No. 09-587

In The Supreme Court of the United States

KELLY HARRINGTON, WARDEN,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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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)?

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INTRODUCTION

As the State explained in its opening brief on the merits, the California Supreme Court's summary disposition of respondent Richter's ineffective-counsel claim was an adjudication on the merits of that claim. (Petitioner's Brief on the Merits [PBOM] at 21-24.) And, because it was an "adjudication on the merits," it was entitled under 28 U.S.C. §2254(d) to limited deferential review for reasonableness under "clearly established Federal law" as determined by the strict holdings of this Court's precedents. (*Id.,* at 24-32.) Nothing in the plain language or legislative history of section 2254(d) suggests that Congress conditioned deferential review of state-court merits adjudications on the issuance of an "explained" or written order detailing why the federal claim was denied. (*Id.* at 27-29.) Further, section 2254(d) deferential review of the California Supreme Court's ultimate decision is required even though Richter's claim invoked this Court's "two pronged" *Strickland* v. *Washington* test for effective counsel. (*Id.* at 32-38.) This is so because, since the state supreme court did not say that its adjudication of the claim was confined to a single prong, there is no basis for assuming that the court did not consider Richter's entire claim in denying relief. To suggest, as Richter does, that the state court might have considered only one part of Richter's claim is entirely speculative.

Therefore, this Court should hold that summary (that is, unexplained) state court dispositions of federal constitutional claims, including claims of

ineffective assistance of counsel (see *Strickland* v. *Washington*, 466 U.S. 668 (1984)), are entitled to deference under section 2254(d).

The State's brief also explained that, in granting Richter habeas corpus relief on his claim, the Ninth Circuit committed multiple errors. First, instead of deferring under section 2254(d) to the state court's reasonable application of this Court's *Strickland* v. *Washington* rule of deference to reasonable investigative choices of defense counsel, the Ninth Circuit impermissibly substituted a rigid and unduly demanding legal standard requiring defense counsel to prepare for "any contingency" and to meet prosecution expert testimony with defense expert testimony. Under the proper *Strickland* rule, however, the state court record supported a reasonable conclusion validating counsel's reliance on cross-examination.

Second, the Ninth Circuit ignored the fact that the state-court record reasonably supported the conclusion that Richter's defense was not prejudiced. The Ninth Circuit exaggerated the importance of whether some of the murder victim's blood was pooled near a bedroom door several feet away from where his body was found. The myopic focus on this "blood pool" overlooks the most salient evidence of Richter's guilt: the bullet casing found near the deceased victim that was identical to that of bullets found in a box and loaded in a magazine for a semi-automatic pistol in Richter's bedroom. In addition, the court minimized counsel's success in cross-examining the

prosecution's blood experts; and it grossly overstated the potential effect of the speculative and inconclusive expert opinions Richter proffered to the state court in support of his state habeas petition.

Because the state court's merits adjudication was at least "objectively reasonable" under the "doubly deferential" review prescribed by section 2254(d) and *Strickland*, Richter was ineligible for habeas corpus relief. (PBOM at 39-61.) The Ninth Circuit's decision should, therefore, be reversed.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S SUMMARY ADJUDICATION OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM IS ENTITLED TO DEFERENTIAL REVIEW UNDER SECTION 2254(d)

A. The California Supreme Court's Unexplained Denials of Petitions for Writs of Habeas Corpus Have Been Properly Presumed to Be Decisions on the Merits Absent Strong Evidence to the Contrary

1. In his merits brief, Richter suddenly argues that the California Supreme Court's unexplained denial of his ineffective-counsel claim was not an adjudication on the merits of the claim. (Respondent's Brief on the Merits [hereafter RBOM] at 16-44.) But he never made any such claim in the district court or before either the three-judge panel or the en banc

court of appeals below. Nor, in those courts, did he ever question that the state court ruling was entitled to deferential review under section 2254(d). If he had raised such a novel claim in the Ninth Circuit, any doubt on the question might have been certified to the California Supreme Court for confirmation. See, e.g., *Evans* v. *Chavis*, 546 U.S. 189, 199 (2006).[1]

Richter never even raised such a claim in his brief in opposition to the State's certiorari petition. At that point, it was incumbent upon him there to bring to this Court's attention any dispute "that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Now, after the grant of certiorari and in the middle of briefing on the merits, he seeks to raise for the first time a threshold challenge not only to whether the issue raised in the State's petition is properly before the Court, but also whether the important issue this Court raised sua sponte is properly presented. It is too late in the day for this.

2. This Court should not credit Richter's belated objection in any event. The Ninth Circuit has long recognized that an otherwise unexplained decision rejecting a habeas corpus claim by the California

[1] If Richter had argued in his previous briefing that the Ninth Circuit's interpretation of California law in regard to "silent denials" was incorrect, that court could have asked the California Supreme Court to exercise its discretion and decide the issue as a certified question pursuant to California Rule of Court 8.548.

Supreme Court is a ruling on the merits of the claim. *Chambers* v. *McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008) ("[U]nless a court expressly (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible."); *Hunter* v. *Aispuro*, 982 F.2d 344, 346-47 (9th Cir. 1992) (the California Supreme Court's denial of a state habeas petition "without comment or citation constitutes a decision *on the merits* of the federal claims") (emphasis added); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) ("There is now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so."). In the circumstances of this case, this Court should defer to the local federal courts' interpretation of state practice. *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004).

Presumably, the California Supreme Court would have found an opportunity over the past few decades to correct the Ninth Circuit's view of state practice if it were erroneous. Although it does not generally adjust state practice in reaction to the federal habeas corpus statute, the state court obviously is aware of the effect of its procedures in later federal habeas corpus proceedings. And it hardly has proved shy about directly citing and correcting the Ninth Circuit's erroneous views of state law on any number of occasions. E.g., *People* v. *Box*, 5 P.3d 130, 152 n. 7

(Cal. 2000); *People* v. *Santamaria*, 884 P.2d 81, 92 (Cal. 1994); *In re Robbins*, 959 P.2d 311, 326 n. 15 (Cal. 1998).

The Ninth Circuit's interpretation, moreover, accords with this Court's own approach to state court rulings. In *Arizona* v. *Evans*, 514 U.S. 1, 7 (1995), this Court reaffirmed the presumption that state-court decisions are on the merits rather than on state law grounds, "to obviate the 'unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court.'" Nothing in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) suggests that Congress intended to abrogate that longstanding presumption.[2] When

[2] Of course, this presumption can be overcome. In *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1992), for example, the last "reasoned decision" from the state court had deemed the petitioner's federal claim forfeited under an independent and adequate state procedural-default rule; and nothing in a subsequent unexplained decision suggested that the later state court ruling was intended to forgive the procedural default. Similarly, depending on the circumstances, the California Supreme Court's denial of a habeas corpus petition on the merits does not preclude a federal court from also concluding that the petition was also denied as untimely. *Evans* v. *Chavis*, 546 U.S. at 198-201.

Richter contends that the State has changed its position regarding the proper interpretation of a "silent denial" from the position it expressed in the briefing in *Ylst* v. *Nunnemaker* and *Evans* v. *Chavis*. (See RBOM at 17, 23-25, 27-30 and n. 5.) The contention is specious. In *Ylst*, the State argued that silent denials can actually be interpreted in light of the last reasoned state court decision. In *Evans*, the State argued that in the great bulk of cases that petitions are denied on the merits. The State's

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Congress enacted AEDPA in 1996, the settled law both nationally and for California was that a state court's disposition of a federal claim was presumed to be on the merits unless the disposition included a "plain statement" of an independent and adequate state ground. *Harris* v. *Reed*, 489 U.S. 255, 264, n. 10 (1989). Congress was presumably aware of this when it enacted AEDPA. Cf. *Holland* v. *Illinois*, ___ U.S. ___, 130 S.Ct. 2549, 2561 (2010).

Richter's denial that the ruling in his case was "on the merits" is, in any event, unpersuasive. He and an amicus deduce from the wording of the ruling in his case and the wording of various other orders issued by the state supreme court on the same day, that the state court employs the simple and unexplained term "denied" when no majority on the court has voted for a "merits" or "procedural" denial. (RBOM at 29.) But his speculation should not suffice to upset the Ninth Circuit's long-standing

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position in regard to "silent denials" has never varied: ordinarily, such summary dispositions are "on the merits"; but, in some instances, the federal court must "look through" the "silent denial" to the last reasoned decision to determine if federal review of a constitutional claim is barred by a state procedural rule.

In the instant case, because the California Supreme Court's summary order denying Richter's petition for a writ of habeas corpus did not refer to a state procedural bar as the basis for denying relief, it must be presumed that the state court's decision was "on the merits." Nothing in this Court's decisions in *Ylst* and *Chavis* compel a different conclusion.

interpretation of unexplained California habeas rulings.

B. A State Court's Explanation of Its Reasoning in Denying a Federal Claim on the Merits is Not a Prerequisite to Section 2254(d) Deferential Review

Richter next contends that, even if the California Supreme Court ruling in his case is accepted as an adjudication on the "merits," "where a state court summarily rejects a *Strickland* claim on the merits, section 2254(d) applies only to those prongs which have actually been adjudicated." (RBOM at 36.) He says that "[e]mbracing a presumption that summary dispositions reflect a merits resolution of both prongs flies in the face of" the practical reality that courts typically resolve *Strickland* claims by analyzing one of the prongs before rendering a decision granting or denying relief. (*Id.* at 38.) Richter's argument boils down to this assertion: only explained state-court merits decisions are entitled to section 2254(d) deference, and then only those portions of the decisions that clearly explicate the precise basis for denying the federal claim. Nothing in the statute supports Richter's view.

1. As the State's opening brief explained, the plain language of section 2254(d) makes it clear that a state court is not required to explain the basis for its ruling in order for it to qualify for deferential review in federal court. The only prerequisite to

obtaining deferential review is that the claim "was *adjudicated on the merits* in State court proceedings. . . ." 28 U.S.C. §2254(d)(1) (emphasis added). (PBOM at 25.) The plain language of the statute focuses on the result—a merits adjudication—as laying down the proscription against habeas corpus relief that the petitioner must overcome. A state court decision is no less an "adjudication" on the merits simply because the state court did not explain why the claim lacked merit. See *Aparicio* v. *Artuz*, 269 F.3d 78, 93-94 (2d Cir. 2001); *Sellan* v. *Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001).

In choosing the term "decision" as opposed to either "opinion" or a comparable term denoting a written opinion, Congress confirmed its intention to afford section 2254(d) deference to all state-court merits adjudications, regardless of whether the basis for the merits adjudication is stated. See *McDermott Intern., Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (Congress's use of a term of art in a statute is intended to have its established meaning). Had Congress intended to require state courts to issue written decisions explicating the bases for denying federal claims in order to invoke the deferential review-for-reasonableness standard set forth in section 2254(d) it easily could have done so.

This Court's interpretation of section 2254(d) in *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam) also supports the conclusion that "silent denials" are entitled to deferential review under section 2254(d). In *Early*, this Court held that the section 2254(d) bar

against relief applied even where the state court decision did not cite any federal law, "much less the controlling Supreme Court precedents." This Court further held: "Avoiding [section 2254(d)'s] 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." *Id.* (emphasis in original). This Court's decision in *Early* is consistent with its holding in *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002), that state court decisions are to be accorded the "benefit of the doubt" when assessing the reasonableness of their dispositions of federal claims.

Further, limiting deferential review to written or explained state-court merits decisions would be inconsistent with AEDPA's purpose "to give effect to state convictions to the extent possible under law." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). (PBOM at 28.) Such a limitation would also be inconsistent with this Court's statement in *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991), that it "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim. . . ."

2. Richter and an amicus argue that section 2254(d) mandates that a federal habeas court undertake certain "inquiries" that can only be accomplished by analyzing the state court's reasoning for denying a federal claim. (RBOM 39-44; NACDL Br. 12-25.) A reasoned decision is necessary, Richter

asserts, because state courts sometimes apply the wrong law, apply the correct law but ignore or get wrong key facts, "or simply fail[ ] to consider all parts of a claim." (*Id.*) In their view, deference to unexplained decisions makes the section 2254(d) exceptions, permitting relief for "unreasonable applications" of clearly-established law, unenforceable. (RBOM 39-43; NACDL Br. 12-25.)

Richter's reasoning is inconsistent with AEDPA's purposes. Moreover, Richter ignores the "presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. at 24. He mistakenly places state courts in a subordinate position to federal courts, whereas "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990).

A federal court logically may undertake a proper section 2254(d) analysis without the benefit of an explained decision from the state court. With *Strickland* claims, for example, this Court has observed that, for a petitioner to obtain federal habeas relief under AEDPA, "he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell* v. *Cone*, 535 U.S. 685, 698-99 (2002). Here, Richter undeniably presented the California Supreme Court with an ineffective-counsel claim expressed in the very language of *Strickland*. (See, e.g., JA 15-24, 72-82.) Thus, the state court was tasked with

deciding, based on the facts as alleged in the habeas petition submitted by Richter, whether Richter had made out a prima facie case of ineffective assistance under *Strickland*.

Similarly, in assessing the objective reasonableness of the state supreme court's summary disposition, a federal court need look no further than the factual allegations made in the state petition and provisionally assumed by the state court to be true, see *People* v. *Duvall*, 886 P.2d 1252, 1258 (Cal. 1995), and the clearly-established law at the time, see *Williams* v. *Taylor*, 529 U.S. 362, 390-91. The State's proffered presumption (that is, that the state court applied the proper "clearly established Federal law") comports perfectly with this Court's interpretation of the AEDPA. If, based on the record before the state court, the state court's rejection of a *Strickland* claim is objectively unreasonable, then the petitioner will have avoided section 2254(d)'s threshold bar to relief. No "explained" decision is needed.

That federal courts are perfectly able to assess the objective reasonableness of an unexplained denial of a *Strickland* claim is amply demonstrated by the various opinions below. Whereas the district court found that the state court decision was reasonable based on Richter's failure to show that counsel's performance was deficient (see App. at 36a-44a), the three-judge panel found that the decision was reasonable in light of weaknesses in Richter's showing of prejudice. (App. at 65a-72a.)

3. Nor is it significant that a "claim," such as Richter's ineffective-counsel claim, is comprised of two components. The state court's rejection of *the claim* remains a merits adjudication nonetheless.

Richter asserts, however, that it is irrational "to think that Congress was unaware that . . . courts rejecting *Strickland* claims often resolve only one prong" (RBOM at 37), and then suggests that "in the absence of proof as to which prong was actually resolved, §2254(d) does not apply." (*Id.* at 38.) But it is hardly an invariable practice for a court to confine itself to considering just one prong of a *Strickland* claim, and Richter in no way shows that it is the dominant practice. So there is no justification for presuming that the state court declined to consider both components of the claim, especially where such a dubious presumption would defeat section 2254(d) deference in the very kind of claims that typify the death penalty litigation system that AEDPA's very name shows was the immediate focus of Congress' reforms.

Moreover, Richter's argument essentially seeks to impose on the states an additional requirement that is both inconsistent with AEDPA's language and is at odds with the statute's intent. As an initial matter, in enacting AEDPA Congress must be presumed to have been aware that, like *Strickland* claims, virtually all federal constitutional claims involve two or more independent components. Had Congress intended to require state courts to indicate how or whether they had considered each component of a constitutional

claim, Congress surely would have included such a requirement in the statute. But they did not do so.

As discussed, so long as a federal claim was adjudicated "on the merits," AEDPA imposes no further duty on the state courts to explain how or why they denied the claim. Instead, AEDPA unambiguously places the burden on the petitioner to demonstrate that the state court's denial of the claim was objectively unreasonable. That burden logically must also require the petitioner to show that the state court's treatment of every component of the claim was unreasonable. And so long as petitioner's reasons for challenging each component of a constitutional claim were fairly presented to the state court, a petitioner cannot meet his burden under AEDPA by pointing to a *mere possibility* that, for unexplained reasons, the state court might not have given any consideration at all to a particular component of a constitutional claim.

And even where a petitioner might show that the silent denial of a multi-component federal claim likely *did* rest solely on a single component, this still would be insufficient to nullify AEDPA deference. If the resolution of a multi-component claim, such as a *Strickland* claim, on one prong would be unreasonable, but it would be reasonable on the other prong, a federal court should not assume that the state court chose the unreasonable rather than the reasonable basis for its resolution.

4. Richter suggests that applying section 2254(d) deference to unexplained decisions would create a disincentive for state courts to render reasoned decisions. (RBOM at 41, 43.) But he unjustifiably assumes that state courts presently write reasoned decisions only in order to ensure section 2254(d) deference in later federal proceedings.

This assertion is overblown. As this Court has observed, state courts facing "overcrowded dockets" cannot be expected to explain their decisions in every case and are not "[ ]sufficiently motivated" to do so simply because of the specter of federal review. *Coleman*, 501 U.S. at 738-39. And, as the California Supreme Court has explained, its habeas corpus adjudications are not intended to insulate the decisions from federal review, but serve "quite different" state institutional goals of preserving the integrity of state appellate and collateral review practice. *In re Robbins*, 959 P.2d at 315 n. 1.

Furthermore, Richter's argument proves too much. Under his logic, no court should ever issue an unexplained decision because it cannot be reviewed. However, as already noted, courts issue unexplained decisions in a wide variety of contexts and those decisions are reviewed based on the record.

Similarly, although Richter advocates "reasoned decisions" for purposes of AEDPA review, he does not state how much reasoning is necessary, nor does he explain the degree or extent of explanation necessary for a state court decision to be reviewable under

AEDPA. There is no reason to conclude that Congress imposed such an uncertain requirement.

In sum, affording AEDPA deference to summary dispositions of federal claims is consistent with the statutory scheme and precedent. Richter's claim that only reasoned decisions should be afforded AEDPA deference should be rejected.

II. THE CALIFORNIA SUPREME COURT'S REASONABLE DENIAL OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM PRECLUDES RELIEF

Properly viewed under 28 U.S.C. §2254(d), the record before the California Supreme Court reasonably supported its denial of Richter's ineffective-counsel claim under the clearly-established two-prong *Strickland* v. *Washington* test.[3] As this Court has explained, the *Strickland* standard is highly deferential to trial counsel, and federal review under section 2254(d) of a state court's *Strickland* ruling must be "doubly deferential." See *Knowles* v. *Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411, 1420

[3] It should be noted that the California Supreme Court did not have the benefit of Richter's counsel's federal court deposition testimony when it considered Richter's *Strickland* claim. However, because counsel revealed almost nothing about the reasoning behind his various tactical choices, the absence of this evidence from the state court record does not change the calculus for determining the reasonableness of the state court's denial of Richter's federal ineffective-counsel claim.

(2009); *Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). Under doubly-deferential review, the state court record supported a reasonable conclusion that counsel's performance was competent under prevailing professional norms. And, in any event, it reasonably supported a conclusion that it was not probable that the result of the trial otherwise would have been different.

A. The State Record Supported a Reasonable Conclusion that Defense Counsel's Performance was Not Deficient

The state record demonstrated that Richter's trial counsel confronted a daunting job. His client denied any involvement in murdering Patrick Klein. Yet there was very strong proof of his guilt, including incontrovertible physical evidence that Klein had been shot with two different guns; the discovery in Richter's house of bullets that matched the brand and caliber of the expended casing found near Klein's body; and eyewitness testimony of a surviving victim identifying Richter as one of the two perpetrators. Under the circumstances, counsel chose to attack the credibility of the drug-dealing survivor, and to exploit flaws in the prosecution's pretrial failure to analyze blood from the crime scene in support of an argument that Klein had been killed by crossfire while standing in the bedroom doorway. Counsel's defense theory was geared toward raising a reasonable doubt that Klein had been killed in the commission of a

robbery or burglary and that Richter had either perpetrated or aided and abetted the commission of a robbery or burglary. Counsel's reliance on traditional cross-examination in these circumstances provides a reasonable basis for the conclusion that he acted competently; and thus shows that the California Supreme Court's rejection of Richter's ineffective-counsel claim was not "objectively unreasonable" under section 2254(d).

1. In contrast, both the Ninth Circuit and Richter assert that counsel's performance was deficient because he ignored the martial philosophy of Sun Tzu to prepare for "any" contingency by failing to consult with and present expert testimony to "eliminate[]" the prosecutor's theory that surviving victim Joshua Johnson rather than Klein was the source of the blood pool near the bedroom door, thus discrediting Johnson's testimony that Klein was shot on the living room couch. But the "clearly established law" of *Strickland* v. *Washington*, which governed the California Supreme Court's decision, does not require defense counsel to gird for just "any" contingency, but to make reasonable professional judgments about the limits of investigations. This Court has never held that defense counsel *must* consult with and/or present experts in every case in which expert opinion testimony could prove useful. Similarly, no opinion of this Court holds that defense counsel must invariably respond in kind to expert evidence presented by the prosecution rather than employ other, reasonably effective methods such as cross-examination. The

California Supreme Court's decision precludes habeas corpus relief because it was reasonable under *Strickland*. It need not have satisfied Sun Tzu.

2. Richter does not dispute the choice of trial counsel to defend his case on the theory that Klein was shot while at the bedroom door, as an unintended victim, when Johnson started shooting at Branscombe, whom he mistakenly thought to be an intruder. Instead, he disputes counsel's choice not to seek expert analysis of the blood pool in the bedroom door.

But the state court record reasonably supports the conclusion that Richter's counsel exercised reasonable professional judgment to limit the investigation of the blood pool. Counsel knew that the prosecution had not tested the blood prior to trial. And he had no incentive to ask the prosecution to test the blood, because such testing could have cured the ambiguities in the prosecution's investigation and probably would have produced damaging results by failing to reveal any evidence of Klein's blood. And counsel had reason to believe that forensic testing was potentially counterproductive because of the strong independent evidence of Richter's guilt. One of the bullets used to shoot Klein matched bullets found at Richter's house. Johnson's stolen property had also been found at Richter's. Finally, in light of various incriminating statements and post-offense guilty conduct, Richter's counsel had reason to believe his client was lying. *Strickland* recognizes that "when a defendant has given counsel reason to believe that

pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland,* 466 U.S. at 691. It is objectively reasonable to conclude that Richter's counsel met prevailing professional norms by choosing instead to wait for trial to exploit the prosecution's investigative failures and attack the prosecution's vulnerable witness.

3. Richter's insinuation that defense counsel selected a theory of the case while oblivious to the availability of evidence that could support his theory distorts the factual record. The evidentiary record in the district court supported the California Supreme Court's assessment. As Richter's trial counsel repeatedly said in his deposition, he had *little or no notice* before the start of trial that the prosecutor intended to present expert witnesses in regard to the blood at the crime scene. (See ER at 252-53, 285-86, 293-94.) This testimony was consistent with the trial court record, which reflects that Detective Bell had not testified as an expert on blood spatter at the preliminary examination (CT at 33-68), and that the prosecutor made no mention of having experts testify on behalf of the prosecution in his opening statement to the jury (Augmented State Reporter's Transcript at 3-21).

In regard to a blood spatter expert in particular, Richter's counsel said that he considered presenting a witness "relating to the what was called atomized blood droppings in the area of Mr. Klein's head on the couch relating also to whether or not this could have

been caused by a sneezing, coughing, choking of the person. . . ." (ER at 240). But defense counsel wanted to wait and see "how cross-examination goes" before deciding whether or not to hire his own expert. (*Id.* at 241.) It is inaccurate to suggest, as Richter does, that defense counsel unreasonably neglected to examine and/or evaluate important physical evidence in the vain hope of discrediting the prosecution's experts via cross-examination.

Ultimately, the California Supreme Court could have reasonably concluded that Richter's counsel should not have been expected to anticipate the prosecution's midtrial tactical change of calling experts, and that he could reasonably conclude that cross-examination of the witnesses was sufficient. Hindsight and second guessing is not part of the law of *Strickland v. Washington*, 466 U.S. at 689.

B. The State Record Reasonably Supported Rejection of Richter's Claim for Lack of Prejudice

The record also validates the state court decision as objectively reasonable on grounds of lack of probable prejudice under the *Strickland* test.

Richter claims that "the entire defense theory that Klein was shot during a struggle, rather than in cold-blood on the couch, depended on establishing where Klein was shot." (RBOM at 55.) But, even if that were the main prop of the defense theory, the California Supreme Court reasonably could have concluded that the available equivocal evidence about

Klein's alleged contribution to the blood pool near the bedroom door was dwarfed by the compelling evidence that Richter had shot Klein in the living room during a robbery.

Richter presented no expert evidence that Klein's blood was, in fact, in the blood pool outside Johnson's back door. The supposedly "readily available evidence" consists exclusively of "expert" opinions that merely disagreed with the prosecution's experts on some relatively insignificant points.[4] And, as the dissent below noted, none of Richter's habeas corpus experts expressed an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face[5] or the high-velocity spatter found near

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[4] Richter argues that, since Ken Moses's expert opinion clearly establishes that "the state's theory Johnson was the source of the blood pool could be 'eliminate[d],' " the only person whose blood could be in the pool was Klein. (RBOM at 56.) But the State has *never accepted* Mr. Moses's opinion as reliable, much less irrefutable. To the contrary, the State has uniformly challenged Moses's opinions throughout the state and federal court proceedings. Richter's claim (see RBOM at 57) that the State "stipulated to admission of Moses's expert conclusion without presenting any contrary testimony" misconstrues the substance of the stipulation. As Judge Bybee correctly noted, the State's stipulation "narrowly waive[d] only an objection to the admissibility of [Moses's declaration] in the district court in lieu of direct testimony for the purposes of considering Richter's habeas petition." (App.179a n. 14.)

[5] The detective testified that photographs of Klein on the couch showed "a blood flow pattern emanating from the area of his eye and nose down the left side of his face in the area of the temple down into the hairline." (RT at 145.) Bell said this

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Klein's body. App.186a. This evidence, which Richter's experts have never disputed, clearly shows that *someone* was shot on or very near the couch.[6]

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pattern of drained blood was important because "it does not show any significant movement up or down." (*Id.*)

[6] Richter asserts that the State erroneously claimed in its opening brief that there was "high-velocity blood spatter on the wall by the couch" where Klein lay mortally wounded. (RBOM at 57-58.) But Richter ignores the most compelling aspect of the blood spatter expert's testimony: his opinion that, based on the lack of any trail of blood leading from the pool of blood near the bedroom door to the couch, Klein could not have made the blood pool by falling to the floor after having been shot. As Detective Bell testified, when a person is shot and there is a corresponding exit wound, there is typically "exit spatter of the bullet as it exits, . . . " (RT at 148.) In this case, however, both bullets that struck Klein lodged in his body and were recovered at autopsy. (RT at 272 75, 277-78.) Bell testified that because "[t]here are no exit wounds to Patrick Klein, . . . what we are dealing with here is back spatter." (RT at 147.) The detective said that he observed atomized blood on a plastic bag and on a piece of paper in the area where the expended casings were found in the living room. (RT 149.) These minute particles of blood, Bell said, could have been caused by blood spattering when Klein was shot in the eye. (RT at 150.) Detective Bell said that "because of that high velocity spatter that we had deposited on that in that area, I don't know what other action could have occurred." (RT at 151-52.)

The detective also testified that, in his opinion, the blood spatter near the couch was inconsistent with Klein having been shot near the bedroom door. As Bell said, if Klein had been shot and had fallen straight to the floor, "I still don't have an explanation for the high-velocity spatter near the couch." (RT at 153.) None of Richter's habeas experts, including Ken Moses, has ever addressed, much less refuted, Bell's testimony on this point.

Further, the proffered expert opinions did not explain how Klein could have been shot in the bedroom doorway even though his body was found on the living room couch. They did nothing to advance the implausible defense scenario that "the drug-addled, intoxicated, 5'10", 155 pound Johnson [c]ould have [performed] an athletic feat of nearly Olympic proportions [by moving] Klein from the bedroom doorway to the couch" without leaving any smears or a trail of blood. App.186a-187a. Richter's blood-spatter expert and pathologist conveniently side-stepped this issue by contending that *the prosecutor's claim*, that Johnson alone caused the blood pool while waiting for the arrival of the police, is "scientifically unreliable." But, as Judge Bybee pointed out, all Richter's experts' opinions mean is "that the blood couldn't have originated from Johnson while he was standing up." App.188a.

In any event, none of Richter's proffered expert testimony undermined the most salient evidence directly tying Richter to the murder of Klein—the .22-caliber casing that exactly matched live bullets found in a box and loaded in a magazine for a semi-automatic pistol found in Richter's bedroom shortly after the murder.

Nor did the "expert" evidence undercut the evidence that Richter committed the robbery, and was not just sitting outside Johnson's home in his truck. That evidence showed that Johnson's stolen gun safe and backpack also were found at Richter's home.

In departing from the "doubly-deferential" review under *Strickland* and section 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was "reasonable"—"the only question that matters"—wrong. See *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). Habeas corpus relief, therefore, is barred under section 2254(d).

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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