Chapter 29

Legal and Mixed Questions of Law and Fact

§ 29:1 Chapter summary

The enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 radically changed the way federal courts review state court merits decisions. Previously, a state court's decision on a question of law or mixed question of law and fact was reviewed de novo—the state court's adjudication received no deference. But under AEDPA, state prisoners are barred from obtaining habeas corpus relief unless they demonstrate that the state court's adjudication of their claims "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."[1]

Analyzing a state prisoner's claim begins with a determination of whether the provisions of AEDPA, § 2254(d) of title 28 in par-

---

[Section 29:1]

[1]28 U.S.C.A. § 2254(d).

§ 29:5 The "adjudication" requirement—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."[1]

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,[2] 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).[3]

§ 29:6 The "adjudication" requirement—On the merits

A state court adjudicates a petitioner's 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 constitutional claim advanced, rather than on a procedural or other rule precluding state court review of the merits.[1] When the state court decision is ambiguous, and so it is "a close question" on whether the state

---

judgment vacated on other grounds, 133 S. Ct. 1452, 185 L. Ed. 2d 358 (2013) and opinion reinstated, 736 F.3d 1331 (11th Cir. 2013) (en banc) (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).").

[Section 29:5]

[1]*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).

[2]*Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008).

[3]*Fahy v. Horn*, 516 F.3d 169, 180 (3d Cir. 2008).

[Section 29:6]

[1]*Wilson v. Workman*, 577 F.3d 1284, 1308 (10th Cir. 2009) (" 'Adjudicated

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.[2] Generally speaking, there is no merits adjudication for purposes of § 2254(d) if the state court overlooked or disregarded the federal claim.[3]

In the absence of a state-court merits adjudication, the federal claim is reviewed *de novo* by the federal court in habeas corpus proceedings.[4] But the fact that the state court misread or misapplied its own precedent does not make it any less of a merits adjudication.[5]

---

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) (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) ("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").

[2]*Runningeagle v. Ryan*, 686 F.3d 758, 768–69 (9th Cir. 2012) (citing *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 784–85, 178 L. Ed. 2d 624 (2011)).

[3]*See Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013). This will not be the case, however, if the federal claim was considered in a different context, *see, infra*, § 29:11, or was subsumed within a claim adjudicated on the merits by the state court, *see, infra*, § 29:8.

[4]*See, e.g., McKenzie v. Smith*, 326 F.3d 721, 727, 2003 FED App. 0119P (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).

[5]*Malinowski v. Smith*, 509 F.3d 328 (7th Cir. 2007).

§ 29:7 The "adjudication" requirement—On the merits—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 in *Harrington v. Richter*[1] recently explained:

> 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.[2]

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."[3]

The Court rejected the argument that deference was not ap-

[Section 29:7]

[1]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

[2]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011). Even before *Richter*, it was the generally accepted view that summary state court adjudications were entitled to deference under § 2254(d). *See, e.g., Luna v. Cambra*, 306 F.3d 954, 960, 59 Fed. R. Evid. Serv. 1408 (9th Cir. 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1254 (11th Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310–12 (2d Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 158–62 (4th Cir. 2000) (en banc); *Harris v. Stovall*, 212 F.3d 940, 943, 2000 FED App. 0169P (6th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999); *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999).

[3]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011) (emphasis added). The Ninth Circuit applied this principle in *Haney v. Adams*, 641 F.3d 1168 (9th Cir. 2011). There, the prosecutor at trial used

propriate under § 2254(d) when state courts issue summary rulings because it would encourage state courts to withhold explanations for their decisions. The Court stated that the manner in which state courts write opinions is "influenced by considerations other than avoiding scrutiny by collateral attack in federal court."[4] Moreover, the Court added, "requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition."

The Court also 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.[5]

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."[6] Richter, however, did not make this showing. Although he "mention[ed] the theoretical possibility that the members of the California Supreme

---

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. (*Cullen v. Pinholster*, 563 U.S. 170, 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).

[4]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011).

[5]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 784–85, 178 L. Ed. 2d 624 (2011) (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)).

[6]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 784–85, 178 L. Ed. 2d 624 (2011) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)).

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."[7]

Numerous circuit courts have concluded 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.[8] 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.[9] But where no factual account is provided by a state court, the federal court must itself

---

[7]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011).

[8]*Cornwell v. Bradshaw*, 559 F.3d 398, 412–13 (6th Cir. 2009) ("Because the Ohio Supreme Court's order was unexplained, Cornwell argues that AEDPA deference does not apply. He is correct. Instead, modified AEDPA deference applies. Where the state court disposes of a constitutional claim but fails to articulate its analysis, this court conducts an independent review of the record and applicable law to determine whether, under the AEDPA standard, the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. Such a review is not *de novo* but is deferential because we cannot grant relief unless the state court's result contradicts the strictures of AEDPA[.]") (internal quotation marks and citation omitted); *Fullwood v. Lee*, 290 F.3d 663, 677, 59 Fed. R. Evid. Serv. 115 (4th Cir. 2002) ("In the absence of any reasoning from the state court . . . we must conduct an independent review of the record and the applicable law to make the 'contrary to' or 'unreasonable application' determinations. Because we have no clear indication of the court's reasoning here, we will independently review the record and the law to make our 'contrary to' or 'unreasonable application' determinations[.]"); Greene v. Lambert, 288 F.3d 1081, 1089 (9th Cir. 2002) (federal court must independently review the record "where, as here, the state court gives no reasoned explanation for its decision on a petitioner's federal claim"); *Pickens v. Gibson*, 206 F.3d 988, 997 (10th Cir. 2000) ("Initially, we reject petitioner's assertion that this court need not defer to the state court's summary disposition of some of his prosecutorial misconduct claims. [W]e owe deference to the state court's result, even if its reasoning is not expressly stated. Therefore, we must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented[.]") (internal quotation marks and citation omitted); *Aycox v. Lytle*, 196 F.3d 1174, 1177–78 (10th Cir. 1999) ("we must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented").

[9]*Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009) ("We rely on the state appellate court's decision for our summary of the facts of the crime[.]");

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).[10]

The Sixth Circuit held that the presumption that the state court of appeals adjudicated the 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.[11] Petitioner filed a habeas corpus petition in a Michigan trial court alleging that he was denied the effective assistance of counsel. The trial court dismissed the habeas petition on procedural default grounds. Petitioner then sought leave to appeal. The Michigan Court of Appeals denied petitioner's application "for lack of merit in the grounds presented." The State argued in federal habeas proceedings that under *Harrington v. Richter*,[12] the Michigan Court of Appeals' ruling—"for lack of merits in the grounds presented"—constituted a merits adjudication of the ineffective-assistance-of-counsel claim that barred the presentation of new evidence in the federal proceeding.

The Sixth Circuit disagreed in a 2-1 decision. The majority recognized that, absent some indication or Michigan procedural principle to the contrary, an unexplained summary order is presumed to be an adjudication on the merits for AEDPA purposes. But here, the majority concluded, there was reason to think some other explanation for the state appellate court's decision was more likely. The majority provided the following explanation. Two state courts reviewed petitioner's postconviction review petition. The first, the Michigan trial court, explicitly denied the petition on procedural-default grounds. The second, the Michigan Court of Appeals, "did not have the lower court record when it rendered its decision," as conceded by the State. The majority concluded that "[t]he only reasonable inference to be drawn from the plain language of the documents and the State's concession is that the Michigan Court of Appeals could not have denied [the] petition on the merits of the ineffectiveness claim." Stated somewhat differently, petitioner "provided sufficient evidence to rebut the presumption and demonstrate that, in this instance, the Michigan Court of Appeals in using the words 'for lack of merits in the grounds presented' did not reach the merits

---

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[.]").

[10]*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").

[11]*McClellan v. Rapelje*, 703 F.3d 344, 348–51 (6th Cir. 2013) (maj. opn.).

[12]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

of the Sixth Amendment ineffectiveness claim." Instead, the record indicated that the Michigan Court of Appeals declined to reach the merits because they found the ineffectiveness claim procedurally defaulted. Because there was no merits adjudication of the ineffectiveness claim, the majority ruled that petitioner was not barred by *Pinholster* from presenting additional evidence in the federal proceeding.[13]

The dissenting judge rejected the premise that the state appellate judges did not have access to or review the trial court record. The dissent recognized that the State represented it had contacted the Chief Clerk of the Michigan Court of Appeals and he had stated that the docket events in the case revealed that the panel deciding the appeal did not have the lower court record when it rendered its decision. But the dissenting judge argued that "[t]he fact that a court employee did not docket receipt of the transcripts does not necessarily mean the judges did not review them." Indeed, the dissent pointed out, the Chief Clerk acknowledged the uncertainty about what the judges actually review when deciding a case precisely because "judges do not record their deliberative process in docket entries."

Moreover, the dissenting judge stated, it was "not unheard of for an appellate court to access lower court records even when those records are not on the court of appeals or lower court docket." The bottom-line, the dissenting judge concluded, was that there really was

> no way of knowing what the Michigan Court of Appeals judges were considering when they denied [petitioner's] application. This is precisely the kind of "theoretical possibility" and "pure speculation" the Supreme Court admonished habeas courts to avoid in an effort to circumvent the deference owed to state court summary orders. *Richter*, 131 S.Ct. at 785. With this in mind, surely, the *Richter* Court would not agree with the majority's reliance on the Chief Clerk's assertions as a basis for concluding that the state court of appeals decision was not on the merits.

The dissenting judge also believed that the Michigan Court of Appeals had the merits of petitioner's ineffective assistance claim "front and center." In addition to the underlying facts of the shooting and the testimony at trial set forth in petitioner's application, the Michigan Court of Appeals was able to consider the testimony that petitioner claimed was so crucial to his ineffective-assistance-of-counsel claim.[14]

---

[13]*McClellan v. Rapelje*, 703 F.3d 344, 348–51 (6th Cir. 2013) (maj. opn.).

[14]*McClellan v. Rapelje*, 703 F.3d 344, 352–56 (6th Cir. 2013) (McKeague, J., dissenting).

§ 29:8 The "adjudication" requirement—On the merits—State court denies state-law claim without explicitly addressing related federal-law claim

It is not uncommon for state prisoners to allege both a state-law and federal constitutional violation arising from a single event at trial. 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 also not uncommon for state courts in their opinions deciding these claims to explicitly address only the state law challenge 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 means 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.[1]

Before turning to that question, two different scenarios should be distinguished. The first is where the state court summarily denied relief of the petitioner's state and federal claims. In this circumstance, it is presumed that the state court adjudicated both claims on the merits.[2] The second 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."[3] And, of course, where the state court applies a state standard that is stricter than the controlling federal standard, the merits adjudication requirement

---

[Section 29:8]

[1]*See, e.g., Danner v. Motley*, 448 F.3d 372, 376, 2006 FED App. 0159P (6th Cir. 2006) (because state court denied relief solely on state law grounds, no deference under § 2254(d)(1) as to federal claim); *accord Lyell v. Renico*, 470 F.3d 1177, 1182, 2006 FED App. 0450P (6th Cir. 2006); *Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006); *Neill v. Gibson*, 278 F.3d 1044, 1053 (10th Cir. 2001); *see generally Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013).

[2]*See Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *see, supra*, § 29:7.

[3]*Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013); *see also O'Laughlin v. O'Brien*, 568 F.3d 287, 299 n.15 (1st Cir. 2009) (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).

is satisfied and the § 2254(d) deference standard applies.[4]

For example, in *Zuluaga v. Spencer*[5] 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*,[6] 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 either of a possible state constitutional claim, which encompassed any federal claim, or of petitioner's *Brady* claim directly, or both."[7] The same result obtained in *Leftwich v. Maloney*[8] where the state court rejected the petitioner's sufficiency of the evidence claim based on a series of state court precedents that, in turn, relied on a state case that had adopted the governing federal constitutional standard for sufficiency of the evidence challenges. The federal court of appeals held that the state court had "effectively answered the federal constitutional question" and, therefore, its adjudication was entitled to § 2254(d)(1) deference even though it addressed the claim "exclusively in the vocabulary of state law and precedent."[9] (On the other hand, where the state court applies a test that is comparable to, or as demanding as, the federal standard in some ways, but not others, there is no merits

---

[4]*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[.]").

[5]*Zuluaga v. Spencer*, 585 F.3d 27 (1st Cir. 2009).

[6]*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[7]*Zuluaga v. Spencer*, 585 F.3d 27, 30–31 (1st Cir. 2009).

[8]*Leftwich v. Maloney*, 532 F.3d 20 (1st Cir. 2008).

[9]*Leftwich v. Maloney*, 532 F.3d 20, 24 (1st Cir. 2008); *accord Kirwan v. Spencer*, 631 F.3d 582, 590 n.3 (1st Cir. 2011) (state standard more favorable to the defendant than the constitutional standard articulated in *Strickland*); *Maynard v. Boone*, 468 F.3d 665, 677–78 (10th Cir. 2006) (state standard applied was "in perfect harmony" with controlling federal standard); *Knight v. Spencer*, 447 F.3d 6, 10–11 (1st Cir. 2006) (state standard at least as favorable as federal constitutional standard); *Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005) (AEDPA deference applied where the state court analyzed the issue under its own state rule of evidence and never discussed federal law, but petitioner failed to show how the state rule differed from, or conflicted with, federal law, citing *Early v. Packer*.); *Owens v. Frank*, 394 F.3d 490, 501 n.7 (7th Cir. 2005) (state standard as demanding as federal standard); *McCambridge v. Hall*, 303 F.3d 24, 35 (1st Cir. 2002) (en banc) (if the state court relies on state law and that standard is more strict than the federal law, the federal standard is subsumed in it and *de novo* review is inappropriate); *Stephens v. Hall*, 294 F.3d 210, 214–15 (1st Cir. 2002) (functional equivalent standard).

adjudication of the federal claim entitled to § 2254(d) deferential review.)[10]

Putting these two circumstances aside, when a petitioner presents the state court with both a state law and federal constitutional claim involving the same alleged error, and the state court in its opinion thoroughly analyzes the state law claim but makes no mention of the federal claim, is there a "merits adjudication" of the federal claim for purposes of § 2254(d)(1)? It could be argued that the state court's failure to acknowledge the federal claim, while at the same time explicitly considering the state-law claim, demonstrates that the state court failed to adjudicate the federal claim on its merits. But is it reasonable to presume that the state court somehow missed the federal claim in the course of analyzing the state-law claim? And is presuming incompetence on the part of the state court consistent with the premise that state courts are equally competent as their federal counterparts in applying federal law? And what is the significance of the Supreme Court's decision in *Woodford v. Visciotti*,[11] admonishing the Ninth Circuit for its "readiness to attribute error" to the state court as "inconsistent with the presumption that state courts know and follow the law," and its pronouncement that § 2254(d)'s deferential standard for evaluating state-court rulings "demands that state court decisions be given the benefit of the doubt"?

The Supreme Court addressed this issue in *Johnson v. Williams*,[12] ruling that when a state-court opinion addresses some but not all of a defendant's claims, there is a rebuttable presumption that the state court adjudicated the unmentioned claims on the merits. The defendant in that case was convicted by a jury of first-degree murder. On direct appeal she argued that the trial court's discharge of a juror for bias violated both the Sixth Amendment and California law. The state court of appeal affirmed the conviction and discussed at length the propriety of the trial judge's decision to dismiss the juror. Although the state court of appeal quoted the definition of "impartiality" from *U.S. v. Wood*,[13] a Supreme Court case, it did not expressly acknowledge that it was deciding a Sixth Amendment issue. The Califor-

---

[10]*Wilson v. Workman*, 577 F.3d 1284, 1297 (10th Cir. 2009) (en banc) (declining to find a "merits adjudication" of the petitioner's claim where, although the state standard for an evidentiary hearing posed a lower substantive standard—the petitioner was only required to show a "strong possibility" of ineffectiveness—the petitioner was held to a higher evidentiary standard of "clear and convincing" when compared to *Strickland*'s "preponderance" standard).

[11]*Woodford v. Visciotti*, 537 U.S. 19, 23–24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam).

[12]*Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013).

[13]*U.S. v. Wood*, 299 U.S. 123, 145–146, 57 S. Ct. 177, 81 L. Ed. 78 (1936).

nia Supreme Court granted defendant's petition for review and remanded her case for further consideration in light of intervening authority—*People v. Cleveland*.[14] The state court of appeal reaffirmed its decision, but again did not expressly acknowledge that defendant had raised a federal claim. On federal habeas review, the Ninth Circuit concluded that it was "obvious" that the state court of appeal had "overlooked or disregarded" defendant's Sixth Amendment claim. It then reviewed that claim *de novo* and held that the dismissal of the juror violated the Sixth Amendment. The Supreme Court granted certiorari.

The threshold question to be decided was whether the state court of appeal had adjudicated defendant's Sixth Amendment claim on the merits for purposes of 28 U.S.C.A. § 2254(d). As the Court put it:

> This issue arises when a defendant convicted in state court attempts to raise a federal claim, either on direct appeal or in a collateral state proceeding, and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question. If this defendant then raises the same claim in a federal habeas proceeding, should the federal court regard the claim as having been adjudicated on the merits by the state court and apply deference under § 2254(d)? Or may the federal court assume that the state court simply overlooked the federal claim and proceed to adjudicate the claim de novo, the course taken by the Court of Appeals in the case at hand?

The Court concluded that the answer followed logically from its decision in *Harrington v. Richter*.[15] In *Richter*, the Court held that "when a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits."[16] The Court in *Williams* reasoned that there was "no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims."[17] The Court explained that because there is not a uniform practice among state court of appeals of separately addressing every single claim mentioned in a defendant's papers,

---

[14]*People v. Cleveland*, 25 Cal. 4th 466, 106 Cal. Rptr. 2d 313, 21 P.3d 1225 (2001).

[15]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

[16]*Johnson v. Williams*, 133 S. Ct. 1088, 1091, 185 L. Ed. 2d 105 (2013) (explaining its holding in *Richter*).

[17]*Johnson v. Williams*, 133 S. Ct. 1088, 1091, 185 L. Ed. 2d 105 (2013).

federal courts cannot assume that any unaddressed federal claim was simply overlooked. Indeed, the Court noted, there are several situations in which state courts frequently take a different course: namely, they may view a line of state precedent as fully incorporating a related federal constitutional right, they may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a federal claim, or they may simply regard a claim as too insubstantial to merit discussion.[18] Thus, the Court ruled, "because it is by no means uncommon for a state court to fail to address separately a federal claim that the court has not simply overlooked," it saw "no sound reason for failing to apply the *Richter* presumption in cases like the one now before us."[19]

Although the presumption is "a strong one," the Court held that it may be rebutted "in unusual" circumstances.[20] This may be done "either by the habeas petitioner (for the purpose of showing that the claim should be considered by the federal court *de novo*) or by the State (for the purpose of showing that the federal claim should be regarded as procedurally defaulted)."[21] These circumstances may include where the state standard is less protective than the federal standard; where "the state standard is quite different from the federal standard, and the defendant's papers made no effort to develop the basis for the federal claim"; and where "a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite . . . ."[22] Similarly, where the defendant fails to exhaust available state court remedies, "the *Richter* presumption is fully rebutted."[23]

The Court rejected the State's argument that a state court must be regarded as having adjudicated a federal claim on the merits if the state court addressed "the substance of [an] asserted trial error."[24] In the State's view, if a defendant alleged in state court that the same act violated both a provision of the Federal Constitution and a related provision of state law, and the state court in denying relief made no reference to federal law, it should be presumed that the state court adjudicated the federal claim on

[18] *Johnson v. Williams*, 133 S. Ct. 1088, 1094–95, 185 L. Ed. 2d 105 (2013).
[19] *Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).
[20] *Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).
[21] *Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).
[22] *Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).
[23] *Johnson v. Williams*, 133 S. Ct. 1088, 1096 n.3, 185 L. Ed. 2d 105 (2013).
[24] *Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).

the merits. But the Court found this argument went "too far."[25] (On the other hand, the Court recognized that "if 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.").[26]

Applying the *Richter* presumption, the Court ruled that the Ninth Circuit erred by finding that the state court of appeal overlooked defendant's Sixth Amendment claim. Several facts made this conclusion "inescapable."[27] Most important, the Court ruled, was the state court of appeal's discussion of the *Cleveland*[28] decision, a state supreme court case that discussed three federal appellate court cases addressing the Sixth Amendment implications of discharging holdout jurors. Although the state supreme court in *Cleveland* did not expressly say that it was deciding a federal constitutional question, its discussion of the federal circuit court cases demonstrated that it understood it was "deciding a question with federal constitutional dimensions."[29] Indeed, the Court found it difficult to imagine the state supreme court announcing an interpretation of state law "that it believed to be less protective than the Sixth Amendment, as any such interpretation would provide no guidance to state trial judges bound to follow

---

[25]*Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).

[26]*Johnson v. Williams*, 133 S. Ct. 1088, 1096, 185 L. Ed. 2d 105 (2013).

[27]*Johnson v. Williams*, 133 S. Ct. 1088, 1098, 185 L. Ed. 2d 105 (2013).

[28]*People v. Cleveland*, 25 Cal. 4th 466, 106 Cal. Rptr. 2d 313, 21 P.3d 1225 (2001).

[29]*Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013). *But see Danner v. Motley*, 448 F.3d 372, 376, 2006 FED App. 0159P (6th Cir. 2006) (No merits adjudication where petitioner alleged related state-law and Sixth Amendment claims, and state courts gave no indication that they examined the Sixth Amendment claim; although state court cited a state case that, in turn, included a Sixth Amendment discussion, the federal court held that any consideration of the Sixth Amendment contained within the state case law upon which the state court relied was "too attenuated to consider the Sixth Amendment claim to have been 'adjudicated on the merits.' ").

The fact that the state court decided the petitioner's claim using a state harmless error standard that was more permissive than the federal constitutional harmless error standard may indicate that the state court only adjudicated the petitioner's state-law claim. *Gonzales v. Thaler*, 643 F.3d 425, 429–32 (5th Cir. 2011). *But cf. Childers v. Floyd*, 642 F.3d 953, 969 n.17 (11th Cir. 2011), cert. granted, judgment vacated, 133 S. Ct. 1452, 185 L. Ed. 2d 358 (2013) and opinion reinstated, 736 F.3d 1331 (11th Cir. 2013) (en banc) (court was not persuaded that because the state appellate court had reviewed petitioner's claim for an abuse of discretion, instead of *de novo*, it had not adjudicated the Confrontation Clause claim; the petitioner's brief on direct appeal invited the state appellate court to apply an abuse of discretion standard to his Confrontation Clause claim, and the federal appellate court could not "imagine a reason why AEDPA deference should not apply to a state court decision that uses legal standards advanced in the petitioner's brief").

both state and federal law."[30]

Moreover, regardless of whether the state and federal claims were "perfectly coextensive," their similarity made it unlikely that the state court of appeal decided one while overlooking the other.[31] The state court of appeal's quotation of the definition of "impartiality" from *U.S. v. Wood*,[32] a Supreme Court decision, was further evidence that the state court of appeal "was well aware" that the questioning and dismissal of the juror implicated both state and federal law.[33]

Finally, defendant's litigation strategy supported this result. In particular, she treated her state and federal claims as interchangeable, and she neither petitioned the state court of appeal for rehearing nor argued in subsequent state and federal proceedings that the state court had failed to adjudicate her Sixth Amendment claim on the merits. "[Defendant] presumably knows her case better than anyone else, and the fact that she does not appear to have thought that there was an oversight makes such a mistake most improbable."[34] In sum, the Court found it "exceedingly unlikely" that the state court of appeal overlooked defendant's federal claim. The Ninth Circuit's judgment was reversed and the case remanded for further proceedings.[35]

Applying *Williams*, the Eleventh Circuit in *Childers v. Floyd*[36] held that, although the state court did not expressly address petitioner's Confrontation Clause claim, petitioner failed to show that the state court inadvertently overlooked the claim—the Confrontation Clause claim was squarely before the state court and, although the court expressly analyzed the claim under only state rules of evidence, "the underpinnings of those rules fit hand

---

[30]*Johnson v. Williams*, 133 S. Ct. 1088, 1098, 185 L. Ed. 2d 105 (2013).

[31]*Johnson v. Williams*, 133 S. Ct. 1088, 1098, 185 L. Ed. 2d 105 (2013); *see Wilson v. Workman*, 577 F.3d 1284, 1297 (10th Cir. 2009) (en banc) (pre-*Johnson* decision declining to find a "merits adjudication" of the petitioner's claim where, although the state standard for an evidentiary hearing posed a lower substantive standard—the petitioner was only required to show a "strong possibility" of ineffectiveness—the petitioner was held to a higher evidentiary standard of "clear and convincing" when compared to *Strickland*'s "preponderance" standard); *Bey v. Bagley*, 500 F.3d 514, 520 (6th Cir. 2007) (pre-*Johnson* decision holding that a state court adjudication is entitled to deference under § 2254(d) if the state test bore "some similarity" to the federal standard).

[32]*U.S. v. Wood*, 299 U.S. 123, 145–146, 57 S. Ct. 177, 81 L. Ed. 78 (1936).

[33]*Johnson v. Williams*, 133 S. Ct. 1088, 1099, 185 L. Ed. 2d 105 (2013).

[34]*Johnson v. Williams*, 133 S. Ct. 1088, 1099, 185 L. Ed. 2d 105 (2013). For additional factors that may be relevant in deciding whether a state court adjudicated a federal claim, *see, infra*, § 29:10.

[35]*Johnson v. Williams*, 133 S. Ct. 1088, 1099, 185 L. Ed. 2d 105 (2013).

[36]*Childers v. Floyd*, 736 F.3d 1331 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014).

in glove with the rights guaranteed under the Confrontation Clause."[37] The jury convicted petitioner of one count of bribery and one count of unlawful compensation for official behavior. On direct appeal, petitioner argued that the trial court abused its discretion and denied him his Sixth Amendment right to confrontation by barring him from bringing out certain facts during cross-examination of a codefendant who had pleaded guilty. The state court of appeal ruled that the trial court's ruling did not constitute an abuse of discretion and affirmed petitioner's conviction under a state rule of evidence. The court affirmed the convictions without expressly addressing petitioner's claim that the trial court's ruling infringed his Sixth Amendment right to confrontation.

The question before the Eleventh Circuit was whether petitioner rebutted the presumption that the state court of appeal adjudicated his Sixth Amendment right-to-confrontation claim on the merits. The court stated that to determine whether the presumption had been rebutted, it would "look to the state court's decision and the record in the case to determine whether 'the evidence leads very clearly to the conclusion that [the] federal claim was inadvertently overlooked in state court.' "[38]

The state court of appeal began its analysis of petitioner's claim with a discussion of whether the trial court had abused its discretion by holding that such evidence was relevant under a state rule of evidence, and that a different state rule of evidence gave petitioner the right to attack the codefendant's credibility. The court of appeal in particular focused on petitioner's right to show that the witness was biased, essentially observing that the state rules of evidence gave petitioner the same right of confrontation he enjoyed under the Confrontation Clause. The state court of appeal nevertheless stated that this right of confrontation was subject to limitation under a particular state rule of evidence. The state court of appeal ultimately concluded that the trial court had not abused its discretion in balancing the import of the evidence against the danger of unfair prejudice.

The Eleventh Circuit found it "clear" from this record that petitioner's Confrontation Clause claim was not "inadvertently overlooked" by the state court of appeals[39] The court explained that the claim was "squarely before the court," and although the

---

[37]*Childers v. Floyd*, 736 F.3d 1331, 1335 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014).

[38]*Childers v. Floyd*, 736 F.3d 1331, 1335 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014) (quoting *Johnson v. Williams*, 133 S. Ct. 1088, 1097, 185 L. Ed. 2d 105 (2013)).

[39]*Childers v. Floyd*, 736 F.3d 1331, 1335 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014) (quoting *Johnson v. Williams*, 133 S. Ct.

court of appeal expressly analyzed petitioner's claim under state rules of evidence, "the underpinnings of these rules fit hand and glove with the rights guaranteed under the Confrontation Clause."[40] A dissenting judge held that the *Williams* presumption had been rebutted because the state rule of evidence applied by the state court of appeal was less protective than the Sixth Amendment's Confrontation Clause.[41]

§ 29:9 The "adjudication" requirement—On the merits—Omitted claims or arguments

The Supreme Court has not specifically addressed whether a federal claim is adjudicated on the merits for purposes of 28 U.S.C.A. § 2254(d) where the state court expressly references all but one of the petitioner's claims and the omitted claim is unrelated to any other claim. Under the reasoning of *Harrington v. Richter*[1] and *Johnson v. Williams*,[2] a federal court should presume that the federal claim was adjudicated on the merits by the state court, and this "strong" presumption of a merits adjudication "may be rebutted only in unusual circumstances."[3] This result follows from the Supreme Court's statement in *Williams* that it saw "no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims."[4]

But under what circumstances the merits presumption will be rebutted is unclear. As Justice Scalia recognized in his concurring opinion in *Williams*: "Consider another case, where the federal and state claims are not related, where there is no relevant state precedent referring to federal law, where state law

---

1088, 1097, 185 L. Ed. 2d 105 (2013)).

[40]*Childers v. Floyd*, 736 F.3d 1331, 1335 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014).

[41]*Childers v. Floyd*, 736 F.3d 1331, 1335 (11th Cir. 2013), cert. denied, 134 S. Ct. 1559, 188 L. Ed. 2d 560 (2014) (Wilson, J., dissenting).

[Section 29:9]

[1]*Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

[2]*Johnson v. Williams*, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013).

[3]*Johnson v. Williams*, 133 S. Ct. 1088, 1091, 185 L. Ed. 2d 105 (2013) ("[W]e see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims."); 133 S.Ct. at 1096 ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits."); *see also* 133 S.Ct. at 1102 (Scalia, J., concurring in judgment) ("Consider another case, where the federal and state claims are not related.").

[4]*Johnson v. Williams*, 133 S. Ct. 1088, 1094, 185 L. Ed. 2d 105 (2013).