NO. 22-_____

In the Supreme Court of the United States

PETER WHYTE,

Petitioner,

v.

DAN WINKLESKI,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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* *APPOINTED UNDER THE CRIMINAL JUSTICE ACT (CJA)*

NOVEMBER 9, 2022

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QUESTIONS PRESENTED

1. Whether a state court's dismissal of a habeas petitioner's claim under the U.S. Constitution for failure to plead sufficient "material facts" under a state pleading standard is a decision interwoven with federal law.

2. Whether a state court satisfies the "plain statement" requirement of *Harris v. Reed* by invoking a state procedural rule without applying it, after adjudicating a habeas petitioner's claim on the merits.

LIST OF PROCEEDINGS

Direct Proceedings Below

United States District Court
for the Eastern District of Wisconsin

No. 12-cv-486

Peter Whyte, *Petitioner,* v. Dan Winkleski, *Respondent*

Judgment Date: July 29, 2020

United States Court of Appeals for the
Seventh Circuit

No. 21-1268

Peter Whyte, *Petitioner-Appellant,* v. Dan Winkleski, Warden, *Respondent-Appellee*

Judgment Date: May 19, 2022

Rehearing Denial Date: August 11, 2022

Initial Proceedings and Direct Review

Conviction

State of Wisconsin Circuit Court,
Branch 1, St. Croix County

2006CF000399 (judgment of conviction)

State of Wisconsin vs. Peter Gamble Whyte

Judgment Date: November 12, 2007 (conviction)

State of Wisconsin, Court of Appeals, District III

No. 2009AP1245-CR, published at 330 Wis.2d 496

State of Wisconsin v. Peter Gamble Whyte

Judgment Date: October 26, 2010

Direct Appeal

Supreme Court of Wisconsin

No. 2009 AP1245-CR, published at 331 Wis.2d 46, 794 N.W.2d 900 (Table), 2011 WI 15

State v. Whyte L.C.#2006CF399

Judgment Date: February 7, 2011 (petition for review denied)

Supreme Court of the United States

No. 10-10538, published at 564 U.S. 1027, 131 S.Ct. 3041 (Mem), 180 L.Ed.2d 859, 79 USLW 3711

Peter Whyte v. Wisconsin

Judgment Date: June 20, 2011 (certiorari denied)

State Collateral Review

Wisconsin Court of Appeals, District III

No. 2013AP1272, published at 364 Wis.2d 405, 866 N.W.2d 404 (Table), 2015 WL 2192808, 2015 WI App 52

Wisconsin v. Peter Gamble Whyte

Judgment Date: May 12, 2015 (denial of petition under Wis. Stat. § 974.06)

Supreme Court of Wisconsin

No. 2013AP1272, published at 365 Wis.2d 742, 872 N.W.2d 668 (Table), 2016 WI 2

State v. Whyte L.C.#2006CF399

Judgment Date: November 4, 2015 (denial of petition for review)

Wisconsin Court of Appeals, District III

No. 2015AP2615-W

State of Wisconsin ex rel. Peter Gamble Whyte v. Timothy Douma (L.C. #2006CF399)

Judgment Date: March 31, 2016 (denial of petition for writ of habeas corpus)

Supreme Court of Wisconsin

No. 2015AP2615-W, published at 371 Wis.2d 612, 887 N.W.2d 895 (Table), 2016 WI 81

Whyte v. Douma L.C.#2006CF399

Judgment Date: June 15, 2016 (denial of petition for review)

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The decision of the U.S. Court of Appeals for the Seventh Circuit is reported as *Whyte v. Winkleski*, 34 F.4th 617 (7th Cir 2022), *reh'g denied*, No. 21-1268, 2022 WL 3326896 (7th Cir. Aug. 11, 2022). Appendix ("App.") App.1a.

JURISDICTION

The decision and judgment of the Seventh Circuit were entered May 19, 2022, a petition for rehearing of which was denied August 11, 2022. That decision affirmed a decision by the U.S. District Court for the Eastern District of Wisconsin dated July 28, 2020 on which judgment was entered July 29, 2020. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2241, and 2254. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

For well over a century, it has been "clearly established" that "whether a right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court, is itself a Federal question." *Carter v. Texas*, 177 U.S. 442, 447, (1900) (citing *Neal v. Delaware*, 103 U.S. 370, 396, 397 (1880); *Mitchell v. Clark*, 110 U.S. 633, 645 (1884); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 180 (1892)). In the decision below, the U.S. Court of Appeals for the Seventh Circuit broke with that precedent. App.1a, 18a-19a. Instead, *Whyte* held that when a state court finds that a litigant has not pled sufficient "material facts" to state a federal claim, that holding is "an adequate and independent state law ground," barring federal consideration of that federal claim. App.12a, 19a. That holding is incompatible with over a century of jurisprudence from this Court and creates a split of authority among the Court of Appeals on a fundamental question of federalism. *See In re Davila*, 888 F.3d 179, 188-89 (5th Cir. 2018); *Balentine v. Thaler*, 626 F.3d 842, 853 (5th Cir. 2010); *Rivera v. Quarterman,* 505 F.3d 349, 359 (5th Cir. 2007). This Court should grant *certiorari* to correct it.

This case also provides an opportunity to reaffirm and clarify this Court's requirement that, to bar a federal court's adjudication of a state litigant's federal claim, a state court must make a "plain statement" of reliance on an independent and adequate state ground.

See Michigan v. Long, 463 U.S. 1032 (1983); *Harris v. Reed*, 489 U.S. 255 (1989). Again, the approach taken by the Court of Appeals for the Seventh Circuit ignores this Court's precedent and creates a split of authority among the Circuits. And, in this case, that approach has led to a miscarriage of justice.

* * *

When Petitioner Peter Whyte was tried for homicide in 2007, the state trial court ordered him, with no objection from his counsel, to sit trial restrained by a visible stun belt, which the trial court "preapproved" without determining that it was justified by a state interest specific to Mr. Whyte's trial. That "preapproval" was a blatant violation of Mr. Whyte's rights under the Fifth and Fourteenth Amendments as set forth by this Court in *Deck v. Missouri*, 544 U.S. 622, 635 (2005), and trial counsel's failure to object constituted ineffective assistance under *Strickland v. Washington*. Mr. Whyte's postconviction/appellate counsel never raised those claims in postconviction proceedings or on direct appeal, procedurally defaulting them.

The Seventh Circuit first considered whether Mr. Whyte could show cause and prejudice for the default of the stun belt and ineffective assistance of trial counsel claims—specifically, ineffective assistance of postconviction/appellate counsel in failing to raise either claim. The Seventh Circuit ultimately concluded that the Wisconsin Court of Appeals had decided *that* claim on an independent and adequate state ground, barring federal consideration of *all* of Mr. Whyte's claims.

According to the Seventh Circuit, the Wisconsin court held that Mr. Whyte failed to plead sufficient

"material facts" under *State v. Allen* (a Wisconsin case setting forth the "material facts" pleading standard) to demonstrate ineffective assistance of his postconviction/ appellate counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). App.13a. The Seventh Circuit concluded that this holding was independent of federal law. Additionally, the Seventh Circuit held that, although the Wisconsin court adjudicated Mr. Whyte's *Strickland* claim on its merits, the court's citation to *Allen* sufficed as a "plain statement" of reliance under *Harris v. Reed* on that purportedly independent ground as an "alternative" holding, even though the Wisconsin court never applied that standard to Mr. Whyte's petition. *See* App.17a-18a. Each of these conclusions is incompatible with this Court's precedents and the conclusions reached by other Courts of Appeals.

For over 120 years, it has been "clearly established" that "whether a right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court, is itself a Federal question." *Carter*, 177 U.S. at 447. It naturally follows that "the denial of a [habeas] petition on the grounds . . . that the petition stated no cause of action based on [a] federal right" is *not* an "independent state ground to support the denial." *See Williams v. Kaiser*, 323 U.S. 471, 478-79 (1945). Each of Wisconsin's federal district courts has thus correctly held that a Wisconsin court's conclusion that a litigant failed to meet the Wisconsin "material facts" pleading standard under *Allen* does *not* constitute an "adequate and independent" state ground for decision because it is not *independent* of federal law. *See Walker v. Pollard*, No. 18-C-0147, 2019

WL 136694, at *6 (E.D. Wis. Jan. 8, 2019); *Singleton v. Mahoney*, No. 17-CV-898-WMC, 2021 WL 848760, at *9 (W.D. Wis. Mar. 5, 2021).

Whyte is also incompatible with the conclusion reached by the Court of Appeals for the Fifth Circuit, which has correctly determined that a state court holding that a litigant has failed to state a federal claim is a decision on the *merits*—or at least one interwoven with the merits and therefore not independent of federal law. *See In re Davila*, 888 F.3d at 1888-89; *Balentine*, 626 F.3d at 853; *Rivera*, 505 F.3d at 359; *but see Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (finding that the Alabama Court of Criminal Appeals had rested its decision on "procedural default and failure to state a claim as alternative grounds"). This Court's guidance is required to address the Seventh Circuit's departure from this Court's precedents and to resolve the intra-Circuit conflict.

To the second question, *Harris* holds that where the state court adjudicates a petitioner's claim on the merits, its mere recitation of a state procedural standard does not suffice as a "plain statement" of reliance on that standard as an alternative basis for decision. Yet *Whyte* holds that a state court's mere recitation of a pleading standard, combined with the state court's ultimate conclusion that Mr. Whyte "fails to establish prejudice"—a conclusion consistent with both a procedural and a merits holding—suffices as a "plain statement" of reliance. That holding is incompatible with *Harris*, as well as with the decisions from another Court of Appeals. *See Smith v. Cook*, 956 F.3d 377, *cert. denied*, 208 L.Ed.2d 554, 141 S. Ct. 1111 (Mem) (2021). Here, too, this Court's guidance is required to

reaffirm its precedents and to resolve the conflict among the Circuits.

B. Mr. Whyte's Trial and Direct Appeal

The Seventh Circuit summarized Mr. Whyte's trial and conviction as follows:

> In August 2006, Whyte and his girlfriend, Suzanne Weiland, returned to their cabin in St. Croix County, Wisconsin after a night of drinking. Whyte declined Weiland's sexual advances and the couple began to quarrel. Enraged, Weiland lunged at Whyte with a knife, stabbing him in the chest. Whyte fell to the floor but was able to pull himself back up. Then Weiland attacked again, stabbing Whyte in his stomach. Whyte knocked Weiland back and pulled out the knife. Armed with a second knife, Weiland again charged at Whyte. This time, Whyte grabbed Weiland by the hand and stabbed her twice in the back with the knife he had removed from his stomach. The couple fell to the floor while attacking each other. Whyte continued to stab Weiland until she stopped struggling. Whyte passed out, and when he woke up, Weiland was dead beside him.
>
> Weiland received nineteen total stab wounds, including three to her neck severe enough to have caused her death within minutes. Whyte was stabbed eight to ten times. . . .
>
> Whyte was charged with first-degree intentional homicide. At trial, Whyte did not dispute that he killed Weiland, but raised self-defense—that he reasonably believed he was

> using the force necessary to prevent imminent death or great bodily harm to himself.

App.2a-3a (footnote omitted).

The trial court acknowledged that Mr. Whyte had always "behaved himself"; nonetheless, the court required Mr. Whyte to sit trial in a visible stun belt, through which an "'officer [was] authorized to send an electric shock" should Mr. Whyte have "become violent or otherwise disrupt[ed] the proceeding. . . . '" *Id.* at App.3a (quoting *Stephenson v. Neal*, 865 F.3d 956, 958 (7th Cir. 2017)). "[W]hile the judge admitted that Whyte had 'been fine,'" he "preapproved a request from the sheriff's office for Whyte to wear the stun belt at trial . . . 'out of an abundance of caution,' . . . because Whyte was 'a large man' who 'may be an emotional person.'" App.3a. As stated by the Seventh Circuit:

> Although the judge and the parties' counsel believed Whyte would wear the stun belt under his clothes so the jury would not see it, Whyte ultimately had to wear the belt over his dress shirt. Throughout the trial, Whyte's counsel tried to conceal the belt by standing in front of the jury whenever Whyte entered the courtroom. The parties . . . do not disagree that the belt interfered with Whyte's ability to explain the events surrounding Weiland's death. When Whyte took the stand to testify, he declined to reenact the altercation with Weiland for fear the jury would see the device and draw negative

> inferences.[1] . . . Despite these limitations, Whyte's trial counsel did not object to the stun belt's use.
>
> The jury was instructed on the elements of both first-and second-degree intentional homicide. For the latter charge, the jury was informed that Whyte would be guilty "if [he] caused the death of Suzanne Weiland with the intent to kill, and actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, but his belief was unreasonable." The jury found Whyte guilty of second-degree intentional homicide, and he was sentenced to forty years of incarceration followed by twenty years of extended supervision.
>
> Whyte appealed his conviction and his counsel raised a single issue—that the admission into evidence of Weiland's statements about her relationship with Whyte violated the Sixth Amendment's Confrontation Clause.

App.3a-4a (third alteration in original). The prosecution had introduced these statements, however, to argue that the killing of Ms. Weiland was *premeditated—i.e.*, that Mr. Whyte was guilty of first-degree intentional homicide. App.66a. Yet Mr. Whyte had *not been convicted* of that offense. Unsurprisingly, therefore, the Wisconsin Court of Appeals held that the error, if any, was harmless, as the challenged statements did

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[1] Mr. Whyte also alleges the belt had a chilling effect on his testimony, rendering his account of the incident "'stilted' and 'emotionless,' a point the State underscored in its closing argument." App.4a.

not bear on the core question of whether the force Mr. Whyte used was reasonable. App.66a. Mr. Whyte petitioned the Wisconsin Supreme Court and was denied. App.5a.

C. Postconviction Proceedings in State Court

Proceeding *pro se*, Mr. Whyte sought postconviction relief in the trial court under Wisconsin Statutes section 974.06, raising not only his stun belt claim but also trial counsel's failure to object—and postconviction/appellate counsel's failure to raise *either* issue, in favor of the single Confrontation Cause issue on appeal.[2]

"The state trial court denied Whyte's motions without a hearing, finding that his claims either lacked merit or were procedurally barred by *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), because Whyte did 'not rais[e] the majority of his issues in his direct appeal.'" App.5a-6a (alteration original).

On appeal, Mr. Whyte argued that his postconviction counsel was ineffective by not raising these issues, constituting a "sufficient reason" for his default. Accordingly, the Wisconsin Court of Appeals

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[2] Under Wisconsin's procedural scheme, Mr. Whyte's appellate counsel, who was also appointed as his "postconviction" counsel, should have first raised the ineffectiveness of trial counsel in a postconviction motion in the trial court. *See State ex rel. Warren v. Meisner*, 2020 WI 55, ¶ 5, 392 Wis. 2d 1, 944 N.W.2d 588; Wis. Stat. § 974.06(1)-(2). However, counsel refused to do so. Instead, acting as "appellate" counsel, he filed a direct appeal in the Wisconsin Court of Appeals, raising the single issue discussed above. Because his failure to raise a meritorious argument through postconviction motion is best understood in light of his contemporaneous decision to raise only the weaker issue on appeal, Mr. Whyte refers to counsel as "postconviction/appellate" counsel.

"addressed the merits of Whyte's claims." App.7a. The court assumed trial counsel performed deficiently but held Mr. Whyte failed to establish prejudice at trial, due to "overwhelming evidence of Whyte's guilt." App.36a, 55a. Thus, the court held, because the ineffective assistance of trial counsel claim failed on its merits, appellate counsel could not have been constitutionally ineffective for failing to raise it on appeal—a separate merits holding regarding the postconviction/appellate counsel claim. App.55a-56a.

The Wisconsin Court of Appeals also stated that Mr. Whyte had failed to establish prejudice under *Strickland*'s second prong. App.56a. Because Mr. Whyte's Petition turns, in large part, on the Wisconsin Court of Appeals' treatment of this issue, Mr. Whyte produces it in full below:

> ¶ 9 With respect to Whyte's challenge to the effectiveness of his appellate counsel, Whyte again fails to establish prejudice. Whyte indicates: "At a hearing, the defendant will establish that post-conviction counsel's deficient performance prejudiced him." We determine the sufficiency of a defendant's reason for circumventing *Escalona-Naranjo*'s procedural bar, however, by examining the "four corners" of the subject postconviction motion. *See State v. Allen*, 2004 WI 106, ¶ 27, 274 Wis. 2d 568, 682 N.W.2d 433. Whyte, therefore, was required to show both deficient performance *and* prejudice within his Wis. Stat. § 974.06 motion. Motions containing only conclusory and legally insufficient allegations that postconviction counsel was ineffective are insufficient to circumvent

> *Escalona-Naranjo*'s procedural bar. *Allen*, 274, Wis. 2d 568, ¶¶ 84-87.

App.56a. The Wisconsin Court of Appeals ultimately held that, because Mr. Whyte could not show ineffective assistance of appellate counsel, he had not established a "sufficient reason" for failing to raise his claims on direct appeal. App.17a, 53a.

D. Federal Habeas Proceedings

With his state remedies exhausted, Mr. Whyte returned to the federal district court and filed an amended habeas petition, again asserting federal claims based on the stun belt, the ineffectiveness of his trial counsel for permitting it, and the ineffectiveness of his postconviction/appellate counsel for refusing to raise those issues and choosing to raise the irrelevant Confrontation Clause issue. App.8a. The magistrate judge denied Mr. Whyte's petition, holding that his stun belt claim was procedurally defaulted under *Escalona-Naranjo* because it could have been raised on direct appeal, and that trial counsel "was not ineffective" under *Strickland*. App.33a-34a.

Ignoring the Wisconsin Court of Appeals' stated decision to address Mr. Whyte's postconviction/appellate counsel claims "on their merits," as well as the Wisconsin courts' merits holding on *Strickland*'s first prong, the magistrate judge pointed to the court's invocation of *Allen*'s holding that "'[m]otions containing only conclusory and legally insufficient allegations that postconviction counsel was ineffective are insufficient to circumvent *Escalona-Naranjo*'s procedural bar.'" App.41a, 55a-66a & n.6. The magistrate judge then assumed, incorrectly, that Mr. Whyte's post-convic-

tion motion contained "*only*" a conclusory statement that Mr. Whyte would demonstrate prejudice at a hearing: "Here, Whyte stated *only* that '[a]t a hearing, the defendant will establish that post-conviction counsel's deficient performance prejudiced him.'" App.41a (emphasis added).

However, the magistrate judge failed to appreciate that the Wisconsin Court of Appeals did *not* in fact find that Mr. Whyte had stated "only" that he would establish prejudice at a hearing—and for good reason. In fact, Mr. Whyte had pled exactly what the magistrate judge assumed he had not:

> Counsel's failure to identify [the improper use of the stun belt] and follow up on it with the defendant was objectively unreasonable and *the defendant was prejudiced when we was deprived of a meaningful appeal and the review of an issue that was substantially stronger then the issue raised by counsel.*
>
> The defendant requests an evidentiary hearing on this issue, where he will testify that the stun belt was placed on the outside of his shirt everyday of the trial, the stun belt *made him extremely nervous* because of his heart condition, he spent the trial sitting in a chair behind his attorneys with no table to block the jury's view of him, because of the stun belt *he was terrified to make any movements while testifying*, and the belt alone . . . *prevented him from attempting to communicate with his attorneys*. . . . At the conclusion of the hearing, the defendant will have established that there was insufficient justification to have him in restraints, the

> restraints prevented him from communicating with counsel, from being able to physically demonstrate his defense, and negatively affected his demeanor while testifying, and that trial and post-conviction counsel prejudiced his defense with their deficient performance.

App.79a. (emphasis added).[3]

Before the Seventh Circuit, Mr. Whyte explained that, as each of Wisconsin's federal district courts had already concluded, a Wisconsin court's invocation of *Allen* could not constitute a "bona fide separate, adequate, and independent" ground for its decision under *Long* and *Harris* in the first place because *Allen* is not "independent" of federal law. *See Long*, 463 U.S. at 1040-41. Rather, because *Allen* "requires a court to apply the relevant substantive law, in cases in which the relevant substantive law is federal, the *Allen* rule cannot be 'independent' of the federal question for purposes of the independent-and-adequate-state-ground doctrine." *Walker*, 2019 WL 136694, at *6; *see Singleton*, 2021 WL 848760, at *10. In other words, "to apply the *Allen* rule to a federal constitutional claim, a Wisconsin court will have to make a federal constitutional ruling." *Walker*, 2019 WL 136694, at *6. By holding that Mr. Whyte had failed to plead "material facts" demonstrating prejudice under *Strickland*, the Wisconsin Court of Appeals necessarily considered the federal substantive standards

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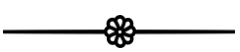
[3] Following an unsuccessful motion for reconsideration, Mr. Whyte filed a timely notice of appeal on February 11, 2021. On April 1, 2021, the Court of Appeals granted Mr. Whyte's request for a certificate of appealability.

governing that inquiry, including what facts are, and are not, "material" to that prong. This is a "federal constitutional ruling." *Id.*; *see Allen*, 682 N.W.2d at 442.

Second, Mr. Whyte argued that, even if *Allen could* represent an adequate and independent basis for decision, under *Harris*, the Wisconsin Court of Appeals' mere citation of *Allen* alongside its conclusion that "Whyte fails to establish prejudice"— following its merits analysis under *Strickland*'s first prong— was not a "plain statement" of reliance on *Allen*.

The Seventh Circuit affirmed. It acknowledged that, under *Allen*, "a Wisconsin court must always examine the substance of the underlying claim to determine whether it is sufficiently pleaded." App.19a. However, the Seventh Circuit held that a state court holding that merely requires a state court to "examine the substance" of a federal claim was nonetheless "independent" of federal law. App.19a.

Mr. Whyte's petition for rehearing *en banc* was denied.



REASONS FOR GRANTING THE PETITION

Under the guise of respecting state court application of state law, *Whyte*'s holding bars federal courts from addressing the *federal* question of whether a *federal* claim "was distinctly and sufficiently pleaded and brought to the notice of a state court." *See Carter*, 177 U.S. at 447. This holding creates a contradiction between the independent and adequate state ground doctrine as applied on direct review, and the same doctrine as applied on collateral review. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Under *Carter*, it has been established for over 120 years that, on direct review, the federal courts *do* have jurisdiction to address whether a federal claim was adequately pled in state court. Inexplicably, *Whyte* holds that, on habeas review, federal courts are barred from reviewing that *identical* question. There is no justification for this incongruity; whether a federal claim is adequately pled cannot be "*a Federal question*" on direct review yet *independent of federal law* on habeas review. *See Carter*, 177 U.S. at 447 (emphasis added). This inconsistency, and the Circuit split it creates, requires this Court's intervention and correction.

Whyte also deviates from this Court's holding in *Harris* with respect to the "plain statement" requirement. This creates another split of authority among the Circuits, which "is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved," *see Long*, 463 U.S. at 1039 (referring to this Court's previously "*ad hoc*" method for determining the adequacy and inde-

pendence of state court decisions), and separately justifies granting *certiorari*.

When reviewing the application of federal law by the States, this Court must balance two principles. First, this Court has "long recognized that dismissal is inappropriate 'where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below.'" *Long*, 463 U.S. at 1040 (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 556 (1940)). At the same time, "[t]he jurisdictional concern" that this Court "not 'render an advisory opinion,'" requires that it refrain from correcting erroneous applications of federal law by state courts if such decisions would only be affirmed on remand based on independent procedural grounds. *Id.* at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). Thus, federal courts "lack[] jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris*, 489 U.S. at 260).

The independent and adequate state ground doctrine applies with equal force in federal habeas cases, though the "basis . . . is somewhat different." *Coleman*, 501 U.S. at 730. While the court does not review the state court judgment directly, if a "federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review," effecting an end run around the limits of federal jurisdiction.

Id. Hence, comity and federalism preclude federal courts from addressing the merits of federal claims on habeas review where they were decided on an independent and adequate state law ground. *Id.*

But "[i]t is not always easy for a federal court to apply the independent and adequate state ground doctrine." *Id.* at 733. To accurately and consistently distinguish state decisions that rest on the federal constitution from those that rest on independent state grounds, therefore, this Court has required that the state "opinion itself" include a "plain statement" of reliance on such grounds "when it fairly appears that the state court rested its decision primarily on federal law." *Long*, 463 U.S. at 1042; *see Harris*, 489 U.S. at 261.

I. *WHYTE* WOULD BAR FEDERAL COLLATERAL REVIEW OF "A FEDERAL QUESTION."

A. This Court's Precedent Forecloses the Decision Below.

As the Seventh Circuit acknowledged, under Wisconsin's "material facts" pleading standard from *Allen*, "a Wisconsin court must *always* examine the substance" of a federal claim "to determine whether it is sufficiently pleaded." App.19a (emphasis added). A decision that rests upon "examining the substance" of a federal claim, and determining whether the "material facts" pled meet that "substance," is "interwoven" with, and not "independent" of, federal law. *See Long*, 463 U.S. at 1040. Indeed, as of 1900, it was "clearly established" that whether a federal claim "was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question." *Carter*, 177 U.S. at 447. The inquiry should end here.

Nonetheless, the Seventh Circuit charted a new path, distinguishing between the "substance" of a federal claim and the "merits" of that claim. App.18a-19a. In the Seventh Circuit's formulation, a state law ground that necessarily requires a state court to "examine the substance" of a federal claim to determine whether it was adequately pled is nonetheless "independent of federal law if it does not depend on the *merits* of the petitioner's claim." App.18a. This distinction is incompatible with *Carter*, and with the century of jurisprudence since.

In *Carter*, a Black criminal defendant, Carter, moved to quash his indictment for first degree murder on the grounds that Texas had excluded all Black people from the grand jury that returned it. *Carter*, 177 U.S. at 444. Carter offered to prove his allegations in a sworn affidavit, which itself contained no testimony or other evidence supporting its allegation. *Id.* at 444-445. "[W]ithout investigating into the truth or falsity of the allegations," the trial court denied the motion. *Id.* at 445. The Texas Court of Criminal Appeals affirmed, ultimately relying on the fact that "the question was presented to the court without any evidence whatever in support of it," that it "name[d] no witness or person by whom it was proposed to prove the allegations of the motion," and was, thus, merely a "bare recitation. . . . " *Id.* at 446 (quoting *Carter v. State*, 48 S.W. 508, 511 (Tex. Crim. App. 1898). In other words, the Texas Court of Criminal Appeals affirmed the dismissal of Carter's motion because it found Carter's allegations conclusory.

Asserting jurisdiction on direct review, this Court explained that "whether a right or privilege, claimed under the Constitution or laws of the United States

was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state." *Id.* at 447. This Court then examined Carter's motion and reversed, finding that it "FULLY AND SPECIFICALLY ALLEGED" the denial of "the equal protection of the laws" arising from the exclusion from the grand jury based on race. *Id.* at 448.

As in *Carter*, the Seventh Circuit affirmed the dismissal of Mr. Whyte's petition "because his pleadings were 'conclusory and legally insufficient' under *Allen*," which the Seventh Circuit mistakenly believed could serve as an "independent" basis for decision. App.17a. But as in *Carter*, whether Mr. Whyte's federal claim "was distinctly and sufficiently pleaded" to the Wisconsin courts "is itself a Federal question." *See Carter*, 177 U.S. at 447.

If applicability of *Carter* in the habeas context could be doubted, this Court dispelled any such doubts in *Williams*, 323 U.S. at 478-79. In *Williams*, the Supreme Court of Missouri rejected a habeas petition asserting a due process claim under the Fourteenth Amendment, finding that it "fails to state a cause of action." *Id.* at 473. Recognizing that the Supreme Court of Missouri's "decision is binding on us insofar as state law is concerned," this Court observed that "[t]he petition establishes on its face the deprivation of a federal right," meaning that "[t]he denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right." *Id.* at 478. And "when we search for an independent

state ground to support the denial, we find none." *Id.* at 478. In other words, "the denial of a [habeas] petition on the grounds . . . that the petition stated no cause of action based on [a] federal right" is *not* an "independent state ground to support the denial." *See id.* at 478-79.

Nor can *Allen* constitute an independent state ground in light of this Court's decision in *Foster*, 578 U.S. at 497-99. "Before turning to the merits" of Foster's federal *Batson* claim, this Court, *sua sponte*, addressed the "threshold issue" of its jurisdiction. *Id.* at 496. The Georgia habeas court rejected Foster's claim based on Georgia's *res judicata* doctrine, but it did so only after examining whether Foster "ha[d] shown any change in the facts" sufficient to overcome that bar. *Id.* at 498. Because determining whether a "change in the facts" exempted Foster's federal claim from the state's *res judicata* bar required the Georgia court to analyze the "merits" of Foster's federal claim, this Court determined that the Georgia court's application of its own *res judicata* doctrine "was not independent of the merits of [Foster's] federal constitutional challenge." *Id.*; *see id.* at 521 (Alito, J., concurring) (explaining that if "the State Supreme Court reached a conclusion about the effect of the state *res judicata* bar based in part on an assessment of the strength of Foster's *Batson* claim or the extent to which the new evidence bolstered that claim . . . [then] the rule that the court applied was an amalgam of state and federal law.").

As in *Foster*, the Wisconsin Court of Appeals' purported holding, that Mr. Whyte had not pled sufficient "material facts" under Wisconsin's pleading standard, required the Wisconsin court to analyze

what "material facts" *would* show prejudice under *Strickland—i.e.*, to analyze the "merits" of a valid federal claim. Under this Court's precedent, that inquiry "was not independent of the merits of his federal constitutional challenge." *See id.* at 498.

Whyte broke with *Carter*, *Williams*, and *Foster* on grounds that will create confusion and themselves conflict with precedents of this Court. The correct inquiry is whether the state ground for decision is "*interwoven* with the federal law," *Long*, 463 U.S. at 1040 (emphasis added), or whether "application of a state law bar 'depends on a federal constitutional ruling,'" *Foster*, 578 U.S. at 497 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). There is no "substance vs. merits" distinction under this inquiry. Nor is there room to insert one, because this Court has held that a ruling that a litigant has not adequately pled a federal law claim *is* a ruling "on the merits." *See Granberry v. Greer*, 481 U.S. 129, 130 (1987). There is no reason that dismissal of the same claim, under a state's "material facts" pleading standard, would transform from a decision "on the merits" into one that "does not depend on the *merits*." App.18a.

If a Wisconsin court rejected Mr. Whyte's federal claim because of a purported failure to plead "material facts" sufficient to plead a colorable *Strickland* claim, this Court would undoubtedly have jurisdiction to review that holding under *Carter*, *Williams*, and *Foster*. Doing so would raise no "jurisdictional concern" of potentially rendering an advisory opinion because it is not possible that "the same judgment would be rendered by the state court after [this Court] corrected its views of Federal laws. . . . " *Herb*, 324 U.S. at 126. This was precisely the holding rendered in *Carter*. In

this light, it is apparent that a Wisconsin court's decision that a federal Constitutional claim was insufficiently pled under *Allen* is "entirely dependent on federal law," like the "antecedent" question at issue in *Ake*. *See Foster*, 578 U.S. at 521 (Alito, J., concurring); *see also Ake*, 470 U.S. at 75. Whether a state court litigant has stated a federal claim is no less "a Federal question," "dependent on" or "interwoven with" federal law, if it arrives on collateral, rather than direct review. *See Carter*, 177 U.S. at 447; *Foster*, 578 U.S. at 521 (Alito, J., concurring); *Long*, 463 U.S. at 1040.

For the same reasons it raises no "jurisdictional concern" on direct review, a federal holding that a Wisconsin litigant *has* stated sufficient "material facts" to make out a federal claim raises no "concerns of comity and federalism" that drive the independent and adequate state ground doctrine on habeas review. *See Coleman*, 501 U.S. at 730. A holding that the state court incorrectly analyzed the bounds of *federal* law in determining whether a petitioner stated a viable *federal* claim does not "ignore[] the State's legitimate reasons for holding the prisoner." *Id.* Nor, for that matter, does it "offer state prisoners . . . an end run around the limits of [federal] jurisdiction." *Id.* Instead, it would uniformly apply the bounds of that jurisdiction, rather than create an anomaly where state courts may foreclose on collateral review what they cannot foreclose in *the same case* reviewed directly.

By holding that *Allen* represents an independent state law ground, *Whyte* broke with decades of precedent holding that whether a federal claim is sufficiently pled is a federal question—one that is at the very least interwoven with federal law. The decision

would mean that whether a federal claim is sufficiently pled is a federal question on direct review—but *independent of federal law* on collateral review. This untenable incongruity requires this Court's intervention and correction.

B. *Whyte* Conflicts with a Line of Decisions in the Fifth Circuit.

The Seventh Circuit's holding also conflicts with the law of the Fifth Circuit, which has, in its own words, "held that a determination by a state court that a petitioner failed to make a 'prima facie showing' of 'sufficient specific facts' to entitle him to relief is a decision on the merits." *Balentine*, 626 F.3d at 853 (quoting *Rivera*, 505 F.3d at 359). In *Rivera*, the Fifth Circuit concluded that Texas' "abuse of the writ doctrine," under which the Texas Court of Criminal Appeals (CCA) may dismiss a petition that does not state a prima facie case for relief, "is not an independent state law ground" with respect to a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Rivera*, 505 F.3d at 359. "Although Texas' abuse of the writ doctrine is superficially procedural in that it has a procedural effect," the Fifth Circuit explained, "it steps beyond a procedural determination to examine the merits of an *Atkins* claim" because "to decide whether an *Atkins* claim is an abuse of the writ, the CCA examines the substance of the claim to see if it establishes a prima facie case of retardation, and only upon deciding that question can the state court decide whether remand is appropriate." *Id.* at 359-60.

The logic of the Fifth Circuit's analysis applies equally to the pleading of *any* federal claim. To determine whether a litigant has stated a claim for

violation of a federal constitutional right, a court must necessarily "step[] beyond a procedural determination to examine the merits" of the asserted claim. The Fifth Circuit therefore applied this same logic in *In re Davila*, where a state court had dismissed a habeas petitioner's claim for a *Brady* violation, purportedly "without reviewing the merits of the claims raised." *In re Davila*, 888 F.3d at 187. Notwithstanding the state court's disclaimer, the Fifth Circuit concluded that the state court's holding that the petitioner "failed to make a *prima facie* showing" of a violation of federal law was "what common sense would indicate to be a *clear example of the merits-based language* we are looking for in applying *Balentine*." *Id.* at 188-89 (emphasis added) (citation omitted). In other words, the Fifth Circuit holds that a litigant's purported failure to plead "'sufficient specific facts'" to state a federal claim, *Balentine*, 626 F.3d at 853, "is not an independent state law ground" for decision precisely because it requires that the state court "examines the substance" of the federal claim, *Rivera*, 505 F.3d at 359—even where the state court purports to reach its holding "without reviewing the merits of the claims raised." *In re Davila*, 888 F.3d at 187. *Whyte* wholeheartedly conflicts with this line of decisions.

* * *

For over 120 years, it has been "clearly established" that "whether a right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court, is itself a Federal question." *Carter*, 177 U.S. at 447. This Court has applied that rule to state decisions dismissing purportedly conclusory motions, *id.* at 446, and to habeas petitions, *Williams*, 323

U.S. at 478–79. Likewise, this Court has held that the decision that a petition failed to state a cause of action under federal pleading standards is a decision "on the merits," *Granberry*, 481 U.S. at 130, and that the failure to allege a sufficient "change in facts" to justify relief from a state procedural bar, which required inquiry into the substance of the federal claim, is "not independent of the merits of [the] federal constitutional challenge." *Foster*, 578 U.S. at 497-99. The Fifth Circuit followed these precedents, correctly concluding that a state court's holding that a petitioner failed to plead "'sufficient specific facts' to entitle him to relief is a decision on the merits." *Balentine*, 626 F.3d at 853 (quoting *Rivera*, 505 F.3d at 359). The Seventh Circuit's holding to the contrary abandons clearly established law, splits with its sister Court of Appeals, and creates irreconcilable inconsistency in applying the independent and adequate state law doctrine across direct and collateral review. This Court should grant *certiorari* to resolve the conflict.

II. *WHYTE* IS INCOMPATIBLE WITH THIS COURT'S DECISION IN *HARRIS* AND CREATES A CIRCUIT SPLIT FOR A SECOND REASON.

This Court should grant *certiorari* on a second question as well. Under *Harris*, "if 'it fairly appears that the state court rested its decision primarily on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds."'" 489 U.S. at 261 (quoting *Long*, 463 U.S. at 1042).

However, *Whyte* holds that the mere invocation of a state procedural standard (assuming *Allen* could so qualify)—without even a finding that the standard

might apply, much less an *application* of it—is a "plain statement" of reliance under *Harris* and *Long*. This holding, too, breaks with this Court's precedent and creates a second split among the Courts of Appeals that requires *certiorari* review.

A. *Whyte* Conflicts with *Harris*.

Harris holds that where a state court adjudicates a habeas petitioner's claim on its merits and then invokes a state procedural standard—even one that the state court observes *could* bar the petitioner's claims—a failure *to apply* that standard to the facts of the petitioner's case prohibits a federal court from later attempting to divine the state court's "intent" to rely upon that standard, as opposed to its merits holding. *See Harris*, 489 U.S. at 259. As this Court described the Appellate Court of Illinois' decision at issue in *Harris*:

> In its order, the Appellate Court referred to the "well-settled" principle of Illinois law that "those [issues] which could have been presented [on direct appeal], but were not, are considered waived." The court found that, "except for the alibi witnesses," petitioner' ineffective-assistance allegations "could have been raised in [his] direct appeal." The court, however, went on to consider and reject petitioner's ineffective-assistance claim on its merits.

Harris, 489 U.S. at 258 (alterations original) (citations omitted). That is, the Illinois court recited a procedural standard, and determined that the standard could have been invoked to bar the petitioner's claim. However, it failed to "connect the dots" by offering a plain

statement of its reliance on that standard. Nonetheless, the Seventh Circuit had held that the Illinois court had reached the merits "as an alternate holding" and that "the order 'suggest[ed]' an intention 'to find all grounds waived except that pertaining to the alibi witnesses.'" *Id.* (alteration original) (citation omitted).

This Court reversed, applying the "conclusive presumption" articulated in *Long* that federal review is proper where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," unless the state court states "clearly and expressly that [its decision] is . . . based on bona fide separate, adequate, and independent grounds." *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (alterations original) (quoting *Long*, 463 U.S. at 1040-41). In other words, when a state court reaches the merits of a federal claim, federal review is precluded only if the "state court's opinion contains a '"plain statement" that [its] decision rests upon adequate and independent state grounds.'" *Harris*, 489 U.S. at 261 (alteration original) (citation omitted). The Illinois court's recitation of the "well-settled" principle of waiver—even combined with its observation that the petitioner's ineffective assistance of counsel claim *could* have been rejected on that ground—did not amount to the requisite "plain statement" of reliance on waiver to dispose of the claim. *Id.* at 266.

In this case, as the Seventh Circuit acknowledged, the Wisconsin Court of Appeals adjudicated the deficient performance prong of Mr. Whyte's claim for ineffectiveness of postconviction/appellate counsel on the merits. App.7a, 55a-56a. This gives rise to the "conclusive presumption" that review is proper, rebuttable only if the Wisconsin Court of Appeals

included a "plain statement" of reliance on independent and adequate state grounds. *See Coleman*, 501 U.S. at 733. But in the next paragraph, the Wisconsin Court of Appeals held only that Mr. Whyte "fails to establish prejudice." App.56a. It then recited, but declined to apply, a procedural rule—that conclusory pleadings, in general, are "insufficient to circumvent *Escalona-Naranjo's* procedural bar," for which it cited "[*State v.*] *Allen*, 274, Wis. 2d 568, ¶¶ 84-87." *Id.* In other words, the Wisconsin court failed to connect the dots.[4]

Under *Harris*, the conclusion that Mr. Whyte "fails to establish prejudice" *because of a procedural deficiency* does not directly follow from the mere recitation of a procedural standard. In fact, under *Harris*, even an observation that Mr. Whyte's pleadings *could* have been dismissed as conclusory would not suffice—an observation the Wisconsin court never made. To erect a procedural bar, the Wisconsin court needed only to 'plainly state' that it was rejecting Mr. Whyte's pleadings for a procedural reason. The fact that it did not include that simple statement, after reaching the merits of Mr. Whyte's claim, renders controlling the "conclusive presumption" that federal courts may review that claim.

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[4] The structure of the Wisconsin Court of Appeals' opinion, as well as the reality of what Mr. Whyte actually pled, render the statement that "Mr. Whyte again fails to establish prejudice" unclear at best. Notably, the first time the court had found that Mr. Whyte "failed to establish prejudice," with respect to his ineffective assistance of trial counsel claim, it did *so on the merits*. App.55a. Referencing this earlier merits holding with "again" suggested that the second finding of a failure to establish prejudice likewise rested on the court's merits analysis. In any event, it is the ambiguity that matters.

This is true even though the Wisconsin court suggestively quoted one arguably conclusory statement from those pleadings—"'At a hearing, the defendant will establish that post-conviction counsel's deficient performance prejudiced him.'" App.56a. The Wisconsin court did not state that this quotation was the *only* thing Mr. Whyte pled on the subject. Nor would such a statement have been correct; again, Mr. Whyte pled detailed facts establishing the prejudice that he suffered at trial as a result of the stun belt, demonstrating the strength and merit of both the stun belt and ineffective assistance of trial counsel claims. App.79a. The fact that those claims had merit means that there is a reasonable probability the outcome of the appeal would have been different had postconviction/appellate counsel pursued them—the definition of prejudice. *Strickland*, 466 U.S. at 694.

Nonetheless, the Seventh Circuit purported to detect a "plain statement" of reliance on *Allen*. It did so by reading into the Wisconsin court's decision a finding that Mr. Whyte "merely" or "only" pled conclusory allegations—a finding that the Wisconsin Court of Appeals never made and, as shown by Mr. Whyte's pleadings themselves, is factually incorrect. *See* App.7a, 13a. The Seventh Circuit not only inferred this factual finding the Wisconsin Court of Appeals never made, it also inferred the Wisconsin court's *reliance* on that finding—in the Seventh Circuit's own words, that "Whyte 'fail[ed] to establish prejudice' *because* his pleadings were 'conclusory and legally insufficient' under *Allen*." App.17a (alteration original) (emphasis added). By treating the suggestive invocation of a state rule as an application of, and "plain statement" of *reliance* upon that rule, the Seventh

Circuit necessarily "tr[ied] to assess the state court's intention"—precisely what this Court has forbidden. *See Harris*, 489 U.S. at 259 (citation omitted). The Wisconsin Court of Appeals' failure to plainly state the basis for its holding cannot, under this Court's precedents, be repaired by reviewing federal courts divining what the state court *probably* meant.

Thus, the Wisconsin Court of Appeals merely invoked *Allen* in reference to the prejudice prong of its inquiry, after its merits determination of the first prong of that inquiry, just as the Illinois court had invoked waiver in *Harris* prior to its merits holding. Just as the Illinois court's suggestive invocation did not amount to a "plain statement" of reliance on waiver, the Wisconsin court's invocation of *Allen* and suggestive quotation of Mr. Whyte's pleading did not constitute a "plain statement" that its ultimate holding rested on state procedural grounds.[5]

Harris and *Long* teach that where a state court reaches the merits of a federal claim, there is a *presumption* of federal review. As *Long* put it:

> in determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, *see Abie State Bank v. Bryan, supra*, 282 U.S. at 773, we merely assume

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[5] That is especially true for two separate reasons. First, the citation to "*Allen*, 274 Wis. 2d 568, ¶¶ 84-87" referenced paragraphs that do not exist. *Allen* contains only 36 paragraphs. *See State v. Allen*, 2004 WI 106, 682 N.W.2d 433. Second, the Wisconsin court observed that it *could* have dismissed Mr. Whyte's petition based on a *different* Wisconsin procedural rule but stated that it would "nonetheless address Whyte's claims on their merits." App.55a. & n.6.

> that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Long, 463 U.S. at 1042. The Seventh Circuit impermissibly reversed this presumption, essentially holding that a state court's invocation of state procedural law presumptively constitutes a "plain statement" of reliance thereon unless the state court clearly states otherwise. That approach is incompatible with *Harris* and *Long* and requires reversal.

B. *Whyte* Conflicts with the Conclusion Reached by the Sixth Circuit and with the Position Previously Taken by the Seventh Circuit Itself.

Not only did the Seventh Circuit's decision below impermissibly read between the lines of the Wisconsin Court of Appeals' decision as prohibited by *Harris*, but it also created a split with the Sixth Circuit, and within the Seventh Circuit, too.

The Sixth Circuit confronted a materially identical decision from the Ohio Court of Appeals in *Smith v. Cook*, 956 F.3d 377 (6th Cir. 2020). The Ohio court had rejected a habeas petitioner's claim under the Confrontation Clause on its substance, stating that it disagreed with the petitioner's legal argument. *Smith*, 956, F.3d at 385. As the Sixth Circuit described, the Ohio court then "agnostically observed that 'this issue *can* be classified as falling within the invited error doctrine which prohibits a party from being "permitted to take advantage of an error which he himself invited

or induced the trial court to make."'" *Id.* "But despite indicating that invited error *might* apply, the Ohio Court of Appeals never specifically determined that invited error in fact *did* apply." *Id.* As the Sixth Circuit explained, "where a state court has omitted the punchline, we and our sister circuits have declined to apply procedural default." *Id.* (citing, *inter alia*, *Sanders v. Cotton*, 398 F.3d 572, 579-80 (7th Cir. 2005)).

Just as in *Whyte*, the Ohio Court of Appeals decided the petitioner's claim on its merits and then went on to cite a procedural rule; like the Illinois court in *Harris*, the Ohio court even explicitly held that rule *could* apply to the petitioner's claim. Yet even *that* was insufficient to interpret the Ohio court's decision as a "'clear and express statement' that it had actually applied" the recited doctrine. In direct conflict, *Whyte* holds that the mere recitation of a state procedural standard, along with an ultimate holding that would follow from either the court's merits analysis or an application of the procedural standard, suffices as such a "clear and express statement" of reliance. This Court should intervene to provide clarity on the bounds of *Harris* and resolve the intra-Circuit conflict.

As *Smith* indicates, *Whyte* also creates a conflict *within* the Seventh Circuit. *Sanders* applied *Harris* to another state court decision almost exactly like the one in this case, where the state court conducted a merits analysis while *also* suggestively reciting a state procedural rule. *See Sanders*, 398 F.3d at 579-80. In *Sanders*:

> The Court of Appeals of Indiana recited that "[i]f an issue was available on direct appeal but not litigated, it is waived." But instead

> of following that observation with a conclusion such as "and Sanders' claims are waived under that standard," the court immediately proceeded to address and decide the merits.

Sanders, 389 F.3d at 579. Consistent with *Harris*, *Sanders* held that a mixed bag of merits analysis and procedural rule recitation does not bar federal review of a petitioner's claim where "the Indiana appellate court *never applied the doctrine of waiver to the claims Sanders raised*" such that "the appellate court's discussion of waiver is intertwined with its merits analysis of Sanders's claims," meaning that "the state court's decision does not rest on an independent and adequate state law ground." *See Id.* at 579-80 (citing *Harris*, 489 U.S. at 266; *Moore*, 295 F.3d at 774-75) (emphasis added).

Thus, where a state court reaches the merits of a claim but also recites a procedural rule, *even suggestively*, the Seventh Circuit agreed—until *Whyte*—that courts may not divine an "intention" to rely upon the rule. *See Harris*, 489 U.S. at 259. Only a "clear[] and express[]" statement of reliance on a state procedural rule will bar federal review. *Harris*, 489 U.S. at 263; *see Sanders*, 398 F.3d at 579.

If anything, Mr. Whyte's case is even further from meeting the plain statement rule than *Harris*, *Smith* or *Sanders*. In *Harris*, the Illinois court found that the petitioner's claims "could have been presented [on direct appeal], but were not" (*i.e.*, that they were subject to waiver). *Harris*, 489 U.S. at 258 (alteration original) (citation omitted). In *Smith*, the Ohio Court of Appeals stated that the issued raised "can be classified as falling within the invited error doctrine. . . ." *Smith*, 956 F.3d at 385 (citation omitted). And in

Sanders, the state court's fundamental error analysis would have been necessary only if there was a waiver to circumvent in the first place—yet because the court "never applied the doctrine of waiver to the claims Sanders raised," the Seventh Circuit correctly held that the plain statement rule was not satisfied. *Sanders*, 398 F.3d at 579-580; *see Sanders v. Indiana*, 764 N.E.2d 705, 709 (Ind. Ct. App. 2002).

By contrast, here, the Wisconsin court never expressly held that *Mr. Whyte's* pleadings were conclusory, or stated that *Allen* could apply—only that conclusory pleadings fail and that, ultimately, for an unspecified reason, Mr. Whyte had not "established" prejudice. Unlike *Harris*, *Smith*, and *Sanders*, then, the Wisconsin court did not even find that the recited procedural rule could apply to Mr. Whyte's petition; the Seventh Circuit's conclusion that the invocation of this rule alone somehow sufficed as a "plain statement" of reliance upon it thus conflicts with each of those holdings and requires correction.

CONCLUSION

For two reasons, *Whyte*'s holding that whether a state litigant has pled properly a federal claim is a question independent of federal law "is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved." *See Long*, 463 U.S. at 1039. First, after *Whyte*, "whether a right or privilege, claimed under the Constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court is itself a Federal question" on direct review but is no longer "itself a Federal question" on collateral review. *See Carter*, 177 U.S. at 447. The unnecessary introduction of that paradox is reason enough to grant *certiorari*. Yet *Whyte* also creates unnecessary doctrinal inconsistency by splitting with the Fifth Circuit's well-reasoned line of cases that thoroughly grapple with the issue, a split that itself justifies granting *certiorari*.

Finally, even on its own terms, *Whyte*'s application of the "plain statement" rule conflicts with this Court's precedent in *Harris* and requires this Court's review as well. Reviewing a state court decision that was far more suggestive in its invocation of procedural rules, *Harris* drew a bright line, forbidding federal courts from succumbing to the temptation to divine a state court's intent to rely upon a procedural rule—even one that *could* apply. *Whyte* ignored that bright line, reading between the lines of a state court decision to discover reliance on a rule that *did not* apply. This, too, was error, which created a second direct conflict

among the Courts of Appeals. It too requires that this Court grant *certiorari*.

Respectfully submitted,

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