

NOTE

WHY SILENCE SHOULDN'T SPEAK SO LOUDLY: WIGGINS IN A POST-RICHTER WORLD

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INTRODUCTION

In 1953, Justice Frankfurter urged the Supreme Court “to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.”¹ In the decades since, the Court has failed to heed to Justice Frankfurter’s admonition to give lower federal courts clear guidance on the

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¹ *Brown v. Allen*, 344 U.S. 443, 501–02 (1953) (Frankfurter, J., concurring) (expressing the view of the majority).

resolution of habeas petitions. Indeed, the precise individualized enforcement that Justice Frankfurter warned against² has materialized.³ Specifically, as habeas litigation has become more complex and different procedural circumstances have emerged, the circuit courts have adopted different standards to review *Strickland* claims of ineffective assistance of counsel.⁴ To make matters worse, differences have arguably emerged even among panels within the same circuit.⁵ The resulting confusion is mostly due to the Antiterrorism and Effective Death Penalty Act (AEDPA),⁶ which instructs that a federal habeas court may not grant habeas relief if the prisoner's claim has been "adjudicated on the merits" in state court unless the claim meets one of two narrow exceptions.⁷ As one circuit judge lamented about the confusion that has arisen, since AEDPA's enactment in 1996 "no law has so vexed the United States Court of Appeals."⁸

To prevail on a *Strickland* ineffective assistance of counsel claim, a defendant must show (1) deficient performance, that is, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) prejudice, that is, "that counsel's

² *Id.* at 501.

³ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting) ("[T]he Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . .").

⁴ Compare *Collins v. Sec'y of the Pa. Dep't of Corr.*, 742 F.3d 528, 545–46 (3d Cir. 2014) ("Section 2254(d) deference applies to any claim that has been adjudicated on the merits in any state court proceeding, which 'can occur at any level of state court' as long as the state court's resolution has preclusive effect." (citations omitted)), *cert. denied*, 135 S. Ct. 454 (2014), with *Thomas v. Clements*, 789 F.3d 760, 766 (7th Cir. 2015), *reh'g denied*, 797 F.3d 445 (7th Cir. 2015) (holding that only the "last reasoned opinion on the claim" is entitled to AEDPA deference).

⁵ Compare *Thomas*, 789 F.3d at 766 (citation and internal quotation mark omitted) (holding that only the "last reasoned opinion on the claim" is entitled to AEDPA deference), with *Atkins v. Zenk*, 667 F.3d 939, 944 (7th Cir. 2012) ("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.").

⁶ 28 U.S.C. § 2254(d) (2012).

⁷ 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.

Id.

⁸ *Garrus v. Sec'y of the Pa. Dep't of Corr.*, 694 F.3d 394, 412 (3d Cir. 2012) (Hardiman, J., dissenting).

errors were so serious as to deprive the defendant of a fair trial.”⁹ Though the *Strickland* test has two prongs,¹⁰ an ineffective assistance of counsel claim can be resolved by deciding only one prong against the petitioner.¹¹ As one might expect, state courts generally follow the Supreme Court’s advice in *Strickland* not to “grade counsel’s performance,” and instead dispose of an ineffective assistance of counsel claim based on lack of prejudice.¹² Issues arise, however, when a state appellate court’s decision that addresses the merits of only one prong reaches the federal courts, and the federal court must decide whether to address the unreviewed prong de novo or with AEDPA deference. More specifically, when a lower state court has addressed the prong left unreviewed by the appellate court, the circuits have reached different conclusions on whether federal courts must “look[] through”¹³ the appellate court’s silence, that is, examine the reasons given by a lower state court decision discussing that prong, or whether they must review that prong de novo.¹⁴

The Supreme Court’s 2003 decision in *Wiggins v. Smith* suggests that federal habeas courts should not “look through” state appellate court silence on a prong to a lower state court decision.¹⁵ In *Wiggins*, the Court examined the prejudice prong of a prisoner’s *Strickland* claim de novo because the state court disposed of the post-conviction petition by finding no deficient performance.¹⁶ However, after the Court’s decision in

⁹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹⁰ *Id.*

¹¹ *Id.* at 697 (“[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the [*Strickland*] inquiry if the defendant makes an insufficient showing on one.”).

¹² *Id.*; see *Thomas v. Clements*, 789 F.3d 760, 765 (7th Cir. 2015), *reh’g denied*, 797 F.3d 445 (7th Cir. 2015) (noting that in collateral proceedings, the state appellate court denied petitioner’s claim based upon lack of prejudice and did not decide whether counsel’s performance was deficient).

¹³ *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (explaining that the look-through methodology is a presumption where unexplained orders are given no effect and the reviewing court “simply ‘looks through’ them to the last reasoned decision”).

¹⁴ Compare *Collins v. Sec’y of the Pa. Dep’t of Corr.*, 742 F.3d 528, 545–46 (3d Cir. 2014) (“Section 2254(d) deference applies to any claim that has been adjudicated on the merits in any state court proceeding, which can occur at any level of state court as long as the state court’s resolution has preclusive effect” (citations and internal quotation marks omitted)), *cert. denied*, 135 S. Ct. 454 (2014), with *Thomas*, 789 F.3d at 766 (only the “last reasoned opinion on the claim” is entitled to AEDPA deference).

¹⁵ 539 U.S. 510, 527–31 (2003).

¹⁶ See *id.* at 534.

Harrington v. Richter,¹⁷ some courts¹⁸ and jurists¹⁹ have suggested that *Wiggins* no longer controls. In *Richter*, the Court determined that a state appellate court is entitled to AEDPA deference when it chooses to remain silent on a claim by summarily denying a habeas petition.²⁰ Recently, courts have agreed that if a lower state court decision does discuss the merits of a prisoner's claim, the federal habeas court can "look through" a summary denial—complete silence on a claim—to the last reasoned opinion on the claim,²¹ as the court instructed in its pre-*Richter* decision, *Ylst v. Nunnemaker*.²² As Judge Easterbrook urged in his concurrence in the denial of rehearing en banc for *Thomas v. Clements*, where the Seventh Circuit held that federal courts are to examine only the last reasoned opinion on the claim, and therefore review an unexamined *Strickland* prong de novo,²³ the Supreme Court should revisit *Wiggins* in a post-*Richter* world.²⁴ The Sixth and Eleventh Circuits join the Seventh in refusing to "look through" silence on a prong,²⁵ but the Third, Fifth, and Ninth Circuits "look through" appellate court silence on a prong to a lower state court decision.²⁶

¹⁷ 562 U.S. 86 (2011).

¹⁸ See, e.g., *Collins*, 742 F.3d at 545–46 (explaining that § 2254(d) deference will apply to any claim adjudicated on the merits, regardless of state court level).

¹⁹ See *Thomas*, 797 F.3d 445, 446 (Easterbrook, J., concurring in denial of rehearing en banc) (discussing how the Supreme Court adopted a "look-past-silence" approach).

²⁰ 562 U.S. at 92.

²¹ See, e.g., *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in the denial of certiorari) (discussing how courts should look through to the last reasoned decision when last state court issues an unexplained order).

²² 501 U.S. 797, 803 (1991) ("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.").

²³ 789 F.3d 760, 767 (7th Cir. 2015), *reh'g denied*, 797 F.3d 445 (7th Cir. 2015).

²⁴ See *Thomas*, 797 F.3d at 448 (Easterbrook, J., concurring in denial of rehearing en banc).

²⁵ See, e.g., *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012) ("When a state court relied only on one *Strickland* prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the *Strickland* prong not relied upon by the state court. The unadjudicated prong is reviewed de novo."); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 929–30 (11th Cir. 2011) (explaining that "[a]s a result of the Florida Supreme Court's decision on the performance prong and non-decision on the prejudice prong, we review the holding that counsel's performance was not deficient with AEDPA deference, but we must conduct a plenary review of whether Johnson was prejudiced" even though the post-conviction court "found a lack of prejudice").

²⁶ See, e.g., *Sessoms v. Grounds*, 776 F.3d 615, 620 n.4 (9th Cir. 2015) (explaining that the court considered the California Court of Appeal's opinion because it was the "'last reasoned opinion' in this matter for purposes of AEDPA");

I agree with Judge Easterbrook that *Wiggins* in a post-*Richter* world is a subject that “belongs on the Supreme Court’s plate,”²⁷ but disagree that *Wiggins* does not survive *Richter*. In his concurrence in the denial of a rehearing en banc in *Thomas*, Judge Easterbrook explains his disapproval of the two legal rules that are triggered by the Seventh Circuit approach: (1) “the proposition that the opinion of every state court except the last must be ignored” and (2) “that performance and prejudice, the two components of an ineffective-assistance claim under *Strickland*, are separate ‘claims’ for the purpose of § 2254(d).”²⁸ Judge Easterbrook also explained that the practice followed in *Wiggins*, reviewing an unexamined prong de novo, was just a “drive-by statement[.]” and therefore has no precedential value.²⁹ Below I defend the two legal rules that underlie the Seventh Circuit approach and explain why *Wiggins* survives *Richter*. Unlike Judge Easterbrook, I believe the Seventh Circuit approach “strike[s] an honest balance between respecting the prerogatives of the state courts while ensuring that every habeas petitioner has an actual and meaningful opportunity to seek redress for constitutional violations.”³⁰

I BACKGROUND

The writ of habeas corpus allows a prisoner to challenge the legality of his or her detention.³¹ It is a civil post-conviction complaint.³² The Constitution does not directly provide for the writ, and the Supreme Court has never held that the writ is a constitutional right.³³ However, since 1789, the writ has been

Woodfox v. Cain, 772 F.3d 358, 369 (5th Cir. 2014) (noting that the court would use the “look through” doctrine); Simmons v. Beard, 590 F.3d 223, 231–32 (3d Cir. 2009) (noting that “in considering a § 2254 petition, we review the ‘last reasoned decision’ of the state courts on the petitioner’s claims”).

²⁷ *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc).

²⁸ *Id.* at 447.

²⁹ *See id.* at 448.

³⁰ Childers v. Floyd, 642 F.3d 953, 982 (11th Cir. 2011), *vacated*, 133 S. Ct. 1452 (2013), *aff’d*, 736 F.3d 1331 (11th Cir. 2013).

³¹ Harrington v. Richter, 562 U.S. 86, 91 (2011) (“The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.”); Artemio Rivera, *The Consideration of Factual Issues in Extradition Habeas*, 83 U. CIN. L. REV. 809, 811–12 (2015).

³² Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007).

³³ Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1080–81 (1995).

codified by federal statutory law.³⁴ Since then, the scope of the right to habeas relief has been interpreted inconsistently as the nation's political climate³⁵ and the composition of the Supreme Court³⁶ have changed. At times, the Court has interpreted a prisoner's right to habeas relief broadly, emphasizing the importance of reviewing state court convictions.³⁷ More recently, however, the Court has reasoned that comity, finality, and federalism require federal courts to grant habeas relief only in very narrow circumstances.³⁸ Under this view, habeas relief serves to guard against "only [the most] extreme malfunctions in the state criminal justice systems,"³⁹ and should not be treated as "a substitute for ordinary error correction through appeal."⁴⁰ Determining the proper scope of the writ is particularly important because it dictates the amount of deference federal habeas courts should give to state court convictions.

A. The Modern Era

"Most trace the genesis of the modern habeas regime to *Brown v. Allen*,"⁴¹ decided by the Supreme Court in 1953. In *Brown*, the Court interpreted the scope of the writ relatively broadly.⁴² Justice Frankfurter attempted to "lay down as specifically as the nature of the problem permits"⁴³ the standard of review for habeas petitions by instructing federal courts to con-

³⁴ *Id.*

³⁵ For example, the 1995 Oklahoma City bombing by Timothy McVeigh sparked public interest in limiting prisoners' ability to delay execution through post-conviction remedies, and Congress subsequently enacted the Antiterrorism and Effective Death Penalty Act. See Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act's Restrictions on Habeas Are Wrong*, 37 SEATTLE U. L. REV. 55, 58 (2013).

³⁶ See Joshua D. Smith, Comment, *Habeas Corpus: Expired Conviction, Expired Relief: Can the Writ of Habeas Corpus Be Used to Test the Constitutionality of a Deportation Based on an Expired Conviction?*, 58 OKLA. L. REV. 59, 67–79 (2005) (discussing how the Court's view of habeas corpus has changed over the years); see also Forsythe, *supra* note 33, at 1135–44 (discussing the Supreme Court's transition from a narrow scope to a more expanded scope of federal habeas corpus between 1885 and 1963).

³⁷ See, e.g., *Townsend v. Sain*, 372 U.S. 293, 311–12 (1963) ("Thus a narrow view of the hearing power would totally subvert Congress' specific aim . . . of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution.").

³⁸ See *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

³⁹ *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

⁴⁰ *Id.* at 102–03.

⁴¹ Kovarsky, *supra* note 32, at 447.

⁴² See *Brown v. Allen*, 344 U.S. 443, 500 (1953) (Frankfurter, J., concurring) ("[P]rior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim").

⁴³ *Id.* at 501–02.

duct a step-by-step analysis of habeas petitions.⁴⁴ He explained that had Congress wanted to leave the resolution of habeas petitions to the state courts, it could and would have done so.⁴⁵ Instead, however, Congress chose to provide prisoners with a federal forum for review of federal constitutional challenges to their detention.⁴⁶ Justice Frankfurter concluded that it is precisely the “command” of federal judges to decide questions of law and mixed questions of law and fact, so those questions should be reviewed *de novo* in federal court.⁴⁷

In the years after *Brown*, the Supreme Court continued to construe the writ broadly and to instruct federal courts to give little difference to state court decisions. For example, in *Fay v. Noia*, the Court held that a federal habeas court could hear a prisoner’s procedurally defaulted claim, that is, one that was not presented in the state courts, so long as the prisoner did not “deliberately by-pass[]” the state system.⁴⁸ However, these decisions spurred much judicial, academic, and legislative criticism.⁴⁹ Shortly after pronouncing the death penalty constitutional in *Gregg v. Georgia* in 1976,⁵⁰ the Court, led first by Chief Justice Burger and then by Chief Justice Rehnquist, quickly adjusted and determined that the scope of a federal court’s power to grant habeas relief should actually be quite narrow.⁵¹

B. AEDPA

After a few decades watching the Court restrict the ability of federal courts to review state court convictions, Congress finally mustered the votes to pass legislation⁵² that either imposed obstacles to habeas relief or fortified obstacles already

⁴⁴ *Id.* at 502–07.

⁴⁵ *Id.* at 499.

⁴⁶ *Id.*

⁴⁷ *Id.* at 506.

⁴⁸ 372 U.S. 391, 389–99, 438 (1963); *see also* *Townsend v. Sain*, 372 U.S. 293, 322 (1963) (discussing how a medical experts’ failure to testify is not an “inexcusable default”); *Sanders v. United States*, 373 U.S. 1, 17 (1963) (explaining that even with a prior application for federal collateral relief, the new application must be fully considered unless there has been an abuse of writ or motion remedy).

⁴⁹ John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 265 (2006).

⁵⁰ 428 U.S. 153, 207 (1976).

⁵¹ Blume, *supra* note 49, at 265–66; *see also* Kovarsky, *supra* note 32, at 448 (noting that the Burger and Rehnquist Courts “created or strengthened” obstacles to habeas relief in response to the Warren Court’s “aggressive use of the writ as a vehicle to reform criminal procedure”).

⁵² Kovarsky, *supra* note 32, at 447–48.

put in place by the Court.⁵³ Congress was able to do so “[j]ust as legislative efforts to restrict the writ’s availability were approaching futility.”⁵⁴ The impetus for action was the trial, conviction, and death sentence of Timothy McVeigh for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City.⁵⁵ McVeigh became “the poster child for the federal death penalty”⁵⁶ and public response to the bombing “made it hazardous for legislators to oppose”⁵⁷ proposed laws that would provide a more “[e]ffective” death penalty.⁵⁸ It did not hurt that in 1994, Republicans seized control of Congress.⁵⁹ Accordingly, on April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act,⁶⁰ and “[g]one were the years of waiting to carry out executions.”⁶¹ Timothy McVeigh became the first federal death row inmate to be executed since 1963.⁶²

But AEDPA had lofty objectives beyond McVeigh. AEDPA “intended . . . to end the flood of habeas petitions filed in federal court”⁶³ and further principles of “comity, finality, and federalism.”⁶⁴ It meant to “incorporate[] reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”⁶⁵ Through AEDPA, then, Congress made clear that federal courts

⁵³ *Id.* at 448–49.

⁵⁴ *Id.* at 462.

⁵⁵ Ritter, *supra* note 35, at 58; see also *United States v. McVeigh*, 153 F.3d 1166, 1176, 1179 (10th Cir. 1998) (discussing the facts of the McVeigh bombing).

⁵⁶ Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591, 1604 (2004).

⁵⁷ Greg Doty, *Federal Habeas Behind Bars: Preserving Evidentiary Review After Cullen v. Pinholster and Harrington v. Richter*, 81 UMKC L. REV. 207, 213 (2012); see also Kovarsky, *supra* note 32, at 447 (noting that “few legislators dared oppose” AEDPA).

⁵⁸ Erik Degrate, *I’m Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not If the Antiterrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 77–78 (2006); see also Ritter, *supra* note 35, at 58 (“Many believed that Congress transformed AEDPA from a long-debated reform to reality in response to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City . . .”).

⁵⁹ Kovarsky, *supra* note 32, at 462–63.

⁶⁰ 28 U.S.C. § 2254(d) (2012).

⁶¹ Blume, *supra* note 49, at 259.

⁶² Degrate, *supra* note 58, at 78.

⁶³ Meredith Regan, Comment, *Lies, Damn Lies, and White Ink: The Convenient Fiction of Adjudication on the Merits in Murdock v. Castro*, 52 B.C. L. REV. E. SUPP. 135, 135 (2011).

⁶⁴ *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

⁶⁵ Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1228 (2012) (citations omitted) (internal quotation marks omitted).

would no longer review state court decisions de novo,⁶⁶ as the Court held in *Brown*,⁶⁷ but instead that state court decisions would be entitled to a heightened level of deference in federal court.⁶⁸ Perhaps the most important change that AEDPA made was “fundamentally alter[ing]”⁶⁹ federal habeas review for prisoners in state custody by modifying 28 U.S.C. § 2254(d) to impose a “substantive limit”⁷⁰ on review. Section 2254(d) now reads:

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.⁷¹

In sum, under § 2254(d), no federal court can grant habeas relief on a claim that was “adjudicated on the merits” in state court unless the federal court determines that the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law” or “resulted in a decision that was based on an unreasonable determination of the facts.”⁷²

C. The Aftermath of AEDPA

Proponents and critics of AEDPA either hoped or feared that it would require federal courts to give so much deference to state court decisions that a prisoner would have virtually no opportunity for federal review of their habeas claim.⁷³ However, in its wake, scholars observed that AEDPA did not have as

⁶⁶ 28 U.S.C. § 2254(d) (2012).

⁶⁷ *Brown v. Allen*, 344 U.S. 443, 500 (1953) (Frankfurter, J., concurring).

⁶⁸ Regan, *supra* note 63, at 135.

⁶⁹ Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 93 (2012).

⁷⁰ See Kovarsky, *supra* note 32, at 449.

⁷¹ 28 U.S.C. § 2254(d) (2012).

⁷² *Id.*

⁷³ See Blume, *supra* note 49, at 260; see also Krista A. Dolan, *The §2254 Trinity: How the Supreme Court’s Decisions in Richter, Pinholster, and Greene Have Interpreted Federal Review Into Near Nonexistence*, 8 CRIM. L. BRIEF 49, 49 (2013) (describing recent Supreme Court cases that have effectively tipped the scales “in favor of no review”).

profound an effect as many thought that it would.⁷⁴ For example, from its enactment in 1996 to 2005, AEDPA had no effect on the percentage of habeas cases under § 2254(d) in which the petitioner was successful in the Supreme Court.⁷⁵ With respect to *Strickland* ineffective assistance of counsel claims, the Supreme Court actually granted relief in several *Strickland* cases, which it had not done before AEDPA.⁷⁶ While the Supreme Court did confirm that after AEDPA, § 2254(d) now mandated a more deferential standard of review than the de novo standard it applied in *Brown*, it took a more modest approach than most expected,⁷⁷ which led leading habeas scholars to report that AEDPA was “largely a ‘symbolic’ statute that made only trivial or ‘marginal changes’ to the already existing judicially created limitations on relief.”⁷⁸

However, the tide began to change in the new millennium; the Supreme Court began to take a more activist approach to AEDPA cases. Specifically, from 2000 to 2012, the Supreme Court granted certiorari in ninety-four AEDPA cases, about half of which dealt with questions of federal habeas courts’ deference to state court decisions.⁷⁹ Though “[a] well-drafted statute should reduce the frequency of disputes about interpretation,” AEDPA certainly did not do so.⁸⁰ In seventy-four percent of the cases in which the Court granted certiorari, it reversed the court of appeals decision for failing to give adequate deference to the state court decision.⁸¹ “Remarkably,” almost fifty percent were reversed without dissent.⁸²

Perhaps the ease with which the Court was first able to conclude that AEDPA did not change the § 2254(d) landscape and shortly after conclude that it actually did significantly restrain federal courts’ ability to grant habeas relief is due to the

⁷⁴ Blume, *supra* note 49, at 276; *see also* Dolan, *supra* note 73, at 49 (noting that the Court’s initial interpretation of AEDPA ran contrary to congressional intent).

⁷⁵ Blume, *supra* note 49, at 277 (explaining that before AEDPA, the Court granted relief in 33% of cases, compared to 34% after the enactment of AEDPA).

⁷⁶ Marceau, *supra* note 69, at 96.

⁷⁷ *Williams v. Taylor*, 529 U.S. 362, 377, 412 (2000).

⁷⁸ Marceau, *supra* note 69, at 108–09 (citations omitted).

⁷⁹ *Garrus v. Sec’y of the Pa. Dep’t of Corr.*, 694 F.3d 394, 412–13 (3d Cir. 2012).

⁸⁰ Benjamin R. Orye III, Note, *The Failure of Words: Habeas Corpus Reform, The Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 470 (2002) (citations omitted).

⁸¹ *Garrus*, 694 F.3d at 413.

⁸² *Id.* at 413–14.

fact that AEDPA was “hastily ratified and poorly cohered.”⁸³ Indeed, even the Supreme Court Justices have expressed frustration with the drafting of AEDPA. For example, in *Lindh v. Murphy*, Justice Souter, writing for the majority, remarked, “[a]ll we can say is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”⁸⁴ Similarly, Justice Scalia asked during oral argument in another AEDPA case, “Who is responsible for writing this?”⁸⁵ In addition to its poor drafting, which even its proponents have acknowledged,⁸⁶ the statute is particularly difficult to interpret because “evidence of AEDPA’s purpose is unusually sparse.”⁸⁷

Nevertheless, in 2011, the Supreme Court sought to interpret the “adjudicated on the merits” language in § 2254(d) in *Harrington v. Richter*.⁸⁸ In *Richter*, the Court determined that an unreasoned state court opinion,⁸⁹ that is, a petition for state post-conviction relief that is denied without an accompanying statement of reasons or a written opinion, is “an adjudic[ation] on the merits” for § 2254(d) purposes.⁹⁰ In *Richter* and other cases decided in the same year,⁹¹ it became “abundantly clear”⁹² to scholars and practitioners that “AEDPA’s practical bite is even more ferocious than the initial legislative bark may have suggested.”⁹³ Specifically, as one study found, from AEDPA’s enactment to 2007, less than four-tenths of one percent of habeas petitioners in state custody received any kind of relief in the federal district courts.⁹⁴

It is clear, though, that *Richter* raised more questions than it answered. For example, because in *Richter* no lower state court had addressed the merits of the prisoner’s claim,⁹⁵ in a post-*Richter* world, lower federal courts have struggled with

⁸³ Kovarsky, *supra* note 32, at 447.

⁸⁴ 521 U.S. 320, 336 (1997).

⁸⁵ Blume, *supra* note 49, at 261 (citations omitted).

⁸⁶ Orye, *supra* note 80, at 470.

⁸⁷ Kovarsky, *supra* note 32, at 469.

⁸⁸ 562 U.S. 86 (2011).

⁸⁹ *Id.* at 98.

⁹⁰ *Id.*

⁹¹ See, e.g., *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) (limiting federal review to the record that was before the state trial court).

⁹² Dolan, *supra* note 73, at 49.

⁹³ Marceau, *supra* note 69, at 88; see also Dolan, *supra* note 73, at 50 (explaining that relief in AEDPA cases declined steadily from AEDPA’s enactment through 2011. Specifically, from 1996 to 2000, 50% of AEDPA petitioners obtained relief, but from 2010 to 2011, that figure dropped to 14%).

⁹⁴ Andrew L. Adler, *The Non-Waivability of AEDPA Deference’s Applicability*, 67 U. MIAMI L. REV. 767, 771 (2013) (citing Joseph L. Hoffman & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at WK8).

⁹⁵ *Richter*, 562 U.S. at 100.

whether they are able to “look through” a summary denial and scrutinize a lower state court’s reasons for rejecting a prisoner’s claim or, alternatively, whether they are required to determine whether “‘fairminded jurists could disagree’ on the correctness of the state court’s decision”⁹⁶ in a vacuum, as the Court instructed in *Richter*. There was,⁹⁷ and still is to some extent,⁹⁸ a circuit split on this question. However, Justice Ginsburg’s concurrence in the denial of certiorari in *Hittson v. Chatman* in June 2015 seemed to confirm that, at least in her view, federal courts are to “look through” a summary denial to the reasons given by a lower state court for rejecting a prisoner’s claim.⁹⁹ Under *Ylst*,¹⁰⁰ she explained, federal courts are to presume that later unexplained orders upholding a judgment or rejecting the same claim rest upon the same ground, since unexplained orders usually reflect agreement with the reasons given by the lower court.¹⁰¹ In a post-*Richter* world, though, should silence on a *Strickland* prong be treated the same as silence on a claim?

II

ANALYSIS

In *Thomas v. Clements*, the Seventh Circuit held that silence on a prong should be treated differently than silence on a claim; that federal habeas courts should not “look through” an appellate court’s silence on a *Strickland* prong to a lower state court’s discussion of that prong.¹⁰² The Seventh Circuit denied a rehearing en banc of this issue, and Judge Easterbrook wrote a concurrence in the denial.¹⁰³ In that concurrence, Judge Easterbrook explained that there are two rules that underlie the Seventh Circuit’s decision: (1) that a federal court can only

⁹⁶ *Id.* at 101 (citations omitted).

⁹⁷ Kovarsky, *supra* note 32, at 493.

⁹⁸ *Compare* *Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 678 (11th Cir. 2014) (“Instead of deferring to the reasoning of the state trial court, we ask whether there was any ‘reasonable basis for the [Supreme Court of Georgia] to deny relief.’”) (citing *Richter*, 562 U.S. at 98), *with* *Cannedy v. Adams*, 706 F.3d 1148, 1157 (9th Cir. 2013) (rejecting the suggestion that it should “evaluate all the hypothetical reasons that could have supported the high court’s decision” as an “overly broad reading of *Richter*”).

⁹⁹ 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in the denial of certiorari).

¹⁰⁰ 501 U.S. 797 (1991).

¹⁰¹ *Hittson*, 135 S. Ct. at 2127 (Ginsburg, J., concurring in the denial of certiorari).

¹⁰² 789 F.3d 760, 767–68 (7th Cir. 2015).

¹⁰³ *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc).

look to one state court decision, and (2) that a prong of a *Strickland* claim is a “claim” for § 2254(d) purposes.¹⁰⁴ He explains that both of these rules are unsound, and that the *Wiggins* practice of reviewing an unexamined prong was an “unreasoned statement” that would be unwise to follow.¹⁰⁵ Below, I first explain the majority opinion in *Thomas* and Judge Easterbrook’s concurrence in the denial of the rehearing en banc. I then defend these two rules that underlie the Seventh Circuit’s opinion and explain why the *Wiggins* holding is indeed a holding, and why it survives *Richter*.

A. *Thomas v. Clements*

In June 2015, the Seventh Circuit reversed the district court’s denial of Oscar Thomas’s habeas petition in *Thomas v. Clements*.¹⁰⁶ In state court proceedings, Thomas was convicted for the murder of his ex-wife, Joyce Oliver-Thomas.¹⁰⁷ Though they were divorced, Thomas and Oliver-Thomas lived together.¹⁰⁸ They also fought.¹⁰⁹ On December 27, 2006, sometime around 2 a.m., a neighbor awoke to screaming, choking, and kicks and thumps on the ceiling.¹¹⁰ Thomas called the police at 3:24 a.m. reporting that Oliver-Thomas was unconscious. She was pronounced dead at the hospital less than an hour later.¹¹¹ During Thomas’s trial, the state’s forensic pathologist testified that Oliver-Thomas’s autopsy report was consistent with the application of intentional pressure to her neck, resulting in her death.¹¹² A coroner and medical examiner also testified that Oliver-Thomas had hemorrhages in her eyes, at least ten abrasions on her face, multiple hemorrhages inside her neck, and bruises on her thyroid and larynx.¹¹³ She concluded that Oliver-Thomas’s death was not an accident, but the result of manual strangulation and physical assault.¹¹⁴

On state post-conviction review, Thomas claimed that his trial counsel was ineffective for failing to present expert testimony reviewing or countering the coroner’s findings.¹¹⁵ Dur-

104 *Id.* at 447.

105 *Id.* at 448.

106 *Thomas*, 789 F.3d at 763.

107 *Id.* at 762.

108 *Id.* at 763.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 764.

113 *Id.*

114 *Id.*

115 *Id.* at 765.

ing post-conviction proceedings, Thomas presented the testimony of a forensic pathologist who explained that certain injuries indicative of strangulation were absent from Oliver-Thomas's body, and that there was no physical evidence of intentional pressure to Oliver-Thomas's neck.¹¹⁶ Trial counsel said that he did not consider retaining a forensic pathologist.¹¹⁷ The post-conviction court found that Thomas failed both prongs of the *Strickland* analysis and denied relief.¹¹⁸ The state appellate court affirmed, finding no prejudice, but did not address whether counsel's performance was deficient.¹¹⁹

1. *The Seventh Circuit Opinion*

On federal habeas, the parties disagreed about whether the court was required to give AEDPA deference to the performance prong of Thomas's *Strickland* claim since the Wisconsin Court of Appeals did not address that prong.¹²⁰ The Seventh Circuit concluded that even though the lower state court determined that Thomas did not satisfy either prong, because the appellate court did not decide whether counsel's performance was deficient, the Seventh Circuit was required to review the performance prong de novo.¹²¹ Although the State argued that the Seventh Circuit's decision in *Atkins v. Zenk*¹²² foreclosed the possibility of reviewing the performance prong de novo,¹²³ the court nonetheless explained that circuit and Supreme Court precedent, as well as the plain language of AEDPA, mandated the court's de novo review.¹²⁴

In addressing circuit precedent, the Seventh Circuit said that its decision in *Atkins* did not contradict *Thomas*.¹²⁵ In *Atkins*, the trial court addressed both *Strickland* prongs and the appellate court only addressed one.¹²⁶ On appeal, the Seventh Circuit stated that "[b]ecause 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."¹²⁷ In *Thomas*, however, the Seventh Circuit disagreed

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 766.

121 *Id.* at 767.

122 667 F.3d 939 (7th Cir. 2012).

123 *Thomas*, 789 F.3d at 766.

124 *Id.* at 766–67.

125 *Id.* at 766.

126 *Atkins*, 667 F.3d at 943.

127 *Id.* at 944.

with the State that *Atkins* controlled, because in *Atkins*, “the standard of review was not subject to debate between the parties.”¹²⁸ It also explained that the Seventh Circuit practice is to give deference only to the “last reasoned opinion on the claim,” not an amalgamation of decisions.¹²⁹ In *Woolley v. Rednour*, for example, the Seventh Circuit articulated that “[u]nless a state-court opinion adopts or incorporates the reasoning of a prior opinion, ‘AEDPA generally requires federal courts to review one state decision.’”¹³⁰ Because in *Woolley* “the appellate court declined to adopt the trial court’s reasoning and instead remained silent on defense counsel’s performance,” the Seventh Circuit reviewed that prong de novo.¹³¹

The court also defended its holding by asserting that Supreme Court precedent and the plain language of AEDPA supported de novo review.¹³² First, the Seventh Circuit noted Supreme Court support for this rule with one citation to *Wiggins* and *Ylst*.¹³³ It then went on to say that AEDPA instructs courts to give deference to “the adjudication.”¹³⁴ If Congress had meant to instruct federal courts to give deference to more than one decision by “looking through” the appellate court’s opinion, the Seventh Circuit reasoned, it would have referenced adjudications, plural.¹³⁵ The exceptions to § 2254(d) also refer to a “decision” that is either contrary to, or involves an unreasonable application of, clearly established Federal law, or is based on an unreasonable determination of the facts.¹³⁶ “Again, the statute refers to a single decision, rather than multiple decisions.”¹³⁷ The Seventh Circuit, therefore, reviewed the performance prong de novo, and concluded that trial counsel’s performance was indeed deficient.¹³⁸ Further, because the Wisconsin Court of Appeals applied the wrong standard to the prejudice prong, the Seventh Circuit also reviewed that prong de novo.¹³⁹

¹²⁸ *Thomas*, 789 F.3d at 766.

¹²⁹ *Id.* (quoting *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012)).

¹³⁰ *Woolley*, 702 F.3d at 421 (quoting *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005)).

¹³¹ *Thomas*, 789 F.3d at 766 (quoting *Woolley*, 702 F.3d at 422).

¹³² *Id.* at 767.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 771.

¹³⁹ *Id.* at 763.

2. *The Denial of Rehearing En Banc*

On August 7, 2015, the Seventh Circuit denied a rehearing en banc of *Thomas*.¹⁴⁰ In his concurrence of the denial, Judge Easterbrook effectively wrote a petition for a writ of certiorari. He disagreed with the panel's decision that "if two state courts consider a subject, with Court A denying relief on one ground and Court B on a different ground, then a federal court must ignore the first decision."¹⁴¹ Nonetheless, Easterbrook wrote, "there is little point in granting rehearing en banc to move this circuit from one side of a conflict to another."¹⁴² Instead, "[t]he subject belongs on the Supreme Court's plate."¹⁴³ He expressed his disagreement with the two legal rules that are triggered by, and underlie, the panel's decision: (1) "the proposition that the opinion of every state court except the last must be ignored" and (2) "that performance and prejudice, the two components of an ineffective-assistance claim under *Strickland*, are separate 'claims' for the purpose of § 2254(d)."¹⁴⁴ Judge Easterbrook also explained that the practice followed in *Wiggins*, *Rompilla*, and *Porter*, that is, reviewing an unexamined prong de novo, were just "drive-by statements" in those cases and therefore have no precedential value.¹⁴⁵ I take each one of these arguments in turn.

B. Why Federal Courts Must Look to One, and Only One, State Court Opinion

In 1991 in *Ylst v. Nunnemaker*,¹⁴⁶ the Court explained that "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."¹⁴⁷ In *Richter*, the Court confronted a situation where no state court had issued a reasoned opinion on the prisoner's claim,¹⁴⁸ so it did not have an opportunity to determine whether it should "look through" the summary denial to the reasons given by a lower state court and, under *Ylst*, assume that the "later unexplained orders . . . rest upon the same

140 797 F.3d 445 (7th Cir. 2015).

141 *Id.* at 445 (Easterbrook, J., concurring in denial of rehearing en banc).

142 *Id.* at 446.

143 *Id.*

144 *Id.* at 447.

145 *Id.* at 448.

146 501 U.S. 797 (1991).

147 *Id.* at 803.

148 *Harrington v. Richter*, 562 U.S. 86, 88 (2011).

ground.”¹⁴⁹ However, in a post-*Richter* world, it has become clear that *Ylst* applies to summary denials and that federal habeas courts can “look through” summary denials to the reasons that a lower state court has given for rejecting a prisoner’s claim.¹⁵⁰

It is not clear, however, that this is the result the *Richter* court intended or even anticipated. In *Richter*, the Court was focused on the situation where there is no written opinion.¹⁵¹ The Court’s holding in *Richter* was that “[w]here a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing” that no “‘fair-minded jurists could disagree’ on the correctness of the state court’s decision.”¹⁵² It instructed petitioners, and also lower federal courts, to engage in a hypothetical analysis of the arguments or theories that could have supported the state court’s decision, even though the state court did not provide any arguments or theories.¹⁵³

This hypothetical analysis proved “very difficult, if not impossible.”¹⁵⁴ As an initial matter, it is not the job of a federal court “to invent arguments in support of upholding a state court’s unexplained decision.”¹⁵⁵ Instead, that is “the job of a state’s attorney general.”¹⁵⁶ More to the point, however, it simply makes no sense to follow the Court’s instruction in *Richter* to determine what arguments or theories could have supported the summary denial¹⁵⁷ if the actual arguments or theories that supported the state court’s decision are readily ascertainable. Therefore, in the years following *Richter*, circuit courts started looking to the reasons given by lower state courts, and cited *Ylst* for the Supreme Court’s endorsement of this approach.¹⁵⁸ In June 2015, Justice Ginsburg expressed her agreement with this practice in the denial of certiorari in *Hittson v. Chattman*,

¹⁴⁹ *Ylst*, 501 U.S. at 803.

¹⁵⁰ *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in the denial of petition for writ of certiorari).

¹⁵¹ *Richter*, 562 U.S. at 98.

¹⁵² *Id.* at 88, 101 (citations omitted).

¹⁵³ *Id.* at 88.

¹⁵⁴ Claudia Wilner, “We Would Not Defer to That Which Did Not Exist:” AEDPA Meets the Silent State Court Opinion, 77 N.Y.U. L. REV. 1442, 1457 (2002).

¹⁵⁵ *Id.* at 1468.

¹⁵⁶ *Id.*

¹⁵⁷ *Richter*, 562 U.S. at 88.

¹⁵⁸ See, e.g., *Guilmette v. Howes*, 624 F.3d 286, 291–92 (6th Cir. 2010) (“In *Ylst v. Nunnemaker*, the Supreme Court applied a presumption that “[w]here 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.” (alteration in original) (quoting 501 U.S. 797, 803 (1991)).

explaining that “*Richter’s* hypothetical inquiry was necessary” when “no state court opinion explain[ed] the reasons relief ha[d] been denied.”¹⁵⁹ She admonished the Eleventh Circuit for “discarding *Ylst*.”¹⁶⁰

In the *Wiggins* situation, however, where a federal court reviews an unexamined prong de novo, there is no need for the *Ylst* rule. In *Ylst*, the Court said that “[t]he maxim is that silence implies consent . . . and courts generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below.”¹⁶¹ But in the *Wiggins* situation, where a state court is silent on a prong discussed and decided by the lower court, it has affirmed a lower state court decision explicitly *with* further discussion. It would be inappropriate in that situation “to presume the state court not only had a finding in mind as to the unexplained prong but that this finding was against the petitioner”¹⁶² because the higher court must have disagreed, at least in part, with the lower court’s reasoning. Otherwise, it would have taken the quickest way home and affirmed the lower court’s decision on the same prong.

Further, many state court opinions explicitly announce their refusal to consider a *Strickland* prong¹⁶³ and the federal habeas court should give meaning to these statements. For example, where a state court says, “we do not address whether Trial Counsel’s conduct fell below an objective standard of reasonableness,”¹⁶⁴ a federal court cannot logically claim that the court nonetheless adjudicated the performance prong of the

¹⁵⁹ *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in the denial of petition for writ of certiorari) (alterations in original) (citation omitted).

¹⁶⁰ *Id.*

¹⁶¹ *Ylst*, 501 U.S. at 804.

¹⁶² *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012).

¹⁶³ *See, e.g.*, *People v. Newmiller*, 338 P.3d 459, 469 (Colo. App. 2014) (“Because defendant has not established deficient performance, we do not address prejudice.”); *Ploof v. State*, 75 A.3d 811, 828 (Del. 2013) (“Even if it was assumed that Trial Counsel’s failure to present . . . evidence fell below an objective standard of reasonableness, . . . [the defendant] cannot show that Trial Counsel’s alleged deficiencies prejudiced him Because we hold that . . . [the defendant] has failed to establish prejudice under *Strickland*, we do not address whether Trial Counsel’s conduct fell below an objective standard of reasonableness.”); *In re Pers. Restraint of Crace*, 280 P.3d 1102, 1108–09 (Wash. 2012) (“We need not consider both prongs of *Strickland* (deficient performance and prejudice) if a petitioner fails on one Assuming without deciding that counsel was deficient . . . we cannot say in all reasonable probability that counsel’s error—failure to seek the lesser included offense—contributed to . . . [the defendant’s] conviction on attempted second degree assault.”).

¹⁶⁴ *Ploof*, 75 A.3d at 828.

prisoner's *Strickland* claim. It would be even more illogical to conclude that the state court not only adjudicated that prong, but also that it adjudicated the prong against the petitioner.¹⁶⁵ That practice would "essentially ascrib[e] a conclusion to the state court that the state court declined to make itself,"¹⁶⁶ and provide no principled reason for refusing to apply the rule when the higher state court not only implicitly rejects the holding of the lower court by choosing to adjudicate the claim on the other prong, but also when it expressly rejects the lower court's reasoning. Under the Easterbrook approach, in these situations, federal courts would still look to the lower state court's reasons for rejecting the prisoner's claim on the performance prong, for example, even when the appellate court explicitly denounces and disapproves of the lower court's reasoning on that prong.¹⁶⁷

Ylst also instructs federal courts to look to one, and only one, state court decision. The *Ylst* court repeatedly referenced "the last explained state-court judgment"¹⁶⁸ and "the last reasoned opinion."¹⁶⁹ It even announced that the analysis "begin[s] by asking which is the last *explained* state-court judgment."¹⁷⁰ In *Ylst*, the Court did not gather as many state court judgments as it could to piece together one adjudication. Piecing together an "adjudication on the merits" would also contradict "the core purpose of [the *Ylst*] rule[, which] is to improve 'administrability' and 'accuracy' amongst the lower federal courts."¹⁷¹ Therefore, federal habeas courts should not be required to apply AEDPA deference to "some amalgamation of multiple state court decisions"¹⁷² because it would sometimes require the court to dig deep into the record.

¹⁶⁵ Of course, this is the approach encouraged by *Strickland* itself. *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the [*Strickland*] inquiry if the defendant makes an insufficient showing on one.").

¹⁶⁶ Respondent's Brief in Opposition at 10, *Wolfenbarger v. Foster*, 133 S. Ct. 1580 (2013) (No. 12-420).

¹⁶⁷ *Compare* *Loden v. McCarty*, 778 F.3d 484, 495 (5th Cir. 2015) ("Where a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference."), *with* *White v. Thaler*, 610 F.3d 890, 907 (5th Cir. 2010) ("[B]ecause the state court did not adjudicate the first prong on the merits, we review the deficient performance prong of *Strickland* de novo and the prejudice prong under the more deferential AEDPA standard.").

¹⁶⁸ *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991).

¹⁶⁹ *Id.* at 803.

¹⁷⁰ *Id.* at 805.

¹⁷¹ *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 463 (6th Cir. 2015).

¹⁷² *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005).

C. Why it is Permissible to Treat Prongs of a *Strickland* Claim as “Claims” for § 2254(d) Purposes

Judge Easterbrook is correct that *Wiggins* seems to stand in conflict with AEDPA. Under AEDPA, § 2254(d) tells us that a federal court cannot grant habeas relief to a state prisoner “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim” was contrary to, or an unreasonable application of federal law or resulted in a decision that was based on an unreasonable determination of the facts.¹⁷³ It seems that if a state court decision is deemed an “adjudication on the merits,” AEDPA deference should apply to the entire “adjudication.” On the other hand, if a state court does not reach an “adjudication on the merits,” the entire claim should be reviewed *de novo*. Under *Wiggins*, though, the §§ 2254(d)(1) and 2254(d)(2) exceptions only apply to the prong that the state court actually reached, and only that prong is deemed an “adjudication on the merits.”¹⁷⁴ However, this is the conclusion that follows directly from *Wiggins*. Treating a prong as a “claim” for § 2254(d) purposes does not at all flow from the *Thomas* problem, or *Wiggins* in a post-*Richter* world. It is a necessary consequence of *Wiggins* itself.

Also, Judge Easterbrook overlooks the fact that his approach, too, requires an element-specific analysis of *Strickland* claims under § 2254(d). It is not just *Wiggins* and the *Thomas* decision that “tacitly equate[] [an] ‘issue’ with [a] ‘claim.’”¹⁷⁵ Applying AEDPA deference to each prong of a prisoner’s *Strickland* claim in different state court decisions is also element-specific because it gives deference to different decisions based on the element of the *Strickland* claim that that decision examines. It necessarily treats a prong of the *Strickland* analysis as an essential component of the adjudication of the *Strickland* claim, just like the Seventh Circuit approach. Some circuits that follow Judge Easterbrook’s approach have acknowledged that this approach conflates a *Strickland* prong with a “claim” for § 2254(d) purposes. For example, in *Loden v. McCarty*, the Fifth Circuit said, “[w]here a lower state court ruled on an *element* that a higher state court did not, the lower state court’s decision is entitled to AEDPA deference.”¹⁷⁶

¹⁷³ 28 U.S.C. § 2254(d) (2012).

¹⁷⁴ *Wiggins v. Smith*, 539 U.S. 510, 530–31 (2003).

¹⁷⁵ *Thomas v. Clements*, 797 F.3d 445, 447 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing *en banc*).

¹⁷⁶ 778 F.3d 484, 495 (5th Cir. 2015) (emphasis added).

Last, treating a prong as a “claim” for § 2254(d) purposes comports with Congress’ intent in passing AEDPA because it allows federal courts to defer only to what the state court actually decided, and also allows a prisoner one full opportunity to have his or her claim heard and decided. Requiring a federal court to give deference “to any claim that has been adjudicated on the merits in any state court proceeding which can occur at any level of state court”¹⁷⁷ does not give proper “[r]espect for the state judiciary,”¹⁷⁸ but rather gives undue deference to state court decisions. The heart of § 2254(d) compels federal courts to give deference to state court decisions where the state court has engaged in an analysis of the “intrinsic rights and wrongs of a [claim].”¹⁷⁹ If the state court has done so with one prong of the *Strickland* analysis, but not the other, it should not matter whether the claim can be deemed “adjudicated on the merits.” Rather, what is important for AEDPA purposes, is applying deference to the prong that the state court actually decided.

Though it is clear that AEDPA was intended to “limit the scope of federal intrusion into state” court decisions¹⁸⁰ and to curb habeas abuse,¹⁸¹ Congress also sought to maintain “meaningful federal court oversight” of state court convictions, particularly those that deal with federal law.¹⁸² Congress sought to maintain the “longstanding practice” of federal courts protecting prisoners’ federal constitutional rights—at least to some degree—where a state court fails to do so.¹⁸³ Of course, through AEDPA, Congress sought to “adjust the balance between state and federal courts,” but that does not mean it intended to “strip prisoners of their right to meaningful review of their federal constitutional claims.”¹⁸⁴

¹⁷⁷ *Collins v. Sec’y of the Pa. Dep’t of Corr.*, 742 F.3d 528, 545 (3d Cir. 2014) (internal quotation marks omitted).

¹⁷⁸ *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc).

¹⁷⁹ *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) (citation and internal quotation marks omitted).

¹⁸⁰ *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

¹⁸¹ Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 597 (2009).

¹⁸² Wilner, *supra* note 154, at 1459.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

D. Why the *Wiggins* Holding is not a “Drive-By Statement”¹⁸⁵

In *Wiggins*, the Maryland Court of Appeals determined that counsel’s performance was not deficient, and therefore did not reach the prejudice prong of the *Strickland* analysis.¹⁸⁶ In evaluating the prisoner’s habeas petition, the Supreme Court first determined that the Maryland Supreme Court unreasonably applied *Strickland* in finding that counsel’s performance was not deficient.¹⁸⁷ The Court explained that even though the state court acknowledged that counsel’s performance “did not meet the minimum standards of the profession,” it nevertheless did not conduct a further investigation.¹⁸⁸ Thus, the Court concluded, the state court unreasonably applied *Strickland*’s deficient performance prong under § 2254(d).¹⁸⁹ The Court reviewed the prejudice prong de novo, reasoning that its “review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached [the prejudice] prong of the *Strickland* analysis.”¹⁹⁰

Contrary to what Judge Easterbrook argues, reviewing the prejudice prong of the prisoner’s *Strickland* claim de novo in *Wiggins* was not an “unreasoned” or “drive-by statement.”¹⁹¹ It was a practice the Court followed; the application of the rule that when a state court does not address a prong of the *Strickland* analysis, that prong is reviewed de novo. Further evidence that this practice is not an “unreasoned statement” lies in the Court’s insistence on obeying this rule. For example, in 2005 in *Rompilla v. Beard*, the Court repeated and again followed this rule, saying that “[b]ecause the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim de novo.”¹⁹² In *Porter v. McCollum*, four years later, the

¹⁸⁵ *Thomas v. Clements*, 797 F.3d 445, 448 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc).

¹⁸⁶ See *Wiggins v. Smith*, 539 U.S. 510, 518 (2003).

¹⁸⁷ *Id.* at 527.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 534.

¹⁹¹ *Thomas v. Clements*, 797 F.3d 445, 448 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc).

¹⁹² 545 U.S. 374, 390 (2005) (citations omitted).

Court also followed the *Wiggins* rule,¹⁹³ and many lower federal courts have since done the same without much hesitation.¹⁹⁴

The Supreme Court in *Wiggins* carried out the steps it thought necessary to resolve an issue under AEDPA. Those steps are models for lower courts to follow. The rule simply cannot be: do as the Supreme Court explicitly says, and not as it does. That would deprive parties and lower federal courts of the guidance they have relied upon for centuries. Following the practice that the Court followed in *Wiggins*, *Rompilla*, and *Porter* is hardly “treat[ing] as a holding everything the Supreme Court ever said on the way to any decision.”¹⁹⁵ Judge Easterbrook tells us that because “[n]one of the petitions in *Wiggins*, *Rompilla*, and *Porter* presented the question whether ‘issue’ is the same as ‘claim’ under § 2254(d),” and “[n]one of the briefs in any of these cases devotes an argument to that subject,” we cannot think of the *Wiggins* practice as a holding.¹⁹⁶ However, it cannot be that lower courts cannot follow a Supreme Court practice unless it is the question presented in the parties’ briefs. The Ninth Circuit acknowledged that federal courts are to look to Supreme Court practice, and not just its narrow holdings, in *Andrews v. Davis*,¹⁹⁷ where it said that “[i]n determining whether a state court’s adjudication of an ineffective assistance of counsel claim was an unreasonable application of Supreme Court precedent, we may consider how the Supreme Court itself has applied *Strickland* to other factual contexts,”¹⁹⁸ which is “illustrative of the proper application of [*Strickland*’s] standards.”¹⁹⁹

E. Why *Wiggins* and *Richter* Operate in Different Spheres

Nothing in *Richter* changes the *Wiggins* rule. *Richter* applies only “[w]here a state court’s decision is unaccompanied by

¹⁹³ 558 U.S. 30, 39 (2009) (“Because the state court did not decide whether Porter’s counsel was deficient, we review this element of Porter’s *Strickland* claim *de novo*.”).

¹⁹⁴ See, e.g., *Rayner v. Mills*, 685 F.3d 631, 637–38 (6th Cir. 2012) (“In at least two published opinions—one of which was decided en banc—where the state court adjudicated only one prong, we have continued to rely on *Wiggins* and have reviewed the remaining prong *de novo*. These decisions did not examine the interplay between *Wiggins* and *Harrington* . . . [and] Fifth and Ninth Circuit cases have, like our own, continued to follow *Wiggins* or *Rompilla* without discussion.” (citations omitted)).

¹⁹⁵ *Thomas*, 797 F.3d at 448 (Easterbrook, J., concurring in denial of rehearing en banc).

¹⁹⁶ *Id.*

¹⁹⁷ 798 F.3d 759 (9th Cir. 2015).

¹⁹⁸ *Id.* at 774–75.

¹⁹⁹ *Id.* at 775 (alteration in original).

an explanation.”²⁰⁰ In *Wiggins*-type cases, the state court decision is accompanied by an explanation, but just fails to address one prong of the prisoner’s *Strickland* claim. In *Richter*-like cases, the reasons that the state court denied a prisoner’s *Strickland* claim are not readily ascertainable. A federal habeas court cannot tell whether the state court adjudicated the performance prong or the prejudice prong or both. *Richter* tells us that we assume the court adjudicated both prongs and gives AEDPA deference to both prongs. However, in *Wiggins*-like cases, the state court discusses just one prong and is silent on the other. In that situation, we need not assume that it also decided the other prong (in part because state courts often explicitly say that they have not reached a particular prong).²⁰¹ We also cannot assume that in *Richter*, the Court overruled *sub silentio* its holding in *Wiggins*.²⁰² The *Richter* Court cited both *Wiggins* and *Rompilla* without suggesting that its decision would call the *Wiggins* holding, or its practice of reviewing an unexamined prong de novo, into doubt. While *Richter* applies to silence on a claim, *Wiggins* applies to silence on a prong. “This is a straightforward approach that allows those Supreme Court decisions to co-exist comfortably.”²⁰³

But even if *Richter* did apply, it would not produce the outcome urged by Judge Easterbrook. In *Richter*, the Court said that silence on a claim is to be deemed an “adjudication on the merits.”²⁰⁴ It follows from *Ylst* that when a lower state court has adjudicated the claim, a federal habeas court can “look through” the state appellate court’s silence to the reasons given by the lower court and defer to those reasons.²⁰⁵ However, under *Richter*, when no state court has discussed the merits of the prisoner’s claim, the federal habeas court still must accord deference to the state court’s decision.²⁰⁶ In those situations, the federal court is to determine what arguments or theories could have supported the summary denial, and then ask if fair-minded jurists could disagree about those argu-

²⁰⁰ *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

²⁰¹ *See, e.g., People v. Newmiller*, 338 P.3d 459, 469 (Colo. App. 2014) (“Because defendant has not established deficient performance, we do not address prejudice.”).

²⁰² *See Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011).

²⁰³ *Rayner v. Mills*, 685 F.3d 631, 639 (6th Cir. 2012) (citations and internal quotation marks omitted).

²⁰⁴ *Richter*, 562 U.S. at 98 (“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.”).

²⁰⁵ *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

²⁰⁶ *See Richter*, 562 U.S. at 98.

ments or theories.²⁰⁷ If *Richter* is wholly imported to a situation where a state appellate court has discussed just one prong of the prisoner's *Strickland* claim, then, when no state court has issued a reasoned decision on the prong, the federal court would have to determine "what arguments or theories supported, or could have supported . . . [the denial of the prisoner's claim on that prong], and then . . . ask whether it is possible fair-minded jurists could disagree" about those arguments or theories.²⁰⁸

However, this is not the conclusion that the circuits that follow Judge Easterbrook's approach reach. Instead, where no state court has discussed the merits of a prong of a *Strickland* claim, the circuit courts that follow Judge Easterbrook's rule look to *Wiggins* for guidance and review the prong de novo.²⁰⁹ But *Richter* either applies to silence on a prong or it does not. It cannot apply only where the state courts have, at one stage or another, discussed both prongs but not where no state court has examined one of the prongs.

CONCLUSION

A case where *Wiggins* would require a federal court to review a prong of a petitioner's *Strickland* claim de novo is rare. A federal court reviewing a *Strickland* claim should conduct a step-by-step analysis of the prisoner's claim and the state court's adjudication of that claim. In most cases, federal courts would not reach the last step, that is, conducting the de novo review of one prong of a prisoner's *Strickland* claim. First, the federal courts should begin by examining the last reasoned opinion.²¹⁰ Under *Richter* and *Ylst*, if the state appellate court issued a summary denial, then the habeas court would "look through" that decision to the lower state court decision.²¹¹

Next, the federal court would determine whether the "last reasoned opinion"²¹² adjudicated one or both of the prongs. If

²⁰⁷ *Id.* at 102.

²⁰⁸ *Id.*

²⁰⁹ *Compare* Loden v. McCarty, 778 F.3d 484, 495 (5th Cir. 2015) ("Where a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference."), *with* White v. Thaler, 610 F.3d 890, 907 (5th Cir. 2010) ("[B]ecause the state court did not adjudicate the first prong on the merits, we review the deficient performance prong of *Strickland* de novo and the prejudice prong under the more deferential AEDPA standard.").

²¹⁰ *Ylst*, 501 U.S. at 805 (explaining that the analysis "begin[s] by asking which is the last *explained* state-court judgment").

²¹¹ See Hittson v. Chatman, 135 S. Ct. 2126, 2127 (2015) (Ginsburg, J., concurring in the denial of petition for writ of certiorari).

²¹² *Thomas v. Clements*, 789 F.3d 760, 766 (7th Cir. 2015).

it adjudicated both prongs, both prongs would receive AEDPA deference. If it adjudicated just one prong, the federal court would begin by applying AEDPA deference to that prong. If the federal court, applying AEDPA deference to that prong agrees with the state court, the inquiry is over and the petition is denied. *Strickland* itself encourages any court adjudicating a *Strickland* claim to dispose of the prisoner's claim in the easiest way possible.²¹³ Only then if the federal court determines that the state court unreasonably applied federal law or unreasonably determined the facts on one prong would it review the other prong de novo.

Further, it may seem as though reviewing an unexamined prong de novo yet reviewing silence with full AEPDA adjudication is backwards. After all, the rule does require federal courts to defer to a "state-court decision that contains no analysis whatsoever on either component of a *Strickland* claim" but not to a "partially-reasoned state-court decision."²¹⁴ However, what distinguishes full AEDPA deference versus de novo review on one prong is not the amount of analysis a state court performs.²¹⁵ Instead, the assessment concerns whether a state court addressed one or both prongs of *Strickland*. Second, giving more deference to a silent decision than one that speaks is not the result of following *Wiggins* in a post-*Richter* world, it is the result of *Richter* itself. Under *Richter*, a state court decision is given the most deference when no state court has discussed the merits of the petitioner's claim. In those cases, a federal habeas court must determine what arguments or theories could have supported the summary denial, and then ask if fair-minded jurists could disagree about those arguments or theories.²¹⁶ Arguably, this is the most heightened level of deference a federal habeas court could possibly accord to a state court decision.

The *Wiggins* rule also does not require much of state courts in order to be granted a level of deference that severely limits the scope of federal review. Applying *Wiggins* actually encour-

²¹³ *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

²¹⁴ Petition for Writ of Certiorari at 17, *Wolfenbarger v. Foster*, 133 S. Ct. 1580 (2013) (No. 12-420).

²¹⁵ Respondent's Brief in Opposition at 13, *Wolfenbarger v. Foster*, 133 S. Ct. 1580 (2013) (No. 12-420).

²¹⁶ *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

ages state appellate courts to write summary denials, which furthers *Richter's* goal of “enabl[ing] a state judiciary to concentrate its resources on the cases where opinions are most needed.”²¹⁷ A state appellate court need only write one word, “denied,” to receive AEDPA deference on *both Strickland* prongs.²¹⁸ Alternatively, if the court wishes to speak, it can express its agreement with the lower court’s decision on the prejudice prong, for example, and then go on to discuss deficient performance.

As Judge Easterbrook urged in his concurrence in the denial of rehearing en banc in *Thomas v. Clements*, “the Supreme Court ought to revisit” *Wiggins* in the post-*Richter* world.²¹⁹ However, I disagree with Judge Easterbrook that *Richter's* holding is so broad that it changes the *Wiggins* rule. The Supreme Court has reached what should be the limit of restricting habeas review, and the time has come to instead limit the *Richter* holding and “lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State courts.”²²⁰ It is no longer enough to justify limiting the availability of habeas relief because, as the Third Circuit explained, it comports with “the United States Supreme Court’s repeated admonitions that AEDPA mandates broad deference to the decisions of the state courts.”²²¹ Because “life and liberty depend on such review,”²²² prisoners deserve one fair opportunity to litigate not just their claim, but both prongs of their *Strickland* ineffective assistance of counsel claim.

²¹⁷ *Id.* at 99.

²¹⁸ *Id.* at 98 (“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.”).

²¹⁹ See *Thomas v. Clements* 797 F.3d 445, 448 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc).

²²⁰ *Brown v. Allen*, 344 U.S. 443, 501–02 (1953) (Frankfurter, J., concurring).

²²¹ *Collins v. Sec’y of the Pa. Dep’t of Corr.*, 742 F.3d 528, 546 n.12 (3d Cir. 2014).

²²² Wilner, *supra* note 154, at 1474.

