No. 09-587

In The Supreme Court of the United States

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1) 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)?

2) Did trial counsel render ineffective assistance of counsel in failing to investigate or be prepared to use readily available forensic evidence directly supporting the theory of defense he himself selected, where that defense directly undercut the state's theory and where counsel promised the jury that defense in opening statements, called defendant to testify to support that defense and relied on that defense in closing argument?

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STATEMENT OF THE CASE

The Trial.

On the morning of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento, California. One person – Patrick Klein – was killed while another – Joshua Johnson – was injured. When police arrived, they found Klein lying on a sleeping bag on the living room couch and a large blood pool in the bedroom doorway.

Police photographed the blood pool but took no sample of the blood. Because the jury would hear two completely different explanations for the shooting – each of which depended on a different source for the blood pool – the blood pool itself played a critical role in the case.

The state charged respondent Joshua Richter and co-defendant Christian Branscombe with murder and attempted murder. As the district court noted, the parties presented "divergent theories" of the shooting. Pet. App. 27a.[1]

According to the state, defendants went to Fair Oaks Boulevard to commit a robbery, shot Klein as he slept on the couch and shot Johnson when he awoke.

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[1] "Pet. App." refers to the Appendix accompanying the state's Petition for Writ of Certiorari. "RT" and "CT" refer to the Reporter's and Clerk's Transcripts of the original trial, lodged in district court. "ER" refers to the Excerpt of Record filed in the Court of Appeals.

There were three components essential to the state's theory: (1) Klein was shot while sleeping on the couch, (2) the blood pool found in the bedroom doorway came from Johnson as he waited for police, and (3) Johnson did not initiate a gun battle by shooting at Branscombe. The state's case was based largely on Johnson's testimony.

At the time of the shooting, Johnson was a drug dealer, selling approximately one pound of marijuana a day, along with psilocybin mushrooms. RT 474, 480. Johnson owned numerous rifles, shotguns and handguns. RT 481-82. He testified for the state under a grant of immunity in connection with a series of charges pending against him, including cultivation of marijuana, conspiracy, using a minor to sell drugs, and possession of a firearm. RT 475-78.

Johnson first told the 911 operator there were four or five assailants. RT 577, 686-87. He then changed his story, saying there were three to four assailants. RT 577, 686-87. Still later, he told police there was one assailant. RT 946. Finally, Johnson said Richter and Branscombe shot Klein as he slept on the couch and then Johnson in the bedroom. RT 507, 510. Johnson never explained why he initially failed to identify the defendants, both of whom he knew well. Johnson admitted he had a .380 caliber gun that night by his bedside but testified he did not fire it. RT 511, 590.

In a detailed opening statement defense counsel outlined the very different defense theory. ER

129-48. According to counsel, defendants went to Fair Oaks Boulevard to return a gun Branscombe borrowed. Richter dropped Branscombe off and, moments later, heard shooting. Rushing into the house, Richter saw Klein on the floor in the bedroom doorway, while Branscombe yelled that Johnson tried to shoot him. There were three components essential to the defense theory: (1) Klein was *not* shot on the couch while sleeping but in the bedroom doorway during a gun battle, (2) the blood pool in the doorway was *not* from Johnson, but from Klein before Johnson carried him to the couch, and (3) Johnson fired a .380 caliber gun at Branscombe who returned fire in self-defense. The defense case was based largely on Richter's testimony. RT 1087-91.

Given these two inconsistent versions of events, the blood pool was a critical piece of evidence. The en banc court noted this precise point:

> If Klein was killed while lying on the couch in the living room, there was no possibility Richter's account was correct. If, in contrast, Klein was killed in the doorway to the bedroom, [the state's] account of the events in question could not possibly be true.

Pet. App. 125a.

This simple point was not lost on defense counsel; in fact, he recognized it from the beginning of the case. In opening statement, counsel promised jurors the physical evidence would show "Patrick Klein was not shot there on the couch;" he relied on the "pool[ ]

of blood" that was "inconsistent with the stories told by Gunner Johnson." ER 134-35. He told jurors the blood pool was "evidence of great importance." ER 135. He promised "the evidence will show that . . . Johnson after Patrick was shot moved him to the couch" and explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 138, 142. During the defense case, he called Richter to testify that he saw Klein lying in the bedroom doorway. RT 1090. And in closing argument, defense counsel argued the same theory: the blood pool proved Johnson was lying and Klein was shot in the doorway during the crossfire after Johnson fired at Branscombe. RT 1510-12.

It should have been easy to decide who deposited the blood by testing a sample from the pool. Yet although police noted the "fair amount of blood" in the pool, they never collected any of it. RT 937. Thus, the genetic source of that blood could not be established by scientific tests. RT 937.

The state did call a blood spatter expert, detective Bob Bell. Bell defined "high-velocity blood spatter" as a blood stain from "a force similar to a gunshot or similar type force applied to the blood source" resulting in "atomized blood" similar "to a can of aerosol spray in that it's minute" with "fan-like distribution." RT 140, 148. Bell conceded there was no high-velocity blood spatter on (1) the wall immediately behind the couch, (2) the sleeping bag or (3)

the couch where Klein was found. RT 162, 183-84, 230, 237.

Because of the complete absence of such blood spatter in the most probative locations, the prosecutor asked Bell if he saw "any spatter . . . consistent with Patrick Klein having been shot on the couch." RT 148. Bell responded "[n]ot much, but there was some" and went on to identify several drops of blood which "may" have been caused by Klein being shot on the couch. RT 148, 150. These drops were on a Ziploc bag and a piece of paper, both on the ground between the couch arm and a chair. RT 149. Branscombe's counsel later described this spatter as "two tiny drops of blood." RT 149, 152, 1585. Despite the absence of high-velocity blood on the wall, couch or sleeping bag, the prosecutor nevertheless argued Klein was shot on the couch and the blood pool in the bedroom doorway was deposited by Johnson dripping blood as he waited for police. ER 178.[2]

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[2] Without citing the record, the state now claims there was "evidence of high-velocity blood spatter on the wall by the couch where Klein was found." Petitioner's Brief ("PB") 19. *Accord* PB 48. The state goes further, describing this as "the most significant evidence proving Richter's guilt" which is "irrefutabl[e]." PB 19.

The state's claim is unsupportable. Not only did Bell himself concede there was no high-velocity blood spatter on the couch or sleeping bag, but he went further and admitted there was none on the wall either. RT 162, 183-84, 230, 237. And during closing arguments, the prosecutor and both defense lawyers all recognized there was no blood on the wall. *See* RT 1457-58, 1585, 1612.

Although defense counsel recognized the importance of the blood pool evidence in opening statements, called his client to support the theory that Klein was the source of the pool, and relied on that theory in closing argument, he neither consulted with nor called a blood spatter expert. He just argued the theory in closing, without support. In his own closing argument, the prosecutor made this exact point, noting that counsel had introduced no expert testimony to support his theory that the blood pool proved Klein was shot in the bedroom doorway:

> Bob Bell, he's 22 years as a blood spatter expert, all that stuff means nothing. He [defense counsel] says, the blood be here. Bob Bell, he's wrong, trust me. I am not going to go get an expert. I am not going to bring some-body in here to tell you because I don't need to do it. I will just do it in closing argument. I will just say it. If you are willing to believe me, hey, that will work.

RT 1607.

Even on this record, the jury obviously viewed the case as close. Although the state presented Johnson's eyewitness testimony identifying defendants, the jury deliberated more than 14 hours over three days, twice returning with requests to have testimony re-read. CT 310-18.

The New Evidence.

In state habeas proceedings initiated after his conviction, Richter presented expert testimony showing that Johnson could not have been the source of the blood pool. The explanation is both logical and simple.

According to blood spatter expert Ken Moses, a standing person dripping blood into blood (as the trial prosecutor theorized) would create a large number of round splash drops – known as satellite drops – surrounding the main pool of blood. ER 82-83. The lack of satellite drops here shows the state's theory as to the source of the blood pool – that it was from Johnson as he stood in the doorway dripping into the blood pool – was false. ER 82-83. To the contrary, the absence of satellite drops establishes the blood pool was caused *not* by drops falling from an injured person standing in the doorway, but by the pooling of blood from a source close to or on the floor. ER 82-83. Moses's conclusion was straightforward:

> The lack of a large number of satellite dropletts [sic] surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

In district court, there was no dispute whether there were satellite drops surrounding the blood pool. The photograph of the blood pool shows there were none, and the state itself conceded this point below. J.A. 110, 143 ("The evidence of record discloses that

no 'satellite drops' were observed by the crime scene investigators."). Thus, the state neither cross-examined Moses nor offered any contrary testimony, instead stipulating to admission of Moses's unrebutted expert testimony. ER 399.

The district court itself noted that defense counsel could have presented expert testimony showing "the pool of blood . . . could not have been made by someone standing and dripping blood." Pet. App. 39a. But because defense counsel did not consult a blood spatter expert, the jury deciding Richter's fate never knew this.

State Court Proceedings.

Based on this new evidence, Richter sought collateral relief in state court, contending counsel violated *Strickland* in failing to investigate and present forensic evidence supporting the theory counsel himself elected to present. Richter presented his *Strickland* claim, as well as several other claims, directly to the state supreme court in an eight-claim habeas petition and asked for discovery and an evidentiary hearing. J.A. 8-31.

The state supreme court requested informal opposition from the state. The Attorney General did not respond at all to two of Richter's claims. *In re*

Richter, S082167, Informal Response at 1-93.[3] As to the remaining six claims, the state argued: (1) four of the six were untimely, (2) a fifth should have been raised on appeal and (3) all six were without merit. *Id*. at 24-92. On March 28, 2001, the state court denied the petition without discovery or a hearing in a one-line order:

Petition for writ of habeas corpus is DENIED. J.A. 129.

Defense Counsel's Explanation.

Richter then sought habeas relief in federal court. The district court ordered a deposition of trial counsel. The parties jointly submitted the deposition in lieu of live testimony. ER 399.

In light of the theory he elected to present, Richter's trial counsel recognized "[i]t was significant to try to show that [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Had Klein's blood been in the doorway, "[i]t would have gone a long way to impeach the testimony of Mr. Johnson" and would have corroborated Richter's testimony. ER 283-84. But counsel did not consult a blood spatter expert before or during trial. ER 245. Counsel admitted there was no tactical

[3] The parties have jointly asked to lodge the state's informal response with the Court. That request is pending.

reason for his failure: he simply did not consider a blood spatter expert. ER 289-90.

Federal Court Proceedings.

The district court found that counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case" between Johnson and Richter. Pet. App. 39a. The court relied on this fact to find reasonable counsel's complete failure to investigate forensic testimony directly supporting Richter's theory. *Ibid*. As a consequence, the court did not address the prejudice component of this issue. Pet. App. 44a.

A three-judge panel affirmed. Although "[c]ounsel highly experienced in trying capital cases involving bloodstain evidence might well have understood the value of such an expert," the "Sixth Amendment does not guarantee defendants a right to highly experienced counsel." Pet. App. 73a. Accordingly, counsel's failure to investigate or present evidence proving the very theory he himself relied on throughout his case was reasonable. Like the district court, the panel never addressed prejudice. Pet. App. 73a.

A 7-4 en banc panel disagreed, ruling that defense counsel unreasonably failed to even consider expert testimony to "support the theory he had chosen." Pet. App. 103a-105a and n.6. In accord with cases from throughout the country, the majority squarely rejected the district court's view that the failure to investigate the defense theory was rendered

reasonable "because counsel thought that the case was, at bottom, a credibility contest." *Id*. at 113a. Accurately noting that counsel himself offered no strategic reason for failing to consult with a blood spatter expert, the court refused to invent such a reason for him. *Id*. at 115a.

The en banc court then turned to prejudice, recognizing that absent Moses's testimony, "the only expert explanation of the evidence that the jury heard was consistent with the prosecution's version." Pet. App. 126a. Had defense counsel done his job, however, the jury would have heard testimony from "an experienced former law enforcement officer" that "directly contradicted the prosecution's version and raised substantial doubt" as to Johnson's testimony on "a central point." *Id*. at 126a-127a. Moreover, because the state had neither cross-examined Moses nor presented any contrary evidence, Moses's conclusion "remains undisputed." *Id.* at 126a. Noting Johnson's shifting versions of events given to police, *id*. at 128a, the court concluded counsel's failure to investigate the blood spatter evidence was prejudicial.

SUMMARY OF ARGUMENT

Richter presented the state court with an eight-claim habeas petition including his *Strickland* claim. The state court summarily denied this petition in an eight-word ruling:

> Petition for Writ of Habeas Corpus is DENIED.

In accord with circuit precedent, both the three-judge and the en banc panels applied the deference provisions of AEDPA – set forth in 28 U.S.C. § 2254(d) – to Richter's *Strickland* claim. Pet. App. 64a, 101a, 120a, 135a-136a.

The first question presented is whether § 2254(d) applies to a state court's summary disposition of a federal claim. By its own terms, § 2254(d) deference applies only to claims that have been "adjudicated on the merits" in state court proceedings. For some time now the question whether § 2254(d) applies to a summary disposition has generated a variety of views in the lower courts. *See*, *e.g.*, *Washington v. Schriver*, 255 F.3d 45, 53-54 (2nd Cir. 2001) (discussing disparate views). However, because of a peculiar feature of California law – which employs four distinct types of summary dispositions in non-capital habeas cases – that general question is not at issue here.

Whatever the treatment of summary dispositions in other states, or indeed the treatment of other summary dispositions from the California Supreme Court, the particular summary denial relied on by the state court here – known as a "silent denial" – is unique among the state court's summary orders. Under state law, a silent denial is used when a majority of the state court has not agreed whether the reasons for denying a petition are merits-based or procedural, and therefore does not constitute an

"adjudication on the merits" within the meaning of § 2254(d).

This Court has already interpreted California's silent denial in light of state law. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1992). In *Ylst*, California itself contended that under state law, a silent denial did *not* constitute an adjudication on the merits. This Court agreed. Thus, under established California practice and this Court's precedent – and in accord with the state's own position on this very issue for years – the silent denial employed here was not an adjudication on the merits. Where, as here, a state court uses a summary disposition that does not reflect an adjudication on the merits, § 2254(d) does not apply.

Even if the silent denial used here were on the merits, § 2254(d) would not apply to the *Strickland* claim on this record. *Strickland* claims have two prongs: deficient performance and prejudice. In a line of cases from *Wiggins v. Smith*, 539 U.S. 510 (2003) through *Porter v. McCollum*, ___ U.S. ___, 130 S.Ct. 447 (2009) the Court has held that in cases raising *Strickland* claims, § 2254(d) applies only to those prongs actually adjudicated on the merits. Here, the state not only assumes a merits adjudication in the first instance, but it urges the Court to presume the state court resolved both prejudice and performance prongs and accord § 2254(d) deference to both presumed resolutions. This presumption as to the applicability of § 2254(d) should be rejected; it constitutes an end run around the state's burden to prove an

adjudication on the merits and is inconsistent with how courts generally resolve *Strickland* claims.

But even if the silent denial here were on the merits, and even if the Court presumed the state court resolved the merits of both components of the *Strickland* test, § 2254(d) would still not apply. In 28 U.S.C. §§ 2254(d)(1) and (2), Congress provided a mechanism for habeas petitioners to prove that § 2254(d) deference does not apply. Both (d)(1) and (2) require petitioners to analyze the reasoning used by the state court. Applying § 2254(d) to unreasoned summary dispositions – even if they are on the merits – is not only inconsistent with Congress's provision of §§ 2254(d)(1) and (2), but provides a strong incentive for state courts to say nothing at all when resolving a federal constitutional claim, and thereby avoid any genuine scrutiny by federal courts. Congress could not have intended such a consequence.

Turning to the merits, the en banc court's conclusion that trial counsel unreasonably failed to investigate his own theory of defense was entirely correct. If the jury here believed Johnson, it would convict of murder. If it believed Richter, it would acquit. The jury thus had to decide one simple question: who was telling the truth?

As the majority noted, if Klein was shot on the couch (as Johnson testified), Richter was lying. But if Klein was shot in the bedroom (as Richter testified), Johnson was lying. The source of the blood pool would tell the real story.

Defense counsel told the jury in opening statements the blood pool was critical, and he called Richter to testify that Klein was lying in the bedroom doorway where the blood pool was found. In closing argument, and without supporting evidence, defense counsel argued that the blood pool proved Johnson was lying and Klein was not shot on the couch. But counsel utterly failed to investigate now-undisputed forensic evidence which would have proven just that. And when asked to explain his failure, he forthrightly conceded he had no tactical reason at all; he simply did not consider such an investigation. Counsel's failure to investigate the defense he himself selected and relied on throughout trial was unreasonable.

It was also prejudicial. The only theory of the case supported by expert testimony was the state's theory. Even so, the jury deliberations were protracted, suggesting a close case. If accepted, Moses's testimony refutes the state's explanation for the blood pool, supports Richter's own testimony and impeaches Johnson's testimony regarding the circumstances of Klein's death. The absence of credible forensic evidence directly supporting the otherwise unsubstantiated defense theory, and just as directly undercutting the state's theory, plainly undermines confidence in the outcome of trial.

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ARGUMENT

I. BECAUSE OF THE NATURE OF THE PARTICULAR SUMMARY DISPOSITION USED IN THIS CASE, SECTION 2254(d) DOES NOT APPLY.

As enacted in 1948, 28 U.S.C. § 2254(a) permits federal courts to grant habeas relief to "person[s] in custody pursuant to the judgment of a State court" where that custody is "in violation of the Constitution or laws or treaties of the United States." *See also* 28 U.S.C. §§ 2241(a), (c)(3). 28 U.S.C. § 2254(d) – enacted in 1996 – precludes federal courts from granting habeas relief as to all claims that have been "adjudicated on the merits" in state court, subject to the criteria set forth in §§ 2254(d)(1) and (2).

Here, Richter presented his *Strickland* claim as the second claim of an eight-claim state petition. J.A. 15-19. The state court summarily denied this petition, ruling "Petition for Writ of Habeas Corpus is DENIED." J.A. 129.

The state argues § 2254(d) applies to this summary ruling. The state is wrong for three separate reasons. First, the silent denial used by the state court here was not an adjudication on the merits within the meaning of § 2254(d). Second, § 2254(d) does not apply because there is no indication in the record which prong of the *Strickland* test the state court adjudicated. Finally, the absence of any reasoning in the summary disposition precludes application of § 2254(d).

A. California Law Has Four General Types Of Summary Denials; Because California Law Recognizes That The Particular Denial Used Here Is Not An Adjudication On The Merits, § 2254(d) Does Not Apply To This Case.

The state first argues that the silent denial issued in this case constitutes an "adjudication on the merits" of the ineffective assistance claim and is therefore entitled to deference under § 2254(d). PB 22-24. The state's thesis has two premises.

First, this Court must examine state law to determine whether a summary ruling is an adjudication on the merits for purposes of § 2254(d). PB 22. Second, "[u]nder California law, this summary denial constituted a merits determination. . . ." PB 22.

The state's first premise is entirely correct. Given the comity interests on which § 2254(d) was based, determining whether the silent denial used here was an adjudication on the merits requires resort to state law. As the state itself has long contended, "the significance of a silent order must be determined by reference to the law of the state." Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *6.

But the state's second premise – contained in a single sentence in its brief – ignores state law almost entirely. In fact, the California Supreme Court has developed four distinct summary orders in connection with non-capital state habeas cases, each reflecting a different resolution of the case. Because the silent

denial used here does not reflect an adjudication on the merits, § 2254(d) does not apply to this case.

Since the parties agree that principles of comity require examination of California law to determine, at least in the first instance, whether the silent denial used here is an "adjudication on the merits," the analysis must begin with California practice. Both the California scheme and the four types of summary orders are discussed below. But one point is clear from a review of the state supreme court's practice: the state court's selection of a particular summary order is not a haphazard circumstance to be ignored but a considered judgment which must be respected. The summary order used here – a silent denial – was not an adjudication on the merits.

1. California's state habeas system.

In California, prisoners may collaterally challenge their convictions by filing a petition for writ of habeas corpus. *People v. Romero*, 8 Cal. 4th 728, 737 (1994). The California Constitution grants original jurisdiction in habeas proceedings to "[t]he Supreme Court, courts of appeal, superior courts, and their judges." Cal. Const., art. VI, § 10.

This original jurisdiction feature of California law has several consequences. First, where a California petitioner has sought and been denied habeas relief in the state superior or appellate court without issuance of an order to show cause, he may seek review by filing an original habeas petition in a

higher state court (as opposed to filing an appeal). *Evans v. Chavis*, 546 U.S. 189, 192-93 (2006). Second, and as Richter did here, a California petitioner may file his initial habeas petition directly with the state supreme court. *See*, *e.g.*, *In re Harris*, 49 Cal. 3d 131, 134 (1989).

When a habeas petition has been filed with the state supreme court, that court has two options. First, the court may require full briefing by issuing an order to "show cause why the relief sought should not be granted." *Romero*, 8 Cal. 4th at 738. After briefing the state court can grant relief, deny relief or order an evidentiary hearing. *Id*. at 739-40. The issuance of an order to show cause creates a "cause" and triggers "the state constitutional requirement that the cause be resolved 'in writing with reasons stated.'" *Romero*, 8 Cal. 4th at 740.

Alternatively, "[i]f the court determines that the petition does not state a prima facie case for relief or that the claims are all procedurally barred, the court will deny the petition outright, such dispositions being commonly referred to as 'summary denials.'" *Romero*, 8 Cal. 4th at 737. A summary denial is proper under state law because, absent an order to show cause, the matter is not a "cause" and the constitutional requirement of a written decision "with reasons stated" does not apply. *Id*. at 740.

2. The silent denial issued here is not an adjudication on the merits.

The California Supreme Court has seven justices. "The concurrence of at least four justices is needed for a decision to review a case or take other action." Supreme Court of California, Internal Operating Practices and Procedures at 20 (2007). As discussed above, when faced with an original habeas petition, a majority of the court may rule that a summary denial is appropriate without issuing an order to show cause.

Under California law, there are four general categories of summary denials. First, the state court may summarily deny a petition where the claims of the petition simply have no merit. *See*, *e.g.*, *People v. Wingo*, 14 Cal. 3d 169, 183 (1975). As the state supreme court has explained, when it specifically uses the phrase "on the merits" in summarily denying a petition or claim, the court has considered the merits. *In re Robbins*, 18 Cal. 4th 770, 814, n.34 (1998). For years, both before and after the 2001 order issued in this case, the state supreme court has summarily denied petitions "on the merits" when a decision on the merits has actually been reached. *See*, *e.g.*, *In re Garcia*, No. S081738, 1999 Cal. LEXIS 8884 (Cal. Dec. 21, 1999) ("Petition for writ of habeas corpus is DENIED on the merits."); *In re Lateef*, No. S083668, 2000 Cal. LEXIS 9069 (Cal. Nov. 29, 2000) (same); *In re Askins*, No. S103529, 2002 Cal. LEXIS 6000 (Cal. Aug. 28, 2002) (same); *In re Gomez*, No. S114736, 2003 Cal. LEXIS 10233 (Cal. Dec. 23, 2003) (same).

Second, the state court may reject a habeas petition for procedural reasons, without considering the merits. *Robbins*, 18 Cal. 4th at 778, n.1. Under state law, summary denial is appropriate for a variety of procedural reasons, so long as at least four justices agree. *See*, *e.g.*, *id*. at 822 (barring claims as untimely based on views of four justices); *In re Gallego* 18 Cal. 4th 825, 856 (1998) (barring claims as untimely based on views of five justices). The state supreme court has explained that it will impose these procedural bars when they are applicable and no exception applies. *See Robbins*, 18 Cal. 4th at 814, n.34 (discussing bars of failing to raise a claim on appeal and timeliness). When a decision has been reached to deny a petition for procedural reasons, the state supreme court issues a summary order containing specific citations to state case law identifying the procedural flaw. *See*, *e.g.*, *In re Martinez*, No. S081606, 1999 Cal. LEXIS 8877 (Cal. Dec. 21, 1999) (citing *In re Clark*, 5 Cal. 4th 750 (Cal. 1965)); *In re Moon*, No. S090390, 2000 Cal. LEXIS 9666 (Cal. Dec. 20, 2000) (same); *In re Walker*, No. S108706, 2002 Cal. LEXIS 8636 (Cal. Dec. 18, 2002) (same); *In re Bowman*, No. S115258, 2003 Cal. LEXIS 10220 (Cal. Dec. 23, 2003) (same).[4]

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[4] California law contains numerous procedural reasons which could form the basis for a summary denial. For example, summary denial is proper where at least four justices agree a petitioner has (1) delayed too long in filing the petition (*In re Streeter*, 66 Cal. 2d 47, 52 (1967)); (2) failed to first file the petition in a lower court (*In re Steele*, 32 Cal. 4th 682, 692 (2004)); (3) presented claims which should have been raised on

(Continued on following page)

Third, the state court may summarily deny a petition for a combination of both merits and procedural reasons. Thus, summary denial is proper where a habeas petition (or a particular claim) is both procedurally flawed and without merit, again so long as at least four justices agree on both grounds. *See*, *e.g.*, *Robbins*, 18 Cal. 4th at 822 (barring claims as untimely and meritless based on views of four justices). As the state court has again explained, where it denies a petition or claim both "on the merits" and for a procedural reason, it has addressed both the merits and the procedural default. *See id*. at 814, n.34. When a decision has been reached to deny a petition for both procedural and merits-based reasons, the state supreme court issues a summary order referencing both the merits and case law identifying a procedural flaw. *See*, *e.g.*, *In re Bennett*, No. S080389, 1999 Cal. LEXIS 8179 (Cal. Nov. 23, 1999) (denying petition on the merits and for lack of diligence); *In re Ali*, No. S085472, 2000 Cal. LEXIS 9656 (Cal. Dec. 20, 2000) (same); *In re Jost*, No. S107124, 2002 Cal. LEXIS 8114 (Cal. Nov. 26, 2002) (same); *In re Karcher*, No. S114996, 2003 Cal. LEXIS 9413 (Cal. Nov. 25, 2003) (same).

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appeal (*In re Dixon*, 41 Cal. 2d 756, 759 (1953)); (4) presented factual allegations which are too vague (*In re Swain*, 34 Cal. 2d 300, 303-04 (1949); (5) presented claims not cognizable in state habeas proceedings (*In re Shipp*, 62 Cal. 2d 547, 550 (1965); or (6) presented claims raised and rejected in prior appellate or habeas proceedings. *In re Waltreus*, 62 Cal. 2d 218, 225 (1965); *In re Horowitz*, 33 Cal. 2d 534, 546 (1949).

But these three categories do not cover the entire range of possibilities. There are cases where at least four justices agree the petition should be denied but have not agreed whether it should be denied on the merits or for a procedural reason. In this situation, the state court issues a silent denial, an order that denies the petition but contains no reference to the merits, no reference to any procedural default, and no reference to a combination of the two. *See*, *e.g.*, *In re Garamallo*, No. S082961, 1999 Cal. LEXIS 9046 (Cal. Dec. 21, 1999) ("Petition for writ of habeas corpus is DENIED.") *In re Rodriguez*, No. S089952, 2000 Cal. LEXIS 8076 (Cal. Oct. 18, 2000) (same); *In re Griego*, No. S111208, 2002 Cal. LEXIS 8572 (Cal. Dec. 11, 2002) (same); *In re Golin*, No. S120778, 2003 Cal. LEXIS 10192 (Cal. Dec. 23, 2003) (same).

This Court has specifically addressed the meaning of California's "silent denial" on two occasions. In *Ylst*, 501 U.S. 797, this Court first addressed whether a silent denial constituted a "decision on the merits." *Id*. at 801. There, defendant was convicted of murder. On appeal, he argued the admission of certain evidence violated the Constitution. The state appellate court procedurally barred the claim because there was no trial objection. Defendant filed a number of habeas petitions in state court, including two in the state supreme court, raising this issue; the state court denied his second petition with a silent denial that read "Petition for writ of habeas corpus is denied." *Ylst v. Nunnemaker*, 90-68, J.A. at 114. The district court held defendant's claim defaulted. On

appeal, the Ninth Circuit held the silent denial was a ruling on the merits which excused the default. *Nunnemaker v. Ylst*, 904 F.2d 473, 476 (9th Cir. 1990). Certiorari was granted.

The Court first noted the question was "whether the California Supreme Court's unexplained order denying [petitioner's] second habeas petition to that court . . . constituted a 'decision on the merits' of that claim sufficient to lift the procedural bar imposed in direct appeal." *Ylst*, 501 U.S. at 801. The question was "not an easy one." *Id*. at 802. This was so, the Court explained, because "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." *Id*. at 803. The Court recognized that "many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial." *Id*. (emphasis in original). As to the silent denial presented in *Ylst*, the Court concluded "it said absolutely nothing about the reasons for the denial." *Id*. at 805. *See also Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J., respecting denial of certiorari) ("A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result.")

Ultimately, this Court reversed the Ninth Circuit's ruling that a silent denial constituted a merits ruling, holding that a summary denial by a state

court as to a federal claim which follows a reasoned decision by a state court rejecting that same claim is presumed to rest on the same ground. *Ylst*, 501 U.S. at 803. Although the *Ylst* presumption itself has no bearing here – because the only state decision on Richter's *Strickland* claim was the state supreme court's silent denial – the Court's observation about the nature of California's silent denial was entirely correct. Given the state court's clear practice of using different summary orders to reflect different dispositions, "the basis of [the summary denial at issue here] is not merely undiscoverable but nonexistent." *Ylst*, 501 U.S. at 803. "Attributing a reason is therefore both difficult and artificial." *Id*. In light of state practice, *Ylst* correctly concluded that a silent denial says "nothing about the reasons for the denial." *Id*. at 805.

The state supreme court's actual practice since *Ylst* shows there is nothing random about the distinct types of summary orders used by that court. Indeed, this Court need look no further than the state court's habeas orders of March 28, 2001 – the very same day the state court denied the petition in this case – to see that the different orders used by the state supreme court reflect a different decision-making process in each case. As noted above, on that day the state court entered an order in Richter's case that, in its entirety, said "Petition for writ of habeas corpus is DENIED." That same day, however, the state supreme court:

- Denied at least five non-capital habeas petitions with orders explicitly stating

the denials were "on the merits." *See*, *e.g.*, *In re Waterbury*, No. S092905, 2001 Cal. LEXIS 2029 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus DENIED on the merits."); *In re Miller*, No. S093294, 2001 Cal. LEXIS 2115 (Cal. Mar. 28, 2001) (same); *In re Reeves*, No. S093340, 2001 Cal. LEXIS 2123 (Cal. Mar. 28, 2001) (same); *In re Hunter*, No. S093724, 2001 Cal. LEXIS 2163 (Cal. Mar. 28, 2001) (same); *In re Smith*, No. S093921, 2001 Cal. LEXIS 2178 (Cal. Mar. 28, 2001) (same).

- Denied at least five non-capital habeas petitions solely on procedural grounds, with orders explicitly stating the denials were based on certain procedural grounds. *See*, *e.g.*, *In re Pham*, No. S092745, 2001 Cal. LEXIS 2000 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal. 2d 218.)"); *In re Cubie*, No. S093034, 2001 Cal. LEXIS 2060 (Cal. Mar. 28, 2001) (same); *In re Flowers*, No. S093107, 2001 Cal. LEXIS 2079 (Cal. Mar. 28, 2001) (same); *In re Olson*, No. S093157, 2001 Cal. LEXIS 2090 (Cal. Mar. 28, 2001) (same); *In re Sistrunk,* No. S093548, 2001 Cal. LEXIS 2141 (Cal. Mar. 28, 2001) (same).

- Denied at least five petitions other than Richter's without referencing either the merits or any procedural defaults. *See*, *e.g.*, *In re Espinosa*, No. S092331, 2001

> Cal. LEXIS 1970 (Cal. Mar. 28, 2001) ("Petition for writ of habeas corpus is denied."); *In re Anton*, No. S092741, 2001 Cal. LEXIS 1999 (Cal. Mar. 28, 2001) (same); *In re Harris*, No. S093014, 2001 Cal. LEXIS 2055 (Cal. Mar. 28, 2001) (same); *In re Machado*, No. S093119, 2001 Cal. LEXIS 2083 (Cal. Mar. 28, 2001) (same); *In re Alford*, No. S093165, 2001 Cal. LEXIS 2093 (Cal. Mar. 28, 2001) (same).

As the state supreme court's actual practice shows, this Court's observations in *Ylst* about the meaning of a silent denial were entirely correct. On March 28, 2001, when the state court rejected a petition on the merits, it did so by explicitly adding the phrase "on the merits" to the summary order. When the state court rejected a petition for procedural reasons, it did so explicitly by adding a specific citation to procedural default case. And when the state court had not agreed on a rationale, it neither referenced the merits nor cited a procedural default case, instead issuing a silent denial. *Ylst* was right; because the members of the state court may not agree on a rationale when a silent denial is issued, it is impossible to determine the basis for that denial. *Ylst*, 501 U.S. at 803.

This Court reached the same result in *Evans v. Chavis*. There, defendant filed a habeas writ in the state supreme court more than three years after his writ in the state appellate court was denied. The state supreme court issued a silent denial. *Chavis*,

546 U.S. at 195. The Ninth Circuit held that because this silent denial did not dismiss the petition as untimely, the state court necessarily found the petition timely and reached "a decision on the merits." *Chavis v. LeMarque*, 382 F.3d 921, 926 (9th Cir. 2004). Thus, the panel held that the three-year period between levels of the state system tolled the one-year time frame within which defendant had to file in federal court pursuant to 28 U.S.C. § 2244(d)(2). *Id*.

In its briefing to this Court, California recognized that under state law, determining what this particular summary order meant was impossible because the seven members of the state court may "not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent." Brief for Petitioner, *Chavis*, 546 U.S. 189 (No. 04-721), 2005 WL 2841657 at *24. The state urged this Court to reject the Ninth Circuit's conclusion that the silent denial was on the merits precisely because "[t]he essence of unexplained orders is that they say nothing." *Id*. at *25. This Court agreed, ruling that it was impossible to determine from the silent denial whether the state court denied the state petition (1) by rejecting the claims on the merits or (2) because it was untimely. *Chavis*, 546 U.S. at 197-98.

The same conclusion applies here. As noted, Richter filed an eight-claim petition with the state supreme court. In response, the state filed a brief arguing (1) four of the eight claims were untimely, (2) one claim should have been raised on appeal and (3) six claims were meritless. The state court issued a

silent denial. On this record, as this Court concluded in *Ylst*, attributing a reason for this denial is "both difficult and artificial." *Ylst*, 501 U.S. at 803.

Indeed, there should be little dispute that not only is it impossible to determine the basis for a silent denial, but a silent denial is not on the merits. Even prior to *Chavis*, the state conceded this very point. Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *30 (silent denial by state supreme court is not "a determination of a 'cause' within the meaning of the state constitution," "does not establish the law of the case" and "is not a judgment which conclusively and definitively establishes the rights and obligations of the parties"); Closing Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1991 WL 11007944 at *21 (the state court's "silent denial . . . of habeas corpus relief" is "not necessarily a decision on the merits."); *id*. at *25 ("Certainly [the state supreme court's] denials are not intended as conclusions on the merits.").

In now arguing a silent denial is actually a decision on the merits, the state ignores (1) the four distinct types of summary orders used in non-capital habeas cases, (2) its prior explicit position that a silent denial is "not intended as [a] conclusion[ ] on the merits" and (3) this Court's decisions in *Ylst* and *Chavis*. PB 22-24. The state does not explain whether its new position requires reconsideration of either *Chavis* or *Ylst*. *See Ylst*, 501 U.S. at 806-07 (White, J., concurring) (noting that if "as a matter of state law . . . [a silent denial] is a ruling on the merits, the

presumption the Court's opinion articulates would be rebutted. . . ."). Nor does the state explain how it is that a silent denial (1) is *not* an adjudication on the merits which federal courts must honor when assessing a lower state court's procedural default (the holding in *Ylst*) but (2) *is* an adjudication on the merits which federal courts must honor when assessing § 2254(d).[5]

The Court need not linger over these obvious tensions. In arguing that a silent denial is a merits determination, the state cites four state cases. PB 22, citing *Robbins*, 18 Cal. 4th 770, *People v. Duvall*, 9 Cal. 4th 464 (1995), *Romero*, 8 Cal. 4th 728, and *In re Clark*, 5 Cal. 4th 750 (1993). Not only will these four cases not support the state's newly-minted position, but when taken together they establish that a silent denial is not a merits determination.

Neither *Duvall*, *Romero* nor *Clark* discussed (or even involved) silent denials. Instead, in generally discussing state habeas practice, they simply reaffirmed longstanding state law that where there is no prima facie case, a summary disposition on the

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[5] The breadth of the state's change in positions is noteworthy. Here, the state argues a silent denial is a merits adjudication precisely because it "settle[s] finally [ ] the rights and duties of the parties. . . ." PB 25. But in *Ylst*, the state argued a silent denial was *not* a merits adjudication because it was "not a judgment which conclusively and definitively establishes the rights and obligations of the parties." Brief for Petitioner, *Ylst*, 501 U.S. 797 (No. 90-68), 1990 WL 505547 at *30.

merits is warranted. *Duvall*, 9 Cal. 4th at 475; *Romero*, 8 Cal. 4th at 737; *Clark*, 5 Cal. 4th at 770. *Robbins* adds that the state court will "deny a claim 'on the merits' when we conclude that no prima facie case for relief is stated . . . ." *Robbins*, 18 Cal. 4th at 814, n.34. Taken together these four cases show (1) where the state court finds no prima facie case, that is a decision on the merits for which a summary disposition is proper and (2) when the state court uses the phrase "on the merits" in its summary orders, it has considered and rejected the merits. Nothing in these cases supports the counter-intuitive proposition that a silent denial means the same thing as an explicit denial "on the merits."[6]

As a consequence, the state court's practice of denying certain cases "on the merits," others for procedural reasons and still others with silent denials

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[6] One of the state's amici cites *Robbins*'s footnote 34 for the proposition that "the California Supreme Court has told us unambiguously that when it sustains a timeliness objection by the State it says so." Amicus Brief of Criminal Justice Legal Foundation ("CJLF") at 11, citing *Robbins*, 18 Cal. 4th at 815, n.34. Because the silent denial here did not reference timeliness, CJLF argues "the context of the summary denial makes it unambiguously on the merits."

CJLF tells only half the story. In footnote 34, the state court also confirmed that when it rejects the merits of a claim, it explicitly "den[ies] [the] claim 'on the merits'." In light of *Robbins*, where a silent denial references neither "the merits" nor a default, this means there simply was no majority for either position. That ambiguity was, of course, exactly the point this Court made in *Ylst.*

is not simply a haphazard factor to be ignored. The state court's practice – both over the course of many years and on the very day the order in this case was issued – shows that the choice of summary dispositions is a considered judgment entitled to respect. As this Court held in *Ylst* and *Chavis*, as the state has consistently conceded (until now) and as state practice shows, the silent denial involved here was not an adjudication on the merits.

In this respect, the summary denial used here is not unique to California. Indeed, Texas has filed an amicus brief here noting that Texas courts also have a choice among summary dispositions, only one of which is a merits adjudication under state law. Amicus Brief of Texas ("TB") at 14, n.1. Texas recognizes § 2254(d) does not apply where a particular summary disposition "show[s] that the state court has not adjudicated the merits . . . ." *Id*.

Texas is right. Under the plain language of § 2254(d), where a state court does *not* adjudicate the merits of a defendant's claim, federal review is unconstrained by § 2254(d). *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534. Since the silent denial here was

not an adjudication on the merits, § 2254(d) does not apply.[7]

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[7] Notwithstanding the inapplicability of § 2254(d) to the silent denial in this case, § 2254(d) nevertheless applies to the great majority of non-capital California habeas petitioners, even those involving a silent denial. In connection with non-capital cases, California court rules not only require petitioners to plead whether they filed a habeas petition below and explain any failure to do so, but reviewing courts may deny habeas petitions not filed first in a lower court. California Rules of Court 8.380(a), 8.384(a)(1), 8.384(b)(1); California Form MC-275, Petition for Writ of Habeas Corpus at p. 6, q. 18; *Steele*, 32 Cal.4th at 692. As this Court has concluded, "California's habeas rules lead a prisoner ordinarily to file a petition in a lower court first." *Carey v. Saffold*, 536 U.S. 214, 221 (2002). And when a California trial court denies a petition, it must issue a written order "contain[ing] a brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient." California Rule of Court 4.551(g). Because *Ylst* requires federal courts to look through silent denials to lower court adjudications – and because California petitioners "ordinarily . . . file . . . in a lower court first" – there are relatively few cases like this one involving a silent denial with no lower court adjudication to examine. This Court's own experience with California habeas cases bears this out. *See Carey*, 536 U.S. at 217 (noting that habeas petition was filed "in the state trial court"); *Chavis*, 546 U.S. at 195 (same); *Ylst*, 501 U.S. at 800 (same).

In the context of California capital habeas petitions, which are filed directly with the state supreme court, the state court generally makes clear exactly which claims have been addressed "on the merits" and which have been procedurally defaulted. *See*, *e.g.*, *Robbins*, 18 Cal. 4th at 822-25; *Gallego*, 18 Cal. 4th at 854-56. In 2001 for example – the same year the summary order was issued here – the state supreme court issued summary dispositions in 18 capital-case habeas petitions. Each disposition contained an explicit denial "on the merits" of every claim. *See In re Nicolaus*, No. S060675, 2001 Cal. LEXIS 312 (Cal. Jan. 17,

(Continued on following page)

B. Assuming The Silent Denial Of Richter's *Strickland* Claim Was On The Merits, § 2254(d) Applies Only To Those Components Of The Claim Which The State Court Actually Resolved.

The substantive constitutional issue raised here is Richter's claim that counsel provided ineffective representation under *Strickland*. Such claims require petitioners to prove (1) deficient performance on counsel's part and (2) prejudice. *Strickland*, 466 U.S. at 687. In *Strickland* itself this Court observed "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the

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2001); *In re Stansbury*, No. S066681, 2001 Cal. LEXIS 535 (Cal. Jan. 30, 2001); *In re Riel*, No. S084324, 2001 Cal. LEXIS 1313 (Cal. Feb. 28, 2001); *In re Benson*, No. S094994, 2001 Cal. LEXIS 1315 (Cal. Feb. 28, 2001); *In re Fauber*, No. S065139, 2001 Cal. LEXIS 1572 (Cal. Mar. 14, 2001); *In re Jones*, No. S092494, 2001 Cal. LEXIS 1944 (Cal. Mar. 28, 2001); *In re Coddington*, No. S085976, 2001 Cal. LEXIS 3283 (Cal. Mar. 28, 2001); *In re Johnson*, No. S090040, 2001 Cal. LEXIS 3815 (Cal. June 13, 2001); *In re Sanders*, No. S094849, 2001 Cal. LEXIS 3816 (Cal. June 13, 2001); *In re Musselwhite*, No. S063433, 2001 Cal. LEXIS 4821 (Cal. July 18, 2001); *In re Silva*, No. S070879, 2001 Cal. LEXIS 5240 (Cal. July 27, 2001); *In re Bradford*, No. S084903, 2001 Cal. LEXIS 5738 (Cal. Aug. 29, 2001); *In re Padilla*, No. S043733, 2001 Cal. LEXIS 6153 (Cal. Sept. 21, 2001); *In re Majors*, No. S062533, 2001 Cal. LEXIS 6370 (Cal. Sept. 19, 2001); *In re Noguera*, No. S068360, 2001 Cal. LEXIS 7044 (Cal. Oct. 17, 2001); *In re Majors*, No. S101360, 2001 Cal. LEXIS 7472 (Cal. Oct. 31, 2001); *In re Weaver*, No. S073709, 2001 Cal. LEXIS 7845 (Cal. Nov. 14, 2001); *In re Frye*, No. S087755, 2001 Cal. LEXIS 9205 (Cal. Jan. 24, 2001).

inquiry if the defendant makes an insufficient showing on one." *Id*. at 697.

The state ignores this observation, instead arguing that where a state court summarily "dispose[s]" of a *Strickland* claim on the merits, a federal court should presume the state court adjudicated the merits of both the performance and prejudice prongs. PB 32-33. Based on this presumption, the state suggests federal courts must apply § 2254(d) to both of these presumed rulings. PB 33-38.

Of course, because the silent denial here was *not* an adjudication on the merits at all, the narrower question of whether federal courts should presume the state court resolved both prongs (and provide § 2254(d) deference) is simply not before the Court. But even if the summary disposition here were on the merits, the suggestion that federal courts should presume the state court adjudicated both prongs of the *Strickland* analysis not only ignores the burden of proof on this issue, but creates a presumption which is entirely at odds with how *Strickland* cases are generally resolved.

As an initial matter, the state's argument that mere disposition of a *Strickland* claim constitutes a merits adjudication on both prongs was rejected in both *Porter* and *Wiggins*. In both cases, petitioners raised *Strickland* claims which the state courts rejected by addressing only one of the *Strickland* prongs, never addressing the other. In both cases – although the state court had plainly "dispose[d]" of

the *Strickland* claim – this Court held § 2254(d) deference applied only to the prong actually adjudicated on the merits. *Porter*, 130 S.Ct. at 452; *Wiggins*, 539 U.S. at 534. In short, where a state court summarily rejects a *Strickland* claim on the merits, § 2254(d) applies only to those prongs which have actually been adjudicated.

Where, as here, a summary disposition on the merits of a *Strickland* claim does not reveal which prong or prongs were resolved, the burden of proof may be critical. If the state has the burden of proving an adjudication on the merits, and that burden is not met, § 2254(d) does not apply. If the petitioner has the burden of proving there was no adjudication, and the burden is not met, § 2254(d) applies.

The text of AEDPA shows that when Congress wanted to impose a burden of proof on a habeas petitioner, it did so. *See* 28 U.S.C. § 2254(e)(1) ("The applicant shall have the burden of rebutting the presumption of correctness. . . ."). In § 2254(d), Congress did not explicitly allocate the burden of proof on this issue to either party. However, in light of fundamental principles of statutory construction, it did not have to.

As noted above, 28 U.S.C. § 2254(a) permits habeas relief for state petitioners in custody "in violation of the Constitution." Section 2254(d) bars relief where the petitioner's claims have been "adjudicated on the merits" in state court. Accordingly, traditional principles of statutory construction compel

a conclusion it is the state's burden to prove an adjudication on the merits. *See*, *e.g.*, *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S.Ct. 2395, 2400 (2008) ("When a proviso . . . carves an exception out of the body of a statute . . . those who set up such exception must prove it. . . . That longstanding convention is part of the backdrop against which Congress writes laws, and we respect it unless we have compelling reasons to think that Congress meant to put the burden of persuasion on the other side."); *accord NLRB v. Kentucky River Cmty. Care Inc.*, 532 U.S. 706, 711 (2001).

The state neither disputes nor even addresses this proposition. But the state's suggestion that federal courts should simply presume there has been a merits adjudication on both prongs of the *Strickland* test utterly ignores that it is the state's burden to prove an adjudication.

The state's suggestion also would create a presumption starkly at odds with the way courts resolve *Strickland* claims. There is certainly no reason to think Congress was unaware of *Strickland*'s very practical admonition that courts need not resolve both prongs of the *Strickland* formulation in rejecting an ineffective assistance claim. Nor is there any reason to think Congress was unaware that for similarly practical reasons, courts rejecting *Strickland* claims often resolve only one prong. *See*, *e.g.*, *Porter*, 130 S.Ct. at 452; *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383, 386 (2009); *Wiggins*, 539 U.S. at 534;

Yarborough v. Gentry, 540 U.S. 1, 4-11 (2003). California courts also take this exact approach. *See*, *e.g.*, *In re Ross*, 10 Cal. 4th 184, 204 (1995); *In re Fields*, 51 Cal. 3d 1063, 1079 (1990). Embracing a presumption that summary dispositions reflect a merits resolution of both prongs flies in the face of this practical experience.

This Court addressed a similar situation in *Ylst*. There, defendant urged the Court to presume that in issuing a silent denial, the state supreme court "disregard[ed] [a lower court's procedural] bar and consider[ed] the merits." *Ylst*, 501 U.S. at 803. The Court refused precisely because it was "a most improbable assessment of what actually occurred." *Id*. at 804. Instead, the Court embraced a contrary presumption which "most nearly reflect[ed]" the role actually played by silent denials in the state system. *Id*.

The same approach should be taken here. Where a state court summarily denies the merits of a *Strickland* claim, presuming the court resolved both the prejudice and performance prongs is simply "a most improbable assessment of what actually occurred." Instead, where a *Strickland* claim is summarily denied on the merits, although federal courts can presume that at least one of *Strickland*'s two prongs was resolved, in the absence of proof as to which prong was actually resolved, § 2254(d) does not apply.

This is entirely consistent with Congress's intent in enacting § 2254(d). That section constitutes a significant change from prior law and provides an

equally significant litigation advantage to the state in connection with claims adjudicated on the merits in state court. *Porter* and *Wiggins* establish § 2254(d) does not apply to those parts of a *Strickland* claim which were *not* adjudicated on the merits in state court. Requiring the state to prove what has actually been adjudicated on the merits is a minimal burden for the state to meet in order to get the considerable benefits of § 2254(d). Ultimately, however, because the silent denial here was not on the merits in the first place, there is no reason to resolve this question.[8]

C. Applying § 2254(d) To Unexplained State-Court Dispositions Ignores §§ 2254(d)(1) And (2) And Leads To Absurd Results Which Congress Could Not Have Intended.

The state and its amici argue that where a state summary disposition constitutes an adjudication on the merits, the absence of reasoning does not preclude application of § 2254(d). PB 23-32; CJLF 7-23; TB 7-19. Once again, however, because the silent denial here was not a merits adjudication at all, this broad question is also not before the Court.

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[8] Proving what has actually been adjudicated on the merits does not require proof of the state court's actual reasoning. That separate issue, addressed by the state and its amici at length, is discussed below. Instead, it simply requires proof of what prong was actually adjudicated on the merits.

Although this issue is addressed in detail in the NACDL amicus brief filed in support of Richter, several points are noteworthy. The state's argument rests on the statutory construction principle that "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." PB 25, *citing Dodd v. United States*, 545 U.S. 353, 359 (2005). If the silent denial here was a merits adjudication, and if this Court presumes the state court resolved the merits of both prongs of the *Strickland* claim, then § 2254(d) deference would indeed be required here so long as the Court read no further than the "adjudicated on the merits" clause of § 2254(d).

However, § 2254(d) does *not* end at the "adjudicated on the merits" clause. Instead, in §§ 2254(d)(1) and (2) Congress went on to provide mechanisms by which petitioners could prove § 2254(d) did not bar relief, requiring determinations as to whether the state court decision "involved an unreasonable application" of federal law or was "based on an unreasonable determination of the facts." In accord with this plain language, the inquiries required by these sections require an analysis of the state court's reasoning. *See*, *e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259-60 (2007); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002); *Wiggins*, 529 U.S. at 527-28; *Williams v. Taylor*, 529 U.S. 362, 397 (2000); *Early v. Packer*, 537 U.S. 3, 8 (2002) (applying § 2254(d)(1) by examining "the reasoning [and] the result of the state-court decision"). Thus, applying § 2254(d) to

summary dispositions which have no reasoning is entirely inconsistent with Congress's considered decision to provide exceptions to § 2254(d) which depend on an analysis of the state court's reasoning. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 35-36 (1992) ("[A] statute must, if possible, be construed [so that] every word has some operative effect.").

But applying § 2254(d) where there is no state court reasoning does more than undercut §§ 2254(d)(1) and (2). Where a state court analyzes federal claims and articulates reasoning for its decision, that decision is subject to the scrutiny of a federal court making the inquiries prescribed by § 2254(d). As the Court's own experience in *Williams*, *Abdul-Kabir* and *Wiggins* has shown, sometimes this scrutiny shows the state court applied the wrong law, applied the correct law but ignored or got wrong key facts, or simply failed to consider all parts of a claim.

Applying § 2254(d) to unexplained decisions creates a perverse incentive structure for state courts: the less the state court says and does, the greater benefit it gets from § 2254(d). If a state court says nothing at all, such decisions may be virtually immune from federal review. Section 2254(d) should not be construed to create such a disincentive for state courts to explain their reasoning. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) (refusing to interpret statute to reach an absurd result which Congress could not have been intended). *Compare Monge v. California*, 524 U.S. 721, 734 (1998) (refusing to interpret the Double Jeopardy clause to

"create disincentives" for the states to provide procedural protections for trials on enhancement allegations).

If the Court construes § 2254(d) to apply to unreasoned state court dispositions on the merits, the Court must then decide how that section is to be applied. Some lower courts have charted a course designed to apply § 2254(d) to summary dispositions but avoid some of the pitfalls discussed above. *See*, *e.g.*, *Ryan v. Miller*, 303 F.3d 231, 245-46 (2d Cir. 2002). Indeed, one of the state's own amici cites *Ryan* as a model for application of § 2254(d). CJLF 20-21.

In *Ryan*, after defendant was convicted of murder he contended admission of certain evidence violated his confrontation clause rights. The state court summarily denied the claim without reasoning and the district court denied relief. On appeal, the Second Circuit first held that § 2254(d) applied notwithstanding the absence of reasoning. *Ryan*, 303 F.3d at 245-46. But because there was no reasoning to reference in analyzing §§ 2254(d)(1) and (2), the court started with an analysis of whether there was clearly established federal law governing the case. *Id*. at 247-49. Concluding there was, the court then applied that law to see if there was a constitutional violation. *Id*. at 249-51. Concluding there was a violation, the court went on to decide if the state court's contrary ruling was objectively unreasonable – not merely wrong, but so clearly wrong that "the state court was objectively unreasonable in not finding a Confrontation Clause violation." *Id*. at 251-52.

Many courts around the country, including the Ninth Circuit, have followed a functionally similar approach. These courts have referred to this approach as "independent review" and held that, absent state-court reasoning, federal courts must independently review the law to determine if there is clearly established federal law, independently review the record to see if there is constitutional error and then determine if the state court's unexplained contrary ruling is unreasonable. *See*, *e.g.*, *Paine v. Massie*, 339 F.3d 1194, 1198-1205 (10th Cir. 2003); *Harris v. Stuvall*, 212 F.3d 940, 943 (6th Cir. 2000); *Aycox v. Little*, 196 F.3d 1174, 1177-78 (10th Cir. 1999); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). Both the three-judge and en banc panels below applied this standard. Pet. App. 64a, 98a. And not only did the state make no objection, it explicitly relied on this intermediate approach. *Richter v. Tilton*, 06-15614, Respondent's Brief at 30-31.

While the *Ryan* approach is not perfect, it reduces the incentive for state courts to do less. It also provides a systematic way for federal courts to approach the issue so they can further Congress's general intent to shift the focus to the state court decision without undercutting Congress's provision of §§ 2254(d)(1) and (2).

In sum, the position advocated by the state here undercuts the exceptions to § 2254(d) Congress deliberately included in AEDPA and creates an obvious disincentive for state courts to resolve federal constitutional claims with considered opinions. And while

several courts have charted a more moderate approach, because the silent denial used here was not an adjudication on the merits in the first instance, § 2254(d) does not apply, and there is simply no need to resolve the general summary disposition issue here.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF (1) SELECTED, (2) PROMISED THE JURY IN OPENING STATEMENT, (3) CALLED HIS CLIENT TO SUPPORT AND (4) RELIED ON IN CLOSING ARGUMENT.

The district court concluded, "the jury heard two very different theories explaining the evidence." ER 3. According to the court, trial counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." ER 11. The court was right on both counts.

The state argued: (1) there was no gun battle in the house, (2) Klein was shot on the couch and (3) the large blood pool in the bedroom doorway was deposited by Johnson as he stood there, dripping blood and waiting for police. The defense argued: (1) there was a gun battle in the house, (2) Klein was not shot sleeping on the couch but in a crossfire while standing between the living room and bedroom where he fell to the floor, and (3) the blood pool was not deposited by Johnson, but by Klein.

As these starkly different versions show, if the blood pool was made by Johnson, Richter's version is false. Just as clearly, however, if the blood pool was made by Klein, Johnson's version is false. The source of the blood pool was critical to both the defense and state theories of the case.

At trial, however, defense counsel neither investigated nor presented blood spatter testimony to support his theory of the case. This despite an opening statement in which he (1) promised jurors the evidence would show "Patrick Klein was not shot there on the couch," (2) referenced the "pools of blood" as "evidence of great importance" which was "inconsistent with the stories told by Gunner Johnson," (3) contended "the evidence will show that . . . after Patrick was shot [Johnson] moved him to the couch" and (4) explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 134-35, 138, 142. This despite calling Richter to testify that when he entered the house, he saw Klein lying in the bedroom doorway. RT 1090. This despite arguing the same theory to the jury in his closing argument: the blood pool proved not only that Johnson was lying, but that Klein had been caught in a cross-fire. RT 1510-12.

In both state and district court, Richter presented testimony from blood spatter expert Ken Moses. Based on his analysis of the blood pool, Moses concluded that the state's theory Johnson was the source of the blood pool could be "eliminate[d]." ER

83. The district court found counsel could have presented expert testimony that:

> [T]he State's theory that Johnson deposited the pool of blood in his doorway is scientifically unreliable.
>
> [T]he pool of blood . . . could not have been made by someone standing and dripping blood.

ER 11. The state stipulated to admission of Moses's expert testimony without cross-examination (ER 399) and did not offer any contrary testimony.

At his federal court-ordered deposition, defense counsel agreed it was important to his theory to "try to show [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Counsel failed to investigate his theory before or during trial not out of tactics, but because he simply did not consider it. ER 245, 289-90.

The en banc panel held that counsel's failure to investigate and present evidence supporting his own defense was both unreasonable and prejudicial. The state disagrees on both counts. As to performance, the state ignores counsel's stated reasons entirely and argues counsel was entitled to rely on cross-examination of the state's experts. PB 41. As to prejudice, the state argues the source of the blood pool was "at best only a peripheral issue" and the new evidence does not undercut the state's case. PB 47-51, 60.

As discussed more fully below, the state's arguments should be rejected regardless of whether § 2254(d) applies to this case. Counsel's failure to investigate the defense he promised to the jury, relied on at trial, and argued in closing was fundamentally unreasonable. And because Moses's testimony supports Richter's testimony, undercuts the state's entire explanation for the blood pool and directly impeaches Johnson's testimony as to how Klein was shot, the writ was properly granted.

A. Defense Counsel Unreasonably Failed To Investigate The Theory Of Defense He Himself Selected And Relied On Throughout His Case.

When a criminal defendant seeks relief because his counsel has provided inadequate representation, two elements must be proven: (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 693. In applying *Strickland*'s performance prong, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 691. But where counsel utterly ignores "pertinent avenues of investigation," the decision not to investigate is not a reasonable professional judgment. *Porter*, 130 S.Ct. at 453.

This Court has recognized that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable. *See*, *e.g.*, *Wiggins*, 539 U.S. at 526 (holding defense counsel's conduct unreasonable where he promised the jury would "hear that Kevin Wiggins has had a difficult life" but failed to investigate or present evidence showing severe physical abuse as a child prior to age six and extreme physical abuse, sexual molestation and rape thereafter while in foster care); *Porter*, 130 S.Ct. at 449 (holding defense counsel's conduct unreasonable where he "told the jury that Porter 'has other handicaps that weren't apparent during the trial' and Porter was not 'mentally healthy,'" but failed to "put on any evidence related to Porter's mental health" including evidence showing "his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity.")

Every circuit to address this question has reached the same result. Where defense counsel selects a theory of defense and relies on it throughout the case, counsel acts unreasonably in failing to at least investigate evidence directly supporting the defense he himself has chosen. *See*, *e.g.*, *Dugas v. Coplan*, 428 F.3d 317, 328-29 (1st Cir. 2005); *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004); *Soffar v. Dretke*,

368 F.3d 441, 473 (5th Cir. 2004); *Eze v. Senkowski*, 321 F.3d 110, 126-30 (2d Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210, 219 (2nd Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990).

Here, defense counsel's theory in opening statements was that the physical evidence (including the blood pool) showed Klein was not killed on the couch. His theory throughout trial and closing argument was the same. But as the prosecutor correctly noted in his closing argument, defense counsel introduced no evidence to support his theory – it was just argument. RT 1607. Under these circumstances, counsel should have at least investigated the theory on which he was relying.

The state urges a contrary result, arguing defense counsel (1) believed "trial would be primarily a credibility case," and (2) was entitled "to choose to rely on effective cross-examination of the prosecution's expert witnesses," especially since the cross-examination here was "to good effect." PB 39, 41, 46.

The state's first observation is entirely correct. Defense counsel here did indeed believe, correctly, the case would be a credibility contest between Johnson and Richter. But this is the problem, not the solution.

Every court to address this issue has held that when trial counsel in a criminal case recognizes the case will come down to a credibility contest between defendant and a state witness, counsel's failure to at

least investigate readily available testimony directly supporting the defense is unreasonable. *Ramonez v. Berghius*, 490 F.3d 482, 488-90 (6th Cir. 2007) (failure to present evidence supporting defendant's testimony violated *Strickland* where the trial "boil[ed] down to a credibility contest"); *Clinkscale*, 375 F.3d at 445 (failure to present evidence supporting defendant's testimony violated *Strickland* where the "evidence essentially boiled down to a credibility contest" between defendant and the state's only eyewitness); *Pavel*, 261 F.3d at 223-24; *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) ("[i]n a credibility contest, the testimony of neutral disinterested witness is exceedingly important."); *Holsomback v. White*, 133 F.3d 1382, 1385-87 (11th Cir. 1998); *Williams v. Washington*, 59 F.3d 673, 681-82 (7th Cir. 1995); *Griffin v. Warden*, 970 F.2d 1355, 1359-60 (4th Cir. 1992); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985). As these cases uniformly recognize, it is hardly eccentric to require defense counsel in a serious criminal case to investigate the physical evidence when he knows the case will be a credibility contest which could be determined by the physical evidence. Counsel here was fundamentally unreasonable in failing to investigate the defense he himself selected, promised the jury in opening statement, called his client to support and relied on in closing argument.

Alternatively, the state suggests counsel was entitled "to choose to rely on effective cross-examination of the prosecution's expert witnesses." PB 41. This suggestion fares no better for three reasons.

First, defense counsel himself did not offer this as his explanation for failing to investigate his own defense. *See Wiggins*, 539 U.S. at 526-27 (in the absence of a strategic reason offered by counsel for a particular choice, both courts and the state must avoid substituting a "*post hoc* rationalization of counsel's conduct.") *Accord Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *Keith v. Mitchell*, 466 F.3d 540, 543-44 (6th Cir. 2006); *Dugas*, 428 F.3d at 333-34; *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004); *Brown v. Sternes*, 304 F.3d 677, 691, 695 (7th Cir. 2002); *Griffin*, 970 F.2d at 1358. The state is defending a tactical judgment trial counsel simply did not make.

Second, counsel's failure to investigate his own defense has nothing to do with the state's subsequent decision to call Bell as an expert. As counsel himself conceded, "even before" the state decided to call Bell as a witness, it was "always [his] intention" to argue the blood pool proved "Mr. Klein had been shot [in the bedroom] . . . as opposed to being shot on the couch." ER 374.

The fact of the matter is that counsel's failure to investigate left him unable to support either his client's own testimony or the theory of defense that counsel himself had selected. It also left him unable to rebut Bell's testimony with expert testimony of his own. These failures occurred not out of tactics, and not because he was relying on cross-examination, but – as counsel admitted – because he simply did not

consider such experts and was unaware such testimony could be obtained. ER 245, 289-92.

Even putting aside both points, however, the argument that counsel here reasonably decided to rely on cross-examination is still meritless. And this is so even though the major premise of the argument – that there are certain circumstances under which a defense lawyer may reasonably decide to rely on cross-examination of a state expert rather than calling his own expert – is unobjectionable.

As this Court has held, there is nothing "reasonable" about a tactical choice not to present evidence where counsel fails to investigate the evidence and thus does not even know what it is. *Wiggins*, 539 U.S. at 522-23. Consistent with *Wiggins*, lower courts hold that a decision to rely exclusively on cross-examination of a state expert is uninformed, and fundamentally unreasonable, where defense counsel has not educated himself, such as by consultation with appropriate experts or literature, so that he is prepared to present the defense case through cross-examination of the state's witness. *See Dugas*, 428 F.3d at 328-32; *Gersten v. Senkowski*, 426 F.3d 588, 610-11 (2d Cir. 2005); *Lindstadt*, 239 F.3d at 201-02.

So even if counsel had made the decision to rely on cross-examination, that decision would have been unreasonable. Defense counsel admitted he did not investigate his defense by consulting a blood spatter expert at any point. ER 245, 289-90. At the time of the 1995 trial, counsel had only done one previous

murder case. ER 228-29. Years later – at the 2004 deposition – trial counsel readily conceded that the satellite drop issue was one he would now "pick . . . up . . . quickly" because "I've had other cases." ER 289. But at trial, he simply did not consider obtaining a blood spatter expert. ER 289-90.

Trial counsel's cross-examination of Bell reflected his complete lack of knowledge as to the morphology of blood drops. The state alleges that defense counsel cross-examined Bell "to good effect" because Bell admitted (1) "he could not tell by looking at the blood on Klein's face in what position Klein had been when he was shot," (PB 8) (2) "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," (PB 8) and (3) "he could not 'use the blood evidence to establish' where [on the couch] Klein had been when he suffered . . . the neck wound." PB 39-40. But all these snippets show is that counsel's cross-examination established that Bell could not pinpoint Klein's exact posture when shot on the couch – whether he was sitting up or lying down. Nothing in this cross-examination furthered the defense theory that Klein was not on the couch when shot but was instead in the bedroom doorway.

In the final analysis, the state's suggestion that the en banc majority created a "per se rule requiring counsel to investigate and produce expert-opinion testimony" misses the real deficiency of counsel's conduct here. PB 53. In fact, the issue here is not really about expert testimony at all, but is about the

general obligation defense counsel has at least to investigate the defense he has selected, promised the jury, called his client to support and relied on in closing argument. Thus, the argument made here would be the same if counsel had promised the jury an alibi defense in opening statement, called his client to support that defense, relied on that defense in closing, but failed to investigate or present readily available evidence to prove the alibi. As this example shows, the issue here has little to do with expert testimony itself and everything to do with requiring counsel to investigate his own theory of defense – whether through experts or lay witnesses. Contrary to the state's argument, such a requirement is neither "novel" nor "rigid." PB 53, 54. It is simply common sense.

B. Because A Blood Spatter Expert Would Have Corroborated The Defense Theory Of The Case And Proven Johnson Was Lying, Counsel's Failure Was Prejudicial.

As noted, in order to prove ineffective representation, a defendant must show not only inadequate performance but that absent counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The state argues any failure to present the blood spatter testimony was harmless because the source of the blood pool was "at best, only a peripheral issue" and would not have undercut the state's case. PB 60.

This argument ignores that two starkly different theories were presented to the jury: (1) the state's theory "Klein was shot in cold-blood on the couch" and (2) the defense theory "Klein was shot not on the couch while asleep but during a struggle in the bedroom." Pet. App. 27a. If the blood pool was from Klein (1) Klein was not shot on the couch, (2) Johnson lied about the shooting, and (3) the state's theory of the case was false. If the blood pool was from Johnson (1) Klein was shot on the couch, (2) Johnson was telling the truth, and (3) the defense theory was false. As noted, the en banc majority recognized this exact point. Pet. App. 125a.

Thus, 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. In short, Richter's credibility and the efficacy of the defense theory rested on the source of the blood pool, as did Johnson's credibility and the state's case. The source of the blood pool was not peripheral to the case, it was central.

Alternatively, the state argues that because police failed to take a sample of the blood pool, Richter's "claim of prejudice is a chimera because the source of the blood pool can never be known. . . ." PB 47. According to the state, "none of Richter's proffered habeas corpus experts could offer more than mere speculation that Klein's blood *might have been* in the pool." PB 49.

We will start with a point of agreement. If indeed the "source of the blood pool can never be known," and the habeas experts could offer nothing "more than mere speculation that Klein's blood *might have been* in the pool" then the state is correct – there would be no prejudice. So it is worth examining the actual record.

Blood spatter expert Kenneth Moses specifically concluded that the state's theory Johnson was the source of the blood pool could be "eliminate[d]." J.A. 118. After explaining the satellite drop phenomena, and reviewing photographs of the blood pool showing no satellite drops, Moses's conclusion was clear:

> The lack of a large number of satellite dropletts [sic] surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

In light of the clarity of this conclusion, it is difficult to understand the state's complaint that "the source of the blood pool can never be known" and its suggestion that Moses could only "speculate[ ] Klein's blood *might have been* in the pool." After all, once the state's theory that Johnson was the source of the blood pool is "eliminate[d]," Klein is the only other source. This is not "speculation" at all.

The state's argument is especially difficult to understand given its concession there were no satellite drops surrounding the blood pool. J.A. 143. As a

result, in district court the state stipulated to admission of Moses's expert conclusion without cross-examination and without presenting any contrary testimony. ER 399. And the state no longer even defends the trial prosecutor's position that Johnson was the source of the blood pool. PB 1-61. The state's suggestion Richter has not proven Johnson could be eliminated as the source of the blood pool is made not by relying on the record, but by ignoring it almost entirely.

Finally, the state argues that proving Klein was the source of the blood pool makes no difference because "the defense's 'shootout' theory was doomed to fail" in light of Bell's testimony that (1) there was high velocity blood spatter on the wall near the couch "that irrefutably showed that someone must have been shot on or 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." PB 19, 48.

As discussed in some detail above, there was *no* "high-velocity blood spatter on the wall by the couch." None at all. Bell explicitly conceded there was no such spatter on the wall and all parties recognized this in closing arguments. RT 230, 1457-58, 1585, 1612. Bell further conceded there was no such spatter

on either the sleeping bag or the couch itself. RT 162, 183-84.[9]

Moreover, Bell never testified "there was no evidence of a trail of blood leading from the bedroom . . . to the couch." PB 48. Although the state repeats this argument three times without citation (PB 40, 48, 50), when asked about this subject, Bell admitted (1) there was "blood dripped at near the [bedroom] door and as well as near the edge of the couch," (2) he could "[not] recall specifically how much blood was in the center of the carpeted living room" and (3) blood spatter was difficult to see on fabric such as "heavy carpeting." RT 148, 195. And as defense counsel specifically pointed out in closing argument, photographs and videotape revealed "drippings" and "some kind of linear blood" supporting the defense theory that Klein was moved to the couch. RT 1514.[10]

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[9] Because the state erroneously suggests the blood spatter was on the wall, it never addresses the obvious implications from the lack of blood on the wall, the couch and the sleeping bag. Under the state's theory, the two blood drops about which Bell did testify had to miss the couch, sleeping bag and wall behind Klein, vault over the armrest of the couch and drop straight down to land on clutter on the ground below the couch. As Branscombe's counsel explained in closing, "if Mr. Klein was shot while he was lying on that sofa . . . there should be some atomized blood spatter somewhere" and "there would be more than two drops." RT 1585. Put simply, the blood spatter evidence hardly proved guilt, "irrefutably" or otherwise.

[10] The state correctly notes that a .22 caliber casing found at the crime scene was the same brand of ammunition found in a drawer in Richter's garage. PB 3, 19, 22, 40, 50-51. The

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Ultimately, the outcome in this case depended on whether the jury would believe Johnson or Richter. And the jury plainly had trouble with this question. Despite eyewitness testimony from Johnson, the jury deliberated more than 14 hours and returned twice with requests to have testimony re-read. CT 310-18.

There was good reason for the jury's pause. After all, Johnson gave four different stories to police and never explained why he failed to identify Richter (who he knew well) until the fourth version. Moses's expert opinion refutes the state's explanation for the blood pool, it raises significant doubts as to Johnson's credibility and it directly supports Richter's version of events. Because the source of the blood pool was critical to both the state and defense cases, counsel's failure to present this kind of credible forensic evidence

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suggestion is that (1) the ammunition in Richter's garage belonged to Richter and (2) because the brands matched, Richter was the shooter.

There is no need to dwell on the value of the second premise, because the first premise is unsupported by the record. Not only was there no evidence Richter ever owned a gun that could fire this ammunition, there was ample evidence connecting the ammunition to Johnson. Johnson and Richter both testified that before the shooting, Johnson stored his safe and other belongings in Richter's garage. RT 483-85, 573-74, 1054-55. After the shooting, police searched the garage and found sitting in the same drawer, a drug scale, the .22 caliber ammunition, and shotgun ammunition. RT 431-32. At trial Johnson admitted he was a drug dealer, and that he owned both a .22 and a shotgun. RT 474, 481.

to supporting the defense case undermines confidence in the jury's verdict.

As the lower court held, this is so regardless of whether § 2254(d) applies. Pet. App. 98a. Even if § 2254(d) is applied through the lens of the *Ryan*/ independent review methodology discussed above, relief is required.

The first step of *Ryan* is straightforward: *Strickland* is the clearly established federal law governing this case. For the reasons discussed above, the second step of that methodology – applying this law – compels a conclusion that counsel's failure to investigate his own theory of defense was both unreasonable and, given the central nature of Klein's location to both the state and defense theories of the case, prejudicial.

To the extent the state court's unexplained contrary decision rested on a view there was no performance prong violation because counsel elected to rely on cross-examination of the state's expert, or actually performed a cross-examination as to whether the blood pool showed Klein was on the couch (the explanations now given by the state), such a view is objectively unreasonable since these factual premises are false. To the extent the state court's unexplained contrary decision rested on a view there was no prejudice prong violation because there was high-velocity blood on the wall, or no evidence of a blood trail (again the explanations now given by the state), such a view was unreasonable for the same reasons.

Even if section 2254(d) applies to this case, it does not bar relief. The writ was properly granted.

CONCLUSION

The Court of Appeals' judgment should be affirmed.

Respectfully submitted,

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