No. 11-465

IN THE

Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. Its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

This case implicates NACDL's mission because a ruling against Respondent Williams would deprive criminal defendants of even one, full, fair opportunity for review of federal constitutional challenges to their convictions or sentences. Federal habeas review is an essential safeguard of the constitutional rights of criminal defendants; to defer to a presumed decision of a state court, absent any indication that the court considered or adjudicated a habeas petitioner's federal claims, would undermine that safeguard when it is most needed.

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[1] Counsel for all parties consented to the filing of this brief. No counsel for a party in this case authored the brief in whole or in part, and nobody, other than *amicus* or its counsel, has made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

I. The parties to this case agree that, if a state court has overlooked or ignored a federal claim properly presented to it, a federal habeas-court's review of that claim must be *de novo*. The question is how the federal court should determine whether the state court has overlooked such a claim. In particular, if the state court issued an opinion that did not mention some federal claim—even as it discussed other claims—should the federal court recognize that the omitted claim was overlooked? Or may the federal court simply presume that the state court resolved that particular claim silently?

II. In such a situation, common sense, confirmed by abundant case law and reinforced by the concern that every habeas petitioner receive at least one full and fair consideration of her federal claims, all point to the same answer: If a state court issues an opinion, but the opinion fails to address a properly presented federal claim, that claim cannot be assumed to have been adjudicated. Accordingly, AEDPA's deferential standard of review in 28 U.S.C. § 2254(d) does not apply.

If a state court, in an opinion, addresses multiple claims raised by the habeas petitioner but omits a single federal claim, it is common sense that the court likely overlooked or ignored that claim. Such a view is in any event more reasonable than the alternative of speculating that the court *silently* resolved that particular claim on the merits even while not according such treatment to other claims. State courts sometimes do, for all sorts of reasons, overlook federal claims, as this Court and state law

itself recognize. Acknowledging that reality is hardly "disrespectful." Rather, ignoring it would be naive.

This realistic approach to state-court opinions, adopted by the unanimous panel below, finds deep support in the precedents of the federal courts of appeals, which broadly followed it for a decade before this Court decided *Harrington* v. *Richter*, 131 S. Ct. 770 (2011). In careful opinions by noted jurists like then-Judge Alito and Judges Luttig and Sutton, the circuit courts treated claims that were properly presented but left unaddressed in state-court opinions as overlooked, not as silently adjudicated on the merits. Those same courts also treated a state court's *summary order* as an adjudication on the merits, triggering AEDPA deference. They saw no conflict between these rules: It makes perfect sense to treat a summary order denying relief as an adjudication on the merits, because there is no reason to treat it as anything else; by contrast, omission of a claim from a written opinion is a red flag. *Richter* approved the circuit courts' rule for summary orders, without disturbing their consensus rule for opinions with omissions. This Court now should similarly approve the latter consensus.

This position is correct not only as a descriptive matter confirmed by precedent (all humans, even judges, make mistakes), but also as a normative matter. By confirming that a state court in issuing an opinion must somehow (even with brief, general language) signal consideration and rejection of a federal claim in order for that claim to receive deferential federal-court review, this Court will advance the sound judicial policy of encouraging clarity by state courts. This Court has recognized the

benefits of placing such a minimal burden of clarity on state courts; doing so here would not break new ground. And the pre-*Richter* consensus in the circuit courts confirms that such a rule neither imposes an appreciable burden nor suffers from practical problems. Rather, resolving ambiguity in a state-court opinion in favor of *de novo* review by the federal habeas court would protect the integrity of the federal habeas framework, ensuring that no prisoner is denied his right to a "first bite at the apple."

III. Finally, the Warden's arguments that a state court's adjudication of a state-law claim, if related to an omitted federal-law claim, somehow also adjudicates the omitted claim are overstated at best, and inapplicable here. As the Warden must admit, the word "claim" has an established meaning in the habeas context: It refers to a particular legal basis for relief under a set of operative facts. That settled definition makes clear that adjudication of a state-law claim does not of necessity dispose of a federal-law claim, even if the claims involve the same set of facts. Nor does the existence of some overlap between the state and federal standards change this conclusion. Only in the limited circumstances in which a State has authoritatively adopted the federal standard, or adopted a state standard that is always more generous than related federal law, might it make practical sense to deem adjudication of the state-law claim to have been a silent adjudication of the federal-law claim. But such circumstances are rare, and they do not exist here. In at least most cases in which a state court issues an opinion, a properly presented federal-law claim should receive some clear resolution. Otherwise, § 2254(d) does not apply, and federal habeas review is *de novo*.

ARGUMENT

I. AEDPA Does Not Restrict Habeas Review of a Properly Presented Federal Claim That the State Courts Overlooked or Ignored.

The only disputed question in this case is *how to determine* whether a state court has overlooked or ignored a federal claim that was properly preserved and presented. For if a state court *does* overlook or ignore such a federal claim, the consequences are undisputed: A federal habeas court must accord that claim *de novo* review.

AEDPA restricts the power of federal courts to grant a petition for a writ of habeas corpus, but only "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). The statute thus prescribes deferential review only for a claim that the state court actually reached and resolved. *See, e.g.*, *Cone* v. *Bell*, 556 U.S. 449, 472 (2009) ("Because the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA.").

In most cases when a state court did not "adjudicat[e]" a federal "claim" on the merits, there will be a good reason: The habeas petitioner either did not present the claim to that court, or the State's procedural rules barred the claim's presentation due to an earlier failure to preserve it. And in either case, the federal court generally may not review the claim *at all*, because of the exhaustion requirement and the doctrine barring federal habeas review of procedurally defaulted claims. *See* § 2254(b)(1); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977).

Section 2254(d) "thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richter*, 131 S. Ct. at 787. If a petitioner fails to preserve or present a federal claim in state court, habeas review of that claim will generally be barred. And if a petitioner does preserve and present his federal claim in state court, the state court will ordinarily adjudicate it on the merits; AEDPA, in turn, will honor that court's "good-faith attempts to honor constitutional rights," by allowing only deferential review by the federal habeas court. *See id.* (internal quotation marks omitted).

Sometimes, however, a petitioner properly presents a federal claim to a state court, yet the state court nonetheless fails to adjudicate it on the merits. While relatively rare, this scenario occurs if, for example, the state court simply misses the claim, or misunderstands its nature or scope, or erroneously believes that it has been procedurally defaulted. Whatever the reason, the habeas petitioner has done all that AEDPA requires of him to ensure that the state courts have "the first opportunity to review this claim," yet the state court has failed to take that opportunity. *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999). The petitioner has received no adjudication of his claim, and there is no merits decision to which a federal court could defer.

When that happens, § 2254(d), by its terms, does not apply; nor would any purpose be served by restricting federal review of the claim. It then falls to the federal habeas court—the first and only court to consider the federal claim's merits—to do so *de novo*.

II. If a State Court Issued an Opinion That Failed To Address a Properly Presented Federal Claim, a Habeas Court Should Not Presume That the Claim Was Nonetheless Adjudicated.

The question, then, is how the federal habeas court should determine whether the state court has actually adjudicated a federal claim on the merits (in which case § 2254(d)'s deferential standard of review governs) or, instead, has overlooked or ignored the claim (in which case review is *de novo*).

The question arises, most obviously, where the state court did not issue any written opinion. This Court confronted that scenario in *Richter*. Agreeing with the longstanding consensus of the federal circuit courts, the Court approved a sensible presumption: "that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-85. If all the state court said is that it denied relief, presumably it adjudicated the claim on the merits and determined that no relief was warranted. At least, there is no reason to believe otherwise. *Cf. Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1991) ("[M]any formulary orders are not meant to convey *anything* as to the reason for the decision.").

Correspondingly, where the state court *did* choose to issue a written opinion giving its reasons for denying relief, determining whether that court adjudicated the federal claim on the merits ought to be easy: The federal habeas court can simply read the opinion. But what if the opinion made no reference to the particular federal claim at issue, even while addressing the remainder of the claims? That is the scenario implicated by this case, and such

an omission raises serious doubts about whether the federal claim was, in fact, adjudicated.

Under such conditions, the more realistic interpretation of the record is that the state court did not adjudicate that particular claim—a common-sense inference reinforced by decisions of this Court. The federal courts of appeal have long widely recognized as much, and there is no reason to believe that this court in *Richter* silently rejected that consensus while agreeing with those same courts' treatment of summary orders. To adopt this interpretation would also be the most consistent with judicial policy. By contrast, to presume that state courts adjudicated all claims that were presented to them—despite direct evidence to the contrary—would be to adopt a legal fiction that will deprive petitioners of even a single opportunity for full review of potentially meritorious federal claims.

A. When a state-court opinion makes no mention of a particular claim, either specifically or generally, the likely reason is that the court overlooked it.

In determining whether a state court adjudicated a federal claim—and thus whether a warden may restrict a federal habeas court's review to the deferential grounds in § 2254(d)—the question is whether the possibility of an actual adjudication is "more likely" than the alternative. *Richter*, 131 S. Ct. at 785. (As the party seeking the benefit of § 2254(d), a warden of course bears the burden of persuasion, even though the habeas petitioner bears the ultimate burden of establishing his claim. *See, e.g.*, *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 91-92 (2008).) If a federal court cannot fairly

answer that question in the affirmative, then § 2254(d) cannot apply, because an "adjudicat[ion] on the merits" of the federal "claim" is a condition precedent to application of that provision's deferential standard of review.

1. Where the state court issued a written opinion explaining its reasons for denying relief on various claims, but omitted to refer to one particular claim that the petitioner properly raised, the most logical inference is that the state court overlooked or ignored that claim. After all, when a court writes an opinion, it ordinarily mentions—at least in general or cursory terms—the claims that it is resolving. Omission of a claim in such circumstances raises a red flag, and leaves a warden no credible ground for establishing that it is "more likely" that the state court actually resolved that lone claim *sub silentio*.

This inference is common sense. For example, if an employee submits to his boss a request for a raise, a larger office, and an extra week of vacation, and the boss responds, "Your salary will stay the same, and no other offices are available," any observer would suspect that the request for additional vacation had been left unresolved, whether by inadvertence or design. The same is true when a criminal defendant seeks relief under, for example, state law, the Fourth Amendment, and the Fourteenth Amendment's Due Process Clause, and the state court writes an opinion referring to only two of the three claims.

Justice Ginsburg, joined by Justices Breyer and Souter, has explained this very point: If a "state court, in disposing of the case, left one or more of the issues unaddressed," there is "no warrant … for an assumption that the state court, *sub silentio*,

considered the issue and resolved it on the merits," because "[n]othing in the record would discount the possibility that the issue was simply overlooked." *Bell* v. *Cone*, 543 U.S. 447, 460-61 (2005) (Ginsburg, J., concurring). "A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point." *Id.*

2. Here, the Warden seeks to "arbitrarily" impose on federal habeas courts precisely that "assumption" that has "no warrant." *Id.* She relies on the policy argument that, because state courts are *obligated* to apply federal law and resolve federal claims, they should always be *presumed* to have done so. (Warden Br. 25-27.) Indeed, any contrary finding would, she asserts, be "untoward" and "ill-behoov[e] comity." (*Id.* 43-44.)

Yet AEDPA itself contemplates that state courts will, sometimes, err. *See* § 2254. And just as they sometimes err in *resolving* federal claims, so they also sometimes err in *not resolving* federal claims. Indeed, the States themselves recognize this, by widely granting their courts the discretion, through petitions for rehearing, to address matters that their opinions overlooked. (*See* Warden Br. 45-46.[2])

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[2] The Warden, in collecting authority on petitions for rehearing, may mean to suggest that a habeas petitioner should be obligated to seek rehearing from a state court that has overlooked his properly presented federal claim, or else § 2254(d) somehow applies. But the petitioner's obligation is simply to exhaust pursuant to § 2254(b)(1), that is, to fairly present his claim so as to give a state court an "opportunity to correct the constitutional violation in the first instance."

This Court too has repeatedly recognized that reality. In *Dye* v. *Hofbauer*, 546 U.S. 1 (2005) (per curiam), the Court summarily reversed the Sixth Circuit's determination that a habeas petitioner had not preserved his federal claim in state court. *Id.* at 5. The circuit court had so inferred because the state-court opinion "made no mention of a federal claim." *Id.* at 3. But, as this Court reasoned: "Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it." *Id.* Quoting an earlier precedent recognizing the same point, the Court found it "too obvious to merit extended discussion" that the state court may have simply "cho[sen] to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief." *Id.* (quoting *Smith* v. *Digmon*, 434 U.S. 332, 333 (1978) (per curiam)).

(continued…)

O'Sullivan, 526 U.S. at 845. This Court accordingly has "never interpreted the exhaustion requirement" to "requir[e] a state prisoner to invoke *any possible* avenue of state court review." *Id.* at 844. In particular, "[h]abeas petitioners are not required to ask for a rehearing of the state court's ruling in order to fulfill the exhaustion requirement." *Wilson* v. *Battles*, 302 F.3d 745, 748 (7th Cir. 2002). Moreover, denial of rehearing is not a decision on the merits and thus would say nothing about whether a state court overlooked or ignored a federal claim. *See, e.g.*, *Norde* v. *Keane*, 294 F.3d 401, 410-11 (2d Cir. 2002) (holding that denial of petition for rehearing was "not a factor in determining whether his claims were adjudicated on the merits"); *see also Alpha/Omega Ins. Servs., Inc.* v. *Prudential Ins. Co.*, 272 F.3d 276, 281 (5th Cir. 2001) (denial "does not amount to a decision on the merits."); Cal. R. Ct. 8.268 ("[A] reviewing court *may* order rehearing.") (emphasis added).

Just as a state court's failure to address a claim hardly warrants assuming that the petitioner failed to raise the claim, so too does the existence of a petitioner's properly raised claim hardly warrant assuming that the state court adjudicated the claim even though failing to address it. In either case, the petitioner may have raised the claim, and the state court may have overlooked it.

Thus, the Warden is at odds with experience and authority in seeking to foist upon the federal courts, through an automatic and apparently irrebuttable presumption, the fiction that state courts *never* overlook or ignore properly presented federal claims. Rather, federal courts must be able to examine the full state-court record and, where it indicates that the state courts overlooked a particular federal claim, to treat that claim accordingly.

B. The federal circuit courts accordingly have long refused to presume that claims omitted from state-court opinions were silently adjudicated.

Consistent with the logic and precedent above, the unanimous Ninth Circuit panel here refused, in light of the state court's failure in its opinion to mention Respondent's Sixth Amendment claim, to "assum[e]" that the court "necessarily decided" it. *Bell*, 543 U.S. at 460-61 (Ginsburg, J., concurring). In so doing, that panel was merely walking a path well-trod by numerous other circuit courts. For a decade before *Richter*, the circuit courts widely held that, while a state court's summary order is properly deemed to be a merits adjudication, the *opposite* inference is appropriate if a state court did issue an opinion but failed therein to address a particular federal claim.

Most notably, in *Chadwick* v. *Janecka*, 312 F.3d 597 (3d Cir. 2002), then-Judge Alito, writing for a unanimous panel, distinguished between two situations: "when a claim is rejected without explanation" by a state court, versus "when the opinion of a state court reveals that it did not adjudicate a claim." *Id.* at 606. He recognized the authority of three Third Circuit precedents addressing the latter situation and "stand[ing] for the proposition that, if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply." *Id.* At the same time, however, *Chadwick* granted AEDPA deference to the state court's summary order denying relief "without explanation," *id.*; and *Richter* cited *Chadwick* approvingly as its lead case on that point. *See* 131 S. Ct. at 784.

Likewise, in *Billings* v. *Polk*, 441 F.3d 238 (4th Cir. 2006), Judge Luttig explained for a unanimous panel that the petitioner had "raised his Sixth Amendment claim before the North Carolina Supreme Court" but that court had "limited its analysis to the state-law question." *Id.* at 252. Given that there was accordingly "no indication that [the state court] considered" the federal claim, the Fourth Circuit reviewed it "without the deference otherwise mandated by AEDPA." *Id.* Yet the Fourth Circuit also agreed that "a summary state court decision … is an 'adjudication' of the claim for purposes of § 2254(d)." *Bell* v. *Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc). And *Richter* cited *Bell* approvingly, too. *See* 131 S. Ct. at 784.

In the Sixth Circuit, the rule regarding omissions was similarly well established. In *Wynne* v. *Renico*, 606 F.3d 867 (6th Cir. 2010), for example, Judge Sutton reasoned for a unanimous panel that "fresh review" was owed to a petitioner's federal claim when "the state courts addressed only his state law grounds for relief, which means they did not 'adjudicate' the federal claim 'on the merits.'" *Id.* at 870. Judge Sutton had employed the same analysis in an earlier case, *Lyell* v. *Renico*, 470 F.3d 1177 (6th Cir. 2006), in which the petitioner had "presented federal polling and fair-trial claims," along with "state-law challenges," but the state court had "addressed [his] claims only in state-law terms in its decision." *Id.* at 1182; *see also Danner* v. *Motley*, 448 F.3d 372, 376 (6th Cir. 2006) (holding that AEDPA deference did not apply where state-court opinion gave no "indication" or "evidence" that it considered federal claim). At the same time, though, the Sixth Circuit as well granted AEDPA deference to summary orders by state courts, as in *Harris* v. *Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), which *Richter* cited approvingly, *see* 131 S. Ct. at 784.

The Tenth Circuit adopted the same reasoning: "When the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court." *Morris* v. *Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003); *see also Duckett* v. *Mullin*, 306 F.3d 982, 990 (10th Cir. 2002) (according no deference when state court "obviously overlooked this particular claim"). And the Tenth Circuit's contrary inference as to summary orders was

approved in *Richter*. *See* 131 S. Ct. at 784 (citing *Aycox* v. *Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999)).

Other circuits were in accord; none imposed a mechanical presumption that any properly presented federal claim must necessarily have been decided, even if the state-court opinion said nothing about it. *See, e.g.*, *Canaan* v. *McBride*, 395 F.3d 376, 382 (7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits.'"); *Brown* v. *Luebbers*, 371 F.3d 458, 460-61 (8th Cir. 2004) (en banc) (determining whether federal claim has been adjudicated on merits requires federal court to "look at what a state court has said, case by case" to ensure that claim was in fact "considered and rejected"); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (distinguishing circuit precedent regarding summary orders, *Sellan* v. *Kuhlman*, 261 F.3d 303 (2d Cir. 2001), where state-court opinion had no language "indicating that [Sixth Amendment] claims were considered and denied on the merits"); *Fortini* v. *Murphy*, 257 F.3d 39, 43, 47 (1st Cir. 2001) (holding that federal claim had not been adjudicated on the merits when "the federal claim was never addressed by the state courts").

Thus, the same circuits that recognized that state-court summary orders denying relief are entitled to AEDPA deference, *see Richter*, 131 S. Ct. at 784, simultaneously recognized that state-court opinions with glaring omissions are not so entitled, because such omissions signal a failure to consider the claim. The Warden is reduced to asserting that these cases, to the extent she acknowledges them, were all wrongly decided. (Warden Br. 44-45.) And the *Amici*

Curiae States simply ignore them. For the reasons explained above, however, the circuit courts were not wrong, and the panel here rightly followed their lead.

C. *Richter* did nothing to disturb the circuit courts' consensus regarding omitted claims.

This Court's recent decision in *Richter* dealt exclusively with the problem posed by summary orders. It would be most peculiar if, in adopting the consensus of the federal circuit courts as to that problem, the Court somehow silently repudiated those same courts' consensus approach to the problem of omitted claims. *Richter* does no such thing, in either its holding or its rationale. Nor does the other authority that the Warden cites to contest the longstanding inference that a claim omitted from an opinion has likely been overlooked rather than adjudicated for purposes of AEDPA.

1. The question that the Court considered in *Richter*—on its own initiative—was narrow and carefully defined: "whether § 2254(d) applies when a state court's order is *unaccompanied by an opinion*." 131 S. Ct. at 784 (emphasis added). The question arose because the California Supreme Court had denied relief "in a one-sentence summary order." *Id.* at 783. In that context, an evidentiary rule one way or the other was needed, and there was no reason to suspect that the state court did not actually adjudicate the claims before it denied relief. To return to an earlier hypothetical, an employer who responds to his employee's request for three special dispensations with a terse "No!" is presumably denying all three. Accordingly, this Court ruled that state courts are presumed, in their summary orders,

to have adjudicated and denied on the merits all presented claims. *Id.* at 784-85.

That presumption, however, has no place when the state court issued an *opinion* to which the federal court can look for guidance. The state court's own explanation for its action is obviously the best source for determining which claims it adjudicated; as the pre-*Richter* caselaw of the federal courts of appeals illustrates, there is no need for a presumption when a state-court opinion is at hand.

Moreover, even *Richter* contemplates a contrary result (overcoming the presumption) if there is "any indication" that the state court did not, in fact, adjudicate the federal claim—if "there is reason to think some other explanation for the state court's decision" than rejection on the merits "is more likely." 131 S. Ct. at 785. A state court's failure, in its opinion, to identify or otherwise address a specific claim is just such an "indication." Thus, if *Richter*'s presumption applied at all, the rule reflected by that prior caselaw would amount to a simple application of *Richter*'s exception—the rebutting of its presumption. As the panel below reasoned: "[W]hen a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is reason to think' that it 'is more likely' that the court simply neglected the issue." Pet. App. 24a-25a.

Thus, although two divided courts have apparently misread *Richter* as undermining their prior decisions on this point, *see Childers* v. *Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), *pet. for cert. filed* (No. 11-42); *Brown* v. *Bobby*, 656 F.3d 325 (6th

Cir. 2011), *pet. for cert. filed* (No. 11-807), this Court's decision in *Richter* is entirely consistent with the logic and holdings of the earlier cases.

2. The Warden, in addition to invoking *Richter*, points to five cases (two from this Court) purportedly suggesting that failure to discuss a claim in an opinion indicates that the claim has been "implicitly rejected," not overlooked. (Warden Br. 29.) Like *Richter*, however, those cases are inapt and, if anything, *undermine* her position.

One involves an *argument* made in support of a claim, not a *claim* itself. *See Clemons* v. *Mississippi*, 494 U.S. 738, 747 n.3 (1990) (describing the Court's implicit rejection of "those arguments"). Of course a court is unlikely to discuss every contention, every doctrinal theory, and every policy argument urged by a party in support of his claim. But a court ordinarily *would* identify the *claims* asserted by the plaintiff. *Cf. Barclay* v. *Florida*, 463 U.S. 939, 951 (1983) (rejecting on the merits the Fourteenth Amendment claim embracing the "arguments" that *Clemons* described as having been implicitly rejected).

Another case that the Warden cites involves an argument "implicit[ly] reject[ed]" by a district court's *summary order*—"without findings or opinion." *Savage* v. *Hadlock*, 296 F.2d 417, 418-19 (D.C. Cir. 1961) (per curiam). But, as shown, the distinction between construing a summary order and construing an opinion with a glaring omission is at the crux of this case, so *Savage* does not help the Warden any more than *Richter* does.

As for a third case, *Comer* v. *Schriro*, 480 F.3d 960 (9th Cir. 2007) (en banc), the Warden quotes Judge Pregerson's *dissent*. Moreover, the state court that

he characterized as having "implicit[ly] reject[ed]" the claims was actually explicit: It identified each of those claims at the start of its opinion and declared at the end that it had "reviewed the entire record for fundamental error" and "found none." *State* v. *Comer*, 799 P.2d 333, 336, 350 (Ariz. 1990). Rather than help the Warden, then, *Comer* exemplifies what one would expect a court to do if it did not feel the need to address every claim at length—and thus drives home the reason for skepticism about opinions that fail to address at all a singular claim.

More broadly, as best illustrated by the final two cases cited, in none did any assumption of implicit rejection prejudice the claimant. In *Stewart* v. *Oklahoma*, 292 F.3d 1257 (10th Cir. 2002), the court fully considered, and rejected, an argument raised by the appellant, and "construe[d] the district court's silence as a rejection" of that argument only to clarify that the panel was "affirm[ing] the district court's implicit ruling." *Id.* at 1260. And in *Castille* v. *Peoples*, 489 U.S. 346 (1989), this Court treated a claim as having been "impliedly rejected" only in holding that the claimant had satisfied the exhaustion requirement. *Id.* at 351. It is one thing to treat an omission as implicit rejection when such treatment is inconsequential, or even beneficial to the claimant. It is quite another to hold that an omission necessarily satisfies the Warden's burden to demonstrate that a claim was adjudicated, where the effect would be to preclude the federal court from a full-fledged review of the merits of the claim. Thus, neither these cases nor *Richter* offers any reason to depart from the longstanding and well-founded consensus of the federal courts of appeals in applying AEDPA to omitted claims.

D. Refusing to presume that omitted claims were adjudicated will further sound judicial policy, by encouraging clarity in state-court opinions.

The Warden's request that this Court fashion an automatic presumption that all federal claims fairly presented to a state court have necessarily been decided by that court is, as illustrated above, inconsistent with both logic and precedent. Sound judicial policy further counsels against adopting that rule.

1. To the extent that there is any doubt, after reading a state court's opinion, which claims it adjudicated, that is because the opinion is less than pellucid. The ready solution is for state courts to be clearer. Yet a rule that presumes adjudication on the merits, and thus grants AEDPA deference blindly, would discourage clarity. By contrast, if this Court were to reject the Warden's mechanical presumption, and instead permit federal habeas courts to continue making their determinations based on full review of state-court records, state courts likely would provide clearer opinions.

In *Richter*, the Court did reject a somewhat analogous argument, on the view that penalizing state courts for issuing summary orders would "undercut state practices designed … to concentrate its resources on the cases where opinions are most needed," 131 S. Ct. at 784; but *no* additional resources would be needed for state courts that are *already writing opinions* simply to indicate, in doing so, which claims they are resolving. Indeed, a simple declaration, at the end of the opinion, that "all other claims are meritless and are rejected" would suffice.

Courts, both federal and state, already often do this. *See, e.g.*, *United States* v. *Taylor*, 173 F.3d 538, 542 (6th Cir. 1999) ("We have considered the other claims of error made by the defendant and conclude that they do not merit discussion."); *People* v. *Lewis*, 12 Cal. Rptr. 3d 1, 3 (Ct. App. 2004) ("We conclude that the other claims of error also lack merit and affirm the judgment."); *Comer*, 799 P.2d at 350 (*see supra*, Part II.C.2). And the federal circuits recognized, before *Richter*, that such practice—"us[ing] general language referable to the merits"—could indicate an adjudication. *Norde*, 294 F.3d at 410.

Thus, contrary to the Warden's suggestion, neither "magic words" nor extensive reasoning from state courts would be necessary if her novel presumption were rejected. (*See* Warden Br. 30-31, 42-43.) *No* circuit before *Richter* required any such thing to find an adjudication for purposes of § 2254(d), nor does the Warden claim otherwise. A state court could, among other easy options, include enumeration of the claim at the start of the opinion; some identification of the claim, or language indicating its rejection, in the body of the opinion; or even, as noted, generic rejection of "all other claims" at the end of the opinion. *Cf. Norde*, 294 F.3d at 410 ("The court did not mention Norde's Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits.").

2. Adopting a rule that places a minimal burden of clarity on the institution best suited to ensure it—the state court—is exactly what this Court did in *Michigan* v. *Long*, 463 U.S. 1032 (1983). In that case,

the Court explained its struggle to determine whether state-court judgments rested on state law (in which case there would be no federal jurisdiction to review them) or on federal law (in which case Supreme Court review would be proper). *Id.* at 1038-42. After rejecting a series of potential approaches to such ambiguity, the Court settled on this rule: "[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion," the Court will "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-41. The Court justified its rule by observing that, to avoid ambiguity—and subsequent review—a state court "need only make clear by a plain statement in its judgment or opinion" that its decision rested on state law. *Id.* at 1041.

By looking to the state courts to clarify the grounds for their decisions, the Court in *Long* effectuated an "important" principle: "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id.* (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)) (internal quotation marks omitted); *see also Harris* v. *Reed*, 489 U.S. 255, 260-65 (1989) (extending, to the habeas context, *Long*'s presumption authorizing federal-court review of an ambiguous state-court judgment).

The same logic supports affirmance of the Ninth Circuit's judgment here and adoption of the longstanding consensus of the circuit courts. To avoid both ambiguity and subsequent, unfettered

habeas review, a state court "need only make clear by a plain statement" in its opinion that it adjudicated the petitioner's federal claim. *Long*, 463 U.S. at 1041. Adopting an automatic presumption of adjudication would, by contrast, effectively permit "ambiguous or obscure adjudications"—even non-adjudications—"by state courts" to "stand as barriers to a determination …of the validity under the federal constitution of state action." *Nat'l Tea*, 309 U.S. at 557.

3. In nevertheless citing *Long* and its progeny as supposed support for *her* proposed rule, the Warden misunderstands the broader import of these authorities. (Warden Br. 38-39.) She describes them as having "held that, when faced with ambiguous state court decisions, a federal court must presume that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary." (*Id.* 38.) As the quotation concedes, *Long* is about determining the *grounds* for a state-court adjudication—not, as here, determining whether one occurred.

More importantly, the lesson of these cases is that federal-court review should not be obstructed by the *possibility* that a state court took certain action that would limit such review—given that the state court itself caused the ambiguity. *Long* resolved ambiguity *in favor of federal-court review*, adopting a presumption that the state court did not make the decision that would restrict such review. Applying that lesson to this case, the Court should hold that if a state-court opinion does not identify or address a particular federal claim, resulting in ambiguity (at best) over whether AEDPA restricts habeas review,

the federal court should *not* assume that adjudication on the merits took place. Rather, the court should break any arguable "tie" in favor of federal review.

E. Presuming that omitted claims were silently rejected would deprive petitioners of the one, full, fair opportunity for review that AEDPA guarantees.

Not only is the Warden's proposed rule at odds with logic, precedent, and sound judicial policy, but it also would, when it applies, prevent habeas petitioners from receiving even a single round of unfettered review of their (potentially meritorious) federal claims, notwithstanding that they diligently preserved those claims.

It should be uncontroversial that, at least *sometimes*, state courts really do overlook or ignore properly presented claims. *See supra*, Part II.A. Overburdened state courts can miss things; *pro se* filings are not always models of drafting. Yet, under the Warden's rule, there would be no way for such a petitioner to obtain *de novo* review in federal court, despite that being the first judicial evaluation of his claim. The Warden's mechanical, irrebuttable presumption of state-court adjudication of all presented claims would trigger § 2254(d)'s further presumption of a *correct* adjudication, with its highly restricted review as the result.

That result is contrary to the scheme that AEDPA presupposed and reinforced. AEDPA is designed to prevent a petitioner from getting a full-fledged "second bite at the apple." But every petitioner is allowed a first bite. Under the Warden's flat presumption, federal courts would be unable to "ensur[e] that every habeas petitioner has at least

one unfettered evaluation of her claim by a competent tribunal." *Childers*, 642 F.3d at 986 (Wilson, J., concurring in the judgment). Some claims would fall through the cracks. But it is precisely because the space AEDPA leaves open to prisoners seeking relief is so small that this Court must carefully police its boundaries, so that space does not collapse.

III. Contrary to the Warden's Alternative Argument, the Adjudication of a State-Law Claim Does Not Adjudicate a Factually Related, but Omitted, Federal-Law Claim.

Perhaps appreciating the obstacles to (and consequences of) assuming that *all* claims fairly presented to a state court were necessarily resolved by that court—even if the court suggested otherwise by omitting the claim from its opinion—the Warden also offers a somewhat narrower argument: Adjudication on the merits should be presumed, the Warden submits, at least so long as the state-court opinion "discussed the substance of the asserted trial error." (Warden Br. 27.) By this vague formulation, the Warden seems to mean that, if the state court evaluated, under *some* legal standard, allegedly wrongful facts regarding the petitioner's conviction (the "error"), that is enough to signify adjudication of *all* claims associated with those same facts—even if the state court analyzed them in the context of a distinct claim, premised on distinct law.

The Warden is wrong. AEDPA deference requires the state court to have adjudicated the "claim" *on which the petitioner seeks habeas relief*. Under well-established law, a habeas "claim" is a set of facts *and* a legal basis for relief. Therefore, for example, a

state court's adjudication of a state-law basis for relief from the introduction or exclusion of evidence hardly adjudicates a federal "claim," under the Due Process Clause, objecting to the same order. At bottom, the Warden is attempting to blur the lines between state-law claims and federal-law claims, but the two are legally and conceptually distinct, and conflating them would make a hash of habeas jurisprudence.

Nor is there any basis for a special inference that a court that rejected a state-law claim must have silently rejected a factually related federal-law claim. Unless the state-law claim fully subsumes the federal-law claim as a matter of law, discussion of the state-law issue in the court's opinion is no indication that the court engaged with the distinct, omitted federal-law issue. If anything, such an omission suggests that the state court missed the federal character of the petitioner's claim.

A. Section 2254(d) applies only if the state court adjudicated the "claim," meaning the facts *and* the legal ground for relief.

Under AEDPA, a federal court is required to defer to a state court's denial of relief only as to a "claim that was adjudicated on the merits in State court proceedings." § 2254(d). The Warden argues that this Court should define the term "claim" broadly, such that if the state court adjudicated a particular state-law challenge to a certain order, it has adjudicated every "claim" for relief based on that order, no matter how many different legal flaws the order contained. (Warden Br. 27-29, 31-33.) But that is not what "claim" means in the habeas context, and such a definition would badly distort AEDPA.

As the Warden concedes, this Court has already defined the term "claim" in the habeas and AEDPA contexts. (*Id.* 31-32.) A habeas claim is an "asserted federal basis for relief from a state court's judgment." *Gonzales* v. *Crosby*, 545 U.S. 524, 530 (2005). It includes not just "a statement of the facts that entitle the petitioner to relief" but also "reference to a specific federal constitutional guarantee." *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996). *Richter* employed this definition, in describing claims as "grounds for relief" and referring to "the elements in a multipart claim." 131 S. Ct. at 783, 784; *see also Mayle* v. *Felix*, 545 U.S. 644, 661 (2005) (noting that Habeas Corpus Rule 2(c) instructs petitioners to "specify all [available] grounds for relief" and "state the facts supporting each ground" (internal quotation marks omitted)). In other words, simply objecting to a piece of evidence or a ruling is not enough to state a habeas "claim"; the objection must be coupled with a source of law—a right that the evidence or ruling violated. Thus, a "claim" that a court violated state law is distinct from a "claim" that it violated federal law through the same action.[3] Indeed, the former claim is *not even cognizable* on federal habeas review. *Estelle* v*. McGuire*, 502 U.S. 62, 68 (1991).

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[3] The Warden cites *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), to argue that the Court should define "claim" more broadly. There, the Court noted—in *dictum*—that "'claim' is often used in a commonsense way to mean a right or demand." *Id.* at 1729. But that statement was comparing the terms "claim" and "cause of action," and in the context of interpreting a statute about the jurisdiction of the Court of Federal Claims. It has no significance in the habeas context, where "claim" long has had a well-established meaning.

The structure of habeas law requires adherence to its well-accepted definition of "claim." A new, broader definition, under which a "claim" would encompass any sort of challenge (under state or federal law) to a given factual "error," would cause all sorts of mischief. For example, habeas jurisprudence requires that the petitioner exhaust his claim in state court before seeking federal review. *See Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *supra,* Part I. Under the Warden's definition, however, it would be enough to object in general or state-law terms to an aspect of one's trial, with a more specific federal legal objection raised for the first time to the habeas court. And, even though the state court certainly would not have considered the federal issue, the federal court (under the Warden's presumption) would still need to defer to its denial of relief. Neither part of that outcome makes sense: The ready bypassing of the exhaustion rule would evade AEDPA's goal of "ensur[ing] that state proceedings are the central process." *Richter*, 131 S. Ct. at 787; *see Baldwin* v. *Reese*, 541 U.S. 27 (2003) (finding no exhaustion in such a scenario). And deferring to a decision that the state court undoubtedly never made would hardly further AEDPA's purpose of preventing federal courts from using habeas "to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010).[4]

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[4] This demanding exhaustion requirement also eliminates the Warden's professed concern that inferring, from a state court's omission of a claim, that it overlooked that claim would lead prisoners to obscure their federal claims in state court. (Warden Br. 46-47.) A habeas petitioner cannot obtain *any* review if he does not first fairly present his claim in state court and exhaust

In short, the Warden's attempt to conflate state-law and federal-law claims fails, because a habeas "claim" is defined with reference to the legal provision allegedly violated. For AEDPA's scheme to work as intended, it must be so. Therefore, if a state court resolved a state-law claim but failed to resolve a federal-law claim, the latter has not been adjudicated as a result, even if the two claims are factually related.

B. Unless state law subsumes federal law, there is no reason to infer from rejection of a state-law claim that the court silently rejected a related federal-law claim.

Nor do common underlying facts of an (addressed) state-law claim and distinct (omitted) federal-law claim change the reasons—of logic, doctrine, or policy—for recognizing that a state court's omission of the latter claim from its opinion indicates that the court overlooked it rather than resolved it *sub silentio*. Distinguishing between state- and federal-law claims is hardly formalism: The two are not only *technically* distinct (as shown) but, often, also *doctrinally* distinct.

1. The Warden emphasizes that state and federal standards may overlap, or the latter may inform the former. (*See* Warden Br. 28, 50.) She thus suggests that a state court adjudicating a state-law claim may

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(continued…)

remedies with respect to it. *See* § 2254(b)(1); *O'Sullivan*, 526 U.S. at 844-45. No prisoner would both give up his right to state-court review and risk forfeiting federal habeas review entirely, just to obtain a shot at *de novo* federal review.

well (and fairly) believe that the distinct federal-law claim adds nothing to the state-law claim it has addressed. If so, the court's silence could mean that it believed its rejection of the state claim necessarily resolved and rejected the federal claim as well—and thus that the court did make a merits determination of the federal claim, entitled to AEDPA deference.

The Warden's suggested inference could have force only in certain, narrow contexts. Specifically, where there are parallel state and federal guarantees, and the state courts have authoritatively determined that state law *adopts* the federal law, or where the state law is *always more generous* than the federal, the state claim does effectively subsume the federal claim. An obvious example could be parallel claims, under the state and federal constitutions, alleging ineffective assistance of counsel. Many States have adopted the federal test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), or constructed a state-law test more protective than it. *See, e.g.*, *State* v. *Fritz*, 105 N.J. 42, 58 (1987) (adopting *Strickland*). The same may be true of claims premised on the withholding of exculpatory evidence, as state law often mimics or exceeds the federal test of *Brady* v. *Maryland*, 373 U.S. 83 (1963). *See, e.g.*, *Commonwealth* v. *Tucceri*, 412 Mass. 401, 413 n.11 (1992) (adopting state-law test "more favorable to defendants than the Federal Constitutional standard").

In such cases, it may make practical sense to infer that the state-court's adjudication of the state-law claim included adjudication of the doctrinally subsumed or identical—albeit technically distinct—federal claim. Indeed, circuit courts have recognized

this reality. Federal habeas courts, in the scenario in which the state court in its opinion expressly rejected the state-law claim but ignored a truly narrower, parallel federal-law claim, have held that, absent any contrary indication, the latter should be deemed to have been adjudicated. *See, e.g.*, *McCambridge* v. *Hall*, 303 F.3d 24, 35 (1st Cir. 2002) (en banc) ("If there is a federal or state case that explicitly says that the state adheres to a standard that is more favorable to defendants than the federal standard (and it is correct in its characterization of the law), we will presume the federal law adjudication to be subsumed within the state law adjudication."). To the extent that this narrow rule is all the Warden seeks to establish, *amicus* has no objection to the basic reasoning.

But, quite often, a shared set of facts will give rise to colorable state-law and federal-law grounds for relief that are doctrinally distinct—where rejection of the one does not imply or presuppose rejection of the other. These claims are legally independent and distinct, not just in *form* but also in *substance*. A quintessential example would be the admission of evidence, triggering a hearsay objection under state law and a federal constitutional objection under the Confrontation Clause. Just because the admission of evidence is permissible under state hearsay exceptions does *not* necessarily make the admission permissible under the Sixth Amendment. *See, e.g., Crawford* v. *Washington*, 541 U.S. 36, 51 (2004); *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2539-40 (2009). Similarly, many States have enacted speedy-trial statutes. But these can be violated even if the Sixth Amendment's Speedy Trial Clause is not; and vice versa. *See Nelson* v. *Hargett*, 989 F.2d 847,

851 n.2 (5th Cir. 1993) ("[A] state's compliance with its own speedy trial statute will not insulate it from constitutional attack."); *State* v. *O'Brien*, 516 N.E.2d 218, 221 (Ohio 1987) (recognizing that "the constitutional guarantees may be found to be broader than speedy trial statutes").

In these situations, the underlying facts—or "error," in the Warden's obscuring words—may be the same for purposes of the state-law claim and the federal-law claim, but the required legal analysis is different. As such, the adjudication of the state-law claim cannot be taken as indicating an effective disposal on the merits of the federal-law claim. If anything, in this situation the inference that the state court overlooked the omitted claim is *stronger*, because the selective analysis suggests that the court missed the federal claim in its focus on the state claim, or perhaps erroneously believed that only a state claim had been asserted.

2. The case of *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), illustrates this contrast between situations where state law subsumes federal law and situations where state-law and federal-law claims are legally independent.

Although the Warden cites and discusses *Early* at length, as somehow bearing on whether an adjudication has occurred, it was undisputed in that case that the state court had adjudicated the federal-law claim. *See* Warden Br. 34; 537 U.S. at 8. The question, instead, was whether, under § 2254(d)'s standard of review, that adjudication had been "contrary to, or involved an unreasonable application of, clearly established Federal law" because the state court had failed to cite federal law. 537 U.S. at 7.

Nevertheless, *Early* does identify the limited circumstances in which adjudication of a state-law claim might practically subsume, and thus fairly indicate, adjudication of a related federal-law claim. In rejecting any requirement that a state court in adjudicating a federal claim cite federal law, the *Early* Court observed that the state court had "cited instead decisions from the California Supreme Court that impose even *greater* restrictions for the avoidance of potentially coercive jury instructions." *Id.* at 8. But *Early* hardly suggests that, if the state and federal claims lack such a doctrinal relationship, the habeas court should nonetheless presume that the state court adjudicated the omitted federal claim.

3. In this case, the Warden vaguely asserts that Respondent's federal-law claim was "intertwined with" her state-law claim and that the applicable California law "had its foundation in federal constitutional principles." (Warden Br. 48, 50.) But it is telling that the Warden cannot and does not claim that § 1089 of California's Penal Code is *necessarily at least as generous* to defendants as the Sixth Amendment. That is because, as Respondent shows, it is not. (*See* Resp. Br. 49-56.) As such, Respondent's state-law claim did not subsume her federal-law claim; and the state court's adjudication of her state-law claim did not subsume adjudication of her federal-law claim—leaving the latter un-adjudicated and AEDPA deference inapplicable.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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