

**In The
Supreme Court of the United States**

ANTONIO DWAYNE HALBERT,

Petitioner,

v.

MICHIGAN,

Respondent.

**On Writ Of Certiorari To The
Michigan Court Of Appeals**

**MOTION TO FILE SUPPLEMENTAL
BRIEF AND SUPPLEMENTAL BRIEF**

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MOTION TO FILE SUPPLEMENTAL BRIEF

Petitioner Antonio Dwayne Halbert respectfully moves for leave to file this Supplemental Brief in order to bring to the Court's attention the May 10, 2005, decision of the Michigan Court of Appeals in *People v. Collier*, No. 253151 (Mich. Ct. App. May 10, 2005). Since *Collier* was decided fifteen days after this case was argued on April 25, 2005, Petitioner could not bring *Collier* to the Court's attention earlier.

As discussed in the Supplemental Brief, *Collier* once again confirms, contrary to the position Respondent has maintained in this Court, that the Michigan Court of Appeals "has consistently held that denial of an application 'for lack of merit in the grounds presented' is a decision on the merits of the issues raised." *Id.*, slip op. at 2. *Collier* is also noteworthy because it once again demonstrates that Michigan is arguing a position in this Court contrary to the position it routinely takes in state court on the identical issue.

Petitioner therefore respectfully requests that this Court grant leave to file this Supplemental Brief so that Petitioner may cite and discuss *Collier*.



SUPPLEMENTAL BRIEF

Petitioner files this Supplemental Brief in order to bring to the Court's attention the May 10, 2005, decision of the Michigan Court of Appeals in *People v. Collier*, No. 253151 (Mich. Ct. App. May 10, 2005), decided fifteen days after this case was argued before the Court on April 25, 2005.

Petitioner has maintained throughout this litigation that an order of the Michigan Court of Appeals denying an application for leave to appeal "for lack of merit in the grounds presented" is, in fact, a decision on the merits of the appeal. *See* Petitioner's Brief at 27-28 (citing three published and five unpublished decisions of the Michigan Court of Appeals each holding that an order denying an application for leave to appeal "for lack of merit in the grounds presented" is a conclusive determination of the merits of the issues raised in the application). Respondent continues to claim, however, that an order denying leave to appeal for lack of merit in the grounds presented is not a decision on the merits. *See* Respondent's Brief at 32-36.

In *Collier*, an unpublished decision, the Michigan Court of Appeals once again unambiguously confirmed that the court has "consistently held" that an order denying an application for leave to appeal "for lack of merits in the grounds presented" is a determination on the merits of the issues raised in that application:

Although denial of an application for leave to appeal where the court expresses no opinion on the merits does not implicate the law of the case doctrine, *this Court has consistently held that denial of an application "for lack of merit in the grounds presented" is a decision on the merits of the issues raised*, which precludes subsequent

review of those issues pursuant to the law of the case doctrine. See, e.g., *People v. Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984); *People v. Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983); *People v. Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Because the issue raised in the instant appeal, i.e., whether the trial court erred in determining that the page limitation in MCR 2.119(A)(2) applies to motions for relief from judgment, is the same as that raised in defendant's previous application for leave to appeal, *which was denied "for lack of merit in the grounds presented," the law of the case doctrine precludes a second review of that issue by this Court*. Accordingly, we do not address the merits of that issue.

Collier, slip op. at 2 (emphasis added, additional citation omitted).

Petitioner also respectfully must point out that the State of Michigan, the plaintiff in *Collier*, successfully "argue[d] that the law of the case precludes review of the defendant's appellate issues." *Id.* at 1. Thus, Michigan continues to successfully argue in state court that orders denying applications for leave to appeal "for lack of merit in the grounds presented" are decisions on the merits in order to preclude relitigation of the issues raised in those applications, while simultaneously taking the opposite position in this Court.



CONCLUSION

For the reasons set forth in Petitioner's Brief and Reply Brief, the judgment of the Michigan Court of Appeals should be vacated.

Respectfully submitted,

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