No. 19-8375

In the Supreme Court of the United States

LAMARR ROBINSON, PETITIONER

v.

CONNIE HORTON, WARDEN

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit Court of Appeals decided this case in a published opinion in favor of the State on the reasoning that an application for leave to appeal to the Michigan Supreme Court does not fairly present an issue if that Court must look beyond the document itself, including to a lower-court brief, to determine the issues presented. The State advanced this reasoning at oral argument but did not raise it in briefing and no longer wishes to stand by it. The State takes the position that an application for leave to appeal can incorporate arguments by reference, but that Robinson's application did not do so. The State also advanced the argument below that Robinson failed to incorporate his *Alleyne* claim by reference, but the Sixth Circuit chose not to address it. The State submits therefore that the question before this Court is:

1. When the court below has issued a published opinion that both parties agree relies on an erroneous interpretation of state law, but the parties disagree on the correct disposition of the case based on a different question, argued but not decided below, should the opinion below should be vacated and the case remanded to allow the court below to determine the issue in dispute?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Lamarr Robinson, a Michigan prisoner. The respondent is Connie Horton, Robinson's warden.

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The order of the Sixth Circuit Court of Appeals denying Robinson's petitioner for rehearing en banc, App. 71a, is not reported. The opinion of the Sixth Circuit affirming the denial of Robinson's habeas petition, App. 2a–14a, is reported at 950 F.3d 337. The opinion and order of the district court denying habeas relief, App. 16a–54a, is not reported but is available at 2018 WL 3609547.

The order of the Michigan Supreme Court denying Robinson's application for leave to appeal, App. 55a, is reported at 877 N.W.2d 729. The opinion of the Michigan Court of Appeals affirming Robinson's convictions and sentences, App. 56a–70a, is not reported but is available at 2015 WL 6438239.

JURISDICTION

The State accepts Robinson's statement of jurisdiction as accurate and complete and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . .

Section 2254(b)(1) of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(b)(1), provides in part:

> 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 unless it appears that—
>
> > (A) The applicant has exhausted the remedies available in the courts of the State; . . .

Section 2254(d) of AEDPA provides in part:

> 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.

INTRODUCTION

Robinson's petition asks this Court to decide whether a pro se application to a state supreme court that attempts to incorporate the claims raised in a state intermediate appellate court "fairly presents" those claims for purposes of exhaustion. Although the State prevailed on this point below, it now believes the Sixth Circuit erred in its reasoning, though not in the result it reached.

To show that his claim was exhausted in the Michigan courts, Robinson must show not only that the attempt to incorporate was a fair presentation of the claim (which the State now agrees it was), but also that there was an attempt to incorporate in the first place—a question the State contested below and continues to contest.[1]

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[1] And even then, Robinson would not be entitled to relief unless he shows that there was a constitutional violation in his sentencing and (because this case arises under AEDPA) that this constitutional violation was clearly established by some holding of this Court. The State was unable to contest these points below because they have been conclusively determined by precedent that is binding in the Sixth Circuit. If this Court were to grant certiorari, the State would contest both of these points.

The State therefore respectfully requests that this Court grant certiorari, vacate the Sixth Circuit's erroneous published opinion, and remand to that court to consider the question the parties disagree on—whether Robinson in fact attempted to incorporate the *Alleyne* claim in his application for leave to appeal.

STATEMENT OF THE CASE

This case arises from Lamarr Robinson's decision to shoot Jamel Chubb at a gas station in Detroit in 2010. The facts of the case are not important to the question presented in the petition. For purposes of the petition, it suffices to say that a Wayne County jury convicted Robinson of assault with intent to commit murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.

The crime of assault with intent to murder carries a maximum penalty of "life or any term of years." Mich. Comp. Laws § 750.83. As enhanced by Robinson's status as a fourth-offense habitual offender, the crime of being a felon in possession of a firearm carries a maximum penalty of "imprisonment for life or for a lesser term." §§ 750.224f & 769.12. The trial court imposed a maximum sentence of 120 years for each of these convictions, running concurrently.

The trial court also imposed a minimum sentence—the period Robinson must serve before becoming eligible for parole. In choosing this sentence, the trial court employed what the court of appeals referred to as "a complex sentencing regime," and described as follows:

> Michigan's sentencing regime operated through the use of offense categories, dual axis scoring grids, minimum ranges, and a holistic focus on

> offender and offense characteristics. Generally speaking, the guidelines operate by "scoring" offense-related variables (OVs) and offender-related, prior-record variables (PRVs). These OV and PRV point totals are then inputted into the applicable sentencing grid to yield the guidelines range, within which judges choose a minimum sentence.

App. 4a (quoting *Loren Robinson* v. *Woods*, 901 F.3d 710, 716 (6th Cir. 2018)).

The trial court calculated Robinson's guidelines range at 170 to 570 months. The court opined "that under these circumstances, the maximum that I can impose should be imposed." (2/15/11 Sentencing Tr. at 15.) True to its word, the court imposed a minimum sentence of 570 months.

Robinson appealed, raising several challenges to his convictions. After Robinson's counsel filed a brief and Robinson filed a supplemental brief in propria persona (known in Michigan as a "Standard 4 brief"), and while the appeal was still pending, this Court issued an opinion in *Alleyne* v. *United States*, which held that "any fact that increases the mandatory minimum [sentence for a crime] is an 'element' that must be submitted to the jury." 570 U.S. 99, 102 (2013).

Robinson then filed a second Standard 4 brief in the Michigan Court of Appeals, raising two new claims including a claim that he was entitled to resentencing under *Alleyne*. That brief argued that offense variables 4, 5, and 7 were scored using facts not found by a jury. App. 99a–106a.

While Robinson's appeal was pending, the Michigan Supreme Court issued an opinion in *People* v. *Lockridge*, which held that the use of judge-found facts to score mandatory sentencing guidelines for minimum sentences violates the Sixth Amendment. 870 N.W.2d 502, 506 (Mich. 2015). *Lockridge* further held that the remedy was the same as that imposed by this Court in *United States* v. *Booker*, 543 U.S. 220, 233

(2005)—that is, that judges would continue to score sentencing guidelines using judge-found facts, but that henceforth those guidelines would be advisory rather than mandatory. 870 N.W.2d at 506. For defendants who were sentenced within the guidelines and whose appeals were pending at the time *Lockridge* was decided, the Court adopted the post-*Booker* procedure chosen by the Second Circuit Court of Appeals in *United States* v. *Crosby*, 397 F.3d 103, 117–118 (2d Cir. 2005)—that is, those defendants would not be entitled to an automatic resentencing, but only to a limited remand to determine whether the sentencing court would have imposed a materially different sentence but for the mandatory nature of the sentencing guidelines. 870 N.W.2d at 522–24.

The Michigan Court of Appeals issued its opinion per curiam affirming Robinson's convictions and sentences a few months after *Lockridge* was issued. In rejecting Robinson's *Alleyne*/*Lockridge* claim, the court agreed with Robinson that judge-found facts were used to score offense variables 4, 5, and 7, but rejected his claim by holding that the scores of offense variables 1, 2, 3, and 6 were "based on facts admitted by defendant or found by the jury verdict, and were sufficient to sustain the minimum number of OV points necessary for defendant's score to fall in the cell of the sentencing grid under which he was sentenced." App. 69a.[2] Based on this reasoning, the court held that Robinson was not entitled to relief. *Id*.

[2] As is discussed in more detail below, the State respectfully disagrees with the Michigan Court of Appeals' holding that the scores of offense variables 1, 2, 3, and 6 were based on facts admitted by Robinson or found by the jury. The State did not defend that conclusion in the Sixth Circuit and does not defend it here. The Michigan Court of Appeals was partially correct, though: *if* those offense variable scores

Robinson then filed a pro se application for leave to appeal, using a preprinted form with blanks to be filled in by the applicant. App. 73a–80a. On the first page of the application, paragraphs 1 through 5 call for details of the convictions and sentences, and paragraph 6 asks the applicant to confirm by checking a box that the application is being filed timely. App. 73a. The second page bears the heading, "Grounds – Issues Raised in Court of Appeals." App. 74a (capitalization modified).

Below that heading, paragraph 7 begins, "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." *Id.* There is then a section labeled, "Issue I," and three subsections follow: subsection A, for the applicant to "Copy the headnote, the title of the issue, from your Court of Appeals brief," subsection B, for the applicant to check boxes to explain why the Court should review the decision below, and subsection C, for the applicant to "Explain why you think the choices you checked in 'B' apply to this issue," and to cite cases and state facts that support that explanation. *Id.* Identical pages follow for the applicant to present Issues II, III, IV, and V. App. 75a–78a. On the next page, there is a form for the applicant to raise a new issue not raised in the Michigan Court of Appeals. App. 79a. And on the last page there is a preprinted prayer for relief (with no boxes to check or lines to fill in) and a signature block. App. 80a.

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had been admitted by Robinson or found by a jury, that fact would have defeated Robinson's claim.

Although Robinson never argued in the Michigan courts or in the district court that offense variables 1, 2, 3, and 6 were scored using judge-found facts, the State has not relied on a waiver or exhaustion argument based on that omission.

Robinson completed this form by typing out five issues he raised in the Michigan Court of Appeals—notably omitting the *Alleyne*/*Lockridge* claim. App. 74a–78a. He also included one new claim unrelated to his sentencing. App. 79a. He later filed a pro per motion to supplement his application for leave to appeal, in which he typed out eleven pages of issues not included in the initial application. App. 84a–94a. The motion to supplement also did not include the *Alleyne*/*Lockridge* claim. *Id.*

The Michigan Supreme Court granted Robinson's motion to supplement his application and denied the application because it was "not persuaded that the questions presented should be reviewed by" it. App. 55a.

Robinson then filed a petition for habeas relief under 28 U.S.C. § 2254. The petition raised eight claims for habeas relief, including a claim for relief under *Allyne*, arguing that offense variables 4, 5, and 7 were not found by a jury and that "due process requires that petitioner be sentenced on accurate information." Additional Pages in Support of Pet. at 2.

The State responded, arguing both that the claim was unexhausted, Answer at 4, and that it was meritless, *id.* at 38–40. The State's merits argument rested on two grounds. First, the State argued there was no clearly established federal law applicable to Robinson's claim:

> The United States Supreme Court has never held that *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and its progeny apply to a Michigan "minimum sentence," which is only a determination of what portion of a defendant's sentence he must serve before becoming eligible for parole. Every case in the *Apprendi* line, up to and including *Alleyne* . . . , on which Robinson relies, deals with the setting of a maximum sentence, at the end of which the defendant becomes entitled to release. The United States Supreme Court has never held that the Sixth Amendment jury

> trial right is implicated in how a state court determines parole eligibility.

Id. at 39.

Second, the State argued that Robinson was not entitled to relief for the reasons given by the Michigan Court of Appeals. *Id*. at 39–40. Robinson did not file a reply.

The district court acknowledged the State's exhaustion argument but did not rule on it, noting that "[a]n unexhausted claim may be adjudicated if the unexhausted claim is without merit, such that addressing the claim would be efficient and would not offend the interest of federal-state comity." App. 44a (citing *Prather* v. *Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); 28 U.S.C. § 2254(b)(2)). The district court then proceeded to the merits of the claim, holding that "*Alleyne* is inapplicable to petitioner's case, because the Supreme Court's holding in '*Alleyne* dealt with judge-found facts that raised the mandatory minimum sentence under a statute, not judge-found facts that trigger an increased guidelines range,' which is what happened to petitioner in this case." App. 46a (quoting and citing *United States* v. *Cooper*, 739 F.3d 873, 884 (6th Cir. 2014); *United States* v. *James*, 575 F. App'x 588, 595 (6th Cir. 2014); *Saccoccia* v. *Farley*, 573 F. App'x 483, 485 (6th Cir. 2014); *Kittka* v. *Franks*, 539 F. App'x 668, 673 (6th Cir. 2013), and noting that *James* cited at least four unanimous Sixth Circuit panels that "have 'taken for granted that the rule of *Alleyne* applies only to mandatory minimum sentences.' "). The district court noted the *Lockridge* decision, but held that the decision did not constitute clearly established federal law for purposes of habeas review. App. 47a–48a.

Less than a month later, the Sixth Circuit issued a published opinion in *Loren Robinson*, holding that *Alleyne* clearly established the unconstitutionality of Michigan's sentencing scheme. 901 F.3d at 718. Based on this holding, the Sixth Circuit granted Robinson a certificate of appealability on his sentencing claim. (11/13/18 Sixth Cir. Order at 9–10.)

Robinson's opening pro se brief in the Sixth Circuit did not address the State's exhaustion defense. The State's brief again raised the exhaustion defense. In his pro se reply, Robinson argued (1) that it was inappropriate to apply exhaustion where the district court had not ruled on the matter, (2) that the exhaustion requirement should not be enforced because the procedures available in state court were "ineffective and futile," (3) that the State had "disingenuous[ly]" relied on inaccurate copies of the state-court pleadings in supporting its arguments, and (4) that enforcement of the exhaustion requirement would be an "overwhelming and harsher penalty th[a]n [C]ongress intended." (Appellant's Pro Se Reply Br. at 1–5.) Robinson never argued in either brief that he had actually raised the claim in the Michigan Supreme Court.

Following this initial round of briefing, the Sixth Circuit ordered counsel appointed and a second round of briefing. (5/2/19 Sixth Cir. Order.) Robinson's counseled brief argued, for the first time in any court, that offense variables 1, 2, 3, and 6 were scored using judge-found facts. (Appellant's Br. at 20.) The brief did not argue that Robinson exhausted the claim in the Michigan Supreme Court. The State filed a new appellee brief that again raised the exhaustion defense and also addressed the arguments Robinson made in his pro se reply brief. Robinson's counseled reply brief, for

the first time in any court, argued that Robinson had exhausted the claim in the Michigan Supreme Court because the form on which he submitted his application included the sentence, "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." (Reply Br. at 4.)

The Sixth Circuit then ordered supplemental briefing on the question whether the quoted sentence "was sufficient to exhaust Robinson's sentencing claim before the Michigan Supreme Court." (11/27/19 Sixth Cir. Order.)

The State's supplemental brief argued that the grammar of the sentence as well as its context within the form demonstrated that it was not an attempt to incorporate all of the issues raised in the Michigan Court of Appeals. Robinson's supplemental brief asserted that it was clear that the language in question was sufficient to exhaust the claim. Robinson anticipated that the State would argue that the claim was unexhausted because Robinson still had an avenue by which to raise the claim in the Michigan courts. (Supplemental Br. at 4.) Robinson also predicted that the State would argue that the claim is procedurally defaulted. (*Id.*) The State did not raise either argument.

At oral argument, Robinson's counsel dismissed the State's explanation of the meaning of the application language as an "academic exercise." The State argued for the first time at oral argument that, even assuming the application language was an attempt to incorporate the claims raised below, that attempt was not adequate to fairly present the claims for exhaustion purposes.

The Sixth Circuit noted but did not address the parties' arguments about whether the language in question incorporated the issues raised in the Michigan Court of Appeals. Instead, the court focused on what it described as "the more important subject of whether, assuming that it was intended to do so, that language was sufficient to fairly present' the claim to the Michigan Supreme Court." App. 9a. The Sixth Circuit held that it was not. App. 9a–12a. The court relied largely on this Court's decision in *Baldwin* v. *Reese*, which held in part that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in that case, that does so." 541 U.S. 27, 32 (2004). The court also looked to Michigan Court Rule 7.305(A)(1), which provides the requirements for an application for leave to appeal, including that the application must include "(b) the questions presented for review related in concise terms to the facts of the case," and "(e) a concise argument . . . in support of the appellant's position on each of the state questions and establishing a ground for the application . . . ." Based on *Baldwin* and the Michigan Court Rules, and to a lesser extent on the Ninth Circuit decision in *Gatlin* v. *Madding*, 189 F.3d 882 (9th Cir. 1999), the Sixth Circuit held that, assuming Robinson's application had attempted to incorporate the claims raised below, this was not enough to "fairly present" the claim in the Michigan Supreme Court and that the claim was therefore unexhausted. App. 11a.

Because the district court denied relief on the merits and the Sixth Circuit held that Robinson's petition was barred by a procedural defense, the court did not affirm the district court, but vacated its decision and remanded for further proceedings. App. 13a–14a. This petition for certiorari followed.

REASONS TO GRANT, VACATE, AND REMAND

I. The parties agree that the basis for the decision below was erroneous, but disagree on a different question, argued but not decided by the court below.

The court below affirmed the district court's denial of habeas relief by concluding that Robinson had not "fairly presented" his claim to the Michigan Supreme Court because a single-sentence reference that would require that court to look beyond the pleading itself would be insufficient under the Michigan court rules to present the claim:

> [W]e conclude that Robinson did not "fairly present" his sentencing claim to the Michigan Supreme Court, thus failing to exhaust that claim in state court. His sentencing claim was not referenced by name at all in his application for leave to appeal or in his motion to supplement that application. The only line that could have even arguably been read to refer to it was the one line, quoted above, referring to "the issues as raised in my Court of Appeals brief." As in *Baldwin* [v. *Reese*, 541 U.S. 27 (2004)], this is insufficient to fairly present the claim because the Michigan Supreme Court would have had to "read beyond" the application to "alert it to the presence" of Robinson's sentencing claim. See *Baldwin*, 541 U.S. at 32, 124 S. Ct. 1347.

Although the State advanced this position at oral argument before the Sixth Circuit, it is now the State's legal position that the Michigan State Supreme Court permits "incorporation by reference" in pro se prisoner applications, and that the Sixth Circuit's analysis misconstrues Michigan law.

While the State contends that (1) Robinson did not in fact incorporated by reference his sentencing claim in the particular circumstances of the case here, (2) his sentencing claim does not constitute a clearly established constitutional violation, and (3) the only remedy that would be available if this were a constitutional violation and he had fairly presented his claim and therefore had properly exhausted his claims would be a *Crosby* remand, the State now agrees on the central claim of the petition that in principle a prisoner may incorporate by reference his arguments.

The question whether Robinson attempted to incorporate his *Alleyne* claim in his application for leave to appeal was briefed and argued by both parties below, and squarely presented to the Sixth Circuit. That court declined to address it, finding it less important than the legal question whether a pro se applicant can in principle incorporate claims by reference. Now that the parties agree that the Sixth Circuit erred in its answer to that legal question, the best course is to remand for consideration of the dispositive question on which the parties disagree.

For these reasons, the State asks this Court to grant the petition, vacate the decision below, and remand to the Sixth Circuit to allow that court to address the remaining issue presented by the parties.

CONCLUSION

The petition should be granted, the decision below vacated, and the case remanded to the Sixth Circuit for consideration of the question whether Robinson in fact attempted to incorporate his *Alleyne* claim by reference.

Respectfully submitted,

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