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No. 09-587

In the
Supreme Court of the United States

Kelly Harrington, Warden,
Petitioner,
v.

Joshua Richter,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

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

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

NACDL agrees with Richter that the question of 28 U.S.C. § 2254(d)'s applicability to a summary state

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[1]Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

court disposition need not be reached in this case because the claims presented in Richter's state habeas corpus petition were not "adjudicated on the merits" by the California Supreme Court. Even if the state court's order did include an adjudication of the merits of Richter's *Strickland v. Washington*, 466 U.S. 668 (1984), claim, however, application of § 2254(d) would still be impossible because the state court's order lacks the information necessary to inform the specific inquiries mandated by the plain language and structure of the statute.

The question of § 2254(d)'s applicability to a summary state court disposition is one of statutory construction, and it must be answered from the plain language and structure of the statute. By its terms, § 2254(d) authorizes deferential treatment of a state court decision only after that decision has been subjected to the analyses prescribed in subparts (d)(1) and (2). Where the state court's decision fails to provide the information necessary to facilitate those analyses, however, the process Congress designed for determining the availability of deferential treatment cannot be carried out. Simply put, while § 2254(d) permits *informed* deference, it makes no provision for *blind* deference.

To establish entitlement to relief, a habeas petitioner must prove both that he "is in custody in violation of the Constitution," § 2254(a), and that the state court decision rejecting his claim on the merits was "contrary to, or involved an unreasonable application of, clearly established federal law," or "was

based on an unreasonable determination of the facts ...," § 2254(d). The § 2254(a) inquiry involves traditional application of established constitutional rules to the evidentiary record. The § 2254(d) inquiry, by contrast, looks to the state court's handling of the petitioner's claim in light of binding federal law and the available record. Giving effect to the presumption that state courts are competent adjudicators of federal rights, § 2254(d) prohibits a federal court from remedying a constitutional violation merely because it disagrees with the outcome reached by the state court; instead, § 2254(d) permits a remedy only where the presumption of state court competence is determined, through the analyses prescribed by § 2254(d)(1) and (2), to be unwarranted as to the particular claim or issue before the federal court.

The analyses required by § 2254(d) cannot be performed in the absence of some articulation of the state court's reasoning. When a claim involves more than one potentially dispositive component – like Richter's *Strickland* claim does – a summary state court order prevents the federal court from discerning which components, if any, were actually adjudicated, and from performing the "was contrary to," "involved an unreasonable application of," and "was based on an unreasonable determination of the facts" inquiries mandated by § 2254(d)(1) and (2). These inquiries cannot be replaced by assumptions that the state court adjudicated a claim in its entirety, and that it did so through application of the correct law to appropriately determined facts. Indulging such assumptions would read § 2254(d)(1)'s "was contrary to" clause out of the

statute, and would render the past participles "involved" (§ 2254(d)(1)) and "was based on" (§ 2254(d)(2)) meaningless.

Application of § 2254(d) to summary state court dispositions would also produce a perverse incentive structure, under which the measure of "deference" given to a state court would be inversely proportional to the amount of reasoning that court discloses in support of its decision. Reading § 2254(d) to apply only where the state court decision provides the information necessary to the analyses dictated by the statute, however, is consistent with states' interests in finality, comity and federalism. State courts that choose not to articulate their reasons for rejecting constitutional claims remain free to do so, and while § 2254(d) is an important part of the habeas scheme, an array of other barriers to review and relief remain in place regardless of whether a state court's decision is eligible for the additional protection made available through § 2254(d).

If § 2254(d) were construed to apply to summary state court dispositions, the impracticability of doing so would have to be accounted for. The accommodation most reconcilable with the statute would require that a state court's rationales be credited to the extent they can be discerned. But where they cannot, and where the federal court's independent assessment of the merits reveals a constitutional violation, the federal court should be permitted to draw the intuitive conclusion that the state court's silent rejection of a meritorious constitutional claim was tainted by one or

more of the defects enumerated in § 2254(d)(1) and (2).

Finally, application of § 2254(d) in connection with the issue of Richter's trial counsel's deficient performance would also be inappropriate because counsel's deposition testimony was considered for the first time by the federal district court. If the state court decided the deficient performance question, it did so on a record that was materially incomplete. As a result, even if the state court decided Richter's claim "on the merits," those "merits" changed significantly with the addition of trial counsel's deposition, such that the state court decision is no longer relevant for § 2254(d) purposes.

ARGUMENT

In the order granting certiorari, this Court directed the parties to brief and argue the following question not presented by the Warden: "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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)?" NACDL agrees with Richter that this question need not be reached in this case because California law makes clear that the state court's order was not an "adjudication on the merits." Even if that order could be read to include a merits adjudication of Richter's *Strickland* claim, however, application of § 2254(d) would still be inappropriate because the state court's decision contains no information with which to undertake the specific inquiries mandated by the plain language and structure of the statute. Furthermore, in

this particular case, any attempt to apply § 2254(d) would be inappropriate because the lower federal courts considered evidence material to the question of counsel's performance that was not before the state court. The resulting difference in the "merits" of the *Strickland* performance prong as they stood before the state and federal courts would also foreclose application of § 2254(d) as to that portion of Richter's claim.

I. The role and operation of § 2254(d) as dictated by the plain language of the statute.

The question posed in the Court's order granting certiorari is one of statutory construction, not statutory supplementation. Thus, while the Court has used the phrase "AEDPA deference," and the Warden and his *amici* embrace that phrase as if it were bedrock habeas law, it is essential to recognize that the answer to the Court's question lies in – and must be derived from – the language and structure of a multi-part statute in which the word "deference" does not appear. *See*, *e.g.*, *Harbison v. Bell*, 129 S.Ct. 1481, 1493 (2009) (Thomas, J., concurring in the judgment) (quoting *id.* at 1491 (Roberts, C.J., concurring in the judgment)) ("This Court is not tasked with interpreting § 3599 in a way that it believes is consistent with the policy outcome intended by Congress. Nor should this Court's approach to statutory construction be influenced by the supposition that 'it is highly unlikely that Congress intended' a given result."); *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries*

Corp., 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

It is true that proper application of § 2254(d) often yields *results* that can, in appropriate cases, be characterized as "deferential" to state court decisions. *See*, *e.g.*, *Renico v. Lett*, 130 S.Ct. 1855, 1865 (2010). It is equally true, however, that there is a fundamental distinction between *informed* deference and *blind* deference. As will be discussed below, the former occurs as a permissible result of a federal court's analysis – prescribed by and performed under the plain language of § 2254(d)(1) and (2) – of a state court decision bearing discernable indicia of its rationale. The latter, by contrast, simply has no footing in the language of the statute, and cannot be reconciled with the process Congress designed.

A. The scheme of habeas corpus review established by §§ 2254(a) and (d).

A habeas petitioner seeking relief on a claim previously rejected by a state court for non-procedural reasons must ordinarily establish two things: *first*, that a constitutional *right* has been violated within the meaning of § 2254(a); and *second*, that a *remedy* may issue because one or more of the conditions enumerated in § 2254(d) has been met.[2] *See Gonzalez*

[2]The issues posed by §§ 2254(a) and (d) need not be taken up in any particular order. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). As a practical matter, there are cases in which it is so

v. Crosby, 545 U.S. 524, 532 n.4 (2005) ("We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).").

Pursuant to § 2254(a), a state prisoner is ineligible for habeas relief unless he "is in custody in violation of the Constitution or laws or treaties of the United States." Absent such a violation, there is no need to consider the availability of a remedy, because there has been no injury for which a remedy could be required. *See*, *e.g.*, *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2265 (2010) ("Courts can ... deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on

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obvious that a petitioner cannot satisfy § 2254(d) that there is no need to invest substantial time in a § 2254(a) analysis. *See*, *e.g.*, *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quickly disposing of petitioner's *Estelle v. Smith*, 451 U. S. 454 (1981), claim under § 2254(d)(1) because "[t]he differences between this case and *Estelle* are substantial, and our opinion in *Estelle* suggested that our holding was limited to the 'distinct circumstances' presented there"); *Andrade*, 538 U.S. at 71-73 (rejecting non-capital proportionality challenge under § 2254(d)(1) because governing federal standard afforded state court such wide latitude that only an exceptionally poor decision could conceivably be sufficient to authorize relief). Where the outcome is not so obvious, however, it is ordinarily necessary for a habeas court to conduct some form of the merits analysis associated with § 2254(a) before it can perform the separate but related analysis called for by § 2254(d). *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387-390 (2005); *Ramdass v. Angelone*, 530 U.S. 156, 167-176 (2000).

de novo review, see § 2254(a).").[3]

Where a prisoner has shown a violation of a constitutional *right* for § 2254(a) purposes, the availability of a *remedy* – in the form of issuance of the writ of habeas corpus – is controlled by § 2254(d).[4] The statute provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that

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[3]*See also*, *e.g.*, (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("Under § 2254(d)(1)'s 'unreasonable application' clause, ... a federal habeas court may not issue the writ *simply because* that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must *also* be unreasonable.") (emphases added); *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (§ 2254(d) "sets forth a precondition to the grant of habeas relief (...) not an entitlement to it").

[4]By controlling remedy-availability rather than right-determination, § 2254(d) stays clear of the territory already occupied by § 2254(a) while limiting federal court intervention to cases meeting the specified statutory criteria. *Cf. Danforth v. Minnesota*, 552 U.S. 264, 290-291 (2008) ("It is important to keep in mind that our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies."); *id.* at 291 (" A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial – only that no remedy will be provided in federal habeas courts.").

> was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

By its terms, § 2254(d) offers two routes to a remedy for the constitutionally injured prisoner: around it, or through it. If a constitutional violation found to exist under § 2254(a) was not "adjudicated on the merits in State court proceedings," then § 2254(d) does not limit the federal court's power to grant relief, and the prisoner need make no further showing (assuming merits review in federal court is not otherwise procedurally barred, and assuming the violation at issue is either actually or presumptively prejudicial).[5] *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534

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[5]For the reasons set forth in the Brief of Respondent and the Brief for California Attorneys for Criminal Justice, Richter's *Strickland* claim is in this category.

(2003). If, on the other hand, the prisoner's claim was adjudicated on its merits by a state court, then § 2254(d) is implicated, and must be dealt with before the writ may issue.

Whereas § 2254(a) is concerned with the existence *vel non* of the constitutional violation alleged by the prisoner, § 2254(d)'s limitation on the habeas remedy looks to the state court's handling of the claim in an earlier proceeding. Starting from a presumption that state courts are generally competent adjudicators of federal rights whose judgments warrant respect,[6] § 2254(d) sets *denial* of a remedy as the default outcome in a federal habeas case ("An application for a writ of habeas corpus ... shall not be granted ...."). Recognizing that the presumption of state court competence does not always hold true, however, the statute also enumerates a set of potential defects which, when found in the "adjudication" that "resulted in" the state court's "decision," indicate that the prisoner's claim was not competently (as distinct from *correctly*) decided by the state court, and permit issuance of the writ ("shall not be granted ... unless ..."). Thus, where a federal court has found constitutional error satisfying § 2254(a), § 2254(d)(1) and (2) require an examination of how and why the state court failed to recognize and remedy the error. If the state court's erroneous outcome resulted from a failure to adhere to governing

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[6]*See*, *e.g.*, *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*) (criticizing court of appeals' "readiness to attribute error" to state court as "inconsistent with the presumption that state courts know and follow the law").

law or decision-making norms, then § 2254(d) permits the federal court to intervene. But, when the state court has produced a competently rendered decision with which the federal court simply disagrees, then § 2254(d) requires that the federal court leave the state court's decision undisturbed.[7] While this scheme often results in deferential treatment of the state court's denial of a federal constitutional claim, the plain language of the statute permits that deference only after the federal court has satisfied itself that the state court's work in adjudicating the prisoner's claim met the criteria prescribed in § 2254(d)(1) and (2).

B. The inquiries mandated by the language of section 2254(d)(1) and (2).

Pursuant to § 2254(d)(1) and (2), a state court's merits decision denying relief must be upheld against a federal court's finding of constitutional error "unless" the adjudication that produced the state court decision: "was contrary to ... clearly established federal law," § 2254(d)(1); or "involved an unreasonable application of[] clearly established federal law," § 2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," § 2254(d)(2). Together these characteristics cover the spectrum of analytical

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[7] *See*, *e.g.*, *Brown v. Payton*, 544 U.S. 133, 143 (2005) ("Even on the assumption that [the state court's] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review.").

missteps and deviations from decision-making norms that a state court can commit while adjudicating a prisoner's claim of constitutional error.

To determine whether a given state court decision contains any of the defects enumerated in § 2254(d)(1) or (2), the federal court looks to the *process* used by the state court in adjudicating a constitutional claim. This is reflected with particular clarity in the statute's second and third categories ("involved an unreasonable application" and "was based on an unreasonable determination of the facts"), both of which incorporate past participles ("involved" and "was based on") explicitly directing the inquiry, not at the state court *outcome*, but at the subsidiary findings and reasoning which *produced* that outcome. To follow the mandate of § 2254(d)(1)'s "involved an unreasonable application of" clause, the federal court must know, *e.g.*, whether the state court understood the scope of the governing rule, what factors the state court considered in applying the rule, and what evidence the state court deemed relevant to the rule's application. A federal court answering § 2254(d)(2)'s "was based on an unreasonable determination of the facts" question must know, *e.g.*, what evidence the state court did and did not acknowledge or credit, what inferences the state court drew or failed to draw from the evidence, and the relative weight assigned to particular items or classes of evidence. And to apply § 2254(d)(1)'s "was contrary to" clause, the federal court must ascertain the rule or legal principle selected and relied upon by the state court.

This Court's own decisions illustrate the analyses that must be performed to answer the statutory inquiries. In (*Terry*) *Williams*, the Court held that § 2254(d)(1)'s "was contrary to" clause is satisfied where "the state court applies a rule that contradicts the governing law set forth in our cases," or where "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams*, 529 U.S. at 405-406. In applying this construction, the Court has consistently looked to the content of the state court's decision for an express statement of the rule chosen by that court, or for other indicators from which to infer that the state court's rule of decision was consistent with the governing federal principles. In *Williams* itself, the Court looked to "[t]he Virginia Supreme Court's own analysis of prejudice" and found it "contrary to" *Strickland* because it "mischaracterized at best the appropriate rule," such that the resulting "decision turned on [the state court's] erroneous view that a 'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel." *Williams*, 529 U.S. at 397. After a similar examination of the content of the state court's decision in *Woodford v. Visciotti*, *supra*, the Court rejected the Ninth Circuit's determination that the state court's decision "was contrary to" federal law because that determination rested upon a "mischaracterization of the state court opinion, which expressed and applied the proper standard for evaluating prejudice." *Visciotti*, 537 U.S. at 22.

Section 2254(d)(1)'s "involved an unreasonable application of" clause has been construed to authorize habeas relief where "the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," and where "the state court either unreasonably extends a legal principle ... to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Here again, this Court has consistently looked to and relied upon the content of the state court's opinion for signs that the court did or did not reasonably apply the governing rule. For example, in *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Ninth Circuit's grant of relief on a jury coercion claim was overturned because, although the state court's opinion did not cite federal law, its reasoning reflected an application of principles at least as favorable to the petitioner as those prescribed by federal law, and the "fair import of the [state] Court of Appeal's opinion" was that it had considered all of the relevant facts. *Early*, 537 U.S. at 8-9; *see also id.* ("Avoiding the[] pitfalls [of § 2254(d)(1)] does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the *reasoning nor the result* of the state-court decision contradicts them.") (second emphasis added). Similarly, in *Williams*, this Court's determination that the Virginia Supreme Court "failed to evaluate the totality of the available mitigation evidence" rested on the content of the state court's opinion. *Williams*, 529

U.S. at 397.[8]

Additionally, although this Court has had fewer occasions to illustrate its application, the approach to § 2254(d)(2)'s "was based on an unreasonable determination of the facts" clause is the same. In *Wiggins*, for example, the state court's opinion revealed that its rationale for denying relief included a mistaken belief that certain records available to trial counsel contained information from which counsel could have made an informed decision to limit their

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[8]*Accord*, *e.g.*, *Renico v. Lett*, 130 S.Ct. at 1865 ("[T]he Michigan Supreme Court's decision ... – while not necessarily correct – was not objectively unreasonable. Not only are there a number of plausible ways to interpret the record of Lett's trial, but the standard applied by the Michigan Supreme Court ... is a general one, to which there is no 'plainly correct or incorrect' answer in this case."); *Porter v. McCollum*, 130 S.Ct. 447, 454-455 (2009) (finding Florida Supreme Court's decision "unreasonable" because that court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 257-258 (2007) (state court's "formulation of the issue" and inattention to "the fundamental principles established by [this Court's] most relevant precedents, resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'"); *Rompilla*, 545 U.S. at 388-389 (2005) (Pennsylvania state post-conviction courts' superficial review of trial counsel's investigation "fail[ed] to answer the considerations" relevant to the *Strickland* deficient performance inquiry, and was therefore "objectively unreasonable"); *Wiggins*, 539 U.S. at 527 (Maryland Court of Appeals' decision involved an unreasonable application of *Strickland* because its reasoning showed it had "merely assumed that [trial counsel's] investigation was adequate").

investigation. After recognizing that the records did not contain the information attributed to them by the state court, this Court concluded under §2254(d)(2) that the state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of [its] decision." *Wiggins*, 539 U.S. at 528; *see also Wood v. Allen*, 130 S.Ct. 841, 849-850 (2010) (finding state court's express factual findings concerning trial counsel's strategy reasonable after detailed review of record on which they were based).

In sum, while this Court's decisions applying § 2254(d) have involved a variety of constitutional claims, and have resulted in both grants and denials of habeas relief, they all share a common characteristic: the § 2254(d) analyses have always been substantially informed by the content of the relevant state court decision. This is no accident, for the questions considered and resolved by this Court in § 2254(d) cases all arise naturally and directly from the plain language of subparts (d)(1) and (2), and none of them can be answered without reference to the content of the state court decision.

II. Section 2254(d) cannot accommodate a summary state court disposition of a constitutional claim.

The inquiries called for by §2254(d)'s "adjudicated on the merits" clause, and by subparts (1) and (2), are relatively straightforward when the federal court can discern the issues resolved by the state court, and the rationales supporting the state court's

decision. When that information is unavailable, however, a federal court lacks the resources necessary to make the assessments the statute requires.[9]

A. The impossibility of discerning which components the state court actually "adjudicated."

On its face, § 2254(d) applies only to a "claim that was adjudicated on the merits in State court proceedings." When a state court fails to indicate which of a claim's components were actually reached, however, it is impossible to determine how much of "the merits" were in fact "adjudicated" for § 2254(d)

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[9]The Warden and his *amici* offer a portrayal of federal habeas courts awash in summary state court orders. As explained in the Appellate Advocacy Scholars' *Amicus Curiae* brief, these claims are vastly overblown. Most habeas claims arrive in federal court having previously been rejected in decisions susceptible to meaningful review under § 2254(d)(1) and (2). Many are addressed in reasoned state appellate court decisions; others have been addressed in reasoned lower court decisions to which a federal habeas court can "look through," *see*, *e.g.*, *Berghuis v. Thompkins*, 130 S.Ct. at 2258-2259 (noting that "[t]he Michigan Supreme Court denied discretionary review," and that "[t]he relevant state-court decision here is the Michigan Court of Appeals' decision affirming Thompkins's conviction ...."); and the reasoning underlying still other purportedly summary dispositions can be easily gleaned from the trial record, *see*, *e.g.*, *Fowler v. Sacramento County Sheriff's Dept.*, 421 F.3d 1027, 1038 (9th Cir. 2005) ("The last-reasoned state-court decision here – and, thus, the decision that we review – is the trial court's."). Thus, cases involving nothing but a summary state court merits disposition are truly the exception, not the rule.

purposes.[10] Richter's *Strickland* claim is a good illustration. If the state court adjudicated the merits at all, it may have held that Richter had not shown deficient performance, or it may have believed he had not been prejudiced; neither Richter nor this Court will ever know for sure.

The Warden proposes to resolve this mystery through an assumption that the California Supreme Court adjudicated "Richter's entire claim in denying relief." Pet. Br. 33. While this assumption would serve the Warden's interest in maximizing the burden on Richter, it would almost certainly be wrong. In *Strickland*, 466 U.S. at 697, this Court explained that "there is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one." Given such a clear instruction, it is much more likely that, if it reached the merits at all, the

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[10] *See Bell v. Cone*, 543 U.S. 447, 460-461 (2005) (per curiam) (Ginsburg, J., joined by Souter and Breyer, JJ., concurring) ("This Court's opinion ... does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio,* considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point.").

California Supreme Court decided no more than one of *Strickland*'s components in Richter's case.[11] Thus, indulging the Warden's assumption would result in application of § 2254(d) to an issue that was never "adjudicated on the merits" by the state court. As this Court has already made clear, that would be forbidden. *See Porter*, 130 S.Ct. at 452 ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."); *Wiggins*, 539 U.S. at 534 ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."); *Rompilla*, 545 U.S. at 390 ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*.") (internal citation omitted).

B. Speculation is not a permissible substitute for real analysis.

Purporting to follow the "plain language of the statute," the Warden contends that "[t]he only prerequisite to obtaining deferential review is that the claim 'was *adjudicated on the merits* in State court

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[11] *See*, *e.g.*, *In re Scott*, 29 Cal.4th 783, 825 (Cal. 2003) ("We need not decide whether competent counsel should have investigated further, for we find no prejudice in the failure to do so."); *In re Ross*, 10 Cal.4th 184, 204 (Cal. 1995) ("Finding no prejudice, we do not address the question of counsel's performance.").

proceedings ....'" Pet. Br. 25. As to how such "review" should proceed when the state court has provided only a summary denial, the Warden proposes that the federal court should "assume[] that the state court applied the proper 'clearly established federal law,' and then determine[] whether its decision was 'contrary to' or was 'an unreasonable application of' that law." Pet. Br. 23. This cannot be correct.

Read in isolation, § 2254(d)'s opening lines do suggest that the only prerequisite to its applicability is a determination that the "claim ... was adjudicated on the merits in State court proceedings." If the statute ended there (and setting aside the ambiguity problem discussed above), then an unexplained state court decision might arguably come within § 2254(d)'s reach. But the statute does not end with the "adjudicated on the merits" clause. Rather, it goes on to require that a federal court check the accuracy of the federal rule selected by the state court, and assess the reasonableness of both the "*application[s]*" of federal law "*involved*" in the state court decision, and the "*determination[s] of the facts*" that the state court decision "*was based on*."[12] While it may serve the Warden's purposes to ignore these features of the statute, this Court must give them meaning, and must do so in a way that avoids perverse results that the

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[12]Like the Warden and his *amici*, the federal courts of appeals they cite as endorsers of their proposal, *see* Pet. Br. 25-26; CJLF Br. 17-18, have uniformly failed to articulate a method of applying the statute to summary denial cases that actually gives meaningful effect to the specific inquiries mandated by § 2254(d)(1) and (2).

statutory text does not support. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (rejecting a proposed construction of AEDPA because its "implications for habeas practice would be far reaching and seemingly perverse"); *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *Sheridan v. United States*, 487 U.S. 392, 402 n.7 (1988) ("courts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading").

Taking the plain meaning of subparts (d)(1) and (2) into account, the Warden's suggestion that a federal court "assume[] that the state court applied the proper 'clearly established federal law,' and then determine[] whether its decision was 'contrary to' or was 'an unreasonable application of' that law," Pet. Br. 23, does not work. To begin with, § 2254(d)(1)'s "was contrary to" clause requires a federal court to decide for itself whether "the state court applie[d] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405-406. To forego that statutorily mandated inquiry in favor of an assumption that the state court selected the appropriate federal rule would be to effectively read "was contrary to" out of the statute.[13] That would not only violate basic rules

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[13]If the Virginia Supreme Court in *Williams* had not disclosed its reasoning, and if this Court had followed the Warden's approach, the state court's misuse of *Lockhart v.*

of statutory construction,[14] it would also fundamentally alter the scheme Congress established by eliminating the only means of securing habeas relief enumerated in § 2254(d) that does not require any showing of unreasonableness on the part of the state court.[15]

The reasonableness assessments prescribed by § 2254(d)(1) and (2) would fare no better under the Warden's proposal. A federal court applying § 2254(d)(1) must be able to assess the "application" of federal law that was actually "*involved*" in the state court's adjudication.[16] And a federal court applying §

Fretwell, 506 U.S. 364 (1993), would never have come to light. Instead, this Court would have assumed – incorrectly – that the state court selected the correct rule, and Williams' entitlement to relief under § 2254(d)(1)'s "contrary to" clause would have been missed.

[14]*See*, *e.g.*, *Barber v. Thomas*, ___S.Ct.___, 2010 WL 2243706, at *10 (June 7, 2010) ("Because the dissent's approach would require us to read words out of the statute, ... its definition cannot be used here."); *Kawaauhau v. Geiger,* 523 U.S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (internal quotation marks omitted).

[15]The Warden's suggestion that a "contrary to" inquiry would still be performed under its proposal makes no sense. As a practical matter, no court could first "assume[]" the state court chose the correct law, and then "determine whether" it did so. Pet. Br. 23. The issue would always be resolved by the assumption, and § 2254(d)(1)'s "was contrary to" clause would be rendered a nullity.

[16]As illustrated by this Court's decisions, discussed *supra*, the "involved an unreasonable application" inquiry often turns on matters such as whether the state court understood the scope of

2254(d)(2) must see the factual determinations the state court decision actually "*was based on*" before it can assess their reasonableness.[17] Nothing in the language of the statute suggests that these inquiries can or should be replaced by the rank speculation that would be necessary to subject a summary denial to § 2254(d)(1) and (2) analysis.[18] *See Wiggins*, 539 U.S. at

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the governing rule, what factors the state court considered in applying the rule, and what evidence the state court considered relevant to application of the rule.

[17]If the Maryland Court of Appeals had not issued a reasoned decision in *Wiggins*, this Court would never have known that the state "court based its conclusion, in part, on a clear factual error" satisfying §2254(d)(2). *Wiggins*, 539 U.S. at 528. The defect in the state court's decision would still have existed, but it would have gone undetected.

[18]While it is fair to say that § 2254(d) reflects an implicit presumption of state court competence to adjudicate federal constitutional claims, it is also clear that the statute makes this presumption rebuttable through satisfaction of the conditions enumerated in (d)(1) and (d)(2). Under the Warden's proposal, however, the presumption would be virtually irrebuttable. It is one thing to withhold relief until a prisoner shows both a constitutional violation and a discernable defect in a state court's decision refusing to recognize or remedy that violation. But it is quite another to encourage federal courts to hypothesize reasons for a state court's decision, and then announce them for the first time in a decision denying relief on the basis that the prisoner failed to imagine and rebut those reasons himself. That is a far more draconian scheme than the plain language of § 2254(d) can support, and one that would violate due process. *See, e.g., Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (irrebuttable presumption is one that, although not universally true, cannot be rebutted with competent individualized evidence; such presumptions violate federal due process).

529 (dismissing state's proffer of *post hoc* rationale for Maryland Court of Appeals' decision as having "no bearing" on § 2254(d) analysis).

C. Applying § 2254(d) to summary dispositions would yield perverse results.

The language and structure of § 2254(d) suggest that Congress' objective in enacting it was to heighten state courts' involvement in and responsibility for accurate, thoughtful resolution of federal constitutional claims. *See Woodford v. Visciotti*, 537 U.S. at 27 (per curiam). Sanctioning application of § 2254(d) to summary decisions – particularly in the manner proposed by the Warden – would result in a perverse incentive structure that would turn that goal on its head. A state court conscientious enough to analyze a prisoner's federal claims and articulate the bases for its decision would subject its reasoning and conclusions to the scrutiny of a federal court making the inquiries prescribed by § 2254(d)(1) and (2). A state court which merely declares that the merits of a prisoner's claims – no matter how numerous, complex or debatable – are "denied," however, would get the benefit of every doubt, from whether the court even understood and reached each claim and its components, to whether the court chose the appropriate rule of decision, to whether the court reasonably applied that rule to facts reasonably found from the state court record. Such a regime would both undermine the legislative premise upon which passage of § 2254(d) was made possible, and increase the number of federal habeas cases

resolved through rank speculation rather than accurate analysis.[19] Neither of these outcomes could be characterized as anything other than perverse.

* * *

Perhaps Congress proceeded on the assumption that state courts take federal constitutional claims too seriously to dispose of them without comment.[20] Or perhaps Congress simply did not speak as clearly as it could have.[21] Whatever the explanation, the only way to give effect to both the "adjudicated on the merits" clause and the specific inquiries mandated in subparts (d)(1) and (2) is to construe the statute as a whole to apply only to claims (or their components) about which the state court has disclosed its reasoning.

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[19]A decision by this Court endorsing the Warden's proposal would inevitably trigger a rise in state courts' use of summary merits dispositions in jurisdictions where they are permitted. States' attorneys would waste no time alerting the state courts to the benefits of saying nothing about the reasons for rejecting constitutional claims, and many state judges would respond to these incentives by utilizing summary dispositions.

[20]That assumption would be consistent with the prevailing legislative sentiment that state courts are competent adjudicators of federal claims. *See* 142 Cong. Rec . S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.").

[21]*Cf. Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("No answer leaps out at us. All we can say is that in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting.").

III. Limiting application of § 2254(d) to state court decisions actually susceptible to review imposes no undue burden on state courts, and would not undermine finality, comity or federalism.

Limiting the application of § 2254(d) to state court decisions whose reach and reasoning can be discerned does not offend the comity and federalism interests underlying AEDPA or place any undue burden on state courts.[22] For the vast majority of state courts, issuance of reasoned decisions is standard operating procedure, and eligibility for the protection afforded by § 2254(d) is an incidental benefit. State courts willing to forego that benefit in exchange for the freedom not to explain their decisions on matters of federal constitutional law remain free to do so. *Cf.* (*Michael*) *Williams v. Taylor*, 529 US. 420, 443 (2000) ("We do not suggest the State has an obligation to pay for investigation of as yet undeveloped claims; but if

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[22]The Warden asserts that "[n]either the language of the statute, nor the policies underlying the writ-restricting reforms enacted in AEDPA, demonstrate any intent on the part of Congress to require state courts to justify their rulings." Pet. Br. 23. This assertion rests on a faulty premise. The issue is not whether "Congress [has] require[d] state courts to justify their rulings." Pet. Br. 23. Of course it hasn't. State courts are as free as they have always been to say as much or as little as they like about why they resolve federal claims the way they do. Instead, the issue is whether, by choosing not to disclose its reasoning, a state court may force a federal court to give *blind* deference under a statute which authorizes only *informed* deference, or no deference at all. As we have demonstrated, the plain language of the statute establishes that the answer must be no.

the prisoner has made a reasonable effort to discover the claims ..., § 2254(e)(2) will not bar him from developing them in federal court"); *Harris v. Reed*, 489 U.S. 255, 266 (1989) (adopting presumption against procedural bar to federal habeas review absent "plain statement" that state court decision rested on adequate and independent state ground).

Furthermore, although § 2254(d) is an important part of the post-AEDPA federal habeas scheme, it is not the sole mechanism for safeguarding states' interests in finality, comity and federalism. On the contrary, even where a state court chooses not to describe the reasoning underlying its decision on a federal constitutional claim, a prisoner seeking federal habeas relief still faces a demanding set of requirements. For example, prisoners remain obligated in all cases to fairly present their constitutional claims to the state courts, *see* 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), and to make diligent efforts to develop the facts in support of those claims before the state courts, *see* 28 U.S.C. § 2254(e)(2); (*Michael*) *Williams v. Taylor*, *supra*. States' interests in the enforcement of their own rules continue to be protected by the procedural default doctrine. *See*, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). States' reliance upon the law as it stood at the time of the state court decision continue to be safeguarded by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288, 301 (1989). *See also Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam) ("[I]n addition to performing any analysis required by AEDPA, a federal court

considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."). For many constitutional violations, moreover, relief remains unavailable absent a finding that the "error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. at 120.

In short, a determination that § 2254(d) should not be applied where the state court has made doing so impracticable would remove only one of a formidable array of barriers to habeas relief. The barriers that remain would provide ample protection to the minority of state courts – chief among them, the California Supreme Court – that choose to reject claims of federal constitutional error without disclosing their reasons for doing so.

IV. If § 2254(d) is construed to apply to summary state court decisions, the attendant practical difficulties must be addressed.

If § 2254(d) were construed to apply to summary state court dispositions (and for the reasons discussed above, it should not be), the impracticability of conducting the analyses required by § 2254(d)(1) and (2) in such cases must be accounted for. The accommodation most reconcilable with the statute would require that, where the state court decision is partially or fully reasoned, a federal court should credit

the state court's rationales – those that appear expressly and those that can be confidently inferred – when performing the § 2254(d) analysis, just as this Court's decisions have illustrated. But to the extent the state court decision is unreasoned, the federal court would first be obligated to independently assess the merits of the constitutional question under § 2254(a). If that independent assessment were to reveal a constitutional violation, the federal court would not be obliged to assume that the state court's result, though decidedly wrong, was nevertheless produced by an analysis that was consistent with or involved a reasonable application of clearly established federal law, and was based on a reasonable determination of the facts. Instead, the federal court would be permitted to make the more natural and intuitive assumption that a state court decision which reaches an incorrect result on an issue of federal constitutional law, and does not even undertake to explain that result, is tainted by at least one of the defects enumerated in § 2254(d)(1) and (2). The combination of constitutional error found under § 2254(a) and adjudicatory defect inferred under § 2254(d) would authorize issuance of the writ.

V. Application of § 2254(d) in connection with the question of Richter's counsel's deficient performance would also be inappropriate because evidence material to that issue was considered for the first time in federal court.

In *Holland v. Jackson*, 542 U.S. 649, 653 (2004)

(per curiam), this Court recognized that, "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer [under § 2254(d)]." While the Court has yet to definitively address this issue,[23] support for the approach noted in *Holland* has not abated. *See*, *e.g.*, *Winston v. Kelly*, 592 F.3d 535, 555-556 (4th Cir. 2010) ("If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."); *Wilson v. Workman*, 577 F.3d 1284, 1293 (10th Cir. 2009) ("To be entitled to deference under AEDPA, the state court must ... decide the 'substance' of the claim, which means to 'apply controlling legal principles to the facts bearing upon [his] constitutional claim.' To dispose of a claim without considering the facts supporting it is not a decision on the merits.") (quoting *Picard v. Connor*, 404 U.S. 270, 277 (1971)); *Taylor v. Maddox*, 366 F.3d 992,

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[23] Certiorari was granted to address this question in *Bell v. Kelly*, 553 U.S. 1031 (2008), but the writ was dismissed as improvidently granted shortly after oral argument, *Bell v. Kelly*, 129 S.Ct. 393 (2008). A variant of the same issue appears to be present in *Cullen v. Pinholster*, ___S.Ct.___, 2010 WL 887247 (June 14, 2010) (order granting certiorari); *see also* Petition for Writ of Certiorari at 13, *Pinholster* (No. 09-1088) (arguing that "[t]he statutory language [of § 2254(d)] ... dictates that the state adjudication must be reviewed only in light of the facts as presented or alleged in the state court"); *id.* at 14 (arguing that language from (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 407-408 (2000), "would seem to rule out inquiry into facts the state court never saw" during application of § 2254(d)).

999 (9th Cir. 2004) (§ 2254(d)(2) "applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record.").

In this case, Richter sought discovery and an evidentiary hearing in state court, J.A. 31, the state responded with a request for summary denial, Informal Reply at 3, and the state court denied the petition without ruling on Richter's request for fact development, Pet. App. 22a. Later, as described in Richter's brief, the federal district court ordered a deposition of trial counsel, and the parties stipulated to the admission of that deposition into the federal court record. ER 399. Among other things, trial counsel acknowledged that his failure to consult with or otherwise prepare to utilize expert witnesses to support the theory of the case he articulated in his opening statement had not been strategic. *See* ER 245; 289-290. Rather, counsel omitted these critical steps simply because he did not consider utilizing a blood spatter expert. *See* 289-290. As the court of appeals recognized, this testimony by counsel was – and remains – highly material to a proper assessment of whether his decision to go to trial without expert assistance was constitutionally deficient. *See Richter v. Hickman*, 578 F.3d 944, 958-959 (9th Cir. 2009) (en banc) ("In his deposition, counsel was unable to provide any reasoned explanation for failing to consult forensic experts or to seek expert testimony in order to corroborate his client's testimony or prepare to rebut the prosecution's case. ¶ Certainly, he did not suggest that any strategy explained that failure.").

If the California Supreme Court adjudicated the merits of Richter's ineffective assistance claim, and if, in doing so, it reached *Strickland*'s "deficient performance" prong, its decision rested on what must now be recognized to have been a materially incomplete record. Proceeding without trial counsel's deposition testimony, the state court likely assumed counsel had made an informed, strategic decision to go forward without expert assistance.[24] In light of trial counsel's deposition testimony, however, that assumption would have been wrong. Thus, even if the state court's summary order constitutes an adjudication "on the merits," those "merits" changed materially in the federal district court proceeding that followed. As a result, "there is no relevant state-court determination to which one could defer," *Holland*, *supra*, and application of § 2254(d) in connection with the deficient performance component of Richter's claim would be inappropriate.

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[24] *See*, *e.g.*, *People v. Jones*, 64 P.3d 762, 778 (Cal. 2003) ("In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions.").

CONCLUSION

WHEREFORE, for the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers supports Richter's request that the grant of habeas relief be affirmed, and urges the Court to hold that 28 U.S.C. § 2254(d) is inapplicable to the summary disposition issued by the California Supreme Court in this case.

Respectfully submitted,

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