No. 16-6855

In the Supreme Court of the United States

MARION WILSON, PETITIONER

v.

ERIC SELLERS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF ADAM K. MORTARA, COURT-APPOINTED *AMICUS CURIAE* BELOW, AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does this Court's decision in *Harrington* v. *Richter*, 562 U.S. 86 (2011) apply only in the absence of a previous reasoned state court opinion, a requirement never once mentioned in the decision itself, or should a federal court instead treat all unexplained merits adjudications the same way for purposes of 28 U.S.C. § 2254(d)?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Adam K. Mortara was appointed by the Eleventh Circuit to brief and argue the question presented below.[1] Mr. Mortara has taught federal courts, federal habeas corpus and criminal procedure at the University of Chicago Law School since 2007, and in that capacity supports the position the Eleventh Circuit instructed him to take, and which that court subsequently adopted. The arguments made herein are solely those of counsel and not necessarily the views of the University of Chicago Law School or its other faculty.

[1] The parties have consented to the filing of this brief and such consents are being lodged herewith. The parties received notice at least 10 days prior to the due date of *amicus* counsel's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The en banc Eleventh Circuit correctly applied this Court's habeas corpus precedents, and Wilson and a few circuit judges have gotten it wrong. *Harrington* v. *Richter*, 562 U.S. 86 (2011) provides the test where the last state-court adjudication on the merits is unexplained, whether or not there is a previous reasoned decision from an inferior state court. *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), a pre-AEDPA case about protecting procedural defaults from vitiation through unexplained affirmances, does not command federal courts to speculate that state appellate courts adopted the specific merits reasoning of their inferiors any more than this Court permits that assumption as to its own summary affirmances.

Wilson attempts to paint the Eleventh Circuit as an outlier, but the split he identifies is far shallower than he lets on. Only three circuits have confronted the question presented, and this shallow split does not merit review because state appellate courts can speak for themselves as to whether unexplained affirmances are intended to adopt the reasoning of an inferior court. The only question here is what the default rule should be. That default rule should, as a matter of respect and comity, not require a presumption that a state supreme court adopted the plainly wrong reasoning of one of its inferiors if the judgment denying relief was, itself, reasonable.[2]

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[2] This is the only scenario in which Wilson's version of the *Ylst* presumption matters – because if the inferior court reasoning does not run afoul of § 2254(d) then no relief will be awarded and the result (denial of relief) is the same under either outcome of the question presented. Wilson's rule only makes a difference when it will require a

When a state prisoner's federal habeas claim has been "adjudicated on the merits" in state court, the deferential standard of 28 U.S.C. § 2254(d) applies. Whether that adjudication is from a trial court, intermediate appellate court, or the state supreme court, there is still only a single decision that is the subject of a § 2254(d) analysis – the "last state-court adjudication on the merits." *Greene* v. *Fisher*, 132 S. Ct. 38, 45 (2011). This uncontroverted interpretation of § 2254(d) makes sense; because only the last decision on the merits can be the continuing legal cause of the prisoner's alleged unlawful custody. Prior merits rulings from inferior state courts are irrelevant where the state supreme court has subsequently denied relief. Analyzing the reasoning of those non-operative lower court rulings would ask a question § 2254(d) does not.

This is so irrespective of whether the state supreme court provided its own explanation of its denial of relief, because § 2254(d) affords federal courts no discretion to discard an unexplained adjudication by referring instead to the previous decision of a lower state court. When reasoning is not given in the last state-court adjudication on the merits, the federal court should apply *Richter* and ask whether the petitioner has shown there was "no reasonable basis" for the denial of relief.

Wilson sees it otherwise, based primarily on decoderring treatment of *Richter* and *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015) and an unthoughtful over-reading of *Ylst*. *Brumfield*'s mention of "looking through" and the other

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federal court to presume, with no evidence, that a state supreme court, with no words, adopted the objectively wrong reasoning of its inferior court to reach a judgment that reasonably *could* have been reached. To state the proposition is to refute it.

dicta Wilson cites do not address adjudications on the merits. Instead those decisions recount the anodyne "looking through" discretionary denials of appellate review to locate the sole operative adjudication on the merits.

As can sometimes happen, repeated improper usage, here of the phrase "looking through," has confused inferior courts into equating the *Ylst* presumption with the statutory exercise under § 2254(d), which requires the federal court to locate the last state-court adjudication on the merits. Nowadays, many appellate courts say they are "looking through" discretionary denials of appellate review and cite *Ylst* in a § 2254(d) analysis. That in fact is not "looking through," but rather "looking for" the one operative adjudication on the merits (where discretionary denials of review do not matter, just like they do not qualify as "final judgments" under 28 U.S.C. § 1257(a)). In a few stray phrases this Court, and several of the courts of appeals, have been imprecise and used this more casual definition of "look through." It does not follow that real adjudications on the merits should be ignored just because they are unexplained.

Where there is an actual adjudication on the merits in an AEDPA case, the strong federalism principles that underlay § 2254(d) and the deference regime embodied in its text foreclose the offensive pretense that a state supreme court automatically adopts *in haec verba* the reasoning of one of its inferiors when it affirms without explanation. This Court does not tolerate this presumption as to its summary affirmances and Congress did not create § 2254(d) to work this sort of cavalier treatment of the merits decision of the Georgia Supreme Court.

Invoking *Ylst* to escape the § 2254(d) deference afforded a state supreme court's adjudication on the merits gets it precisely backwards. *Ylst* is a pre-AEDPA decision shaping the judge-made law of procedural default, a doctrine crafted to vindicate federalism interests by respecting state procedural rules. Because a subsequent state court decision on the merits can vitiate a previous procedural default, the rule of *Ylst* exists to protect states from such vitiation by engaging in the pro-federalism assumption that an unexplained affirmance rested on *procedural* grounds if the earlier decision explicitly did so. *Ylst* no more controls this case than it controls how to treat a summary affirmance from this Court, and it in no way adopts a general rule of interpretation of unexplained merits decisions.

Wilson's position conflicts with *Richter* and the text of § 2254(d) by ignoring a state supreme court's adjudication on the merits in favor of a previous adjudication from an inferior court. No decision of this Court confines *Richter* to the narrow circumstance where there is only one, unexplained, state court adjudication on the merits. And there is not a single word of *Richter* that reveals this secret and dramatic limitation on its scope. This is for good reason, as the text of § 2254(d) cannot be parsed to treat an unexplained state court adjudication differently based on whether there is a previous explained adjudication from a lower court. Those taking this erroneous position have not even made a token effort to articulate how the text would support such a distinction. And a brief pause to consider the perverse effects of Wilson's rule – where a stale lower court decision will be measured against a body of law and evidence as of the date of the later unexplained adjudication on the merits – shows how wrong it is.

Putting aside the correctness of the Eleventh Circuit's decision, many of Wilson's arguments are better addressed first to the Georgia Supreme Court. What role the state trial court ruling plays in Georgia's system and how a federal habeas court treats a CPC denial (as an unexplained adjudication on the merits or as adopting the lower court reasoning or as just a discretionary denial of review) are questions for the Georgia Supreme Court, and the more general question presented is one for state appellate courts generally. Those courts can speak for themselves as to whether unexplained affirmances are meant to adopt the reasoning of inferior courts.

This Court should deny the petition.

REASONS FOR DENYING THE WRIT

I. IF THE LAST STATE COURT ADJUDICATION ON THE MERITS IS UNEXPLAINED, *RICHTER* PROVIDES THE TEST

A. The Only Operative Adjudication On The Merits For § 2254(d) Is The Latest State-Court Decision

In *Greene*, the Court considered the question of what temporal body of law functions in the § 2254(d)(1) inquiry as "clearly established Federal law as determined by the Supreme Court of the United States." Relying on its earlier decision in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011) relating to the body of facts for review under § 2254(d)(1), the Court held that the law to be applied was the law as of the time of the "last state-court adjudication on the merits." *Greene*, 132 S. Ct. at 45. "State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" *Cullen*, 131 S. Ct. 1388 at 1399 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 71-72 (2003)).

The text of § 2254(d) refers to a single "adjudication" and a single resulting "decision." Thus, there is only one time at which to close the record (*Cullen*) and the Supreme Court Reports (*Greene*) for a federal court's analysis. "A later affirmance of that decision on alternative procedural grounds, for example, would not be a decision *resulting from* the merits adjudication. And much less would be (what is at issue here) a decision by the state supreme court not to hear the appeal – that is, not to decide at all." *Greene*, 132 S. Ct. at 45 (first emphasis in original, second added). It follows that only the last state-court adjudication on the merits is legally connected to the prisoner's continuing custody. *Cf. Coleman* v. *Thompson*, 501 U.S. 722, 730 (1991) ("a state prisoner is in custody *pursuant* to a judgment."). Two principles emerge from *Greene* and *Cullen*: (1) A later *discretionary* denial of appellate review is a nullity as it pertains to § 2254(d)(1) and (2) to apply § 2254(d)(1) to a second-to-last adjudication on the merits would result in an advisory opinion regarding a non-operative decision that has since been supplanted.

Wilson's hyperbolic assertion that the Eleventh Circuit held that *Richter* abrogated *Ylst* rests on a basic misunderstanding of both cases and federal habeas corpus review of state convictions more generally. Wilson never even attempts to explain how the text of AEDPA supports two divergent analytical modes to treat unexplained adjudications on the merits – one for when there is no previous reasoned opinion, and another for when there is. There is no possible explanation.

B. Whether There Is A Prior Adjudication On The Merits Is Irrelevant To The Mode Of Analysis Of The Last Adjudication

Section 2254(d) provides:

> 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
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> (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.

As noted before, the text refers to a singular "adjudication on the merits" that "result[s]" in a singular "decision." Section 2254(d)(1) then dictates that a petitioner may not obtain relief unless that singular adjudication and resulting decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* As the Court observed in *Richter*, "[t]here is no text in the statute requiring a statement of reasons." 562 U.S. at 98. And when the "last state-court adjudication on the merits," *Greene*, 132 S. Ct. at 45, is unexplained, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98.

Nothing in the text requires the federal court to do what Wilson is asking for here – transpose the reasoning of a lower court opinion *in haec verba* into the unexplained adjudication on the merits of a state supreme court. Wilson would have § 2254(d)(1) say "resulted in, *or affirmed*, a decision that was contrary to …." But it does not. And it is for good reason that the text of AEDPA directs the federal court only to the last adjudication and, in this case, the test of *Richter*. Only the last decision is the continuing cause of the prisoner's custody and thus the platform for federal court review. Only the last decision has the benefit of all the law (*Greene*) and all the evidence (*Cullen*) that the federal court will itself look to.

Wilson's sole basis for his position is *Ylst*. But *Ylst* does not purport to interpret § 2254(d) (nor could it, as it predates AEDPA), is a decision about the judge-made doctrine of procedural default, and in fact has nothing to do with § 2254(d).

C. *Ylst* Does Not Require Making The Undignified Assumption That Unexplained Affirmances Adopt *In Haec Verba* The Reasoning Of An Inferior Court

Ylst is a case about how to implement the procedural default doctrine in the face of state court judgments that do not clearly delineate whether they rest on procedural or merits grounds. In the AEDPA era, through what could best be described as a case of improper usage hardening into common usage,[3] *Ylst* has also come to stand for the routine practice of "looking through" *discretionary*

[3] *Cf. MCI Telecommunications Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 & n.3 (1994) (Scalia, J.) (noting that Webster's Third dictionary contains definitions incorporating improper usage and defines "infer" to mean "imply").

denials of appellate review to locate the last state-court "adjudication on the merits" for § 2254(d) purposes. It is not, as Wilson would have it, a general "rule of interpretation" that "gives meaning to a summary decision that leaves in place an earlier reasoned decision," Pet. 13 n.17, outside of the context of the procedural default doctrine. If it were, then this Court has done a poor job of implementing this rule as to its own summary affirmances.

The procedural default doctrine springs from the jurisdictional rule that the Court will not review state judgments that rest on an adequate and independent state ground. *Coleman*, 501 U.S. at 729-30. Resolution of the federal question would be advisory because it could not alter the judgment. *Id.*

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31.

As "[s]tate procedural bars are not immortal [and] they may expire because of later actions by state courts," *Ylst*, 501 U.S. at 801, the Court endorsed a presumption that where an earlier decision rests on procedural grounds a later unexplained order does as well. *Id.* at 803. There can be absolutely no doubt that *Ylst* in this format

is limited to implementing the procedural default doctrine. The *Ylst* presumption protects States by refusing to vitiate their procedural rules through silent and unexplained orders. That is all.

And, notably, *Ylst* never endorses Wilson's proposed microscopy of assuming the later unexplained order adopted *precisely* the same reasons (e.g., "we also would apply *Strickland* in exactly the same way to achieve the same result as the lower court did"), instead looking to the macroscopic "grounds" – procedural or not.[4] This Court has not perverted *Ylst* into the insult that Wilson would make it – the crude assumption that the Georgia Supreme Court denies relief on the merits for the identical reasons its inferior state court did so.

Nor should this Court do so. Because to adopt Wilson's view would fly in the face of how this Court treats its own unexplained summary affirmances. These affirm not reasoning but "only the judgment of the court below, and no more may be read into [its] action than was essential to sustain that judgment." *Ill. State Bd. of Elections* v. *Socialist Workers Party,* 440 U.S. 173, 182–83 (1979) (internal citations omitted). To over-read *Ylst* engages the false presumption that the Georgia Supreme Court does not deploy independent reasoning to its work. To over-read *Ylst* in light of how Article III appellate courts treat their own summary affirmances is to transform that insult to the independence of the Georgia Supreme Court into an

[4] *Richter*'s own discussion of *Ylst* is solely directed to this point regarding whether a ruling is procedural or merits-based. 562 U.S. at 99.

insult to federalism itself.[5] Does anyone seriously believe that *Ylst* or § 2254(d) accomplish this or (less relevantly) are intended to do so?[6]

Wilson, and those few judges agreeing with him have failed, at any point, to address the text of the governing statute. Thus, one should view with suspicion Wilson's confident proclamations about how this Court has already applied *Ylst* to circumstances such as these. It has not.

II. THE COURT HAS NOT ENDORSED THE OVER-READING OF *YLST* THAT WILSON ADVOCATES

Wilson does his best to assemble examples of the Court applying *Ylst* in AEDPA cases. All he comes up with are passing references to "looking through" discretionary denials of appellate review – and he cannot identify a single instance where this Court did what he is asking it to do now.

In the state process leading to the Court's decision in *Brumfield*, the Louisiana Supreme Court summarily denied an "application for a supervisory writ to review the trial court's ruling." 135 S. Ct. at 2275 (citing 885 So.2d 580). "Supervisory writs" in the Louisiana courts of appeal (including its Supreme Court) are discretionary, and

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[5] The Federal Circuit gives its unexplained affirmances the same treatment. "[A] Rule 36 judgment simply confirms that the trial court entered the correct judgment. It does not endorse or reject any specific part of the trial court's reasoning." *Rates Tech., Inc.* v. *Mediatrix Telecom, Inc.*, 688 F.3d 742, 750 (Fed. Cir. 2012).

[6] Engage in the following thought experiment: what if the Georgia Supreme Court denied a CPC and said "Denied but for reasons independent of the denial of relief below." Would Wilson still have his *Ylst* presumption apply? One would guess not. But, if not there, then why should silence on the subject bind the Georgia Supreme Court adjudication on the merits to the reasoning of its inferior court?

therefore denying a supervisory writ without explanation is not an adjudication on the merits. 1 La. Civ. L. Treatise, Civil Procedure § 14:17 (2d ed.). No federal court has ever treated the unexplained discretionary denial of a supervisory writ by the Louisiana Supreme Court as an adjudication on the merits under § 2254(d). (And Wilson, for all his interest in supervisory writ practice, Pet. 20, has identified no such case.)[7]

So, when the Court in *Brumfield* cited *Ylst* and said "we, like the courts below, 'look through' the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state trial court's reasoned decision refusing to grant Brumfield an Atkins evidentiary hearing," it was deploying that term in the sense of looking for the operative adjudication on the merits. *Ylst* itself speaks of its "looking through" as a presumption that gives the "unexplained order … *no* effect." 501 U.S. at 804 (emphasis in original). That's what the Court in *Brumfield* was doing – giving the Louisiana Supreme Court's discretionary denial of review no effect. But § 2254(d), *Cullen*, *Richter*, and *Greene* absolutely prohibit giving the "last state-court adjudication on the merits" no effect. To the extent anyone would ever work hard to convince

[7] The examples Wilson gives of Louisiana Supreme Court *per curiam* merits opinions wherein writs of "certiorari" are also denied contain detailed discussion of the merits and include phrases like "we affirm." *See State* v. *Lee,* 181 So.3d 631 (La. 2015) (rejection of all of petitioner's claims in detail); *State ex rel. Scales* v. *State*, 718 So.2d 402 (La. 1998) ("The trial court rejected petitioner's claims of ineffective assistance of counsel and we affirm.") How anyone could contend that these are the same as the Louisiana Supreme Court's ruling in *Brumfield*, which is not labeled *per curiam* and has no words in it beyond "denied," is left for Wilson to explain in reply.

themselves *Ylst* says otherwise, the AEDPA makes them wrong.

Brumfield cites *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094 n.1 (2013) for the application of the *Ylst* "no effect" look-through – where discretionary denials of appellate review are not treated as adjudications on the merits. *Brumfield* and *Johnson* are two of the decisions that Wilson says show how the Court "post-*Richter* continue[s] to apply its 'look through' doctrine as the proper method for analyzing state court *decisions* that leave undisturbed a prior reasoned state court decision." Pet. 14 (emphasis added). Is the denial of the supervisory writ in *Brumfield* a "decision" within the meaning of § 2254(d)(1)? No. Yet sloppy use of words like "decision" and phrases like "summary denial" can (and in Wilson's petition does) blur the critical line between discretionary denials of review and merits-based denials of relief. That is the line that matters for purposes of § 2254(d). That is the line Wilson essentially ignores, addressing the Eleventh Circuit's careful discussion of these issues with the tautological observation that, well, *Ylst* applied to a merits decision, so it applies to merits decisions. Pet. 18.

Take *Johnson*. There, the Court, in reversing the Ninth Circuit on the merits, cited with approval the Ninth Circuit's opinion looking through the "California Supreme Court's summary denial of Williams' petition for review . . . ." *Johnson*, 133 S. Ct. at 1094 n.1. But the Ninth Circuit opinion reveals two things. First, the "summary denial" that the Court said it was acceptable to "look through" was in fact a discretionary denial of appellate review, not relief on the merits. *Williams* v. *Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011), *rev'd sub nom. Johnson* v. *Williams*,

133 S. Ct. 1088 (2013) ("As when the United States Supreme Court denies a petition for certiorari, the California high court's decision to deny a petition for review is not a decision on the merits, but rather means no more than that the court has decided not to consider the case on the merits."). Second, Judge Reinhardt in that opinion draws exactly the line that the Eleventh Circuit did and § 2254(d) demands – leaving *Richter* to unexplained decisions on the merits and "looking through" only discretionary denials of relief. *Id.* at 635-36. Judge Reinhardt did not refuse to apply *Richter* on the grounds that an earlier reasoned decision merely existed. He refused to apply it on the grounds that the unexplained denial of review was not a decision on the merits. He was right.

Petitioner's other alleged examples of this Court looking through despite *Richter* are no better than *Johnson* and *Brumfield*. Pet. 14-16. Three opinions on certiorari from the Sixth Circuit all analyze decisions from the Michigan Court of Appeals in circumstances where the Michigan Supreme Court denied discretionary review not relief on the merits. *Woods* v. *Donald*, 135 S. Ct. 1372, 1375 (2015) (reviewing lower court opinion because it was the last state-court adjudication on the merits and in no way ignoring *Richter*; *see People* v. *Donald*, 756 N.W.2d 87 (Mich. 2008) (discretionary denial of review by Michigan Supreme Court that has nothing to do with *Richter*)); *Burt* v. *Titlow*, 134 S. Ct. 10 (2013) (finding it unimportant to mention that the Michigan Supreme Court had in its discretion denied review; *see People* v. *Titlow*, 680 N.W.2d 900 (Mich. 2004) (discretionary denial of review that has nothing to do with *Richter*)); *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1385, 1390 (2012) (reviewing lower court opinion not because of it was ignoring *Richter* and distorting *Ylst*, but

because "the Michigan Supreme Court denied respondent's application for leave to file an appeal" and therefore the Michigan Court of Appeals opinion was the last state-court adjudication on the merits; *see People* v. *Cooper*, 705 N.W.2d 118 (Mich. 2005) (discretionary denial of review that has nothing to do with *Richter*)).[8]

That leaves *Premo* v. *Moore*, 562 U.S. 115 (2011), in which the Court analyzed a trial court opinion where there was also an unexplained adjudication on the merits from the Oregon Court of Appeals. Three observations dispose of *Moore*'s relevance here. First, the Court did not cite *Ylst* or say it was doing any "looking through." Second, the Court reversed the grant of the writ. *Richter*'s test is a condition of granting relief, and analysis of any jurist's reasoning in denying relief, including any prior state court opinion adjudicating the claim, can be sufficient to show that the operative decision – the last state-court denial of relief – was reasonable. This is so because any reasoned opinion denying relief is but one of the numerous possible

[8] Wilson's reference to *Woods* v. *Etherton*, 136 S. Ct. 1149 (2016), in a footnote, rounds out this irrelevant string of Michigan state prisoner habeas cases. Pet. Br. 15 n.20. As this Court noted, the Michigan Supreme Court (and the Michigan Court of Appeals) denied "leave to appeal." *Id.* at 1151. The Michigan rule under which such leave was denied applies only where the petitioner has procedurally defaulted and this denial of leave to appeal is not an adjudication on the merits of the claim at issue, even though Wilson gestures at arguing that such denials are adjudications on the merits. *Compare* Pet. Br. 15 n.20 *with* MCR 6.508(D) (establishing *procedural* barriers to relief, including failure to raise the claim on direct appeal). The references to prejudice and the merits that Wilson alights upon in his footnote is in a subsection of this rule directed to meeting the requirements to escape a procedural default. *See* MCR 6.508(D)(3).

hypothetical reasoned opinions that would also deny relief. Third, and most importantly, the Court did apply *Richter*'s test. *Moore*, 562 U.S. at 131 ("The state postconviction court could reasonably have concluded that Moore was not prejudiced by counsel's actions. Under AEDPA, that finding ends federal review. See *Richter*, 562 U.S. at ___, 131 S.Ct. 770.") (emphasis added). The Court committed no drive-by foul of the *Richter* doctrine in *Moore*.[9]

There is still the *Hittson* v. *Chatman*, 135 S. Ct. 2126 (2015) opinion concurring in the denial of certiorari from Justice Ginsburg, joined by Justice Kagan. Respectfully, Justice Ginsburg did not have the opportunity to address any of the arguments made here, or the reasoning in the Eleventh Circuit's opinion, which post-dates it. And thus Justice Ginsburg dismissed the idea that a discretionary denial of review is different from an adjudication on the merits. *Hittson*, 135 S.Ct. at 2128. She concluded that "[t]here is no reason not to 'look through' such adjudications, as well, to determine the particular reasons why the state court rejected the claim on the merits." *Id.* Given the posture of *Hittson* and the lack of a full adversary presentation, it is possible that Justice Ginsburg overlooked these good reasons to do so:

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[9] *Kernan* v. *Hinojosa*, 136 S. Ct. 1603 (2016) is also irrelevant here. The case is about whether a California Supreme Court denial of relief on the merits was, in fact, a denial of relief on the merits. There, the Ninth Circuit abused *Ylst* to find otherwise because an earlier inferior state court had denied relief on procedural grounds (improper venue). The Court quoted *Ylst* and gave no indication that it is meant to apply beyond the boundaries of the procedural default doctrine when unexplained *adjudications on the merits* (as opposed to discretionary denials of appellate review) are at issue. *Id.* at 1605-06.

> (1) *Ylst* involves protecting the adequate and independent state ground of a procedural default and must be invoked for non-discretionary adjudications if it is to have any effect at all; whereas
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> (2) § 2254(d)'s text only operates when we already know that there is an adjudication on the merits and, under *Greene*, *Cullen*, and *Richter*, looks only to the last such state-court adjudication not earlier and inoperative inferior court opinions; because
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> (3) to assume that the Georgia Supreme Court adopted the reasoning of its inferior court is contrary to how this Court treats its own summary affirmances, and perverts a federalism enhancing decision, *Ylst*, into an insult to federalism and the Georgia Supreme Court.

A fourth reason presents if one considers *Greene*, *Cullen*, and the body of law and evidence to be applied to a § 2254(d) inquiry. Adoption of Wilson's "look through" approach will lead to further absurd results, as has already occurred in the Ninth Circuit.

III. ADOPTION OF WILSON'S ERRONEOUS APPROACH WILL LEAD TO FURTHER ABSURD RESULTS

Greene and *Cullen* close the universe of law and facts as of the date of the last state-court adjudication. Thus, any evidence that was before the state court when it made that adjudication (*Cullen*) and any Supreme Court decision that issued prior to that adjudication (*Greene*) are fair game in deciding whether that state court adjudication "resulted in a decision contrary to, or an unreasonable application of clearly established Federal law as determined

by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Under Wilson's view, if there is an earlier reasoned lower court opinion that precedes an unexplained adjudication on the merits (like the denial of the CPC in this case), then the federal court must pretend that the later state-court adjudication adopted that reasoning. Thus, Wilson's over-muscled *Ylst* would have a federal court presuming that the exact same reasoning was applied by the later adjudicator even though the universe of evidence and law could be dramatically different. Imagine the Court made a new rule of criminal procedure, like *Apprendi* v. *New Jersey*, 530 U.S. 436 (2000) but the inferior state court had denied relief on the basis of pre-*Apprendi* case law. How would the *Ylst* work for an unexplained affirmance on the merits that post-dated *Apprendi*, according to Wilson? Well, we would assume that the state supreme court willfully ignored *Apprendi*, applied earlier and superseded case law, and the petitioner would surpass the § 2254(d)(1) bar. It is hard to imagine a worse and less-correct assumption under the AEDPA than that the state supreme court cast aside controlling Supreme Court precedent.[10] *Cf. Early* v. *Packer*, 537 U.S. 3, 8 (2002) (hold-

[10] Nor is it any answer for Wilson to suggest the *Ylst* presumption would be overcome in such circumstances. If intervening law kills the *Ylst* presumption, then so should an inferior state court decision with reasoning so erroneous it fails to pass muster under § 2254(d). In other words, if a state supreme court affirms the judgment of an inferior court that deployed wildly wrong reasoning but still entered a reasonable judgment, why would anyone apply *Ylst* to assume the state supreme court used the same palpably incorrect pathway? *Richter* gives the state supreme court the benefit of hypothetical reason-

ing that § 2254(d)(1) applies and AEDPA "does not require citation of our cases – indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

Lest this Court dismiss the above – the specter of evaluating a sovereign state supreme court's merits decision using stale reasoning from its inferior court – it has already happened, in the Ninth Circuit. In *Cannedy* v. *Adams*, 706 F.3d 1148 (9th Cir. 2013), the Ninth Circuit affirmed a grant of the writ, by using Wilson's rule and measuring the lower state court opinion against the record evidence that existed at the time of the later, unexplained, state court adjudication on the merits. *Id.* at 1156 n.3. In this case that included significantly more factual evidence (favorable to the petitioner) presented to the California Supreme Court prior to its unexplained denial of relief on the merits. *Id.* at 1169 (Kleinfeld, J., dissenting). That is the absurd end of the road for Wilson's position, and among the reasons six active judges on the Ninth Circuit would have hewn to the line Judge Reinhardt earlier drew in *Johnson* and applied *Richter* to the California Supreme Court's unexplained adjudication on the merits. *See Cannedy* v. *Adams*, 733 F.3d 794, 801-02 (2013) (O'Scannlain, J., joined by Tallman, Bybee, Callahan, Bea, and Ikuta, J.J., dissenting from denial of rehearing *en banc*).

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able bases that support its judgment without engaging in the odd presumption that a silent ruling adopted objectively unreasonable logic. And remember, this scenario is the only one where Wilson's erroneous *Ylst* presumption will ever matter. *See supra* n.2.

IV. THE CIRCUIT SPLIT IS SHALLOW, AND STATE APPELLATE COURTS CAN SPEAK FOR THEMSELVES IF THEY INTEND UNEXPLAINED AFFIRMANCES TO BE READ AS ADOPTING INFERIOR COURT REASONING

While the Ninth and Fourth Circuits have gotten this issue wrong, and the Eleventh gotten it right, that is all there is of any circuit split. All the other decisions Wilson cites do not address this question. Several "look through" discretionary denials of appellate review and are therefore not in conflict with the Eleventh Circuit, which would also look through such discretionary denials, as it noted for itself. *Wilson* v. *Warden, Georgia Diagnostic Prison*, 834 F.3d 1227, 1241-42 (11th Cir. 2016) (citing *Woodfox* v. *Cain*, 772 F.3d 358, 369 (5th Cir. 2014) (purporting to "look through" what again appear to be discretionary denials of Louisiana "supervisory writs"); *Wooley* v. *Rednour*, 702 F.3d 411, 422 (7th Cir. 2012) (same as to Illinois Supreme Court's denial of review); *Sanchez* v. *Roden*, 753 F.3d 279, 298 n.13 (1st Cir. 2014) (same as to Massachusetts Supreme Judicial Court)). The Sixth Circuit case Wilson cites deals with a procedural default issue (pure *Ylst*) and has nothing to do with this case because a finding of procedural default is not an adjudication on the merits. *See Wogenstahl* v. *Mitchell*, 668 F.3d 307, 339-40 (6th Cir. 2012). And the Third Circuit case cited involved a scenario where the state supreme court explicitly adopted the reasoning of the lower state court, also a different case entirely. *See Blystone* v. *Horn*, 664 F.3d 397, 417 n.15 (3d Cir. 2011). To the extent this issue could ever be worthy of this Court's review, permitting further percolation will benefit the Court, because other circuits have yet to weigh in and no circuit has yet, in disagreement, addressed the Eleventh Circuit's well-reasoned opinion.

A final reason to deny the writ is the relative unimportance of this issue, given that state appellate courts can easily indicate by rule whether they intend unexplained affirmances to adopt the reasoning of inferior courts. In the absence of such a statement, the correct default is the Eleventh Circuit's application of *Richter*. A state supreme court does not need to incant each time it issues a summary ruling that its affirmance is not wholesale adoption of the inferior court's reasoning.

After all, this Court does not need to do that with its summary affirmances.

CONCLUSION

The Court should deny the writ.

Respectfully submitted,

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