April, 2002

Habeas Review of Perfunctory State Court Decisions on the Merits

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I. Introduction

This article discusses the appropriate standard of review a federal habeas court should use to review a state court determination of federal law unaccompanied by a rationale. In other words, what standard of review does the federal court employ when the state court's opinion is wholly composed of the phrases: "The claims are without merit. Denied."? The Supreme Court has not explicitly resolved the issue, and various federal judges around the country have reached different opinions. This paper will demonstrate that a close scrutiny of the controlling habeas corpus statute, relevant case law, and policy considerations leads to the conclusion that such a state court determination is an adjudication entitled to statutory deference by federal courts.

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II. Background

A. *The Great Writ*

The Constitution of the United States ensures the existence of the writ of habeas corpus.[1] Long ago, Congress empowered the federal courts "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[2] Originally viewed as one of the most important individual rights and a necessary check on executive power,[3] today the Great Writ has been roundly criticized as an infringement on state sovereignty and a barrier to effective punishment.[4] No doubt the critics are in some sense correct.

The writ of habeas corpus permits federal courts to order new trials for state convicts whose detentions violate federal law. In part, this purpose derives sanction from Article III of the Constitution, which proclaims that the federal courts are the ultimate arbiters of federal law.[5]

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1 *See* U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

2 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; *accord Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867) (proclaiming the writ a judicial remedy for "every possible case of privation of liberty contrary to the Constitution, treaties, or laws").

3 *See*, *e.g.*, THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (explaining that the Constitution provided for habeas corpus as protection against "arbitrary methods of prosecuting pretended offenses, and arbitrary punishment upon arbitrary convictions"); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) (stating that the writ served "to liberate an individual from unlawful imprisonment"); Lindh v. Murphy, 96 F.3d 856, 867 (7th Cir. 1996) (en banc) ("The writ known in 1789 was the pre-trial contest to the executives power to hold a person captive, the device that prevents arbitrary detention without trial."), *rev'd on other grounds*, 521 U.S. 320 (1997); *see also* Frank v. Mangum, 237 U.S. 309, 330 (1915) (explaining that in 1867 Congress extended the privilege of the writ to "all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States"). The idea reaches far back into English jurisprudence. *See* DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA – DUALISM OF POWER AND LIBERTY 25 (1966) (asserting that, by the mid-1600s, habeas corpus was "*the* mode for vindicating the liberty of the subject by protecting him against confinement contrary to the due process of law") (emphasis in original); BLACKSTONE'S COMMENTARIES 131 (6th ed. 1774) (describing the writ as "efficacious . . . in all manners of illegal confinement").

4 *See*, *e.g.*, S. CONF. REP. No. 3446 (Apr. 17, 1996) (statement of Senator Hatch) ("I believe convicted killers should be punished, and the particularly heinous killings ought to be punished with the death penalty. I think the survivors and family, the victims of this type of heinous murder, have a right to see that those who killed their loved ones are justly punished. That is why we have to pass this provision. It is long overdue."); H.R. CONF. REP. H1426 (1996) (statement of Representative Cox) ("But if habeas corpus, statutory habeas corpus is available simply to throw our the whole State judicial system, why do we have it in the first place? If we are going to look at all of these questions from scratch, de novo, facts, evidence, law, the whole thing, as if the State proceeding had never happened, then Robert Alton Harris would be able to, in the future, to be able to delay his execution for 13 more years.").

5 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* Williams v. Taylor, 529 U.S. 362, 378-79 (2000) (Stevens, J., dissenting)

When applied to habeas review, this principle collides with state sovereignty.[6] After all, state courts are obligated to enforce federal law to the same extent as federal courts, and principles of comity and federalism dictate that their determinations be entitled to some deference.[7] On a practical level, habeas corpus "entails significant costs" to state criminal justice systems.[8] The years of affirmations in state courts, culminating in the issuance of a federal writ of habeas corpus ordering a new trial, can render the prosecution's case on retrial stale and ineffective. The state is forced either to release the accused or to attempt to reconvict on often now-flimsy evidence. If the state does retry, the criminal process begins anew for the accused, who, if convicted again, will likely take full advantage of all the state appellate and post-conviction processes, as well as another round of federal habeas corpus. There is no question that habeas corpus intrudes upon the states' implementation of criminal justice and the "finality" of state convictions.[9] Despite the Supreme Court's reiteration that habeas corpus remains an important and widely accepted method for the vindication of fundamental constitutional rights,[10] a growing national disenchantment with current habeas corpus litigation has led Congress to strive to alleviate its burdens.[11]

("When federal judges exercise their federal-question jurisdiction under the 'judicial power' of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is.' At the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government and from the separate authority of the several states—to interpret federal law.") (citation omitted); *id.* at 402 (O'Connor, J., dissenting) ("'We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.'") (quoting Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J.)); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[It is a] basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected . . . as a permanent and indispensable feature of our constitutional system."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

6 *See Williams*, 529 U.S. at 379 (Stevens, J., dissenting) ("A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.").

7 *See* Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Irvin v. Dowd, 359 U.S. 394, 404 (1959) (stating that state courts are obligated "'equally with the courts of the Union . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States'") (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

8 Engle v. Isaac, 456 U.S. 107, 126 (1982).

9 *See* Duckworth v. Eagan, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) ("It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.").

10 *See* Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights.").

11 *See Williams*, 529 U.S. at 404 ("Congress wished to curb delays, to prevent retrials on federal habeas, and to give effect to state convictions to the extent possible under law.") (internal quotation marks omitted).

B. *The Statute and the Supreme Court*

On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[12] which substantially changed federal habeas corpus jurisprudence.[13] Prior to AEDPA, federal courts entertaining a habeas petition reviewed state court determinations of federal law de novo.[14] AEDPA, however, amended habeas law to direct federal courts to accord extreme deference to state court determinations of federal law.[15]

AEDPA states:

> An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[16]

The Supreme Court recently interpreted this language in *Williams v. Taylor*.[17] The Court began by asserting that the phrases "contrary to" and "unreasonable application of" have independent meaning.[18] Tackling

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12 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241-66 (1996)).

13 *See Williams*, 529 U.S. at 404 ("It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved."); *id.* at 412 ("[AEDPA] places a new constraint on the power of a federal habeas court to grant a state prisoner's application . . . .").

14 *See*, *e.g.*, Schiro v. Farley, 510 U.S. 222, 232 (1994) ("The preclusive effect of the jury's verdict, however, is a question of federal law which we must review *de novo*."); O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998) ("Prior to AEDPA's passage, a federal court's exercise of habeas corpus jurisdiction did not require that it pay any special heed to the underlying state court decision."); Miller v. Fenton, 474 U.S. 104, 111-12 (1985) (asserting that questions of law are subject to plenary and independent review). *But see* Wright v. West, 505 U.S. 277, 285-95 (1992) (Thomas, J.) (intimating that the "independent review" by federal habeas courts may be deferential).

15 In addition, AEDPA also restricted prisoners' ability to file successive habeas petitions and imposed a one-year limitations period on the filing of habeas petitions. *See* Pub. L. No. 104-132, §§ 101-09 (1996) (codified at 28 U.S.C. § 2244 (2001)).

16 28 U.S.C. § 2254(d) (2001).

17 529 U.S. 362 (2000).

18 *See id.* at 404-05.

the former phrase first, the Court suggested that a state court decision could be "contrary to" clearly established Supreme Court precedent in at least two ways: by identifying a rule that contradicts Supreme Court law[19] or by confronting identical facts as a prior Supreme Court case and reaching a different decision.[20] The Court made clear that the "contrary to" phrase does not permit review of the "manner in which [the state court] applies Supreme Court precedent."[21]

Review of the state court's application and reasoning is instead left to the "unreasonable application of" phrase. If the state court correctly identifies the salient Supreme Court rule but nevertheless applies it unreasonably, habeas relief can be granted under the "unreasonable application of" phrase of AEDPA.[22] The Court made no attempt to provide guidance to this admittedly tautological definition.[23] Instead, the Court merely clarified that an unreasonable application is different from an incorrect application.[24] The Court expressly reserved decision on whether AEDPA permits habeas relief for a state court's "unreasonable extension of" or "unreasonable failure to extend" Supreme Court precedent.[25]

C. *The Question*

The question begged by *Williams* is whether a state-court decision, purporting to dispose of a federal challenge on the merits but failing to articulate any semblance of reasoning or controlling federal authority, is an "adjudication" falling under the AEDPA § 2254 deferential standard of review. The question has raised controversy in the lower courts.[26]

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19 *See id.* at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases[illegible].").

20 *See id.* at 406 ("A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.").

21 *Id.* at 407.

22 *Id.* at 407-08 (stating that the "unreasonable application of" phrase encompasses a "state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case").

23 *See id.* at 410 ("The term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning.").

24 *See id.* at 410 ("For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original).

25 *See id.* at 408-09 ("Today's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1).").

26 *Compare* Washington v. Schriver, 240 F.3d 101 (2d Cir. 2001) (hereinafter *Washington I*) (holding that a state court decision on the merits unaccompanied by a federal rationale is not an

On the one hand, because AEDPA uses the terms "adjudication," "decision," and "judgment," the statute could be read as attributing different meaning to each term—namely, reading "adjudicated" as something more than mere "decision" or "judgment."[27] Also, the determination of whether the "contrary to" or "unreasonable application of" phrase applies to a particular state court decision cannot be made without the appearance of the state court's reference to federal law,[28] and further, two of the three AEDPA inquiries mandated by *Williams* cannot readily be undertaken without some inkling of the state court's rationale.[29]

"adjudication" entitled to AEDPA deference), *superceded by* Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (hereinafter *Washington II*); Bell v. Jarvis, 236 F.3d 149, 184 (4th Cir. 2000) (en banc) (Motz, J., dissenting) ("State courts should not be allowed to insulate their decisions by failing to express their reasoning."), *cert. denied*, 122 S. Ct. 74 (2001); Royal v. Netherland, 4 F. Supp. 2d 540, 556-57 (E.D. Va. 1998) (arguably performing a de novo review but at the very least indicating that "the deferential standard mandated by § 2254(d)(1) has less meaning in this situation"), *aff'd sub nom.* Royal v. Taylor, 188 F.3d 239 (4th Cir.), *cert. denied*, 528 U.S. 1000 (1999); Lockhart v. Maddock, No. C97-1447 MJJ, 1999 WL 179688, at *8 (N.D. Cal. March 29, 1999) (applying de novo review), *rev'd sub nom.* Lockhart v. Terhune, 250 F.3d 1223 (9th Cir. 2001); *and* Maxwell v. Gilmore, 37 F. Supp. 2d 1078, 1088-89 (N.D. Ill. 1999), *with* Santellan v. Cockrell, 271 F.3d 190, 193-94 (5th Cir. 2001) ("[I]f a state court denies a prisoner's claim without reasoning of any sort, our authority under AEDPA is still limited to determining the reasonableness of the ultimate decision."); Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (holding that perfunctory decisions on the merits are "adjudications" under AEDPA); *Bell*, 236 F.3d 149; Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) (rejecting a de novo review standard); Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000) ("Where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court's decision, applying the [AEDPA] standard articulated above."); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("Since we have an adjudication on the merits, we must consider what it means to defer to a decision which does not articulate a reasoned application of federal law to determined facts. We conclude, for reasons that follow, that we owe deference to the state court's *result*, even if its reasoning is not expressly stated.") (emphasis in original).

The First and Eighth Circuits have yet to resolve the issue. *See* Gary v. Dormire, 256 F.3d 753, 756 n.1 (8th Cir. 2001) (recognizing the issue but declining to resolve it); Hurtado v. Tucker, 245 F.3d 7, 18 n.18 (1st Cir.) (recognizing the issue but declining to resolve it), *cert. denied*, 122 S. Ct. 282 (2001). The First Circuit did, however, indicate that when the state court articulates a reasoning, the flaws of the reasoning may be indications of an unreasonable application. *Hurtado*, 245 F.3d at 18, 19. The Eleventh Circuit has not yet addressed the issue.

27 *See Washington II*, 255 F.3d at 54 ("This approach points out that the challenge of defining 'adjudicated on the merits' is all the greater because the statute uses 'judgment,' 'decision,' and 'adjudication' . . . without specifying the meaning of—and differences among, if any—these terms."); *Washington I*, 240 F.3d at 108 ("The statute does draw a distinction between a 'judgment,' a 'decision' and an 'adjudication' . . . .").

28 *See Washington II* , 255 F.3d at 53-54 ("This approach looks to the view of at least six justices in *Williams v. Taylor* that the substance of the state court decision should be examined in order to determine which clause of § 2254(e) to apply and whether the state court decision was 'contrary to' or involved an 'unreasonable application of' federal law."); *Washington I*, 240 F.3d at 108 ("*Williams* teaches that the substance of the state court decision must be examined in order to determine which clause of §2254(d)(1) should be applied.").

29 *See Washington II* , 255 F.3d at 54 ("That analysis, the argument proceeds, cannot be performed if the state court decision does not identify in some fashion the legal rule through which the result was reached."); *Washington I*, 240 F.3d at 108 ("Neither one of these inquiries can be performed if the state court's decision did not make any reference to a federal constitutional claim

In addition, certain congressional statements arguably reveal an intent to give deferential review only to the "reasoned decisions" of state courts.[30] Finally, certain beneficial results might accrue to both state and federal courts alike should the federal courts not defer to perfunctory state court decisions. For example, requiring state courts to delineate at least skeletal reasons would help resolve the sometimes difficult question of whether the state-court decision was on the merits or on procedural grounds.[31] Judge Calabresi has elegantly proposed that a state court could choose to allow the federal courts to defer to an easy decision by explaining its reasoning or to permit the federal courts to review *de novo* a complex issue of constitutional law by refraining from writing a difficult opinion.[32]

On the other hand, the language of AEDPA could be read as instructing federal courts to review the state-court "decision," not the reasoning process,[33] and as equating "adjudicated" with "decided by a judicial officer on the merits and reduced to judgment accordingly."[34] Supporting this view is Congress's desire to reduce federal supervision of state courts.[35] It also comports with general principles of federalism and the Supreme Court's caution that federal courts should avoid "impos[ing] on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim."[36] As explained below, this latter answer is correct, though not for all of the same reasons.

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by, for example, citing Supreme Court case law or state court precedents which themselves apply federal law.").

30 *See Washington I* , 240 F.3d at 109 ("This conclusion is in keeping with Congress's determination in enacting AEDPA that when state courts adequately satisfy their obligation to enforce federal constitutional rights in criminal proceedings, their reasoned decisions adjudicating federal claims require deference. Such deference is due when state courts, for example, discuss or at least cite Supreme Court case law or state court decisions which refer to federal law.") (citation omitted).

31 *See Washington II*, 255 F.3d at 54 ("On this view, when the state court decision provides some sense of its reasoning, it promotes an overall more efficient use of judicial resources and a speedier and more accurate resolution of habeas petitions. Thus, according to this approach, it could obviate the need for the sometimes complicated analysis that arises when a federal habeas court cannot determine whether a state court decided a claim on substantive or procedural grounds.").

32 *See id.* at 63 (Calabresi, J., concurring).

33 *See id.* at 53 ("On one view, AEDPA directs federal habeas courts to ascertain whether a state court adjudication has 'resulted in a decision' that is contrary to, or involves an unreasonable application of, clearly established federal law, or is based on an unreasonable determination of the facts. That is, federal habeas courts are to evaluate the state court result, and not the reasoning process.") (internal citations omitted); Aycox v. Lyttle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("Section 2254(d) requires us to examine the 'decision' of the state court . . . . The focus is on the state court's *decision* or *resolution* of the case.") (emphasis in original).

34 *Washington II*, 255 F.3d at 53.

35 *See id.* ("This approach . . . asserts that with AEDPA, Congress sought to reduce federal court supervision of the state's criminal processes and increase deference to state judicial decisions.").

36 *Id.* (quoting Coleman v. Thompson, 501 U.S. 772, 739 (1991)).

III. Discussion

A. *The Statute*

AEDPA states quite clearly that an application for a writ of habeas corpus "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings"[37] unless deferential review warrants the issuance of a writ. The clause "that was adjudicated" thus mandates deference when the state court "adjudicated" the claim "on the merits." The statute makes no mention of what, exactly, an "adjudication" encompasses. In legal contexts, "adjudication" can mean both the process of a court's reasoning and the actual judgment.[38] In AEDPA, the first definition is more appropriate.

Within the statutory context, "decision" clearly means the state court "result:" no writ shall be granted unless the state adjudication "resulted in a decision."[39] The accepted legal definition of "decision" supports this usage.[40] Thus, "decision" here has an air of finality akin to "disposition" or "conclusion" and unlike "consideration" or "reasoning." By contrast, AEDPA uses "adjudication" much differently. The language refers to situations when "the adjudication of the claim . . . resulted in a decision."[41] The "adjudication" necessarily precedes and causes the "decision." The construction therefore reads coherently only if the "adjudication" means the *process of reasoning* by which the "decision" is reached.

I therefore agree with those who suggest that an "adjudication" means something different than a mere "decision" or "judgment" and necessarily contemplates some sort of judicial reasoning process. That interpretation, however, does not inexorably lead to the conclusion that a decision unaccompanied by a written rationale actually was not adjudicated. The real question, therefore, is whether the term "adjudicated" requires some *articulated* reasoning, as some courts have assumed.[42] This assumption is a poor one for several reasons.

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37 28 U.S.C. § 2254 (2001).

38 *See* BLACK'S LAW DICTIONARY 42 (7th ed. 1999) ("1. The legal process of resolving a dispute; the process of judicially deciding a case. 2. JUDGMENT.") (emphasis in original).

39 *See* 28 U.S.C. §§ 2254(d)(1), (2).

40 BLACK'S LAW DICTIONARY 414 (7th ed. 1999) (defining "decision" as a "judicial determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case") (emphasis omitted).

41 28 U.S.C. § 2254(d).

42 *See* Washington v. Schriver, 240 F.3d 101, 109 (2d Cir. 2001) (*Washington I*) ("Such deference is due when state courts, for example, discuss or at least cite Supreme Court case law or state court decisions which refer to federal law."), *superceded by* Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (*Washington II*); *cf. Washington II*, 255 F.3d at 53 ("Another approach would find

First, it is without justification in the statute. The ordinary meaning of the term "adjudicated" (*i.e.*, as a "reasoning process") is not restricted to a written explanation. An "adjudication" can be written, oral, or purely cognitive. These three facets of "adjudication" are as intertwined with its meaning as the others. To hold that AEDPA somehow restricts the meaning of "adjudicated" to one particular method of the decision-making process would require some textual indication that Congress was so confining it. Yet the statute makes no such intimation. It does not condition deference on the *articulation* of reasoning.[43] Nor does it suggest that an unarticulated adjudication should not be presumed to be an adjudication. In fact, AEDPA gives no indication that the differences between written and mental adjudications are at all important. The language only refers to some state court adjudication on the merits.[44] The text itself, therefore, speaks to what is required when an adjudication on the merits has taken place, whether written or not.

The argument that an unarticulated adjudication cannot be reviewed[45] is irrelevant for the simple reason that AEDPA does not contemplate federal review of state adjudications. AEDPA directs federal courts to look to state court *decisions* when conducting a review, not *adjudications*.[46] It is only when a *decision* is "contrary to, or involved an

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that unexplained, summary dismissals of federal claims are not 'adjudicat[ions] on the merits.'") (alteration in *Washington II*).

43 *See* Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) ("Nothing in the phrase 'adjudicated on the merits' requires the state court to have explained its reasoning process. Nowhere does the statute make reference to the state court's process of reasoning."); Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000) (en banc) ("First and foremost, the language of § 2254(d) does not support such a requirement. Section 2254(d) requires federal habeas courts to ascertain whether the underlying state court adjudication of a claim on the merits *resulted in a decision* that was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. It does not require that a state court cite to federal law in order for a federal court to determine whether the state court decision is an objectively reasonable one . . . ."") (internal quotation marks and citation omitted) (emphasis in original), *cert. denied*, 122 S. Ct. 74 (2001).

44 For that matter, the statute arguably does not specify what standard a federal court must use when no adjudication was actually performed by the state court. The clause "that was adjudicated" is not a conditional clause; rather, it is an adjectival clause modifying the word "claim." Nothing in the literal reading of the text indicates how to review the merits of a claim that was *not* adjudicated on the merits in state court proceedings.

45 *See*, *e.g.*, *Washington I*, 240 F.3d at 108-09 (discussing the futility of analyzing perfunctory decisions).

46 *See Sellan*, 261 F.3d at 311-12 ("[T]he federal court will focus its review on whether the state court's ultimate decision was an 'unreasonable application' of clearly established Supreme Court precedent."); Hurtado v. Tucker, 245 F.3d 7, 20 (1st Cir. 2001) ("The ultimate question on habeas, however, is not how well reasoned the state court decision is, but whether the outcome is reasonable."); Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000) ("Where a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court's decision, applying the [AEDPA] standard . . . ."); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("[W]e owe deference to the state court's *result*, even if its reasoning is not expressly stated. . . . The focus [of AEDPA] is on the state court's *decision* or

unreasonable application of, clearly established law" or when a *decision* "was based on an unreasonable determination of the facts" that habeas relief can be granted.[47] I discuss this argument in more detail below in the context of *Williams v. Taylor*. Suffice it to say at this point that, whatever the dictates of the Supreme Court, the text of AEDPA instructs federal courts to review decisions, not reasoning.

In addition, strong support exists for the interpretation that "adjudicated on the merits" is an AEDPA term of art which emphasizes "merits" rather than "adjudicated."[48] The term "adjudicated" immediately precedes the term "on the merits," and the conjoined phrase appears in its own isolated dependent clause.[49] The grammatical juxtaposition of the terms "adjudicated" and "on the merits," coupled with their isolation in a dependent clause, suggests an intimate connection between the terms and their meanings. The most important part of the

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resolution of the case.") (emphases in original); *cf.* Hennon v. Cooper, 109 F.3d 330, 334-35 (7th Cir. 1997) (Posner, C.J.) ("Another way to take 'unreasonable' in the new law, however, is as having reference to the quality of the reasoning process articulated by the state court in arriving at the determination. . . . But we do not think this approach is correct."), *cert. denied*, 522 U.S. 819 (1997).

47 28 U.S.C. §§ 2254(d)(1), (2). After all, as the Supreme Court has indicated, a habeas court "does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*." Coleman v. Thompson, 501 U.S. 722, 730 (1991) (emphasis in original). Reviewing the judgment of the state court is simply the judicially proper vehicle for reviewing the constitutionality of the detention. *See id.* ("Nevertheless, a state prisoner is in custody *pursuant* to a judgment.") (emphasis in original).

48 *See* Neal v. Puckett, 239 F.3d 683, 686 (5th Cir. 2001) ("In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a [state] court's disposition of the case was substantive as opposed to procedural."); Miller v. Johnson, 200 F.3d 274, 281 (5th Cir. 2000) ("In the context of federal habeas proceedings, a resolution (or adjudication) on the merits is a term of art that refers to whether a court's disposition of the case was substantive, as opposed to procedural.").

The Second Circuit has intimated that "adjudicated on the merits" is a term of art which, whether used in the habeas corpus statute or in the law of res judicata, encompasses summary dispositions on the merits. *See*, *e.g.*, *Sellan*, 261 F.3d at 311 ("When Congress uses a term of art such as 'adjudicated on the merits,' we presume that it speaks consistently with the commonly understood meaning of this term. 'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.") (internal citation omitted); Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001) (*Washington II*) ("Congress, on this view, may also have had in mind the well-settled meaning of 'adjudicated on the merits' as used in the *res judicata* context in civil litigation. [Under *res judicata*,] even the most summary orders disposing of federal claims without comment are adjudications on the merits . . . .") (emphasis in original).

I believe this argument to be on shaky ground for three reasons. First, Congress specifically considered, and emphatically rejected, an amendment which would have given res judicata effect to state court judgments on the merits. *See* 141 CONG. REC. S7849 (June 7, 1995) (defeating the Kyl Amendment). Second, the Supreme Court has considered the phrase "adjudicated on the merits" in the context of Rule 41(b) of the Federal Rules of Civil Procedure and held that it does not mean the same as it does in res judicata jurisprudence. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 121 S. Ct. 1021, 1027 (2001). Third, courts have considered, and uniformly discarded, an interpretation of habeas corpus review that engenders state court decisions with res judicata effect on federal courts. *See*, *e.g.*, Frank v. Mangum, 237 U.S. 309, 334 (1915). Nevertheless, to the extent this res judicata argument is persuasive, it certainly furthers my own.

49 *See* 28 U.S.C. § 2254(d).

dependent clause "that was adjudicated on the merits in State court proceedings" is arguably the phrase "on the merits." A constitutional claim that was rejected by a state court pursuant to a state procedural bar, as opposed to "on the merits," cannot be reviewed by a federal court *at all*, much less under a deferential standard of review.[50] Because of this distinction, it is likely that the phrase "adjudicated on the merits" accents the "on the merits" portion. This is not to say that the term "adjudicated" is merely filler. If the state court has wholly failed to adjudicate a federal claim, on the merits or otherwise, § 2254 cannot apply.[51] However, beyond the bare requirement that the federal claim actually be considered, the force of the phrase "adjudicated on the merits" is that it be considered "on the merits."[52] In light of these concerns, it is extremely unlikely that the term "adjudicated" has any special limitation to "written reasoning."

Second, the assumption contravenes the basic intricacies inherent in a judicial system. "Adjudicate" is what courts do, even when they fail to delineate their reasoning on paper. It is an inherent and paramount assumption of the American judicial system that courts confronted with a justiciable controversy faithfully adjudicate claims, which result in decisions.[53] To assume that a court has not faithfully adjudicated a controversy simply because the resulting decision is unaccompanied by a written summary of that adjudication is to turn to the judicial system on

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50 *See Coleman*, 501 U.S. at 750 ; Wainwright v. Sykes, 433 U.S. 72, 81 (1977). If the state procedural rule is constitutionally adequate, the petition is barred from asserting the defaulted claim on habeas unless he can show cause for his default and prejudice therefrom. *See* Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

51 *See* Gary v. Dormire, 256 F.3d 753, 756 n.1 (8th Cir. 2001) ("If a claim was not presented in State court, it cannot be said it was 'adjudicated on' under even the most liberal construction of § 2254(d)."); *Miller*, 200 F.3d at 281 n.4 (taking the view that a merits review of a petition which the state court rejected on procedural grounds must be de novo) (citing Nobles v. Johnson, 127 F.3d 409, 416 (5th Cir. 1997)); Lockhart v. Johnson, 104 F.3d 54, 57-58 (5th Cir. 1997) ("As stated above, this claim was not presented to the state court, and the Director has waived the exhaustion requirement. Consequently, the AEDPA's provision altering our standard of review, when the petitioner's claim has been adjudicated on the merits by a state court, has no application to this claim."); *cf.* Williams v. Taylor, 529 U.S. 362, 404 (2000) ("Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court."). The Seventh Circuit has held that a state court decision which fails to reach the merits cannot be reviewed under § 2254(d) but must instead by reviewed under § 2243, which requires a disposition "as law and justice require[s]." *See* Braun v. Powell, 227 F.3d 908, 916-17 (7th Cir. 2000). This is not an unreasonable position to take. *See* Wright v. West, 505 U.S. 277, 285 (1992) (Thomas, J.).

52 Of course, a written delineation of the adjudication enables federal courts to decipher more easily whether the state-court decision was on the merits or on procedural grounds. However, this benefit is mooted when the state court clearly disposes of the claims on their merits.

53 *See*, *e.g.* , Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001) ("The notion that state courts may absolve themselves of their duty to decide federal questions has no basis in the law. Under the Supremacy Clause, state courts are obligated to apply and adjudicate federal claims fairly presented to them."); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

its head.[54] This assumption is especially important in the context of habeas corpus, in which federal courts are reviewing the decisions of a co-equal state judicial system. Principles of comity and federalism dictate that assumptions as to the propriety of state judicial systems be resolved in a manner most favorable to the state courts. At least two courts have assumed that a summary denial on the merits was nevertheless "adjudicated" by the state courts.[55]

Third, legitimate justifications for summary dispositions undermine the assumption that they are not adjudications. Many courts in the United States—if not all—have, from time to time, issued perfunctory decisions.[56] Part of the reason concerns judicial economy. Most courts, state appellate courts included, are busy tribunals.[57] Writing out in opinion form a court's meticulous review of constitutional law followed by an exhaustive analysis of the facts surrounding a criminal trial and conviction would be a tremendous waste of resources for appellate issues that obviously lack merit. It is enough that the judges' collective wealth of legal knowledge and intuition, confirmed by an appropriate review of the law and facts, is codified in a simple, summary decision. In short, there is dubious basis for assuming that such a summary decision is the product of a dereliction of judicial duty.

These reasons undermine the interpretation that a state court's perfunctory decision cannot be an "adjudication" within the literal

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54 *See* Testa v. Katt, 330 U.S. 386, 391 (1947) ("[T]he obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."). A contrary assumption implicitly calls into question the skill of state judges. *See Sellan*, 261 F.3d at 312 ("[T]his would reflect doubt regarding the capabilities of the New York courts as fair and competent forums for the adjudication of federal constitutional rights . . . ."); *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 n.2 (1985) ("It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.").

55 *See*, *e.g.*, Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (en banc) ("However, we may not presume that [the] summary order is indicative of a cursory or haphazard review of [the] petitioner's claims. Rather, the state court decision is no less an 'adjudication' of the merits of the claim and must be reviewed under the deferential provisions of § 2254(d)(1).") (internal quotation marks and citation omitted) (alterations in *Bell*), *cert. denied*, 122 S. Ct. 74 (2001); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) ("There is no evidence here that the state court did not consider and reach the merits of Aycox's claim. Since we have an adjudication on the merits, we must consider what it means to defer to a decision which does not articulate a reasoned application of federal law to determined facts.").

56 The Supreme Court of the United States on a daily basis denies or grants petitions for certiorari without discussion.

57 Judge Calabresi acknowledged as much in his *Washington II* concurrence. *See* Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring) (*Washington II*) ("Specifically, if AEDPA deference were deemed automatically and universally to apply, then that law would require extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken (but not unreasonably).").

meaning of AEDPA. However, some courts claim to have found extra-textual support in the Supreme Court's decision *Williams v. Taylor*.[58]

B. Williams v. Taylor[59]

The argument has been made that because AEDPA deferential review cannot be conducted in two of the three ways set forth by *Williams* if the state court fails to articulate a federal basis for its rejection of the petitioner's constitutional claims, the Supreme Court implicitly imposed an articulation requirement.[60] The argument fails for several reasons.

There can be no dispute that at least one of the three inquiries set forth by the Supreme Court *can* be conducted on a summary disposition.[61] A state-court decision is "contrary to" clearly established federal law if different than the result of a Supreme Court case with materially indistinguishable facts.[62] A state-court decision need not be accompanied by an articulated rationale to be "contrary to" Supreme Court precedent under this inquiry.[63] All that is necessary is a review of the facts and the disposition.

The other two inquiries are, admittedly, more difficult without a written reasoning.[64] *Williams* instructed that a decision can be "contrary

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58 *See*, *e.g.*, *id.* at 53 ("This approach looks to the view of at least six justices in *Williams v. Taylor* that the substance of the state court decision should be examined[illegible]."); Hurtado v. Tucker, 245 F.3d 7, 18 (1st Cir. 2001) (relying in part on *Williams* to set forth guidelines for evaluating a state court's decision which include looking to the substance of the state court's reasoning); Washington v. Schriver, 240 F.3d 101, 108-09 (2d Cir. 2001) (*Washington I*) (reasoning that the *Williams* inquiries cannot be undertaken without some inkling of the state court's federal rationale), *superceded by Washington II*, 255 F.3d 45; Neal v. Puckett, 239 F.3d 683, 696 (5th Cir. 2001) ("There is, therefore, at least some basis for the view that Section 2254(d)'s 'unreasonable application' standard refers to the quality of the state court's analysis.").

59 529 U.S. 362 (2000).

60 *See Washington II*, 255 F.3d at 54 ("This approach to the statute infers from *Williams* that Congress's direction that § 2254(d) only applies to claims that were 'adjudicated on the merits' by the state courts means that such 'adjudication' only takes place when the state court decision makes its rationale (the legal rule it applied) at least minimally apparent."); *Washington I*, 240 F.3d at 108-09.

61 Even *Washington I* implicitly conceded this point. The court discussed the inability to undertake the "contrary to" *Williams* inquiry because no federal rationale was apparent from the state-court opinion, but it did not comment on the ability to determine whether the state-court set of facts was materially indistinguishable from a Supreme Court case. *See Washington I*, 240 F.3d at 108.

62 *See Williams*, 529 U.S. at 406.

63 Indeed, the Supreme Court acknowledged as much when it stated that the "contrary to" phrase does not permit review of the "manner in which [the state court] applies Supreme Court precedent." *Id.* at 407.

64 *See* Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001) ("We recognize that a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to' tests."); Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999) ("Of course, it is far preferable if the state court explains its reasoning because then we are not forced to guess as to the reasoning behind a determination. A state court's explanation of it's reasoning would avoid the risk that we might misconstrue the basis for the determination, and

to" clearly established federal law if based on a legal rule that contradicts Supreme Court precedent.[65] A decision made without reference to specific federal law cannot, ipso facto, identify a legal rule which could contradict Supreme Court caselaw.[66] The Court also stated that habeas relief can be granted if the state-court decision "involved an unreasonable application of" Supreme Court precedent.[67] Implicit in that directive is a precondition that the state court at least "correctly identif[y] the governing legal rule but appl[y] it unreasonably to the facts."[68] Without those actions by the state court, a habeas court cannot conduct an "unreasonable application of" inquiry.[69] Under this view, it could be concluded that a summary denial circumvents these two inquiries.

In fact, it is not precisely the case that these two inquiries cannot be conducted on a disposition devoid of federal rationale. If there is no controlling federal law clearly established by the Supreme Court, for example, habeas relief is unavailable.[70] A determination on whether the controlling federal law has been clearly established by the Supreme Court is an easy undertaking independent of the state-court decision. Thus, in reviewing a state-court decision lacking reference to federal law, a habeas court could, faithfully to the language of AEDPA, conclude that habeas relief is not warranted under the "contrary to" phrase because no clearly established Supreme Court precedent existed.

At least one circuit has held similarly. In *Harris v. Stovall*,[71] the Sixth Circuit confronted a state-court summary denial.[72] The court determined that no Supreme Court precedent had been extended to apply to the particular facts at hand. Because no Supreme Court precedent

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consequently diminish the risk that we might conclude the action unreasonable at law or under the facts at hand.").

65 *See Williams*, 529 U.S. at 405.

66 *See* Washington v. Schriver, 255 F.3d 45, 54 (2d Cir. 2001) (*Washington II*) ("That analysis, the argument proceeds, cannot be performed if the state court decision does not identify in some fashion the legal rule through which the result was reached."); *Washington I*, 240 F.3d at 108; Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir. 1996) (en banc) (reasoning that if there is no clearly established federal law then the state court decision cannot fail the "contrary to" test), *rev'd on other grounds*, 521 U.S. 320 (1997).

67 28 U.S.C. § 2254(d)(1).

68 *Williams*, 529 U.S. at 407.

69 *Cf. Washington I*, 240 F.3d at 108 ("Neither one of these inquiries can be performed if the state court's decision did not make any reference to a federal constitutional claim by, for example, citing Supreme Court case law or state court precedents which themselves apply federal law."); Doan v. Brigiano, 237 F.3d 722, 730 (6th Cir. 2001) ("Because the Ohio Court of Appeals did not even identify in its opinion that Doan had a federal constitutional right to a fair and impartial jury that considers in its deliberations only the evidence presented against him at trial, the 'unreasonable application' prong of § 2254(d)(1) does not govern our analysis."); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) (holding that the lack of state court rationale precluded an evaluation "under the models suggested by Justice O'Connor in *Williams*").

70 28 U.S.C. § 2254(d)(1).

71 212 F.3d 940 (6th Cir. 2000).

72 *See id.* at 943.

clearly controlled the outcome, the court concluded that it could not grant the petition under the "contrary to" phrase.[73]

Likewise, a federal court can determine whether a perfunctory disposition is an "unreasonable application of" Supreme Court precedent. Even a summary decision can be patently unreasonable in light of controlling Supreme Court precedent if no reasonable analysis could have led to the decision reached by the state court. In other words, a federal court would ask the question: "Was the state court's rejection of the constitutional claims an objectively reasonable one in light of the facts of the case and the controlling law of the Supreme Court?"[74] In answering, a habeas court would still be adhering to the language of the statute by refusing to grant habeas relief unless the state-court decision must have been the result of an unreasonable application.[75] Several circuit courts have actually undertaken this exact inquiry.[76]

Federal courts are not strangers to deferential review of perfunctory decisions. Take district-court review of a magistrate judge's non-dispositive discovery rulings, for example. The magistrate judge's decisions are subject to district-court review under a "clearly erroneous

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73 *See id.* at 945.

74 A few circuit courts have devised similar tests. *See* Neal v. Puckett, 239 F.3d 683, 695 (5th Cir. 2001) (asking whether the state court's determination is at least minimally consistent with the facts and circumstances of the case); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.) (Posner, C.J.), *cert. denied*, 522 U.S. 819 (1997).

75 Granted, *Williams* itself looked to the state court reasoning to engage its "unreasonable application of" analysis. *See* Williams v. Taylor, 529 U.S. 362 (2000). But there, at least, the Court had some reasoning to review. I do not here give opinion on what role the state court's opinion, if given, should play in the inquiry. I pose only the following hypothetical. Say a state court identified an erroneous Supreme Court precedent (overruled, for example), or completely misapplied the correct legal precedent, but nevertheless came to exactly the correct disposition. What would a federal court do then? Should the federal court grant the writ based on the state court's legal error even though no constitutional right was violated? Or deny the writ based on the fact no constitutional right was violated but in arguable contravention of *Williams v. Taylor*?

76 *See*, *e.g.*, Sellan v. Kuhlman, 261 F.3d 303, 315-17 (2d Cir. 2001) (reviewing a summary denial under the "unreasonable application of" phrase); *Neal*, 239 F.3d at 696-97 (reviewing a poorly-reasoned state-court decision under the "unreasonable application of" phrase by "look[ing] only to the substance of the . . . decision"); Bell v. Jarvis, 236 F.3d 149, 166 (4th Cir. 2000) (en banc) (denying the writ because the summary state disposition was not an unreasonable application of Supreme Court precedent), *cert. denied*, 122 S. Ct. 74 (2001); Bacon v. Lee, 225 F.3d 470, 482 (4th Cir. 2000) (denying the writ because the summary state disposition was not an unreasonable application of Supreme Court precedent); Gordon v. Kelly, 205 F.3d 1340 (6th Cir. 2000) (denying the writ because the state disposition was not unreasonable); Aycox v. Lyttle, 196 F.3d 1174, 1178-80 (10th Cir. 1999) (denying the writ because the state disposition was not unreasonable); *Hennon*, 109 F.3d at 334-35 (denying the writ under the "unreasonable application of" prong without looking to the state court's perfunctory reasoning); *see also*, *e.g.*, Leka v. Portuondo, 257 F.3d 89, 97-98 (2d Cir. 2001) (granting the writ because the state court's summary decision was an unreasonable application of Supreme Court precedent); Lindstadt v. Keane, 239 F.3d 191, 205 (2d Cir. 2001) (granting the writ because the state court's summary decision was an unreasonable application of Supreme Court precedent); Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) (granting the writ because the state court's summary decision was an unreasonable application of Supreme Court precedent).

or contrary to law" standard.[77] Magistrate judges rarely reduce their rulings to a written analysis, often preferring instead to rule by summary oral order from the bench. In deferentially reviewing such orders, district judges are left with the factual record and the applicable law to determine whether the magistrate judge clearly erred or acted contrary to law. This is not a particularly arduous task, and district courts review magistrates in such a manner all the time. Habeas review is not appreciably different.

Federal courts can conduct full deferential habeas review of perfunctory state-court decisions while remaining faithful to both the language of AEDPA and the teaching of the Supreme Court's decision in *Williams*. The next question is whether the legislative history evinces a contrary intent.

C. *Legislative Clues*

The legislative history on this question is unilluminating. While Congress was clearly concerned with establishing a deferential review of state-court decisions,[78] there is no indication that any member considered the question raised here. *Washington I* did purport to buttress its conclusion with legislative statements which, it claimed, were evidence of Congress's insistence that state courts produce reasoned and thoughtful adjudications.[79] Even were it true that the sections of the Congressional Record cited in support by *Washington I* really did support that proposition, no section even remotely suggests that Congress believed state courts could only decide federal questions with due consideration when they articulated their reasoning in a written opinion. In short, the legislative history is unhelpful to resolving the meaning of "adjudicated."

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77 28 U.S.C. § 636(b)(1)(A); *see also* FED. R. C IV. P. 72(a) ("The district judge . . . shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.").

78 *See*, *e.g.* , 142 CONG. R EC. S3446, 3447 (1996) (statement of Senator Hatch) ("[The AEDPA] simply ends the improper review of State court decisions. After all State courts are required to uphold the Constitution and to faithfully apply Federal laws. There is simply no reason that Federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts."); 142 CONG. REC. H2247, 2249 (1996) (statement of Representative Hyde) ("[Deference] is given to State courts' legal decisions if they are not contrary to established Supreme Court precedent. That is to avoid relitigating endlessly the same issues. There is a system of State courts. We give them deference, provided their decisions are not contrary to Supreme Court precedent.").

79 *See* Washington v. Schriver, 240 F.3d 101, 109 (2d Cir. 2001) (*Washington I*) ("This conclusion is in keeping with Congress's determination in enacting AEDPA that when state courts adequately satisfy their obligation to enforce federal constitutional rights in criminal proceedings, their reasoned decisions adjudicating federal claims require deference.▯.▯.▯. [S]uch deference is due when state courts, for example, discuss or at least cite Supreme Court case law or state court decisions which refer to federal law."), *superceded by* Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (*Washington II*).

D. *Policy Arguments*

Several policy arguments support my interpretation of "adjudication." First, it coincides with the principles of comity and federalism that are central to habeas corpus.[80] Federal courts rarely favor the distasteful practice of instructing state courts to explain their reasoning in greater detail.[81] As the Supreme Court has reiterated in the habeas corpus context, federal courts may not tell state courts how to write opinions.[82]

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80 *See* Frank v. Mangum, 237 U.S. 309, 329 (1915) (directing courts to defer to state court procedures for reasons of comity and federalism). I do not suggest that my argument is supported by the federalism and comity concerns espoused by Congress in debating on AEDPA. I am aware that Chief Judge Posner recently stated that review of state-court reasoning is "just the kind of tutelary relation to the state courts that the [AEDPA] amendments are designed to end." *Hennon*, 109 F.3d at 335. While I agree that a "tutelary relationship" has no place in federal habeas corpus under the statute and case law, I cannot agree that Congress enacted AEDPA with the *design* of removing any such relationship. Instead, the legislative history more convincingly suggests that Congress desired to promote the finality of state convictions, rather than protect federalism. *See*, *e.g.*, H.R. CONF. REP. H1426 (Feb. 8, 1995) (statement of Representative Cox) ("But if habeas corpus, statutory habeas corpus is available simply to throw out the whole State judicial system, why do we have it in the first place? If we are going to look at all of these questions from scratch, de novo, facts, evidence, law, the whole thing, as if the State proceeding had never happened, then Robert Alton Harris would be able to, in the future, to be able to delay his execution for 13 more years."); S. CONF. REP. S3446 (Apr. 17, 1996) (statement of Senator Hatch) ("I believe convicted killers should be punished, and the particularly heinous killings ought to be punished with the death penalty. I think the survivors and family, the victims of this type of heinous murder, have a right to see that those who killed their loved ones are justly punished. That is why we have to pass this provision. It is long overdue."); H.R. CONF. REP. H2249 (YEAR) (statement of Representative Hyde) ("Deference is given . . . to avoid relitigating endlessly the same issues.").

Of course, some voiced concerns of state comity. *See*, *e.g.*, H.R. CONF. REP. H1427 (Feb. 8, 1995) (letter from Attorneys General to Representative Hyde) ("As Attorneys General for our respective states we are confronted with a system of federal habeas review that is often intrusive, cumbersome, and time consuming. . . . The central problem underlying federal habeas corpus review is a lack of comity and respect for state judicial decisions."); S. CONF. REP. S3446 (Apr. 17, 1996) (statement of Senator Hatch) ("Why then, given this preference for reasonableness in the law, should we empower a Federal court to reverse a State court's reasonable application of Federal law to the facts? Our proposed standard simply ends the improper review of State court decisions. After all, State courts are required to uphold the Constitution and to faithfully apply Federal laws."); H.R. CONF. REP. H2249 (YEAR) (statement of Representative Hyde) ("There is a system of State courts. We give them deference, provided their decisions are not contrary to Supreme Court precedent."). But these concerns are a far cry from Chief Judge Posner's statement.

81 *See* Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001) ("'[T]his would place us in the position of dictating to state courts that they must issue opinions explicitly addressing the issues presented or else face 'second guessing' by the federal courts.'") (quoting Capellan v. Riley, 975 F.2d 67, 72 (2d Cir. 1992)).

82 *See* Arizona v. Evans, 514 U.S. 1, 7 (1995) (reaffirming a federal presumption that state court decisions are on the merits "to obviate the 'unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court'") (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983)); Coleman v. Thompson, 501 U.S. 772, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions.").

Second, basing federal review on the reasoning of a state-court opinion would distort the original purposes of habeas corpus. Under this view, habeas relief might be granted,[83] not because the petitioner's confinement violated the constitution, but because the state courts were inarticulate in their opinions.[84] This would continue to be the case even if the state-court judges actually had carefully considered the correct Supreme Court precedent and properly applied it to arrive at the right result, but just failed to record that process on paper. Granting a habeas petitioner a new trial in this situation would unnecessarily punish the state courts and, at the same time, would give the petitioner a windfall new trial to which he has no basis for entitlement.

This is not to say that no policy concerns are worthy of consideration. Indeed, forcing judges to explain their reasoning on paper for public scrutiny would likely improve the quality of the adjudication process. Moreover, at least one federal circuit judge has expressed the fear that state courts might attempt to circumvent habeas review by intentionally refusing to articulate their reasoning.[85] While these may or may not be cause for serious concern, they cannot carry the day. To the extent that they are valid, Congress surely weighed them and considered them incidental to other, overriding purposes. To the extent that they are merely theoretical possibilities, they must, in this dual system of government, be resolved in favor of proper state-court judging. In other words, the functioning of our judicial system depends upon the assumption that state-court judges, like all other judges, uphold their duties to interpret, unflinchingly and honorably, the law presented to them. The idea that a judge would give an issue short shrift, with the obvious result of condemning a man to an unconstitutional criminal punishment, is unthinkable; to make that idea the default assumption is to

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83 A habeas courts cannot remand but can only grant a new trial as the sole remedy. *See Hennon*, 109 F.3d at 335 ("A federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial[.].[.].[.]."); Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000) ("It would be error for a federal court to 'remand' an action to the state appellate courts for the issuance of fuller findings to facilitate review under AEDPA or for a federal court to order any state court to issue fuller findings.").

84 *See Hennon*, 109 F.3d at 335 (explaining that a review of state court reasoning could mean granting the writ even "though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness").

85 *See* Bell v. Jarvis, 236 F.3d 149, 184 (4th Cir. 2000) (en banc) (Motz, J., dissenting) ("After all, the North Carolina courts enunciated no reason for their decision and from what can be gleaned from the record this most likely was because they were unfaithful to well-established Supreme Court precedent. State courts should not be allowed to insulate their decisions by failing to express their reasoning."), *cert. denied*, 122 S. Ct. 74 (2001); *see also* Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000) (recognizing the argument but rejecting it). *But see* Washington v. Schriver, 255 F.3d 45, 62-63 (2d Cir. 2001) (Calabresi, J., concurring) (*Washington II*) (suggesting that state courts will actually prefer to expose difficult decisions to federal review).

negate the idea that judges are honest interpreters of our governing precepts.

A more persuasive policy suggestion is the one ingeniously advanced by Judge Calabresi in his *Washington II* concurrence. He asserted that state judges, as members of the justice system, are naturally concerned with the unconstitutional confinement of prisoners. Constitutional law may present difficult questions that state courts, knowing AEDPA deference essentially ensures that their reasonable interpretation will be upheld even if incorrect, will want to resolve correctly.[86] This places a "heavy, and sometimes unwanted and unmanageable burden" on the state courts.[87] Conditioning AEDPA deference on the appearance of a federal rationale permits the state courts to choose take or avoid this burden.[88] If the state court is confident of its decision, it can cite federal law and be afforded deference.[89] If the state court is unsure of its decision, it can summarily deny the claim and know that the claim will be reviewed de novo by the federal courts.[90] In this way, claims Judge Calabresi, the considerations of federalism are in the state courts' hands.[91]

A panel of the Second Circuit roundly criticized Judge Calabresi's suggestion as leading to potentially "deleterious substantive consequences."[92] That panel predicted that his suggestion would encourage state prisoners to press federal claims in a cursory manner with the hope that the state court will not address them, and federal

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86 *See Washington II*, 255 F.3d at 63 (Calabresi, J., concurring) ("Specifically, if AEDPA deference were deemed automatically and universally to apply, then that law would require extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken (but not unreasonably so).").

87 *Id.* at 62 (Calabresi, J., concurring).

88 *See id.* at 63 (Calabresi, J., concurring) ("In contrast, a reading of the AEDPA under which AEDPA deference does not apply where a State court has rejected a petitioner's claim without expressly mentioning its federal aspects allows State courts to avoid this burden. It enables State courts *to choose* whether or not they wish to take on the burden and be deferred to.") (emphasis in original).

89 *See id.* (Calabresi, J., concurring) ("Under this interpretation, State courts that wish fully to evaluate federal claims need only indicate that they have done so, and their decisions will be deferred to.").

90 *See id.* (Calabresi, J., concurring) ("Conversely, State courts that believe that their energy and resources are better employed elsewhere can remain silent without having the AEDPA impose on them the burden (and all the consequences) of being treated as if they have given the in depth consideration that AEDPA deference implicates. And they can make this docket controlling choice on a case by case basis.").

91 *See id.* (Calabresi, J., concurring) ("Nor does this rule at all infringe on the freedom of State courts [because] they can command deference concerning the issues they wish to decide, and pass on for *de novo* review the issues they prefer to avoid, or to treat less fully.").

92 Sellan v. Kuhlman, 261 F.3d 303, 313 (2d Cir. 2001).

review would thus be de novo.[93] The effect, claimed the panel, would be at odds with the "spirit of AEDPA which respects the state court's adjudication of *all* claims."[94]

The *Sellan* panel's prediction that prisoners would not press claims in state court is, in my opinion, an extremely unlikely one. The misguided prisoner who only mildly asserts a constitutional claim in state courts risks foregoing a full round of state review of his claim,[95] and then risks his habeas petition being dismissed by the federal habeas court for failure to present the claim to the state courts.[96] The risks, it seems clear to me, would dissuade most prisoners from attempting what the *Sellan* court predicts.

Although I disagree with the *Sellan* panel's specific criticism, I submit that Judge Calabresi's proposal cannot be endorsed for one simple reason. It is his alone and not Congress's. For the reasons stated above, nothing in the text or legislative history indicates that Judge Calabresi's suggestion is appropriate. Without such support, one creative idea cannot override the much more defensible interpretation that even a state-court decision silent on reasoning is an adjudication entitled to AEDPA deference.

IV. Conclusion

I have argued that AEDPA requires federal court deference to a state-court decision which is clearly on the merits of a federal question, even if unaccompanied by an articulated rationale. A moment is necessary to explain the limited contours of my argument. I speak only concerning those cases in which a state court clearly resolves a specific claim or group of claims on the merits. I make no comment on the appropriate standard of review when a state court wholly fails to resolve

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93 *See id.* at 313-14 ("[The rule] could encourage state prisoners to press their federal claims in state court in an essentially cursory manner—just enough to exhaust state remedies and to avoid default or waiver, but not too strongly—with the hope that the state court will not 'refer to' or engage in any lengthy discussion of their federal claims, thus entitling the prisoner to *de novo* consideration of these claims on federal habeas review.").

94 *Id.* at 314 (emphasis in original).

95 *See* Williams v. Taylor, 529 U.S. 420, 437 (2000) ("For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, §2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met."); *see also* Coleman v. Thompson, 501 U.S. 722, 765 (1991) (Blackmun, J., dissenting) ("[E]ncouraging a defendant to assert his federal rights in the appropriate state forum makes it possible for transgressions to be arrested sooner and before they influence an erroneous deprivation of liberty.").

96 *See* Rose v. Lundy, 455 U.S. 509 (1982) (requiring unexhausted claims to be dismissed without prejudice for reconsideration by the state court).

a federal question that has been fairly presented,[97] or when a state court's procedurally-based decision is circumvented[98] by, for example, a showing of cause and prejudice.[99] I also do not address cases that purport dispose wholesale a number of presented claims by proclaiming them "either unpreserved for appellate review or without merit." In that vein, nothing here should be taken to extend to judicially-created presumptions or assumptions that a particular state-court decision is on the merits, rather than procedurally resolved or mistakenly unaddressed. I only examine federal habeas review of state-court determinations of federal law that are clearly on the merits. That examination conclusively establishes that such determinations are "adjudications" under AEDPA.

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97 *See*, *e.g.*, DiBenedetto v. Hall, 272 F.3d 1, 7 (1st Cir. 2001) (holding that pre-AEDPA de novo review applies to claims fairly presented but not adjudicated); Hameen v. Delaware., 212 F.3d 226, 248 (3d Cir. 2000) (holding that pre-AEDPA de novo review applies to claims fairly presented but not adjudicated), *cert. denied*, 121 S. Ct. 1365 (2001); Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999) (holding that pre-AEDPA de novo review applies to claims fairly presented but not adjudicated).

98 *Compare* Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001) (reviewing a state court decision made pursuant to state law by asking whether the state law was contrary to clearly established federal law), *with* Doan v. Brigiano, 237 F.3d 722 (6th Cir. 2001) (attempting to apply § 2254(d)), *and* Braun v. Powell, 227 F.3d 908, 916-17 (7th Cir. 2000) (refusing to employ the AEDPA standard of review).

99 Such a case, in my opinion, means that there has been *no* "adjudication" of the federal claim, and therefore, § 2254(d) cannot apply.