No. 16-6855

IN THE

Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RETIRED STATE SUPREME COURT JUSTICES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

As former state supreme court justices[2], the undersigned have a special interest in preserving and protecting our federalist system, in which governing power (including the judicial power) is properly shared between state and national governments. In the criminal justice context, the integrity of that system depends in large part on comity—the principle under which the federal courts review state court criminal convictions for federal constitutional infirmities, but do so only after affording state courts the first opportunity to review federal constitutional challenges to state court convictions, and only after applying appropriate deference to those state court decisions.

Amici come from many different state supreme court systems. But we all are intimately familiar with the operation of the state court post-conviction review process and the relationship of that process to federal habeas corpus review. From this vantage point, we write to express alarm about the manner in which the decision below offends—and upsets—the appropriate comity balance by requiring federal court judges to ignore the reasoned state adjudication of federal constitutional claims that are purportedly under

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[1] The parties have consented to the filing of this brief and letters of consent are attached. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The attached Appendix A contains a list of the *amici* along with biographical information for each.

review. Such a decision, we believe, disrespects the state courts' decisions about where and how to allocate their post-conviction review resources between trial and appellate courts.

When states have chosen to direct substantial resources toward resolving federal constitutional issues, as Georgia has here, and have produced a reasoned decision followed by a discretionary, summary order denying a certificate of probable cause without analysis, it makes little sense to ignore the express reasoning of the state courts and instead "defer" to a "decision" that did not express that reasoning. In short, we believe that the final reasoned state court decision, to the extent one exists, should be the focus of federal habeas corpus review, and the appropriate subject of the deference required by 28 U.S.C. § 2254(d).

SUMMARY OF ARGUMENT

When Congress adopted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), its focus was clear: It sought to make state court adjudication the primary focus in federal habeas corpus cases, and to have federal courts review state court criminal judgments in a way that was respectful of the state system, and deferential to the decision that was under review. Going forward, under the revised provisions of 28 U.S.C. § 2254(d), federal habeas corpus relief is available after merits adjudication only where the state court unreasonably denied relief to the state habeas petitioner.

In the AEDPA, Congress thus circumscribed the general role of federal habeas courts to conducting judicial *review*, rather than allowing federal courts to act as though the state court adjudication never existed at all. Allowing federal courts to engage in untethered examination of a state court criminal case—as many of the AEDPA's sponsors believed happened frequently before the AEDPA's passage—significantly undervalued state court criminal justice systems, and threatened to render the state court adjudications superfluous.

Ironically, the decision below—if affirmed by this Court—would have a similar effect and it would do so without serving any apparent purpose. When the state court process has chosen to direct resources toward trial court resolution of post-conviction claims, as Georgia has here, and when that is the only reasoned decision resulting from the state court process, the AEDPA's primary purpose is served by having the federal habeas court respect that allocation of resources by reviewing the state trial court decision. The result dictated by the slim Eleventh Circuit majority below disrespects state court systems by inviting the very sort of federal court untethered creativity and speculation that prompted the adoption of the AEDPA in the first place. As Petitioner points out, Brief of Petitioner ("Pet'r Br.") at 19, 55-56, such a rule of decision only makes a difference in cases where relief is most deserving: cases where the federal court would have concluded that the state habeas court's reasoned decision *unreasonably* denied relief. In all other cases, it makes no difference whether the federal court reviews the actual state court decision or the hypothetical one.

In this limited universe of cases, it makes no sense to require the federal courts to construct and uphold a ruling that "might have been," as opposed to simply shifting the focus to the merits of the constitutional claim itself, which is all that would occur if the deference provisions of 28 U.S.C. § 2254(d) were not found to be applicable.

ARGUMENT

The AEDPA places "'primary responsibility with the state courts'" for adjudicating habeas petitions. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). While the system permits federal review of state habeas decisions under § 2254(d), federal review must adhere to principles of federalism and comity by affording deference to state court merits adjudications. Such adjudications may be overturned only where the state court adjudication is objectively unreasonable. *See Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015).

These principles are easily applied when a reasoned decision is entered by the state court of last resort. When that occurs, a federal court examines that decision to determine whether the state court unreasonably applied federal constitutional law, and unless it so finds, it must deny habeas corpus relief. If it finds that the state court's application of federal law was unreasonable, it then moves on to determine whether to grant relief based on a determination that a petitioner is in custody in violation of the Constitution. 28 U.S.C. § 2254(a).

But what happens when the state court of last resort has not entered a reasoned decision on the merits, but a lower court has? In our view, *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which was in place when the AEDPA was adopted and remained untouched by the AEDPA amendments, sets forth the proper mode of review. In *Ylst*, this Court determined that, where the state court of last resort has silently affirmed a reasoned state court decision from a lower court, a federal court must "look through" that order to the last reasoned decision by a state court to see the grounds on which the unexplained order was in fact issued. Doing so, we believe, satisfied the twin goals of comity and federalism by placing the state court's actual decision at the center of habeas corpus review, precisely where it belongs. Based on our experience, moreover, the *Ylst* decision correctly interpreted a silent affirmance or denial of review as indicating agreement with the reasoned state court decision. We believe that such an analysis transfers logically and efficiently to the instant situation.

Every other federal court of appeals to address the issue—except for a bare majority of Eleventh Circuit—has agreed. *See, e.g.*, *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525 (4th Cir. 2016); *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014); *Murray v. Schriro*, 745 F.3d 984, 1006 (9th Cir. 2014); *Lint v. Prelesnik*, 542 F. App'x 472, 476 (6th Cir. 2013); *Woolley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012); *Worthington v. Roper*, 631 F.3d 487, 494 (8th Cir. 2011); *Martinez v. Hartley*, 413 F. App'x 44, 47 n.3 (10th Cir. 2011); *Rosario v. Ercole*, 601 F.3d 118, 126 n.3 (2d Cir.

2010); *Malone v. Clarke*, 536 F.3d 54, 63 n.6 (1st Cir. 2008); *Bond v. Beard*, 539 F.3d 256, 290 (3d Cir. 2008); *Joseph v. Coyle*, 469 F.3d 441, 448–49 (6th Cir. 2006); *Sweet v. Sec'y, Dep't of Corr.*, 467 F.3d 1311, 1313 (11th Cir. 2006). The court below, however, limited *Ylst* to its precise procedural context, and chose to apply instead the rule from *Harrington v. Richter*, 562 U.S. 86, 102 (2011). But in our view, the *Richter* rule, which permits a federal court under § 2254(d) to speculate or even imagine what arguments "could have supported" the state court decision when the state court has issued no reasoned decision, was one of necessity. With no reasoned state court decision, a serious question arose about whether any deferential review under § 2254(d) could apply at all, since it could be argued that no state court adjudication had ever occurred. Rather than adopt an "all or nothing" position, which itself seemed inconsistent with the state court's expenditure of resources in *Richter*, this Court determined that in such a situation a federal court could presume that such an adjudication had occurred and could then conduct review under § 2254(d) by determining whether any grounds reasonably "could have supported" the state court's otherwise silent denial of relief. In such circumstances, it was understandable that, in light of the clear preference in the AEDPA for deference to state court adjudications, this Court would choose the deference route and would not find that § 2254(d) could be entirely bypassed.

But here there is no such "all or nothing" choice. There *is* a reasoned state court judgment to review and in such circumstances, there is no need

to apply a rule that requires federal courts to speculate about the basis for a state court decision. Here, § 2254(d) can be used to measure the reasonableness of a decision that state courts actually made. Expanding *Richter* to allow federal courts to speculate about what state courts *might* have been thinking when the state courts actually provided their reasoning would undermine the construct of putting state court decisions at the center of § 2254(d) review.

I. Conducting Federal § 2254(d) Review of Summary Denial Orders by State Supreme Courts Disrespects the State Court Process by Ignoring Where States Have Chosen to Invest Judicial Resources

Expanding *Richter* to cases where a state trial court has issued a reasoned decision ignores the substantial resources the state courts expend on such adjudications at the trial-court level. Like many states, Georgia's collateral review system invests its resources in having its trial courts conduct habeas proceedings. *See* Ga. Code Ann. §§ 9-14-40 – 53 (West 2017). Georgia employs its trial courts in their traditional fact-finding role: the procedures empower the Superior Court to receive evidence and require the Superior Court to issue a reasoned decision. *See* Ga. Code Ann. §§ 9-14-48, 49. This is a perfectly reasonable—and common—allocation of state court resources because cognizable claims usually require factual development and thus the cases must begin in the trial-level court. Indeed, most states vest their trial courts with primary responsibility to

adjudicate claims under their post-conviction review procedures.[3]

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[3] Most state courts' post-conviction review schemes require initiating proceedings in the trial court, and often the court in which the individual was convicted. *See, e.g.*, Ala. R. Crim. P. 32.1 (a proceeding must be instituted "in the court of original conviction"); Alaska Stat. Ann. § 12.72.030(a) (West 2016) (requiring filing an application "with the clerk at the court location where the underlying criminal case is filed"); Ariz. R. Crim. P. 32.4(a) ("A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred."); Conn. Gen. Stat. Ann. § 52-466 (West 2017) (an application must be "made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question"); Ga. Code Ann. § 9-14-43 (West 2017) (a petition must be filed "in the superior court of the county in which the petitioner is being detained" and granting exclusive jurisdiction to the superior courts); Haw. R. Penal P. 40 (a petition must be filed "with the clerk of the court in which the conviction took place"); Idaho Code Ann. § 19-4902(a) (West) (an application must be filed "with the clerk of the district court in which the conviction took place"); Ind. Post-Conviction R. PC 1 § 2 (a petition must be filed "with the clerk of the court in which the conviction took place"); Iowa Code Ann. § 822.3 (West 2017) (an application must be filed "with the clerk of the district court in which the conviction or sentence took place"); Kan. Stat. Ann. § 60-1507(a) (West 2017) (a motion must be filed "the court which imposed the sentence"); Ky. R. Cr. P. 11.42(1) (a motion must be filed "in the court that imposed the sentence"); Mont. Code Ann. § 46-21-101(1) (West 2017) (a petition must be filed with "the court that imposed the sentence"); Neb. Rev. Stat. Ann. § 29-3001(1) (West 2017) (a motion must be filed "in the court which imposed such sentence"); Nev. Rev. Stat. Ann. § 34.738(1) (West 2017) (a petition must be filed "with the clerk of the district court for the county in which the conviction occurred"); N.C. Gen. Stat. Ann. § 15A-1413(a) (West 2017) (a motion must be filed "in the trial division by any judge who . . . is empowered to act in criminal matters in the district court

Because Georgia has chosen to allocate its post-conviction resources toward trial court review, appellate review afterwards is discretionary and often limited. In our experience, state court trial judges, after hearing the evidence and arguments of counsel, generally do their best to faithfully find the facts and apply the law to those facts. We have often trusted trial judges to get things right, and our silent denial of discretionary review can fairly be read to signal agreement with the underlying decision—not just the result—but the reasoning as well. And where we disagreed, either with the result or the reasoning, we would say so. Under the AEDPA's review scheme, state trial courts, as some of the most practiced factfinders in the country, deserve deference too. Federal courts cannot shirk their duty to defer to state courts based on which court—trial or appellate—issued the reasoned decision. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981) ("This interest in federalism

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district . . . or superior court district or set of districts . . . in which the judgment was entered"); Ohio Rev. Code Ann. § 2953.21(A)(1)(a) (West 2017) (a petition must be filed "in the court that imposed sentence"); Okla. Stat. Ann. tit. 22, § 1080 (West 2017) (proceedings must be initiated "in the court in which the judgment and sentence on conviction was imposed"); S.C. Code Ann. § 17-27-40 (2017) (an application must be filed "with the clerk of the court in which the conviction took place."); Tenn. Code Ann. § 40-30-104(a) (West 2017) (West) (a petition must be filed "with the clerk of the court in which the conviction occurred"); Utah Code Ann. § 78B-9-104(1) (West 2017) (an action must be filed "in the district court of original jurisdiction for post-conviction relief"); Wyo. Stat. Ann. § 7-14-101(b) (West 2017) (a petition must be filed "with the clerk of the court where the conviction occurred").

recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts."). Expanding the *Richter* rule to include cases where a state trial court has issued a reasoned decision, on which the appellate court then relied in issuing a summary decision, inappropriately permits federal habeas courts to effectively override a state's clear preference for the analysis of its trial court in favor of uninformed speculation about the state habeas proceedings.

The decisions below do not meaningfully contest these practices. Thus, it appears to be undisputed that the collateral review system in Georgia places primary responsibility for adjudication in the trial courts, and that Georgia's Supreme Court regularly issues summary denials of certificates of probable cause without expending additional time or resources to conduct a factual review. *See Wilson v. Warden*, 834 F.3d 1227, 1262 (11th Cir. 2016) (en banc) (Pryor, J., dissenting). The Georgia Supreme Court can issue opinions, but almost always chooses to issue a summary order denying a certificate of probable cause. Such summary dispositions should not be assumed to reflect regular disagreement with the trial courts. Rather, in our experience, this silence should more reasonably be assumed to reflect agreement with the trial courts, which the system requires to issue reasoned opinions after receiving evidence and hearing argument.

Principles of comity require federal courts to respect this allocation of resources between state trial and appellate courts. Many states construct

their post-conviction review systems like Georgia's—trial courts conduct the bulk of the review, conserving limited appellate resources. And the federal courts that have heard habeas petitions under § 2254 from states that conduct their review at the trial-court level have all sensibly looked through to the trial court decision for elements of the case unaddressed by the higher state court on appeal. *See, e.g.*, *Grueninger*, 813 F.3d at 522 (Virginia trial court conducted post-conviction review based on briefing and issued reasoned opinion); *Woodfox*, 772 F.3d at 365 (Louisiana trial court conducted post-conviction review based on briefing and issued opinion); *Prelesnik*, 542 F. App'x at 474 (Michigan trial court conducted post-conviction review based on briefing and issued opinion); *Woolley*, 702 F.3d at 419 (Illinois trial court conducted post-conviction review by holding evidentiary hearing and issuing reasoned opinion); *Worthington*, 631 F.3d at 494 (Missouri trial court conducted post-conviction review by holding evidentiary hearing and issuing reasoned opinion); *Martinez*, 413 F. App'x at 46 (Colorado post-conviction review conducted by trial court); *Rosario*, 601 F.3d at 121 (New York trial court conducted post-conviction review by holding evidentiary hearing and issuing reasoned opinion); *Bond*, 539 F.3d at 262 (Pennsylvania trial court conducted post-conviction review by holding seven-day evidentiary hearing and issuing reasoned opinion); *Joseph*, 469 F.3d at 448–49 (Ohio trial court conducted post-conviction review); *Sweet*, 467 F.3d at 1313 (Florida trial court conducted post-conviction review); *Boyd v. French*, 147 F.3d 319, 324–25 (4th Cir. 1998) (North Carolina trial court conducted post-conviction review by holding

evidentiary hearing and issuing reasoned opinion). By looking through to the trial court decision for deference review, these federal courts have demonstrated a respect for the states' allocation of post-conviction resources to the trial courts.

It further undermines the AEDPA to expand *Richter's* holding to where it clearly does not belong. *Richter* addressed whether § 2254(d) applied to summary dispositions in the first instance—not whether a court should "look through" a summary disposition. And *Richter's* fundamental holding—that § 2254(d) can be applied to summary dispositions when no other merits adjudication has occurred—conserved state resources by ensuring the AEDPA was not interpreted to require a statement of reasons from a state court. *See Richter*, 562 U.S. at 99. The Court specifically noted that issuing "summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Id.* Indeed, *Richter* addressed situations in which states must conserve resources by issuing stand-alone unexplained orders—not when a trial court had invested substantial resources to hear a habeas claim and then had issued a reasoned opinion. To ignore a trial court's reasoned opinion, where available, twists the underlying reasoning of *Richter*, and is disrespectful of the resources states invest at the trial-court level in post-conviction review.

II. In States That Have Chosen to Conduct the Bulk of Capital Post-Conviction Review in Trial Courts, State Supreme Court Summary Probable Cause Proceedings Are Not Designed to Create Reasoned, Reviewable Decisions

The decision below not only disrespects state court systems like Georgia's, but it also undermines the very policy reasons that lead state courts to adopt such systems in the first place. Georgia's collateral review system requires the trial court to issue a reasoned disposition in a habeas proceeding, meaning that the Georgia Supreme Court must necessarily rely on those decisions when deciding whether to issue a certificate of probable cause to appeal. This structure grants the Georgia Supreme Court the leeway to issue summary denials of probable cause certificates, which rely on the trial court decision and are not meant to create distinctly reasoned, reviewable decisions. *Ylst* reasoned that, when faced with an unexplained order, "[a]ttributing a reason is . . . both difficult and artificial." 501 U.S. at 803. So, *Ylst* created a presumption 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." *Id.* As we have mentioned in the previous section, this presumption should properly have been applied to the Georgia collateral review scheme because of how Georgia has chosen to allocate its resources: the Georgia Supreme Court summary denials of probable cause certificates are not designed to create reasoned, reviewable decisions, in light of the requirements imposed on the decisions issued by the trial court.

The Georgia Supreme Court regularly issues denials of certificates of probable cause; in fact, as Petitioner points out, it does so in 93% of cases. Pet'r Br. at 36-37. Within that subset, the Georgia Supreme Court occasionally issues reasoned denials; this occurs when the appellate court agrees with the outcome of the trial, but disagrees with the trial court's reasoning. *See Wilson*, 834 F.3d at 1262. By doing so, the Georgia Supreme Court strengthens the presumption that in cases where it issues summary denials it has adopted the trial court's reasoning—a presumption that is fully in accord with our own experience.

When a state trial court has issued a reasoned decision, applying the *Richter* "could have supported" standard to the unreasoned appellate decision erroneously elevates form over substance. In contrast, a rule that looks through the summary denial to the reasoned trial-court decision respects the judgment of both the state appellate and trial courts. What's more, it reflects a practical understanding of which court has the resources to conduct a full review and reasoned decision. The appellate court's summary denial relies upon the trial court opinion, and the federal court should do the same by looking beyond the summary denial to the merits of the trial court's decision.

III. Having Federal Courts Conduct Federal § 2254(d) Review by Speculating About the Basis of a Summary Denial Order Does Not Serve the Comity Interests That Motivated Congress to Adopt the Deference Provisions in the AEDPA

Perhaps the most troubling aspect of the decision below is the manner in which it compels federal courts to speculate about the basis for a state court judicial system any time a state appellate court summarily denies discretionary review. The AEDPA places "'primary responsibility with the state courts'" for adjudicating habeas petitions, and grants the decisions of those state courts substantial deference. *Pinholster*, 563 U.S. at 182 (quoting *Visciotti*, 537 U.S. at 27). This deference is essential to the comity interests between federal and state courts because "'[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Richter*, 562 U.S. at 103 (*quoting Calderon v. Thomas*, 523 U.S. 538, 555-56 (1998)). Thus, the AEDPA creates an intentionally difficult standard to ensure federal courts "afford state courts due respect." *See Donald*, 135 S. Ct. at 1376.

The process for affording this respect to a state court requires a federal court conducting review under § 2254(d) to focus its examination on the state court's ruling. A rule permitting federal courts to review only the summary denial—rather than a trial court's reasoned decision—permits a federal court to speculate about a state court's reasons or motives without any basis. This promotes a system where federal trial court

speculation is upheld *over* a state trial court's reasoning. Permitting federal courts to assign their own reasoning to a state summary denial order—and then purport to "defer" to that reasoning—undermines the principles of comity and federalism that the AEDPA sought to respect.

Responsible deference to a state judicial determination under § 2254(d), requires a federal court to review the state court decision underlying that determination. Permitting a federal court to ignore such a decision turns deference on its head. The various presumptions and rules underlying deference to state courts are inapplicable if the federal courts can simply ignore the state court reasoning. For example, applying *Richter* here does not effectuate the "'presumption that state courts know and follow the law.'" *Donald*, 135 S. Ct. at 1376 (quoting *Visciotti*, 537 U.S. at 24). In fact, it creates an end-run around this presumption: Federal courts can ignore the state court's own statements about why it ruled the way it ruled. This swallows the presumption that state courts "know and follow the law" because the court never analyzes the state court's own reasoning. Any rule that ignores what a state court says its reasoning is does not reflect deference to the state's "good-faith attempts to honor constitutional rights." *Cf. Richter*, 503 U.S. at 103.

A rule permitting a federal court to "review" a summary denial by the Georgia Supreme Court would impose an opinion-writing burden on the Georgia Supreme Court because otherwise it risks having a federal court speculate about its reasoning. In most cases, the Georgia Supreme Court has decided it has no reason to re-write the

trial court opinion. Georgia has chosen to deploy its judicial resources in this manner—using its practiced finder of fact for most habeas review and conserving limited appellate resources so that they will be available to perform other functions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

APPENDIX A

List of *Amici*

The Hon. Fred Banks (ret.) served as Justice of the Mississippi Supreme Court from 1991 to 2001, and at the time of his retirement from the court in 2001, he served as Presiding Justice.

The Hon. Norman Fletcher (ret.) served as Justice of the Georgia Supreme Court from 1990 to 2005, and served as Chief Justice from 2001 to 2005.

The Hon. Gerald Kogan (ret.) served as Justice of the Florida Supreme Court Justice from 1987 to 1998, and served as Chief Justice from 1996 to 1998.

The Hon. James Robertson (ret.) served as Justice of the Mississippi Supreme Court from 1983 to 1992, and at the time of his retirement from the court in 1992, he served as Associate Justice.

The Hon. Michael Wolff (ret.) served as Justice of the Missouri Supreme Court Justice from 1998 to 2011, and served as Chief Justice from 2005 until 2007.