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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LAMARR ROBINSON,

Petitioner-Appellant,

v.

CONNIE HORTON, Warden,

Respondent-Appellee.

No. 18-1979

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-12721—Denise Page Hood, Chief District Judge.

Argued: December 13, 2019

Decided and Filed: February 13, 2020

Before: GILMAN, KETHLEDGE, and READLER, Circuit Judges.

COUNSEL

ARGUED: Steven D. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. Rebecca A. Berels, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Steven D. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. Linus Banghart-Linn, MICHIGAN DEPARTMENT OF ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Lamarr Robinson, Kincheloe, Michigan, pro se.

OPINION

RONALD LEE GILMAN, Circuit Judge. This case presents an unfortunate situation in which, despite the fact that the habeas petitioner has an unquestionably valid claim on the merits,

procedural grounds preclude our ability to grant him relief. That petitioner, Lamarr Robinson, was convicted of various offenses by a Michigan trial court in 2011 and sentenced under Michigan's then-existing sentencing scheme. The Michigan Court of Appeals affirmed his conviction and sentence, and the Michigan Supreme Court declined to hear his case. Robinson then filed a petition for a writ of habeas corpus in federal court, which the district court denied.

On appeal to this court, Robinson's sole claim is that a series of judicial decisions postdating his sentencing have established that his sentence was imposed in violation of the Sixth Amendment to the U.S. Constitution. The state of Michigan does not contest that conclusion, but it does persuasively argue that Robinson is not entitled to habeas relief because he failed to exhaust his sentencing claim in state court. For the reasons set forth below, we **VACATE** the portion of the district court's decision dealing with Robinson's sentencing claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

"The facts as recited by the Michigan Court of Appeals are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1)." *Shimel v. Warren*, 838 F.3d 685, 688 (6th Cir. 2016). That court summarized the facts of Robinson's case as follows:

> A jury convicted the 39-year-old defendant of shooting 20-year-old Jamel Chubb at a Detroit gas station on May 13, 2010. The prosecution presented evidence that defendant and Chubb were both dating 19-year-old Jessica Taylor, whom defendant had been dating for a couple of years. Defendant learned about the relationship between Taylor and Chubb, and thereafter followed them on multiple occasions and sent several text messages to both Taylor and Chubb. On the day of the shooting, the men had a brief encounter at Taylor's mother's Livonia residence. Upon leaving, defendant told Taylor, "Don't let me catch y'all in the hood." Later that day, Chubb, Taylor, Jasmine Miller, and Kayana Davies were all at Miller's Detroit residence, and ultimately went to a local gas station. The gas station surveillance video captured an individual wearing a hoodie and riding a bike approach Chubb and shoot him as he was pumping gas. Taylor, who was in the front passenger seat of the vehicle, identified defendant as the shooter. Cellular phone tracking evidence also placed defendant in the area of the gas station at the time of the shooting. The defense theory at trial was

> misidentification, and the defense argued, inter alia, that Taylor's identification was not credible and the cell phone tracking evidence was not reliable.

People v. Robinson, No. 321841, 2015 WL 6438239, at *1 (Mich. Ct. App. Oct. 22, 2015) (per curiam).

B. Proceedings in state court

Robinson's trial took place in January 2011, and he was sentenced the following month. A 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. *Id.* At the time, Michigan had a complex sentencing regime in place, which this court has summarized 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.

Loren Robinson v. Woods, 901 F.3d 710, 716 (6th Cir. 2018) (citations and footnotes omitted). In other words, Michigan trial judges found facts in order to "score" the OVs and PRVs, which in turn determined the minimum sentencing range for each offense.

The trial judge in Robinson's case assessed points for a number of the relevant OVs. *Robinson*, 2015 WL 6438239, at *13. Robinson received a total of 181 OV points, placing him at OV Level VI on the applicable sentencing grid. *Id.* On this basis, the trial judge sentenced Robinson as a fourth habitual offender to "concurrent terms of 47-1/2 to 120 years' imprisonment for the assault and felon-in-possession convictions, to be served consecutive to two years' imprisonment for the felony-firearm conviction." *Id.* at *1.

Robinson then appealed to the Michigan Court of Appeals, raising a variety of claims. In a supplemental brief before that court, he argued that he was entitled to resentencing on the basis of the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013). The Supreme Court has long held that the Sixth Amendment's right to a trial by an impartial jury, in

conjunction with the Due Process Clause, "requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Id.* at 104 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995), and *In re Winship*, 397 U.S. 358, 364 (1970)). In *Alleyne*, the Court concluded that any fact that increases the mandatory-minimum sentence for an offense is an element of that offense that must be submitted to a jury for consideration. *Id.* at 103.

While Robinson's case was pending on appeal, the Michigan Supreme Court decided *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015), in which the Court held that the rule set forth in *Alleyne* "applie[d] to Michigan's sentencing guidelines and render[ed] them constitutionally deficient." *Id.* at 506. The Michigan Supreme Court determined that the guidelines were deficient to the extent that they required "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score [OVs] that *mandatorily* increase the floor of the guidelines minimum sentence range." *Id.* (emphasis in original). As a remedy, the *Lockridge* Court decided to sever the relevant statute "to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Id.*

In reviewing Robinson's case in light of *Alleyne* and *Lockridge*, the Michigan Court of Appeals agreed with Robinson that three of the variables that were found to apply to his case were "scored based on impermissible judicial fact-finding." *Robinson*, 2015 WL 6438239, at *13. The court concluded, however, that Robinson was not entitled to resentencing because the other variables "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." *Id.* Accordingly, the court affirmed Robinson's sentence, along with his conviction.

Robinson then proceeded to file an application for leave to appeal to the Michigan Supreme Court. He later filed a motion to supplement the application. The Michigan Supreme Court granted the motion to supplement the application, but then denied the application for leave to appeal. It simply noted that it was "not persuaded that the questions presented should be reviewed by this Court." *People v. Robinson*, 877 N.W.2d 729, 730 (Mich. 2016) (mem.).

C. Proceedings in federal court

Robinson next filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. He raised a range of claims, including that the state trial court violated his Sixth Amendment right to a trial by jury "by using factors that had not been submitted to a jury and proven beyond a reasonable doubt or admitted to by petitioner" in assessing his sentence. The district court rejected this claim, concluding that "*Alleyne* is inapplicable to petitioner's case." It noted that the Michigan Supreme Court in *Lockridge* had previously come to a different result, but concluded that the applicable standard of habeas review "prohibits the use of lower court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law." The district court also determined that *Lockridge* did not render the principle that Robinson was relying on "clearly established" for the purposes of habeas review, and so it denied Robinson relief on this claim. After rejecting all of Robinson's other claims, the court denied his habeas petition and declined to issue a certificate of appealability (COA).

Robinson responded by filing a notice of appeal and a motion in this court seeking a COA. Just four days after Robinson filed his notice of appeal, another panel of this court issued its decision in *Loren Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018). In *Loren Robinson*, this court came to essentially the same conclusion that the Michigan Supreme Court had reached in *Lockridge*. The *Loren Robinson* court held that "*Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime." *Id.* at 714. In light of *Alleyne*, this court determined that "the Michigan trial court's use of judge-found facts to score mandatory sentencing guidelines that resulted in an increase of petitioner's minimum sentence violated petitioner's Sixth Amendment rights." *Id.* at 718.

Robinson's motion for a COA had asserted eight grounds for relief, including his argument that he was entitled to resentencing under *Alleyne*. On the basis of *Loren Robinson*, this court granted his motion for a COA with respect to the *Alleyne* claim. It denied the motion with respect to all of his other claims. After an initial round of briefing before this court in which Robinson acted pro se, this court entered an order directing that counsel be appointed for

Robinson and that a new briefing schedule be issued. Such briefing has now been completed, making this case ripe for a decision.

II. ANALYSIS

A. Standard of review

We review a district court's legal conclusions in habeas proceedings de novo and its findings of fact under the clear-error standard. *Braxton v. Gansheimer*, 561 F.3d 453, 457 (6th Cir. 2009). Federal courts may not provide relief on habeas claims that were previously adjudicated on the merits in state court unless the state-court adjudication either (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." 28 U.S.C. § 2254(d); *see also Ayers v. Hall*, 900 F.3d 829, 834–35 (6th Cir. 2018). A state-court decision is "contrary to" clearly established federal law if the state court "applies a rule that contradicts the governing law set forth in the Supreme Court's cases, or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from the Supreme Court's precedent." *Ayers*, 900 F.3d at 835 (brackets, citations, and internal quotation marks omitted).

B. Exhaustion

The State's sole argument before this court is that Robinson failed to exhaust his sentencing claim in the Michigan courts. This argument has potential merit because, "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion doctrine, first announced by the Supreme Court in *Ex parte Royall*, 117 U.S. 241 (1886), is now codified by statute. *See* 28 U.S.C. § 2254(b)(1); *see also O'Sullivan*, 526 U.S. at 842. Exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to state courts in order to give them the opportunity to correct violations of federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

In states such as Michigan with a two-tiered appellate system—that is, those that have both an intermediate appellate court and a state supreme court—a petitioner must present his claims to the state supreme court in order to satisfy this exhaustion requirement. *O'Sullivan*, 526 U.S. at 839–40, 845. The exhaustion doctrine "is not a jurisdictional matter," but it is a "threshold question that must be resolved before [the court] reach[es] the merits of any claim." *Wagner v. Smith*, 581 F.3d 410, 415 (6th Cir. 2009) (citations omitted).

In the district court, the State argued that Robinson had failed to exhaust his sentencing claim in the Michigan courts, in addition to arguing that he was not entitled to relief on the merits. The district court, citing *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987), noted 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." Accordingly, the district court did not address the State's exhaustion argument and simply rejected Robinson's sentencing claim on the merits.

On appeal, the State renews its exhaustion argument, contending that Robinson did not exhaust his state-court remedies because he failed to raise his sentencing claim before the Michigan Supreme Court. Robinson filed two documents before the Michigan Supreme Court: a pro per application for leave to appeal, and a pro per motion to supplement his application for leave to appeal. The State asserts that neither of these documents raises any claim of sentencing error under either *Alleyne* or *Lockridge*.

Robinson counters that he did exhaust his sentencing claim because the following preprinted language was included in his application for leave to appeal to the Michigan Supreme Court: "I want the Court to consider the issues as raised in my Court of Appeals brief and the additional information below." The form he submitted was apparently prepared by a prison legal-services organization, with the above-quoted language preprinted on the form. Robinson contends that because the sentencing issue was presented to the Michigan Court of Appeals (which the State does not dispute), this language served to fairly present the issue to the Michigan Supreme Court as well. With the exception of this single sentence, Robinson did not otherwise mention the sentencing claim in either his application for leave to appeal or in his motion to supplement that application.

In their briefing on the exhaustion issue, both parties closely parse the quoted sentence. Their arguments primarily deal with whether the language in the form should be deemed to have effectively incorporated the briefing before the Michigan Court of Appeals. Neither party, however, spends much space addressing 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. *See Duncan*, 513 U.S. at 365.

Our analysis must begin with the Supreme Court's decision in *Baldwin v. Reese*, 541 U.S. 27 (2004). Michael Reese, who had previously been convicted in an Oregon state court of kidnapping and attempted sodomy, brought collateral-relief proceedings in the state-court system. In Reese's petition for discretionary review by the Oregon Supreme Court, he asserted that he had received ineffective assistance of both trial and appellate counsel. *Id.* at 29. Reese's petition did not indicate that his ineffective-assistance-of-appellate-counsel claim was based on federal law. *Id.* at 30. After the Oregon Supreme Court denied the petition, Reese sought a writ of habeas corpus in federal court.

The Supreme Court rejected Reese's argument that, because the justices of the Oregon Supreme Court had the opportunity to read the lower-court opinion and thus be alerted to the federal nature of the claim, the claim had been fairly presented to them. *Id.* at 30–31. It reasoned that such a requirement would impose serious burdens on state appellate courts, particularly those with the power of discretionary review. *Id.* at 31–32. The Court also noted that the Oregon Rules of Appellate Procedure instruct "litigants seeking discretionary review to identify clearly in the petition itself the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal." *Id.* at 31 (citing Or. R. App. P. 9.05(7) (2003)). Accordingly, the Supreme Court held 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 the case, that does so.

Id. at 32.

In short, *Baldwin* stands for the proposition that if a filing does not "fairly present" a claim on its own, the fact that the claim might be apparent from other documents in a lower court will not satisfy the exhaustion requirement. But *Baldwin* did not involve a situation in which a filing with a state's supreme court attempted to "incorporate" arguments presented to a lower court.

The Ninth Circuit, however, expressly addressed this incorporation-by-reference issue in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999). In a petition for review to the California Supreme Court, a petitioner had written: "Petitioner incorporate's [sic] herein the arguments raised by his appellate counsel on Direct Appeal on this issue." *Id.* at 885. The Ninth Circuit held that this language was insufficient to "fairly present" the claim at issue. *Id.* at 888–89. It largely relied on the California Rules of Court, which "expressly prohibit[ed] the incorporation by reference of authorities or argument from another document." *Id.* at 888.

As both *Baldwin* and *Gatlin* indicate, the courts have looked to the relevant state procedural rules for guidance. In the present case, the Michigan Court Rules set out the requirements for exactly what a party must file in an application for leave to appeal to the Michigan Supreme Court. Those rules provide that a party must file an application consisting of the following:

> (a) a statement identifying the judgment or order appealed and the date of its entry;
>
> (b) the questions presented for review related in concise terms to the facts of the case;
>
> (c) a table of contents and index of authorities conforming to MCR 7.212(C)(2) and (3);
>
> (d) a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6);
>
> (e) a concise argument, conforming to MCR 7.212(C)(7), in support of the appellant's position on each of the stated questions and establishing a ground for the application as required by subrule (B); and
>
> (f) a statement of the relief sought.

Mich. Ct. R. 7.305(A)(1).

Based on these authorities, we 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*, 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.

Our conclusion is reinforced by the relevant Michigan Court Rules. Although these Rules do not explicitly proscribe the practice of incorporation by reference in applications for leave to appeal, they do direct that a party include both "the questions presented for review related in concise terms to the facts of the case" and "a concise argument . . . in support of the appellant's position on each of the stated questions" in such an application. Mich. Ct. R. 7.305(A)(1)(b), (e). Neither Robinson's application for leave to appeal nor his motion to supplement that application described the question presented with respect to his sentencing claim or provided any type of argument in support of his position on that issue.

The case of *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam), which Robinson cites, does not point toward a contrary result. In *Dye*, this court had denied habeas relief on the grounds that the habeas petition filed in the district court "presented the prosecutorial misconduct claim in too vague and general a form." *Id.* at 4. The Supreme Court reversed, noting that the "habeas corpus petition made clear and repeated references to an appended supporting brief, which presented Dye's federal claim with more than sufficient particularity." *Id.* It cited Rule 10(c) of the Federal Rules of Civil Procedure. Rule 10(c) provides that "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." *Dye*, however, dealt with the presentation of a claim in a habeas petition, not in a state-court filing, and the Federal Rules of Civil Procedure of course do not apply in state court. In other words, Rule 10(c) explicitly authorizes incorporation by reference, whereas the relevant Michigan Court Rules relating to applications for leave to appeal do not.

The outcome in this case might be different had the language in the form referring back to the earlier brief appeared in an official form prepared by the State. But that is not what happened. Instead, the form that Robinson used was apparently developed by an organization called "Prison Legal Services of Michigan, Inc." That form differs from the official form that appears on the Michigan Courts' website. *See* Michigan Courts, *Pro Per Application for Leave to Appeal in a Criminal Case to the Michigan Supreme Court*, http://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/ClerksOfficeDocuments/Pro-Per_MSC_Criminal-Application_06-2016_FillableForm.pdf (last visited Feb. 13, 2020).

The official form bolsters the conclusion that Robinson did not fairly present his sentencing claim to the Michigan Supreme Court. That form notes that it "was created by the Clerk's Office of the Michigan Supreme Court" and that it "satisfies the formatting and structural requirements of the court rules if it is completed in accordance with the instructions." *Id.* at i. Most importantly, the official form warns individuals that "[i]f you do not raise an issue in the Supreme Court by writing it out in the application form, it will not be addressed by the Supreme Court even if it was raised in the Court of Appeals." *Id.* at ii. Similarly, in the section where applicants are instructed to list the issues that they want to present, they are told to "write out those issues you want to raise in the Supreme Court that were raised in the Court of Appeals." *Id.* at vi. Robinson's application for leave to appeal came nowhere close to meeting these requirements.

Despite Robinson's failure to exhaust his sentencing claim, the exhaustion doctrine would not bar our review of that claim if there were "an absence of available State corrective process" or if "circumstances exist[ed] that render[ed] such process ineffective to protect the rights of the applicant." *See* 28 U.S.C. § 2254(b)(1)(B); *see also Wagner v. Smith*, 581 F.3d 410, 419 (6th Cir. 2009). Robinson, however, has such an available avenue for relief in this case. As the State points out, Robinson may file a motion for relief from judgment under Subchapter 6.500 of the Michigan Court Rules. Robinson has not yet filed such a motion, and there is no time limit on filing one. Moreover, Robinson concedes that, for these same reasons, this option is still available to him. Section 2254(b)(1)(B) therefore does not provide a basis for Robinson's unexhausted habeas claim to proceed.

C. Disposition

The only remaining question, then, is how to dispose of this case. In its briefing, the State initially requested that we affirm the district court's denial of habeas relief on the grounds of failure to exhaust. At oral argument, the State revised this request and instead asked us to remand the case with instructions for the district court to dismiss the sentencing claim without prejudice. The State clarified that the reason for this revision is that the district court's decision on that claim has now been shown to be wrong on the merits.

Robinson's counsel did not address the issue of how we should dispose of the case if we determine that the sentencing claim had not been exhausted, instead simply asking us to reverse the denial of his habeas petition. In the initial round of briefing when Robinson was acting pro se, however, Robinson requested in the alternative that we direct the district court to stay the case administratively and hold it in abeyance pending his exhaustion of the state-court claims.

In the past, where a district court has denied a habeas petition on the merits, and this court determined on appeal that the petition contained unexhausted claims, this court has often remanded the case to the district court to address how to proceed in the first instance. *See, e.g.*, *Hickey v. Hoffner*, 701 F. App'x 422, 426–27 (6th Cir. 2017); *Wagner*, 581 F.3d at 419–20. We conclude that this is the appropriate course of action in this case as well, particularly given that the disposition issue has not been addressed in any depth in the parties' briefing.

In *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009), this court described four options that a district court may pursue under similar circumstances:

> (1) dismiss the mixed petition [a petition containing both exhausted and unexhausted claims] in its entirety; (2) stay the petition and hold it in abeyance while the petitioner returns to state court to raise his unexhausted claims; (3) permit the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims; or (4) ignore the exhaustion requirement altogether and deny the petition on the merits if none of the petitioner's claims has any merit.

Id. at 1031–32 (citations and emphasis omitted). The Supreme Court in *Rhines v. Weber*, 544 U.S. 269 (2005), approved the use of the "stay and abeyance" procedure in certain situations, discussing that procedure "in the context of 'mixed petitions,' [while] other circuits

have found it appropriate for petitions containing solely unexhausted claims." *Hickey*, 701 F. App'x at 426 n.5 (citing *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016)).

In the present case, we have a petition that was initially a mixed petition but now contains just one unexhausted claim, since all of the other claims have previously been dismissed. The third option enumerated in *Harris* is therefore unavailable to the district court because there are no exhausted claims that may proceed. In addition, the fourth option is unavailable because Robinson's sentencing claim undoubtedly has merit in light of this court's holding in *Loren Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018), that "*Alleyne* clearly established the unconstitutionality of Michigan's mandatory sentencing regime." *Id.* at 714.

On remand, then, the district court should decide whether to dismiss Robinson's petition (now consisting of only the sentencing claim) without prejudice for failure to exhaust, or to stay the petition and hold it in abeyance while Robinson returns to state court to exhaust that claim. In *Rhines*, the Supreme Court held that stay and abeyance is appropriate only "when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court" and when the claims are not "plainly meritless." 544 U.S. at 277. Robinson's claims plainly have merit, as noted above. The key question on remand, therefore, will be whether Robinson can present good cause for his failure to exhaust his sentencing claim before the Michigan Supreme Court.

III. CONCLUSION

For all of the reasons set forth above, we **VACATE** the portion of the district court's decision dealing with Robinson's sentencing claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.