NO. 14-10681

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARION MURDOCK WILSON, JR.,
Petitioner-Appellant,

v.

WARDEN, GEORGIA DIAGNOSTIC AND PRISON,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

RESPONSE OF APPELLEE/RESPONDENT TO PETITION FOR REHEARING

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NO. 14-10681
MARION MURDOCK WILSON, JR. V. WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 28-1(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the Respondent hereby certifies that the following persons have an interest in the outcome of this case:

1. Bina, Gabrielle E., Counsel for Petitioner/Appellant;
2. Bradley, Steven, Trial Prosecutor;
3. Bradley, John H., Appellate Counsel for Appellant;
4. Bright, Fred, Trial Prosecutor;
5. Burton, Beth, Counsel for Respondent/Appellee;
6. Carr, Jon Philip, Trial Counsel for Appellant;
7. Chatman, Bruce, Warden, Georgia Diagnostic & Classification Prison;
8. George, Honorable Hulane, Superior Court of Baldwin County, Georgia, Trial Judge;
9. Greb, Emily J., Counsel for Petitioner/Appellant;
10. Harth, David J., Counsel for Petitioner/Appellant;
11. Jones, David E., Counsel for Petitioner/Appellant;
12. Kammer, Brian S., Counsel for Petitioner/Appellant;

13. Koop, Lissa R., Counsel for Petitioner/Appellant;

14. Lukemire, Honorable Edward D., Superior Court of Butts County, Georgia, State Habeas Judge;

15. Nero, Autumn N., Counsel for Petitioner/Appellant;

16. O'Donnell, Thomas J., Jr., Trial Counsel for Appellant;

17. Olens, Samuel S., Attorney General;

18. Parks, Donovan Cory, Victim;

19. Prior, Honorable William A., Jr., Superior Court of Baldwin County, Georgia, Trial Judge;

20. Treadwell, Honorable Marc T., United States District Court for the Middle District of Georgia, Federal Habeas Judge; and

21. Wilson, Marion, Jr., Petitioner/Appellant.

TABLE OF AUTHORITIES

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On March 19, 2015, this Court ordered Respondent to address the following question:

> [W]hether *Ylst v. Nunnemaker*, 501 U.S. 797, 806, 111 S. Ct. 2590, 2596 (1991), requires us to "look through" the summary denial of the certificate of probable cause of the Supreme Court of Georgia to review the reasoning of the opinion of the Superior Court of Butts County or whether *Ylst* requires only that we "look through" the summary denial to decide if the Supreme Court of Georgia affirmed on the merits or on procedural grounds. *See Harrington v. Richter*, 562 U.S. 99-100, 131 S. Ct. 784-85 (2011).

As an initial matter, the federal courts are to look at "the highest state court decision reaching the merits of a habeas petitioner's claim" for review of "the relevant state court decision." Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008). In Georgia, the highest state court for review of habeas corpus is the Georgia Supreme Court. That court often summarily denies applications to appeal the

denial of state habeas relief.[1] United States Supreme Court precedent and 28 U.S.C. § 2254(d) require this Court to "look through" that summary denial only to determine whether the Supreme Court of Georgia affirmed on the merits or on procedural grounds.

In the pre-AEDPA case of Ylst v. Nunnemaker, 501 U.S. 797 (1991), Nunnemaker raised a Miranda claim on direct appeal and the California Court of Appeal found, as he had failed to raise the claim in the lower court, it was procedurally barred on appeal under state law. Ylst, 501 U.S. at 799. Thereafter, the California Supreme Court denied discretionary review.

Petitioner then raised collateral attacks on his conviction in the Superior Court, the California Court of Appeal and ended with his final state habeas petition filed in the California Supreme Court under the original jurisdiction of that court. All courts issued denials without further opinion or explanation. Id. at 800.

Nunnemaker then filed a federal habeas petition, was denied relief in the district court, and appealed to the Ninth Circuit Court of Appeals. The Ninth

[1] Respondent recognizes that this Court's precedent has concluded that the Georgia Supreme Court's denial of a certificate of probable cause is "the final decision 'on the merits.'" Wilson v. Warden, Ga. Diagnostic Prison, 774 F.3d 671 (11th Cir. 2014), quoting Newland v. Hall, 527 F.3d 1162, 1199 (11th Cir. 2008) and citing Jones v. GDPC Warden, 753 F.3d 1171, 1182 (11th Cir. 2014). Further, the Georgia Supreme Court has been given the opportunity to address any ambiguity in state law on this issue, but has declined.

Circuit "held that the California Supreme Court's 'silent denial' of [Nunnemaker's] second state habeas petition to that court lifted the procedural bar arising from the decision on direct review." Id. at 801. The Court reasoned, "because the California Supreme Court did not 'clearly and expressly state its reliance on Nunnemaker's procedural default,' the federal court could not say that the Supreme Court's order 'was based on a procedural default rather than on the underlying merits of Nunnemaker's claims.'" Id. at 801.

The United States Supreme Court granted certiorari review to consider "whether the California Supreme Court's unexplained order denying his second habeas petition to that court … constituted a 'decision on the merits' of that claim sufficient to lift the procedural bar imposed on direct appeal." Id. The Court examined the issue and found the following rebuttable presumptions:

> Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits. This approach accords with the view of every Court of Appeals to consider the matter, save the court below.

Id. at 803. In so concluding, the Court presumed, since state law was unclear, that the California original habeas corpus jurisdiction was not discretionary. Id. at 802.

The Court then explained that, "The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect -- which simply 'looks through' them to the last reasoned decision -- most nearly reflects the role they are ordinarily intended to play." Id. at 804.

Thus, pre-AEDPA law clearly required the Court to "look through" the summary denial of a state court, an unexplained decision, to the last reasoned decision to determine whether the subsequent decision affirming the lower court was based on a merits determination or a procedural bar, but also required the courts to look at the state court's reasoning.

Twenty years later the Supreme Court granted certiorari review of another Ninth Circuit decision arising from the California Supreme Court, Harrington v. Richter, 562 U.S. 86 (2011). Following his conviction and sentence, Richter's appeal was affirmed. See Harrington, 562 U.S. at 95. The California Supreme Court denied his petition for review. Id. Richter did not petition the United States Supreme Court for certiorari review. Id.

Subsequently, Richter began his collateral appeals by petitioning the California Supreme Court for a writ of habeas corpus alleging ineffective assistance of counsel. The court issued a summary denial of the petition. See Harrington, 562 U.S. at 96. He then filed a federal habeas corpus petition, which

was governed by the AEDPA. Unlike Ylst, there was no reasoned state court opinion, only summary denials from the state courts.

The Ninth Circuit, sitting en banc, failed to give deference under § 2254(d) to the summary denials. The United States Supreme Court granted certiorari review and held that "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." Harrington, 562 U.S. at 99. Then citing to Ylst, the Court held that this presumption could be overcome "when there is reason to think some other explanation for the state court's decision is more likely." Id. at 99-100. Thus, Harrington reaffirmed that if there is an indication that procedural laws were relied upon by the state courts the presumption of a merits decision is overcome. Therefore, the courts must still "look through" to satisfy that rebuttable presumption and determine whether the later summary denial decision is based on a procedural default or a review on the merits.

However, what Harrington made clear was that a summary denial or a decision without reasoning means "something" under the AEDPA, not "nothing," as previously held in Ylst. Moreover, the Court found that the "something" fell within the purview of the AEDPA and was entitled to deference.

> 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 (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.

Harrington, 562 U.S. at 98. It is clear that the focus in Harrington is the decision, not the reasoning or whether it was reasoned at all. Accordingly, under Harrington, the summary denial of the Georgia Supreme Court is a decision entitled to deference, not looked through as "nothing."

Two years later, in another case arising from California and the Ninth Circuit Court of Appeals, Johnson v. Williams, 133 S. Ct. 1088 (2013), the Supreme Court reaffirmed the deference owed summary denials. Williams appealed her conviction to the California Court of Appeal. That court decided a Sixth Amendment claim raised by Williams in a reasoned opinion. Thereafter, the California Supreme Court issued a summary denial of Williams' "petition for review." Johnson, 133 S. Ct. at 1094. The Ninth Circuit found the state court had overlooked a portion of Williams' Sixth Amendment claim in denying her relief and, therefore, the state court opinion was not afforded deference under § 2254. The Supreme Court granted certiorari review from the Ninth Circuit's opinion and concluded that the state court had denied the Sixth Amendment claim on the merits and that decision was entitled to AEDPA deference. Williams, 133 S. Ct. at 1098-

99. Therefore, even though the lower court had not articulated Federal precedent or conducted a full analysis in its holding, the decision was given deference. Accordingly, a summary denial by the Georgia Supreme Court would likewise be entitled to deference under the AEDPA.

Thus, although Respondent agrees with Petitioner that the Ylst's look through provision still applies, he disagrees that the analysis is to grade the lower court's reasoning and that the summary denial of the Georgia Supreme Court may be ignored. As set forth in Harrington, the fact that the Georgia Supreme Court denies the appeal without reasoning does not take that decision beyond the ambit of the AEDPA.

This interpretation is further supported by the statute, which gives deference to the decision of the state courts, not the reasoning. 28 U.S.C. § 2254(d) explicitly states that the federal courts are to review the **decision** of the claims raised on the merits in the state court, not the opinion or the reasoning; and no relief shall be granted to a claim adjudicated on the merits in the state courts unless the adjudication of the claim "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." 28 U.S.C. § 2254(d)1) (emphasis added).

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, 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."

Harrington, 562 U.S. at 102, (quoting Lockyer v. Andrade, 538 U.S. 63, 71 (2003)).

Thus, 28 U.S.C. § 2254(d) and Harrington suggest that federal courts are no longer to focus on the reasonableness of the reasoning of the state courts, but the reasonableness of the decision of the state courts. The crux of the analysis is the ultimate decision, not the rationale that resulted in that decision. Accordingly, this Court would look through a summary denial to a reasoned decision only to determine whether the state appellate court affirmed on procedural grounds or on the merits. Thereafter, in accordance with Harrington and Johnson, the summary denial of the Georgia Supreme Court would be entitled to AEDPA deference and under § 2254(d) this Court would be required to determine what argument or theories could have supported the affirmance. Harrington, 562 U.S. at 102. "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." Id. See also Nevada v. Jackson, 133 S. Ct. 1990 (U.S. 2013) (per curiam) ("It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists

could disagree that the state court's **decision** conflicts with this Court's precedents.'" (emphasis added)).

This Court's precedent is in direct accordance with the Supreme Court as this Court has consistently focused on the decision of the state court, not the reasoning.

> To be entitled to federal habeas relief under § 2254, a petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. __, __, 131 S. Ct. 770, 786-87, 178 L. Ed. 2d 624 (2011). "A state court's application of clearly established federal law or its determination of the facts is unreasonable only if no 'fairminded jurist' could agree with the state court's determination or conclusion." Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1257 (11th Cir. 2012) (quoting Harrington, 562 U.S. at __, 131 S. Ct. at 780).

Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172 (11th Cir. 2013). See also Gill v. Mecusker, 633 F.3d 1272 (11th Cir. 2011) ("the statutory language focuses on the result, not on the reasoning that led to the result."), quoting Wright v. Moore, 278 F.3d 1245, 1254 (11th Cir. 2002).

Further, the majority of the Circuit Courts, which have addressed this issue, have consistently held that, following the Supreme Court's holding in Harrington, it is the decision of the state court that is entitled to deference and not the reasoning. See Clements v. Clarke, 592 F.3d 45, 55-56 (1st Cir. 2010) ("AEDPA's trigger for deferential review is adjudication, not explanation."); Rashad v. Walsh, 300 F.3d 27, 45 (1st Cir. 2002) ("It is not our function . . . to

grade a state court opinion as if it were a law school examination."); Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014) ("Even where the state court's decision does not explain its reasoning or does so broadly, 'the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.'"); Holder v. Palmer, 588 F.3d 328 (6th Cir. 2009) ("The law requires such deference to be given even in cases, such as this one, where the state court's reasoning is flawed or abbreviated." (quoting Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) ("[O]ur focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not whether the state court considered and discussed every angle of the evidence.")); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) ("It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case."), but see Woolley v. Rednour, 702 F.3d 411, 423 (7th Cir. 2012) ; Long v. Humphrey, 184 F.3d 758, 760-61 (8th Cir. 1999) (focusing on the reasonable of the decision).

The correctness of this interpretation is further supported by the Court's instructions that "A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." Woodford v. Visciotti, 537 U.S. 19, 24-25, 154 L.

Ed. 2d 279, 123 S. Ct. 357 (2002) (per curiam). Instead, the state court's **decision** must be objectively unreasonable. See Williams, 529 U.S. at 410; Andrade, 538 U.S. at 75; Yarborough v. Alvarado, 541 U.S. 652, 665-666 (2004); Woodford v. Visciotti, 537 U.S. 19 (2002) ("under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. Bell, 535 U.S. at 699, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (slip op., at 12). The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court **decision** is objectively unreasonable." (Emphasis added).

> A state court **decision** is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" where the state court (1) "arrives at a **conclusion** opposite to that reached by [the Supreme Court] on a question of law" or (2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a **result** opposite to [the Supreme Court]."

Gill v. Mecusker, 633 F.3d at 1289 (quoting Williams, 529 U.S. 362, 405-06 (2000) (emphasis added).

As it is the result/decision and not the reasoning that is the crux of the state review and as Harrington and Johnson establish that a summary decision is entitled to deference under the AEDPA, this Court looks through the Georgia Supreme Court's summary denial only to determine whether there was a merits review or whether the claim was procedurally barred.

Moreover, in the instant case, as the result from the state habeas court and the Georgia Supreme Court are the same and as this Court's reasoning was consistent with the state habeas court's rationale, this Court's affirmance of the denial of federal habeas relief was proper under any standard of review.

CONCLUSION

As this Court properly analyzed Petitioner's claims under the AEDPA, Petitioner's motion for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed this pleading with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorney of record:

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This 6th day of April, 2015.

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