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 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. section 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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The en banc opinion of the Ninth Circuit Court of Appeals, granting habeas corpus relief, is reported as *Richter* v. *Hickman*, 578 F.3d 944 (9th Cir. 2009) (en banc). The earlier panel opinion, denying relief, was reported as *Richter* v. *Hickman*, 521 F.3d 1222 (9th Cir. 2008). The opinion of the district court, also denying relief, is unpublished. The order of the California Supreme Court, denying habeas corpus, is unpublished. The opinion of the California Court of Appeal, affirming respondent's criminal conviction, is unpublished. Each is reproduced in the Appendix to the Petition for Writ of Certiorari. App. 1a-196a.

JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on August 10, 2009. The petition for writ of certiorari was filed on November 9, 2009, and was granted on February 22, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

Summary

Respondent Joshua Richter and Christian Branscombe were convicted of murder, attempted murder, burglary, and robbery. At trial, the prosecution's evidence showed that, in stealing a gun safe from a house, Richter and Branscombe shot and injured Joshua Johnson in his bedroom—and that they shot and killed Patrick Klein as he lay sleeping on a couch in the living room. Klein was shot with two different semi-automatic firearms: a .32-caliber, and a .22-caliber. An expended .22-caliber casing found in the living room matched .22-caliber bullets

and a magazine for a semiautomatic pistol found in Richter's bedroom. Thus, the prosecutor argued that Richter had shot Klein with a .22-caliber gun while Branscombe had shot Klein with a .32-caliber gun.

Richter testified that he and Branscombe had gone to the residence around 4 a.m., for innocent reasons, and that Branscombe entered while Richter waited in his truck. Upon hearing gunshots, Richter said, he rushed into the house. There, he saw Johnson unconscious on the bed, Klein lying in a pool of blood on the floor by the bedroom door, and Branscombe holding a gun and screaming that "they tried to kill" him. In closing argument, Richter's counsel theorized—despite the matching ammunition found in Richter's bedroom and despite Richter's acknowledgement to the police that he and Branscombe had disposed of two firearms in a marsh after the crimes—that Johnson had shot at Branscombe but hit Klein instead and that Branscombe, firing back in self-defense, had hit both Johnson and Klein.

In later habeas corpus petitions, Richter alleged that his lawyer had rendered ineffective assistance in refraining from investigating and producing expert-opinion testimony that a pool of blood by the bedroom door—photographed but never tested by anyone—might have contained Klein's blood. In Richter's view, such evidence would have corroborated his testimony that he had seen Klein lying there rather than on the couch—so that it would become less likely that Klein had been shot in cold blood

while sleeping on the couch and more likely that he had been shot in a "crossfire" as Branscombe supposedly had described it to Richter at the scene. The California Supreme Court, the federal district court, and a panel of the Ninth Circuit Court of Appeals all rejected Richter's ineffective-counsel claim.

However, the Ninth Circuit sitting en banc granted Richter habeas corpus relief. Even though defense counsel had cross-examined the prosecution's blood experts at trial to good effect, the Ninth Circuit held that counsel had acted incompetently in declining to investigate and present expert testimony on the source of the pool of blood. Further—even though none of Richter's proffered experts in the state or federal proceedings ever tested the blood or averred that Klein's blood in fact was present in the pool, and even though photographs showed high-velocity blood spattering on the wall by the couch where Klein lay—the Ninth Circuit also held that counsel's performance had prejudiced the defense. Finally, in a one-sentence statement, the en banc court's opinion characterized the California Supreme Court's rejection of Richter's ineffective-counsel claim as an "objectively unreasonable" application of *Strickland* v. *Washington*, 466 U.S. 668 (1984), so as to permit relief under 28 U.S.C. § 2254.

The Crime and the Investigation

On December 19, 1994, Richter and Branscombe visited Johnson, a marijuana dealer, at his Sacramento home. State Trial Reporter's Transcript (RT) 493. Klein was also there. *Id.* During the visit, Branscombe sat cleaning a .32-caliber handgun. RT 347, 494.

After Richter and Branscombe left, Klein went to sleep on the couch in the living room. Johnson fell asleep in his bedroom. RT 504. Sometime afterwards, Johnson awoke to see Richter and Branscombe in his bedroom taking a gun safe from the closet. RT 507. Branscombe shot Johnson with the .32-caliber pistol, knocking him down. RT 507, 602. A moment later, Johnson heard another gunshot and the sound of voices outside the house. RT 510. Entering the living room, Johnson saw Klein bleeding on the couch. RT 513-14. Richter and Branscombe were gone. RT 632-33.

Johnson's own pistol and his hip sack containing $6,000 were missing. RT 510-13, 538, 583-84. Johnson called the police, and then hid evidence of his own drug dealing. RT 82-83, 514-15. Two sheriff's deputies arrived and saw that Johnson was covered with blood on his cheeks, shirt, hands, and shoulder. RT 25, 27, 32, 39. They also saw Klein, lying on the couch but not breathing, with blood on his face and shoulder from his gunshot wounds. RT 33-34, 42, 53, 144. Near the couch, investigators found a .22-caliber

casing and an .32-caliber casing. RT 117, 121, 127-29, 172-73, 253-57, 768-69.

A pool of blood, on the floor just inside Johnson's bedroom, appeared to have been disturbed, possibly by a "foot stomp." There also was blood on the wall inside the bedroom, just above the floor molding. RT 138-41, 261. Investigators obtained a sample of blood from the wall. But no samples ever were collected from the pool of blood on the floor. RT 261, 937-38.

The day after the shootings, sheriff's deputies found Johnson's backpack and gun safe—bearing Richter's fingerprints—in Richter's house. RT 422-23, 446-47, 518-19, 717-20. Investigators also found live .22-caliber cartridges loaded in a magazine of a type usable with a semiautomatic handgun. RT 424-33, 760-65. These cartridges were the same brand and caliber as the .22-caliber casing found near the couch in Johnson's front room. RT 117-21, 254, 256, 768-69.

Richter and Branscombe were arrested and questioned separately. State Clerk's Transcript (CT) 184-85. Richter claimed that his truck had not been at the crime scene and that he was being "set up." RT 1336-37. During a break, the police recorded a conversation in which Branscombe asked Richter what he had told the police. Richter replied that he had told the police he did not kill anyone and "da, da, da." RT 1136. Branscombe responded that he thought "we were going to tell the truth." *Id.* In addition, Richter's girlfriend told the police that she had talked to Richter after the shootings, but said she did not

believe it would be helpful to Richter to reveal their conversation. RT 1006.

The State Court Jury Trial

Richter and Branscombe were charged with murder, attempted murder, burglary, and robbery. CT 16-19. At their joint trial, the prosecution produced testimony from Johnson and from the police investigators. RT 25-265, 419-714, 790-808.

In addition, the prosecution—which had never sought to analyze any blood from the crime scene until after the trial had begun—produced expert testimony from two witnesses. Jill Spriggs, a county criminalist who analyzed a blood sample taken from the bedroom wall, opined that it could have been Johnson's but could not have been Klein's. RT 261, 888, 937, 892. Detective Robert Bell, a blood-spatter expert, testified that the various blood droplets, smears, transfers, and spatter in Johnson's home were all consistent with an injured person moving about inside the house. RT 115-16, 134-37, 206, 225. Bell further testified, based on the blood flow patterns on Klein's face, that Klein had been "on that couch fully or slightly above the couch at the time he was shot." RT 145. Bell opined that it was "highly unlikely" that Klein could have been shot somewhere else in the house and then moved to the couch. RT 151. He explained that, if Klein had been shot near the bedroom door and fallen straight down, Klein

"would have had to have been lifted straight up because we have no transfer of blood." RT 155.

On cross-examination by Richter's counsel, Spriggs admitted that she had not performed any testing to determine if there were any cross-contamination (i.e., a mixture of more than one person's blood) in the blood sample. RT 896. And, in response to questioning by Richter's counsel, Bell admitted that he could not tell by looking at the blood on Klein's face in what position Klein had been when he was shot. RT 160. Bell also acknowledged that, because of the absence of a bullet hole in the armrest of the couch, it was unlikely that Klein had been lying down on the couch when he was shot. RT 162. Finally, Richter's counsel got Bell to admit that he could not "use the blood evidence to establish where" in relation to the couch Klein had been positioned when he suffered his neck wound. RT 230.

Testifying in his own defense, Richter asserted that he and Branscombe had gone to the house around 4 a.m. to return a .32-caliber hand gun belonging to Johnson. RT 1085, 1233. Richter claimed that Klein had let Branscombe in while Richter waited outside. RT 1087. Then, Richter testified, he heard "a series of gunshots." *Id.* Entering the house, he saw Klein lying in the bedroom doorway; and, entering the bedroom, he saw Johnson contorted on the bed. RT 1089-90. Branscombe, holding a gun, told Richter, "They fired. They shot at me, . . . they tried to kill me." RT 1090-91. Next, according to Richter's testimony, Branscombe picked up another one of

Johnson's guns, a .380-caliber Mac-12, and ran out of the house. RT 1091-92. Richter and Branscombe drove to Richter's girlfriend's apartment and then to a marsh where they threw away the Mac-12 and the .32. RT 1092-95, 1102, 1119, 1145.

Richter's counsel also called Richter's current and former girlfriends. They testified that Johnson's gun safe was already in Richter's bedroom before the incident. Richter's then-girlfriend asserted that the incident had to have occurred at around 4:20 a.m., which was inconsistent with Johnson's testimony that the incident had to have occurred at around 5:00 a.m. RT 979, 1015-23.

The jury found Richter and Branscombe guilty as charged. CT 317-25. The court sentenced them to prison for life without parole. CT 389, 392-93.

State Post-Trial Proceedings

In 1998, the California Court of Appeal affirmed the judgment. App. 1a-21a. The California Supreme Court denied further direct review. SER[1] 29.

In 1999, Richter filed a petition for writ of habeas corpus in the California Supreme Court. JA 7-87. He alleged that his lawyer had rendered ineffective assistance under *Strickland* v. *Washington* by not presenting, among other things, "readily available

[1] SER refers to the Supplemental Excerpts of Record submitted to the Court of Appeals by the Warden.

expert testimony" about the blood spatter and the pool of blood in the bedroom doorway that supposedly would have corroborated Richter's trial testimony that he saw Klein's body there. *Id.*, 15-22, 57-60, 72-74, 78-81. In support, Richter presented declarations from four "experts," who claimed that they could have offered evidence (1) to refute the prosecutor's theory that the large pool of blood near the bedroom was made by Johnson and (2) to show that Klein was a possible contributor to the blood spatter sample. JA 111-18, 126-28.

Under California law, a habeas corpus court initially determines whether a petition for writ of habeas corpus states facts that, if true, would entitle the petitioner to relief. If no such prima facie case is stated, the court summarily denies the petition on the merits. See *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc) (unexplained "postcard" denial from the California Supreme Court is a decision on the merits). In 2001, the California Supreme Court summarily denied Richter's petition on the merits. JA 129.

Federal Habeas Corpus Proceedings

In April 2001, Richter filed a petition for writ of habeas corpus in the United States District Court. JA 1. Again he claimed that his trial counsel had rendered unconstitutionally ineffective assistance in

declining to investigate and produce expert opinion evidence on the blood pool and blood spatter.

At the district court's direction, Richter's trial counsel gave a deposition. JA 1-2. In it, he explained that his initial strategy was to exploit the State's failure to analyze the blood evidence or to designate any experts to testify about the blood. ER[2] 367-80. Accordingly, Richter's counsel concentrated on demonstrating the unreliability of Johnson as a witness and the superficial investigation conducted by the police. ER 269-70, 367.

The district court denied the petition. App. 23a-57a. The court noted that the deferential review standard of 28 U.S.C. § 2254(d)(1) applied to the claim. But its explicit conclusions focused directly on counsel's performance. The district court found that Richter's counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." App. 39a. This determination was reasonable, the court held, because the prosecution had "not prepar[ed] a blood spatter analysis or even test[ed] any of the blood samples taken from the crime scene." *Id.* Moreover, upon being presented with the serologist's report and being informed that the prosecution intended to use Bell as a blood spatter expert, Richter's counsel objected to these witnesses being called to testify—but to no avail.

[2] ER refers to the Excerpts of Record submitted to the Court of Appeals by Richter.

Under the circumstances, the district court found, counsel's "actions were reasonable." App. 40a.

A three-judge panel of the Ninth Circuit affirmed. See *Richter* v. *Hickman*, 521 F.3d 1222. App. 58a-85a. The panel acknowledged that, under § 2254(d)(1), it could not grant Richter's application for habeas relief unless the state court had rendered a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. App. 64a. The panel held that, even if Richter's counsel's "failure to consult and present [scientific] experts was unreasonable," Richter was not prejudiced. App. 66a. The panel wrote:

> There is no reasonable probability that the jury would have rendered a different verdict had [Richter's] proffered serology experts testified at trial. The serology experts' testimony, even if believed, would not significantly weaken the State's case. All the testimony says is that it is possible that the blood sample taken from the bedroom doorway might be a mixture of Klein and Johnson's blood, instead of being exclusively Johnson's blood. Because these expert reports do not foreclose the likelihood that the blood from the blood sample came exclusively from Johnson, they do not impeach Johnson's testimony that the blood came from him alone. The expert reports also do nothing to contradict the weight of the evidence presented at trial that supported the State's theory of the case.

App. 70a. The panel also rejected Richter's pathologist's claim that the prosecutor's theory of how the blood pool was formed (that it came from Johnson while he awaited the sheriff's deputies) was "scientifically un-reliable." The panel explained: "The reasons the expert provided in reaching his conclusion [i.e., Johnson's wounds were not serious enough to have bled profusely while he stood in one place] are flawed and are partially contradicted by the record." App. 71a.

On rehearing en banc, the Ninth Circuit by a 7-4 vote granted Richter habeas corpus relief. App. 86a-196a. Invoking Sun Tzu's martial philosophy, the rule of always being prepared for "any contingency," the majority found counsel's performance to be deficient. *Id.* at 87a. Claiming that the source of the blood in the hallway by the bedroom door was "the single most critical issue in the case, at least from the standpoint of the defense," App. 103a, the majority faulted Richter's counsel for not consulting forensic experts at three stages: first, before choosing a defense; second, while preparing a defense; and, third, in the middle of trial when the prosecution suddenly produced two expert witnesses of its own. According to the majority, defense counsel should have anticipated that the prosecution would call a blood-spatter expert. App. 103a-107a. The majority acknowledged that counsel reasonably had decided not to have any of the blood tested before trial because it would have risked harm to the defense, App. 109a-110a (n. 9); but it nonetheless criticized

him because there still was "no negative consequence" to consulting a serology expert before trial. *Id.* The majority denigrated cross-examination as rarely an adequate substitute for affirmative defense testimony. App. 118a-119a (n. 14).

The en banc majority concluded that, while counsel's decision not to call a serology expert alone was not "prejudicial," the failure to call a blood-spatter specialist resulted in prejudice to the defense. App. 125a-132a. The majority stated: "The introduction of forensic evidence that had the effect of showing that Johnson's version of the events was false, and that was consistent with Richter's explanation, would . . . have been invaluable to the defense." *Id.* at 125a. It further asserted: "[T]he spatter evidence presented by Richter's habeas counsel would have conclusively refuted the prosecution's explanation" of how the blood pool had formed. *Id.* at 126a. And it concluded that "impeaching [Johnson's] credibility on a central point through forensic evidence would have likely precluded the jury from returning a verdict of guilty." *Id.* at 127a.

After devoting over 30 pages of its printed opinion to its belief that counsel had rendered ineffective assistance, the majority then asserted, in a bare one-sentence statement, that the California Supreme Court's adjudication of Richter's ineffective-counsel claim had been "objectively unreasonable" so as to permit relief under § 2254(d). App. 135a-136a.

Four judges, in dissent, concluded that defense counsel acted reasonably and that the state court's decision was objectively reasonable so as to bar relief under § 2254(d). In the dissent's view, the majority had failed to take *Strickland* and AEDPA "to heart." App. 157a. Instead, the majority created a novel rule requiring defense counsel to always be prepared for any contingency and thus seek expert advice on every potential evidentiary issue. Viewing the case from the perspective of counsel at the time, the dissent noted that the available evidence of Richter's guilt had made it highly unlikely that forensic investigation would produce helpful evidence. Nor was there any showing that the "modest" difference between the actual cross-examination and the omitted expert testimony would have made a difference in this case. Counsel's decision to refrain from producing expert testimony—such as Richter's proffer about hypothetical possibilities that did not actually eliminate Johnson as the source of the blood in the hallway—did not undermine confidence in the verdict in light of the strong evidence of Richter's guilt. App. 159a-195a.

SUMMARY OF ARGUMENT

In erroneously granting respondent Richter habeas corpus relief on his ineffective-counsel claim, the Ninth Circuit impermissibly changed the legal standard for assessing the competence of counsel, exaggerated the importance whether the murder victim's blood also might have been present near a

bedroom door away from where his body was found, and grossly overstated the potential effect of the speculative and inconclusive expert opinions Richter proffered to the habeas corpus courts while minimizing the good results of defense counsel's cross-examination of the prosecution's experts. Regardless whether the Ninth Circuit might have been authorized to act on such views in a federal criminal case on direct appeal, it was not allowed to indulge them in reviewing the California Supreme Court's rejection of Richter's claim on the merits. For, under 28 U.S.C. § 2254(d), habeas corpus relief was barred because the state court had adjudicated Richter's claim on its merits. Richter was not entitled to relief unless he showed that the state court's ruling was, not only "wrong," but also "objectively unreasonable" under this Court's "clearly-established" and counsel-deferential *Strickland* v. *Washington* standard. Nothing, however, required the California Supreme Court to anticipate or adopt the Ninth Circuit's novel and dubious view of Sixth Amendment law. And nothing compelled the state court to agree with the Ninth Circuit's views on whether counsel reasonably relied on cross-examination rather than expert opinion as a means of raising a reasonable doubt about Richter's guilt. Finally, nothing compelled the state court to agree with the Ninth Circuit's overly enthusiastic opinion on the likelihood that Richter's proffered expert opinions would have affected the verdict.

Instead, in light of the state record, the California Supreme Court's rejection of Richter's

claim was at least "reasonable," so its merits adjudication barred relief under § 2254(d)(1).

1. As Richter conceded below, the California Supreme Court's rejection of his ineffective-counsel claim was an "adjudication on the merits" triggering the deferential-review-for-reasonableness standard of § 2254(d). Nothing in the plain language of § 2254(d) requires, as a condition to deferential review, a written or an "explained" ruling from the state court. Congress undoubtedly was aware that unexplained decisions are common in state and federal criminal and habeas corpus litigation, yet it refrained from imposing any procedural prerequisite to deferential review beyond an "adjudication on the merits." To impose such a requirement by judicial fiat would defeat Congress's intent in adopting the landmark deferential-review reform by largely eviscerating the effect of § 2254(d) in many cases. Instead, Congress recognized, in § 2254(d), that state courts are trustworthy guardians of federal constitutional rights, so that their merits adjudications should be entitled to respect in the federal courts. That is why every circuit court of appeals to have considered the question has recognized that "unexplained" state-court adjudications on the merits of federal claims are entitled to deference under § 2254(d).

Nor does it make any difference that Richter's was a multi-"prong" *Strickland* claim. A claim is the prisoner's substantive request for relief; it comprises all of the components within the application for relief. When a state court rejects a *Strickland* claim as

fatally flawed in any substantive respect, it adjudicates the ultimate merits of that claim completely. Federal appellate courts frequently review unexplained district court orders (*e.g.*, rulings on motions to conduct discovery; motions for the appointment of counsel; motions to amend the pleadings, etc.) under a deferential standard. In disposing of many of these cases, the district court considers multiple factors. Yet, such district court decisions are reviewed deferentially under an abuse of discretion standard, notwithstanding the absence of a statement of the lower court's reasoning. Reviewing an unexplained state court decision under the deferential § 2254(d)(1) standard is not fundamentally different. It would be anomalous, and would offend comity, to afford state courts less deference on summary adjudications than district courts enjoy.

2. As a qualifying merits adjudication under § 2254(d), the California Supreme Court's rejection of Richter's claim now precludes federal relief. For Richter cannot show that the ruling was "contrary to," or involved an "unreasonable application" of this Court's clearly-established and deferential *Strickland* v. *Washington* test for effective counsel in light of the unique facts disclosed in the state-court record. That record provided a firm basis for a reasonable conclusion that counsel had not rendered constitutionally-ineffective representation.

First, the state record supported at least a reasonable conclusion that counsel's conduct comported with the norms of competent performance.

Counsel reasonably did not anticipate the prosecution would call expert witnesses about the blood evidence and reasonably chose a strategy of attacking the prosecution witnesses' credibility and highlighting defects in the prosecution's investigation. When the prosecution presented expert evidence at the last minute, Richter's attorney reasonably chose to rely on cross-examination to undermine its significance.

Second, and perhaps more obviously, the record supported a reasonable conclusion that, even if trial counsel should have presented the expert opinion later proffered by Richter in habeas corpus proceedings, it still was not "reasonably probable" that the error affected the verdict. The supposedly impressive expert evidence that Richter presented in the habeas corpus proceedings never challenged, and hardly could have refuted, the most significant evidence proving Richter's guilt. The composition of the "pool of blood" was insignificant in comparison with the evidence of the high-velocity blood spatter on the wall by the couch where Klein was found that irrefutably showed that someone must have been shot on or near the couch. Nor could theories about the source of the blood pool explain why a .22-caliber casing, found by investigators near where Klein lay mortally wounded, just happened to be identical to live rounds found along with loot from the crime in Richter's bedroom the day after the murder.

Given those circumstances and the doubly deferential nature of the federal habeas court's inquiry—according deference to counsel under *Strickland* and deference to the state court under AEDPA—the Ninth Circuit's task was straightforward. Because the state court's merits adjudication was not unreasonable, § 2254(d) dictated that habeas corpus relief "shall not be granted."

3. But, the Ninth Circuit here mishandled the § 2254(d) inquiry. Rather than applying this Court's clearly-established and deferential *Strickland* rule to the facts, the Ninth Circuit applied a novel and dubious rule—one mandating that counsel always must prepare for everything and always must meet forensic evidence with forensic evidence rather than relying on the "greatest legal engine" of cross-examination as a means of establishing reasonable doubt about his client's guilt. This new rule was based on Sun Tzu's martial philosophy rather than on the Framers' Sixth Amendment as interpreted in *Strickland*. Indeed, it was not just new. As a rigid or crystallized corollary requirement, it conflicts with the generalized and deferential *Strickland* standard that reflects this Court's recognition that there is no one way to defend a case.

It is not surprising that, having erroneously adopted that unrealistic standard for counsel's performance, the Ninth Circuit then would err further: both in relying on that rule to condemn

counsel as incompetent, and in being too quick to find prejudice from his performance. Nor is it surprising that, having relegated to one brief conclusionary sentence the central question of reasonableness—the "only one that matters" under § 2254(d)—the Ninth Circuit got that ultimate and determinative question wrong too.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S SUMMARY DENIAL OF RICHTER'S INEFFECTIVE-COUNSEL CLAIM QUALIFIES AS A MERITS ADJUDICATION ENTITLED TO § 2254(D)(1) DEFERENTIAL REVIEW

The California Supreme Court summarily denied Richter's ineffective-counsel claim on the merits. That fact remains true regardless whether the state court explained its ruling or whether the underlying claim was comprised of multiple components. So habeas corpus relief is therefore precluded by § 2254(d) unless Richter demonstrates that the state court's adjudication of the claim—including its constituent parts—was objectively unreasonable under this Court's clearly-established law.

A. The California Supreme Court's Rejection Of Richter's Ineffective-Counsel Claim Was An Adjudication On The Merits

1. Richter filed a habeas corpus petition in the California Supreme Court alleging that he was denied his Sixth Amendment guarantee of effective assistance of counsel. JA 7-87. The California Supreme Court summarily denied the petition. JA 129. Under California law, this summary denial constituted a merits determination—that the facts alleged by Richter, even if true, failed to state a prima facie case upon which relief could be granted. *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot*, 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Hunter* v. *Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); see *In re Robbins*, 959 P.2d 311, 340 n. 34 (Cal. 1998); *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 391 (Cal. 1994); *In re Clark*, 855 P.2d 729, 741-42 (Cal. 1993).

2. Under AEDPA, a state-court merits adjudication of a claim brought by a prisoner challenging his conviction or sentence is reviewed for objective unreasonableness under clearly-established law in federal habeas corpus proceedings. In particular, 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

3. It is not significant that the state court's ruling expressed no articulation of the precise rationale behind its decision. Neither the language of the statute, nor the policies underlying the writ-restricting reforms enacted in AEDPA, demonstrate any intent on the part of Congress to require state courts to justify their rulings. When evaluating the reasonableness of a state court's summary denial of a federal constitutional claim, a federal habeas court assumes that the state court applied the proper "clearly established Federal law," and then determines whether its decision was "contrary to" or was "an objectively unreasonable application of" that law. *Schaetzle* v. *Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003) (citing *Catalan* v. *Cockrell*, 315 F.3d 491, 493 & n. 3 (5th Cir. 2002)). A federal habeas corpus court's review is therefore restricted to the reasonableness of the state court's "ultimate decision, not every jot of its reasoning." *Santellan* v. *Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (citing *Cruz* v. *Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (even where a state court makes a mistake in its analysis, "we are

determining the reasonableness of the state court's 'decision,' . . . not grading their papers.")), *cert. denied*, 535 U.S. 982 (2002).

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. And there is no basis for presuming that the state court declined to consider both components of the claim. Richter, who has the burden of establishing entitlement to relief, certainly has not established that the state court adjudicated his claim only on a single component. Indeed, Richter in these lengthy federal proceedings has never disputed—in the district court or before the Ninth Circuit three-judge or en banc panels—that the California Supreme Court's merits adjudication of his claim was entitled to the full measure of deference afforded by § 2254(d).

B. The Plain Meaning Of § 2254(D) Manifests Congress's Intent To Afford Deferential Review To Summary Merits Decisions Of The State Courts

1. The task of interpreting § 2254(d) begins with its language. *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000). Words in a statute are to be given "their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Id.* at 431 (internal quotation marks and citations omitted). Indeed, "[t]he plain

meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) (quotation marks and citations omitted).

The language of § 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). "Adjudicated" is unambiguous: it refers to the judicial resolution of a legal dispute. See Black's Law Dictionary 45 (8th ed. 2004) (adjudicate: "1. To rule upon judicially. 2. adjudge"); Webster's Third New International Dictionary 27 (2002) (adjudicate: "to settle finally (the rights and duties of the parties of a court case) on the merits of issues raised: enter on the records of a court (a final judgment, order or decree of sentence)"). The plain language of the statute focuses on the result—a merits adjudication—as opposed to the "process" that led to that result. The existence of a merits adjudication is all that the statute requires. 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.

2. This interpretation is confirmed by other language in § 2254(d)(1) providing that habeas relief is barred unless the state court's merits adjudication "resulted in a decision" that was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. A judicial decision and a judicial opinion are not the same thing. A "decision" under § 2254(d)(1) as "a legal judgment rendered 'after consideration of facts, and . . . law.'" *Williams*, 529 U.S. at 385 (opinion of Stevens, J., in which Souter, Ginsburg, and Breyer, JJ., joined) (emphasis omitted) (quoting Black's Law Dictionary 407 (6th ed. 1990)). An "opinion" is "[a] court's written statement explaining its decision in a given case, usu[ally] including the statement of facts, points of law, rationale, and dicta." Black's Law Dictionary 1125 (8th ed. 2004). In choosing the term "decision" as opposed to either "opinion" or a comparable term denoting a written opinion, Congress confirmed its intention to afford § 2254(d)(1) 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) (absent a contrary indication, it is presumed that Congress's use of a term of art in a statute is intended to have its established meaning).

3. Congress presumably was aware at the time it enacted AEDPA of the prospect, if not the prevalence, of summary or unexplained state-court rulings in criminal and habeas corpus cases. See *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"). It is a common practice of both state and federal courts to issue unexplained decisions. See *Muth* v. *Frank*, 412 F.3d 808, 815 (7th Cir. 2005) and cases cited therein; see also *Harris* v. *Superior Court*, 500 F.2d 1128 (explaining California's "postcard" denials). And, clearly, many criminal and habeas corpus claims arising in state courts do not warrant expenditure of judicial resources in issuing explained or written opinions.

Yet Congress declined to include a reasoned-decision requirement in § 2254(d). Instead, Congress conditioned § 2254(d) deferential review only on the state court having adjudicated the claim—whether explained or not—on the merits. Imposing the condition that state courts must explain the basis for their decisions would necessarily require adding language to an unambiguous statute—no less one that is part of a detailed and comprehensive statutory scheme. See *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572 (1983) ("However correct these assertions may be, they do not authorize us to add specific language that Congress did not include in a carefully considered statute"). The courts should not

"assume this role." *Koon* v. *United States*, 518 U.S. 81, 108-09 (1996).

4. Limiting deferential review to written or explained state court decisions, further, would be inconsistent with AEDPA's purpose "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams*, 529 U.S. at 404). Indeed, denying deferential review to the unexplained merits adjudications that make up a large part of state criminal and habeas corpus practice would eviscerate the cornerstone reform of habeas corpus embodied in § 2254(d).

This Court has recognized that it has "no power to tell state courts how they must write their opinions." *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991); see *Arizona* v. *Evans*, 514 U.S. 1, 7 (1995) (reaffirming presumption that state-court decisions are on the merits "to obviate the 'unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court'") (quoting *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983)). And state courts, faced with "overcrowded dockets," cannot be expected to articulate decisions in every case and are "insufficiently motivated" to do so simply because of the specter of federal review. *Coleman*, at 738-39. For example, the California Supreme Court has explained that its habeas corpus adjudications are not drafted to insulate the decisions from federal review, but for "quite different" state institutional goals of preserving the integrity of the

state appellate and collateral review practice. *In re Robbins*, 959 P.2d at 315 n. 1. It is hardly surprising that state courts do not write opinions for the benefit of federal court review, for state courts are not bound by the rulings of intermediate federal courts. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58 fn. 11 (1997).

Given the reality of state court caseloads, precluding deferential review for summary or unexplained dispositions would be antithetical to AEDPA's further objectives of promoting judicial efficiency and conserving judicial resources. See *Panetti*, 551 U.S. at 945-96; *Schriro* v. *Landrigan*, 550 U.S. 465, 474-75 (2007). State courts in California dispose of nearly 20,000 criminal habeas corpus petitions each year. 2009 Court Statistics Report, Statewide Caseload Trends. See http://www.courtinfo.ca.gov/reference/documents/csr-2009.pdf. The overwhelming number of these cases are brought by pro se prisoners, frequently alleging a plethora of claims. Adjudicating these actions requires a substantial expenditure of judicial resources. See FAIR PRESENTATION AND EXHAUSTION: THE SEARCH FOR IDENTICAL STANDARDS, 31 Cardozo L. Rev. 581, 595-96 (2009) (the "poor quality of pro se petitions makes sifting through such petitions a real challenge" for courts). Many cases, moreover, do not warrant expenditure of judicial resources in issuing explained or written opinions; it is a common practice of both state and federal courts to issue unexplained decisions. For instance, in the fiscal year 2007-2008,

for example, the California Supreme Court issued few, if any, written opinions in the 3,476 criminal, noncapital habeas corpus petitions disposed of in original proceedings. In the same fiscal year, the California Court of Appeal issued written opinions in only 183 of the 6,806 dispositions of original proceedings in criminal matters.[3]

Denying § 2254(d) deference to unexplained state-court decisions also would imply, unjustifiably, that these adjudications are not well-reasoned and are the product of a dereliction of judicial duty. Such "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24. Indeed, "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 240 n. 2 (1985). And such an approach would be inconsistent with "the settled view that elected judges of our state courts are fully competent to decide federal constitutional issues, and that their decisions must be respected by federal district judges in processing habeas corpus applications pursuant to 28 U.S.C. § 2254." *Swain* v. *Pressley*, 430 U.S. 372, 383 (1977).

As this Court has observed, "State courts are coequal parts of our national judicial system and give

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[3] 2009 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS. See http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf.

serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). The purpose of AEDPA is to promote "'comity, finality, and federalism' by giving state courts 'the first opportunity to review [a federal constitutional] claim,' and to 'correct' any 'constitutional violation in the first instance.'" *Jimenez* v. *Quarterman*, ___ U.S. ___, 129 S.Ct. 681, 686 (2009) (quoting *Carey* v. *Saffold*, 536 U.S. 214, 220 (2002)). Nothing in the statute suggests that Congress intended to diminish the state courts' historical role as co-equal arbiters of the Constitution.

5. Although this Court has not explicitly addressed whether summary merits adjudications are entitled to deferential review under § 2254(d), see *Smith* v. *Spisak*, ___ U.S. ___, 130 S.Ct. 676, 688 (2010), prior decisions point decisively in that direction. In *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), a Ninth Circuit panel concluded that § 2254(d) did not preclude relief where the state court decision did not cite any federal law, "much less the controlling Supreme Court precedents." *Id.* at 8. This Court reversed, explaining that "[a]voiding [§ 2254(d)'s] pitfalls does not require citation of our cases—indeed, it does not even require *awareness* of our cases. . . ." *Id.* (emphasis in original). In *Weeks* v. *Angelone*, 528 U.S. 225 (2000), this Court applied the § 2254(d) standard even though the state court had summarily denied the federal claim without explanation. *Id.* at 237; see also *Rompilla* v. *Horn*, 355 F.3d 233, 247-48 (3d Cir. 2004) (Alito, J.) ("a state

court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever," citing *Weeks*), reversed on other grounds by *Rompilla* v. *Beard*, 545 U.S. 374 (2005); see *Ylst* v. *Nunnemaker*, 501 U.S. 797, 806-07 (1991) (White, J. concurring) (explicit statement from a state court that it is ruling on the merits is a ruling on the merits for habeas purposes even if the ruling is summary in nature).

C. A State Court Merits Adjudication of a Federal Constitutional Claim is Reviewed Deferentially Even If the Claim has Multiple Components

The fact that Richter raises an ineffective-counsel claim—which consists of deficiency and prejudice components—makes no difference for purposes of the § 2254(d) analysis. See *Strickland* v. *Washington*, 466 U.S. at 687 (indentifying the two components). As lower federal courts have recognized, the principle that unexplained state-court merits decisions are reviewed deferentially under § 2254(d) applies equally to claims of ineffective assistance of counsel. See, *e.g.*, *Luna* v. *Cambra*, 306 F.3d 954, 960 (9th Cir. 2002); *Sellan* v. *Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 158-62 (4th Cir. 2000) (en banc); *Miller* v. *Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *James* v. *Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

Richter might argue that, because its summary disposition does not on its face disclose whether the California Supreme Court rejected his ineffective-counsel claims on both *Strickland* components, the

claim should be reviewed *de novo* in the federal court. But there is no basis for assuming that the state supreme court did not consider Richter's entire claim in denying relief. The state supreme court did not say that its adjudication was confined to a single prong. And to suggest that the court only considered part of Richter's claim is altogether speculative.

In any event, the state court adjudicated the *Strickland* claim on the merits; and its adjudication on the merits therefore is entitled to deferential review in federal court under the plain terms of § 2254(d). A claim is the prisoner's substantive request for relief; it comprises all of the components within the substantive request for relief. See Black's Law Dictionary 264 (8th ed. 2004) (defining "claim" as "[t]he aggregate of operative facts giving rise to a right enforceable by a court"); *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005) (defining "claim" as an "asserted federal basis for relief from a state court's judgment of conviction"). The result of a state court decision is the ultimate disposition of the claim. See Webster's Third New International Dictionary 1937 (2002) (defining "result" as "something that results as a consequence, effect, issue, or conclusion").

As the applicant seeking relief, then, Richter bears the burden of demonstrating that the state court applied clearly established Supreme Court precedent in an objectively unreasonable manner. 28 U.S.C. § 2254(d)(1); *Visciotti*, 537 U.S. at 24-25 ("it is the habeas applicant's burden to show that the state court applied [that case] to the facts of his case in an objectively unreasonable manner"). Federal courts,

of course, are well-acquainted with deferential review of unexplained orders. In the § 2254 context, in particular, federal appellate courts are frequently called upon to review unexplained district court orders under a deferential standard. Examples include motions to conduct discovery, Rule 6 of the Rules Governing Section 2254 Cases in the United States District (Habeas Rules); motions to expand the record, Rule 7 of the Habeas Rules; motions for an evidentiary hearing, Rule 8 of the Habeas Rules; motions for the appointment of counsel, Rule 8(c) of the Habeas Rules, 18 U.S.C.A. § 3599; motions to amend the pleadings, Fed. R. Civ. P. 15(a); motions to amend findings, Fed. R. Civ. P. 52(b); motions for new trial, Fed. R. Civ. P. 59(a); motions to alter or amend the judgment, Fed. R. Civ. P. 59(e); motions for reconsideration; motions for corrections based on a clerical mistake, oversight, or omission, Fed. R. Civ. P. 60(a); motions to be relieved from a final judgment, order, or proceeding, Fed. R. Civ. P 60(b); and motions to extend the time to appeal, Fed. R. App. P. 4(a)(5)(A)(i) & (ii).[4] Many of these issues require the district court's consideration of multiple factors. Yet,

[4] Other examples include a district court's review of a magistrate judge's unexplained ruling on a non-dispositive matter under the "clearly erroneous or contrary to law" standard, 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a), a federal circuit court's review of a district court's unexplained finding of fact under the clearly erroneous standard, Fed. R. Civ. P. 52(a), and a federal court's review of a state court's implied or unarticulated findings of fact under the deferential standards of § 2254(d)(2) and (e)(1), 16A Federal Procedure, Lawyers Edition § 41:341 (2010).

in each of these circumstances, the district court's decision is reviewed deferentially under an abuse of discretion standard,[5] notwithstanding the absence of a statement of the lower court's reasoning. Reviewing an unexplained state court decision under the deferential § 2254(d)(1) standard is not appreciably different. It would be anomalous to afford state courts lesser deference on summary adjudications than district courts enjoy. See *Francis* v. *Henderson*, 425 U.S. 536, 542-43 (1976).

Similarly, this Court has approved or reviewed silent decisions in a variety of contexts and based only the circumstances of the case. See, *e.g.*, *Renico* v. *Lett*, 559 U.S. ___ (No. 09-338; decided May 3, 2010) (denial of motion for mistrial); *Parker* v. *Dugger*, 498 U.S. 308 (1991) (Florida court rejects jury recommendation of life imprisonment); *Wainwright* v. *Witt*, 469 U.S. 412 (1985) (excusal of juror for cause); *Coleman* v. *Thompson*, 501 U.S. at 740-44 (dismissal order). Of course, this Court has long relied on the settled rule of affirming lower court decisions that reach the correct result even if the lower court relied upon the wrong ground. *Schenck* v. *Pro-Choice Network of Western New York*, 519 U.S. 357, 384 n. 12 (1997).

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[5] See Means, FEDERAL HABEAS MANUAL, §§ 4:32, 5:9, 6:13, 8:47, 9A:154; 12:3, 12:4, 12:5, 12:57, 13:51 (West 2010) (identifying abuse of discretion standard for various district court rulings).

Declining to give deference to the California Supreme Court's summary denial of Richter's *Strickland* claim would have particularly unjustified and far-reaching consequences. Most apparent would be the erosion of AEDPA policies with respect to one of the most commonly asserted claims alleged by state prisoners challenging their conviction or sentence—that of "ineffective assistance of counsel." FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS, 31 Cal. W. L. Rev. 237, 250 (Spring 1995) (noting that over forty percent of the claims raised by California state prisoners are for ineffective assistance of counsel). And the problem would not end there. Many other types of federal claims are comprised of multiple components or factors. See, *e.g.*, *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (four-factor test for determining whether public access to a courtroom in a criminal case may be restricted); *Solem* v. *Helm*, 463 U.S. 277, 292 (1983) (three-factor test for Eighth Amendment cruel and unusual punishment claims); *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979) (three-component test for fair-cross-section claims); *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972) (five-factor test for determining whether identification procedure is impermissibly suggestive); *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972) (four-factor test for evaluating a speedy trial claim); *Brady* v. *Maryland*, 373 U.S. 83, 96 (1963) (three-component test for claim based on the prosecutorial suppression of evidence).

If summary adjudications of *Strickland* claims are not reviewed deferentially under § 2254(d), then summary adjudications of other claims comprised of multiple factors or components also would be susceptible to the argument that they must be reviewed *de novo* rather than deferentially for reasonableness.

It is true that this Court in *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Wiggins* v. *Smith*, 539 U.S. 510 (2003), reviewed *de novo* the prejudice component of the habeas petitioners' *Strickland* claims where the state courts, having concluded that the deficient-performance component was not established, made it clear that they had not reached the prejudice component. This Court held that the state courts' rulings on deficient performance were "unreasonable" applications of *Strickland* under § 2254(d)(1), and then, noting the absence of state courts ruling on the issue, reviewed the prejudice component *de novo*. *Rompilla*, 545 U.S. at 389-90; *Wiggins*, 539 U.S. at 534. In those cases, however, the state courts *said* they were not reaching the question of prejudice. Here, in contrast, the California Supreme Court made no such attestation. That is, the state supreme court did not signal, in denying Richter's *Strickland* claim on the merits, that it had limited its adjudication to just one component. Neither *Wiggins* nor *Rompilla* control on the question of silent rulings where the state court does not disclaim reaching one of the prongs of the *Strickland* test.

Because the language of 2254(d)(1) prohibits the granting of federal habeas relief *unless* the petitioner can show either that the state court's adjudication of the claim was "contrary to, or involved an unreasonable application of" this Court's precedent, the state does not have to prove that its disposition of a federal constitutional claim was right. *Woodford* v. *Visciotti*, 537 U.S. at 24 (AEDPA "demands that state-court decisions be given the benefit of the doubt.") Instead, it is the petitioner's burden to show that the state court's disposition of his federal constitutional claim was unreasonable.

Although the California Supreme Court's ruling on Richter's two-pronged *Strickland* claim was "unexplained," the state court nonetheless adjudicated the claim on its merits within the meaning of § 2254(d). Accordingly, that ruling is entitled to full deferential review under AEDPA: That is, "relief shall not be granted" *unless* Richter shows that the ruling was "contrary to" or involved an "unreasonable application" of "clearly established Federal law." But, as demonstrated in Argument II, *post*, the state supreme court's adjudication was reaonable under *Strickland* and therefore precludes federal habeas corpus relief.

II. BECAUSE THE CALIFORNIA SUPREME COURT'S REJECTION OF RICHTER'S CLAIM WAS OBJECTIVELY REASONABLE, § 2254(D) PRECLUDES RELIEF; THE NINTH CIRCUIT VIOLATED § 2254(D) BY INVOKING ITS OWN ECCENTRIC SIXTH AMENDMENT RULE AND FAILING TO DEFER TO THE STATE COURT'S REASONABLE RULING

Richter's counsel confronted the daunting job of vindicating his client's complete denial of any involvement in the crimes in the face of strong evidence of his guilt: incontrovertible physical evidence that Klein had been shot with two different guns; the eyewitness testimony of a surviving victim identifying Richter as one of the two burglars; and the discovery in Richter's house of bullets that matched the brand and caliber of the expended casing found near Klein's body. Counsel reasonably chose to attack the credibility of the drug-dealing survivor and to exploit deficiencies in the police investigation.

When the trial court permitted the prosecutor to present evidence developed mid-trial from a serologist and a blood-spatter expert, Richter's counsel met it by cross-examining them to good effect. The serology expert admitted that she had not tested the stains for cross-contamination. And the blood-spatter expert admitted—consistently with Richter's testimony about seeing Klein on the floor—that it was unlikely that Klein had been lying down on the couch when he was shot. Indeed, Richter's counsel got the blood spatter expert to admit that he could not "use the

blood evidence to establish" where Klein had been when he suffered the non-fatal neck wound.

Later, in habeas corpus proceedings, Richter presented various expert opinions that purported to prove that (1) the prosecution serologist's testimony was not credible because she had incorrectly concluded that only Johnson's blood was in the sample taken from the crime scene, and (2) the prosecutor's theory—laid out in his closing argument—of how the blood pool was formed (that Johnson bled while standing in the doorway waiting for the Sheriff's deputies to arrive at the house) was "scientifically unreliable." But Richter's experts never addressed the most salient forensic evidence that supported the prosecution's case against Richter. For example, the high-velocity blood spatter on the wall near the couch that established beyond cavil that *someone* had to have been shot on or very near the couch. Nor do Richter's experts offer any explanation for the expended .22-caliber casing near the couch where Klein lay mortally wounded that was exactly the same brand as live bullets loaded in a magazine for a semiautomatic pistol that was found in Richter's bedroom the day after the crimes were committed. Finally, none of Richter's habeas experts proffer any credible explanation for how Klein could have been moved from the bedroom doorway onto the couch without leaving any visible trail of blood.

The California Supreme Court's summary rejection of Richter's ineffective-assistance-of-counsel claim was objectively reasonable—especially given

the wide latitude afforded by "double deference" review of *Strickland* claims under § 2254(d). Richter's allegations, even if true, did not compel the conclusion that counsel's performance had been deficient under prevailing professional norms. Certainly, this Court has never required counsel to prepare for the possible presentation of forensic evidence the prosecution has neither disclosed nor expressed an intention to present before the start of trial—much less required counsel to be prepared for "any contingency." Nor has this Court ever laid down a rigid rule requiring the defense to meet forensic evidence with forensic evidence of its own rather than to choose to rely on effective cross-examination of the prosecution's expert witnesses.

Nor, in any event, did Richter's proffer of new expert-opinion evidence compel the conclusion that there was a reasonable probability that the defense was prejudiced so as to undermine the reliability of the verdict. Here, it is reasonable to conclude that the new opinion evidence presented in habeas corpus was too equivocal and speculative and that it would not have accomplished anything significant beyond what counsel had accomplished in cross-examining the prosecution's witnesses.

In granting Richter habeas corpus relief, the Ninth Circuit erred under § 2254(d) in two basic ways. First, rather than afford the California Supreme Court's decision rejecting Richter's *Strickland* claim the deference to which it is entitled, the court of appeals deemed the state court's implicit finding that

Richter's counsel was not deficient "objectively unreasonable." Second, rather than apply *Strickland*'s general and deferential rule regarding counsel's performance (see 466 U.S. at 689), the court of appeals instead held that counsel must prepare for "any contingency"—in particular the presentation of the prosecution blood experts—and to meet expert-opinion evidence with expert opinion. Contrary to the Ninth Circuit's approach, "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico* v. *Lett*, 559 U.S. ___, slip opn. at p. 12.

A. The California Supreme Court's Rejection Of Richter's Claim Was Objectively Reasonable And Therefore Precludes Relief Under § 2254(d)

Under 28 U.S.C. § 2254(d), habeas corpus relief "shall not be granted" if the state court's adjudication of the merits of the prisoner's claim is at least a "reasonable" application of this Court's "clearly established" law. *Renico* v. *Lett*, slip opn. at p. 5 (citing *Williams* v. *Taylor*, 529 U.S. at 410). Where a state prisoner alleges ineffective assistance of counsel, the "clearly established Federal law" is this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668. Defendants must show that counsel's performance was unreasonable under the then-prevailing professional norms, and a "reasonable probability" that any incompetent performance

affected the outcome of the case. See *id.* at 687-96. In evaluating the reasonableness of counsel's preparation for trial, the court must consider such difficult decisions as how to allocate investigative resources, which avenues of investigation are worth pursuing further, which witnesses to subpoena or call to the stand, and whether to present an affirmative defense or simply make the government meet its burden. Such decisions are pre-trial and trial strategy issues about which competent counsel might reasonably disagree. As this Court has noted: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689.

The *Strickland* standard is itself deferential to trial counsel. Thus, federal review under § 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 (2009); *Yarborough* v. *Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam).

The California Supreme Court's rejection of Richter's ineffective-counsel claim easily passes muster under the "doubly deferential" review required by the combination of § 2254(d) and *Strickland.* The state-court record provided a reasonable basis for rejecting the ineffective counsel claim on "competent performance" grounds or in any event on "no prejudice" grounds. And, as this Court has held: "The question 'is not whether a federal court believes the state court's determination'

under the *Strickland* standard 'was incorrect but whether that determination was unreasonable—a substantially higher threshold.'" *Id.,* 129 S.Ct. at 1420.

1. It Was Reasonable For The State Court To Credit, As Competent, Counsel's Reliance On Cross-Examination Rather Than On Expert Testimony

The state-court record provided a reasonable basis for the California Supreme Court to conclude that counsel's challenged decision—to refrain from presenting expert-opinion testimony, but to counter the prosecutor's blood evidence by minimizing it through cross-examination instead—constituted competent performance.

A proper view of the case from counsel's perspective at the time provides reasonable support for the conclusion that Richter's counsel was not deficient. He was confronted by the indisputable fact that Klein had been shot by two different firearms. Near where Klein was shot, investigators found a spent .22-caliber casing that matched live cartridges and a magazine for a semi-automatic pistol later found in Richter's bedroom. The inevitable inference was that Richter had shot Klein with a .22-caliber firearm while Branscombe had shot Klein with a .32-caliber handgun. Richter's counsel thus had to explain how Klein happened to have been shot inside Johnson's house by two different firearms, while

Richter supposedly sat outside in his truck. Also bearing on Richter's counsel's predicament was the fact that Richter, after his arrest, had made tape-recorded statements to Branscombe reflecting a consciousness of guilt. And, of course, counsel had received no notice of the prosecution's intention to either test, or to present expert testimony about, the blood samples from the crime scene. Indeed, counsel knew that the prosecution had neither tested nor preserved samples of the photographed blood in the pool by Johnson's bedroom door.

In addition, a choice for cross-examination was proper as cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." And, in fact, counsel cross-examined the state's experts effectively. He succeeded in wresting from prosecution expert Spriggs her acknowledgment that she could not rule out the possibility that Klein's blood, and not just Johnson's, had been present in the sample of blood taken from the bedroom wall. Similarly, blood-spatter expert Bell admitted that he could not be certain where Klein had been positioned in relation to the couch when he was shot because of the absence of any bullet hole in the armrest. Recognizing the inherently speculative nature of the prosecution's blood spatter evidence, counsel reasonably chose to counter that evidence via cross-examination alone.

That the state court ruling was at least a "reasonable" application of *Strickland's* "performance" standard (129 S.Ct. at 1420) is buttressed by the fact

that the federal district judge went further and found that counsel's performance indeed was competent. The district judge explained:

> [Counsel]'s pretrial investigation and study led him to the belief that the trial would be primarily a credibility case. AD at 51. The State implicitly agreed with [counsel] by not preparing a blood spatter analysis or even testing any of the blood samples taken from the crime scene. Given the lack of blood evidence developed by the State prior to trial, [counsel]'s failure to find and produce the expert testimony at issue does not fall below the standard.
>
> [Counsel]'s failure to find and call [his own blood] experts after he was surprised at trial by the sudden presentation of expert blood spatter and serology testimony was . . . reasonable. [Counsel] did what he could under the circumstances. [Counsel] objected to Bell being called as an expert witness, moving to exclude the testimony and/or for a preliminary facts hearing; both motions were denied. AD at 152. [Counsel] objected to the surprise expert testimony on serology and requested more time to prepare; this motion was denied as well. AD at 35, 48, 77. [Counsel] spent the night studying serology and the State's expert's report at the library to prepare for cross-examination. AD at 78-82.

App. 39a-40a.

This Court's clearly-established *Strickland* jurisprudence has never required counsel to prepare for the presentation of evidence the prosecution had ignored until the start of trial or to meet forensic evidence in a particular way different from cross-examination. On the record presented to it, the California Supreme Court correctly—and in any event reasonably—could conclude that Richter's counsel's performance was not deficient under *Strickland*.

2. Given The Evidence Of Guilt, And The Debatable Difference Between The Effect Of Counsel's Cross-Examination Versus The Inconclusive And Speculative "Expert" Opinion Offered After The Trial, The State Court's Ruling Also Was Reasonable Under The Prejudice Component Of The *Strickland* Test

The state-court record also provided the requisite reasonable support for the conclusion that counsel's decision not to consult with and/or present an expert to counter the State's forensic blood evidence did not result in any "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 695-96. Contrary to the Ninth Circuit's analysis, the blood evidence was in no way crucial to the defense case.

In the first place, Richter's claim of prejudice is a chimera because the source of the blood pool can never be known as it was not preserved at the crime scene and has never been analyzed by any forensic

scientist. Moreover, Richter has never disputed Detective Bell's testimony that (1) there was high velocity blood spatter on the wall near the couch indicating someone had been shot on or very near the couch, and (2) there was no evidence of a trail of blood leading from the bedroom door to the couch which would suggest that Klein had ever been moved from one part of the house to another after he had been shot. In the absence of some plausible explanation for how Klein could have been moved without leaving any blood trail, and how high velocity blood spatter got on the wall near the couch other than by someone being on or near the couch when shot, the defense's "shootout" theory was doomed to fail—no matter how many alternative theories could be propounded to explain the so-called blood pool. As the dissent observed, "although Richter's experts raise more hypothetical situations than did counsel on cross-examination in which a combination of Johnson and Klein's blood would create [the state serologist]'s result, they are still merely hypothetical and have no basis in the actual facts of the case." App. 169a-170a n. 12.

The "evidence" that Richter and the Ninth Circuit say would have been uncovered by competent counsel consists of proffered expert opinion that Johnson *could not have caused* the blood pool if he was standing in the doorway waiting for the police to

arrive.[6] With such expert testimony, so Richter's argument goes, the jury then would have found more credible Richter's testimony that he had seen Klein lying on the floor rather than on the couch where he lay when the police later arrived. This, the argument continues, somehow would have proved that Klein was killed in a crossfire between Johnson and Branscombe—and not, as the prosecutor asserted, while Klein lay sleeping on the couch.

But—largely because no samples from the pool of blood were obtained or preserved—none of Richter's proffered habeas corpus experts could offer more than mere speculation that Klein's blood *might have been* in the pool. And, as Judge Bybee's dissenting opinion pointed out, none of Richter's habeas corpus experts has ever proffered an opinion challenging Detective Bell's testimony in regard to the blood stains on Klein's face or the high velocity spatter near the couch where he was found by the police. App. 186a. This evidence, which Richter's experts have never

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[6] The Ninth Circuit's mischaracterization of Richter's habeas experts' opinions as "undisputed" (see, e.g., App. 126a) apparently derives from nothing more than the State's unexceptional stipulation that, if Richter's federal habeas experts were called to testify in the district court at an evidentiary hearing, their testimony would be consistent with the content of their declarations—nothing more. The State has *never conceded* that this equivocal, speculative testimony, if presented at trial, would have undermined the People's case regarding the circumstances surrounding the murder of Patrick Klein.

disputed, clearly shows that *someone* was shot on or very near the couch.

In addition, none of Richter's habeas experts has offered an explanation of how "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 sidestepped 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 the dissent observed, all Richter's experts' opinions mean is "that the blood couldn't have originated from Johnson while he was standing up." App. 188a.

The dissenting opinion correctly observed that the presentation of Richter's habeas experts' opinions at trial would not have yielded more persuasive evidence of Richter's innocence. The testimony of the pathologist, for example, would merely have repeated "the defense's overarching theory, echoed by defense counsel throughout the trial," that the criminal episode had to have occurred much earlier in time than Johnson said it had occurred. App. 179a. And while his own blood spatter expert "might have been helpful in general, [Richter's counsel] had no reason to believe that blood spatter testimony would definitively indicate that Klein or Johnson created the blood pool." *Id.* at 184a.

Just as important, even if the opinion evidence that Richter and the Ninth Circuit are so enamored of had been presented at Richter's trial, it would not have addressed the compelling physical evidence that tied Richter directly to the crimes: the expended .22-caliber cartridge, found near the couch where Klein lay mortally wounded, that was exactly the same as live bullets found in Richter's bedroom by police investigators; and the discovery of Johnson's stolen gun safe and backpack in the same location. And it could hardly have been a mere coincidence that the police fortuitously found among Richter's belongings a firearm magazine of a type usable with a semi-automatic handgun capable of firing .22-caliber bullets—but no handgun.

The jury could hardly have overlooked the fact that neither the .32-caliber handgun that Branscombe had been seen cleaning in Johnson's house before the murder and the .22-caliber semi-automatic firearm used to shoot Klein were never found. This evidence is especially damning in light of Richter's admission that he and Branscombe had discarded clearly incriminating evidence in the marsh.

The four dissenting judges on the en banc court, the three judges on the original panel, and the district judge got it right. In departing from "doubly-deferential" review under *Strickland* and § 2254(d), the Ninth Circuit got the question of whether the state court's adjudication was at least "reasonable"—"the only question that matters"—wrong. See *Lockyer*

v. *Andrade*, 538 U.S. 63, 71 (2003). Reversal is warranted.

B. The Ninth Circuit Deviated From The AEDPA Standard Of Review By Invoking Its Own Eccentric Sixth Amendment Rule

In *Strickland*, this Court observed that "no particular set of detailed rules" could "satisfactorily take account of the variety of circumstances faced by defense counsel." 466 U.S. at 688-89. A court considering an ineffective-counsel claim must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case." *Id.* at 690. Rather than afford Richter's trial counsel's performance the "strong presumption" of reasonableness to which it is entitled under *Strickland*, however, the Ninth Circuit erected its own standard of conduct predicated on the martial philosophy of Sun Tzu and then deemed Richter's counsel's performance prejudicially deficient. The Ninth Circuit's failure to adhere to the strictures of AEDPA should not be countenanced.

In *Knowles* v. *Mirzayance*, 129 S.Ct. at 1411, this Court confirmed that, under 28 U.S.C. § 2254(d)(1), federal habeas relief may be granted on an ineffective-counsel claim *only if* the state-court decision unreasonably applied the general and deferential standard established by *Strickland*. It cannot be "'an unreasonable application of clearly

established Federal law'" for a state court to decline to apply a specific ineffective-counsel rule that has not been squarely established by this Court. *Mirzayance*, 129 S.Ct. at 1419; *Wright* v. *Van Patten*, 552 U.S. 120, 124-26, (2008) (per curiam); *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007); see *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006); *Williams* v. *Taylor*, 529 U.S. 362, 412-13 (2000).

Yet the Ninth Circuit in this case granted habeas corpus relief on the basis of the novel rule that counsel is obliged to consult with and/or present "forensic experts regarding critical issues in the case." App. 119a. But 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, equally effective methods such as cross-examination.

Here—much like in *Mirzayance*—the Ninth Circuit created and applied its own, different standard for attorney competence. Relying on Sun Tzu's philosophy of war, rather than on this Court's precedent recognizing that there are innumerable ways for a lawyer to render competent assistance in a given case (see, *e.g.*, *Strickland*, 466 U.S. at 689 ["[t]here are countless ways to provide effective assistance in any given case"]), the Ninth Circuit in effect laid down a *per se* rule requiring counsel to investigate and to produce expert-opinion testimony.

This eccentric Circuit rule applies regardless whether counsel could reasonably conclude that such investigation would not be promising or would simply produce equivocal results. App. 110a-120a.

Contrary to the Ninth Circuit's rigid approach, this Court has eschewed mechanistic rules governing what counsel must do in order to effectively represent his client. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 479 (2000) (citing 466 U.S. at 689). Thus, in *Strickland* this Court wrote:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

466 U.S. at 688-89.

This Court repeatedly has explained that defense counsel need not exhaustively investigate every avenue of defense. See, *e.g.*, *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987) (The question is not "what is prudent or appropriate, but only what is constitutionally compelled.") (quoting *United States* v. *Cronic*, 466 U.S. 648, 665 n. 38 (1984)). Rather, counsel must use reasonable professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigative time. The dissent below

astutely noted that the court of appeals' "decision will force counsel to seek expert advice at every stage of the proceedings, even when counsel believes that it will detract from the other issues counsel must confront." App. 139a. Nothing in this Court's Sixth Amendment jurisprudence even hints at such an expansive obligation on the part of defense counsel in the routine case.

Citing Circuit law, rather than the law as clearly established by this Court's precedents as required by § 2254(d), the en banc majority opinion invoked a "rule" that "counsel *must . . . present* to the jury *any evidence* he finds that tends to show his client's innocence, tends to undermine the prosecution's case, or raises a reasonable doubt as to his client's guilt." App. 110a. It somehow cannot be enough, in the en banc majority's idiosyncratic opinion, for counsel to rely on cross-examination—"beyond any doubt the greatest legal engine ever invented for the discovery of truth," 5 J. Wigmore, Evidence 32 [§ 1367] (J. Chadbourn rev. ed. 1974)—to make the defense's point. Instead, even while constrained to recognize that cross-examination of the State's witnesses may establish reasonable doubt, the Ninth Circuit imposed its own rule that "[l]eaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable." *Id.,* at 114a.

In essence, under the Ninth Circuit's novel rule, defense counsel may not reasonably rely on cross-examination if "affirmative" defense evidence may be produced. Indeed, in the Ninth Circuit's peculiar view—but not in any view expressed by this Court—defense counsel bears special *Strickland* obligations with respect to forensic-expert testimony. *Id*. at 111a ("The obligation to investigate only grows more imperative where the evidence at issue is the 'only forensic evidence' that could reasonably support the defense theory").

The court of appeals thus improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer relevant forensic evidence. While Sun Tzu's exhortation to be ready for "any contingency," much like the Boy Scouts' motto, "Always Be Prepared," might express a laudable goal, the demands of a criminal trial force counsel to marshal his or her resources in order to best respond to the evidence the prosecution has signaled it intends to present to prove the charges—not evidence the prosecution *might* present *if* it happens to develop at some point in time. This Court has never held, and thus the federal habeas court under § 2254(d) may not on its own establish, that defense counsel's failure to be prepared for "any contingency" constitutes deficient performance.

It is true that the Ninth Circuit purported to disclaim adoption of any per se rule about presenting

available forensic or expert evidence. App. 116a (n. 12). But the disclaimer cannot be reconciled with the opinion. The Ninth Circuit similarly disclaimed adoption of a "nothing to lose" rule in *Mirzayance*. This Court, however, correctly discerned that, in substance, the Ninth Circuit had done precisely that. 129 S.Ct. at 1419 n. 3. It is the same here.

Ironically, the en banc majority's attempt to distinguish *Mirzayance* merely exposed the conflict. The en banc majority described *Mirzayance* as a case in which counsel reasonably investigated and decided not to pursue a hopeless defense. App. 116a. However, in this case, Richter's counsel also reasonably decided not to pursue an investigation that presented little prospect of a favorable result.

As graphically illustrated by its immediate appeal to Sun Tzu, rather than to *Strickland,* the en banc court's majority opinion apparently applied, in the guise of "clearly established Federal law," a novel rule requiring investigation of "any" conceivable line of defense despite counsel's reasonable professional judgment as to the necessity for such investigation so long as there was "no negative consequence" to the defense and regardless of whether it deprived counsel of time to check out more promising leads. The Ninth Circuit thus spawned a "hard edged rule" rather than looking at the case as if standing in counsel's shoes. Cf. *Rompilla* v. *Beard*, 545 U.S. at 381.

The Ninth Circuit's decision in this case suffers from the same kind of error that this Court was

constrained to correct in *Wong* v. *Belmontes*, 130 S.Ct. 383 (2009) (per curiam). There, the Ninth Circuit determined that a reasonably competent defense lawyer would have introduced more mitigation evidence on top of what counsel had already presented and the additional evidence it proposed would have carried greater weight if counsel had submitted expert testimony. In reversing the Ninth Circuit, this Court explained that "the notion that the result could have been different if only [defense counsel] had put on more than the nine witnesses he did, or called expert witnesses to bolster his case, is fanciful." 130 S.Ct. at 391. As it was in *Belmontes*, the Ninth Circuit's infatuation with expert testimony is plainly wrong.

As the dissenting opinion cogently observed, "the majority's holding plainly enlarges the constitutional duty of defense counsel to seek out and present expert testimony." App. 139a. The dissent warned that:

> If counsel in this case can be said to have unreasonably rendered deficient performance in failing to use a serologist at trial, almost no counsel in the future can satisfy *Strickland* without first consulting with every conceivably relevant expert before trial and then calling these experts at trial to testify on any contested forensic issue.

App. 172a.

Consider, for example, cases where eyewitness identification testimony was involved. Under the Ninth Circuit's interpretation of the Sixth

Amendment, defense counsel would have to consult with and/or present an expert to address the various psychological and other factors bearing on the reliability of such testimony in order to be deemed "competent." Similarly, in any case in which the prosecution proposed to present evidence regarding sexual assault, defense counsel would be constrained to present an expert to challenge any forensic evidence presented by the prosecution—even if the defense were willing to concede that there had been sexual contact and the only contested issue was whether the contact was consensual.

The instant case underscores the difficulty in mandating, as a function of evaluating attorney competency, the use of experts irrespective of the availability of other means of challenging the prosecution's case. As the dissent noted:

> At best [Richter's habeas experts] can only challenge the [prosecutor's] conclusion that evidence shows conclusively that the swabbed sample contained Johnson's blood only—a conclusion that Richter's counsel effectively challenged at trial during cross-examination.

App. 163a.

Having established its own standard for attorney competency that elevates the importance of expert testimony, the Ninth Circuit then deemed Richter's counsel's failure to meet that standard prejudicial. App. 125a-131a. According to the en banc majority,

"counsel's failure to present blood spatter expert testimony undermines our confidence in the result, and, accordingly, was prejudicial." *Id.* at 127a. The majority then found, with no further discussion, that the California Supreme Court's denial of Richter's ineffective-counsel claim "was an unreasonable application of *Strickland*. . . ." *Id.* at 132a.

The Ninth Circuit's finding of prejudicially-deficient performance is the inevitable result of its exalted view of expert opinion evidence. Thus, the majority asserts that "reasonable doubt in the minds of the jurors" would have been "reinforced had counsel offered expert testimony on blood typing to rebut that of the State's serology expert." App. 132a.

The court of appeals' prejudice analysis proceeds from the premise that the source of the blood pool was a "critical question" that the jury could not adequately resolve in the absence of expert evidence that contradicted the State's experts. However, this is a false premise as the source of the blood pool was, at best, only a peripheral issue. The Ninth Circuit's finding that the California Supreme Court unreasonably applied this Court's *Strickland* standard by not finding Richter's counsel's performance prejudicially-deficient is clearly untenable.

As we have shown, by employing its own novel expert-opinion rule—rather than this Court's "clearly established" *Strickland* standard—in evaluating Richter's ineffective-counsel claim, the Ninth Circuit

improperly deviated from the protocol established by AEDPA for evaluating habeas corpus petitions presented pursuant to 28 U.S.C. § 2254. Had the Ninth Circuit faithfully adhered to this Court's general and highly deferential *Strickland* standard, it would have ruled as the district court and the three-judge panel had, that is, that Richter had failed to meet his burden of showing that he was denied effective representation at trial.

CONCLUSION

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

Respectfully submitted,

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