No. 15-7848

IN THE
SUPREME COURT OF THE UNITED STATES

Clark Elmore,
Petitioner,
v.

Donald R. Holbrook,
Respondent.

On Petition for a Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR REHEARING

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PETITION FOR REHEARING

A circuit split regarding AEDPA deference existed when Mr. Elmore filed his petition for a writ of *certiorari* on January 19, 2016, and his reply on March 8, 2016. In the intervening time, that split has become pronounced. There is now a deep and robust difference of opinion whether Section 2254(d) requires deference only to the reasoning of state court decision or requires the consideration of reasons never advanced by the state court.

These recent decisions merit rehearing. This Court should grant rehearing and review this reoccurring fundamental habeas issue.

In *Dennis v. Secretary, Pennsylvania DOC*, __ F.3d __, 2016 WL 4440925 (3d Cir. 2016), the Third Circuit discussed the issue, and the conflicting authorities, at considerable length. The majority held that (as Elmore submits), where a state court gives reasons for its decision to reject a constitutional claim, Section 2254(d) deference should be applied to the state court's reasoning:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *[Harrison v.] Richter*, 562 U.S. at 102. The highly deferential standard "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (internal quotation marks omitted). This level of deference stems from deep-rooted concerns about federalism. *Williams*, 529 U.S. at 436 (noting that Congress intended to "further the principles of comity, finality, and federalism" in passing AEDPA). That said, *Richter* and its progeny do not support unchecked speculation by federal

habeas courts in furtherance of AEDPA's goals. While we must give state court decisions "the benefit of the doubt," as Judge Fisher recognizes, federal habeas review does not entail speculating as to what other theories could have supported the state court ruling when reasoning has been provided, or buttressing a state court's scant analysis with arguments not fairly presented to it…. We now write to clarify how we interpret the Supreme Court's jurisprudence as to when and how federal courts ought to "fill the gaps" in state court opinions on federal habeas review subject to AEDPA.

* * *

We suggest that the concept of "gap filling" is fairly limited. It should be reserved for those cases in which the federal court cannot be sure of the precise basis for the state court's ruling. It permits a federal court to defer while still exploring the possible reasons. It does not permit a federal habeas court, when faced with a reasoned determination of the state court, to fill a non-existent "gap" by coming up with its own theory or argument, let alone one, as here, never raised to the state court….

When the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that "could have supported" the state court's decision. The Supreme Court established this limitation on *Richter* "gap filling" in *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012), where it described the proper analytical path for state court decisions accompanied by reasoning:

> Under § 2254(d), a habeas court must determine *what arguments or theories 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.

Id. at 1198 (quoting *Richter*, 562 U.S. at 102; alterations in original; emphasis added). This is fairly straightforward. As explained above, the Court in *Richter* included the language "or, as here, could have supported" when it initially instructed courts on gap filling. Courts were tasked with considering what theories "could have supported" the state court decision in cases akin to those "as here," or, summary denials. Removing the clause "or, as here, could have supported" from the instruction when the state court

> provides a fully-reasoned decision removed the task of speculative gap-filling from the habeas court's analysis. Instead, federal habeas courts reviewing reasoned state court opinions are limited to "those arguments or theories" that actually supported, as opposed to "could have supported," the state court's decision….

Id. at *12-14. Three Circuit Judges dissented in *Dennis* based on a different reading of *Richter*:

> Because the Pennsylvania Supreme Court provided no explanation for why it found that the receipt was not withheld from the defense, there is an analytical gap. This gap is more open-ended than the two possibilities the state court could have considered in *Moore* and narrower than a summary disposition, such as *Richter*, where the universe of possible theories is broad. But our obligation to consider what theories could have supported the Pennsylvania Supreme Court's decision is no less than in *Richter* and *Moore*…. Unlike the Majority, I am unable to discern the precise basis for the state court's ruling, and, for that reason, this is one of those cases in which consideration of theories that could have supported the state court's decision is required. This required consideration leads to the conclusion that there is a viable gap-filling theory here: the Pennsylvania Supreme Court could have meant that the receipt was not withheld because it was available to the defense with reasonable diligence.

Id. at *76–77.

A panel of the Second Circuit recently engaged in much the same debate in *Fuentes v. T. Griffin*, __ F.3d __, 2016 WL 3854206 at *8 (2d Cir. 2016). Though with much less discussion, the majority in *Fuentes* agreed with the *en banc* majority in *Dennis*:

> A state-court decision is "contrary to" clearly established federal law " 'if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or 'if the state court confronts a set of facts that are

> materially indistinguishable from a decision of th[e Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.' " Id. at 73 (quoting *Williams* [*Terry*] *v. Taylor*, 529 U.S. 362, 405–06 (2000) ("*Williams* [*Terry*]")). A state-court decision is an "unreasonable application of" clearly established federal law " 'if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' " *Andrade*, 538 U.S. at 75, (quoting *Williams* [*Terry*], 529 U.S. at 413).

A dissenting judge in *Fuentes* argued to the contrary:

> Critically, our review must defer to the decision, *i.e.*, the substantive conclusion, reached by the state court—not the reasoning it employed to reach that decision. Our Circuit adopted this position in 2001, stating candidly, "[W]e are determining the reasonableness of the state courts' 'decision,' not grading their papers." *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (citation omitted) (quoting 28 U.S.C. § 2254(d)(1)); *accord Cotto v. Herbert*, 331 F.3d 217, 248 (2d Cir. 2003); *see also Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001) ("Nowhere does [§ 2254(d)] make reference to the state court's process of reasoning.")…Likewise, our sister circuits have overwhelmingly interpreted § 2254 to require deference to the state court's result, not to the presence or the particulars of its reasoning. *See, e.g.*, *Holland v. Rivard*, 800 F.3d 224, 236–37 (6th Cir. 2015); *Makiel v. Butler*, 782 F.3d 882, 906 (7th Cir. 2015); *Williams v. Roper*, 695 F.3d 825, 831–32 (8th Cir. 2012); *Gill v. Mecusker*, 633 F.3d 1272, 1291–92 (11th Cir. 2011); *Clements v. Clarke*, 592 F.3d 45, 55 (1st Cir. 2010); *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002); *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 159 (4th Cir. 2000) (en banc); *Aycox v. Lytle*, 196 F.3d 1174, 1177–78 (10th Cir. 1999).

Id. at *15.

In another very recent opinion, *Whatley v. Zatecky*, __ F.3d __, 2016 WL 4269805 (7th Cir. 2016), the Seventh Circuit analyzed the issue somewhat differently. *Whatley* held that when a federal habeas court finds the state court

rationale unreasonable, the decision can be disregarded and federal review focuses instead on "the remainder of the record," including the rulings of the lower state courts on the issue. Id. at *7-*9. *Whatley* reserved judgment on whether such review is subject to Section 2254(d) deference, because it found all the state court decisions in the case before it were both wrong and unreasonable.

Finally, the Eleventh Circuit has addressed the question presented here in two decisions. One of those decisions simply stated its previously-established position on the issue, which is consistent with that of the *Dennis* dissenters and the decision below in this case:

> [W]e have stressed that, under § 2254(d)(1), "we review the state court's 'decision' and not necessarily its rationale." *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 785 (11th Cir. 2003) (citing *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002)). Accordingly, we have "cautioned that overemphasis on the language of a state court's rationale would lead to a 'grading papers' approach that is outmoded in the post-AEDPA era." *Parker*, 331 F.3d at 785 (quotation omitted). "Although a state court opinion containing a conspicuous misapplication of Supreme Court precedent would not be entitled to deference under [ ] AEDPA, we will not presume that a state court misapplied federal law, and absent indication to the contrary will assume that state courts do understand 'clearly established Federal law as determined by the Supreme Court of the United States." Id. at 785-86 (quotations omitted, alterations adopted); 28 U.S.C. § 2254(d)(1).

Jones v. Secretary, Florida DOC, __ F.3d __, 2016 WL 4474677, at *9 (11th Cir. 2016). Despite this apparent clarity, however, in *Wilson v. Warden, Georgia Diagnostic Prison*, __F.3d __, 2016 WL 4440381 (11th Cir. 2016), another panel of

the Eleventh Circuit found itself (and other Circuits) divided on the corollary question of *how* a federal court can "fill the gap" left by a final state court decision that is inadequately or unreasonably explained. The panel majority in *Wilson* held that because deference is owed to the final state judgment, not its rationale, there is no need to consider the actual grounds given at any stage of the state proceedings for rejecting a constitutional claim:

> [O]ne reason to "look through" for purposes of procedural default but no further is that appellate courts often affirm on bases not relied on by lower courts. Indeed, Justice Ginsburg's concurrence serves as a perfect illustration. She concurred in the denial of certiorari because she was "convinced that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst*." *Id*. Justice Ginsburg was satisfied with our decision on the merits even though she did not agree with our reasoning. Because appellate courts may affirm for different reasons, presuming that state appellate courts affirm only for the precise reasons given by a lower court deprives them of the "benefit of the doubt" that the Act and *Richter* require, *Renico*, 559 U.S. at 773 (quoting *Visciotti*, 537 U.S. at 24).

Id. at *11. A dissenting judge in *Wilson* argued—much as the Seventh Circuit panel in *Whatley* held—that the "gap" left by an unexplained or unreasonable final state court decision can only be filled by "looking through" to the reasons for rejecting the claim given by the lower state courts, as in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991):

> …. Starting with a result (the result reached in a summary denial of relief), then coming up with hypothetical reasons to support that result, and then assessing whether such imagined reasons are contrary to or an unreasonable application of clearly established Supreme Court precedent, is not what

> appellate courts normally do. The notion of a court starting with a result, and then searching far and wide for reasons to justify that result, turns the notion of neutral decisionmaking on its head.

Id. at *14.

Because there was only one state court decision on the merits in Elmore's case, this case does not present the precise issue debated by the judges in *Whatley* and *Wilson.* But that debate, and those among the judges in *Dennis* and *Fuentes*, demonstrate the continued and widespread uncertainty and disagreement regarding the question presented here: how Section 2254(d) and *Richter* apply to cases like this one, in which a state court gives an inadequate or unreasonable explanation for the rejection of a federal constitutional claim.

CONCLUSION

This Court should grant this petition for rehearing.

DATED this 3rd day of November, 2016

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CERTIFICATE OF COUNSEL

I, Jeffrey Ellis, certify that this petition for rehearing it is presented in good faith and not for delay**.**

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