of adjudications, much less merits adjudications, and therefore cannot trigger AEDPA deference.

Focusing on what the Michigan appellate courts "knew and did," *id.* at 44 (internal quotation marks omitted), shows that neither court acted with the benefit of complete information about Mr. Werth's claims, fundamentally distinguishing this case from *Harrington*. Looking carefully at the procedural rules for the Michigan Court of Appeals, for example, shows that this is by design. The factual record presented with an application for leave to appeal is far more limited than that required to assist a court adjudicating an appeal on the merits. *Compare* Mich. Ct. R. 7.205(B)(4) (specifying limited tran-

scripts to be filed with application for leave to appeal) *and* Mich. Ct. R. 7.210(A) (requiring record on appeal to include all original papers filed with, complete transcript of all proceedings in, and all exhibits produced to court below). Legal argument is similarly limited at the leave-to-appeal stage; the Michigan Court Rules do not authorize a party seeking leave to appeal to file a reply brief supporting that request and responding to arguments raised in opposition. *Compare* Mich. Ct. R. 7.205 (authorizing one brief in support of application for leave to appeal) *and* Mich. Ct. R. 7.212(G) (allowing reply briefs on appeal). And, recognizing the limited information provided to the court at the leave-to-appeal stage, the Michigan Court Rules distinguish between the court's denial of leave and an adjudication on the merits as two separate outcomes. *See* Mich. Ct. R. 7.205(D)(2) ("The court may grant or deny the application [for leave to appeal]; enter a final decision; grant other relief; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed.").

Because no Michigan court ever considered—much less adjudicated—Mr. Werth's claim that the trial court violated his right to self-representation, AEDPA deference does not apply to either order in which Michigan's appellate courts opted "not to decide at all," *Greene*, 132 S. Ct. at 45, the merits of Mr. Werth's claims.

The record contains no indication that the trial court examined Mr. Werth's claim that he was denied his Sixth Amendment right to represent himself. Though Mr. Werth repeatedly and

unequivocally asked to represent himself (*see* Pet. App. 37a), the trial judge never engaged him in the colloquy required by *Faretta*, 422 U.S. at 842. For this reason, the federal district court observed that Mr. Werth "has a strong … claim that he was denied his Sixth Amendment right to self-representation." (Pet. App. 36a.) However, the district court declined to adjudicate that claim because it wrongly concluded that AEDPA required deference to the Michigan appellate court orders. (*See id.* 32a-35a.)

Nor did Michigan's appellate courts consider Mr. Werth's claim in declining to hear his appeal. The Michigan Court of Appeals denied Mr. Werth's request with an order that read, in full: "The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented." (*Id.* 55a) Both this Court and the Sixth Circuit have recognized the "for lack of merit" language as boilerplate phrasing without significance. *Halbert*, 545 U.S. at 612 ("[T]he Court of Appeals, in its orders denying properly filed applications for leave, uniformly cites 'lack of merit in the grounds presented' as the basis for its decision."); *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983) (recognizing language used by Michigan Court of Appeals in Mr. Werth's case as "a standard form denial of leave to file a delayed appeal" and explaining that it "gives no indication as to the basis for the decision"). And the Michigan Court Rules expressly recognize that an order denying leave to appeal is not a disposition of any kind. *See* Mich. Ct. R. 7.215(E)(1) ("An order denying leave to appeal is not deemed to dispose of an appeal.").

The Michigan Supreme Court subsequently denied Mr. Werth's application for leave to appeal to that court because it was "not persuaded that the questions presented should be reviewed." (Pet. App. 56a.) There, too, the order contained boilerplate language and expressed no actual assessment of Mr. Werth's claims. *See, e.g.*, *Beasley*, 765 N.W.2d at 608 (Kelly, C.J., concurring) ("When the court denies leave to appeal, it does not comment on the merits of a case. Likewise, it is well settled that nothing of precedential significance should be deduced from an order of this Court denying leave."); *People v. Shook*, No. 233346, 2002 WL 31379664, at *2 (Mich. Ct. App. Oct. 22, 2002) (per curiam) (citing *People v. Phillips*, 575 N.W.2d 784, 787 (Mich. Ct. App. 1997)); Mich. Ct. R. 7.321) ("[A] denial of leave to appeal by the Supreme Court, without explanation, is generally not considered a decision on the merits and is not precedentially binding.").

The failure of any Michigan court to engage Mr. Werth's Sixth Amendment claim is precisely the kind of "'extreme malfunction[] in the state criminal justice systems'" that federal habeas review exists to "'guard against.'" *Harrington*, 131 S. Ct. at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

When the Sixth Circuit held that *Harrington* required it to presume both that the state courts had adjudicated Mr. Werth's claim and that they had done so on the merits, it applied *Harrington* unfaithfully. When it dismissed Mr. Werth's citation to *Greene*—the rationale of which is directly on point—on the basis of state law, it did so improperly. The Sixth Circuit's analysis flies in the face of the

factual record and misapplies precedent. This Court should grant certiorari to develop the relationship between *Greene* and *Harrington*, and it should remand this case so that, finally, a court can consider the merits of Mr. Werth's self-representation claim for the first time.

2. Even if the *Harrington* presumption applies to *pro forma* denials of leave for discretionary appeal, that presumption is rebutted where state law shows there was no underlying merits adjudication.

The Sixth Circuit panel below concluded that "[t]here is not" "a principle of Michigan law or circumstance of this case that overcomes the *Harrington* presumption." (Pet. App. 13a.) But that conclusion treats the presumption as being sturdier and more difficult to rebut than *Harrington* provides.

Harrington held that when a state court summarily disposes of a case presented on the merits, a federal habeas court should presume that the disposition constituted a merits adjudication subject to AEDPA deference "in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 785. Those state-law principles need not be iron-clad, because *Harrington*'s "presumption may be overcome when there is reason to think some other explanation [rather than a merits adjudication] for the state court's decision is more likely." *Id.*

The Sixth Circuit acknowledges that "a denial of leave to appeal by the [Michigan] Supreme Court, without explanation, is generally not considered a decision on the merits and is not precedentially binding." *Shook*, 2002 WL 31379664, at *2 (quoted at Pet. App. 14a). But it rejects this as a rebuttal of

the *Harrington* presumption because it is only "*generally* true." (Pet. App. 14a (internal quotation marks and citations omitted).) That rejection is improper because a state-law principle that something is "*generally* true" (*id.*) meets *Harrington*'s standard for rebuttal—a "reason to think some other explanation for the state court's decision *is more likely*" than a merits explanation. 131 S. Ct. at 785 (emphasis added).

The Sixth Circuit cites a "caveat" to escape the Michigan rule it quotes, but that caveat does not withstand scrutiny as a matter of logic or law. Logically, the Sixth Circuit elides the distinction between the Michigan Court of Appeals and the Michigan Supreme Court. The two courts have separate procedural rules. *Compare generally* Mich. Ct. R. subchapter 7.200 (Michigan Court of Appeals) *and* subchapter 7.300 (Michigan Supreme Court). And their *pro forma* orders denying leave to appeal differ markedly. (*See* Pet. App. 55a, 56a). Nonetheless, the Sixth Circuit recognizes a general rule about the Michigan Supreme Court's denials of leave, but then identifies a caveat to that rule by quoting a case about—and specific to the language of—denials from the Michigan Court of Appeals. (*See id.* 14a.) The result is a jumbled analysis that treats the courts—and their orders—interchangeably, though they are entirely distinct.

Legally, the Sixth Circuit decision is no more coherent. It mischaracterizes as settled law the caveat on which its analysis turns, without even acknowledging the existence of authority pointing in the opposite direction. Both this Court and the Sixth Circuit have expressly recognized that the Michigan

Court of Appeals uses the phrase "for lack of merit in the grounds presented" as boilerplate in its orders denying applications for leave to appeal. *See, e.g.*, *Halbert*, 545 U.S. at 612; *Raper*, 706 F.2d at 164. The routine use of this phrase reveals that the Michigan Court of Appeals order in this case is an unexplained order, and, as this Court has explained, "[t]he essence of unexplained orders is that they say nothing." *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991). In this case, the Sixth Circuit found case law, both its own and unpublished opinions from the Michigan Court of Appeals, expressing a contrary approach, but failed to recognize that the meaning of the Court of Appeals's routine orders is contested—much less analyze or explain why it chose to privilege the line of cases regarding those boilerplate orders as merits adjudications over the competing cases and procedural rules teaching that such orders should not be regarded as decisions on the merits.

For example, the Sixth Circuit brushed aside the Michigan Court Rule that provides "[a]n order denying leave to appeal [to the Michigan Court of Appeals] is not deemed to dispose of an appeal," Mich. Ct. R. 7.215(E)(1), because the Rule "has no bearing on the issuing court's reasons for denying the application" (Pet. App. 15a). But that ignores the substance of the Rule, which clearly distinguishes an order denying leave to appeal from a summary disposition. The Sixth Circuit's complaint that the Rule sheds no light on what a federal habeas court should infer while evaluating an order denying leave to appeal as a summary disposition fails to recognize the Rule's clear statement that such an order *is not a "disposition" of any kind*. Nor did the panel address judicial opinions—from this Court, its own court, or

the Michigan appellate courts—that recognize the Michigan Court of Appeals's *pro forma* orders as reflections of something wholly distinct from adjudication on the merits.

This is not a matter of mere error-correction or clarification of the details of Michigan procedural law (tasks unsuited for this Court's review). The Sixth Circuit's opinion in this case disregards this Court's instructions for assessing rebuttals of the *Harrington* presumption. Thus, even if the Court rejects Mr. Werth's primary argument and finds that the presumption does generally apply to denials of leave for discretionary appeal, the Court should grant certiorari to clarify how lower courts should apply the rebuttal standard when a habeas petitioner points to established state law—and not mere speculation, as in *Harrington* itself, *see* 131 S. Ct. at 785—to rebut the presumption that AEDPA deference applies.

II. IN APPLYING AEDPA DEFERENCE TO A DENIAL OF LEAVE FOR DISCRETIONARY APPEAL, THE SIXTH CIRCUIT CREATED SPLITS WITH SEVERAL OTHER CIRCUITS.

In addition to contravening this Court's precedents, the Sixth Circuit's decision conflicts with the conclusions of every other Circuit that has faced a state court's denial of discretionary appeal in the wake of *Harrington*.

A. The Decision Below Departs from the Determination by Several Circuits that *Harrington* Does Not Reach a State Court's Denial of Leave for Discretionary Appeal.

In the months between this Court's decisions in *Harrington* and *Greene*, several Circuits concluded that *Harrington* did not transform state-court orders denying leave for discretionary appeals into merits adjudications. *See, e.g.*, *Watson v. Greene*, 640 F.3d 501, 508, 511 (2d Cir.), *cert. denied*, 132 S. Ct. 335 (2011) (looking through New York Court of Appeals' denial of leave to appeal and deferring to New York Appellate Division opinion); *Childers v. Floyd*, 642 F.3d 953, 965, 969 (11th Cir. 2011) (en banc) (looking through Florida Supreme Court's denial of petition to invoke that court's discretionary jurisdiction and deferring to Florida District Court of Appeal's decision). The Ninth Circuit analyzed the issue expressly, holding that "[a] state court's decision to deny *discretionary* review is entirely different" from summary disposition of a case presented on its merits which that court "must actually adjudicate" because a state court's denial of a petition for discretionary review "is decidedly not a decision on the merits." *Williams*, 646 F.3d at 636. These courts recognized, in anticipation of this Court's analysis in *Greene*, that a denial of discretionary appeal signifies only that a state appellate court opted not to consider the case on the merits.

Even after this Court decided *Greene*, some Circuits continued to reason, based on *Harrington* and without citation to *Greene*, that denials of discretionary appeal did not constitute merits adjudications subject to AEDPA deference. *See, e.g.*,

Salts v. Epps, 676 F.3d 468, 480 (5th Cir. 2012) (looking through Mississippi Supreme Court's denial of discretionary review and holding that habeas relief was proper because Court of Appeals of Mississippi's opinion affirming conviction was contrary to clearly established federal law); *Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir.), *cert. denied*, 133 S. Ct. 441 (2012) (looking through North Carolina Supreme Court's denial of petition for a writ of certiorari to state court's Motion for Appropriate Relief panel and deferring to that panel's post-conviction adjudication); *Butler v. O'Brien*, 663 F.3d 514, 516 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2748 (2012) (looking through Supreme Judicial Court's denial of appellate review and deferring to Massachusetts Appellate Court decision).

Had any of these courts—before or after *Greene*—believed the respective state supreme court denials of discretionary appellate review to be merits determinations, they would have applied AEDPA deference to those denials, not to the prior decisions of the state intermediate appellate courts.

B. The Decision Below Also Directly Conflicts with Three Circuits' Applications of *Greene* to Distinguish a State Court's Denial of Leave for Discretionary Appeal from a Merits Adjudication.

This Court's decision in *Greene* confirmed the correctness of the Ninth Circuit's—and the other courts'—reading of *Harrington* on this issue, as every Circuit court decision to face this issue since *Greene*, other than the Sixth Circuit's decision here and those relying upon it, has applied *Greene*'s reasoning to distinguish between state-court orders denying leave

for discretionary appeal, on the one hand, and merits adjudications subject to AEDPA deference, on the other. *See, e.g.*, *Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012); *Garrus v. Sec'y of Pa. Dep't of Corrs.*, 694 F.3d 394 (3d Cir. 2012) (en banc); *Vega v. Walsh*, 669 F.3d 123 (2d Cir. 2012) (per curiam).

In *Harris*, the Seventh Circuit looked through the state supreme court's denial of discretionary review in considering AEDPA deference. The Illinois Appellate Court had affirmed Harris's murder conviction, and the Supreme Court of Illinois denied her petition for leave to appeal. *See* 698 F.3d at 622. Harris then sought federal habeas relief. *See id.* In reviewing the district court's denial of Harris's petition, the Seventh Circuit, citing *Greene*, concluded that "[t]he operative decision under review is that of the last state court to address a given claim on the merits. In this case, that is the Illinois Appellate Court's decision." *Id.* at 623 (internal citations omitted).

Similarly, in *Garrus*, the Third Circuit looked through the state supreme court's denial of discretionary review and applied AEDPA deference to the Pennsylvania Superior Court's earlier opinion denying collateral relief, noting that this opinion was "the last state court decision on the merits." 694 F.3d at 400 n.4 (citing *Greene*, 132 S. Ct at 43-45). And in *Vega*, the Second Circuit looked through a denial of discretionary review by the New York Court of Appeals and deferred to "the Appellate Division's affirmance of Vega's convictions, which was 'the last state-court adjudication on the merits of his claim.'" 669 F.3d at 127 (quoting *Greene*, 132 S. Ct. at 45).

C. The Circuit Splits Created by the Decision Below Inject Considerable Confusion Into Habeas Law.

The Sixth Circuit's decision below conflicts with the Second, Third, and Seventh Circuits on how to apply *Greene*'s reasoning in habeas cases where a state-court declined to hear the petitioner's discretionary appeal. It therefore injects considerable confusion into the law about how—if at all—*Harrington* applies to denials of discretionary appeal. By doing so, it creates conflicts with several more Circuits—the First, Fourth, Fifth, Ninth, and Eleventh—which have determined, even without applying *Greene*'s rationale, that *Harrington* does not reach denials of discretionary appeal.

A number of courts within the Sixth Circuit have already relied on the erroneous interpretation of *Harrington* adopted below. *See McPherson v. Woods*, Nos. 11-2010 & 11-2048, 2012 WL 5870315, at *6 (6th Cir. Nov. 21, 2012) (citing *Werth* for proposition that "in the absence of a reason to think some other explanation is more likely, a summary denial of review from Michigan's appellate courts is a decision on the merits and is entitled to AEDPA deference"); *Donaldson v. Booker*, No. 11-1756, 2012 WL 5862467, at *4 (6th Cir. Nov. 19, 2012) (same); *Robinson v. McKee*, No. 5:12-cv-11059, 2012 WL 6642651, at *4 (E.D. Mich. Dec. 20, 2012) (citing *Werth* for proposition that state-court denials of leave for discretionary appeal were merits adjudications subject to AEDPA deference); *Thomas v. Warren*, No. 12-cv-11351, 2012 WL 6115047, at *2 (E.D. Mich. Dec. 10, 2012) (same); *Northrup v.*

Warren, No. 11-cv-12801, 2012 WL 5363776, at *2 (E.D. Mich. Oct. 30, 2012) (same).

III. WHETHER AEDPA REQUIRES TREATING AN ORDER DENYING LEAVE FOR A DISCRETIONARY APPEAL AS A MERITS ADJUDICATION IS A QUESTION OF FUNDAMENTAL IMPORTANCE.

The Sixth Circuit's application of *Harrington* to a *pro forma* denial of discretionary review presents "an important federal question" worthy of this Court's attention. *See* Sup. Ct. R. 10(a), (c). AEDPA plays a crucial role in the efficient and fair administration of justice, and the issue of how to apply AEDPA to state-court denials of discretionary review arises frequently. The specific question raised here is particularly important for AEDPA's proper functioning.

While AEDPA's standard for federal habeas relief "is difficult to meet" by design, *Harrington*, 131 S. Ct. at 786, the Court also "consider[s] it uncontroversial [ ] that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law," *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001)). Precisely because the space AEDPA leaves open to prisoners seeking habeas relief is small, this Court must carefully police its boundaries to ensure that space does not collapse.

AEDPA is designed not only to prevent prisoners from getting a full-fledged second bite at the apple, but also to guarantee that every prisoner is allowed a

first bite. State courts provide "the principal forum for asserting constitutional challenges to state convictions." *Harrington*, 131 S. Ct. at 787. When state courts fail to adjudicate a claim, the federal courts must do so in the first instance. *See*, *e.g.*, *Harris*, 698 F.3d at 625 (when the state courts "simply have not addressed the federal constitutional issue[,]" federal habeas review "must be *de novo* for there is no state court judgment to which [to] defer"); *accord, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (weighing *de novo* evidence of ineffective assistance of counsel "as neither of the state courts below reached this [issue]").

By misapplying *Harrington*, the Sixth Circuit denied Mr. Werth his first bite. After the Michigan courts declined to adjudicate his self-representation claim, AEDPA required the federal courts to consider his petition. The Sixth Circuit failed to heed that requirement.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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