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

BRIEF OF LAW PROFESSORS AND LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JEFFREY T. GREEN*
STEPHANIE P. HALES
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Amici Curiae
* Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and legal scholars with expertise in appellate advocacy and other areas of the law pertaining to post-conviction remedies and procedures. See the Appendix for more information about *amici*.

Together, *amici curiae* write to address our concern that the Brief of several State Attorneys General, writing as *amici curiae* in support of Petitioner, asserts empirical claims regarding the number and frequency of unexplained "summary dispositions" by state courts, which, in our view, do not set forth an accurate picture of appellate practice in the courts of the United States. As this Court considers the important questions presented in this case, the Court should have before it a balanced and accurate view of appellate practice. We therefore write to demonstrate how Amici States overstate the extent to which state courts rely exclusively upon unexplained decisions at all levels of state adjudication in order to deny habeas petitions for post-conviction relief.

SUMMARY OF THE ARGUMENT

In an attempt to support Petitioner's argument that the applicability of § 2254(d)'s limitation on relief does not require "a written or an 'explained' ruling from the state court," Pet. Br. at 17, Amici States list

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

a smattering of state-court statistics and rules, which purportedly demonstrate that state courts across the country have a regular practice of issuing unexplained decisions when denying "on the merits" habeas petitions for post-conviction relief. See Brief of Texas et al. as Amici Curiae in Support of Petitioner (hereinafter "AG Br.") at 4-7. Although several states have rules and procedures for "summary dispositions," the statistics and rules relied upon by Amici States do not establish that claims for post-conviction relief frequently leave a state-court system with a denial on the merits yet without any state court ever providing reasons. Indeed, many states expressly require such explanations by law or applicable court rules. Although such explanations may be brief, a short summary by at least one state tribunal stands in stark contrast to the completely unexplained state-court decision that is at issue in this case.

In addition:

- Amici States' data are misleading in that the statistics often include not only decisions on habeas petitions but also figures regarding direct appeals (sometimes both criminal and civil appeals) and other types of petitions or filings.
- Amici States' data often lump into a single category dispositions based on procedural grounds and dispositions based on the merits.
- Amici States' data often do not distinguish between a summary *denial* and a summary *dismissal*. Dismissal of a claim is different from a denial in many ways; for example, dismissals often allow the petitioner to amend the claim before the adjudication becomes final.

Moreover, dismissals are often based on procedural grounds, not on the merits.

- Amici States' data and citations do not acknowledge that state laws or court rules most often require at least one court (even if a lower court) to provide a form of written reasoning explaining the grounds on which a claim is denied, particularly where such denial is based on the merits of a facially valid claim.

By ignoring these distinctions and other aspects of the data they cite, Amici States present a highly distorted picture of state-court reliance on unexplained denials of post-conviction relief. As a result, the statistics and rules cited by Amici States do not undermine Respondent's position that § 2254(d) should not apply when, as is the case with Richter's ineffective assistance claim, no state court ever provided any explanation at all of the reasons for denying a claim, especially one like the instant claim that is facially valid. Because the term "summary disposition" has different meanings in different states—and, indeed, often has multiple meanings even *within* a particular state—this Court should decline to establish a "per se" rule that would automatically deem any "summary disposition" issued by a state court to be an "adjudication on the merits" for purposes of applying § 2254(d).

ARGUMENT

I. MATERIALS CITED BY AMICI STATES DO NOT ESTABLISH THAT STATE COURTS RELY FREQUENTLY OR SUBSTANTIALLY ON UNEXPLAINED DENIALS WHEN DECIDING FEDERAL CLAIMS RAISED IN PETITIONS FOR HABEAS CORPUS.

This case presents a situation where *no* state court has at any point offered a reasoned decision on the claim at issue. As the court of appeals explained: "Here, the California Supreme Court denied Richter's habeas petition in one sentence, without providing any reasoning for its decision. No other state court commented on Richter's claim that counsel provided ineffective assistance . . . ." *Richter* v. *Hickman*, 578 F.3d 944, 951 n.5 (9th Cir. 2009) (en banc); see also *id.* at 977 (Bybee, J., dissenting) (stating that this case is one "where no state court has explained its reasoning"). As such, reviewing courts have no decision to "look through" to determine whether the state court's decision was objectively reasonable. See *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804-05 (1991) ("The essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play. . . . To decide the present case, therefore, we being by asking which is the last *explained* state-court judgment on the . . . claim.") (emphases in original).

The state court denied Respondent's petition in a one-line order which read, in its entirety, "Petition for writ of habeas corpus is DENIED." Resp. Br. in Opp. at 10. According to Petitioner, such "summary or unexplained dispositions" are common in California courts. Pet. Br. at 29-30 & n.3; see also *id.* at 29

(stating that it "is a common practice of both state and federal courts to issue unexplained decisions" and citing statistics only from California state courts and only with respect to the number of "written opinions" issued). As explained in the Amicus Brief of California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers, the California habeas system is unique in how it handles petitions for a writ of habeas corpus. See generally Brief for California Attorneys for Criminal Justice and the California Academy of Appellate Lawyers as Amici Curiae in Support of Respondent. Nevertheless, picking up on Petitioner's argument in the context of California state courts' reliance on "summary or unexplained dispositions," Amici States assert that "California is not unusual in this regard." AG Br. at 4.

Amici States then present a string of state-court statistics and rules that purportedly illustrate the prevalence of "summary dispositions" in state courts across the country. AG Br. at 4-7. These examples point to statistics and rules from 13 states: Alabama, Alaska, Connecticut, Florida, Hawai'i, Illinois, North Dakota, Wisconsin, Texas, New York, Arizona, Delaware, and Utah. Amici States do not offer an explanation for having chosen this particular sampling of states. Presumably, it is because Amici States believe these examples are illustrative—perhaps more so than other potential examples—of the proposition they seek to establish. A review of the materials cited, however, shows that Amici States have not acknowledged the substance of these materials and, consequently, have overstated the extent to which states use "summary dispositions" that resemble the unique California system that generated the facts at issue in this case—a situation

where no state court ever provided any reasoning or explanation of the grounds for denying Richter's ineffective assistance claim.

A. Alabama

Amici States assert that the Alabama "state supreme court issued 1506 decisions without opinion and 252 decisions with opinion, in disposing of 698 direct appeals" in fiscal year 2008. AG Br. at 5 (citing Alabama Unified Judicial System: *FY 2008 Annual Report & Statistics* at 8, *available at* http://www.alacourt.gov/Annual%20Reports/2008AOCAnnualReport.pdf). However, the first two figures (1506 and 252) reflect the Alabama Supreme Court's *total* case load of appeals—which includes direct appeals as of right, petitions for discretionary review in both civil and criminal cases, state bar petitions, mandamus petitions, and other miscellaneous filings. The report does not specify which of the court's summary dispositions, if any, purported to resolve the merits of a criminal or post-conviction relief appeal.

Furthermore, these data are substantially irrelevant because it is the Alabama Court of Criminal Appeals (CCA), not the Alabama Supreme Court, which handles the overwhelming majority of the state's criminal and post-conviction relief work. See Alabama Unified Judicial System: *FY 2008 Annual Report & Statistics* at 9 ("The Alabama Court of Criminal Appeals is a five-judge court having exclusive appellate jurisdiction of all criminal cases, including all post-conviction writs arising therefrom."). According to the report, the CCA "issued 1,338 decisions in submitted appeals during FY 2008," of which 137 cases resulted in "[w]ritten opinions," and an additional 1,081 cases involved "[m]emorandum decisions." *Id.* Pursuant to Rule 54

of the Alabama Rules of Appellate Procedure, governing "Opinions and 'No Opinion' Cases of the [CCA]," the CCA is obligated even in so-called "No Opinion" cases to "write a memorandum addressing the appellant's contentions and giving a reason for rejecting them." Ala. R. App. P. 54(b). Thus, contrary to Amici States' assertion, the relevant data indicate that few, if any, post-conviction cases leave the Alabama state courts without a reasoned order.

Amici States also point to the Alabama Rules of Criminal Procedure as an example of how "[s]ome States explicitly provide by rule for summary dispositions in their courts." AG Br. at 7 (citing, among other state court rules, Ala. R. Crim. P. 32.7(d)).[2]

Yet this provision, on its face, governs *dismissals*, typically with leave to amend, not *denials*. Additionally, many of the stated grounds for a "summary disposition" are essentially procedural and result from a determination that the pleading is deficient, not an adjudication on the merits of a facially valid claim. Further, under Ala. R. Crim. P. 32.9(a) and (d), unless a petition is dismissed, in which case Rule 32.7(d) states that "[l]eave to amend shall be freely granted," petitioners for post-

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[2] The text of the cited rule provides:

> (d) Summary Disposition. If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.

Ala. R. Crim. P. 32.7(d).

conviction relief are entitled to an evidentiary hearing to determine disputed issues of material fact, and "[t]he court shall make specific findings of fact relating to each material issue of fact presented." The CCA has also held that:

> The fact that the circuit judge is not required to conduct an evidentiary hearing on a petitioner's claims of ineffective assistance of trial counsel if that judge personally observed the conduct of those counsel does not . . . relieve the judge of the responsibility of entering a sufficiently specific order addressing each of the petitioner's claims of ineffective assistance of trial counsel.

Holloway v. *State*, 848 So. 2d 1017, 1019 (Ala. Crim. App. 2002) (citing to other decisions where the CCA "noted . . . that meritorious allegations 'warrant either an evidentiary hearing or an adequate explanation for their denial'").

B. Alaska

Amici States cite the Office of the Administrative Director, Alaska Court System: Annual Statistical Report 8, 14 (2009), as showing that the state Supreme Court issued 120 dispositions by published opinion and 40 summary dispositions on merits, while the state court of appeals issued 48 dispositions by published opinion and 157 summarily on merits. See AG Br. at 5 (citing Alaska Court System, *Annual Statistical Report* 2009, *available at* http://www.courts.alaska.gov/reports/annualrep-fy09.pdf). The report itself does not define what is meant by "summary dispositions" or "summarily on merits." To the extent that the Alaska Supreme Court summarily denied review of a case, or summarily affirmed the appellate court, a federal court would look through to the lower court's decision for application of § 2254(d).

Regarding intermediate appellate court opinions, page 11 of the same report shows that, in 2009, the Alaska Court of Appeals published 50 full opinions and 142 memorandum opinions. In Alaska, unpublished memorandum opinions issued by the Alaska Court of Appeals include both factual and legal analysis of the arguments raised in the appeal. See Alaska Court System, *Recent Court of Appeals Memorandum Opinions*, *available at* http://www.courts.alaska.gov/moj.htm (linking to example memorandum opinions). In any event, it is not at all clear from Amici States' statistics that the state courts are issuing "summary dispositions" that in any way resemble the completely unexplained decision at issue in this case.

C. Connecticut

Amici States cite the Hon. Chase T. Rogers, Biennial Connecticut Judicial Branch Report and Statistics 2006-2008, at 37, as showing that state appellate courts disposed of 298 criminal appeals by opinion and 101 criminal appeals "by other means." AG Br. at 5-6 (citing Biennial Connecticut Judicial Branch, *Report and Statistics 2006-2008*, *available at* http://www.jud.ct.gov/Publications/BiennialReport2006-08.pdf). First, these statistics do not distinguish direct appeals from post-conviction appeals; rather, they include the full criminal caseload of the state court of appeals. Second, and importantly, there is no indication of what "by other means" signifies. The report refers to "Appeals Disposed by Opinion" and "All Other Dispositions." *Id.* The catch-all category of "all other dispositions" presumably includes cases dismissed by the appellate court, as well as decisions based on procedural grounds, neither of which would constitute an "adjudication on the merits," whether issued as a "summary disposition" or not.

Further, there is no information about how appeals in habeas proceedings are generally resolved and whether trial courts routinely issue factual findings and conclusions of law in adjudicating habeas petitions. See, *e.g.*, *Washington* v. *Comm'r of Correction*, 950 A.2d 1220 (Conn. 2009) (trial court issued written decision explaining basis for denial of habeas petition). If it is standard practice in the state for lower courts to issue reasoned decisions, then even an unexplained affirmance or denial upon review by the appellate court would not replicate the facts at issue in this case, where no court has offered any reasoning on the merits for a reviewing court to look through to.

D. Florida

Amici States cite the District Court of Appeal Workload and Jurisdiction Assessment Committee, Report and Recommendations app. A (Nov. 2006), as showing that Florida appellate courts disposed of 38.0% of criminal cases and 65.8% of post-conviction cases by short, per curiam affirmance. AG Br. at 6 (citing District Court of Appeal Workload and Jurisdiction Assessment Committee, *Report and Recommendations* (Nov. 2006), *available at* http://www.floridasupremecourt.org/pub_info/documents/DCAWorkload/2006_DCAReport.pdf). Under Florida law, however, these "short" orders still must include reasoning.

In capital post-conviction cases, Florida law requires the trial court to provide "detailed findings of fact and conclusions of law with respect to each claim" raised in the post-conviction motion, and to "attach[] or referenc[e] such portions of the record as are necessary to allow for meaningful appellate review." Fla. R. Crim. P. 3.851(f)(5)(D). In non-capital post-conviction proceedings, if the trial court's

denial of the motion is not predicated on the legal insufficiency of the motion on its face, the court is required to attach to its order "a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief. . . ." Fla. R. Crim. P. 3.850(d); see also *Nixon* v. *State*, 932 So. 2d 1009, 1018 (Fla. 2006) (per curiam) ("In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims."); *Gentry* v. *State*, 464 So. 2d 659, 660 (Fla. Dist. Ct. App. 1985) (discussing requirements of state trial courts when issuing orders in connection with proceedings for post-conviction relief). Further, if an evidentiary hearing is conducted, the trial court is required to "make findings of fact and conclusions of law with respect" to any issues addressed at the hearing. Fla. R. Crim. P. 3.850(d).

Given the requirement of "reasoned" denials by Florida trial courts, it appears that federal courts will always have at least some reasoning to analyze when applying § 2254(d) to a habeas petition that originated in Florida, irrespective of a short, per curiam affirmance by a Florida appellate court.

E. Hawai'i

Amici States cite the Hon. Ronald T.Y. Moon, The Judiciary, State of Hawai'i: 2009 Annual Report Statistical Supplement tbl. 1, as showing that the state supreme court and court of appeals decided 19 criminal cases by published opinion, 19 criminal cases by memorandum opinion, and 160 criminal cases by summary disposition order. AG Br. at 6 (citing http://www.courts.state.hi.us/docs/news_and_reports_docs/annual_reports/Jud_Statistical_Sup_2009.pdf). Review of sample "summary disposition orders" from Hawai'i establishes that these orders are

not one-line statements of denial. Rather, they contain detailed discussions of the facts and relevant law and provide a reasoned explanation for the ultimate decision.[3] Indeed, although Hawai'i Rules of Criminal Procedure allow for dispositions that deny petitions for post-conviction relief upon the court's determination that "the allegations and arguments have no merit," the rules nevertheless require that the court "shall state its findings of fact and conclusions of law in entering its judgment on the petition." Hawai'i R. Penal P. 40(g)(2)–(3).

F. Illinois

Amici States cite the Annual Report of the Illinois Courts as "reporting that of 3755 criminal cases disposed by state appellate court, 850 were disposed of without written opinion or order." AG Br. at 6 (citing Annual Report of the Illinois Courts, *Statistical Summary* at 130 (2008), *available at* http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008_Statistical_Summary.pdf). Here again, however, Amici States have not provided information about the types of appeals included in this statistic and whether they are in fact relevant to the issue presented in this case. Two pages later, the same report indicates that few, if any, of the dispositions "without opinion or order" qualify as adjudications "on the merits."

Of the 850 dispositions at issue, 423 were dismissals on "Motion of Appellant," and 17 were on "Motion of Appellee"; 142 resulted from "Failure to Comply With Rules/Orders"; 32 were categorized as

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[3] *See* Hawai'i Appellate Court Opinions and Orders 2010, *available at* http://www.courts.state.hi.us/opinions_and_orders/opinions/2010/index.html for examples; "summary disposition orders" can be identified by "s.d.o." following the case title.

"Lack of Jurisdiction No Appealable Order"; three involved denials of "Leave to Appeal"; 65 involved denials of a "Motion for Leave to File Late Notice of Appeal"; 41 were "Remanded With Direction For Further Proceeding"; 31 involved cases that were "Dismissed in the Trial Court"; 10 involved entry of a "Bail Order"; four ended with a "Confession of Error"; one was "Transferred to Proper Court"; and the remaining 81 were designated merely as "Other" or "Other Dispositions."

Moreover, Amici States do not discuss the extent to which a lower court may or may not have been required to provide a reasoned explanation of its decision. For example, Illinois law requires that, in capital cases, a trial court's disposition of a petition for post-conviction relief must provide a written explanation of the court's factual findings and legal conclusions even if it dismisses the petition as "frivolous or patently without merit." 725 Ill. Comp. Stat. 5/122-2.1(2).

G. North Dakota

Amici States cite figures indicating that the North Dakota Supreme Court used "summary disposition" to resolve 34 of 130 criminal cases in 2009. AG Br. at 6 (citing Hon. Gerald W. VandeWalle, *2009 Annual Report, North Dakota Court System* at 9, *available at* http://www.ndcourts.gov/_court/News/ndcourtsar2009.pdf). This figure is misleading, however, because a typical "summary disposition" in North Dakota conveys substantially more information about the bases for the court's decision than the one-line, unexplained denial entered by the California Supreme Court in Richter's case. Under Rule 35.1 of the North Dakota Rules of Appellate Procedure, which Amici States themselves cite as an example of a state-court rule that explicitly provides for

summary dispositions, AG Br. at 7, the state Supreme Court is authorized to issue an "affirmance by summary opinion" under seven enumerated circumstances, one or more of which must be identified in the court's order. This requirement alone provides more reasoning than the entirely unexplained order at issue in this case. See, *e.g.*, *Clifford* v. *Redmann*, 719 N.W.2d 384 (N.D. 2006) (per curiam) (affirming trial court's summary dismissal under N.D. R. App. P. 35.1(a)(1) where the "district court determined [petitioner] was not entitled to the relief . . . because no new matters were raised in his current action that were not already addressed in his previous attempts for relief").

Indeed, a search for "summary disposition" in Westlaw's ND-CS (North Dakota cases) database for the year 2009 returned 57 orders, 32 of which addressed criminal direct appeals and challenges to denials of post-conviction relief. (Others addressed civil matters.) A review of those orders—many of which contain multiple sentences or even multiple paragraphs—indicates that the North Dakota courts adhere closely to the mandate of Rule 35.1 in both criminal and civil cases. For example, in 13 of the 32 criminal orders retrieved through this search, the court cited Rule 35.1(a)(2), indicating the presence of lower court findings "that are not clearly erroneous." The presence of such findings would itself provide a written explanation that a federal habeas court could "look through." Additionally, in seven of the orders retrieved through the above search, the court made clear that its affirmance rested on procedural grounds, not on the merits, again demonstrating the Amici States' fallacy in interpreting the term "summary disposition" to refer *per se* to an "adjudication on the merits."

Under North Dakota's Uniform Postconviction Procedure Act, courts "may grant a motion by either party for summary disposition" if the "application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." N.D. Cent. Code Ann. § 29-32.1-09(1). Notably, however, the Act further requires that a court issuing an order in post-conviction proceedings "shall make explicit findings on material questions of fact and state expressly its conclusions of law relating to each issue presented"; and, "[i]f the court rules that the applicant is not entitled to relief, its order must indicate whether the decision is based upon the pleadings, is by summary disposition [*i.e.*, judgment as a matter of law], or is the result of an evidentiary hearing." *Id.* § 29-32.1-11.

H. Wisconsin

Amici States cite Wisconsin Court System, Court of Appeals Annual Report 3 (2009), as showing that 28% of total case terminations in state courts of appeals were by summary disposition. See AG Br. at 6 (citing Court of Appeals Annual Report (2009), *available at* http://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=47578). Under Wisconsin law, a summary disposition may be the result of the appellate court's own motion or issued by request of the parties. Wis. Stat. Ann. § 809.21(1). According to the Wisconsin Court of Appeals Internal Operating Procedures, VI, Decisional Process, *available at* http://www.legis.state.wi.us/rsb/scr/5999.pdf, cases identified for summary disposition are decided by the panel following review of the briefs and the record. The case is then assigned to staff attorneys "for preparation of an order implementing the court's

decision." Importantly, "[t]he order will identify the case, the deciding judges, the ultimate result or disposition, and *the reasons for the result*." *Id.* (emphasis added). The draft order is then submitted to the panel for final decision.

At that point, the case is "disposed of summarily by order" only if *all* of the following occur:

- the panel "unanimously agrees on the decision";
- the panel "unanimously agrees the issues involve no more than the application of well−settled rules of law or the issues are decided on the basis of unquestioned and controlling precedent or the issues relate to sufficiency of evidence or trial court discretion and the record clearly shows sufficient evidence or no abuse of discretion"; *and*
- "the issues may be resolved by merely *stating the reasons for the decision* without a detailed analysis."

Id. (emphasis added).

Thus, unlike here, the summary disposition process in Wisconsin does not allow for entirely unexplained decisions. See also Wis. Stat. Ann. § 974.06(3)(c)–(d) ("Unless the motion and the files and records of the [post-conviction] action conclusively show that the person is entitled to no relief, the court shall . . . grant a prompt hearing . . . [and] [d]etermine the issues and make findings of fact and conclusions of law.").

I. Texas

Amici States cite the Texas Court of Criminal Appeals Activity report for fiscal year 2009 as showing that "Habeas corpus relief [was] denied

without written order" in 946 cases. AG Br. at 4 (citing Court of Criminal Appeals Activity: FY 2009, at 2, *available at* http://www.courts.state.tx.us/pubs/AR2009/cca/cca-activity-report-2009.pdf). While the number itself is accurately stated, what it actually signifies within the context of Texas' scheme for state habeas review is not clear.

In Texas, the power to grant state habeas relief is vested exclusively with the Texas Court of Criminal Appeals (CCA). The CCA exercises this power with assistance from trial-level courts, which accept and review initial filings, conduct fact development proceedings where necessary, enter findings of fact and conclusions of law, and offer dispositional recommendations to the CCA. See generally Tex. Code of Crim. P. Art. 11.07; 11.071. In capital cases, the trial-level state habeas court must enter written findings of fact and conclusions of law in *all* capital cases, whether or not the claims raised required an evidentiary hearing or other method of resolving disputed factual issues. See *id*. Art. 11.071 §§ 8(c), 9(e). In non-capital cases, the trial-level state habeas court is authorized to dispose of a case without entering written findings of fact and conclusions of law, but it may do so only after determining that there are no "controverted, previously unresolved facts material to the legality of the applicant's confinement." *Id.* Art. 11.07 § 3(c). Where any such factual issues are present, the court must undertake procedures to resolve them and enter appropriate findings. *Id.* Art. 11.07 § 3(d).

Viewed against this legal backdrop, one cannot be confident that the report of 946 non-capital habeas denials by the CCA "without written order" actually reflects the number of state habeas petitions denied on the merits without any findings of fact or

conclusions of law by any state court. For while the CCA declined to issue reasoned opinions in those cases, it is quite likely that some proportion nevertheless involved findings and conclusions issued by the trial-level court, see *id.* Art. 11.07 § 3(d) and Art. 11.071 §§ 8(c), 9(e), to which a federal habeas court could "look through" when applying § 2254(d).[4] Moreover, even if all 946 dispositions were devoid of reasoning by any state court, that number still represents less than 1/5 of the CCA's total habeas dispositions for the year. And, as acknowledged by Amici States in a footnote, at least some summary dispositions in Texas rest on procedural grounds, rather than on the merits. AG Br. at 14 n.1.

There is, therefore, no sound reason to believe that a decision by this Court recognizing that § 2254(d) cannot be applied absent *some* indication of the state court's approach or rationale would have a meaningful impact on state or federal habeas litigation in Texas.

J. New York

Amici States cite a pre-AEDPA law review article from 1995, which reported that, "in a study of state courts in Alabama, California, New York, and Texas, 'about seventy-five percent of [habeas] petitions were dismissed or denied summarily without a reason.'"

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[4] *See Ylst*, 501 U.S. at 804-05; *see also Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2258-59 (2010) (stating that "[t]he relevant state-court decision" for purposes of federal habeas review is that of the Michigan Appeals Court, where both the state trial court and state appeals court provided a reasoned decision and the state supreme court thereafter denied petitioner's application for leave to appeal in an unexplained, one-sentence order (*see People* v. *Thompkins*, 471 Mich. 866, 683 N.W.2d 676 (2004)).

AG Br. at 5 (citing Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 262 (1995)) (alteration in original). Apart from conflating the distinct concepts of a "dismissal" and a "denial," it seems to stretch reason to claim that a study cited in a 15-year-old, pre-AEDPA law review article accurately portrays the current state of appellate practice in connection with state courts' handling of habeas petitions, particularly given the points above regarding the more current statistics cited by Amici States pertaining to Alabama and Texas.

Further, New York Criminal Procedure Law provides: "Regardless of whether a hearing was conducted, the court, upon determining the motion [for post-conviction relief], must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." N.Y. Crim. P. L. § 440.30.

K. Arizona, Delaware, and Utah

Amici States point to Arizona, Delaware, and Utah as states that "explicitly provide by rule for summary dispositions in their courts." AG Br. at 7 (citing court rules from these states and, as noted above, rules from Alabama and North Dakota). Each of the rules cited by Amici States refers to summary "dismissals" rather than "denials" and includes other nuances not addressed by the Amici States.

Arizona law provides, in pertinent part:

> On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a

> material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, *the court shall order the petition dismissed*. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

Ariz. R. Crim. P. 32.6(c) (emphasis added). This rule first requires Arizona courts to identify "procedurally precluded" claims. Then, the petition is to be dismissed, not denied, if it presents no issues of material fact or law which would entitle a defendant to relief *and* if no purpose would be served by further proceedings. A comment to Rule 32.6(c) states that this section "instructs the court to make a final adjudication of all the petitioner's claims—those lurking in the background as well as those specified." *Id.*, cmt. to Rule 32.6(c) and (d). The comment continues:

> If the court finds from the pleadings and record that all of the petitioner's claims are frivolous and that it would not be beneficial to continue the proceedings, it may dismiss the petition. . . . However, if the court finds any colorable claim, it is required by *Townsend* v. *Sain*, [372 U.S. 293 (1963)], to make a full factual determination before deciding it on its merits.

Id.

It appears, then, that Arizona rules, although permitting "summary dispositions" in post-conviction proceedings, require that such orders "make a full factual determination" in connection with any claim that is not "procedurally precluded" or frivolous on its face.

Delaware law permits the Superior Court to issue a "summary dismissal . . . '[i]f it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief." Del. Super. Ct. R. Crim. P. 61(d)(4). A *dismissal* is distinct from a *denial*, and a number of scenarios could result in a "dismissal" based on the court's determination that "the movant is not entitled to relief"—including, for example, lack of jurisdiction or petitioner's failure to comply with a statutory requirement or applicable court rule (see Del. Super. Ct. R. Crim. P. 39(h) ("Dismissal")), neither of which constitutes an adjudication of a claim on its merits.

Additionally, under Rule 61(h)(3), the court may "make such disposition of the motion as justice dictates" in cases where "it appears that an evidentiary hearing is not desirable." Prior to that determination, however, the attorney general is required (for any case that is not "summarily dismissed" under Rule 61(d)(4)) to file a response that "explain[s] the factual and legal basis for the state's position on each ground for relief alleged in the motion in sufficient detail to enable the court to determine whether an evidentiary hearing is desirable or summary disposition of the motion is appropriate." Del. Super. Ct. R. Crim. P. 61(f)(1)–(2). Thus, the components of Delaware's "summary disposition" procedure include requirements to ensure that the record contains information referencing the criteria upon which the court decided to reject petitioner's claim(s).[5]

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[5] *See, e.g.*, *Videtto* v. *State*, 892 A.2d 1085 (Del. 2006) ("Having carefully considered the parties' respective positions, we find it manifest that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's well-reasoned

Finally, Amici States point to Utah Rules of Civil Procedure 65C(h)(1), which pertains to "summary dismissal of claims" in post-conviction proceedings. This provision requires the court to "review the petition" and to issue an order *dismissing* any claim that "has been adjudicated in a prior proceeding" or that "appears frivolous on its face." As noted above, dismissals are often based on procedural grounds, not an "adjudication on the merits." Moreover, in issuing such orders of dismissal, the court must "stat[e] either that the claim has been adjudicated or that the claim is frivolous on its face," although such "order of dismissal need not recite findings of fact or conclusions of law." Utah R. Civ. P. 65C(h)(1). A claim is "frivolous on its face" when, "based solely on the allegations contained in the pleadings and attachments," one of three limited circumstances applies: (a) the facts alleged do not support a claim for relief as a matter of law; (b) the claim has no arguable basis in fact; or (c) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition. Utah R. Civ. P. 65C(h)(2).

Thus, while true that Utah court rules allow "summary dispositions," these rules, like those of North Dakota and Delaware, are quite specific and themselves provide an explanation for the basis of the ruling. See also Part I.G, *supra* (discussing North Dakota). Utah law also expressly prohibits these "summary dismissals" in capital cases. See Utah R. Civ. P. 65C(h)(4).

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decision . . ., which adopted the findings and recommendation of the Superior Court Commissioner . . . .").

II. NEITHER PETITIONER NOR AMICI STATES HAVE SHOWN THAT IT WOULD DISTURB THE REGULAR AND TYPICAL POST-CONVICTION PRACTICES OF MOST STATE COURTS IF THIS COURT HELD THAT A COMPLETELY UNEXPLAINED DENIAL IS NOT AN "ADJUDICATION ON THE MERITS" UNDER § 2254(d).

Petitioner claims that it would "largely eviscerat[e] the effect of § 2254(d) in many cases" if this Court were to hold that a state court's unexplained denial of post-conviction relief is not an "adjudication on the merits" for purposes of applying "the deferential-review-for-reasonableness standard of § 2254(d)." Pet. Br. at 17. To support this proposition, Petitioner baldly asserts that "[i]t is a common practice of both state and federal courts to issue unexplained decisions." *Id.* at 27.[6] As demonstrated above, although a number of states permit some type of "summary disposition" in the context of petitions for post-conviction relief, applicable state procedures governing "summary dispositions" very often, perhaps even typically, require that at least one state court provide some type of reasoning or explanation of the grounds for denying a claim on the merits. See Part I, *supra*. Furthermore, several states expressly *prohibit* "unexplained" denials of post-conviction relief, such that Respondent's construction of § 2254(d) would have no impact on these states'

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[6] We strongly disagree with Petitioner's assertion that federal appellate courts' decisions on "unexplained district court orders" on routine court matters such as "motions to conduct discovery[,] motions for the appointment of counsel[, or] motions to amend the pleadings" are not "fundamentally different" from final state-court adjudications on the merits in connection with post-conviction proceedings. Pet. Br. at 18.

procedures.[7] Other states expressly prohibit "unexplained" denials by way of state court

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[7] *See, e.g.*, Ark. R. Crim. P. 37.3(a) (requiring the trial court to "make written findings" in post-conviction cases even in the case of a "summary disposition"); *id.* at 37.5(i) (for capital cases, requiring the court to make "specific written findings of fact" and "specific written conclusions of law" with respect to each legal and factual issue, whether or not a hearing is held); Ind. Post Conviction R. 1 § 6 ("The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held."); Md. Rules, R. 4-407 (requiring a judge to "prepare and file or dictate into the record a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reason for the action taken thereon"); Mich. Crim. R. 6.503(B)(2) ("If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial."); Mo. R. Crim. P. 29.15(j) and 24.035(j) (requiring the court to "issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held"); Nev. Rev. Stat. Ann. 34.830(1) ("Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."); Ohio Rev. Code Ann. § 2953.21(G) (requiring trial courts to make findings of fact and conclusions of law when determining whether a habeas petition presents grounds for relief); 22 Okla. Stat. Ann. § 1083(c) (requiring that an "order disposing of an application without a hearing shall state the court's findings and conclusions regarding the issues presented"); *id.* § 1084 (when a hearing is held, requiring the court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"); Tenn. Code Ann. § 40-30-111(b) ("Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground.").

precedent. See, *e.g.*, *Datt* v. *Hill*, 227 P.3d 714, 722 (Or. 2010) (en banc) ("[T]o be clear, and to enable federal courts to determine habeas corpus jurisdiction, a judgment denying claims for post-conviction relief must, at a minimum: (1) identify the claims for relief that the court considered and make separate rulings on each claim; (2) declare, with regard to each claim, whether the denial is based on a petitioner's failure to utilize or follow available state procedures or a failure to establish the merits of the claim; and (3) make the legal bases for denial of relief apparent.").[8]

By citing to irrelevant or incomplete statistics and only a select sampling of rules, Amici States present

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[8] *See also Nixon*, 932 So. 2d at 1018 ("In order to support summary denial, the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims."); *Gentry*, 464 So. 2d at 661 ("[T]he trial court erred in summarily denying the motion without holding an evidentiary hearing or attaching to its order 'that portion of the record which conclusively shows the prisoner to be entitled to no relief.'"); *Holloway*, 848 So. 2d at 1019 ("Our review of the allegations Holloway raises in his brief on appeal is hampered because the circuit court failed to make written findings of fact concerning each material issue of fact presented. Indeed, it would be premature for this Court to review the issues without the circuit court's first making such findings of fact."); *State* v. *Gilley*, 517 S.W.2d 7, 9 (Tenn. 1974) ("[W]e concur with the Court of Criminal Appeals that the duty imposed upon the trial Court [by Tenn. Code Ann. § 40-30-111 (formerly § 40-3818)] to 'state the findings of fact and conclusions of law with regard to each such ground' is mandatory."); *State* v. *Craven*, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982) ("Upon the final disposition of the petition, the trial court shall include in its order or in a written memorandum its findings of fact and conclusions of law with regard to each ground presented, as required by TCA 40-3818 [(now Tenn. Code. Ann. § 40-30-111)]" (citing *Gilley*, *supra*)).

a picture of appellate practice that is not consistent with what state courts actually do or what they are expressly required to do. Amici States have created a straw man argument by claiming that "unexplained" denials such as the one presented in this case are common under existing state-court practice. In fact, however, neither Petitioner nor Amici States have shown that states regularly rely on completely unexplained denials. In sum, they have failed to show that it would "largely eviscerat[e] the effect of § 2254(d) in many cases" if this Court were to hold that § 2254(d)'s limitation on relief does not apply in cases where no state court has at any point provided any level of reasoning or rationale in connection with a denial, supposedly on the merits, of a federal claim.

CONCLUSION

Amici join Respondent in urging the Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

JEFFREY T. GREEN*
STEPHANIE P. HALES
SIDLEY AUSTIN LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Amicus Curiae
* Counsel of Record

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APPENDIX

LIST OF LAW PROFESSORS AND LEGAL SCHOLARS JOINING AS *AMICI CURIAE*

Ursula Bentele. Ms. Bentele, Professor of Law at Brooklyn Law School, is co-author of Appellate Advocacy, Principles and Practice (LexisNexis, 4th Ed. 2004). She has taught appellate advocacy, criminal law, and capital punishment law. For ten years she supervised the Criminal Appeals Clinic at the law school, and she is now the Director of its Capital Defender and Federal Habeas Clinic.

Mary E. Berkheiser. Professor Berkheiser is the Director of Clinical Studies and of the Juvenile Justice Clinic at the William S. Boyd School of Law, University of Nevada, Las Vegas. In addition, she teaches Criminal Law and Criminal Procedure and has taught Advanced Issues in Criminal Law and Procedure, Criminal Appellate Clinic, and Federal Courts.

Ray Bernstein. Ray Bernstein is a member of the Legal Analysis, Research, and Writing Faculty at Santa Clara University School of Law. He teaches Appellate Advocacy, as well as Legal Analysis, Research, and Writing. His relevant experience includes work as Senior Staff Attorney, Criminal Research Division, for the United States Court of Appeals for the Ninth Circuit, as well as a clerkship with the Hon. Fern M. Smith (retired) in the Northern District of California. Ray has also practiced civil and criminal law in California, and has received numerous awards for his pro bono service.

Timothy D. Blevins. Professor Blevins has taught legal writing and legal methods for thirteen years. He has attended a number of professional meetings

where he has presented papers on the design and use of rubrics, structuring multiple semester writing programs, and the use of technology in teaching and assessing legal education. He also coordinates the Legal Education Advancement Program for potential applicants to the Florida A&M University College of Law.

Linda H. Edwards. Professor Linda H. Edwards (William S. Boyd School of Law, University of Nevada, Las Vegas) has taught brief writing, oral advocacy, and appellate practice for twenty-three years. Prior to teaching, she practiced law for ten years, and she continues to teach and consult with appellate practitioners. She is the author of two leading texts on brief writing and oral advocacy and is presently preparing an advanced text. She is a frequent national speaker on topics of advocacy and appellate practice.

Sidney L. Harring. Sidney L. Harring, Professor of Law at CUNY Law School, received his J.D. and Ph.D. degrees from the University of Wisconsin. A founding member of the faculty of the City University of New York School of Law, he has taught at six law schools, including three as a Fulbright professor, and held three National Endowment for the Humanities Fellowships.

Christopher Hawthorne. Christopher Hawthorne is Clinical Professor of Law and Assistant Director of Academic Support at Loyola Law School Los Angeles. He teaches Legal Writing and Ethics, and was formerly a defense attorney specializing in criminal appeals.

Jeffrey L. Kirchmeier. Jeffrey L. Kirchmeier is a Professor of Law at CUNY School of Law, where he directs the school's Moot Court appellate advocacy

program in addition to teaching courses such as criminal law, criminal procedure, and capital punishment and the courts. He received his B.A. and J.D. degrees from Case Western Reserve University. In addition to his professional writings that have appeared in journals, books, reports, and practice publications, he is also the co-author of a study aid for first-year law students.

Jacqueline Kutnik-Bauder. Jacqueline Kutnik-Bauder is an Assistant Professor of Legal Writing at St. Louis University School of Law, where she teaches Legal Research & Writing, Appellate Advocacy, and Pre-Trial Drafting. She was formerly an attorney for the Youth Advocacy Unit of the Missouri State Public Defender's Office, and she has extensive experience in civil rights, criminal, administrative, and appellate litigation. She received her B.A. from the University of California at Davis and her J.D./M.S.W. from Washington University Schools of Law and Social Work.

Daniel S. Medwed. Daniel S. Medwed is a Professor of Law at the University of Utah where he teaches criminal law and evidence, among other courses. His research focuses on issues related to wrongful convictions and post-conviction procedure. He is a graduate of Yale College and Harvard Law School.

Philip N. Meyer. Philip N. Meyer is Professor of Law at Vermont Law School. He is co-author of two books and has written extensively on several subjects, including legal writing, appellate advocacy, and trial practice. He has directed or coordinated Legal Writing and Lawyering Skills Programs at Vermont Law School, University of Connecticut School of Law, and New York University School of

Law. He currently teaches Criminal Law, Torts, Law and Popular Culture, and Capital Punishment.

Tiffany R. Murphy. Professor Murphy is an Assistant Clinical Professor at the University of Missouri-Kansas City School of Law and serves as Legal Director of the Midwestern Innocence Project. Her work with the indigent began with the Federal Defenders Office of Eastern Washington and Idaho, and she also has worked in various state and federal capital habeas units in Florida, Pennsylvania, and Nevada. She has argued before the Florida Supreme Court and has worked on several cases resulting in exoneration or reduced sentences.

Sean D. O'Brien. Sean D. O'Brien is an Associate Professor at University of Missouri-Kansas City School of Law, where he teaches Criminal Law, Criminal Procedure, and Postconviction Remedies. He is a member of the ABA Task Force on Postconviction Remedies, and former Chair of the Missouri Bar Criminal Law Committee.

Anne R. Traum. Anne R. Traum is an Associate Professor of Law at the William S. Boyd School of Law at the University of Nevada, Las Vegas. Professor Traum teaches criminal procedure and directs the school's Appellate Clinic. She is the author of *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 Md. L. Rev. 545 (2009).

Mark E. Wojcik. Mark E. Wojcik is a professor of law at The John Marshall Law School in Chicago, where he has taught lawyering skills and coached appellate moot court teams for more than fifteen years. He previously clerked for the Supreme Court of Nebraska.