No. 19-8375

IN THE

Supreme Court of the United States

LAMARR ROBINSON,

Petitioner,

v.

CONNIE HORTON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM, AND SANDRA GIRARD AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES AND RULES:

OTHER AUTHORITIES:

INTEREST OF THE *AMICI CURIAE*[1]

Criminal Defense Attorneys of Michigan

Since its founding in 1976, Criminal Defense Attorneys of Michigan ("CDAM") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles relating to criminal law and procedure, and provides information to the state legislature regarding contemplated legislation. CDAM is often invited to file *amicus curiae* briefs by the Michigan appellate courts.

Based on its experience representing indigent criminal defendants in the Michigan courts, CDAM has substantial institutional expertise regarding how

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[1] *Amici* provided timely notice of intent to file this brief under Rule 37.2(a), and all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

issues should be presented to the Michigan Supreme Court. CDAM has a significant interest in review of the question presented because the decision below is contrary to established practice in Michigan and threatens to deprive indigent criminal defendants of the ability to vindicate their federal rights through habeas corpus.

Michigan Appellate Assigned Counsel System

The Michigan Appellate Assigned Counsel System ("MAACS"), a division of the State Appellate Defender Office ("SADO"), oversees the appointment of felony appellate counsel for approximately 3000 indigent defendants per year in Michigan and oversees a roster of approximately 150 private attorneys who provide representation in over 75% of those cases. Among its roles, MAACS ensures compliance with nine minimum standards of appointed appellate representation, including the requirement that, upon disposition of an appeal by the Michigan Court of Appeals—and the completion of counsel's responsibilities under the appointment order—counsel must inform the client how to seek discretionary review in the Michigan Supreme Court. MAACS has always deemed counsel to have satisfied this requirement if they inform their clients of the Supreme Court filing deadline and provide an appropriate form for self-representation. Before the Sixth Circuit decision below, MAACS guidance recognized that provision of the form at issue here was an appropriate way for counsel to satisfy these ethical obligations to their clients. MAACS thus has a significant interest in review of the decision below, which imposes an exhaustion requirement that is contrary to established practice in Michigan.

Sandra Girard

Sandra Girard is the former Director of Prison Legal Services of Michigan and is a licensed attorney in Michigan. During Ms. Girard's tenure as Director of Prison Legal Services of Michigan, the organization developed the standard form for *pro se* criminal defendants at issue in this case. Ms. Girard's insight into the development and subsequent use of that form will materially assist the Court in consideration of the petition for a writ of certiorari.

INTRODUCTION

As all concede, petitioner Lamarr Robinson has "an unquestionably valid claim on the merits" of his federal habeas petition because he was sentenced under an unconstitutional sentencing regime. Pet. App. 2a, 14a. It is also undisputed that petitioner raised his meritorious Sixth Amendment challenge to his sentence on appeal to the Michigan Court of Appeals. Pet. App. 8a. After that appeal was wrongly denied, petitioner, acting *pro se*, used a "preprinted" form "prepared by a prison legal-services organization" to file an application for discretionary review in the Michigan Supreme Court. *Id.* That standard form expressly incorporated the arguments made in the Court of Appeals, representing that petitioner "want[ed] the Court to consider the issues as raised in my Court of Appeals brief." *Id.* Remarkably, the Sixth Circuit nevertheless held that petitioner failed to exhaust his Sixth Amendment claim. In reaching that conclusion, the Sixth Circuit took no account of how frequently this exact same "preprinted" language has been used in discretionary review applications to the Michigan Supreme Court. Nor did the Sixth Circuit

offer a single example in which the Michigan Supreme Court has rejected the form language used by petitioner here as inadequate to raise an issue for the Court's consideration.

The injustice to petitioner resulting from the Sixth Circuit's decision—which leaves an "unquestionably" unconstitutional sentence in place, Pet. App. 2a—is considerable. But while the Court of Appeals described this case as merely "present[ing] an unfortunate situation," Pet. App. 2a, the impact of the Sixth Circuit's decision extends far beyond petitioner. In the professional experience of the *amici*, the preprinted form at issue here has been regularly used by criminal defendants filing applications for review in the Michigan Supreme Court. At that stage of proceedings, criminal defendants no longer have a right to counsel, and they thus typically file their applications *pro se*. The form at issue was developed by a legal services organization (the Prison Legal Services or "PLS") to help *pro se* litigants file applications for review in the Michigan Supreme Court—an essential step for satisfying the exhaustion requirement for subsequent habeas review. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 839-840, 845 (1999). For ease of use, the PLS form has standard language that lets criminal defendants incorporate arguments that were made in briefing to the Michigan Court of Appeals, where the defendant generally would have had the benefit of counsel.

The PLS form has been widely used in Michigan for decades. Indeed, one of the *amicus curiae* (the Michigan Appellate Assigned Counsel System) has identified the PLS form as one appointed appellate counsel should provide to indigent clients, typically

after the conclusion of direct review in the Court of Appeals. *See* p. 10, *infra*. Organizations and counsel that provided this form to indigent criminal defendants (as well as the defendants themselves) had every reason to believe that the form's express language of incorporation would fairly present all incorporated arguments to the Michigan Supreme Court and thus would exhaust state remedies. After all, as the Sixth Circuit acknowledged, nothing in the Michigan Court Rules "proscribe[s] the practice of incorporation by reference." Pet. App. 11a. To the contrary, the Michigan Supreme Court has repeatedly granted review in appeals initiated by the form at issue here, and in doing so, the Court has repeatedly considered issues outside the four corners of those forms. *See* pp. 11-14, *infra*. Moreover, outside of the Sixth Circuit, other courts of appeals have held that a criminal defendant may—if not prohibited by state law—exhaust his state claims in the highest court with an application that refers to and incorporates lower-court materials. *See, e.g.*, *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir. 2009); *Lockheart v. Hulick*, 443 F.3d 927, 929 (7th Cir. 2006); *Galdamez v. Keane*, 394 F.3d 68, 75 (2d Cir. 2005) (Sotomayor, J.).

The Sixth Circuit's decision upsets settled practice in Michigan, and it will have significant negative implications for habeas practice in cases throughout the Sixth Circuit. By holding that the standard incorporation language on the commonly used legal service form at issue here does not fairly present a question to a state court of last resort, the Sixth Circuit's decision blocks access to federal court for prisoners like petitioner who used that standard form. The result, no doubt, will be many more "unfortunate

situation[s]" in which a habeas petitioner with a "valid claim on the merits" is denied relief based on the Sixth Circuit's unduly rigid application of exhaustion principles. Pet. App. 2a. This Court should grant the petition for certiorari in order to clarify that, at least absent an explicit state rule to the contrary, a filing seeking higher-court review that incorporates arguments made in a lower-court brief suffices to "fairly present[]" those arguments to the higher court, *Boerckel*, 526 U.S. at 848, for purposes of federal exhaustion under 28 U.S.C. § 2254(b).

ARGUMENT

I. The Prison Legal Services Form Used In This Case Has Long Filled A Critical Role For Indigent Criminal Defendants.

This case involves a *pro se* court form, its treatment by the Michigan state courts, and its importance to unrepresented criminal defendants. The form has been a critical tool for indigent criminal defendants, who often must act on their own when applying for discretionary review at the Michigan Supreme Court. To understand the role the PLS form has played in Michigan practice, historical context is important.

In *Ross v. Moffitt*, 417 U.S. 600 (1974), this Court held that states are not constitutionally required to provide counsel to indigent criminal defendants seeking discretionary review before their state supreme courts. Following *Ross,* Michigan initially continued to provide appointed counsel to prepare applications for leave to appeal in the Michigan

Supreme Court.[2] But Michigan stopped that practice in 1977,[3] and instead implemented a "letter request" procedure that allowed prisoners simply to write to the court requesting review of their Michigan Court of Appeals decisions. As once described by the Sixth Circuit, the process was built on a commitment by the Michigan Supreme Court, in every letter-request proceeding, to review the record below—including "consideration of all issues raised by the defendant to the Court of Appeals." *Elmore v. Foltz*, 768 F.2d 773, 775 (6th Cir. 1985) (quotation marks and citation omitted). Thus, the Sixth Circuit recognized at the time that "a defendant who has filed a 'letter request' with the Michigan Supreme Court must be considered to have presented to that Court all those issues which he raised to the Michigan Court of Appeals." *Id.*

The Michigan Supreme Court eliminated the "letter request" process in 1990, at which point "it was anticipated and expected that [the Michigan Supreme] Court would establish a procedure for the compensation of assigned counsel who pursue an application for leave to appeal." *People v. Trice*, 441 Mich. 882 (1992) (Levin, J., dissenting). But no such procedure was adopted, and a new court form was developed by Prison Legal Services ("PLS") to fill the void. That form is the subject of this case.

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[2] Michigan Supreme Court Administrative Order 1975-9, 395 Mich. xliii.

[3] Michigan Supreme Court Administrative Order 1977–4, 400 Mich. lxvii.

PLS was a legal aid service that operated inside Michigan prisons.[4] *Amicus curiae* Sandra Girard was the former director of PLS. PLS created the form at issue in the early 1990s and Ms. Girard actively contributed to drafting the document.[5] Echoing the earlier letter-request procedure, the form includes a catchall provision that specifies, "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." Pet. App. 8a (quotation marks omitted). It is the recollection of Ms. Girard that PLS sought and obtained approval for its form from the Michigan Supreme Court.

Over the next 25 years, the PLS form was ubiquitous in the Michigan Supreme Court, appearing in a majority of *pro se* applications for leave to appeal criminal convictions. Given the absence of any statutory or constitutional right to counsel for that

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[4] PLS was an independent organization operating within the walls of the State Prison of Southern Michigan in Jackson, providing legal assistance to prisoners. *Hadix v. Johnson*, 694 F. Supp. 259, 273 (E.D. Mich. 1988), *aff'd in part, vacated in part sub nom. Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992). The organization was initially funded by grants from the State Bar of Michigan and the Law Enforcement Assistance Network. After this funding dried up, the Department of Corrections continued its funding in the 1970s but sought to terminate it in the early 1980s. Based on a preliminary injunction from the U.S. District Court for the Eastern District of Michigan, PLS continued to operate under a contract with the Department of Corrections. While nominally independent, PLS was functionally under the control of the Department. *See id.* PLS ceased operations in 2003.

[5] *Amici* have not been able to determine when the form was first used. The date is no later than March 19, 1992, when it was used in *People v. Trice*, discussed above.

stage of a case, most of the applications in criminal cases are pursued by *pro se* defendants. In 2015, for example—the year that petitioner filed his application for discretionary review—the Michigan Supreme Court received 1472 new criminal filings, 1023 of which (69.5%) were by unrepresented defendants.[6]

II. The PLS Form Is Commonly Used And Has Consistently Been Accepted By The Michigan Supreme Court.

1. Although the Michigan Supreme Court did not itself publish the PLS form, the Court has long accepted the form as the quasi-official mechanism for *pro se* criminal defendants to seek discretionary review. Indeed, providing the PLS form to indigent clients has been deemed an essential component of competent appellate representation in Michigan.

Standard 8 of the Minimum Standards for Indigent Criminal Appellate Defense Services, adopted by the Michigan Supreme Court in 2005, provides that

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[6] Michigan Supreme Court, *2015 Quantitative Report*, https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/reports/quantitative/2015.Quantitative.Report.pdf (last visited June 24, 2020). Relatively few indigent defendants are represented by counsel when seeking discretionary review in the Michigan Supreme Court. Because appointed counsel are not compensated for this representation, the private attorneys who represent about 75% of Michigan's indigent criminal defendants on appeal rarely undertake such services. While the staff attorneys at the State Appellate Defender Office, who represent the remaining 25% of indigent criminal defendants are paid a salary, the choice to seek discretionary review in the Michigan Supreme Court is largely left to the discretion of the individual staff attorney, and many of the defendants they represent proceed *pro se* when filing an application for further review.

"counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued" after completion of appointed representation. Michigan Supreme Court Administrative Order 2004-6, 471 Mich. c-cvi. This typically occurs after adjudication by the Michigan Court of Appeals. Enforcement of this Standard falls to *amicus* MAACS, which published commentary providing, among other things,that when the Court of Appeals issues an adverse order or opinion and counsel's representation concludes, appellate counsel must "provid[e] the defendant with forms for filing a *pro se* application for leave to appeal in the Michigan Supreme Court." MAACS Comment to Standard 8. At least until 2016 when the Michigan Supreme Court published an official form, *see* pp. 17-18, *infra*, the forms referenced in the published commentary naturally would have been understood to endorse the PLS form.[7]

Consistent with Standard 8, the PLS form has been provided to thousands of indigent criminal defendants by hundreds of private MAACS roster attorneys, as well as staff attorneys from SADO. And for years, MAACS and SADO have included the PLS form in their training materials and appellate representation manuals, instructing counsel to include the form in their case closing letters at the conclusion of the appointed appellate representation. The PLS form

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[7] In 2019, MAACS rewrote the commentary to provide that counsel should "provide copies of the Court's forms for filing a pro per application." This revision post-dated the Michigan Supreme Court's publication of its own *pro se* form in 2016, discussed below, *see* pp. 17-18, *infra*.

has also been available in libraries within the Michigan Department of Corrections.

2. MAACS considered provision of the PLS form to be essential to satisfying Standard 8 and providing competent appellate representation based on its experience that the form was both easy for *pro se* litigants to understand and was effective in presenting issues to the Michigan Supreme Court. In the experience of the *amici*, the Michigan Supreme Court has construed the PLS form liberally and given full consideration to any claims referenced in that form, including through incorporation of lower-court materials.[8] That experience is confirmed through a review of several Michigan Supreme Court decisions that were initiated using the PLS form. The following cases are illustrative.

People v. Sharpe, 502 Mich. 313 (2018): The Court of Appeals reversed the trial court's refusal to allow certain evidence about the complaining witness in a sexual assault case. The defendant filed an application with the Michigan Supreme Court using the PLS form and leaving that form essentially blank aside from its preprinted language. (Apart from the cover page and signature block, the only thing written on the form was "Irrelevant, inflammatory, and prejudicial evidence will be admitted.") Relying on the form application, the Michigan Supreme Court

[8] In fact, the Michigan Supreme Court's Internal Operating Procedures ("IOP") expressly contemplate incorporation by reference. *See* Mich. S. Ct. IOP 7.305A(6) (explaining that both factual statements and legal arguments "contained in an appendix or other document that are incorporated by reference in the application" for leave to appeal count against the page limit).

granted leave to appeal and issued a lengthy opinion on the admissibility of the evidence under both the state's rape-shield statute and the Michigan Rules of Evidence. *Id.* at 319.

People v. Kennedy, 500 Mich. 978 (2017): The trial court denied the defense's request to appoint a DNA expert. After conviction, the defendant appealed, arguing that the denial of an expert violated his "due process" rights by impairing his opportunity to present a defense. The defendant's brief did not address the leading precedent on this issue—*Ake v Oklahoma*, 470 U.S. 68 (1985)—but the Michigan Court of Appeals recognized the appeal to present a claim directly implicating *Ake*, and both the majority and dissenting opinions addressed *Ake*. *People v. Kennedy*, No. 323741, 2016 WL 4008364 (Mich. Ct. App. July 26, 2016). The defendant then filed a *pro se* application to the Michigan Supreme Court, using the PLS form. On the form, the defendant claimed that he had been denied his "right to due process and fundamental fairness to present a defense" when he had been "denied access to evidence and was denied an expert." Issue II, *Pro Se* Form, *People v. Kennedy*. But he provided no additional explanation, and the only discussion of *Ake* occurred in the two opinions issued by the Court of Appeals. Nevertheless, when the Michigan Supreme Court directed argument on the application, it specifically requested briefing on *Ake*.

People v. Richardson, 488 Mich. 1055 (2011): After losing in the Court of Appeals, the defendant filed a *pro se* application for leave to appeal using the PLS form. Issue II on the form referred only to the denial of a fair trial and due process due to "confusing and contradictory" jury instructions. Issue II, *Pro Se* Form,

People v. Richardson. The form did not identify *which* instructions the defendant took issue with or explain why he believed those instructions were "confusing and contradictory." Yet in its order directing argument on whether to grant the application, the Michigan Supreme Court specifically instructed the parties to brief the instructions pertaining to the defendant's duty to retreat.

People v Sargent, 480 Mich. 869 (2007): The Court of Appeals rejected the defendant's sentencing challenge to a Guidelines calculation, holding that the evidence "adequately supports th[e] trial court's scoring." *People v. Sargent,* No. 263392, 2007 WL 189360, at *3 (Mich. Ct. App. Jan. 25, 2007). The defendant then sought leave to appeal, using the PLS form. As one of his "new issues," the defendant claimed that his sentence violated the Sixth Amendment because it was based on facts not found by a jury. Issue III, *Pro Se* Form, *People v. Sargent*. In the explanation immediately following, the defendant referred to several offense variables, and he expanded on that challenge in a supporting *pro se* brief. But when the Michigan Supreme Court granted leave to appeal, it directed the parties to brief an entirely different, state-law sentencing issue that the defendant had not expressly raised in his application.

In all of these cases, the Michigan Supreme Court looked beyond the face of the defendant's PLS form to identify a legal claim for review. Collectively, the decisions belie the Sixth Circuit's conclusion that the Michigan Supreme Court does not consider an issue properly presented—despite express language of incorporation—unless it is separately and expressly

enumerated in an application for leave to appeal. Pet. App. 11a-12a.

III. The Sixth Circuit's Decision Will Have Significant, Negative Impacts On Numerous Cases.

The Sixth Circuit decision in this case will have significant and disruptive effects on habeas practice within the Circuit, given how frequently the PLS form has been used by indigent criminal defendants who have no right to counsel when seeking discretionary review. As discussed, pp. 10-11, *supra*, the PLS form has been widely distributed in Michigan, and for years was regarded as the standard form that appellate attorneys should provide to clients at the conclusion of their representation in the Court of Appeals. By holding that the standard language of incorporation used in the form does not fairly present an issue to a state's highest court, the Sixth Circuit's decision will block numerous indigent prisoners from pursuing federal habeas relief for perceived violations of state procedural rules that state courts have not themselves recognized.

1. The Sixth Circuit described "[t]his case" as merely "present[ing] an unfortunate situation." Pet. App. 2a. But the court's exhaustion holding establishes a rule of law that will have negative implications for habeas petitions far beyond the context of this one case.

As the Sixth Circuit elsewhere acknowledged (Pet. App. 8a), there is nothing unique about the application for discretionary review that petitioner filed in the Michigan Supreme Court. To the contrary,

petitioner's application used "preprinted" language from the standard PLS "form." *Id.* The Sixth Circuit examined the form's standard language—"I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below"—and held that this express language of incorporation failed to "fairly present" to the Michigan Supreme Court issues that petitioner had briefed in the court below. Pet. App. 8a, 9a (quotation marks omitted). Nothing in the Sixth Circuit's decision turned on any specific features of petitioner's application apart from this "preprinted" form language. In fact, the court *assumed* that the language from the standard form used by petitioner was intended to "incorporat[e] the briefing before the Michigan Court of Appeals" into his application for discretionary review. Pet. App. 9a. The Sixth Circuit nevertheless held, as a matter of law, that incorporating by reference in this manner does not "fairly present" a claim to a state court. Pet. App. 10a-11a (quotation marks omitted).

At a minimum, the Sixth Circuit's decision will have significant adverse consequences for the many indigent prisoners like petitioner who used the PLS form to present claims to the Michigan Supreme Court. As discussed, pp. 10-11, 14 *supra*, legal service providers, volunteers, and prison libraries all have relied upon and distributed the PLS form for over two decades without ever receiving an indication from the Michigan Supreme Court that incorporation by reference was not allowed. Indeed, as discussed, it has long been standard practice for many attorneys to provide the form to clients upon the conclusion of their representation in the Court of Appeals, in order to make it easier for criminal defendants to pursue

further review on a *pro se* basis. *See* pp. 9-10, *supra*. Given these longstanding practices, numerous Michigan prisoners similarly situated to petitioner will be negatively impacted by the Sixth Circuit's decision and will have their potentially meritorious claims blocked from federal habeas consideration.

In addition, the Sixth Circuit's decision will almost certainly impact numerous prisoners outside of Michigan, given the court's broad rejection of incorporation by reference as a means to "fairly present" a federal question to a state's highest court. Pet. App. 9a-10a (quotation marks omitted). Significantly, the Sixth Circuit reached its decision even though the relevant Michigan Court Rules "do not explicitly proscribe the practice of incorporation by reference in applications for leave to appeal," and even though the Sixth Circuit did not identify a single decision from the Michigan Supreme Court that had treated incorporation by reference as insufficient to raise an issue for discretionary review. Pet. App. 11a. In fact, as discussed, pp. 11-14, *supra*, the Michigan Supreme Court has frequently read beyond the face of the PLS form to review issues raised in the lower court.

The language in the Michigan Court Rules that the Sixth Circuit *did* rely on to support its anti-incorporation rule (Pet. App. 10a) is thoroughly unremarkable. The language does not address incorporation by reference, but rather simply sets out standard requirements for how an application for review should be presented. The rules in other states

in the Sixth Circuit are not meaningfully different.[9] Thus, the decision below creates a new default rule for the Circuit that treats incorporation by reference as presumptively impermissible, absent at least some express endorsement of the practice by the state's highest court. That is the *opposite* of the default rule that other circuits have applied. *See, e.g., Scott*, 567 F.3d at 582; *Lockheart*, 443 F.3d at 929; *Galdamez*, 394 F.3d at 75. And it will impose needless burdens on the ability of indigent *pro se* prisoners to exhaust their state remedies and, if necessary, pursue federal habeas review.

2. The Sixth Circuit also briefly discussed (Pet. App. 12a) an "official" form created by the Clerk's Office of the Michigan Supreme Court for *pro se* applicants seeking leave to appeal. But the existence of that form neither justifies the Sixth Circuit's decision nor diminishes the decision's negative implications.

The official form was first made available in 2016—*after* petitioner filed his application to the Michigan Supreme Court. As a result, petitioner (and other *pro se* criminal defendants like him) had no official alternative to the PLS form. Moreover, in the experience of the *amici*, the PLS form remained in widespread use even after 2016, given the absence of any indication from the Michigan Supreme Court that it was no longer acceptable. Indeed, as noted, p. 10 n. 7, *supra*, the MAACS commentary regarding the ethical standards for appellate counsel in indigent

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[9] *See, e.g.* Kentucky Rules of Civil Procedure Rule 76.20; Ohio Supreme Court Rules of Practice Rule 7.01(B); Tennessee Rules of Appellate Procedure Rule 11.

criminal defense were not amended to reference "the Court's forms for filing a pro per application" until 2019. And while responsible legal services organizations have been forced to quickly transition away from use of the PLS form in light of the Sixth Circuit's decision, it will unquestionably remain in use for some time. The PLS form continues to be filed with the Michigan Supreme Court Clerk's Office, suggesting that it remains in circulation in prison libraries and elsewhere, making it inevitable that some criminal defendants will continue to use that form rather than identify an official form on the website for the Michigan Supreme Court.

Moreover, even the new official form does not preclude incorporation by reference. To the contrary, the form specifies that applicants "may rely on the facts and the law contained in the Court of Appeals brief." Pro Per Application for Leave to Appeal in a Criminal Case to the Michigan Supreme Court, General Instructions at ii. The form does specify that an applicant must "writ[e] . . . out" issues in the application form, rather than relying exclusively on the fact that an issue was "raised in the Court of Appeals." *Id.* But the form used by petitioner here did not merely rely on the fact that an issue was briefed below, as occurred in *Baldwin v. Reese*, 541 U.S. 27 (2004); rather, petitioner incorporated those issues by reference, alerting the Michigan Supreme Court that petitioner wanted those issues considered, *see* pp. 14-15, *supra.*[10] Although the new official form is perhaps

[10] The lower-court materials are readily accessible to the Michigan Supreme Court, which instructs applicants not to burden the Court with extensive record documents since the

clearer because it asks applicants to incorporate previous briefing issue-by-issue, the Sixth Circuit's inference that the Michigan Supreme Court does not accept the more general incorporation used here is inconsistent with that court's actual practices, *see* pp. 11-14, *supra*, and the precedent in other circuits, *e.g.*, *Galdamez*, 394 F.3d at 75.

3. The Sixth Circuit suggested that, despite its decision, petitioner might still be able to pursue his Sixth Amendment claim in state court by filing a motion for post-appeal relief from judgment under Subchapter 6.500 of the Michigan Court Rules. Although it can be hoped that the state would consent to relief from judgment here since "petitioner has an unquestionably valid claim on the merits," Pet. App. 2a, this theoretical path to relief does not mitigate the serious negative impact of the Sixth Circuit's decision on the rights of criminal defendants and provides no basis to deny certiorari. Subchapter 6.500 relief carries procedural restrictions that will make it an unsuitable vehicle for many prisoners seeking to vindicate their rights under federal law. And it advances neither comity nor efficiency to compel prisoners to burden the Michigan courts with motions for post-appeal relief based on the Sixth Circuit's misunderstanding of how the Michigan Supreme Court reviews applications for discretionary review.

Court "obtains both the trial court / tribunal records and the Court of Appeals files on virtually all applications for leave to appeal." Mich. S. Ct. IOP 7.310(A).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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