No. 09-587

IN THE

# Supreme Court of the United States

KELLY HARRINGTON, Warden,

*Petitioner*,

*vs*.

JOSHUA RICHTER,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER**

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

*Attorney for Amicus Curiae Criminal Justice Legal Foundation*

(Intentionally left blank)

## QUESTIONS PRESENTED

1. In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U. S. C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?

2. Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?

(Intentionally left blank)

## TABLE OF CONTENTS

Questions presented . . . . . . . . . . . . . . . . . . . . . . . . . . . i

Table of authorities . . . . . . . . . . . . . . . . . . . . . . . . . iv

Interest of *amicus curiae* . . . . . . . . . . . . . . . . . . . . . 1

Summary of facts and case . . . . . . . . . . . . . . . . . . . . . 2

Summary of argument . . . . . . . . . . . . . . . . . . . . . . . 5

Argument . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

**I**

A summary decision that is clearly on the merits is different from an ambiguous decision that is not necessarily on the merits . . . . . . . . . . . . . . . . . . . 7

**II**

Subsection 2254(d) is a modified rule of issue preclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

A. The language of the statute . . . . . . . . . . . . 12

B. Habeas corpus and prior adjudications . . . 13

**III**

A summary disposition on the merits of the federal claim, as opposed to procedural default, is an "adjudication on the merits" for the purpose of § 2254(d) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

A. Adjudication, not explanation . . . . . . . . . . 17

B. Applying the exceptions . . . . . . . . . . . . . . . . 19

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24

## TABLE OF AUTHORITIES

### Cases

Allen v. McCurry, 449 U. S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) . . . . . . . . . . . . . . . . . . . . . 13

Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947) . . . . . . . . . . . . . . . . . . . . . . . 13

Aycox v. Lytle, 196 F. 3d 1174 (CA10 1999) . . . . . . . 9

Baker v. General Motors Corp., 522 U. S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) . . . . . . . 12

Baldwin v. Reese, 541 U. S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) . . . . . . . . . . . . . . . . . . . . . 9

Benn v. Greiner, 402 F. 3d 100 (CA2 2005) . . . . . . 18

Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953) . . . . . . . . . . . . . . . 7, 15, 16, 19

Brown v. Maloney, 267 F. 3d 36 (CA1 2001) . . 10, 11

Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) . . . . . . . . . . . . . . . . . . . . 21

Cardwell v. Greene, 152 F. 3d 331 (CA4 1998) . . . . . 9

Chambers v. Mississippi, 410 U. S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) . . . . . . . . . . . . . . . . . . . . . 9

Christianson v. Colt Industries Operating Corp., 486 U. S. 800 (1988) . . . . . . . . . . . . . . . . . . . . . . 23

Clements v. Clarke, 592 F. 3d 45 (CA1 2010) . . . . . 19

Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) . . . . . . . . . . . . . . 5, 7, 8, 16

Darr v. Burford, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761 (1950) . . . . . . . . . . . . . . . . . . . . . . . 15

Dodd v. United States, 545 U. S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005) . . . . . . . . . . . . . . . . . . . . 22

Early v. Packer, 537 U. S. 3, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) . . . . . . . . . . . . . . . . . . . . 20

Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944) . . . . . . . . . . . . . . . . . . . . 15, 16

Ex parte Siebold, 100 U. S. 371, 10 Otto 371, 25 L. Ed. 717 (1880) . . . . . . . . . . . . . . . . . . . . . . . 16

Ex parte Watkins, 3 Pet. (28 U. S.) 193, 7 L. Ed. 650 (1830) . . . . . . . . . . . . . . . . . . . . . . . . 14

Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) . . . . . . . . . . . . . . . . . . . 15, 16

Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) . . . . . . . . . . . . . . . . . . . . 13

Fortini v. Murphy, 257 F. 3d 39 (CA1 2001) . . . . . . . . . . . . . . . . . . . . . . . . . 9, 10, 23

Green v. Johnson, 116 F. 3d 1115 (CA5 1997) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8, 11

In re Robbins, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153, 959 P. 2d 311 (1998) . . . . . . . . . . . . . . . . . . . . . . . 11

In re Serrano, 10 Cal. 4th 447, 41 Cal. Rptr. 2d 695, 895 P. 2d 936 (1995) . . . . . . . . . . . . . . . . . . . . . . . 20

In re Wood, 140 U. S. 278, 11 S. Ct. 738, 35 L. Ed. 505 (1891) . . . . . . . . . . . . . . . . . . . . . . . 16

Knowles v. Mirzayance, 129 S. Ct. 1411,
173 L. Ed. 2d 251 (2009) . . . . . . . . . . . . . . . . . . . . . 5

Lambert v. Blodgett, 393 F. 3d 943 (CA9 2004) . . . 18

Lambrix v. Singletary, 520 U. S. 518, 117 S. Ct. 1517,
137 L. Ed. 2d 771 (1997) . . . . . . . . . . . . . . . . . . . . 22

Massaro v. United States, 538 U. S. 500,
123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003) . . . . . . 10

McCleskey v. Zant, 499 U. S. 467, 111 S. Ct. 1454,
113 L. Ed. 2d 517 (1991) . . . . . . . . . . . . . . . . . . . . 15

Mercadel v. Cain, 179 F. 3d 271 (CA5 1999) . . . . . . 8

People v. Mendoza Tello, 15 Cal. 4th 264,
62 Cal. Rptr. 2d 437, 933 P. 2d 1134 (1997) . . . . 10

People v. Romero, 8 Cal. 4th 728, 35 Cal. Rptr. 2d 270,
883 P. 2d 388 (1994) . . . . . . . . . . . . . . . . . . . . . . . 20

Reed v. Farley, 512 U. S. 339, 114 S. Ct. 2291,
129 L. Ed. 2d 277 (1994) . . . . . . . . . . . . . . . . . . . . 19

Renico v. Lett, 559 U. S. __ (No. 09-338,
May 3, 2010) . . . . . . . . . . . . . . . . . . . . . . . . . . . 11

Romine v. Head, 253 F. 3d 1349 (CA11 2001) . . . . . 9

Rompilla v. Horn, 355 F. 3d 233 (CA3 2004) . . . . . 18

Ryan v. Miller, 303 F. 3d 231 (CA2 2002) . . . . . 20, 21

Saiz v. Ortiz, 392 F. 3d 1166 (CA10 2004) . . . . . . . 18

Salinger v. Loisel, 265 U. S. 224, 44 S. Ct. 519,
68 L. Ed. 989 (1924) . . . . . . . . . . . . . . . . . . . . 14, 15

Sanders v. United States, 373 U. S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963) . . . . . . . . . . . . . . . . . . . . . 15

Santellan v. Cockrell, 271 F. 3d 190 (CA5 2001) . . 18

Schriro v. Landrigan, 550 U. S. 465, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) . . . . . . . . . . . . . . . . . . . . 20

Sellan v. Kuhlman, 261 F. 3d 303 (CA2 2001) . . . . . . . . . . . . . . . . . . . . . . . 6, 17, 21, 23

Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) . . . . . . . . . . . . . . . . . 12, 16

Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3, 6, 7, 21

Sunal v. Large, 332 U. S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982 (1947) . . . . . . . . . . . . . . . . . . . . . 19

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) . . . . . . . . . . . . . . . . . . . . 16

Teti v. Bender, 507 F. 3d 50 (CA1 2007) . . . . . . . . . 18

Thompson v. Keohane, 516 U. S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995) . . . . . . . . . . . . . . . . . . . . . 7

Waley v. Johnston, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942) . . . . . . . . . . . . . . . . . . . . . 14

Wiggins v. Smith, 539 U. S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) . . . . . . . . . . . . . . . . . . . . 22

Wright v. Moore, 278 F. 3d 1245 (CA11 2002) . . 9, 18

Wright v. West, 505 U. S. 277, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) . . . . . . . . . . . . . . . . . . 7, 15

Zuluaga v. Spencer, 585 F. 3d 27 (CA1 2009) . . . . . 10

**United States Statutes**

28 U. S. C. § 2244(b) . . . . . . . . . . . . . . . . . . . . . . . . 15

28 U. S. C. § 2254(d) . . . . . . . . . . . . . . . . . . 5, 7, 11, 12

28 U. S. C. § 2255(h) . . . . . . . . . . . . . . . . . . . . . . . . 15

**Rules of Court**

Cal. Rules of Court 4.551(g) . . . . . . . . . . . . . . . . . . . . 3

Cal. Rules of Court 8.380-8.388 . . . . . . . . . . . . . . . . . 3

Cal. Rules of Court, former Rule 260(e) . . . . . . . . . . 3

**State Constitution**

Cal. Const., Art. VI, § 10 . . . . . . . . . . . . . . . . . . . . . . 3

**Secondary Sources**

Congressional Record . . . . . . . . . . . . . . . . . . . . 12, 19

Hurd, R., A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus (2d ed. 1876) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 13

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998) . . . . . . . . . . . . . . . . . . . 11, 12, 13, 14, 16, 19

IN THE

# Supreme Court of the United States

KELLY HARRINGTON, Warden,
*Petitioner*,
*vs.*

JOSHUA RICHTER,
*Respondent.*

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the application of the central habeas corpus reform of the landmark Antiterrorism

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

and Effective Death Penalty Act of 1996. A negative answer to the question added by the Court would remove the application of that reform to a great many habeas corpus cases despite the clear language of the statute. Such a step would increase the delays, the expense, and the erroneous overturning of correct judgments that Congress sought to reduce when it enacted AEDPA. This result would be contrary to the interests CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

The facts of the case and trial are stated in detail in the Brief for Petitioner at pages 2-15. This summary focuses on the procedural history of the case to frame the issues discussed in this brief.

On December 19, 1994, Joshua Johnson and Patrick Klein were shot in Johnson's home in Sacramento, California. Klein died, but Johnson survived. Respondent Joshua Richter and Christian Branscombe were convicted of the murder of Klein, the attempted murder of Johnson, and other crimes. Brief for Petitioner 2-3. The prosecution's evidence at trial included expert testimony regarding whether Klein was shot at the place where his body was found, rather than somewhere else in the house, which was relevant to the credibility of Richter's claim that he was outside the house and not a participant in the crimes. See *id.*, at 3-4.

On appeal, Richter made several allegations of ineffective assistance unrelated to the expert testimony question, which the Court of Appeal rejected in a written opinion. See App. to Pet. for Cert. 4a-19a. The California Supreme Court denied discretionary review on June 24, 1998, and the time to seek certiorari review in this Court expired on September 22, 1998. J. A. 9.

Nine days short of a year later, Richter filed a state habeas corpus petition in the California Supreme Court. See J. A. 8, 87. All three levels of California courts have original jurisdiction in habeas cases. See Cal. Const., Art. VI, § 10. Part VII of the petition is the ineffective assistance claim at issue in the present case, alleging, "Trial counsel rendered ineffective assistance of counsel in failing to present readily available expert testimony which directly supported his theory of the case." J. A. 15. The State[2] opposed this claim on the merits and as untimely. See Informal Response to Petition for Writ of Habeas Corpus, Cal. Supreme Court No. S082167, pp. 31-40, 64-76.[3]

A habeas petitioner who files in the Superior Court is entitled to at least "a brief statement of the reasons for denial. An order only declaring the petition to be 'denied' is insufficient." Cal. Rules of Court 4.551(g); see also former Rule 260(e) (in effect when the petition was filed). There is no corresponding rule for habeas petitions filed in appellate courts. See Rules 8.380-8.388. The California Supreme Court entered a summary denial, stating only, "Petition for writ of habeas corpus is DENIED." App. to Pet. for Cert. 22a.

On federal habeas, the District Court acknowledged the standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but then proceeded to reject Richter's claim directly under the standard of *Strickland* v. *Washington*, 466 U. S. 668

---

2. In the present case, the habeas petitioner is the certiorari respondent and vice versa. For clarity, we will refer to the parties as "Richter" and "the State."

3. This pleading is available at http://www.cjlf.org/files/RichterStateHabResponse.pdf. We understand that Richter intends to formally submit it to the Court but has not done so as of the printing deadline of this brief.

(1984), without further reference to AEDPA or the state court decision. The District Court found that trial counsel's handling of the serology and blood spatter issues did not fall below the "objective standard of reasonableness" for *Strickland*. App. to Pet. for Cert. 39a-40a. Having rejected Richter's claim on the performance prong of *Strickland*, the District Court noted that it need not decide the prejudice prong. App. to Pet. for Cert. 44a.

On appeal, the panel similarly acknowledged the AEDPA requirement but then proceeded on an "independent" review that differed little, if at all, from what a federal court would have done before AEDPA. See App. to Pet. for Cert. 64a. The Court of Appeals panel rejected some of the claims on the prejudice prong of *Strickland*, see *id*., at 72a, and rejected the bloodstain pattern claim on the performance prong. See *id*., at 73a-74a.

The Court of Appeals granted rehearing en banc. Contrary to the decisions of all three of the previous courts, the en banc court found that Richter had a meritorious claim of ineffective assistance. The en banc court further held, "The state court's conclusion to the contrary constituted an objectively unreasonable application of *Strickland*." App. to Pet. for Cert. 136a. Given that the District Court and the Court of Appeals panel had effectively reviewed the same claims *de novo*, the en banc court was implicitly holding that both of these courts had been unreasonable as well.

In a footnote, the en banc court said, "Because we would grant the writ whether we reviewed the state court's decision de novo or for objective unreasonableness, we apply the stricter unreasonableness standard. Thus, we need not determine whether or when an unreasoned state court decision warrants AEDPA deference." App. to Pet. for Cert. 99a.

The dissent noted that AEDPA does apply, resulting in "doubly deferential" review of counsel's performance. App. to Pet. for Cert. 156a, quoting *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009). "I would conclude that there was no *Strickland* error and, *a fortiori*, no grounds for us to grant the writ under AEDPA." App. to Pet. for Cert. 197a.

The State petitioned this Court for a writ of certiorari, posing the question as whether the Ninth Circuit had misapplied the AEDPA standard. On February 22, 2010, this Court granted the petition, adding the question, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?"

## SUMMARY OF ARGUMENT

A summary disposition of a federal claim by a state court raises two different issues that must be kept distinct. In some cases, it may be unclear whether the disposition was on the merits or on procedural grounds, an issue related to the problem in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). That issue is not presented in this case. The California Supreme Court's disposition, when considered in the context of the pleadings before it and its past statements on how it treats habeas petitions, was unambiguously on the merits.

The second issue is how a federal court should treat, under AEDPA, a court disposition that is clearly on the merits but lacks an explanation of the state court's reasoning. To resolve this issue, it is important to understand the nature of the rule of 28 U. S. C. § 2254(d). Although commonly called a rule of "deference," this statute actually establishes a modified rule of issue preclusion or collateral estoppel. A claim

rejected by the state court on the merits cannot be granted by the federal court unless an exception applies. As the Second Circuit explained in *Sellan* v. *Kuhlman*, 261 F. 3d 303, 311 (2001), "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process."

When the state court has rejected a petition without a fact-finding process, under a standard that permits in such a decision only by assuming any genuinely disputed facts in the petitioner's favor, the only exception that could apply is § 2254(d)(1). A federal court can find the requirements of that exception met in a case of a summary denial if the clearly established law, applied to the undisputed or assumed facts, leads to only one reasonable conclusion, *i.e.*, that the petitioner is entitled to relief.

For a claim where the petitioner must clear more than one hurdle, such as the ineffective assistance rule of *Strickland* v. *Washington*, 466 U. S. 668 (1984), the exception applies if a decision against the claim would be unreasonable on both prongs of the test. Although the state court may have actually rejected the claim on only one of the prongs, in practice this approach is unlikely to produce anomalous results. If there are two grounds on which a state court might have decided the case, one of which is reasonable and the other unreasonable, it is fair to presume that the court decided on the reasonable ground.

In the present case, a court could reasonably find for the State on both prongs of the *Strickland* test. Indeed, the District Court and initial Court of Appeals panel did so find in decisions that were effectively *de novo* review. No exception to AEPDA's modified rule of issue preclusion applies, and Richter's claim should be denied under § 2254(d).

## ARGUMENT

### I. A summary decision that is clearly on the merits is different from an ambiguous decision that is not necessarily on the merits.

The question added by the Court in the order granting certiorari is, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U. S. 668 (1984)?" Summary disposition can raise two different questions with regard to the application of 28 U. S. C. § 2254(d). First, there may be a question whether the state court decided the claim on the merits or on some other basis, a question related to the one presented in *Coleman* v. *Thompson*, 501 U. S. 722 (1991). Second, if the state court did decide the merits, the lack of an explanation raises issues regarding how to apply § 2254(d).

This case presents only the second question. There are some statements in the case law that might appear at first glance to relate to this question, but which, on closer examination, can be seen to deal only with the first question. It is important not to confuse the two.

Between *Brown* v. *Allen*, 344 U. S. 443 (1953), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), if the state court denied a claim solely on the merits, the federal habeas court decided *de novo* the questions of federal law and mixed questions of law and fact. See, *e.g.*, *Wright* v. *West*, 505 U. S. 277, 287-289 (1992) (plurality opinion); *Thompson* v. *Keohane*, 516 U. S. 99, 110, and n. 9 (1995). However, if the state court rejected a claim on the ground that it was procedurally defaulted, the federal court could proceed to the merits only if the "cause and prejudice" test was satisfied. See *Coleman*, 501 U. S., at 750. The "plain statement" rule raised a presumption that the state

court decision was on the merits if the state court decision "fairly appeared to rest primarily on resolution of [federal] claims . . . and did not clearly and expressly rely on an independent state ground . . . ." *Id.*, at 735.

*Coleman* involved a terse order from the Virginia Supreme Court that listed the pleadings and then said, "Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." *Id.*, at 727-728. This Court held that the order was sufficiently clear to invoke the procedural default rule. The state court's order was an "explicit grant of a dismissal motion based solely on procedural grounds." *Id.*, at 744.

After AEDPA, a summary denial may raise a "reverse *Coleman*" problem. The state may be the party arguing that the state court's disposition was on the merits. In *Green* v. *Johnson*, 116 F. 3d 1115, 1121 (1997), the Fifth Circuit set out a framework for dealing with these kinds of dispositions.

> "We must inquire, on a case-by-case basis, whether a resolution was on the merits, considering the following factors: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination of the merits."

In *Green*, consideration of the context led to the conclusion that the disposition was on the merits. See *ibid.* In *Mercadel* v. *Cain*, 179 F. 3d 271, 274-275 (CA5 1999), the context led to the conclusion that the disposition was on procedural grounds. Other circuits have similarly found summary dispositions to be on the merits for the purpose of § 2254(d) when there is no reason to

believe that the decision was on procedural grounds. See, *e.g.*, *Aycox* v. *Lytle*, 196 F. 3d 1174, 1177 (CA10 1999) (an order holding "as a matter of law, Petitioner is not entitled to relief" was a decision on the merits); *Cardwell* v. *Greene*, 152 F. 3d 331, 335, 339 (CA4 1998) (order "finding no merit in other complaints raised by petitioner, the Court is of the opinion that the writ of habeas corpus should not issue as prayed for" was on the merits).

Other cases deal with a state court decision that is entered with a written opinion, but the opinion does not expressly address the federal question later raised in federal habeas. Sometimes the state court does not address the issue because the defendant fails to brief it or fails to make clear that he is making a federal claim separate from his state-law claims. That was the situation in *Romine* v. *Head*, 253 F. 3d 1349, 1365, n. 15 (CA11 2001), a holding the court later characterized by saying, "We would not defer to that which did not exist." *Wright* v. *Moore*, 278 F. 3d 1245, 1254 (CA11 2002). The correct disposition of such a case would normally be to deny the claim as procedurally defaulted, see *Baldwin* v. *Reese*, 541 U. S. 27, 33-34 (2004), but in *Romine* the state had defaulted the default argument. See *Romine*, *supra*, at 1365, n. 15.

A case of genuine and unresolvable ambiguity was presented in *Fortini* v. *Murphy*, 257 F. 3d 39 (CA1 2001). Objecting to the exclusion of certain defense evidence, Fortini argued only state grounds at trial, but on appeal he added a federal constitutional claim under *Chambers* v. *Mississippi*, 410 U. S. 284 (1973). See *Fortini*, *supra*, at 43. The state appellate court rejected the state law claim and made no mention of the federal claim. The state appellate court could have rejected the *Chambers* claim as procedurally defaulted, but it made no statement to that effect. See *id.*, at 45. A state

court ruling on the merits "would [have been] easy to uphold . . . under AEDPA's ordinary standard for evaluating state legal determinations," *id.*, at 47, but the First Circuit could not have confidence that any such ruling had been made. "[W]e can hardly defer to the state court on an issue that the state court did not address." *Ibid.* The court found it had to review the claim *de novo*, and it found no constitutional violation. See *ibid.*

*Brown* v. *Maloney*, 267 F. 3d 36, 40 (CA1 2001), purports to apply *Fortini* but has some unnecessarily broad language: "In the absence of reasoning on a holding from the state court on the issue, we cannot say the claim was 'adjudicated on the merits' within the meaning of 28 U. S. C. § 2254(d)." On its facts, though, *Brown* is like *Romine*, not *Fortini*. The state court did not address the question because Brown raised it for the first time on petition for rehearing, and the state defaulted the default issue. See *id.*, at 39. Despite its needlessly expansive language, *Brown* reached a correct result, and its broad dictum has already been narrowed by the First Circuit. See *Zuluaga* v. *Spencer*, 585 F. 3d 27, 32 (2009).

Cases such as *Fortini*, with genuine ambiguity regarding whether the state court decision rests on procedural grounds or the merits, present a difficult problem that need not and should not be resolved in the present case. That question is simply not presented. There is no ambiguity here.

This case involves a claim of ineffective assistance of counsel. Such claims are categorically exempt from the California rule against raising on habeas a claim that could have been raised on appeal. See *People* v. *Mendoza Tello*, 15 Cal. 4th 264, 267, 933 P. 2d 1134, 1135 (1997); cf. *Massaro* v. *United States*, 538 U. S. 500, 504 (2003) (same rule for same reason for federal defen-

dants under § 2255). The State raised a timeliness objection and also opposed the claim on the merits. See *supra*, at 3. The California Supreme Court has told us unambiguously that when it sustains a timeliness objection by the State it says so. See *In re Robbins*, 18 Cal. 4th 770, 815, n. 34, last ¶, 959 P. 2d 311, 340, n. 34 (1998). In this case, as in *Green* v. *Johnson*, *supra*, the context of the summary denial makes it unambiguously on the merits.

The only basis on which it could be contended that § 2254(d) does not apply would be an argument extrapolating from the broad, unsubstantiated dicta of *Brown* v. *Maloney*, *supra*, to a conclusion that summary denials are not adjudications on the merits for the purpose of 28 U. S. C. § 2254(d). That proposition has been rejected by every Federal Court of Appeals to squarely consider it. To fully understand why this unanimous rejection is correct, it is necessary to consider the true nature of the rule commonly called the "deference standard."

## II. Subsection 2254(d) is a modified rule of issue preclusion.

The question added by the Court in this case turns on the meaning of the phrase "adjudicated on the merits" in 28 U. S. C. § 2254(d). That meaning is illuminated by understanding the nature of the rule enacted by that subdivision. The rule is commonly referred to as a rule of "deference" in the case law, see, *Renico* v. *Lett*, 559 U. S. __, n. 1 (No. 09-338, May 3, 2010) (slip op., at 6) (collecting cases), just as it was during the floor debate. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 945, and n. 400 (1998). However, this convenient shorthand expression is not a substitute

for a close examination of the nature of the rule in a case where its exact nature matters.

*A. The Language of the Statute.*

The place to begin is the language of the statute. "An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court *shall not be granted* with respect to any claim that was *adjudicated on the merits* in State court proceedings *unless* . . . ." 28 U. S. C. § 2254(d) (emphasis added).

This states the general rule. What follows the "unless" are exceptions to the general rule. This rule is a prohibition against granting relief to a party who has already litigated and lost the same claim. It falls into the same family of rules as the doctrines of res judicata, law of the case, successive petitions, and *Stone* v. *Powell*, 428 U. S. 465 (1976). Rules of this class forbid relitigation of a dispute, with certain exceptions, because of the unfairness to the party who prevailed in the first suit of being forced to fight the same battle over again. "The general principle in this language in the Hatch bill is that Federal courts shall not grant a claim that was adjudicated in State court proceedings. That is what is at the top." 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Scheidegger, 98 Colum. L. Rev., at 946.

More specifically, § 2254(d) is a rule of issue preclusion, traditionally known as collateral estoppel. See *Baker* v. *General Motors Corp.*, 522 U. S. 222, 233, n. 5 (1998). Under that doctrine, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim . . . ." *Ibid.* Section 2254(d) does not bar the entire habeas petition, and it does not bar issues that might have been but were not

litigated in the state proceeding, although such issues will generally be barred by the exhaustion and procedural default rules. The rule of § 2254(d) applies to and only to claims adjudicated on the merits in state court, and it bars them unless and only unless one of the enumerated exceptions applies. It is thus a modified rule of issue preclusion. Cf. *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996) (referring to § 2244(d) as "a modified res judicata rule").

*B. Habeas Corpus and Prior Adjudications.*

Far from being a radical innovation, § 2254(d) brings federal habeas for state prisoners back toward the mainstream of Anglo-American jurisprudence. The procedure is still unique, but it is less anomalous than it was before.

The traditional general rule is res judicata. State court judgments have res judicata effect in federal court, even if the federal court disagrees with the result. That has been the rule, if not from day one, at least from year two, the Full Faith and Credit Act of 1790. See Scheidegger, *supra*, 98 Colum. L. Rev., at 912; see also *Angel* v. *Bullington*, 330 U. S. 183, 187 (1947) (correctness of state decision is immaterial); *Allen* v. *McCurry*, 449 U. S. 90, 103-104 (1980) (no right to relitigate federal claim in federal court).

At common law and in early nineteenth century America, a prior denial of habeas relief was treated very differently from a judgment of conviction of a crime. A prior denial of habeas relief was not res judicata, although a court did have discretion to deny a habeas petition on the basis of a previous denial. See R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 574 (2d ed. 1876).

A judgment convicting the prisoner of a felony was quite different.

> "[T]he celebrated habeas corpus act of the 31 Car. II . . . . enforces the common law. This statute excepts from those who are entitled to its benefit . . . persons convicted or in execution. The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be reexamined upon a writ of *habeas corpus*?" *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 202 (1830).

The answer, as of 1830, was no. "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." *Id.*, at 203; Scheidegger, *supra*, 98 Colum. L. Rev., at 928-932.

In the late nineteenth and early twentieth centuries, the scope of issues reviewable on habeas corpus was expanded with an increasingly strained definition of "jurisdiction" until the 1940s, when this Court finally dropped the pretense and expanded collateral attacks on convictions to all constitutional questions. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932-933; *Waley* v. *Johnston*, 316 U. S. 101, 104-105 (1942). That expansion did not render state court decisions irrelevant to the federal habeas process, however. The state court judgment had relevance similar to that of a prior denial of federal habeas relief.

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), a federal prisoner case, the Court noted that the availability of appeal from denials of habeas relief warranted giving those denials more weight than in earlier times. See

*id.*, at 231. A District Court receiving a successive habeas petition had discretion to deny the petition solely on the ground of a prior determination. See *id.*, at 231-232. In *Ex parte Hawk*, 321 U. S. 114 (1944) (*per curiam*), the Court made very clear that the same rule applied to state court dispositions. "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (citing *Salinger*).

Similarly, *Darr* v. *Burford*, 339 U. S. 200, 215 (1950), overruled on other grounds, *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963), held that following state review and denial of certiorari, the habeas court "*may* decline to examine further into the merits *because they have already been decided against the petitioner*. [Footnote citing *Salinger*.]" (Emphasis added). Words can hardly be more clear. *Darr* was a rule of prior adjudication, albeit a flexible, discretionary one.

The *Salinger* rule of successive petitions evolved from one of amorphous discretion to the very lax rule of *Sanders* v. *United States*, 373 U. S. 1, 17-18 (1963), to the more structured rule of *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991), and finally into the strict codified rules of 28 U. S. C. §§ 2244(b) and 2255(h). The effect of the prior state adjudication of the claim has followed a similar, though not parallel, evolution. *Brown* v. *Allen*, 344 U. S. 443 (1953), effectively reduced the state decision to a mere precedent from another jurisdiction, albeit a particularly pertinent one. See *Wright* v. *West*, 505 U. S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). In § 2254(d), Congress has done with *Darr* just what *McCleskey* and § 2244(b) did with *Salinger*; it has restored the spirit of the pre-1953

discretionary rule but replaced it with a structured and more tightly limited rule.

Throughout American history, the availability of federal habeas for state prisoners has varied as a function of confidence in state courts relative to federal courts. It was forbidden in the beginning, when federal courts were a feared innovation. See Scheidegger, *supra*, 98 Colum. L. Rev., at 932. It was expanded during Reconstruction, retracted in the late nineteenth century, see, *e.g.*, *In re Wood*, 140 U. S. 278, 285-286 (1891), expanded again in the 1950s and 1960s during the civil rights struggle, see *Brown* v. *Allen*, *supra*; *Fay* v. *Noia*, 372 U. S., at 438, and retracted again in the last quarter of the twentieth century in *Stone* v. *Powell*, 428 U. S. 465 (1976), *Teague* v. *Lane*, 489 U. S. 288 (1989), *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991) (overruling *Fay*), and other cases.

The enactment of a qualified prior adjudication bar is the next logical step in this evolution. It takes us back to the principle that relitigation is the exception and finality of judgments is the rule. See *Ex parte Hawk*, 321 U. S., at 118 (*per curiam*) ("not ordinarily re-examine"). It does so based on the recognition that state courts today are far different from what they were in 1953 or 1963, that they warrant more confidence, and that their judgments deserve more respect.

The nature of this rule is plain and found on the surface. Cf. *Ex parte Siebold*, 100 U. S. 371, 393 (1880). It forbids granting a claim previously rejected on the merits by a coordinate court, unless an exception applies.

### III. A summary disposition on the merits of the federal claim, as opposed to procedural default, is an "adjudication on the merits" for the purpose of § 2254(d).

*A. Adjudication, Not Explanation.*

With the nature of § 2254(d) as a modified rule of issue preclusion firmly in mind, we can easily see the correctness of the opinion of the Second Circuit in *Sellan* v. *Kuhlman*, 261 F. 3d 303, 311-312 (2001):

> " 'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground . . . .
>
> "Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning . . . .
>
> "In sum, the plain meaning of § 2254(d)(1) dictates our holding: For the purposes of AEDPA deference, a state court 'adjudicates' a state prisoner's federal claim on the merits when it (1) disposes of the claim 'on the merits,' and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U. S. C. § 2254(d)(1) to the state court's decision on the federal claim—even if the state court does not explicitly refer to either the federal claim or to relevant federal case law."

This is fully consistent with the nature of § 2254(d) as a modified rule of issue preclusion. The prerequisite for issue preclusion is simply the actual litigation and resolution of the issue in a final judgment. See *supra*, at 12.

*Sellan* has been widely quoted and followed not only in the Second Circuit, see, *e.g.*, *Benn* v. *Greiner*, 402 F. 3d 100, 104, n. 3 (CA2 2005), but also in other circuits. See *Teti* v. *Bender*, 507 F. 3d 50, 56-57 (CA1 2007); *Rompilla* v. *Horn*, 355 F. 3d 233, 247 (CA3 2004), rev'd on other grounds, 545 U. S. 374 (2005); *Santellan* v. *Cockrell*, 271 F. 3d 190, 193-194 (CA5 2001); *Lambert* v. *Blodgett*, 393 F. 3d 943, 969 (CA9 2004). In *Wright* v. *Moore*, 278 F. 3d 1245, 1254 (2002), the Eleventh Circuit surveyed the decisions and found,

> "Six circuits have squarely addressed that question, all of them concluding that the summary nature of a state court's decision does not lessen the deference that it is due. See *Sellan* v. *Kuhlman*, 261 F. 3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F. 3d 149, 158-62 (4th Cir. 2000) (en banc), *cert. denied*, 122 S. Ct. 74 (2001); *Harris* v. *Stovall*, 212 F. 3d 940, 943 n.1 (6th Cir. 2000); *Aycox* v. *Lytle*, 196 F. 3d 1174, 1177-78 (10th Cir. 1999); *James* v. *Bowersox*, 187 F. 3d 866, 869 (8th Cir. 1999), *cert. denied*, 528 U. S. 1143, 120 S. Ct. 994, 145 L. Ed. 2d 942 (2000); *Delgado* v. *Lewis*, 181 F. 3d 1087, 1091 n.3 (9th Cir. 1999), *cert. granted and judgment vacated on other grounds*, 528 U. S. 1133, 120 S. Ct. 1002, 145 L. Ed. 2d 926 (2000). We agree with those circuits." (Footnote omitted).

More recent cases are also in accord. See, *e.g.*, *Saiz* v. *Ortiz*, 392 F. 3d 1166, 1176 (CA10 2004).

> "AEDPA's trigger for deferential review is *adjudication, not explanation*. [Citing *Wright*]. When a state court has truly avoided (or merely overlooked) the petitioner's federal claim, a federal court may step into the breach and review de novo. But judicial opacity is a far cry from judicial avoidance. It is the result to which we owe deference, not the opinion

> expounding it." *Clements* v. *Clarke*, 592 F. 3d 45, 55 (CA1 2010) (emphasis added).

*B. Applying the Exceptions.*

The lack of an explanation for the state court decision certainly makes the federal court's task more difficult in terms of applying paragraphs (1) and (2) of § 2254(d). Here again, it is useful to keep the nature of the rule in mind. Section 2254(d) is not a standard of review on appeal. Federal district courts have no jurisdiction to hear appeals from the decisions of state supreme courts. The principle that "habeas corpus will not be allowed to do service for an appeal," *Sunal* v. *Large*, 332 U. S. 174, 178 (1947), applies to state prisoner cases as well as federal. See *Reed* v. *Farley*, 512 U. S. 339, 354 (1994). Opponents of broad habeas review have long protested against practices which seemed to treat habeas petitions as if they were appeals. See *Brown* v. *Allen*, 344 U. S. 443, 539-540 (1953) (Jackson, J., concurring in the judgment). It took 43 years, but Congress finally vindicated Justice Jackson's position by enacting § 2254(d).

At the top of subsection (d) we have the general rule: no relitigation of claims resolved on the merits by the state court. See Scheidegger, 98 Colum. L. Rev., at 946; 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden). Determination that the state court decision was on the merits establishes that subsection (d) applies, and the claim is precluded unless an exception applies. Thus, the federal habeas court's task is not to apply a standard of review to the state court decision, but only to ascertain whether the requirements of either exception to the general rule of preclusion have been met.

> "A state-court decision is 'contrary to' our clearly established precedents if it 'applies a rule that

> contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.' *Williams* v. *Taylor*, 529 U. S. 362, 405-406 (2000). Avoiding these pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)* (emphasis in original).

In the absence of any expressed reasoning, it is necessary to focus on the result. When a petition for a writ of habeas corpus is denied without explanation, it will typically be denied without an evidentiary hearing. In California, a denial on the merits without an evidentiary hearing is proper only if the court concludes that the petitioner would not be entitled to relief even assuming any genuinely disputed facts in his favor. A petition alleging facts that, if true, would entitle petitioner to relief requires further proceedings. See *People* v. *Romero*, 8 Cal. 4th 728, 739-740, 883 P. 2d 388, 392-393 (1994); *In re Serrano*, 10 Cal. 4th 447, 455-456, 895 P. 2d 936, 942 (1995). That is a typical rule. See, *e.g.*, *Schriro* v. *Landrigan*, 550 U. S. 465, 474 (2007). Generally, then, these cases will not involve issues of unreasonable factual findings under the second exception but will instead focus on the first.

Suppose that the clearly established federal law, as set forth in this Court's precedents and as applied to the admitted or assumed facts of the case, leads only to one reasonable conclusion—the petitioner is entitled to relief. In that event, a denial of relief must be based on either a choice of the wrong standard or an unreasonable application of it. That is the approach the Second Circuit took in *Ryan* v. *Miller*, 303 F. 3d 231 (2002).

The state appellate court had addressed the defendant's other claims and then said, " 'The defendant's remaining contentions are either unpreserved for appellate review or without merit.' " *Id.*, at 245-246. The federal court first had to ascertain that the Confrontation Clause claim was not among those unpreserved. *Id.*, at 246, and n. 6. "Thus, the unreasonable application standard of AEDPA applies." *Ibid.* The court then reviewed the clearly established federal law, *id.*, at 247-248, applied it to the facts of the case, and held "that the state court was objectively unreasonable in not finding a Confrontation Clause violation by applying *Bruton* [v. *United States*, 391 U. S. 123 (1968)] to the facts of this case." *Id.*, at 251.

*Ryan* demonstrates that a grant of relief on federal habeas following an unexplained state decision is not impossible, but it is not typical. Claims dismissed in this manner will usually be so patently without merit that AEDPA is not even needed. Most of the remainder will be within the zone of reasonable disagreement, see, *e.g.*, *Sellan*, 261 F. 3d, at 310, exactly the situation where Congress decided the state court decision should stand.

Finally, there is the problem of how to deal with rules of law that require the defendant to establish more than one element before he can obtain relief. The most common of these is the rule at issue in this case, the ineffective assistance of counsel standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984). A court applying this standard need not decide both the performance and prejudice prongs of the test but may properly deny relief upon finding that the defendant cannot meet one of them, leaving the other undecided. See *id.*, at 697.

In these circumstances, a federal court can say that the state court unreasonably applied *Strickland* only if

a ruling against the defendant would be unreasonable on both prongs. The defendant may object that this amounts to "deferring" to a ruling that the state court never made, but § 2254(d) is not really a rule of deference. Once the prerequisites of the general rule of issue preclusion are met, the question is whether the elements of an exception are met.

The objection might also be raised that this approach gives greater "deference" to an unexplained decision than it gives to a full opinion on the issue. If the state court produces a reasoned opinion resolving only one prong of *Strickland*, and the habeas court finds the resolution of that prong to be unreasonable, then the habeas court proceeds to decide the other prong *de novo*. See *Wiggins* v. *Smith*, 539 U. S. 510, 534 (2003).

There are two answers to this objection. The first is that occasional anomalies in the application of AEDPA are insufficient reason to evade the language of the statute. See *Dodd* v. *United States*, 545 U. S. 353, 359-360 (2005). In this case, the statute clearly provides that a state court adjudication on the merits precludes relief unless the requirements of an exception are met, and that finding cannot be made on a summary denial if a holding against the defendant on either prong would be reasonable.

The second answer is that the anomaly is more theoretical than real. A court denying a claim under one of *Strickland*'s prongs will decide the one it considers clearest. If the federal habeas court decides that a court could reasonably have decided against the defendant on one prong but not the other, the reasonable ground of the decision is highly likely to be the actual ground of decision. Judges are presumed to know and follow the law, see *Lambrix* v. *Singletary*, 520 U. S. 518, 532, n. 4 (1997), and it is not too much to presume that

judges have taken the reasonable path rather than the unreasonable one.

In the present case, the California Supreme Court rejected Richter's claims on the merits. Section 2254(d) requires denial of the claim on the ground of prior adjudication unless that prior adjudication would be an unreasonable application of *Strickland* on both prongs of that test. In the present case, both the District Court and the initial Court of Appeals panel engaged in what amounts to *de novo* review and found that Richter's claim had no merit. See *supra*, at 3-4. The rejection of his claim by three consecutive courts should be sufficient to establish that the issue is at least close, and that is all that is needed to establish that the exception of § 2254(d)(1) does not apply.

Whenever the underlying merits question is close, the § 2254(d) question is necessarily easy. See *Fortini*, 257 F. 3d, at 47-48 (case "would be easy" under AEDPA standard but "is a close case" *de novo*); *Sellan*, 261 F. 3d, at 310 ("might well be inclined to grant" under *de novo* review, but denial is "plain" under AEDPA). If federal courts would approach AEDPA cases in this manner, much needless delay and expense could be avoided, and the intent of Congress in passing AEDPA would be more fully implemented. As soon as the underlying merits of the case can be seen to be close, the AEDPA question is resolved, because "close questions, by definition, never have clearly correct answers." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988). If an answer in petitioner's favor is not clearly correct, the state court's contrary answer cannot be unreasonable. That is all a federal habeas court needs to decide to bring the case to an end.

## CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

May, 2010

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*