

HARRINGTON v. RICHTER: AEDPA DEFERENCE AND THE RIGHT TO EFFECTIVE COUNSEL

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I. INTRODUCTION

In *Harrington v. Richter*,¹ the Supreme Court will interpret the AEDPA² in light of two great bulwarks against injustice for criminal defendants: habeas corpus and the constitutional right to effective assistance of counsel.³ The Court will determine what degree of deference, under the AEDPA, federal courts must grant to state-court summary dispositions in considering petitions for writs of habeas corpus. The Court then will proceed to the merits of Respondent Joshua Richter’s habeas claim to determine whether the Ninth Circuit incorrectly, and impermissibly, enlarged the Sixth Amendment right to effective assistance of counsel.⁴

II. FACTS

On December 19, 1994, Richter and his co-defendant Christian Branscombe were visiting Joshua “Gunner” Johnson at his home.⁵ At around 2:30 AM, after smoking marijuana and cleaning Branscombe’s gun, Richter and Branscombe left.⁶ Patrick Klein, a friend of

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1. *Harrington v. Richter*, No. 09-587 (U.S. argued Oct. 12, 2010).

2. Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C.A. § 2254(d) (West 2010)).

3. U.S. CONST. amend. VI.

4. *Id.*

5. *Richter v. Hickman*, 578 F.3d 944, 947 (9th Cir. 2009), *cert. granted sub nom. Harrington v. Richter*, 130 S. Ct. 1506 (U.S. Feb. 22, 2010) (09-587).

6. *Id.*

Johnson's, decided to spend the night.⁷ At trial, the State of California and Richter presented "dramatically different accounts" of the events that followed.⁸

The State, according to testimony by Johnson, argued that Johnson awoke to find Richter and Branscombe in his bedroom attempting to steal his gun safe.⁹ Branscombe then shot Johnson twice, wounding him.¹⁰ A short time later, Johnson heard shots in the living room and found Klein bleeding on the couch.¹¹ His gun safe, .380 caliber M-12, and \$6,000 in cash were missing.¹²

In contrast, Richter said that upon returning to Johnson's to drop off some belongings, he waited in the truck while Klein let Branscombe into the house.¹³ Shortly thereafter, Richter heard gunshots and entered the house to find Klein lying in a pool of blood in the doorway, Johnson wounded, and Branscombe "totally freaked out."¹⁴ Branscombe was shouting, "[t]hey tried to kill me."¹⁵ Richter argued that Johnson fired first, accidentally hitting Klein, and that Branscombe responded in self-defense.¹⁶

At some point after the shootings, Johnson called 911 and the police arrived to find him "hysterical" and bloody.¹⁷ Klein was "near death" on top of a sleeping bag on the couch.¹⁸ Police uncovered two casings in the bedroom, a large pool of blood in the doorway, more casings near the couch, and blood throughout the house.¹⁹ Police deemed this evidence consistent with Johnson's story and did not conduct an in-depth forensic investigation.²⁰

After the trial had already started, the State conducted forensic tests and called two forensic experts to testify.²¹ A blood spatter expert stated that it was unlikely that Klein had been killed in the doorway

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 947–48.

13. *Id.* at 948.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 948–49.

20. *Id.* at 949.

21. *Id.* at 950.

and later carried to the couch.²² A serologist tested blood from spatter above the doorway and testified that it did not match Klein's blood type.²³ The defense did not call or consult with forensic experts.²⁴

The jury convicted Richter and Branscombe of murder, attempted murder, robbery, and burglary.²⁵ The California Court of Appeal affirmed the convictions and the California Supreme Court denied petitions for review and for habeas relief.²⁶ The District Court for the Eastern District of California then rejected Richter's federal habeas petition, a decision affirmed by a panel of the Ninth Circuit.²⁷ Sitting en banc, however, the Ninth Circuit reversed the district court's denial and remanded with directions to grant Richter's habeas petition.²⁸

III. LEGAL BACKGROUND

In his petitions for writs of habeas corpus in the California Supreme Court and the federal district court, Richter argued that he had been deprived of his Sixth Amendment right to effective counsel.²⁹ When, as here, a district court considers a habeas petition that originated in state court, it must address the additional obligations set forth in section 2254(d) of the AEDPA.³⁰

A. *The AEDPA*

If a prisoner believes his conviction was obtained in violation of the United States Constitution, the exhaustion of state appeals "need not be the end of the road."³¹ Through the writ of habeas corpus, he may petition for relief in federal court.³² The goal of habeas corpus is to ensure the "fundamental fairness of the state adjudication."³³ As Justice Holmes wrote in his dissent in *Frank v. Mangum*,³⁴ "[h]abeas corpus . . . cuts through all forms and goes to the very tissue of the

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 947.

26. *Id.* at 950.

27. *Id.*

28. *Id.* at 969.

29. *Id.* at 952.

30. AEDPA, 28 U.S.C.A. § 2254(d) (West 2010).

31. Gregory J. O'Meara, "You Can't Get There From Here?": *Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545, 550 (2009).

32. *Id.*

33. *Williams v. Taylor*, 529 U.S. 362, 375 (2000).

34. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

structure . . . and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”³⁵

In 1953, the Supreme Court in *Brown v. Allen*³⁶ broadened the scope of habeas review by mandating that state-court decisions rejecting the federal constitutional claims of state prisoners receive de novo review.³⁷ In 1996, however, Congress passed the AEDPA, raising the level of deference accorded to state-court decisions and insulating them from federal scrutiny.³⁸ The relevant statutory provision, section 2254(d), provides that an application for habeas “shall not be granted” for any claim that was “adjudicated on the merits” unless the state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law” or was “based on an unreasonable determination of the facts.”³⁹

The AEDPA was enacted to address the interests “of comity, finality, and federalism.”⁴⁰ Specifically, “Congress wished to curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law.”⁴¹ By making it more difficult for a federal court to grant a habeas petition that originated in a state court, the AEDPA altered the relationship of those courts.⁴² De novo review, as required under *Brown*, implies a level of skepticism about whether state courts can adequately decide federal constitutional issues,⁴³ whereas the AEDPA adopts the presumption that “state courts know and follow the law.”⁴⁴

When federal courts consider unreasoned state-court decisions,⁴⁵ the relationship between federal and state courts is further

35. *Id.*

36. *Brown v. Allen*, 344 U.S. 443 (1953).

37. *Id.* at 546.

38. Ezra Spilke, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts to Exhibit Their Reasoning*, 39 J. MARSHALL L. REV. 995, 1003 (2006).

39. AEDPA, 28 U.S.C.A. § 2254(d) (West 2010).

40. *E.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (internal quotation marks omitted) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)).

41. *Williams v. Taylor*, 529 U.S. 362, 386 (2000).

42. *See O’Meara, supra* note 31, at 555 (“The strength of the writ of habeas corpus depends in large part on how easily petitioners can get into court. AEDPA seemed to make access to federal court difficult.”).

43. Claudia Wilner, “*We Would Not Defer To That Which Did Not Exist*”: AEDPA Meets the Silent State Court Opinion, 77 N.Y.U. L. REV. 1442, 1447 (2002).

44. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

45. An “unreasoned” decision would be a summary disposition that provides no signal or explanation as to how it was decided.

complicated by the statutory requirement that the claim be “adjudicated on the merits.”⁴⁶ In *Ylst v. Nunnemaker*,⁴⁷ the Supreme Court authorized federal courts to “look through” the unexplained order to an earlier reasoned state-court judgment, based on the presumption that the decisions “rest upon the same ground.”⁴⁸ The Court stated that “[t]he essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect . . . most nearly reflects the role they are ordinarily intended to play.”⁴⁹ The Court has not yet answered the question of what federal courts are to do when no such earlier reasoned judgment exists.

B. Ineffective Assistance of Counsel and Strickland v. Washington

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁵⁰ In *Strickland v. Washington*,⁵¹ the Court fleshed out this right and laid down the current standard for constitutional claims of ineffective assistance of counsel.⁵² The Court stated that “[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment”⁵³ and that the “benchmark . . . must be whether counsel’s conduct so undermined the proper functioning of [that] process that the trial cannot be relied on as having produced a just result.”⁵⁴

Strickland requires that a criminal defendant meet a two-pronged test.⁵⁵ The defendant must prove that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense.⁵⁶ This standard, which is no more specific than “reasonableness under prevailing professional norms,”⁵⁷ was meant to be “highly deferential” to defense counsel.⁵⁸ To meet the performance prong, counsel’s failures must be so severe that he was not “functioning as the

46. AEDPA, 28 U.S.C.A. § 2254(d) (West 2010).

47. *Ylst v. Nunnemaker*, 537 U.S. 797 (1991).

48. *Id.* at 803.

49. *Id.* at 804.

50. U.S. CONST. amend. VI.

51. *Strickland v. Washington*, 466 U.S. 668 (1984).

52. *Id.*

53. *Id.* at 685.

54. *Id.* at 686.

55. *Id.* at 687.

56. *Id.*

57. *Id.* at 688.

58. *Id.* at 689.

‘counsel’ guaranteed the defendant by the Sixth Amendment.”⁵⁹ To meet the prejudice prong, the defendant must have been deprived of a fair trial.⁶⁰ The test accounts for the fact that there are “countless ways to provide effective assistance in any given case.”⁶¹

Beginning in 2000, the Supreme Court decided a series of cases—*Williams v. Taylor*,⁶² *Wiggins v. Smith*,⁶³ and *Rompilla v. Beard*⁶⁴—that enlarged the scope of the right to effective counsel by requiring “far more robust investigation.”⁶⁵ In each of these capital cases, the Supreme Court found that the defendant’s counsel had provided ineffective assistance by failing to reasonably investigate possible avenues of defense. In *Williams*, the Court invalidated the conviction because counsel “failed to discover a treasure trove of mitigating evidence”⁶⁶ that might have “influenced the jury’s appraisal of [the defendant’s] moral culpability.”⁶⁷ In *Wiggins*, counsel knew of the defendant’s troubling history yet failed to follow up on leads regarding that history.⁶⁸ The Court found that this was not a strategic decision because without adequate investigation “counsel w[as] not in a position to make a reasonable strategic choice”⁶⁹ Finally, in *Rompilla*, counsel failed to investigate an aggravating factor on which the prosecution intended to rely.⁷⁰ Though noting that counsel need not “look[] for a needle in a haystack, when a lawyer has reason to doubt there is any needle there,”⁷¹ the Court nevertheless expanded

59. *Id.* at 687.

60. *Id.*

61. *Id.* at 689.

62. *Williams v. Taylor*, 529 U.S. 362 (2000).

63. *Wiggins v. Smith*, 539 U.S. 510 (2003).

64. *Rompilla v. Beard*, 545 U.S. 374 (2005).

65. O’Meara, *supra* note 31, at 575.

66. Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 527 (2009).

67. *Williams*, 529 U.S. at 398. In *Williams*, the defendant was “borderline mentally retarded” and had suffered severe mistreatment, abuse, and neglect as a child, all of which his attorney had failed to investigate and present. Furthermore, the same experts that testified on the State’s behalf later admitted that in a controlled environment the defendant would not pose a risk of future harm. *Id.* at 370–71.

68. *Wiggins*, 539 U.S. at 535. In *Wiggins*, the defendant had a traumatic childhood that included physical and sexual abuse, being left at home for days with no food, and being raped and molested while in foster care, all of which counsel failed to reasonably investigate and present at trial. *Id.* at 517.

69. *Id.* at 536.

70. *Rompilla*, 545 U.S. at 385–86. In *Rompilla*, counsel failed to thoroughly investigate signs of the defendant’s troubled childhood, mental illness, and alcoholism. Counsel failed to look at the defendant’s prior conviction file, which the State had and planned to use against the defendant. *Id.* at 390.

71. *Id.* at 389.

Strickland by requiring defense attorneys to look at the entire case and “all avenues leading to facts relevant to the merits”⁷²

In 2009, however, the Supreme Court halted the growth of the ineffective assistance of counsel doctrine with its rejection of the Ninth Circuit’s analysis in *Knowles v. Mirzayance*.⁷³ In *Knowles*, the Ninth Circuit held counsel’s performance deficient because he failed to present an insanity defense when he had “nothing to lose.”⁷⁴ The Supreme Court refused to adopt the “nothing to lose” standard and noted that “this Court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance of success.”⁷⁵ Even without the “doubly deferential” review under the AEDPA, the Court stated, the claim would still fail.⁷⁶

IV. HOLDING

In *Richter v. Hickman*, the Ninth Circuit reversed the district courts’ decision and held that Richter’s counsel violated the right to effective assistance of counsel.⁷⁷ The court began by quoting Sun Tzu⁷⁸ on the virtues of preparedness,⁷⁹ condemning Richter’s counsel for behaving most unlike a Boy Scout.⁸⁰ Judge Reinhardt, writing for the majority, stated that counsel’s lack of preparation resulted in ineffective representation and, as a result, the trial court unreasonably applied *Strickland*.⁸¹ The majority stated that counsel behaved unreasonably in failing to investigate the availability of forensic evidence and to consult forensic experts regarding a central issue in

72. *Id.* at 387.

73. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1413 (2009) (holding that “Mirzayance failed to establish that his counsel’s performance was ineffective . . .”).

74. *Id.* at 1417.

75. *Id.* at 1420.

76. *Id.*

77. *Richter v. Hickman*, 578 F.3d 944, 947 (9th Cir. 2009), *cert. granted sub nom. Harrington v. Richter*, 130 S. Ct. 1506 (U.S. Feb. 22, 2010) (09-587).

78. Sun Tzu is a famous Chinese philosopher who is best known for writing THE ART OF WAR.

79. *Richter*, 578 F.3d at 946 (“To . . . not prepare is the greatest of crimes; to be prepared beforehand for any contingency is the greatest of virtues.” (quoting SUN TZU, THE ART OF WAR 83 (Samuel B. Griffith trans., Oxford University Press 1963))).

80. See *Boy Scout Motto*, BOY SCOUTS OF AMERICA (Aug. 5, 2007), <http://usscouts.org/advance/boyscout/bsmotto.asp> (“Be Prepared.”).

81. The majority proceeded to an analysis of the merits and dismissed the issue of AEDPA deference, noting that it would grant the writ under either a de novo or objective unreasonableness standard of review. *Richter*, 578 F.3d. at 951 n.5.

the case.⁸² The holding revolves around the understanding that adequate investigation is at “the heart of an effective defense.”⁸³

Under *Strickland*’s first prong, the performance prong, the majority stated that counsel failed in his duty to Richter in three ways. Counsel failed to (1) investigate prior to choosing a trial strategy; (2) investigate available corroborating forensic evidence during trial preparation; and (3) consult experts during the trial to counter the State’s sudden introduction of damaging expert testimony.⁸⁴ The majority reasoned that although state courts have a generous amount of latitude in applying the Sixth Amendment’s protections, “[w]e do not . . . afford [them] a blank check to determine, at their whim, whether an attorney’s conduct was reasonable or unreasonable.”⁸⁵

Because counsel provided no reasoned explanation for his failure to investigate, the majority rejected the argument that counsel’s decision was strategic.⁸⁶ It distinguished the case from *Knowles*, where counsel was well-informed, and analogized it to *Wiggins*, in which the Court held that counsel could not be well-informed without adequately investigating his client’s history.⁸⁷ The majority also rejected the argument that counsel’s failure was reasonable because he was “hamstrung by the element of surprise,” stating that he should have investigated before the trial began and not only in response to the State’s use of experts.⁸⁸ The majority cautioned, however, that this holding would not require counsel to seek expert advice on every conceivable issue⁸⁹ or at “every stage of the proceedings,”⁹⁰ but only where the issue is of central importance.

Continuing to *Strickland*’s prejudice prong, the majority held that Richter’s counsel prejudiced his client by failing to introduce blood-spatter evidence.⁹¹ A subsequent investigation by Richter’s new counsel revealed expert testimony from a reliable source that directly contradicted the State’s version of events.⁹² The testimony would seriously reduce Richter’s culpability and would discredit Johnson,

82. *Id.* at 953–54.

83. *Id.* at 946.

84. *Id.* at 954.

85. *Id.* at 952.

86. *Id.* at 958.

87. *Id.* at 959.

88. *Id.* at 957.

89. *Id.* at 954 n.7.

90. *Id.* at 954 n.8 (quoting *id.* at 970 (Bybee, J., dissenting)).

91. *Id.* at 966.

92. *Id.* at 963.

the State's key witness.⁹³ Furthermore, the majority noted that counsel's failures did not go unnoticed by the State, who mocked the defense counsel during closing arguments.⁹⁴

On February 22, 2010, the Supreme Court granted the State's petition for writ of certiorari regarding whether the Ninth Circuit "impermissibly enlarged" the Sixth Amendment right to effective counsel.⁹⁵ In addition, the Court directed the parties to brief the question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?"⁹⁶

V. ARGUMENTS

A. *The Scope of the AEDPA's "Adjudicated on the Merits" Clause*

The State argued that AEDPA deference applies to the unreasoned summary disposition because of state court practices, the plain language of section 2254(d), and the need to protect the interests of federalism and efficiency.⁹⁷ First, the State argued that under well-established state-court precedent an unexplained decision rejecting a habeas petition is a ruling on the merits.⁹⁸ The State relied on *In re Robbins*,⁹⁹ stating that if a California court invokes a procedural bar as a basis for denying relief, it will cite to that procedural default in its order.¹⁰⁰ The California Supreme Court did not do so here.

Second, the State argued that the plain language of the statute does not require an explained ruling, noting that Congress presumably knew that unexplained decisions are common in state and federal habeas litigation.¹⁰¹ Under section 2254(d), the State

93. *Id.*

94. *Id.* at 962 ("I am not going to worry about Jill Spriggs . . . because, hey, her seven years as a biochemist and a criminalist, and the fact that she went to college to learn this stuff doesn't mean anything, because I am a lawyer I am not going to pay and bring in an expert to show you I am a lawyer. I can do it.") (emphasis omitted).

95. Petition for Writ of Certiorari at i, *Harrington v. Richter*, No. 09-587 (U.S. Nov. 9, 2009).

96. *Harrington v. Richter*, 130 S. Ct. 1506, 1507 (U.S. Feb. 22, 2010) (No. 09-587).

97. Petitioner's Brief on the Merits at 17, *Harrington*, No. 09-587 (U.S. May 10, 2010).

98. Petitioner's Reply Brief on the Merits at 4-5, *Harrington*, No. 09-587 (U.S. Aug. 23, 2010).

99. *In re Robbins*, 959 P.2d 311 (Cal. 1998).

100. *Id.* at 340.

101. Petitioner's Brief on the Merits, *supra* note 97, at 24-27.

articulated that it is the ultimate decision that matters and not the reasoning.¹⁰² To suggest that AEDPA deference requires a reasoned decision would “necessarily require adding language to an unambiguous statute—no less one that is part of a detailed and comprehensive statutory scheme.”¹⁰³

Finally, the State argued that the purposes for which the AEDPA had been enacted would be frustrated if summary dispositions do not warrant AEDPA deference.¹⁰⁴ Nearly 20,000 criminal habeas petitions are decided in California each year,¹⁰⁵ and “this Court has recognized that it has ‘no power to tell state courts how they must write their opinions.’”¹⁰⁶ To deny deference when, for efficiency reasons or otherwise, a state-court decision is unexplained would “imply, unjustifiably, that these adjudications are not well-reasoned and are the product of a dereliction of judicial duty.”¹⁰⁷

Richter, in contrast, argued that the summary disposition should not trigger AEDPA deference because of California’s “peculiar” scheme of summary denials, the necessity of adjudicating on both *Strickland* prongs, and the fact that sections 2254(d)(1) and (2) require some analysis of the state court’s reasoning.¹⁰⁸ First, California has four distinct types of summary dispositions.¹⁰⁹ State courts may deny a petition by stating that it is “on the merits”¹¹⁰; by citing a procedural default¹¹¹; and by relying on a combination of merits-based and procedural reasons.¹¹² Courts can also, as here, issue a “silent denial” when “a majority of the state court has not reached a consensus as to whether the reasons for denying a petition are merits-based or procedural.”¹¹³ In light of this scheme, Richter argued that had the California Supreme Court intended the order to be an adjudication on the merits it could have stated that intention, as it had with at least five other cases that were reviewed on the same day.¹¹⁴

102. *Id.* at 23.

103. *Id.* at 27.

104. *Id.* at 28.

105. *Id.* at 29.

106. *Id.* at 28 (quoting *Coleman v. Thompson*, 501 U.S. 722, 739 (1991)).

107. *Id.* at 30.

108. Respondent’s Brief on the Merits, *Harrington*, 09-587 (U.S. Jul. 9, 2010).

109. *Id.* at 12.

110. *Id.* at 20.

111. *Id.* at 21.

112. *Id.* at 22.

113. *Id.* at 12–13.

114. *Id.* at 26.

Richter also noted that the State, in a brief for another case, adopted this very argument: “[D]etermining what this particular summary order meant was impossible because the seven members of the state court may ‘not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent.’”¹¹⁵

Second, Richter argued that in cases raising *Strickland* claims, AEDPA deference to unreasoned decisions is an “end run around the state’s burden” to prove that both prongs were adjudicated on the merits.¹¹⁶ Richter asserted that, “[r]equiring the state to prove what has actually been adjudicated on the merits is a minimal burden for the state to meet in order to get the considerable benefits of section 2254(d).”¹¹⁷

Finally, Richter argued that sections 2254(d)(1) and (2), which provide mechanisms to prove that the AEDPA does not bar habeas relief,¹¹⁸ require some analysis of the state court’s reasoning.¹¹⁹ The state court’s decision must be reached “through application of the correct law to appropriately determined facts.”¹²⁰ As Amicus Curiae National Association of Criminal Defense Lawyers argued, “[w]here the state court’s decision fails to provide the information necessary . . . the process Congress designed for determining the availability of deferential treatment cannot be carried out.”¹²¹ Richter claimed that if unreasoned decisions are granted AEDPA deference, state courts will have a perverse incentive to “say nothing at all” and thereby avoid scrutiny.¹²²

B. What is “Reasonable” under Strickland v. Washington?

Regarding the merits of Richter’s claim, the State argued that the Ninth Circuit incorrectly held that the state court was unreasonable and that it impermissibly enlarged the Sixth Amendment right to effective counsel.¹²³ The State characterized the Ninth Circuit’s

115. *Id.* at 28 (quoting Brief for Petitioner at 24, *Evans v. Chavis*, 546 U.S. 189 (2006) (No. 04-721)).

116. *Id.* at 13–14.

117. *Id.* at 39.

118. AEDPA, 28 U.S.C.A. § 2254(d) (West 2010).

119. Respondent’s Brief on the Merits, *supra* note 108, at 40.

120. Amicus Curiae Brief of National Association of Criminal Defense Lawyers in Support of Respondent at 3, *Harrington v. Richter*, 09-587 (U.S. Jul. 14, 2010).

121. *Id.* at 2.

122. Respondent’s Brief on the Merits, *supra* note 108, at 14.

123. Petitioner’s Brief on the Merits, *supra* note 97, at 52.

holding as one that requires counsel to consult with or produce expert testimony “regardless [of] whether counsel could reasonably conclude that such investigation would not be promising”¹²⁴ The State reasoned that although Sun Tzu’s exhortation on preparedness is worthy of aspiration, it is not the law and does not take into account the demands and constraints of our judicial system.¹²⁵ Here, Richter’s counsel faced a “daunting” job and reasonably executed his chosen strategy.¹²⁶ As the State articulated, “it was reasonable under *Strickland*. It need not have satisfied Sun Tzu.”¹²⁷

The State claimed that counsel’s actions were not deficient enough to overcome the “strong presumption” of reasonableness under the first *Strickland* prong.¹²⁸ The State argued that the choice of strategy—attacking the credibility of the drug-dealing survivor and exploiting the deficiencies in the police investigation—ought to be protected as a product of reasonable professional judgment.¹²⁹ Counsel faced overwhelming evidence of Richter’s guilt,¹³⁰ and to limit the investigation of the blood evidence was reasonable when it could have been harmful.¹³¹ Furthermore, though counsel did not call expert witnesses to rebut the State’s mid-trial presentation of expert testimony, he did “cross-examin[e] them to good effect.”¹³² Counsel originally, and reasonably, believed the case to be a credibility contest, and later was hampered by denied motions for continuance following the State’s introduction of expert testimony.¹³³

Under the second *Strickland* prong, the State argued that the issue of the blood pool was not “crucial to the defense case.”¹³⁴ In addition, Richter’s experts, who did not address the most important forensic evidence, would not be able to overcome the “compelling physical evidence that tied Richter directly to the crimes[.]”¹³⁵ Thus, even if counsel had been deficient, it would not have affected the outcome.¹³⁶

124. *Id.* at 53–54.

125. *Id.* at 56.

126. *Id.* at 39.

127. Petitioner’s Reply Brief on the Merits, *supra* note 98, at 19.

128. Petitioner’s Brief on the Merits, *supra* note 97, at 52.

129. *Id.* at 39.

130. Petitioner’s Reply Brief on the Merits, *supra* note 98, at 17.

131. *Id.* at 19.

132. Petitioner’s Brief on the Merits, *supra* note 97, at 39.

133. *Id.* at 46.

134. *Id.* at 47.

135. *Id.* at 51.

136. *Id.* at 47.

Richter, in contrast, argued that counsel’s performance was so deficient as to be unreasonable, using much of the same reasoning as the Ninth Circuit.¹³⁷ Richter claimed, consistent with *Wiggins*, that the Sixth Amendment protects a defendant from counsel who fails to investigate the theory of the defense that he selected, called his client to support, and relied on in both opening and closing.¹³⁸ Richter rejected the idea that relying on cross-examination was a reasonable alternative to presenting affirmative evidence because counsel’s failure to consult with experts left him uninformed and unprepared for questioning.¹³⁹

Richter claimed that these failures were prejudicial because in a credibility contest any defense attorney “worth his salt” would investigate available affirmative evidence to bolster the witness’ credibility on a central issue in the case.¹⁴⁰ Presenting expert testimony to directly contradict the State could have persuaded the jury to decide that issue in the Richter’s favor.¹⁴¹

VI. ANALYSIS AND DISPOSITION

Regarding the initial question of AEDPA deference, the Court likely will decide that summary dispositions are “adjudicated on the merits” when it is clear that the decision was made on substantive, rather than procedural, grounds. This would require no more than a brief signal to federal courts rather than a full opinion or analysis. The Court likely will not want to undermine the common practices of state courts to summarily deny habeas petitions, particularly given the interests of efficiency and simplicity.¹⁴² Thus the Court will adopt the

137. See *supra* Part IV (arguing that counsel was unreasonable in failing to adequately investigate and prepare for a strategy he selected and noting the importance of the new evidence, particularly in regard to its role in corroborating Richter’s testimony).

138. Respondent’s Brief on the Merits, *supra* note 108, at 48.

139. *Id.* at 52.

140. Transcript of Oral Argument at 41, *Harrington*, No. 09-587 (U.S. Oct. 12, 2010).

141. Respondent’s Brief on the Merits, *supra* note 108, at 50–60.

142. See Brief of Texas, Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming as Amici Curiae in Support of Petitioner at 4–7, *Harrington v. Richter*, 09-587 (U.S. May 17, 2010) (providing statistics for the widespread use of summary dispositions in state courts and illustrating that it is a common practice in habeas litigation to deny a petition summarily and without reason); *but see* Brief of Law Professors and Legal Scholars as Amicus Curiae in Support of Respondent at 1–2, *Harrington*, 09-587 (U.S. Jul. 16, 2010) (arguing that

view, held by several circuits, that the “adjudicated on the merits” clause is focused on the ultimate decision and not on the process.¹⁴³ As the Second Circuit stated, “we are determining the reasonableness of the state courts’ ‘decision,’ . . . not grading their papers.”¹⁴⁴ This interpretation is in line with the principles of federalism¹⁴⁵ and judicial administrability,¹⁴⁶ for which the AEDPA was enacted because it will promote the efficient disposition of habeas petitions without the threat of relitigation in federal court.

The Court likely will not extend AEDPA deference, however, to instances where the state court has been silent. During oral arguments, the justices struggled to determine what exactly the California Supreme Court’s “silent denial” was meant to communicate.¹⁴⁷ As the Court said in *Ylst*, “[t]he problem we face arises . . . because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial.”¹⁴⁸ Similarly, in *Fortini v. Murphy*,¹⁴⁹ the First Circuit noted the “frustrating impossibility”¹⁵⁰ that surrounds silent denials in habeas litigation: “AEDPA imposes a requirement of deference to state-court decisions, but we can hardly defer to the state court on an issue that the state court did not address.”¹⁵¹ By holding that AEDPA deference is not warranted for “silent” denials that are issued without indication of a basis for the decision, the Court likely will establish a clear rule that eliminates

although summary dispositions are common, many states require some form of explanation or reasoning).

143. See Maura Caffrey, *Untying the Knot: A Solution for Confusion in Federal Habeas Review of Pennsylvania State Court Capital Convictions*, 11 U. PA. J. CONST. L. 985, 992 (2009) (citing several circuits that support the proposition that AEDPA deference does not require discussion).

144. *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (citation omitted).

145. See Dennis M. Cariello, *Federalism for the New Millennium: Accounting for the Values of Federalism*, 26 FORDHAM URB. L.J. 1493 (1999) (explaining the core principles of federalism and defining federalism as a form of cooperative government that seeks to allocate responsibility to either the state or national government depending on which is better suited to the task).

146. Petitioner’s Brief on the Merits, *supra* note 97, at 28.

147. See Transcript of Oral Argument, *supra* note 140, at 55 (“It’s still not clear to me how to distinguish that, between denied, deny—do we say, when there’s a one-line order, as in this case, where it says simply ‘deny,’ it is presumptively on the merits? I mean, how . . . do we interpret that?” (Kennedy, J.)).

148. *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

149. *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001).

150. *Wilner*, *supra* note 43, at 1462.

151. *Fortini*, 257 F.3d at 47.

much of the confusion and inaccuracy with which courts have applied the AEDPA.

Although such a holding would help to simplify the application of the AEDPA by federal courts, a preferable, though extremely unlikely, outcome would be for the Court to decide that AEDPA deference is triggered only if a state-court decision contains explicit reasoning. Such a holding would best protect the fundamental habeas right, while providing a clear directive to state courts that the disposition of such important cases cannot be merely formulaic.¹⁵² In *Williams*, the Court clarified sections 2254(d)(1) and (2) and suggested that some analysis of the state court's reasoning is needed to apply the statute.¹⁵³ Requiring state courts to provide such reasoning would advance the judiciary's interest in accuracy and administrability when reviewing state-court habeas cases because federal courts would not have to speculate about what facts were relied on or which law was applied. Although federal courts would still defer to state-court decisions, they would not have to do so blindly.¹⁵⁴ Habeas corpus is often the final means of relief for a state prisoner and deserves reasoned, thoughtful review from at least one court.¹⁵⁵

Because the Court will probably find that the denial here was silent and does not warrant AEDPA deference, Richter's ineffective assistance of counsel claim will be reviewed de novo. Even so, the Court will likely reiterate the importance of the duty to investigate as found in *Williams*, *Wiggins*, and *Rompilla*, but will distinguish this case and reverse the Ninth Circuit's decision. Here, the Court will likely

152. See Spilke, *supra* note 38, at 1015 (describing the problems inherent in deferring to silent state-court opinions in the habeas context: "Since nothing stops state courts from acting arbitrarily, yet silently, the requirement that the claim be adjudicated on the merits before its dismissal is granted AEDPA deference is rendered meaningless.").

153. See *Williams v. Taylor*, 529 U.S. 362, 407 (2000) ("First, a state-court decision involves an unreasonable application of this Court's precedent if 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. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.").

154. See Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 28 ST. JOHN'S L. REV. 615, 659 (2004) ("It makes little sense to circumscribe a federal court's ability to analyze a federal question based on the absence of a state court analysis." (emphasis omitted)).

155. This is not to suggest that state courts would need to write long opinions for each case, but that they would be required at a minimum to signal to the petitioner and to federal courts under what law and applying which facts the petition was rejected.

find that, on these facts, the Ninth Circuit has pushed the boundary too far.¹⁵⁶

During oral arguments, Justice Sotomayor said “if you are in an area . . . where you have no expertise and your case depends on a technical issue, it behooves you to at least talk to an expert to find out if you are on the right track.”¹⁵⁷ Sotomayor’s reasoning, however, is unlikely to persuade the Court for a least two reasons. First, the three cases that expanded counsel’s duty to investigate were all capital cases.¹⁵⁸ Richter faces life in prison, and while that is a significant punishment, the Court likely will distinguish Richter from a defendant facing death row.¹⁵⁹ In non-capital cases, it is often extremely difficult for a defendant to prevail on a claim of ineffective assistance of counsel.¹⁶⁰ In fact, *Strickland* has been referred to as the “foggy mirror” test: “If you place a mirror in front of defense counsel and it fogs, counsel is in fact effective.”¹⁶¹ Here, counsel prepared and carried out a strategy, albeit not a winning strategy, that likely will be protected against the claim of ineffective assistance. Furthermore, even if Richter were to win on the performance prong, the Court is unlikely to find prejudice given the weight of evidence against him.

Second, the Court will strongly consider the administrability of stretching the *Strickland* standard to these facts. The Court will be wary of any rule that seems to require consultation with or presentation of experts, or that requires affirmative evidence in the place of cross-examination. The Court has been reluctant to impose

156. Notably, of the circuit courts, the Ninth Circuit has the highest rate of reversal by the Supreme Court in the past thirty years. Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 357 (2006).

157. Transcript of Oral Argument, *supra* note 140, at 17.

158. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

159. *See Smith*, *supra* note 66, at 535–36 (explaining the expansion of the ineffective assistance of counsel doctrine from 2000–2005 as an effort to combat the “politics of death”—such as the underfunding of indigent capital defense—and the effects they have on the administration of the death penalty).

160. *See Marcus Proctor Henderson, Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom*, 13 IND. INT’L & COMP. L. REV. 317, 330 (2002) (citing various criticisms of the *Strickland* test); *McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (“Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant’s right to be represented by something more than ‘a person who happens to be a lawyer.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984))).

161. RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS, TEACHER’S MANUAL 210 (3d ed. 2006).

specific rules, instead favoring the independent choices of counsel.¹⁶² Effective assistance of counsel is a right guaranteed by the Constitution and stands as a safeguard against injustice, but it must work within the constraints and demands of our criminal justice system. In *Harrington v. Richter*, the Court likely will attend to this tension by declining to impose strenuous burdens on defense counsel.

162. See *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (rejecting a rule that failing to file an appeal, absent contrary instructions from the client, is *per se* deficient, favoring a consideration of all circumstances); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (explaining that choosing how to structure closing arguments is a “core exercise” of counsel’s discretion and that there is a strong presumption that those choices are tactical).