Chapter 3

AEDPA Review Standards

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Scope

The focus of this chapter is on the manner in which a petitioner's federal habeas claim is analyzed. More specifically, it identifies when a state court's legal, factual, or mixed legal-and-factual adjudication is entitled to deference by the federal courts, as well as the extent of that deference.

Briefly, in deciding whether a state prisoner is entitled to federal habeas relief, a federal court will, in most cases, initially determine the appropriate standard of review. Prior to the enactment of AEDPA, questions of law and mixed questions of law and fact were reviewed de novo (nondeferentially) (§ 3:1). But under AEDPA, a state court's merits adjudication (assuming there is one) involving questions of law

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I. PRE-AEDPA CASES

§ 3:1 Deference limited to state court factual findings

Research References

West's Key Number Digest, Habeas Corpus ⚿311, 312

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts reviewed de novo state court decisions on questions of law and mixed questions of law and fact. A state court's decision involving a question of fact was reviewed under a presumption of correctness. *See, e.g.,* Miller v. Fenton, 474 U.S. 104, 112, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985).

II. POST-AEDPA CASES

§ 3:2 The statute

Research References

West's Key Number Digest, Habeas Corpus ⚿311, 312

With the enactment of AEDPA on April 24, 1996, came significant changes in how federal courts review state court adjudications. The AEDPA modified "the role of federal habeas courts in reviewing petitions filed by state prisoners" by placing "a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (opinion of O'Connor, J.).

The present standards of review are set forth in § 2254 and provide as follows:

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

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

The application of these new standards of review—or limitations on relief—is the subject of this chapter. See Jimenez v. Walker, 458 F.3d 130, 135 n.2 (2d Cir. 2006), cert. denied, 549 U.S. 1133, 127 S. Ct. 976, 166 L. Ed. 2d 740 (2007) ("§ 2254(d) may more accurately be called a 'limitation on relief' than a deferential 'standard of review' ").

For further discussion of AEDPA's review standards, *see* Brian R. Means, *Postconviction Remedies*, Chapter 29 (2016 ed.) (West).

§ 3:3 Cases governed by AEDPA

Research References

West's Key Number Digest, Habeas Corpus ⚿311, 312

Whether AEDPA applies to a state prisoner's federal petition turns on what was before the federal court on April 24, 1996, the date AEDPA was enacted. If, on that date, the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the merits of the petitioner's claims, then the standard of review provisions of AEDPA do not apply. An application filed after April 24, 1996, is subject to AEDPA, even if other filings by the same applicant—such as, for example, a request for the appointment of counsel or a motion for a stay of execution—were presented to the federal court prior to AEDPA's effective date. Woodford v. Garceau, 538 U.S. 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003).

Where a petitioner files a federal habeas application by the effective date of AEDPA (April 24, 1996), and the district court retains jurisdiction over the case, the AEDPA does not apply even where the petitioner files an amended federal petition post-AEDPA. Thomas v. Chappell, 678 F.3d 1086, 1100 (9th Cir. 2012), cert. denied, 2013 WL 598863 (U.S. 2013); *accord* Smith v. Mahoney, 611 F.3d 978, 994–95 (9th Cir. 2010); *see also* Fuller v. Johnson, 158 F.3d 903, 905 (5th Cir. 1998) (AEDPA did not apply where first federal petition was filed pre-AEDPA and was never dismissed, and petitioner was allowed to file a post-AEDPA amended petition.); *see also* Allen v. U.S., 175 F.3d 560, 562 (7th Cir. 1999) (AEDPA did not apply to post-AEDPA amended petition, even though pre-AEDPA had been dismissed, where petitioner's habeas action was deemed "pending" at the time AEDPA was enacted.).

But where the federal petition is filed pre-AEDPA and is

dismissed without prejudice for non-exhaustion or on other procedural grounds, any subsequent petition filed after the effective date of AEDPA is governed by the provisions of AEDPA. Pope v. Secretary for Dept. of Corrections, 680 F.3d 1271, 1282 (11th Cir. 2012) (AEDPA applied to federal petition filed in 1999 even though petitioner had filed a federal petition in 1991 that was dismissed without prejudice on non-exhaustion grounds in 1994 and the case was then officially deemed "closed" by the clerk of the court.); Barrientes v. Johnson, 221 F.3d 741, 751 (5th Cir. 2000) (AEDPA governs "a federal habeas corpus petition filed after [its] effective date . . . where the petitioner's previous federal petition was filed before the effective date of AEDPA and was dismissed without prejudice for failure to exhaust state remedies."); Weaver v. Bowersox, 241 F.3d 1024, 1029 (8th Cir. 2001) ("[AEDPA] applies even when a prisoner's original petition was filed prior to AEDPA's effective date and dismissed without prejudice for failure to exhaust state remedies."); Sanchez v. Gilmore, 189 F.3d 619, 622-23 (7th Cir. 1999) ("[A] second petition [was] filed in 1997, and that is the year which controls whether AEDPA applies. It applies; he cannot move the date to pre-AEDPA times by relying on his old unexhausted petition."); Taylor v. Lee, 186 F.3d 557, 560 (4th Cir. 1999) ("Since [Taylor] filed his second petition . . . well after the signing of the AEDPA . . ., the AEDPA applies in this case."); Mancuso v. Herbert, 166 F.3d 97, 101 (2d Cir. 1999) ("[T]he AEDPA applies to a habeas petition filed after the AEDPA's effective date, regardless of when the petitioner filed his or her initial habeas petition and regardless of the grounds for dismissal of such earlier petition.").

◆ **COMMENT:** Generally, when an original habeas action is dismissed, there is no pending petition to which a second petition can relate back or amend. Neverson v. Bissonnette, 261 F.3d 120, 126 (1st Cir. 2001); Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001); Marsh v. Soares, 223 F.3d 1217, 1219–20 (10th Cir. 2000); Warren v. Garvin, 219 F.3d 111, 114 (2d Cir. 2000); Nyland v. Moore, 216 F.3d 1264, 1266 (11th Cir. 2000); Jones v. Morton, 195 F.3d 153, 160–61 (3d Cir. 1999). Thus, a petitioner cannot avoid the AEDPA by relating back a post-AEDPA petition to a prior, previously dismissed pre-AEDPA petition. *See, e.g.*, Hull v. Kyler, 190 F.3d 88, 103–04 (3d Cir. 1999) (later petition governs for purposes of applying AEDPA notwithstanding a prior petition that was dismissed pre-AEDPA without prejudice; the prior petition is treated as if it never existed); Sanchez v. Gilmore, 189 F.3d 619, 623 (7th Cir. 1999) (AEDPA applied to habeas petition filed after its enactment, though petitioner had filed a pre-AEDPA petition, which remained unexhausted). The Ninth Circuit in Griffey v. Lindsey, 345 F.3d 1058, 57 Fed. R. Serv. 3d 126 (9th Cir. 2003), held that an exception to this rule exists in the very limited

circumstance where the petitioner is able to have the judgment in the prior action set aside under either Federal Rule of Civil Procedure 59(e) or 60(b). But because the petitioner died during the pendency of a petition for rehearing, the opinion was later vacated. Griffey v. Lindsey, 349 F.3d 1157 (9th Cir. 2003).

AEDPA Deference—Key Points

- *"Adjudicated on the merits."* The § 2254(d) bar to relief (limiting the grant of habeas relief to unreasonable applications of clearly established law) only applies to those claims that were adjudicated on the merits by a state court.
- *"Clearly established."* Habeas relief is barred by § 2254(d) if the petitioner's claim depends on the application of a rule not clearly established by the Supreme Court. A law is not clearly established if the Supreme Court has not squarely addressed the issue.
- *"Contrary to."* A state court's merits adjudication is not entitled to deferential review under § 2254(d) if the adjudication is "contrary to" clearly established Supreme Court precedent. An adjudication is "contrary to" clearly established Supreme Court precedent if the state court decision is opposite to that reached by the Supreme Court on a question of law, or if the state court decides the case differently than the Supreme Court has on a set of materially indistinguishable facts.
- *"Unreasonable application."* So long as the state court's merits adjudication of the petitioner's claim was not contrary to Supreme Court precedent, a petitioner is barred from obtaining federal habeas relief unless the merits adjudication resulted in an "unreasonable application" of clearly established Supreme Court precedent. An unreasonable application of federal law requires more than a showing that the state court's decision was incorrect, erroneous, or constituted clear error. An unreasonable application might include a situation where a state court either unreasonably extends a legal principle from Supreme Court precedents to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply. The range of reasonable judgment can depend in part on the nature of the relevant rule: the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

III. QUESTIONS OF LAW / MIXED QUESTIONS OF LAW AND FACT

A. METHODOLOGY

§ 3:4 Purely legal and mixed questions of law distinguished

Research References

West's Key Number Digest, Habeas Corpus ⚿311, 312

Challenges to purely legal questions resolved by the extant state court record are reviewed under § 2254(d)(1). The question on review is whether the state court's decision contradicts a holding of the Supreme Court or reaches a different result on a set of facts materially indistinguishable from those at issue in a deci-

sion of the Supreme Court; or whether the state court unreasonably applied controlling Supreme Court precedent to the facts of the petitioner's case.

Challenges to mixed questions of law receive mixed review. The state court's ultimate conclusion is reviewed under § 2254(d)(1), as described above, but its underlying factual findings supporting that conclusion are clothed with all of the deferential protection afforded factual findings under § 2254(d)(2) and (e)(1). Lambert v. Blodgett, 393 F.3d 943, 976–78 (9th Cir. 2004).

§ 3:5 Court may proceed directly to AEDPA analysis without first deciding whether state court's decision was wrong

Research References

West's Key Number Digest, Habeas Corpus ⚿311, 312

In Van Tran v. Lindsey, 212 F.3d 1143, 1156 (9th Cir. 2000), the Ninth Circuit set forth a two-stage approach for analyzing constitutional claims under AEDPA. First, the federal court would determine whether the state court disposition was erroneous. Second, if error was found, the federal court would decide whether the state court merits adjudication was contrary to or an unreasonable application of clearly established United States Supreme Court precedent.

But the Supreme Court in Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), held that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." In *Lockyer*, the Court chose not to reach the question of whether the state court erred, instead focusing solely on whether § 2254(d) foreclosed habeas relief.

This does not, however, necessarily foreclose consideration of the merits first in every case. See Penry v. Johnson, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001); Ramdass v. Angelone, 530 U.S. 156, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000); Weeks v. Angelone, 528 U.S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); Frantz v. Hazey, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) ("Sometimes, we may be able to decide the § 2254(d)(1) issue better by deciding the constitutional issue first when doing so would illuminate the § 2254(d)(1) analysis").

B. MERITS ADJUDICATION

§ 3:6 The statute

The AEDPA provides that a federal habeas court may not grant

relief to a state prisoner whose claim has already been "*adjudicated on the merits* in State court," 28 U.S.C.A. § 2254(d) (emphasis added), unless the claim's adjudication 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," § 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). The sections that follow address this adjudication-on-the-merits requirement.

§ 3:7 The "merits adjudication" requirement

Generally

The restrictions imposed on habeas corpus by 28 U.S.C.A. § 2254(d) apply to any claim that the state court adjudicated on the merits. A state court adjudicates a claim "on the merits" for purposes of § 2254(d) when it decides the petitioner's right to relief on the basis of the substance of the federal claim advanced, rather than on a procedural or other rule precluding state court merits review. Runningeagle v. Ryan, 686 F.3d 758, 768–69 (9th Cir. 2012) (citing Harrington v. Richter, 131 S.Ct. 770, 784–85, 178 L.Ed. 2d 624 (2011) (when a state court decision is ambiguous, and so it is "a close question" on whether the state court denied a petitioner's claim on procedural grounds or on the merits, a federal court must presume that the state court adjudicated the claim on the merits)); Wilson v. Workman, 577 F.3d 1284, 1308 (10th Cir. 2009) (" 'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other ground") (internal quotation marks omitted); Thomas v. Horn, 570 F.3d 105, 114–16 (3d Cir. 2009), as corrected, (July 15, 2009) and cert. denied, 130 S. Ct. 1879, 176 L. Ed. 2d 368 (2010) and cert. denied, 130 S. Ct. 1942, 176 L. Ed. 2d 399 (2010) (a claim has been adjudicated on the merits in state court proceedings when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance, rather than on a procedural, or other, ground); Yeboah-Sefah v. Ficco, 556 F.3d 53, 66 (1st Cir. 2009), cert. denied, 130 S. Ct. 639, 175 L. Ed. 2d 491 (2009) ("A matter is 'adjudicated on the merits,' giving rise to deference under § 2254(d) of AEDPA, if there is a 'decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground' ") (internal quotation marks omitted); Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) ("An adjudication on the merits is perhaps

best understood by stating what it is not: it is not the resolution of a claim on procedural grounds"); Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) ("adjudicated on the merits" understood to mean a decision finally resolving the parties' claims that is based on the substance of the claim advanced, rather than on a procedural, or other, ground); Neal v. Puckett, 286 F.3d 230, 235 (5th Cir. 2002) ("adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural"); Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (noting that "adjudicated on the merits" has "a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground").

Generally speaking, there is no merits adjudication for purposes of § 2254(d) if the state court overlooked or disregarded the federal claim. *See* Johnson v. Williams, ___ S.Ct. ___, 2013 WL 610199 (2013). Exceptions to this rule have been recognized, however, where the federal claim was subsumed within a claim adjudicated on the merits by the state court, *see, infra*, § 3:10, or was considered in a different context, *see, infra*, § 3:14.

In the absence of a state-court merits adjudication, the federal claim is reviewed *de novo* by the federal court in habeas corpus proceedings. *See, e.g.,* McKenzie v. Smith, 326 F.3d 721, 727 (6th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); DiBenedetto v. Hall, 272 F.3d 1, 7 (1st Cir. 2001); Hameen v. State of Delaware, 212 F.3d 226, 248 (3d Cir. 2000); LaFevers v. Gibson, 182 F.3d 705, 711 (10th Cir. 1999); Mercadel v. Cain, 179 F.3d 271, 274–75 (5th Cir. 1999). The fact that the state court misread or misapplied its own precedents, however, does not make it any less of a merits adjudication. Malinowski v. Smith, 509 F.3d 328, 323 (7th Cir. 2007).

Contingent observations

A contingent observation—opining that if the merits were reached the result would be the same—does not qualify as a merits adjudication. In Bell v. Miller, 500 F.3d 149 (2d Cir. 2007), the state court's ruling on the petitioner's motion discussed the merits and was reduced to a judgment, but the wording of the opinion indicated that the disposition was not premised on the court's view of the merits. The discussion of the merits was preceded by a contrary-to-fact construction: "if the merits were reached, the result would be the same." The court held that a "contrary-to-fact construction is not the same as an alternative holding," and declined to read a contingent observation as an "adjudication on the merits." Bell, 500 F.3d at 155; *see also* James v. Ryan, 679 F.3d 780, 802 (9th Cir. 2012) cert. granted, judgment

vacated, 133 S. Ct. 1579 (2013) ("where a state court primarily relies on a procedural bar to deny a habeas claim, it only receives AEDPA deference for an alternative holding that actually reaches and resolves the merits of the claim."). On the other hand, if the state court rules in the alternative that the claim was "unpreserved, and, in any event, without merit," the merits adjudication requirement is satisfied. Zarvela v. Artuz, 364 F.3d 415, 417 (2d Cir. 2004) (per curiam).

Multiple state-court decisions and summary rulings

Before applying AEDPA's standards, the federal court must identify the state court decision that is appropriate for review. Often, this will require application of the "look through" doctrine. This doctrine originated from Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), a procedural default case. In *Ylst,* the Supreme Court held that where a petitioner files in a lower state court, rather than proceeding straight to the state's highest court, and where the "last reasoned decision" before the petition reaches the state's highest court "explicitly imposes a procedural default," an unexplained denial from the state's highest court presumptively does not represent a decision on the merits that lifts that default. 501 U.S. at 803. The term "unexplained" is defined as "an order whose text or accompanying opinion does not disclose the reason for the judgment." 501 U.S. at 802. "The essence of unexplained orders is that they say nothing." 501 U.S. at 804; *see also* Brumfield v. Cain, 135 S. Ct. 2269, 2276, 192 L. Ed. 2d 356 (2015) (applying the *Ylst* "look through" doctrine to evaluate the reasonableness of a state trial court's fact finding under § 2254(d)(2)).

The presumption associated with the look-through doctrine can be rebutted by strong evidence. "It might be shown, for example, that even though the last reasoned state-court opinion had relied upon a procedural default, a retroactive change in law had eliminated that ground as a basis of decision, and the court which issued the later unexplained order had directed extensive briefing limited to the merits of the federal claim. Or it might be shown that, even though the last reasoned state-court opinion had relied upon a federal ground, the later appeal to the court that issued the unexplained order was plainly out of time, and that the latter court did not ordinarily waive such a procedural default without saying so." Ylst v. Nunnemaker, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); *see also* Hull v. Freeman, 991 F.2d 86, 90–91 (3d Cir. 1993) (*Ylst* presumption rebutted where petitioner's appeal was filed three months after the 30-day time limit for appealing had expired and the state supreme court would not ordinarily waive the timeliness requirement without saying so); Sawyers v. Collins, 986 F.2d 1493,

1499–1500 (5th Cir. 1993) (*Ylst* presumption rebutted were state appellate court had ruled, during week prior to its decision, that the state procedural violation would not bar review in a similar case, and therefore was evidently affirming only on the federal constitutional law claim). Lower federal courts have universally extended *Ylst*'s "look through" principle beyond its procedural default moorings to include determining the basis for a state-court's merits adjudication. *See, e.g.,* Mark v. Ault, 498 F.3d 775, 783 (8th Cir. 2007); Joseph v. Coyle, 469 F.3d 441, 450, 2006 FED App. 0418P (6th Cir. 2006); Sweet v. Secretary, Dept. of Corrections, 467 F.3d 1311, 1317 (11th Cir. 2006); Barker v. Fleming, 423 F.3d 1085, 1092–93 (9th Cir. 2005).

One of the few cases where the *Ylst* presumption was found to have been rebutted is Kernan v. Hinojosa, 136 S. Ct. 1603, 194 L. Ed. 2d 701 (2016) (per curiam). In 2003, Hinojosa pleaded guilty to robbery and related crimes and was sentenced to a prison term of 16 years. In 2009, California prison officials "validated" him as a prison-gang associate and placed him in a secured housing unit. At the time Hinojosa pleaded guilty in 2003, California law allowed prisoners placed in a secured housing unit solely by virtue of their prison-gang affiliation to continue to accrue good-time credits. In 2010, however, the California Legislature amended the law so that prison-gang associates placed in a secured housing unit could no longer earn future good-time credits, although they could keep any credits they had already earned. Hinojosa sought state habeas relief on the ground that applying the law to him violated the Federal Constitution's prohibition of ex post facto laws. The California Superior Court denied the claim "on the grounds petitioner has not sought review of his claim of error in the proper judicial venue." Hinojosa then sought relief in the state intermediate court of appeal, which summarily denied his petition. Instead of appealing that decision, Hinojosa filed an original writ petition in the California Supreme Court, which also summarily denied relief. Hinojosa then sought federal habeas relief. The district court denied the ex post facto claim under AEDPA's deferential review standard. See 28 U.S.C.A. § 2254(d)(1).

The Ninth Circuit reversed Hinojosa v. Davey, 803 F.3d 412 (9th Cir. 2015). At the outset, the circuit court held that there was no state-court merits adjudication entitled to deference under AEDPA. The circuit court reached this conclusion by "looking through" the Supreme Court of California's summary denial to the last reasoned decision adjudicating Hinojosa's claim: the California Superior Court's dismissal for improper venue. It was undisputed that the California Superior Court's decision was on a procedural ground, and not on the merits. The circuit court rejected the State's argument that it was required to presume

the California Supreme Court decided petitioner's ex post facto claim on the merits when it summarily denied his petition. The circuit court stated:

> . . . [The State's] argument fails to comprehend the relationship between [Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)], whereby we must presume state courts decide federal claims on the merits, see 562 U.S. at 99–100, 131 S.Ct. 770, and *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), which directs us to consider the last reasoned decision of the state courts, see *id.* at 806, 111 S.Ct. 2590. Where the last reasoned state-court decision rejects a federal claim solely on procedural grounds, any presumption that a subsequent summary denial decided the claim on the merits is rebutted.

Hinojosa, 803 F.3d at 419. Having concluded there was no merits adjudication, the circuit court reviewed Hinojosa's claim de novo and granted habeas relief.

The Supreme Court reversed in a 6–2 per curiam decision, finding the *Ylst* presumption "amply refuted." The Court explained:

> . . . Improper venue could not possibly have been a ground for the high court's summary denial of Hinojosa's claim. There is only one Supreme Court of California—and thus only one venue in which Hinojosa could have sought an original writ of habeas corpus in that court. Under these circumstances, it cannot be that the State Supreme Court's denial "rest[ed] upon the same ground" as the Superior Court's. [*Ylst*, 501 U.S.] at 803. It quite obviously rested upon some different ground. *Ylst*'s "look-through" approach is therefore inapplicable.

Hinojosa, 136 S.Ct. at 1606. Therefore, the Court concluded that the Ninth Circuit should have reviewed Hinojosa's ex post facto claim "through AEDPA's deferential lens." 136 S.Ct. at 1606. The Court declined to express a view on the merits of the claim.

Justice Sotomayor, joined by Justice Ginsburg, dissented. They argued that the majority's reason—that the California Supreme Court could not have denied the petition for "improper venue" because there is only one California Supreme Court—was "a straw man, and a poorly constructed one at that." Hinojosa, 136 S.Ct. at 1607 (Sotomayor, J., dissenting). The dissenters stated that while "[o]bviously the California Supreme Court did not deny Hinojosa's petition because he filed it in the wrong State Supreme Court, . . . it easily could have denied his petition because it agreed with the Superior Court's conclusion that he filed the first petition in the wrong county." 136 S.Ct. at 1607. The dissenters maintained this possibility was "even more likely in light of California's atypical habeas rules, which treat an original habeas petition to the California Supreme Court as the com-

monplace method for seeking review of a lower court's order." 136 S.Ct. at 1607 "Contrary to the majority's characterization," the dissent asserted, "Hinojosa did not file his petition '[i]nstead of appealing' the lower court's denial—his petition was itself his appeal." 136 S.Ct. at 1607 (quoting the majority and citing Carey v. Saffold, 536 U.S. 214, 225, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (calling an original habeas petition and the alternative "petition for hearing" "interchangeable" methods of appeal, "with neither option bringing adverse consequences to the petitioner")).

It is important to recognize that critical to the outcome in the case was that Hinojosa had filed an original writ petition in the California Supreme Court, as opposed to appealing the lower court's decision by filing a petition for discretionary review. Presumably, had Hinojosa filed a petition for discretionary review and the California Supreme Court summarily denied relief on the merits, it would have been presumed that the California Supreme Court denied relief on the same ground articulated by the lower court: improper venue. The decision sheds no light on the ongoing split among the circuit courts over whether post-Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), a federal court reviewing a summary state appellate court decision under § 2254 looks through the summary decision to the last reasoned state-court decision, or whether instead it looks solely to the outcome in the state appellate court.

One of the most common examples of where the "look through" presumption applies is where a lower state court issues a reasoned decision and a higher state court summarily denies the claims on the merits. As discussed elsewhere, the Supreme Court in Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), held that a summary state court decision—one unaccompanied by an explanation—is presumed to have been on the merits and, therefore, afforded § 2254(d) deference. (*See, supra*, § 3:9.) But it is undecided whether a federal habeas court may "look through" a higher state-court's summary merits denial to the reasoning of an *explained* lower state-court decision. Prior to *Richter*, circuit courts applied Ylst v. Nunnemaker, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), to "look through" summary decisions by state appellate courts—reviewing, under § 2254(d), "the last reasoned decision" by a state court. But post-*Richter*, there is disagreement over whether, where there is a reasoned decision by a lower state court, a federal habeas court may "look through" the higher state court's summary denial to the lower state court's reasoning, or instead it should evaluate all the hypothetical reasons that could have supported the higher state court's unexplained decision.

So far, two justices have gone on record as endorsing the former view. Justices Ginsburg and Kagan, in concurring in the

denial of certiorari in Hittson v. Chatman, 135 S. Ct. 2126, 2127–28, 192 L. Ed. 2d 887 (2015) (mem.), stated that the Eleventh Circuit erred in declining to apply the *Ylst* "look through" presumption to the Georgia Supreme Court's unexplained denial of a certificate of probable cause to appeal. These justices opined that *Richter* governs only where "there was no reasoned decision by a lower court" and that *Ylst* provides the rule where there is one.

Most circuits have continued to apply the *Ylst* "look through" presumption to summary appellate affirmances without discussing the possibility that *Richter* invalidated that approach. *See, e.g.,* Woodfox v. Cain, 772 F.3d 358, 369–70 (5th Cir. 2014). And a few circuits have expressly affirmed the *Ylst* presumption to "look through" an on-the-merits adjudication of a higher state court and then grant habeas relief. *See, e.g.,* Grueninger v. Director, Virginia Dept. of Corrections, 813 F.3d 517, 525–26 (4th Cir. 2016) ("When a state appellate court summarily affirms a reasoned lower-court decision, or refuses a petition for review, then under *Ylst*, a federal habeas court is to 'look through' the unexplained affirmance to examine the 'last reasoned decision' on the claim, assuming that the summary appellate decision rests on the same ground."); Woolley v. Rednour, 702 F.3d 411, 422 (7th Cir. 2012) (explaining that *Richter*, "[b]y its terms" is limited to cases " '[w]here a state court's decision is unaccompanied by an explanation' ") (quoting *Richter*, 562 U.S. at 98, 131 S.Ct. 770); Cannedy v. Adams, 706 F.3d 1148, 1157 (9th Cir. 2013), amended on denial of reh'g, 733 F.3d 794 (9th Cir. 2013) ("it does not follow from *Richter* that, when there is a reasoned decision by a lower state court, a federal habeas court may no longer 'look through' a higher state court's summary denial to the reasoning of the lower state court."); *see also* 706 F.3d at 1159 ("*Richter* does not change our practice of 'looking through' summary denials to the last reasoned decision—whether those denials are on the merits or denials of discretionary review.") (footnote omitted); *accord* Ayala v. Chappell, 829 F.3d 1081, 1095 (9th Cir. 2016) ("for claims addressed both in a summary denial and a reasoned opinion, we 'look through' the summary denial to review the reasoned decision").

The Eleventh Circuit, on the other hand, has concluded that the *Ylst* "look through" presumption does not apply where the last state court decided the claim on the merits, even in cases of summary or unexplained denials:

> The Supreme Court has never held that a federal court must "look through" the last adjudication on the merits and examine the specific reasoning used by the lower state court. The phrase "look through" from *Ylst* has come to stand for the routine practice of "looking through" denials of appellate review that are *not on the*

> *merits* to locate the proper state court adjudication on the merits for purposes of section 2254(d).

Wilson v. Warden, Georgia Diagnostic Prison, 834 F.3d 1227, 1240 (11th Cir. 2016) (en banc) (emphasis added); *see also* Cannedy v. Adams, 706 F.3d 1148, 1166–67 (9th Cir. 2013), amended on denial of reh'g, 733 F.3d 794 (9th Cir. 2013) (arguing that after *Richter*, a federal habeas court should not "look through" a state high court's summary denial of a habeas petition to evaluate the reasoning that a lower court offered for denying a claim, but instead should evaluate all the hypothetical reasons that could have supported the higher state court's ruling). *But see* Wilson, 834 F.3d at 1242 (11th Cir. 2016) (en banc) (Jordan, J., dissenting) (opining that *Richter* should be limited to situations where there is no reasoned decision by any state court).

Under this method, a federal court reviewing a state court decision under § 2254(d) does not "look through" a state appellate court summary decision to "the last reasoned" state-court decision, but instead reviews the record "to see whether the outcome of the state court proceedings permits a grant of habeas relief." Hittson v. GDCP Warden, 759 F.3d 1210, 1232 n.25 (11th Cir. 2014). The court in *Hittson* explained that in light of the Supreme Court's directive in Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)—"[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief"—state appellate courts' "summary affirmances warrant deference under AEDPA because the summary nature of a state court's decision does not lessen the deference that it is due." Hittson, 759 F.3d at 1232 n.25 (internal quotation marks omitted). The petitioner in *Hittson* had filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. The Superior Court denied the claim on its merits in a reasoned decision. Petitioner then sought a certificate of probable cause from the Georgia Supreme Court. The Georgia high court concluded that these arguments lacked arguable merit and summarily denied petitioner's application. Thereafter, petitioner proceeded to federal court seeking federal habeas corpus relief pursuant to 28 U.S.C.A. § 2254. The Eleventh Circuit ruled that it would not review the reasoning given in the Butts County Superior Court decision, but rather would "review the decision of the Georgia Supreme Court, in accordance with *Richter*'s instructions." Hittson v. GDCP Warden, 759 F.3d 1210, 1232 n.25 (11th Cir. 2014).

The Supreme Court appears poised to resolve this conflict in Wilson v. Sellers, ___ S.Ct. ___, 2017 WL 737820 (Feb. 27, 2017) (granting certiorari).

Multiple state-court reasoned decisions.

When more than one state court has adjudicated a claim in a reasoned decision, the federal court turns to the last reasoned decision. A federal court generally will not consider the decisions of multiple state courts. Barker v. Fleming, 423 F.3d 1085 (9th Cir. 2005); *accord* Jensen v. Clements, 800 F.3d 892, 900–01 (7th Cir. 2015) (state appellate court's ruling that any Confrontation Clause violation was harmless was the dispositive merits adjudication for purposes of § 2254(d)(1), and not the trial court's earlier ruling that there was no violation to the right to confrontation; the court rejected the government's argument that the state appellate court's ruling was not a merits adjudication because that court had rejected the confrontation claim solely on harmless error grounds, reasoning that this argument was foreclosed by the Supreme Court's ruling in Davis v. Ayala, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015), that a state court's ruling that any federal error was harmless beyond a reasonable doubt "undoubtedly" constitutes an adjudication on the merits).

However, where the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous decision, it is acceptable for the federal court to look at both state court decisions to fully ascertain the reasoning of the last decision. Norris v. Morgan, 622 F.3d 1276, 1285 (9th Cir. 2010); Barker v. Fleming, 423 F.3d 1085 (9th Cir. 2005); *see* Weaver v. Palmateer, 455 F.3d 958, 963 n.6 (9th Cir. 2006); Lambert v. Blodgett, 393 F.3d 943, 970 (9th Cir. 2004); Lewis v. Lewis, 321 F.3d 824, 829 (9th Cir. 2003). Also, where successive state court decisions decided separate issues, such as the separate prongs of a *Strickland* inquiry, each individual state court decision constitutes a merits adjudication entitled to § 2254(d) deference. Collins v. Secretary of Pennsylvania Dept. of Corrections, 742 F.3d 528, 545–46 n.12 (3d Cir. 2014) (lower state court's ruling on ineffectiveness claim constituted an adjudication on the merits, even though the state supreme court on appeal of that decision only addressed a narrow aspect of the ineffectiveness claim and did not consider the prejudice prong); Atkins v. Zenk, 667 F.3d 939, 944 (7th Cir. 2012) (Deferential review applied to both *Strickland* prongs—deficiency and prejudice—where the trial court ruled on both prongs, even though the state appellate court addressed only one of the two prongs; "Because both prongs have been addressed by Indiana state courts, in one form or another, the deferential standard of review set out in § 2254(d) applies to both."); Hammond v. Hall, 586 F.3d 1289 (11th Cir. 2009) (holding that, when "a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA defer-

ence"); Bond v. Beard, 539 F.3d 256, 269 (3d Cir. 2008), as amended, (Oct. 17, 2008) (reviewing the Pennsylvania Supreme Court's decision for the first prong of the *Strickland* analysis, but reviewing the trial court's decision for *Strickland*'s second prong). *But see* Thomas v. Clements, 789 F.3d 760, 766–76 (7th Cir. 2015) (lower state court's ruling on the performance prong of *Strickland* ineffectiveness claim did not constitute a merits adjudication under AEDPA where the reviewing state appellate court, which issued the last reasoned decision, only addressed the *Strickland* prejudice prong); Woolley v. Rednour, 702 F.3d 411, 421–22 (7th Cir. 2012) (applying de novo review where the opinion of the state appellate court was "silent on defense counsel's performance," even though the state lower court had expressly ruled on both prongs of the *Strickland* test); Barker v. Fleming, 423 F.3d 1085 (9th Cir. 2005) (holding that when more than one state court has adjudicated a claim in a reasoned decision, the federal court turns to the last reasoned decision, and generally will not consider the decisions of multiple state courts).

One effect of looking to the last reasoned decision is that if a state court errs in analyzing the federal claim, but the last state court to consider the claim in a reasoned decision applies the correct analysis, the latter state court decision controls for purposes of applying deference under § 2254(d)(1). *See, e.g.,* Smulls v. Roper, 535 F.3d 853, 862 (8th Cir. 2008) ("Even if the trial court made a legal error, the error does not support habeas relief if the state appellate court correctly applied federal law."); Wood v. Quarterman, 491 F.3d 196, 202 (5th Cir. 2007) ("Although the trial court did not base its decision on the untimeliness of Wood's motion [and indeed appeared to have denied the motion for impermissible reasons], the last reasoned state court decision—the decision of the state habeas court—did") (footnote omitted); Boyd v. Newland, 467 F.3d 1139, 1144 (9th Cir. 2006) (giving deference to a California Court of Appeals decision that correctly applied *Batson* even though the trial court had applied a higher state court standard for making out a prima facie *Batson* claim); *see* Stenhouse v. Hobbs, 631 F.3d 888, 894–95 (8th Cir. 2011) (declining to decide whether, "if the reasoning of the state appellate court cannot pass muster under AEDPA, the rationale of the state trial court also merits deference under § 2254(d)").

No adversarial proceeding requirement

There is no requirement that the adjudication on the merits occur at an adversarial proceeding. Browning v. Trammell, 717 F.3d 1092, 1102–08 (10th Cir. 2013). In *Browning*, petitioner alleged that the prosecutor's refusal to provide him with a victim's psychiatric reports violated his rights under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). He contended

that there was no adjudication on the merits with respect to the *Brady* claim because the reports were reviewed by the trial court in camera, and defense counsel was thereby excluded from weighing in on what should be disclosed.

The Tenth Circuit rejected petitioner's argument, noting that petitioner failed to identify any authority establishing that "adjudicated on the merits" necessarily requires an adversarial proceeding. The court recognized that the Supreme Court had stated that "[a] judgment is normally said to have been rendered on the merits only if it was delivered after the court . . . heard and evaluated the evidence and the parties' substantive arguments." Johnson v. Williams, — U.S. —, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105 (2013) (internal quotation marks omitted). The Tenth Circuit stated that although this is what it "normally" means to adjudicate a claim in the American legal system, this case did not present "a normal situation."

Waiver

There is authority for the proposition that a prisoner may waive the argument that a state court decision does not constitute a merits adjudication for purposes of AEDPA. *See* McBride v. Superintendent, SCI Houtzdale, 687 F.3d 92, 100 n.10 (3d Cir. 2012); Childers v. Floyd, 642 F.3d 953, 967–71 (11th Cir. 2011) (en banc), certiorari granted, judgment vacated, and case remanded on other grounds, ____S.Ct. ____, 2013 WL 656034 (U.S. 2013) (suggesting that a petitioner may waive the question of whether the state court decision constituted an "adjudication on the merits," stating: "We note only that the Supreme Court has suggested that habeas petitioners can waive this issue," citing Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1418 n.2, 173 L. Ed. 2d 251 (2009) ("[B]ecause Mirzayance has not argued that § 2254(d) is entirely inapplicable to his claim or that the state court failed to reach an adjudication on the merits, we initially evaluate his claim through the deferential lens of § 2254(d).").

§ 3:8 A "claim"

Section 2254(d)(1) pertains to any *claim* in the habeas petition that was adjudicated on the merits. The Supreme Court has stated that "a 'claim' . . . is an asserted federal basis for relief from a state court's judgment of conviction." Gonzalez v. Crosby, 545 U.S. 524, 530, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005); Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002) (a "claim" is one that which, if granted, would provide the petitioner entitlement to relief on the merits).

A state court adjudication of something other than a "claim,"

as that term is used in § 2254(d)(1), is not entitled to deferential review under AEDPA. In Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008), for example, the state court held that the defendant had validly waived his right to collateral and appellate review. In federal habeas corpus proceedings, the government argued that the state court's adjudication that petitioner's waiver was valid was entitled to deferential review under § 2254(d)(1). The Third Circuit disagreed. The court explained that a "claim" is that which, if granted, provides entitlement to relief on the merits. Thus, the court concluded, "[b]ecause resolution of the question as to whether Fahy's waiver was valid will not entitle him to relief on the merits of his habeas petition, the waiver question is not a 'claim.' " Therefore, the state court's determination that the waiver was valid is not entitled to deference under § 2254(d)." 516 F.3d at 180.

§ 3:9 Unexplained state court decisions

There is no requirement that the state court decision be accompanied by an explanation in order for the decision to be entitled to deferential review under § 2254(d). As the Supreme Court recently explained in Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011):

> By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a "decision," which resulted from an "adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

Richter, 131 S. Ct. at 784.

Significantly, the Supreme Court added, in the case of an unexplained decision "a habeas court must determine what arguments or theories supported or . . . *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Richter, 131 S. Ct. at 786 (emphasis added). The Ninth

Circuit applied this principle in Haney v. Adams, 641 F.3d 1168 (9th Cir. 2011), cert. denied, 132 S. Ct. 551, 181 L. Ed. 2d 411 (2011). There, the prosecutor at trial used peremptory challenges to remove nine potential jurors. Petitioner did not object at trial and did not raise a *Batson* claim on direct appeal. Later, petitioner filed a habeas petition in the state supreme court asserting a *Batson* claim. The court summarily denied the claim on the merits. The Ninth Circuit ruled that, although the state court did not explicitly deny the *Batson* claim on the ground that petitioner failed to timely object, it was sufficient that it "may have" done so. The court explained that because there was no reasoned state court opinion to review, petitioner was required to show that "there was no reasonable basis" for the state court's ruling. (Quoting Cullen v. Pinholster, 131 S. Ct. 1388, 1402, 179 L. Ed. 2d 557 (2011)). Under this standard, "[a] habeas court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Pinholster,* 131 S.Ct. at 1402 (alterations and citation omitted). Applying this standard, the Ninth Circuit concluded that "the state court *may* have denied [petitioner's] *Batson* claim because he failed to object to the use of peremptory challenges during voir dire or at any point during the trial." Haney, 641 F.3d at 1170–73 (emphasis added).

The Supreme Court in *Richter* rejected the argument that § 2254(d) was inapplicable because the California Supreme Court in that case had not said it was adjudicating the claim "on the merits," stating: "The state court did not say it was denying the claim for any other reason. When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." Richter, 131 S. Ct. at 784–85 (citing Harris v. Reed, 489 U.S. 255, 265, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis)).

Finally, the *Richter* Court said that "the presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." Richter, 131 S. Ct. at 784–85 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)). Richter, however, had not made this showing. Although he "mention[ed] the theoretical possibility that the members of the California Supreme Court may not have agreed on the reasons for denying his petition," the Court found this was "pure speculation." The Court found the argument that

a "mere possibility of a lack of agreement prevents any attribution of reasons to the state court's decision" was "foreclosed by precedent." *Richter*, 131 S. Ct. at 785 (citing *Ylst*, 501 U.S. at 803); *see also* McClellan v. Rapelje, 703 F.3d 344, 348–51 (6th Cir. 2013) (presumption that state court of appeals adjudicated petition on the merits was overcome by evidence that the appellate court did not have the lower state court record before it when it rendered its decision).

Lower federal courts have ruled that where the state court does not provide a reasoned decision, the federal court must conduct an independent review of the record to determine whether the state court erred in its application of controlling federal law, while continuing to apply § 2254(d)(1)'s deferential review standard. *See, e.g.,* Cornwell v. Bradshaw, 559 F.3d 398, 412–13 (6th Cir. 2009), cert. denied, 130 S. Ct. 1141, 175 L. Ed. 2d 978 (2010); Fullwood v. Lee, 290 F.3d 663, 677, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002); Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir. 2002); Pickens v. Gibson, 206 F.3d 988, 997 (10th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177–78 (10th Cir. 1999). The reason for this is clear. Where the state court provides a reasoned decision, the federal court is entitled to rely on the state court's recitation of facts. *See* Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009), cert. denied, 130 S. Ct. 1086, 175 L. Ed. 2d 908 (2010) ("We rely on the state appellate court's decision for our summary of the facts of the crime"); Moses v. Payne, 555 F.3d 742, 746 (9th Cir. 2009) ("For a summary of the preliminary facts, we rely on the state appellate court's decision").

But where no factual account is provided by a state court, the federal court must itself review the state court record to ascertain the relevant facts in order to determine whether the state court's merits adjudication was objectively reasonable under § 2254(d)(1). Greene v. Lambert, 288 F.3d 1081, 1088 (9th Cir. 2002) ("we held that in such a case a review of the record is the only means of deciding whether the state court's decision was objectively reasonable").

§ 3:10 State court denies state-law claim without explicitly addressing related federal-law claim

It is not uncommon for state prisoners to allege both state and federal claims based on the same challenged event. For instance, the exclusion of evidence may give rise to a claim that the trial court violated a state evidentiary rule as well as the federal Due Process Clause. It is not uncommon for state courts in their opinions deciding these claims to expressly address only the state law claim without mentioning the federal claim. A question that

arises in federal habeas proceedings is whether the absence of any discussion of the federal claim by the state court in its decision rejecting the state-law claim signifies that the state court did not adjudicate the federal claim on the merits. This is significant in the post-AEDPA era because the deferential review standard of 28 U.S.C.A. § 2254(d)(1), by its terms, only applies if the state court adjudicated the federal claim on the merits. *See generally* Johnson v. Williams, ___ S.Ct. ___, 2013 WL 610199 (2013).

Before turning to that question, two different scenarios should be distinguished. The first is where the state court summarily denied relief of both of the petitioner's state and federal claims. In this circumstance, it is presumed that the state court adjudicated both claims on the merits. Harrington v. Richter, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *see, supra*, § 3:9. The second circumstance is where the state court's adjudication of the state-law claim necessarily entailed adjudication of the federal claim. Where "the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits." Johnson v. Williams, ___ S.Ct. ___, 2013 WL 610199 (2013); *see also* O'Laughlin v. O'Brien, 568 F.3d 287, 299 n.15 (1st Cir. 2009), cert. denied, 130 S. Ct. 1142, 175 L. Ed. 2d 991 (2010) (a federal habeas court may "infer that the federal claim was considered if the state court rejects a counterpart state claim and then cites to a case holding that the federal constitution provides no greater protection."); *accord* White v. Coplan, 399 F.3d 18, 23, 66 Fed. R. Evid. Serv. 626 (1st Cir. 2005). And, of course, where the state court applies a state standard that is stricter than the controlling federal standard, the merits adjudication requirement is satisfied and the § 2254(d) deference standard applies. *See* Early v. Packer, 537 U.S. 3, 7, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) ("The Ninth Circuit's disapproval of the [state] Court of Appeal's failure to cite this Court's cases is especially puzzling since the state court cited instead decisions from the California Supreme Court that impose even greater restrictions for the avoidance of potentially coercive jury instructions").

For example, in Zuluaga v. Spencer, 585 F.3d 27 (1st Cir. 2009), the state court's ruling was entitled to deferential review under § 2254(d) with respect to petitioner's claim that the prosecutor violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), even though it was not clear from that ruling whether the state court had applied the *Brady* test or a state law standard. The First Circuit held that the state standard was more generous to petitioner than *Brady* and, "[a]lthough short on citation, the state court's holding squarely addressed the merits