No. 12-1480

In the Supreme Court of the United States

LLOYD RAPELJE, PETITIONER

v.

TYRIK MCCLELLAN

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

REPLY BRIEF

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Linus Banghart-Linn
Assistant Attorney General

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

INTRODUCTION

McClellan recasts the State's argument and the basis of the holding below, to paint this case as a poor vehicle to review the questions presented. His arguments are wrong.

First, McClellan asserts that the State is asking this Court to hold that the *Richter* presumption (that an unexplained order is a merits adjudication) is irrebuttable. Not true. The State is asking this Court to hold that the *Richter* presumption does not apply in this case. Such a presumption is appropriate only for unexplained orders, and the state-court decision in this case was *explained* and should have been treated as a merits adjudication. It is no small matter of comity for a state-court order that rejects an appeal "on the merits" to be accorded the dignity of a merits decision. The Michigan courts say that the order is a merits one. The federal courts should respect that view.

Second, McClellan asserts that there was an alternate basis for the decision below. This is also mistaken. The Sixth Circuit did not make an alternate holding assuming the state-court adjudication was on the merits. If this Court reverses and holds that the Sixth Circuit must give the state-court decision the respect to which AEDPA entitles it, it will require the Sixth Circuit to conduct a completely different analysis.

Third, McClellan has misstated the State's position in several respects. Section III of this brief corrects these errors in summary fashion.

Certiorari is warranted.

ARGUMENT

I. The petition asks this Court to grant certiorari and vindicate the principle in habeas that a state-court order means what it says.

In the first question presented in the petition, the State argues that the presumption that an *unexplained* order is a merits adjudication does not apply in this case, because the order in question is not unexplained. Pet. 9 (emphasis added). McClellan misunderstands, accusing the State of "seek[ing] to have this Court make the *Richter* presumption *irrebuttable*." Br. in Opp. 6. He argues that this makes the petition "fatally flawed" because this Court has only this term rejected exactly that argument, *Johnson* v. *Williams*, 133 S. Ct. 1088, 1097 (2013). McClellan is mistaken. The first question presented is whether the *Richter* presumption applies *at all* in this case, given that the order in question was not an unexplained order, and that, therefore, no presumption was necessary.

As stated in the petition, the Michigan Court of Appeals explained the basis for its decision: "*for lack of merit* in the grounds presented." Under Michigan law, the order was a merits decision with law-of-the-case effect. *People* v. *Hayden*, 348 N.W.2d 672, 684 (Mich. Ct. App. 1984). And an explained decision does not need a presumption that it is a merits adjudication. It simply *is* a merits adjudication. By treating the order as an unexplained one, and by "looking-through" to the previous (state trial-court) decision, the Sixth Circuit majority and district court failed to give the proper respect to the last explained state-court decision. This Court should grant the writ and reverse.

II. The Sixth Circuit made no alternate holding assuming a merits adjudication.

The Sixth Circuit panel majority's affirmance of the habeas grant in this case was based solely on its holding that the claim was procedurally defaulted and that McClellan showed cause and prejudice to excuse the default, justifying *de novo* review and a federal evidentiary hearing. McClellan now says that "habeas relief was granted on the alternative grounds that, assuming a merits adjudication, the state court's adjudication was unreasonable within the meaning of [28 U.S.C.] § 2254(d)." Br. in Opp. 8. Not so.

The Sixth Circuit majority did not affirm that holding of the district court. The majority never considered whether McClellan was entitled to relief under AEDPA's deferential standard without the evidence adduced at the evidentiary hearing. The dissenting judge did, and determined that McClellan was *not* entitled to relief under AEDPA. Pet. App. 17a, 28a–33a. Hence, a decision holding that the state-court decision was on the merits would require reversal.

Further, the second question presented addresses the circuit court's intrusion into the internal processes of the state courts. Much of the circuit court's reasoning was based on speculation about what the state court did, specifically, whether the lower court record had been transmitted to the court before it made its decision. Such an inquiry is like asking state-court clerks whether judges actually reviewed the trial transcripts before issuing an opinion. Such speculation defies any traditional notion of comity and AEDPA deference. This Court should grant the petition.

III. The brief in opposition contains other errors that do not relate to the case's soundness for certiorari, but still warrant correction.

Other errors in McClellan's response do not affect the appropriateness of this case for certiorari, but nonetheless deserve a brief response:

- McClellan alleges that "it is undisputed that the only reasoned, explained judgment was [that of] the state trial court . . . ." Br. in Opp. 11. This is disputed. The Michigan Court of Appeals order rejecting McClellan's appeal "for lack of merits in the grounds presented" is an explained order.

- Further, McClellan says it is undisputed that the state trial court resolved the case "exclusively" on procedural grounds. Br. in Opp. 11. This is disputed as well: the trial court also held that the claims lacked merit. Pet. 16–17.

- McClellan asserts that, in the lower courts, "the State agreed that the state trial court ruling was on procedural grounds and not a merits adjudication." Br. in Opp. 9. The State has agreed that the trial court ruled on procedural grounds, but the ruling was a merits adjudication, and the State has never said otherwise.

- McClellan accuses the State of erroneously claiming that the order in this case constitutes precedent under state law. The State has made no such claim. This order is the law of the case, because state law rightly considers the order a merits adjudication. Pet. 12, citing *People* v. *Collier,* 2005 WL 1106501, *1 (Mich. Ct. App. 2005) (order is a "decision on the merits").

CONCLUSION

The petition for writ of certiorari should be granted, or, in lieu of a grant of certiorari, this Court should peremptorily reverse the Sixth Circuit decision.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Linus Banghart-Linn
Assistant Attorney General

Attorneys for Petitioner

Dated: AUGUST 2013