No. 12-840

IN THE

# Supreme Court of the United States

GERALD L. WERTH,

*Petitioner,*

v.

CINDI CURTIN, WARDEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Gerald L. Werth submits this supplemental brief to highlight the relevance of the Court's recent decision in *Johnson v. Williams*, No. 11-465 (U.S. Feb. 20, 2013), to the issue presented by Petitioner's case.

The *Johnson* decision begins by emphasizing the fundamental importance of the standard of review in a federal habeas proceeding: "Because the requirements of § 2254(d) are difficult to meet, it is important whether a federal claim was 'adjudicated on the merits in State court.'" *Johnson*, slip op. at 1 (quoting 28 U.S.C. § 2254(d)). This observation goes to the heart of Mr. Werth's petition, which asks whether, when a state court declines to hear a discretionary appeal, the underlying claims have been "adjudicated on the merits in State court" within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Mr. Werth argues in his petition that a state court's *pro forma* order declining to hear a discretionary appeal does not, under either the statutory text or this Court's habeas case law, constitute a merits adjudication subject to AEDPA deference.

The *Johnson* decision supports Mr. Werth's argument, both in its treatment of the procedural history and in its broader statements of law.

Procedurally, *Johnson* reiterates that a federal habeas court properly "look[s] through" a state appellate court's order denying discretionary review and defers to "the last reasoned state-court decision to address" the petitioner's federal claims. *Johnson*, slip op. at 6 n.1 (citing *Ylst v. Nunnemaker*, 501 U.S.

797, 806 (1991)). After the California Court of Appeal affirmed Williams' conviction for the second time, the California Supreme Court issued a "summary denial of Williams' petition for review." *Id.* The Ninth Circuit held that "the California high court's decision to deny a petition for review is not a decision on the merits, but rather means no more than that the court has decided not to consider the case on the merits." *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011).

*Johnson* clearly conveys that, while the Ninth Circuit went on to misread the California Court of Appeal's opinion, it was correct on the threshold procedural issue. First, this Court approvingly explains that the Ninth Circuit took an approach "[c]onsistent with our decision in *Ylst v. Nunnemaker*" when it "'looked through' the California Supreme Court's summary denial of Williams' petition for review and examined the California Court of Appeal's opinion, the last reasoned state-court decision to address" Williams' federal claims. Slip op. at 6 n.1. Second, the Court then adopts the same procedural approach, turning directly to the California Court of Appeal's decision—without even a glance toward the California Supreme Court's subsequent order declining to hear an appeal—to determine whether a California court had in fact adjudicated Williams' Sixth Amendment claim. *See id.* at 13-16. Thus, *Johnson* casts real doubt on the Sixth Circuit's insistence that a state court's denial of discretionary review should presumptively be treated as a merits-based adjudication.

The substance of this Court's analysis in *Johnson* similarly illuminates the flaws in the Sixth Circuit's

decision here. Specifically, *Johnson*'s discussion of what a merits adjudication entails highlights the absence of such a decision in Mr. Werth's case. The opinion explains that "[a] judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court heard and *evaluated* the evidence and the parties' substantive arguments.'" *Id.* at 12 (quoting Black's Law Dictionary 1199 (9th ed. 2009)). The Court then looks to several definitions of "merits" "as used in this context," including both "'*the intrinsic rights and wrongs of a case* as determined by *matters of substance*, in distinction from matters of form,'" and "'the *intrinsic right and wrong of a matter*, as a law case, unobscured by procedural details….'" *Id.* (quoting Webster's New Int'l Dictionary 1540 (2d ed. 1954); Random House Dictionary of the English Language 897 (1967)). Justice Scalia, in his opinion concurring in the judgment, puts it even more plainly: "An 'adjudication on the merits' is 'best understood by stating what it is not: it is not a resolution of a claim on procedural grounds.'" Slip. op. at 3 (Scalia, J., concurring in judgment) (quoting *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005)).

Under any of these definitions, a *pro forma* order in which a state court declines to hear a discretionary appeal is not a merits adjudication subject to AEDPA deference but is instead, as this Court has more aptly described it, a decision "not to decide at all." *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011).

*Johnson*, like this Court's decisions in *Greene v. Fisher* and *Harrington v. Richter*, 131 S. Ct. 770 (2011), suggests that the Sixth Circuit improperly

treated the Michigan appellate courts' denials of Mr. Werth's applications for leave to appeal as merits adjudications subject to AEDPA deference. However, this Court has not spoken directly to whether a state court's *pro forma* order declining to hear a discretionary appeal constitutes an adjudication on the merits for purposes of § 2254(d). As Mr. Werth's petition for a writ of certiorari details, the Sixth Circuit's decision in this case conflicts with decisions in several other Circuits. Mr. Werth respectfully asks this Court to grant his petition and resolve the conflicting approaches among the Circuits over the applicability of AEDPA deference to state-court orders declining to hear discretionary appeals.

Respectfully submitted,

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February 21, 2013 *Counsel for Petitioner*