No. 12–11

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

STEVEN CRAIG JAMES,

Respondent.

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

REPLY BRIEF

TOM HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief Counsel

JEFFREY A. ZICK
Section Chief Counsel

LACEY STOVER GARD
Assistant Attorney General
Criminal Appeals/
(Counsel of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

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INTRODUCTION

The state post-conviction (PCR) court found Respondent Steven Craig James' ineffective-assistance-of-counsel (IAC) at sentencing claim precluded under state law. In the alternative, the court found, as to the *entire petition*, that James had presented no colorable claims for relief.

On federal habeas review, a panel of the Ninth Circuit Court of Appeals reversed the district court's denial of relief and remanded with instructions to grant the habeas writ based on ineffective assistance of sentencing counsel. The panel refused to apply the Anti-terrorism and Effective Death Penalty Act's (AEDPA's) deferential standard of review because it found, in direct conflict with decisions from other circuits, that Petitioner had "waived" any argument that the state PCR court rejected James' IAC claim on the merits. The Ninth Circuit further found that the PCR court did not individually address the claim's merits and thus did not issue a merits decision within AEDPA's meaning.

Contrary to James' assertion, this case presents two compelling issues of nationwide importance that warrant Certiorari. First—in contravention of AEDPA's language and intent and in conflict with opinions from other federal circuits—the Ninth Circuit found that Petitioner had "waived" an argument that the state courts adjudicated James' IAC claim on the merits. In

defending this ruling, James acknowledges that a party cannot waive AEDPA's standard of review, but draws an artificial distinction between waiving an *argument* that a state court merits adjudication exists and waiving AEDPA's *standard of review* itself. However, a party cannot waive the *argument* that a state court resolved a claim on its merits without also necessarily waiving AEDPA's *standard of review*, because the existence of a state court merits adjudication automatically triggers AEDPA deference.

Second, the Ninth Circuit's alternative holding—that the state court did not resolve James' IAC claim on the merits because that court did not expressly address the claim outside of its finding of a procedural bar—is factually incorrect and, in fact, contravenes this Court's decision in *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770 (2011). Although the Ninth Circuit acknowledged *Richter*, it unreasonably restricted that case to circumstances in which a state court does not invoke a procedural reason for denying a claim. In fact, *Richter*'s rationale squarely applies in this case, where the state court found that "[a]s to the entire petition, … there are no genuine or material issues of fact or law" and "[n]o colorable claims have been made."

For the reasons stated herein and in the Petition for Writ of Certiorari, this Court should grant Certiorari, reverse the Ninth Circuit's

decision, and remand for reconsideration of James' IAC claim under AEDPA's deferential standard of review. At a minimum, this Court should remand for an evidentiary hearing, at which Petitioner could subject James' affidavits and documentary evidence to adversarial scrutiny.

I

AEDPA'S DEFERENTIAL STANDARD OF REVIEW IS MANDATORY AND CANNOT BE WAIVED.

James addresses the Ninth Circuit's waiver ruling only in passing, instead dismissing Petitioner's challenge to that portion of the opinion as a "red herring." (Brief in Opposition, at 27–28.) James argues that "[w]aiving a *line of argument* about the record in a case is not the same as waiving a mandatory *standard of review*."[1] (*Id.* at 28.) As set forth below, the distinction James draws is illusory and his argument is unpersuasive.

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[1] James also argues that waiver "is not an issue in this case" because the PCR court did not resolve his IAC claim on the merits. (Brief in Opposition, at 27–28.) Petitioner addresses this contention in connection with Argument II, *infra*.

James implicitly concedes that AEDPA's standard of review is mandatory in the face of a state court merits adjudication. (*See* Brief in Opposition, at 28.) *See* 28 U.S.C. § 2254(d) ("[a]n 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…" unless statutory exceptions are satisfied) (emphasis added). As noted in the Petition for Writ of Certiorari, at least four federal circuits have recognized this principle. *See Wilson v. Mazzuca*, 570 F.3d 490, 500 (2nd Cir. 2009); *Gardner v. Galetka*, 568 F.3d 862, 878–79 (10th Cir. 2009); *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008); *Eze v. Senkowski*, 321 F.3d 110, 120–21 (2nd Cir. 2003); *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001). James fails to address the foregoing authority in any meaningful fashion, or offer any persuasive explanation why it does not apply in this case.

Instead, James attempts to distinguish between waiving the *argument* that a state court merits decision exists and waiving AEDPA's *standard of review* itself.[2] This

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[2] James contends that Petitioner "misrepresent[ed]" the Ninth Circuit's opinion by characterizing it as finding that they waived AEDPA's standard of review rather than the argument that a merits decision existed. (Brief (Continued)

argument fails because the existence of a state court merits decision alone triggers AEDPA deference. *See* 28 U.S.C. § 2254(d). Thus, a party's waiver of the *argument* that a state court merits ruling exists necessarily also constitutes a waiver of AEDPA's *standard of review*. In fact, in this case, the Ninth Circuit relied on Petitioner's purported waiver to justify its refusal to apply AEDPA deference. *See James v. Ryan*, 679 F.3d 780, 802 (9th Cir. 2012). For the reasons stated above and in the Petition for Writ of Certiorari, this Court should reject James' arguments and grant Certiorari to resolve this important issue.

II

THE NINTH CIRCUIT CONTRAVENED *RICHTER* BY FINDING THAT THE STATE PCR COURT DID NOT ADJUDICATE JAMES' IAC CLAIM ON THE MERITS.

At the conclusion of its ruling denying James' third PCR proceeding, the state court

(Continued).

in Opposition, at 28.) James is incorrect. Petitioner accurately described the opinion. (*See* Petition, at 12–13 ("[T]he Ninth Circuit found that Petitioners had waived their argument that the state court *issued a merits decision* by raising it for the first time in a petition for rehearing.") (emphasis added)).

expressly stated, "*As to the entire petition*, the court finds there are no genuine or material issues of fact or law that are in dispute that would entitle the petitioner to an evidentiary hearing. *No colorable claims have been made*." (Petition, at App. D p. D–54, emphasis added.) The court further found, "There is no reasonable probability that any of [the] facts presented would have changed the result of the trial or sentencing." (*Id.*) James argues that the above-quoted language did not constitute an alternative merits determination on his IAC claim, in part because it did not specifically address that claim and in part because Petitioner purportedly presented it out of context. (Brief in Opposition, at 17–27.) James is incorrect.

James does not contest that a state court's alternative merits adjudication of a procedurally-barred claim is entitled to AEDPA deference if the procedural bar is subsequently deemed inadequate. However, he maintains that the PCR court did not adjudicate his IAC claim on the merits because it did not specifically address that claim aside from finding it procedurally barred. (Brief in Opposition, at 17–27.) James limits *Richter*, as did the Ninth Circuit, "to instances where the state court 'did not say it was denying the claim for any other reason'" than the merits. *James III*, 679 F.3d at 803 (quoting *Richter*, 131 S.Ct. at 784).

Petitioner exposed the flaws in this reasoning in the Petition, and James offers no meaningful response. (*See* Petition, at 15–20.) Instead, he further complicates the issue by citing an inapplicable case, *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), and responding to an argument Petitioner has not made. (Brief in Opposition, at 18–27.) In *Ylst*, this Court held, "Where … the last reasoned [state court] opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Id.* According to James, *Ylst*, rather than *Richter*, governs this case because the Arizona Supreme Court, in denying review, is presumed not to have disregarded the PCR court's imposition of a procedural bar and considered the IAC claim's merits. (Brief in Opposition, at 18–27.)

However, Petitioner did not argue that the Arizona Supreme Court disregarded the PCR court's procedural bar and adjudicated the IAC claim on its merits when it denied discretionary review, an argument that would arguably implicate *Ylst*. (Petition, at 15–20.) Rather, Petitioner asserted that the *PCR court's order*—the last reasoned decision addressing the IAC claim and the decision the Ninth Circuit examined[3]—rejected the claim on the merits in

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[3] The Ninth Circuit has vowed, notwithstanding *Richter*, to continue to "'look
(Continued)

the alternative to its imposition of a procedural bar, an argument upon which *Ylst* has no bearing.

James cites *Bell v. Miller*, 500 F.3d 149 (2nd Cir. 2007), for the proposition that "when a state court expressly denies a federal claim on procedural grounds, then refers to the claim's lack of merit without explicitly rejecting the claim on the merits, it has not denied the claim on 'alternative' grounds." (Brief in Opposition, at 20 n.10.) *Bell* is inapposite. In that case, the state court preceded its merits discussion by a "contrary-to-fact construction: '*if* the merits *were* reached, the result *would be* the same.'" *Id.* at 155. The court determined that "a contrary-to-fact construction is not the same as an alternative holding." *Id.* Here, the PCR did not utilize a "contrary-to-fact" construction, but instead expressly stated, as to the *entire petition*, that James had presented no colorable claims for relief. (Petition, at Appx. D, p.D–54.) James' arguments are unavailing.

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through' the state supreme court's denial of discretionary review to the last reasoned state court decision." *Williams v. Cavazos*, 646 F.3d 626, 636 (9th Cir. 2011) (cert. granted on separate issue, *Cavazos v. Williams*, 132 S.Ct. 1088 (Mem. Jan 13, 2012)). Although this practice is arguably erroneous under *Richter*, Petitioner does not challenge it here.

Relying on dicta in *Ylst* and *Coleman v. Thompson*, 501 U.S. 722 (1991), James also encourages this Court to ignore the PCR court's express language and instead refer to the *State's pleadings* during James' state and federal proceedings to determine whether the state court adjudicated the IAC claim on its merits. (Brief in Opposition, at 20–23.) In *Ylst* and *Coleman*, this Court looked to the circumstances of the state courts' unexplained rulings to determine the basis for those rulings. *See Ylst*, 501 U.S. at 802–06 (recognizing potential need to look to state's briefs to find "clues" for basis for state court's unexplained ruling, and noting that the Court in *Coleman* also looked at surrounding circumstances to find a basis for the ruling). In this case, in contrast, the state court found James' IAC claim precluded (a procedural bar later found inadequate to preclude federal review), and alternatively found that the *entire petition*—necessarily including the IAC claim—failed on the merits. (Petition, at Appx. D, p. D–54.) Given the clarity of this language, there is no need to examine the state's pleadings or any other collateral information.

James also suggests that the PCR court's failure to use the word "alternative" in connection with its merits ruling, and the fact that it specifically addressed the merits of other claims it found precluded, somehow reveals that it did not intend to include the IAC-at-sentencing claim in its reference to the "entire

petition." (Brief in Opposition, at 23–25.) But James cites no authority requiring a state court to use the word "alternative" when entering an alternative merits ruling and, in fact, this Court has never required a state court to use any particular language in its rulings. *See Coleman*, 501 U.S. at 739. Moreover, the state court's merits discussion explicitly embraces the entire petition, as set forth above. And, the court's decision to individually address the merits of other claims does not change the analysis. Under *Richter*, the court was not required to explain its reasoning in denying the IAC claim on the merits as a prerequisite to applying AEDPA deference. 131 S.Ct. at 784.

Finally, James accuses Petitioner of divorcing the PCR court's language from its context. (Brief in Opposition, at 25–27.) He suggests that the language refers to the court's decision to deny an *evidentiary hearing* on James' claims. (*Id.*) The order, however, speaks for itself; although the portion at issue refers to an evidentiary hearing, it is not limited to that topic. Moreover, James fails to explain how the reference to an evidentiary hearing signifies that the court did not enter a merits ruling. This failure is critical because the standard for granting a hearing under Arizona law is whether a petitioner has presented a colorable claim *on the merits*. *See* Ariz. R. Crim. P. 32.6(c). For the reasons stated above and in the Petition, this Court should grant certiorari and remand to the Ninth Circuit for consideration of

the claims' merits under AEDPA's deferential standard.

III

AT A MINIMUM, THIS COURT SHOULD REVERSE THE NINTH CIRCUIT'S ORDER GRANTING THE HABEAS WRIT, AND REMAND FOR AN EVIDENTIARY HEARING IN DISTRICT COURT.

Should this Court reject Petitioner's argument that the state court resolved James' IAC claim on the merits, it should remand for an evidentiary hearing in district court. In arguing otherwise, James maintains that "there are no disputed facts" and that he is entitled to relief under the documentary evidence presented. (Brief in Opposition, at 28–34.) James is incorrect. As stated in the Petition, Petitioner has consistently argued that James' evidence does not establish a basis to conduct an evidentiary hearing, much less federal habeas relief. (Petition, at 18–20.)

Although James chastises Petitioner for failing to identify "a single exhibit" or fact that they dispute (Brief in Opposition, at 33), Petitioner was under no obligation to do so. Throughout this proceeding, Petitioner has assumed for the sake of argument that James' witnesses would testify consistently with their affidavits; this assumption differs from a

concession that the evidence is accurate or warrants habeas relief. A federal court can reject a habeas claim supported by affidavits without holding an evidentiary hearing, but may not *grant* relief based on affidavits without subjecting the evidence to adversarial scrutiny. Accordingly, at a minimum, the Ninth Circuit clearly erred by granting habeas relief, rather than remanding for an evidentiary hearing in district court.

CONCLUSION

For these reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

TOM HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Division Chief Counsel

JEFFREY A. ZICK
Section Chief Counsel

LACEY STOVER GARD
Assistant Attorney General
(Counsel of Record)

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