IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10681-P

MARION WILSON, JR.,

Petitioner-Appellant,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent-Appellee.

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

Reply Brief on Petition for Rehearing and Rehearing *En Banc*

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TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

Statutes

ARGUMENT AND CITATIONS TO AUTHORITY

Respondent's position that "Supreme Court precedent and 28 U.S.C. § 2254(d) require this Court to 'look through' [a] summary denial only to determine whether the Supreme Court of Georgia affirmed on the merits or on procedural grounds" (Rehearing Response at 2) is diametrically opposed to the position Respondent previously advanced to this Court. Before the panel, Respondent argued that "this Court should 'look through' the denial of CPC to the *factual and legal findings* of the last court to review the claims on the merits, the state habeas court, as the denial of a CPC by the Georgia Supreme Court is not a review on the merits." Appellee's Brief at 11 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991)) (emphasis added).[1] Respondent makes no attempt to justify or

[1] Respondent's current position is also at odds with arguments he made to the Supreme Court of Georgia when asking the court to clarify the import of a summary denial of a habeas petitioner's application for certificate of probable cause ("CPC"). There, he argued that this Court's approach in *Hittson v. GDCP Warden*, 759 F.3d 1210 (11th Cir. 2014), and *Jones v. GDCP Warden*, 753 F.3d 1171 (11th Cir. 2014), improperly construes Georgia law and will create havoc in federal habeas cases. *See, e.g.*, *O'Kelley v. Chatman*, Ga. Sup. Ct. No. S14E0708, Respondent's Supplemental Response in Opposition to Application for Certificate of Probable Cause to Appeal, at 2-3 (attached to Letter, dated August 14, 2014, from Sabrina Graham, Assistant Attorney General, to John Ley, Clerk, in *Jones v. Warden*, 11th Cir. No. 11-14774) (arguing that the Eleventh Circuit's new approach will "negate all procedural default findings by state habeas courts" "nullify all factual findings relied upon by state habeas courts" and "give the

explain this about face, indeed he does not even acknowledge that there has been an about face.

Regardless of the capricious nature of Respondent's legal arguments, recent Supreme Court precedent establishes that *Harrington v. Richter*, 562 U.S. 86 (2011), neither abrogated, nor diluted, the "look-through" rule adopted in *Ylst*, 501 U.S. at 806, and that a federal habeas court must review the last reasoned state court decision, if one exists, in evaluating whether a petitioner has satisfied AEDPA and is thus entitled to *de novo* review of his claims.

A. *Ylst v. Nunnemaker* Is Not Limited To The Question Of Whether A Summary State Court Ruling Reached The Merits Of A Claim.

In *Ylst*, the Court addressed "whether the unexplained denial of a petition for habeas corpus by a state court lifts a state procedural bar imposed on direct appeal, so that a state prisoner may then have his claim heard on the merits in a federal habeas proceeding." 501 U.S. at 799. There, the California Court of Appeal had rejected a Fifth Amendment claim raised for the first time on appeal and subsequent summary denials of petitions for collateral relief had left that ruling

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federal courts what amounts to de novo review of constitutional claims" in contravention of "the intent of the AEDPA" and the United States Supreme Court).

undisturbed. *Id.* at 799-800. In federal habeas proceedings, the Ninth Circuit revived the Fifth Amendment claim, holding that "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 Supreme Court reversed, holding that federal courts should presume that a decision that summarily leaves undisturbed a previous articulated ruling rests on the grounds previously articulated. *Ylst*, 501 U.S. at 803. As the Court explained:

> The maxim is that silence implies consent, not the opposite – and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below. 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.

Though *Ylst* addressed whether a silent ruling revived a previously defaulted claim or left the default intact, nothing in the decision suggests it only applies to determine whether a summary denial is merits or procedurally based. Respondent concedes as much, observing that *Ylst* "clearly required the Court to 'look through' the summary denial of a state court, an unexplained decision [sic], 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."[2] Rehearing Response at 4. Respondent contends, however, that the AEDPA and the Court's decision in *Harrington* abrogated the *Ylst* presumption because the reasoning undergirding a state court decision is now irrelevant. Respondent's argument finds no support in 28 U.S.C. § 2254(d) or the Supreme Court's post-AEDPA (and post-*Harrington*) decisions.

B. Neither The Language Of 28 U.S.C. § 2254(d) Nor The Supreme Court's Decision In *Harrington* Abrogates *Ylst*.

Respondent argues that a state court's analysis of federal claims is irrelevant because AEDPA is concerned solely with the outcome, not the grounds, of the state court's ruling. *See* Rehearing Response at 8. This position is not supported by the statutory language. By its very terms, AEDPA implicates a state court's "application of [] clearly established Federal law," 28 U.S.C. § 2254(d)(1), and its

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[2] Subsequent to *Ylst*, the Supreme Court has applied the rule to assess the rationale undergirding a state court's reasoned merits decision. *See, e.g.*, *Sears v. Upton*, 561 U.S. 946, 951-56 (in pre-*Harrington* case, vacating denial of habeas relief on basis of flawed analysis in state habeas court's order, rather than the Georgia Supreme Court's summary denial of a certificate of probable cause, noting that "it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry . . .").

"determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2)—in other words, the substance of what the state court actually reasoned and found.[3]

The Supreme Court's decision in *Harrington* did not change this. *Harrington* held that, regardless of whether the state court articulated reasons for denying the claim, a federal court must defer to the state court decision unless the petitioner satisfied the constraints of § 2254(d):

> 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. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)."

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[3] As the Supreme Court explained in a post-*Harrington* decision:

> Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew *and did*. . . . To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" *and how the decision "confronts [the] set of facts" that were before the state court*. If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess *whether the decision "unreasonably applies that principle to the facts of the prisoner's case.*"

Cullen v. Pinholster, 131 S. Ct. 1388, 1399 (2011) (citations omitted) (emphasis added).

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

As *Harrington* clearly articulated, when reviewing a reasoned state court merits ruling, a federal court "must determine what arguments or theories supported . . . the state court's decision." 562 U.S. at 102. When there is no reasoned state court merits ruling, a federal court "must determine what arguments or theories . . . could have supported, the state court's decision." *Id.* Nothing in this language suggests that a state court's reasoning is irrelevant. Nor is there anything in this language that is inconsistent with the holding of *Ylst*—that a silent state court ruling is presumed to adopt the reasoning of the last reasoned state court ruling it upholds.

C. *Harrington* Cannot Be Construed To Have Abrogated *Sub Silentio Ylst*'s "Look Through" Doctrine.

"[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); *see, e.g.*, *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) (discussing the unambiguous nature of this rule). *Harrington* does

not purport to overrule *Ylst* in any fashion,[4] consequently this Court cannot construe *Harrington* to abrogate the "look through" doctrine *Ylst* adopted.

In addition, it is clear from Supreme Court decisions post-*Harrington* that the "look through" doctrine remains the proper method for analyzing silent state court decisions that leave undisturbed a prior reasoned state court decision. In *Premo v. Moore*, 562 U.S. 115 (2011), a case decided the same day as *Harrington*,[5] the Court analyzed the state habeas court decision, as the Oregon Court of Appeals had "affirmed without opinion," *Moore v. Palmateer*, 26 P.3d 191 (Or. App. 2001), and the Oregon Supreme Court denied review, *Moore v. Palmateer*, 30 P.3d 1184 (Or. 2001). In *Johnson v. Williams*, 133 S. Ct. 1088 (2013), the Court observed that the Ninth Circuit, "[c]onsistent with . . . *Ylst* . . . 'look[ed] through' the California Supreme Court's summary denial of Williams' petition for review and

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[4] *Harrington*, in fact, cites *Ylst* with approval. *See Harrington*, 562 U.S. at 99-100.

[5] As the Court observed in *Moore*, "[t]his case calls for determinations parallel in some respect to those discussed in today's opinion in *Harrington v. Richter* . . . ." *Moore*, 562 U.S. at 118.

examined the California Court of Appeal's opinion, the last reasoned state-court decision to address" the claim. *Id.* at 1094 n.1.[6]

D. The Majority Of Circuits Addressing The Issue Have Held That *Harrington* Did Not Abrogate *Ylst.*

Respondent argues that "the majority of the Circuit Courts, which have addressed this issue, have consistently held that, following . . . *Harrington*, it is the decision of the state court that is entitled to deference and not the reasoning." Rehearing Response at 9. Respondent then cites several cases, all but one of which *predate Harrington*. *See id.* at 9-10. Apart from Respondent's chronological error, moreover, Respondent's survey of circuit law is misleading and inaccurate.

Two circuits, the Seventh and Ninth, have addressed the issue directly and determined that Ylst's look-through doctrine remains intact. In *Woolley v. Rednour*, 702 F.3d 411 (7th Cir. 2012), one of Respondent's "but see" cites, the

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[6] *See also, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372 (2015) ("The Michigan Court of Appeals' decision was not contrary to any clearly established holding of this Court"); *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) ("The Michigan Court of Appeals' conclusion that Toca's advice satisfied *Strickland*[*v. Washington*, 466 U.S. 668 (1984)] fell within the bounds of reasonableness under AEDPA, given that respondent was claiming innocence and only days away from offering self-incriminating testimony in open court pursuant to a plea agreement involving an above-guidelines sentence."); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (granting relief where "the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it").

Seventh Circuit found that "*Harrington* did not purport to disturb . . . *Ylst*," and accordingly the court "consider[ed] 'the last reasoned opinion on the claim'—here the opinion of the Illinois Appellate Court." 702 F.3d at 421. In *Cannedy v. Adams*, a panel of the Ninth Circuit applied the look-through doctrine to find that the last reasoned state court opinion was an unreasonable application of *Strickland*. 706 F.3d 1148, 1157-59 (9th Cir. 2013).[7]

Notwithstanding Respondent's assertions and citations to pre-*Harrington* cases, the First, Fifth, and Sixth Circuits have continued to follow the look-through doctrine, even after *Harrington*. *See Sanchez v. Roden*, 753 F.3d 279, 298 n.13 (1st Cir. 2014); *Woodfox v. Cain*, 772 F.3d 358, 369-74 (5th Cir. 2014); *Wogenstahl v. Mitchell*, 668 F.3d 307, 340 (6th Cir. 2012). The Third Circuit

[7] The *Cannedy* dissent proposed the same analysis adopted by the panel in this case, that after *Harrington* there was no longer "justification for granting a writ because we reject as unreasonable arguments or theories articulated by a lower court" and that the proper analysis was to consider "whatever arguments or theories 'could have' supported" the California Supreme Court's "postcard denial." *Id.* at 1167 (Kleinfeld, J., dissenting). The panel majority, however, disagreed, pointing out that *Harrington* addressed the circumstance where "there was *no* reasoned decision by a lower court; there was no reasoned decision at all." *Id.* at 1158. Over the dissent of six judges, who adopted the panel dissent's reasoning, the Ninth Circuit denied rehearing. *Cannedy v. Adams*, 733 F.3d 794, 795 (9th Cir. 2013) (O'Scannlain, J., dissenting from the denial of rehearing *en banc*).

follows the same approach. *See Blystone v. Horn*, 664 F.3d 397, 417 n.15 (3d Cir. 2011).

E. Conclusion

Contrary to Respondent's unsupported assertion that it would make no difference here, Rehearing Response at 12, the application of the "look through" doctrine has real consequence in this case. The state habeas court found that the mitigation evidence introduced in the state habeas proceedings would have been inadmissible at sentencing, and thus Petitioner was not prejudiced by his trial counsel's constitutionally deficient failure to investigate and put on such evidence. Petition for Rehearing at 11-12; Appellant's Brief at 47-50. Because the panel deferred to the Georgia Supreme Court's summary CPC denial, it never addressed the reasonableness of the state habeas court's actual adjudication of the case. As detailed in Petitioner's principal brief, it was an unreasonable determination of fact to find Petitioner's evidence inadmissible in a Georgia capital sentencing, and, to the extent the state habeas court's decision wholly discounted Petitioner's evidence based on the rote application of state hearsay law to a capital sentencing procedure, it was an unreasonable application of Supreme Court law. *See* Appellant's Brief at 47-50. Proper application of *Ylst* would result in *de novo* review and the grant of the Writ.

This 20th day of April, 2015.

Respectfully submitted,

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vs.	)	Case No. 14-10681-P
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee.	)	

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 attorneys of record:

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This 20th day of April, 2015.

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