No. 11-___

IN THE

Supreme Court of the United States

KEVIN N. BROWN,

Petitioner,

v.

DAVID BOBBY, 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 *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), which concerned the applicability of 28 U.S.C. § 2254(d) to summary orders, requires deferential habeas review of a federal claim when a state court issued an opinion and that opinion addressed other claims raised by the petitioner but failed to address the federal claim in question.

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PETITION FOR A WRIT OF CERTIORARI

Kevin N. Brown 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 656 F.3d 325. Its order denying rehearing (Pet.App.74a) is unreported. The opinion of the district court, adopting the magistrate judge's report and recommendation (Pet.App.49a), is not reported in the Federal Supplement but is available at 2007 WL 3342717, along with the report and recommendation. The opinion of the Ohio Court of Appeals (Pet.App.76a) is not reported in the North Eastern Reporter, but is available at 2005 WL 1385715.

JURISDICTION

The Sixth Circuit entered judgment on September 2, 2011, and denied panel rehearing and rehearing en banc on October 7, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 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

Petitioner Kevin Brown was arrested on rape allegations on July 6, 2001, indicted, and imprisoned without bail, but not brought to trial by the State of Ohio until February 10, 2003. *See Brown* v. *Bobby*, Pet.App.3a. Since then, he has sought in vain to have *some* court grant him a full, unfettered review of his claim that this delay violated the Speedy Trial Clause of the Sixth Amendment to the United States Constitution.

1. The overriding cause of the delay of Brown's trial was the State's repeated inaction in obtaining routine DNA testing of material collected on the day of Brown's arrest—together with its repeated lies to the trial court about its efforts.

Upon collecting the material on July 6, 2001, the police waited two weeks to send it to the State's laboratory; that government-run laboratory took four months to preliminarily process it; and then prosecutors waited until late January 2002, over six months after Brown's arrest and imprisonment, to obtain DNA material from Brown for comparison. ECF Nos. 13-37, at 14; 13-5; 13-12, at 32; 6-2, at 31. Six more months wasted away until prosecutors obtained that comparison testing, even though a

private laboratory ultimately conducted the testing in just two weeks. *See State* v. *Brown*, Pet.App.88a-90a. During that six-month period, prosecutors lied to the court at least four times about the status of testing, repeatedly falsely claiming that they had submitted the materials and sought a "rush." Pet.App.35a-36a, 43a (Cole, J., dissenting). Thereafter, contrary to their promises and a court order, prosecutors failed to promptly share with the defense the results of the testing—which "excluded" Brown "as the source of the DNA," ECF No. 16-1, at 12—waiting over two more months, until a trial date, to hand them over. *See* Pet.App.38a.

In sum, the State took over sixteen months—from the July 6, 2001, arrest of Brown until November 18, 2002, a day set for trial—to obtain and hand over the results of a routine DNA test comparing two hairs, even though the actual test took a private laboratory two weeks to perform. Neither in state nor in federal court has the State disputed, or attempted to explain, any of these events. *See* Pet.App.35a, 36a, 38a, 43a; *id.* at 42a n.3 (noting Warden's concession, at oral argument, that "I have to deal with the record that I have"). Nor is there any dispute that, while the State delayed, Brown repeatedly and sincerely sought a speedy trial, and that all of his dealings with the court were in good faith. *See id.* at 13a.

Having received the DNA results only on the trial date, Brown's counsel required time to seek an expert witness concerning them. ECF No. 13-35, at 26. The court therefore continued trial until January 6, 2003, and then again until January 21, 2003. ECF Nos. 13-17 & 13-18; Pet.App.91a. A jury was

impaneled on January 22, more than eighteen months after Brown's arrest. *See* Pet.App.91a.

Then the State's blundering (or worse) caused another delay: Prosecutors realized that the indictment included inaccurate dates for the alleged crimes, and sought to amend it. The court determined that a mistrial was necessary to avoid prejudice to Brown. ECF No. 13-19; Pet.App.91a-92a. This further delay became necessary only because prosecutors had disregarded two orders, months before, to provide Brown a bill of particulars, the second issued in response to Brown's motion to compel. *See* Pet.App.98a.

Brown's trial ultimately began on February 10, 2003, more than *nineteen months* after his arrest and incarceration. ECF No. 13-22. He was convicted of the charges ten days later and sentenced to life in prison without parole. ECF No. 13-24.

2. On direct review in the Ohio Court of Appeals, Brown raised four assignments of error, including that his rights to a speedy trial had been violated. ECF No. 13-35, at 7. With respect to that issue, Brown raised two claims, asserting rights under both an Ohio statute, which generally imposes a bright-line, 270-day period following indictment during which an accused must be brought to trial, *id.* at 15, and the Federal Constitution, *id.* at 17. On the latter, Brown cited the leading authority of this Court on the Sixth Amendment's Speedy Trial Clause, *Barker* v. *Wingo*, 407 U.S. 514 (1972), identifying and discussing the four factors that *Barker* sets out as governing the inquiry. ECF No. 13-35, at 18-19.

The State in response focused on the state-law speedy-trial claim and ignored the distinct federal claim under the Sixth Amendment. ECF No. 13-37, at 1. The State in its brief cited not one federal case on the Speedy Trial Clause, nor did it mention—let alone apply—*Barker*'s four-factor test. *Id.* at i, 14-16.

In affirming, the Ohio Court of Appeals followed the State's lead. It generally noted at the threshold that the Ohio Constitution, Ohio statutory law, and the Sixth Amendment all guarantee a right to a speedy trial. Pet.App.79a, 80a. Then the court embarked upon nearly fifty paragraphs of analysis of Brown's claim under the state statute, parsing various periods to determine whether he was brought to trial within the statute's bright-line rules. *Id.* at 80a-92a. The court acknowledged and to some extent accepted Brown's claims of prosecutorial misconduct, but largely did not address them. *Id.* at 78a, 89a, 98a, 99a. (The Ohio statute does not take into account whether the prosecution's delays were "purposeful or oppressive." *Pollard* v. *United States*, 352 U.S. 354, 361 (1957).) The Ohio court concluded: "Thus, appellant was brought to trial within the 270-day speedy trial limit. Accordingly, appellant's first assignment of error is without merit." Pet.App.92a. The court then moved on to Brown's other assignments of error, without anywhere addressing his claim under the federal Speedy Trial Clause. Brown unsuccessfully sought leave to appeal to the Ohio Supreme Court. ECF No. 13-44.

3. Acting *pro se*, Brown timely filed a federal habeas petition in the United States District Court for the Northern District of Ohio. His petition raised

six claims, the first of which rested upon the Speedy Trial Clause of the Sixth Amendment. ECF No. 1, at 5.

The Warden's answer conceded that this speedy-trial claim was exhausted and procedurally proper. ECF No. 13, at 7, 10, 16. He acknowledged that Brown had raised speedy-trial claims "as a matter of both state law based upon Ohio Revised Code Section 2945.71 and the United States Constitution's Sixth Amendment." *Id.* at 17. The answer then block-quoted more than seven pages of the opinion of the Ohio Court of Appeals. *Id.* at 18-26.

The magistrate judge recognized that the state court had "focused its analysis on Ohio's statutory speedy trial provision," even though "Brown did present a claim of denial of his Sixth Amendment constitutional right to speedy trial" as well as his related claim under state law. Pet.App.51a. The magistrate was "not so sure" whether the court had actually adjudicated Brown's federal constitutional claim. *Id.* He also recognized that analysis under the Speedy Trial Clause, unlike the state speedy-trial act, is "not based on fixed time limitations but is a functional analysis based on balancing." *Id.* at 52a. Nonetheless, and despite agreeing that three of the four factors under *Barker* favored Brown's claim, the magistrate recommended rejecting the claim, with the benefit of AEDPA deference pursuant to 28 U.S.C. § 2254(d). *Id.* at 50a-62a. Over Brown's objections, ECF No. 20, the district court adopted the recommendation and denied Brown's petition in full, ECF No. 21.

4. The Sixth Circuit granted a certificate of appealability limited to the Speedy Trial Clause

issue. Brown argued that *de novo* review of this constitutional claim was necessary because the Ohio Court of Appeals had failed to "adjudicate[it] on the merits," instead adjudicating only his distinct claim under the state speedy-trial statute. 28 U.S.C. § 2254(d). Brown further argued that, even assuming for the sake of argument that the state court had adjudicated his federal claim, the reasoning in its opinion (applying state statutory law) indicated that such decision would be "contrary to" clearly established Supreme Court law. *Id.* § 2254(d)(1).

5. After oral argument, but before the Sixth Circuit ruled, this Court issued its decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011). The first question presented was whether § 2254(d) applied—that is, whether a federal claim was "adjudicated on the merits"—if the state court denied the claim in a summary order, unaccompanied by an opinion. *Id.* at 784. Emphasizing that it was merely "reconfirm[ing]" a rule followed by "every Court of Appeals to consider the issue," this Court held that "§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Id.* at 784, 785.

Likely because *Harrington* did not so much as mention whether or how federal habeas courts ought to apply § 2254(d) when a state court *has* issued an opinion but failed therein to reject or otherwise address a particular federal claim, the Warden did not submit a letter to the Sixth Circuit, pursuant to Federal Rule of Appellate Procedure 28(j), notifying the panel of the *Harrington* opinion. Nor did Brown.

6. Nearly eight months later, on September 2, 2011, the Sixth Circuit issued its opinion, over a dissent. The panel majority expressly relied on *Harrington* in applying AEDPA deference and affirming the district court's denial of Brown's federal speedy-trial claim. The majority's opinion opened by highlighting that Brown's case presented "a close question in regard to whether a Sixth Amendment violation occurred," and that the resolution of this close question turned on whether the court should defer to the state court. Pet.App.2a. It then cited *Harrington* as "support[ ] [for] the application of AEDPA deference to the state court's determination." *Id.*; *see id.* at 5a ("Pursuant to *Harrington*, this court can presume that the state court adjudicated on the merits Brown's speedy trial claim, warranting the application of AEDPA deference."). The majority went on to determine that the Ohio Court of Appeals' supposed adjudication of Brown's federal claim was neither contrary to nor an unreasonable application of federal law. *See id.* at 13a, 24a. It therefore affirmed the district court's denial of the writ.

Judge Cole dissented. He agreed with the majority that "whether the state court adjudicated Brown's federal claim must be assessed in light of *Harrington v. Richter*." *Id.* at 26a (Cole, J., dissenting). In his view, however, *Harrington* did not require any deference here; if anything, it confirmed that *de novo* review was required. Invoking *Harrington*'s language, he explained:

> The fact that the Ohio Court of Appeals adjudicated Brown's speedy trial claim *solely* within the framework of state

> statutory law is a strong 'indication' it did not adjudicate his federal speedy trial claim. Indeed, the 'more likely' explanation for the state's decision is that it misinterpreted Brown's appeal as raising only a state claim or mistakenly believed the statutory analysis in and of itself adjudicated his federal claim.

Id. at 27a (quoting *Harrington*, 131 S. Ct. at 785). Judge Cole further concluded that, "[e]ven assuming the state court adjudicated Brown's federal claim" by adjudicating his state-law claim, "that decision was contrary to clearly established federal law." *Id.* at 28a. Because all four of the *Barker* factors used to identify Speedy Trial Clause violations weighed in Brown's favor, Judge Cole would have reversed the district court and remanded with instructions to grant the writ. *Id.* at 48a.

7. Brown petitioned for panel and en banc rehearing, addressing *Harrington* for the first time and explaining why neither its holding nor its rationale called for deferential review of his Speedy Trial Clause claim, given the Ohio Court of Appeals' lengthy, reasoned opinion addressing each of Brown's other claims. The panel denied rehearing, and the Sixth Circuit denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

This Court often grants certiorari to resolve circuit splits over the proper interpretation and application of AEDPA's provisions.[1] The Court also

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[1] *See, e.g.*, *Pace* v. *DiGuglielmo*, 544 U.S. 408, 410, 413 & n.3 (2005) (resolving circuit conflict over whether state post-conviction petition rejected as untimely is "properly filed" for

frequently grants certiorari to clarify the meaning and scope of its earlier decisions.[2] By granting this petition, the Court would achieve both of these important objectives: It would clarify the scope of *Harrington* v. *Richter*, and in doing so would resolve a conflict in the circuits over that decision's implications for AEDPA's prerequisite of a state-court adjudication of a claim. In the less than a year since this Court decided *Harrington*, the courts of appeals have divided three ways on the issue, and this case is an ideal vehicle—in light of Brown's preservation of the issue and the Sixth Circuit's

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purpose of tolling AEDPA's one-year limitations period); *Clay* v. *United States*, 537 U.S. 522, 524-25, 526 (2003) (resolving split over when judgment of conviction becomes final, triggering AEDPA's filing period); *Duncan* v. *Walker*, 533 U.S. 167, 169, 171-72 (2001) (resolving conflict over whether pendency of federal habeas petition tolls limitations period for filing another petition); *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 839-40, 842 (1999) (resolving conflict over whether AEDPA's exhaustion provision requires prisoner to file petition for discretionary review in state's highest court).

[2] *See, e.g.*, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002) (certiorari granted to "resolve any ambiguity" in preceding opinions); *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (certiorari granted to correct Ninth Circuit, which, "[i]n thinking its rule compelled by this Court's instruction," misconstrued earlier case); *Arkansas* v. *Sanders*, 442 U.S. 753, 754 (1979) (certiorari granted "to resolve some apparent misunderstanding as to the application of [the Court's] decision in *United States v. Chadwick*, 433 U. S. 1 (1977)"); *see also Aschroft* v. *Iqbal*, 556 U.S. 662 (2009) (expounding on *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007)); *Rita* v. *United States*, 551 U.S. 338 (2007) (instructing lower courts on proper application of *United States* v. *Booker*, 543 U.S. 220 (2005)).

admission that it was dispositive of the outcome—to resolve an important question affecting innumerable habeas cases across the country.

I. THE CIRCUITS ARE ALREADY DEEPLY DIVIDED OVER WHETHER AND HOW *HARRINGTON* APPLIES WHEN A STATE COURT ISSUES AN OPINION.

Before this Court decided *Harrington*, there was widespread consensus among the circuit courts as to two related, vexing questions about the proper application of § 2254(d)'s instruction that federal habeas courts defer to state courts only as to claims that those courts "adjudicated on the merits." *First*, the circuit courts agreed that deference was warranted even if the state court resolved the federal claim by summary order, that is, without any opinion providing the court's reasons. *Second*, the appellate courts appreciated that when a state court *did* issue an opinion but, in that opinion, failed to address one of the habeas petitioner's federal claims, that claim had not been "adjudicated on the merits," and thus no deference was warranted.

Harrington, without dissent, validated the circuit courts' answer to the *first* question. But, in its wake, some lower courts have read the case broadly and, as a result, abandoned the settled answer to the *second* question. The courts of appeals are now divided three ways over how to treat a federal claim that is presented to a state court but left unaddressed in a reasoned opinion by that court.

A. Before *Harrington*, the Circuits Broadly Agreed That, When A State Court Issued An Opinion But Failed To Address A Particular Federal Claim, No AEDPA Deference Was Required.

By the time the Court issued *Harrington*, the majority of the federal appellate courts had converged on an answer to its first question presented—namely, whether AEDPA deference was warranted where a state court rejected a federal claim but did not give its reasons in an opinion. The *Harrington* Court understood the settled state of the law, noting that "every Court of Appeals to consider the issue has recognized" that "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." 131 S. Ct. at 784. The Court then cited cases from seven courts of appeals to illustrate its point. All seven of these cases involved habeas review of state-court summary dispositions.[3]

The pre-*Harrington* consensus in the circuits had another dimension: Appellate courts broadly agreed that when a state court does issue an opinion, but fails therein to address a certain federal claim, a federal habeas court must review that claim *de novo*.

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[3] *See Chadwick* v. *Janecka*, 312 F.3d 597, 605-06 (3d Cir. 2002); *Wright* v. *Sec'y for Dept. of Corrections*, 278 F.3d 1245, 1253-54 (11th Cir. 2002); *Sellan* v. *Kuhlman*, 261 F.3d 303, 308, 311-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000) (en banc); *Harris* v. *Stovall*, 212 F.3d 940, 943 & n.1 (6th Cir. 2000); *Aycox* v. *Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

Indeed, the first case that *Harrington* cited approvingly, as confirming that AEDPA deference is owed to a state court's summary adjudication, *Chadwick* v. *Janecka*, 312 F.3d 597 (3d Cir. 2002), illustrates this two-fold consensus. Then-Judge Alito, writing for the panel, distinguished between "when a claim is rejected without explanation" by a state court and "when the opinion of a state court reveals that it did not adjudicate a claim." *Id.* at 606. Describing three precedents of the Third Circuit governing the latter situation, he explained that those earlier opinions "stand for the proposition that, if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." *Id.*

This divergent treatment between summary dispositions, on the one hand, and reasoned opinions with glaring omissions, on the other, was hardly unique to the Third Circuit. Prior to *Harrington*, seven other circuits (including five singled out approvingly in *Harrington* for their rule regarding summary orders) agreed that, if a state court issued an opinion, it would be deemed to have "adjudicated on the merits" a federal claim only if the opinion gave some indication that the court had engaged with that claim.

For example, it was well-established in the Sixth Circuit that "fresh review" was owed to a habeas petitioner's federal claim when "the state courts addressed only his state law grounds for relief, which means they did not 'adjudicate' the federal claim 'on the merits.'" *Wynne* v. *Renico*, 606 F.3d 867, 870

(6th Cir. 2010) (internal quotation marks and citations omitted); *see Danner* v. *Motley*, 448 F.3d 372, 376 (6th Cir. 2006) (holding that AEDPA deference does not apply where state courts confined their analysis of petitioner's claim to state law, giving no "indication" or "evidence" that they considered Sixth Amendment claim); *see also Lyell* v. *Renico*, 470 F.3d 1177, 1181-82 (6th Cir. 2006) (same). The Tenth Circuit, too, repeatedly invoked a similar rule: "When the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court." *Morris* v. *Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003); *see also Duckett* v. *Mullin*, 306 F.3d 982, 991 & n.1 (10th Cir. 2002) (according no deference to state-court disposition of one of petitioner's claims when that court "obviously overlooked this particular claim"). Other circuits were in accord.[4]

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[4] *See Billings* v. *Polk*, 441 F.3d 238, 252 (4th Cir. 2006) (holding § 2254(d) not to apply where petitioner "raised his Sixth Amendment claim before the North Carolina Supreme Court" but that court "limited its analysis" to a "state-law question," and "there is no indication" that the state court considered the federal claim); *Canaan* v. *McBride*, 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits.'"); *Brown* v. *Luebbers*, 371 F.3d 458, 460-61 (8th Cir. 2004) (en banc) (determining whether federal claim has been adjudicated on merits in state court requires federal court to "look at what a state court has said, case by case" to ensure that claim was in fact "considered and rejected by that court"); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (finding § 2254(d) inapplicable where state-court opinion did not mention federal claims or "indicat[e] that those claims were

B. *Harrington* Clarified How To Determine Whether A State Court's Summary Disposition, Unaccompanied by an Opinion, Warrants AEDPA Deference.

In *Harrington*, this Court addressed whether AEDPA deference applied to the California Supreme Court's denial of petitioner Joshua Richter's federal claim for ineffective assistance of counsel, even though that court had denied relief in a one-sentence summary order. *See* 131 S. Ct. at 783. This Court added that question when it granted the State of California's petition for certiorari. *See Harrington*, 130 S. Ct. 1506, 1506-07 (2010) (directing parties to brief and argue the following additional question: "Does AEDPA deference apply to a state court's summary disposition of a claim?").

This Court opened its opinion by addressing this threshold question, "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." 131 S. Ct. at 784. The Court, in a paragraph of analysis and without dissent, answered the question in the affirmative. It simply noted that the text of the statute does not require a state-court statement of reasons, and recognized the unanimous view of all of the federal circuit courts to have faced the issue. *See id.*

(continued…)

considered and denied on the merits"); *Fortini* v. *Murphy*, 257 F.3d 39, 43, 47 (1st Cir. 2001) (holding deference inappropriate where state court addressed federal claim only in terms of state law, because reviewing court "can hardly defer to the state court on an issue that the state court did not address").

The Court also responded to Richter's argument that a summary denial of relief may be considered an adjudication on the merits only if the state court specifically stated that it was denying a claim "on the merits." Rejecting any such magic-words requirement, the Court instead laid down the rule that state courts are presumed, in their summary orders denying relief, to have adjudicated and denied on the merits all presented claims. *Id.* at 784-85. That presumption may of course be rebutted, however, if there is "any indication or state-law procedural principles to the contrary." *Id.* That is, the presumption may be overcome whenever there is "reason to think some other explanation for the state court's decision . . . more likely." *Id.* at 785. But in Richter's case, there was no such reason.

The Court concluded by "hold[ing] and reconfirm[ing] that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Id.*

C. The Sixth, Ninth, and Eleventh Circuits Have Already Split Over the Application of *Harrington* To State-Court Opinions That Fail To Address A Federal Claim.

Harrington did not discuss the application of AEDPA deference when a state court *has* issued an opinion but nonetheless failed therein to address a particular federal claim. Yet the courts of appeals quickly began to disagree over whether *Harrington* has implications for such situations.

1. The Ninth Circuit weighed in first. In *Williams* v. *Cavazos*, published four months after *Harrington*, that court unanimously held that the California Court of Appeal had not adjudicated the

petitioner's Sixth Amendment claim on the merits when it "simply failed to decide the claim without explanation." 646 F.3d 626, 636-37 (9th Cir. 2011). The circuit court acknowledged the *Harrington* presumption of adjudication on the merits when a state court issues an order unaccompanied by a statement of reasons, *id.* at 639, but it determined that the presumption did not govern Williams's case: The state-court decision "was *not* 'unaccompanied by an opinion explaining the reasons relief has been denied'; rather, the court provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly." *Id.* (quoting *Harrington*, 131 S. Ct. at 784-85). The state court's substantive engagement with the other claims made it "obvious, not 'theoretical' or 'speculative,' that Williams's constitutional claim was not adjudicated at all, and so the [*Harrington*] presumption [was] overcome." *Id.* (quoting *Harrington*, 131 S. Ct. at 785). The State of California has filed a petition for a writ of certiorari in *Williams*, objecting to the Ninth Circuit's interpretation of *Harrington*; that petition is pending before this Court. (No. 11-465.)

2. The Eleventh Circuit was next. In *Childers* v. *Floyd*, a majority of the en banc court took a diametrically different view of *Harrington*. Resting expressly on that decision, the majority held that "an 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar." 642 F.3d 953, 968 (11th Cir. 2011) (en banc). Thus, even though the Florida appellate court had upheld the admission of certain challenged evidence against Childers only under

state evidentiary rules, without analyzing his claim under the Sixth Amendment's Confrontation Clause, the en banc majority applied AEDPA deference and denied relief. *Id.* at 963-64, 971, 980. It reasoned that, because the state court had not invoked a procedural bar, it therefore had denied relief on the merits of Childers's federal claim. *Id.* at 969.

Judge Wilson wrote separately "to object to the majority's overbroad and unnecessary formulation of what constitutes an 'adjudication on the merits' under AEDPA." *Id.* at 981 (Wilson, J., concurring in the judgment). He criticized the majority for having "extend[ed] [*Harrington*'s] presumption to all claims presented to the state court, excepting only those denied purely on procedural grounds and eliminating any provision for non-procedural 'indications' that a state court failed to actually adjudicate the merits of a claim." *Id.* at 981-82. In Judge Wilson's view, the majority's rule was an "alteration of [*Harrington*]." *Id.* at 982. As he understood that decision, it simply taught that, "[w]hen a state court issues an order without articulating its reasons," the presumption must be that it "performed its duties in accordance with the law, absent any indication to the contrary." *Id.* at 985. By contrast, however, "when a state court invests the time and effort to issue a written explanation of its decision" and yet, "in so doing, indicates that it did not reach the merits of [a] properly presented federal constitutional claim, it is our unshirkable duty to give that claim its first and proper adjudication." *Id.* at 985-86.

Two dissenting judges agreed with Judge Wilson that the majority had misapplied *Harrington* and § 2254(d). *Id.* at 988-89 (Barkett, J., dissenting).

The dissenters did not understand this Court to have disturbed Eleventh Circuit precedent that, in the dissenters' view, held that, "where the state court simply failed to address the federal constitutional claim that the defendant raised, the court had not adjudicated the merits of the claim." *Id.* at 989. Rather, they saw *Harrington* as having dealt with state-court dispositions that *had* considered the federal claim, but simply denied it without explanation.

A petition for a writ of certiorari in *Childers* is pending before this Court as well. (No. 11-42.)

3. The Sixth Circuit's opinion in this case followed on the heels of *Williams* and *Childers*. As explained above, the well-settled and oft-repeated Sixth Circuit rule before *Harrington* was that no deference is owed when a state court adjudicates a state-law claim but fails to address a related federal-law claim. *Supra*, at 13-14. Nonetheless, the panel majority briskly concluded that pursuant to *Harrington* it should "presume that the state court adjudicated on the merits Brown's federal speedy trial claim," even though the state court had never mentioned that distinct federal claim or purported to apply any federal law to resolve it. Pet.App.5a. While the panel majority conceded that the supposedly applicable *Harrington* presumption might be rebutted, it found no "significant reason . . . to believe that the Ohio Court of Appeals did not consider [Brown's] Sixth Amendment claim." *Id.* at 6a. That the state court had, in its opinion, addressed at length the basis for rejecting, among others, Brown's state-law speedy-trial claim, with no mention of the federal claim, apparently did not

suffice, even though it readily would have done so under the circuit's pre-*Harrington* precedent.

By thus charting its own post-*Harrington* course—adopting neither the Eleventh Circuit's new, bright-line rule of merits adjudication absent a procedural bar, nor the Ninth Circuit's retention of the pre-*Harrington* view that reasoned rejection of one claim and ignoring of another indicates a lack of adjudication—the Sixth Circuit opened a three-way split on the application of *Harrington* to state-court opinions that fail to address certain federal claims. In the Ninth Circuit, Brown and Childers would have received *de novo* review; in the Sixth and in the Eleventh, even Williams would not have.

In dissent, Judge Cole (like the unanimous panel in *Williams* and the three concurring and dissenting judges in *Childers*) disputed the panel majority's approach to *Harrington*. He read the case to be consistent with the previously governing approach, in the Sixth Circuit and elsewhere, that a failure in a reasoned opinion to address a particular claim indicates that the claim was not adjudicated on the merits. In Judge Cole's view, such a scenario fell squarely within "the exception announced in *Harrington*" for cases where there is reason to believe that the state court's decision represents something other than an adjudication on the merits. Pet.App.27a. Namely, "the 'more likely' explanation for the state's decision is that it misinterpreted Brown's appeal as raising only a state claim." *Id.* (quoting *Harrington*, 131 S. Ct. at 785).

4. Other circuits, too, have manifested the confusion about *Harrington*'s scope. The First Circuit has raised, but declined to decide, "whether

the rule of *Fortini v. Murphy*, under which de novo review has been available in [that] circuit for habeas claims not expressly and individually addressed by a state court, survives *Harrington*." *Jewett* v. *Brady*, 634 F.3d 67, 75 n.5 (1st Cir. 2011) (internal citation omitted); *see supra*, at 15, n.4. And Judge Ripple of the Seventh Circuit declared, a month before *Williams* was decided, that *Harrington* does not apply when a state court has issued a reasoned opinion as opposed to a summary order. *Sussman* v. *Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (Ripple, J., in chambers).

It has not been long since *Harrington*, but the circuits have already divided three ways over its meaning. This Court should clarify what it meant to say in that case, and nip this confusion in the bud.

II. THIS COURT SHOULD CLARIFY THAT *HARRINGTON* DOES NOT MANDATE AEDPA DEFERENCE FOR CLAIMS THAT STATE-COURT OPINIONS FAILED TO ADDRESS.

In light of the (perhaps unexpected) confusion over the scope of the Court's holding and reasoning in *Harrington*, the Court should clarify its implications without delay. *Harrington* simply does not speak to the applicability of § 2254(d) when a state court has issued an opinion in which it failed to address a federal claim properly presented to it. As evidenced by *Harrington*'s facts and language, that case applies only when a state court has disposed of a claim in a summary order. And even if *Harrington* did have anything to say about state-court opinions, it should not be read to require deference as to claims that, in contrast to others, were omitted from mention or resolution in such opinions. There is no

evidence that *Harrington* intended to displace the considered view of the courts of appeals on the proper treatment of that scenario; this Court should correct the error of those courts that have concluded otherwise, and instruct a return to the pre-*Harrington* consensus position.

A. *Harrington* Does Not Apply When The State Court Issued An Opinion, Rather Than Denying Relief In A Summary Order.

The AEDPA question that the Court considered in *Harrington*—on its own initiative—was narrow and carefully defined: "whether § 2254(d) applies when a state court's order is *unaccompanied by an opinion.*" 131 S. Ct. at 784 (emphasis added). And such were the facts of *Harrington*—the California Supreme Court had denied relief in a one-sentence order. The decision is therefore limited, by its own terms, to summary dispositions by state courts.

Subsequent language in the opinion establishing the presumption of adjudication on the merits*, see id.* at 784-85, must be read against the backdrop of the specific issue the Court was addressing—rejecting Richter's argument for a magic-words requirement on state courts issuing summary adjudications. In the context of summary adjudications, an evidentiary rule one way or the other is needed, and giving the benefit of the doubt to the state courts in that context makes sense. When a state court issues a summary disposition, there is no question that the claim or claims presented to it have been "adjudicated"; the difficulty is in determining whether the adjudication was "on the merits" (triggering deference) or rather on procedural or other grounds. The *Harrington* Court established

the presumption that summary dispositions reflect merits adjudications, unless "there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct. at 785; *see also Harris v. Reed*, 489 U.S. 255, 265 (1989) (establishing similar presumption for purposes of determining whether Supreme Court has jurisdiction to review state-court decision that does not indicate whether it rests on federal or state law). But the presumption has no place when the question is whether the state court *adjudicated* the claim *at all*, particularly when that court itself has provided indications that it did not—in its opinion, which addressed other claims but not the one at issue.

Even if *Harrington*'s presumption of merits adjudication had any relevance to state-court opinions, it would not alter the established rule that a state court's failure to address a particular federal claim in its opinion indicates that the state court did not adjudicate that claim. Rather, in such a scenario, the prior rule would amount to a simple application of *Harrington*'s exception—the rebutting of its presumption. After all, *Harrington* instructs that its presumption may be overcome whenever "there is reason to think some other explanation for the state court's decision" than rejection on the merits "is more likely." 131 S. Ct. at 785. As the court explained in *Williams*, "when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is reason to think' that it 'is more likely' that the court simply neglected the issue and failed to adjudicate the claim." 646 F.3d at 639 (quoting *Harrington*, 131 S. Ct. at 785). That is why circuit

courts have long held that, "[w]hen the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court." *Morris*, 319 F.3d at 1267.

B. *Harrington* Did Not Mean To Disturb The Lower Courts' Settled Practice As To A Federal Claim Unaddressed By A State-Court Opinion.

As explained above, the courts of appeals had, prior to *Harrington*, converged around the understanding that a federal habeas court should give *de novo* review to a federal claim that is presented to a state court, but (in contrast to other claims) not addressed in that court's opinion. *See supra* Part I.A. There is no indication in *Harrington* that this Court disagreed with or meant to displace the lower courts' approach to that scenario.

The Court in *Harrington* actually *affirmed* the consensus position of the lower courts regarding a related question, namely, the application of AEDPA deference to state-court summary orders. The Court declared that it was "*reconfirm[ing]*" that AEDPA "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" *Harrington*, 131 S. Ct. at 785 (emphasis added). A principle can only be "reconfirmed" if it has been previously established, and the only established principle discussed in the relevant section of *Harrington* is the courts of appeals' consensus view that summary dispositions should ordinarily be treated as merits adjudications for purposes of § 2254(d).

Yet those same circuits had distinguished from summary dispositions the scenario in which a state court issued an opinion that *omitted* a federal claim. Most notable among these is then-Judge Alito's opinion for the Third Circuit in *Chadwick*, in which, on the very pages that this Court in *Harrington* favorably cited, he distinguished summary orders from opinions with an omission, thus reaffirming each consensus. *See supra* Part I.A, at 13.

There accordingly cannot be any conflict between *Harrington*'s rule and the settled practice of the lower courts. The two are best read in unison. Whether by limiting *Harrington* to the question actually at issue in that case or by construing its presumption and exception to capture the distinct problem that the circuit courts long had treated differently, one can readily reconcile *Harrington* with the circuit consensus that existed before it was decided. And such an approach makes far more sense than interpreting the decision to have upended the considered view of the lower courts on a question that it never mentioned.

Nonetheless, the consensus in the appellate courts has disintegrated in *Harrington*'s wake, as courts have stretched its logic to cover circumstances that this Court never intended to address. *See supra* Part I.C. This Court should grant certiorari to instruct the lower courts that their previous approach to determining the AEDPA treatment of federal claims left unaddressed in state-court opinions remains valid after *Harrington*.

III. WHETHER *HARRINGTON* APPLIES TO STATE-COURT OPINIONS IS A QUESTION OF FUNDAMENTAL IMPORTANCE.

The Sixth Circuit's application of *Harrington* to a reasoned state-court opinion presents "an important federal question" worthy of this Court's attention. *See* Sup. Ct. R. 10(a), (c).

The frequency with which this Court agrees to hear AEDPA cases, *see supra*, at 9, n.1, illustrates that statute's crucial role in the efficient and fair administration of justice in this country. The specific question raised here is particularly important for AEDPA's correct functioning. Indeed, the Court's request for a response to the *Childers* petition, No. 11-42, suggests that it has already recognized the importance of the question presented by these cases.

In *Harrington*, the Court reminded its audience that, "[i]f this [§ 2254(d)] standard is difficult to meet, that is because it was meant to be," although the statute "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." 131 S. Ct. at 786. Precisely because the space AEDPA leaves open to prisoners seeking relief is so small, this Court must carefully police its boundaries so that that space does not collapse. AEDPA is designed to prevent prisoners from getting a full-fledged "second bite at the apple." But every prisoner is allowed a first bite. When the state court, "the principal forum for asserting constitutional challenges to state convictions," *id.* at 787, fails to adjudicate a claim, "the only remaining forum—the federal courts—must do so in the first instance," *Williams*, 646 F.3d at 637.

By misapplying *Harrington*, the Sixth Circuit denied Brown his right to one full review of his federal speedy trial claim. But Brown is not the only prisoner who will never receive a *de novo* review of his federal claim if the erroneous interpretation of *Harrington* adopted by the Sixth Circuit and others stands. Before *Harrington*, at least eight circuits had the opportunity to address and decide whether § 2254(d) applied to a federal claim left unaddressed by a state-court opinion. *See supra*, at 12-14 & n.4. The settled state of the pre-*Harrington* law reflects the frequency with which this issue arises in the appellate courts. Post-*Harrington* experience has proven the same: *Brown*, issued less than eight months after *Harrington*, was the *fifth* circuit court case to take up *Harrington*'s applicability under these circumstances. *See supra* Part I.C. The speed with which this circuit conflict has developed highlights the importance of the question presented here.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Brown's case is an ideal vehicle to resolve whether § 2254(d) applies to a federal claim left unaddressed in a state-court opinion. Brown preserved his federal claim, and argued to the court below that this claim should receive *de novo* review because the state court failed to adjudicate it. Neither of the other pending petitions raising the question presented, *Williams* and *Childers*, can claim both of these virtues. Moreover, the Sixth Circuit admitted that application of AEDPA deference was dispositive. This case thus clearly and cleanly presents the question of § 2254(d)'s applicability, and

highlights the degree to which erroneous applications of *Harrington* are affecting actual outcomes in the circuit courts.

A. Brown Clearly and Concededly Presented His Federal Claim To The Ohio Courts, And Those Courts Plainly Failed To Address It.

There is no dispute that Brown preserved his federal speedy-trial claim throughout the state proceedings and properly presented it to the Ohio Court of Appeals on direct review. The Warden freely conceded as much in the district court, recognizing Brown's distinct claims under state statutory law and the federal Constitution. *See supra*, at 6.

It is equally clear that, despite Brown's assertion of a federal constitutional right and citation of relevant Supreme Court authority, the Ohio Court of Appeals failed to address this federal claim. Rather, following the lead of the State—which had focused its appellate briefing exclusively on the state-law speedy-trial claim and ignored the federal claim, ECF No.13-37, at 1, 14-16—the court failed to discuss or even acknowledge a federal constitutional claim separate from the state-law statutory claim it parsed at length. *See* Pet.App.79a-92a. The court stated its disposition in purely state-law terms, concluding that "appellant was brought to trial within the [state statutory] 270-day speedy trial limit. Accordingly, appellant's first assignment of error is without merit." *Id.* at 92a.

The absence of any dispute over whether Brown clearly presented and preserved his federal claim makes *Brown* a better vehicle than *Williams*. In that case, the State of California maintains that Williams

may not have clearly preserved her constitutional claim in state court. *See* Petition for Writ of Certiorari at 17 n.4, *Williams*, No. 11-465 ("Williams's Sixth Amendment argument presented to the California Court of Appeal was not independent of her [state] statutory argument, but rather was inextricably intertwined with it."). No such question exists here.

B. Brown Also Preserved His Argument That AEDPA Deference Should Not Apply.

Further, Brown pressed before the Sixth Circuit the argument that the Ohio Court of Appeals failed to adjudicate his federal claim on the merits, making AEDPA deference inapplicable. (Brief of Petitioner-Appellant at 19-21.) He flagged for that court his preservation of his federal claim throughout the state proceedings, including at the Ohio Court of Appeals, and he discussed the state court's omission of the claim from its opinion. (*Id.* at 20-21.) Relying on the established Sixth Circuit rule that when a petitioner raises distinct federal and state claims, but the state court addresses only the state-law claim, the latter claim has not been "adjudicated on the merits," Brown argued that his federal claim should receive *de novo* review. (*Id.* at 19-20.) The Sixth Circuit panel addressed those arguments, rejecting them by invoking *Harrington*. And after the panel issued its decision, Brown addressed that newly decided case in a petition for rehearing. The question presented was thus fully ventilated below, so this Court will not be in the position of considering a question that the court of appeals has not considered and passed upon.

Neither Williams nor Childers made a similar argument. In his opening brief to the Eleventh Circuit, Childers *conceded* that his federal claim had been adjudicated on the merits in state court. *See Childers*, 642 F.3d at 965-66. Williams, too, conceded § 2254(d)'s application to her federal claim, presenting a further obstacle to this Court's review of the Ninth Circuit decision. *See* Petition for Writ of Certiorari at 19, *Williams*, No. 11-465. Brown's petition, therefore, is uniquely suitable for resolution of whether AEDPA deference applies in this setting.

C. The Court Below Admitted That Application Of *Harrington* And AEDPA Was Dispositive.

Importantly, the Sixth Circuit left no doubt about the role that its application of AEDPA deference played in its denial of Brown's federal speedy-trial claim. Conceding that it was "a close question" on the merits whether Brown's right to a speedy trial had been violated, the panel majority declared in the first sentence of its opinion that its resolution of that close question depended largely on whether the panel should defer to the state court under AEDPA. Pet.App.2a. The panel was equally clear about the source of its conclusion that it *should* defer to the state court, explaining that deference was appropriate "in light of the Supreme Court's recent decision in *Harrington v. Richter*." *Id.*; *see also id.* at 5a ("Pursuant to *Harrington*, this court can presume that the state court adjudicated on the merits Brown's speedy trial claim, warranting the application of AEDPA deference.").

Yet, under the different view of *Harrington* taken by *Williams* and the *Childers* concurrence and dissent, Brown would have received *de novo* review

and, very likely, relief on the merits. Indeed, the dissent in *Brown* confirms this. Whereas the *Brown* majority applied AEDPA to a "close question" and then denied relief, the *Brown* dissent had little difficulty in concluding on a *de novo* application of relevant precedent that Brown's speedy-trial right was violated and a writ of habeas corpus should issue.

The Sixth Circuit's answer to the question presented thus dictated its disposition of Brown's appeal. This is not especially common: Courts of appeals often make a point of clarifying just the opposite—that their choice of standard of review did *not* affect the outcome, because they would reach the same conclusion even on *de novo* review. *See, e.g.*, *Yeboah-Sefah* v. *Ficco*, 556 F.3d 53, 80 (1st Cir. 2009) (declining to decide whether AEDPA deference applied, because the result would be the same either way); *Washington* v. *Schriver*, 255 F.3d 45, 48 (2d Cir. 2001) (same); *Nobles* v. *Johnson*, 127 F.3d 409, 416 (5th Cir. 1997) (same). Since this Court grants certiorari only when its resolution of the question presented could conceivably change the outcome of the case, the Sixth Circuit majority's candid admission that § 2254(d) was dispositive here, confirmed by the dissent, makes this case an ideal vehicle for resolving the important question presented.

CONCLUSION

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

Respectfully submitted,

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