NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Tyrone Noling,

Petitioner,

v.

Margaret Bradshaw, Warden,
Respondent.

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

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Jon M. Sands
Federal Public Defender
Kelly L. Schneider (OH 0066394)
Assistant Federal Public Defender
Office of the Federal Public Defender
for the District of Arizona
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816; Fax (602) 889-3960
Kelly_Schneider@fd.org
Counsel of Record

Ralph I. Miller (DC 186510)
Stephen A. Gibbons (DC 493719)
Weil, Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
(202) 682-7000; Fax: (202) 857-0940
Ralph.Miller@weil.com
Stephen.Gibbons@weil.com

James A. Jenkins (OH 0005819)
1370 Ontario, Ste. 2000
Cleveland, Ohio 44113
(216) 363-6003; Fax: (216) 363-6013
Jajenkins49@hotmail.com

Capital Case

Question Presented

I.

Should the federal courts apply 28 U.S.C. § 2254(d)'s limitation on relief to a habeas petitioner's claim, where the state court presented with the claim issued a detailed, reasoned opinion that simply failed to address the federal constitutional claim at issue?

Parties to the Proceedings and Corporate Disclosure Statement

There are no parties to the proceeding other than those listed in the caption. Under Rule 29.6, Petitioner states that no parties are corporations.

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Petitioner Tyrone Noling, an Ohio capital inmate, respectfully prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals in *Noling v. Bradshaw*, 651 F.3d 573 (6th Cir. 2011).

Opinions Below

The Sixth Circuit Court of Appeals' opinion denying relief is attached in the Appendix at A-001 through A-007. *Noling v. Bradshaw*, 651 F.3d 573 (6th Cir. 2011).

The United States District Court for the Northern District of Ohio issued an Opinion and Order in *Noling v. Bradshaw*, No. 5:04 CV 1232, 2008 WL 320531 (N.D. Ohio Jan. 31, 2008), denying the Petition for Writ of Habeas Corpus. This opinion is at Appendix pages A-008 through A-100.

The opinion of the Ohio Supreme Court in Noling's direct appeal of right is published in *State v. Noling*, 781 N.E.2d 88 (Ohio 2002). It is found in the Appendix at pages A-101 through A-126. The Court of Appeals denied relief on direct appeal in *State v. Noling*, No. 96-P-0126, 1999 WL 454476 (Portage Ct. App. June 30, 1999). This opinion is reprinted in the Appendix at pages A-127 through A-153.

Jurisdictional Statement

The United States Court of Appeals for the Sixth Circuit issued its opinion on the merits on June 29, 2011. This Court has jurisdiction over this cause under

28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (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.

Statement of the Case

More than sixteen years ago, Tyrone Noling was wrongfully convicted of the murders of Bearnhardt and Cora Hartig who were found shot to death in their home in rural Atwater, Ohio on April 7, 1990.

In April 1990, Noling committed two robberies (one with co-defendant Gary St. Clair) in the Alliance, Ohio. (Tr. 949-50, 836-37) Noling stole a .25

caliber handgun during the first robbery, which he accidentally fired during the second robbery of the Murphy home.[1] After the shot was fired into the floor, Noling immediately checked on Mrs. Murphy's well-being. (Tr. 1370.)

It did not take long for the police to figure out who committed the Alliance robberies, and Noling—along with St. Clair, Joseph Dalesandro, and Butch Wolcott—was arrested. (Tr. 1062.) At the time of their arrest, the four youths, aged fourteen to twenty, were questioned about the Hartig murders and all denied any involvement. Noling and St. Clair pled guilty to the Alliance robberies and began serving time. Two years later, in June of 1992, Ron Craig, an investigator from the Portage County Prosecutor's Office, began questioning the youths about the unsolved murders. (Tr. 877-78, 1095.) Threats, lies, and coercion produced a case that incriminated Noling. St. Clair, Wolcott, and Dalesandro all gave statements inculpating Noling in the Hartig murders—Dalesandro in exchange for a plea deal and Wolcott in exchange for immunity.

Noling was initially indicted for the Hartig murders in 1992, but in June of 1993, the court entered a nolle prosequi. It was not until 1995 that Noling was

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[1]While the .25 caliber handgun was recovered, ballistics have excluded that weapon as the gun that killed the Hartigs. (Tr. 1240, 1241-43.)

indicted again.[2]

Noling's trial began in January of 1996. The State offered the testimony of 24 witnesses, but it was apparent that the State's real case against Noling was offered via his co-defendants. Wolcott, Dalesandro, and St. Clair were all called as prosecution witnesses. Wolcott and Dalesandro both gave testimony, albeit inconsistent on significant details, that supported the State's theory of the case. St. Clair, however, chose not to lie anymore.

St. Clair testified that he pled guilty to Aggravated Murder in relation to the Hartig homicides. (Tr. 939-40.) Despite that plea, St. Clair testified unequivocally that he, Noling, Dalesandro, and Wolcott did not go to Atwater on April 5, 1990. (Tr. 961-62.) He denied any involvement in the Atwater robbery

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[2]Shortly before the second indictment, the State rescinded its plea agreement with Dalesandro. (ROW Apx. Vol. 8, p. 391.) A new sentencing hearing was held in which the State argued that Dalesandro had not fully cooperated as was required by his plea agreement. (*Id.*) Prosecutors asked the court to sentence him to the maximum of eight to fifteen years. (*Id.*) Dalesandro protested saying that the State was trying to put words into his mouth about the murders. (Hrg. Tr. 8.) He told the court: "They want to throw words in my mouth and I can't let them do that. I told them my story once. They want me to go in there, you know, and try to yell at me to say stuff and I ain't going to say nothing that ain't true, you know." (*Id.*) After Dalesandro received the maximum sentence, he wrote to the Portage County prosecutor asking to have his deal reinstated and promising to cooperate in Noling's prosecution. (Tr. 1071.)

and homicide.[3] (Tr. 962.) At this point, the State was granted permission to treat St. Clair as a hostile witness. (Tr. 963.)

The State then propounded approximately ten leading questions regarding St. Clair's guilty plea and sentence. (Tr. 964-65.) The State went on to ask not less than sixty-seven questions regarding St. Clair's prior statement, literally reading questions and answers verbatim from the statement at certain points, with defense counsel raising repeated objections. (Tr. 966-87.) At a sidebar, the State admitted the improper motive behind the impeachment:

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[3]In addition to St. Clair, both Wolcott and Dalesandro recanted their inculpatory testimony while Noling's case was on post-conviction review describing how they were manipulated and coerced into inculpating Noling. Wolcott, fourteen at the time of the murders, describes how Craig told him that police had an eyewitness and DNA linking him to the scene. They then shipped him off to a psychologist who suggested he was repressing memories of the crime.

Beyond the recantations, there is other compelling evidence of Noling's innocence. No physical evidence links Noling to the crime scene. Rather than a home invasion robbery, the crime scene paints a picture of a perpetrator who knew the Hartigs—the Hartigs were shot while seated at their kitchen table, with the perpetrator seated across from them. Mr. Hartig still had his wallet; Mrs. Hartig still wore jewelry. Numerous and repeated inconsistencies amongst and between the State's witnesses are present. And, significantly, viable alternative suspects exist, including a convicted murderer and one-time neighbor of the Hartigs whose foster brother claims he confessed to the murders and an insurance agent who defaulted on a loan to the Hartigs. The Sixth Circuit acknowledged Noling's evidence of innocence presented a "worrisome scenario" but indicated it was "not enough to create a constitutional claim cognizable under habeas and the Antiterrorism and Effective Death Penalty Act. *Noling v. Bradshaw*, 651 F.3d 573, 576 (6th Cir. 2011).

> THE COURT: Are you suggesting to me, and the jury, that the contradictory statements are the evidence that he should listen to, that he made?
>
> THE STATE: What I want to demonstrate to the jury, your Honor--
>
> THE COURT: Answer my question.
>
> THE STATE: That is what I'm trying to do.
>
> THE COURT: Answer it in the way I put it to you.
>
> Are you suggesting that the jury should accept as true the statement that you are now cross examining on, is that what you're trying to do?
>
> THE STATE: Am I -- yes.

(Tr. 990-91.) Ultimately, the trial court indicated that it would sustain any future objection to this type of question. (Tr. 992.)

But it was already too late. The State's actions had their intended effect. The number, type, and nature of the questions posed by the State encouraged the jurors to consider the statement for its truth. (Tr. 990-91.) And, it was a successful tactic—even the trial court fell for the State's ploy, relying on impeachment evidence as substantive evidence of Noling's guilt in its sentencing opinion:

> St. Clair ransacked the bedrooms and other areas of the house. At some point, St. Clair heard shooting and ran from the bedroom to see Noling shooting Mrs. Hartig.

Opinion of the Trial Court in a Capital Case at p. 2, *State v. Noling,* No. 95 CR

0220 (Portage C.P. Feb. 28, 1996).

Noling challenged St. Clair's impeachment on direct appeal to the Ohio Supreme Court in his Second and Fourteenth Propositions of Law. Noling's second proposition asserted that the trial court abused its discretion in declaring St. Clair a hostile witness and in failing to control the State's impeachment of St. Clair.[4] In sub-claim (B)(1) of his fourteenth proposition, Noling asserted that the prosecutor's improper impeachment of St. Clair was prejudicial misconduct that violated his rights to a fair trial and due process.[5]

The Ohio Supreme Court spent some nineteen paragraphs and engaged in extended discussion of Noling's individual claims of prosecutorial misconduct, save one—Noling's claim that the prosecutor committed prejudicial misconduct

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[4]Noling's Second Proposition of Law asserted: A trial court abuses its discretion when it declares a witness hostile without the showing required by Ohio Rule of Evidence 607. Further, when a trial court permits a witness to be impeached pursuant to Rule 607, the trial court has an obligation to control the nature and extent of that cross-examination. The trial court's failure to do either violates a capital defendant's due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution and § 16, Article I of the Ohio Constitution.

[5]Noling asserted in his Fourteenth Proposition of Law: A capital defendant is denied his substantive and procedural due process rights to a fair trial as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9 and 16 of the Ohio Constitution when a prosecutor commits acts of misconduct during voir dire, the trial phase, and the sentencing phase of his capital trial. He is also denied his right to reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution.

during St. Clair's impeachment. *See State v. Noling*, 781 N.E.2d 88, 108-11 (Ohio 2002).[6] The Ohio Supreme Court's opinion rejecting Noling's several claims of prosecutor misconduct simply fails to address this allegation.[7] *See id.* Resultantly, no state court has considered the merits of Noling's claim.

The Sixth Circuit Court of Appeals ignored Noling's call for the court to review his claim of misconduct de novo because the Ohio Supreme Court's failure to address Noling's claim of misconduct meant there was no adjudication on the

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[6]The Ohio Supreme Court explicitly referenced every allegation of misconduct made by Noling, excluding St. Clair's improper impeachment. *See Noling*, 781 N.E.2d at 108 (devoting paragraph 90 to Noling's claim that the state improperly used peremptory challenges against jurors who were hesitant to impose the death penalty"); *id.* at 109 (devoting paragraphs 91-95 to Noling's claim that the prosecutor committed misconduct during his trial phase closing argument, making specific reference to each phrase Noling challenged); *id.* at 110 (devoting paragraphs 96-98 to Noling's attack on the improper cross-examination of his penalty phase expert and other defense penalty phase witnesses); *id.* (addressing Noling's claims of misconduct in his penalty phase closing in paragraphs 99-106). This was not an instance where the court issued a summary disposition to "concentrate its resources on the cases where opinions are most needed." *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 784 (2011). The Ohio Supreme Court's opinion addresses 19 paragraphs to Noling's prosecutorial misconduct claims; the court's full opinion spans some 33 pages in toto.

[7]The Ohio Supreme Court denied on the merits Noling's Second Proposition of Law. In so doing, the court clearly delineated that this portion of its opinion only addressed Noling's claim of trial court error. *See Noling*, 781 N.E.2d at 100. ("In his second proposition of law, Noling argues that the trial court erred both in declaring St. Clair a hostile witness and in not restricting the state's cross-examination and impeachment of its own witness. We reject Noling's contentions that these acts constitute reversible error.").

merits. The Sixth Circuit presumed that the Ohio Supreme Court's opinion adjudicated the merits, despite its utter silence as to this issue, as demonstrated by the Court's single paragraph resolution of Noling's habeas claims in which it applied § 2254(d) to all of Noling's habeas claims:

> We granted a certificate of appealability for the following of Noling's claims: (1) whether Noling's actual innocence claim would excuse any procedural defaults accompanying his constitutional claims; (2) whether the district court erred in allowing the prosecution to treat its own witness as hostile and to impeach the witness with a prior inconsistent statement; (3) whether the prosecution acted improperly by calling its hostile witness solely to introduce the prior inconsistent statement; and (4) whether one of the capital counts in Noling's indictment was faulty. The district court addressed these issues below and rejected them. *See Noling* [*v. Bradshaw*, No. 5:04 CV 1232] 2008 WL 320531 at *17-24, 29-31, 33, 47-50 [(N.D. Ohio Jan. 31, 2008)]. We find the district court's conclusions and supporting analysis persuasive. Noling has not shown that the Ohio Supreme Court's rejection of these claims "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or that it "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." *See* 28 U.S.C. § 2254(d)(1)-(2). Accordingly, we must affirm the district court's denial of habeas relief.

Noling v. Bradshaw, 651 F.3d 573, 575 (6th Cir. 2011).

Reasons Why the Writ Should Be Granted

I.

There is a split among the circuit courts of appeal as to whether 28 U.S.C. § 2254's limitation on relief is applicable to a state court's reasoned opinion that fails, by inadvertence or intention, to address the merits of a federal constitutional claim.

28 U.S.C. § 2254(d) imposes a limitation on relief where a state court has adjudicated a habeas petitioner's claim on the merits. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 780 (2011). *Richter* asked this Court to address the implications of § 2254(d) where a state court denies relief on a habeas petitioner's state court claims summarily. *Id.* at 780, 784. This Court was clear that the limitations of the AEDPA and § 2254(d) apply when a federal court is presented a summary denial in state court. *Id.*

This Court looked at the text of § 2254 and found no requirement of a "statement of reasons." *Id.* at 784. Indeed, the state court opinion need not mention the decisions of this Court. *Id. Richter,* however, did not suggest that an adjudication on the merits by the state court was no longer necessary. This Court made clear that the statute requires a "'decision,' which resulted in an 'adjudication.'" *Id.*

Richter directs the federal courts to presume "that the state court adjudicated the claim on the merits *in the absence of any indication or state-law*

procedural principles to the contrary. Id. at 784-85 (*citing Harris v. Reed*, 489 U.S. 255, 265 (1989)) (parenthetical omitted and emphasis added).That presumption can be overcome where "there is a reason to think some other explanation for the state court's decision is more likely." *Id.* at 785 (*citing Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).

Richter dealt with a summary denial in state court. It did not address the more complicated situation presented in Noling's case—whether the limitation on relief found in § 2254(d) applies where the federal court is presented with a reasoned state court opinion that fails to rule on one of several constitutional claims raised by the petitioner or does such a circumstances make "some other explanation for the state court's decision [ ] more likely." *Id.* Both the Seventh and Ninth Circuits have recognized the guidance in *Richter*, as well as prior decisions of this Court, that illustrate instances where the state courts fail to afford a habeas petitioner an adjudication on the merits of a claim. In stark contrast, the Eleventh Circuit has presumed that the state court has adjudicated each of the petitioner's claims on the merits regardless of "any indication . . . to the contrary," *id.* at 784-85, save the express application of a state procedural bar. These cases demonstrate the confusion and disagreement *Richter* has created among the federal circuit courts grappling with how to deal with a reasoned state court opinion that, through inadvertence or choice, fails to

address the merits of a habeas petitioner's claim. The courts are reaching irreconcilable conclusions as to the implications of *Richter* in this circumstance.

The Seventh Circuit Court of Appeals continued to adhere to the traditional understanding of an adjudication on the merits in *Sussman v. Jenkins*, 636 F.3d 329 (7th Cir. 2011).[8] That court recognized that *Richter* did not alter the fundamental definition of an "adjudication on the merits." *Sussman* presented the court with an ineffective assistance of counsel claim. When the state court addressed his claim, it proceeded directly to the prejudice inquiry. *Id.* at 350 (footnote omitted). As such, the Seventh Circuit recognized that Sussman was entitled to de novo review on his claim that counsel performed deficiently. *Id.* (internal citation omitted); *see also id.* (*citing Tolvier v. McCaughtry*, 539 F.3d 766, 775 (7th Cir. 2008); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)) ("However, if a state court does not reach either the issue of performance or prejudice on the merits, then federal review of this issue 'is not circumscribed by a state court conclusion,' and our review is de novo."); *see also Morales v. Johnson*, No. 10-1696, 2011 WL 4361651 at *9-10 (7th Cir. Sept. 20, 2011) (applying de novo review to prejudice prong of *Strickland v. Washington*,

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[8]Noling alerted the Sixth Circuit to *Sussman* via a Fed. R. App. P. 28(j) letter filed on May 6, 2011.

466 U.S. 668 (1984), where "no state court has squarely addressed the merits.").[9]

The Ninth Circuit Court of Appeals reached a similar conclusion in *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011). Williams presented two claims to the state court related to the removal of a juror in her case: (1) an issue under section 1089, asserting that the trial court abused its discretion when it dismissed jurors for cause; and (2) a constitutional claim that removal of a holdout juror violated her Sixth Amendment rights. *Id.* at 638. The state court adjudicated only Williams' section 1089 claim. Resultantly, her case was "one of those rare cases in which a claim was properly raised and yet was not decided by the state court." *Id.* (footnote omitted). The state court "provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion." *Id.* at 639. Resultantly, the court found "[i]t is obvious, not 'theoretical' or 'speculat[ive],' that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome." *Id.* Put most simply, "when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is a reason to think' that it 'is more likely' that the court simply neglected the

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[9]A petition for writ of certiorari was filed in *Sussman* on June 29, 2011. *See Jenkins v. Sussman*, No. 11-22. That petition was dismissed via stipulation of the parties on September 9, 2011.

issue and failed to adjudicate the claim." *Id.* (footnote omitted).

The en banc Eleventh Circuit Court of Appeals reached a contrary conclusion in *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011). In *Childers,* the habeas petitioner asserted that his claim had not been adjudicated on the merits because the state court misunderstood the claim and resultantly failed to rule on the actual claim that he presented. In rejecting Childers' argument, the Eleventh Circuit describes an adjudication on the merits "as any state court decision that does not rest solely on a state procedural bar."[10] *Id.* at 968 (internal citations omitted). Absent a plain statement from the state court that "its decision was based solely on a state procedural rule, we will presume the state court has rendered and adjudication on the merits." *Id.* at 969.[11]

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[10]Both a concurring and dissenting opinion take issue with the en banc majority's definition of adjudication on the merits. *Childers*, 642 F.3d at 981 (footnote omitted) (Wilson, J., concurring in judgment) ("An adjudication 'on the merits' of a claim is a ruling based on the court's evaluation of whether those facts pled or proven (depending on the cases's posture entitle a claimant to relief under the prevailing legal rule or standard defining the scope of the relevant right's protection. If the court fails to conduct this evaluation, there can be no adjudication on the merits."; *id.* at 989 (Barkett, J., dissenting) (internal citations omitted) (finding no adjudication on the merits where the court "treated and resolved a different claim than the one raised by the petition" or where "the state court simply failed to address the federal constitutional claim that the defense raised").

[11]Pre-*Richter*, the Eleventh Circuit Court of Appeals had suggested the AEDPA limitations should not apply "where a state court addresses only one of the petitioner's two claims without any other language suggesting a summary adjudication of the unaddressed." *Childers*, 642 F.3d at 969 n.17 (*citing Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006)). The *Childers* Court

In Noling's appeal, the Sixth Circuit Court of Appeals took a path similar to the Eleventh Circuit. The court devoted a single paragraph to the merits of the claims raised in Noling's habeas appeal, explicitly applying § 2254(d) to all of his habeas claims:

> We granted a certificate of appealability for the following of Noling's claims: (1) whether Noling's actual innocence claim would excuse any procedural defaults accompanying his constitutional claims; (2) whether the district court erred in allowing the prosecution to treat its own witness as hostile and to impeach the witness with a prior inconsistent statement; (3) whether the prosecution acted improperly by calling its hostile witness solely to introduce the prior inconsistent statement; and (4) whether one of the capital counts in Noling's indictment was faulty. The district court addressed these issues below and rejected them. *See Noling* [*v. Bradshaw*, No. 5:04 CV 1232] 2008 WL 320531 at *17-24, 29-31, 33, 47-50 [(N.D. Ohio Jan. 31, 2008)]. We find the district court's conclusions and supporting analysis persuasive. Noling has not shown that the Ohio Supreme Court's rejection of these claims "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or that it "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." *See* 28 U.S.C. § 2254(d)(1)-(2). Accordingly, we must affirm the district court's denial of habeas relief.

Noling v. Bradshaw, 651 F.3d 573, 575 (6th Cir. 2011). The court made this decision despite the fact that the Ohio Supreme Court's reasoned opinion, nineteen paragraphs of which address every other claim of prosecutorial misconduct raised by Noling, makes absolutely no mention of Noling's claim that

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explicitly overruled *Espy*. 642 F.3d at 969, n.17

the prosecutor committed prejudicial misconduct while impeaching St. Clair. Noling argued he was entitled to de novo review in his merit brief, his reply brief, at argument,[12] and in his Rule 28(j) letter to the court. The panel's failure to review the claim de novo demonstrates it presumed the Ohio Supreme Court's silence to be an unfavorable adjudication on the merits of Noling's claim.[13] Certainly *Richter*'s presumption of a merits adjudication should be overcome when the state court opinion described in detail the reasons for denying review—without a single reference to Noling's claim that the prosecutor committed misconduct in his impeachment of St. Clair. Pages 108 through 111 of the Ohio Supreme Court opinion signal that the state court did not reach this federal issue.

In addition to the Sixth, Seventh, Ninth, and Eleventh Circuits, at least

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[12]Lengthy discussion at oral argument was devoted to the impact of *Richter* on Noling's assertion that he was entitled to de novo review of his prosecutorial misconduct claim due to the Ohio Supreme Court's failure to address this claim on the merits in its reasoned opinion.

[13]The court's failure to review Noling's claim de novo is significant. Controlling circuit precedent weighed in Noling's favor and de novo review would have resulted in a grant of the writ in Noling's case. *Apanovitch v. Houk*, 466 F.3d 460 (6th Cir. 2006), resolves Noling's claim. "The recitation by the prosecutor of the entire substance of a witness's disavowed, unsworn prior statements, which, if credited by the jury, would be sufficient to sustain a conviction, [the impeachment] abridged defendant's right to a fair trial in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 485 (*citing United States v. Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977)). St. Clair's disavowed statement was sufficient on its face to sustain a conviction rendering the grant of the writ appropriate.

one additional circuit court will soon be grappling with the implications of *Richter* upon reasoned opinions that fail to address the merits of one claim among many presented. *See Jewett v. Brady*, 634 F.3d 67, 75 (1st Cir. 2011) ("We do not decide whether the rule of *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001), under which de novo review has been available in this circuit for habeas claims not expressly and individually addressed by a state court, survives *Harrington*."). Further demonstrating the importance of the issue presented herein, the *Childers* Court suggested that this Court's decision in *Rompilla* may no longer be good law. *Childers*, 642 F.3d at 970, n.18 (*citing Richter*, 131 S. Ct. at 784 ("The dissent also makes much out of *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2457, 162 L. Ed.2d 360 (2005), where the Court reviewed the prejudice element of a claim for ineffective assistance under *Strickland de novo* because the state court had expressly declined to reach the prejudice element in its analysis, *id.* at 390, 125 S. Ct. at 2467. Language in *Harrignton*, however, suggests that this portion of *Rompilla* may no longer be good law."). There is a clear need for guidance from this Court.

Noling's case affords this Court the opportunity to clarify *Richter*'s impact on reasoned state court opinions. It affords this Court the vehicle to clarify that the commonly understood meaning of an adjudication on the merits remains intact. Where a state court foregoes an adjudication of the merits, either with

intention (as with application of a procedural bar) or through oversight, the strictures of § 2254(d) do not apply.[14]

II.

The Sixth Circuit's opinion is incompatible with the AEDPA's plain language as well as prior rulings of this Court.

Whether through oversight or by intention, the Ohio Supreme Court failed to consider the merits of Noling's claim that the prosecutor committed prejudicial misconduct during his improper impeachment of St. Clair. In its 33-page opinion, which includes an extended discussion of each separate allegation of prosecutorial misconduct, not one word is uttered related to this particular claim of misconduct. *State v. Noling*, 781 N.E.2d 88, 108-11 (Ohio 2002). This is a clear indication that Noling's claim was not adjudicated on the merits. To hold despite that, that Noling's claim in fact was adjudicated on the merits, is inconsistent with the plain language of § 2254(d). Morever, such application of

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[14]The Petitioner in *Childers* has filed a petition for writ of certiorari seeking review of the Ninth Circuit's decision. *See* Petition filed September 20, 2011, *Childers v. Floyd,* No. 11-42. Similarly, the Respondent in *Williams* has filed a petition for writ of certiorari seeking to review the Ninth Circuit's decision. *See* Petition filed October 10, 2011, *Cavazos v. Williams,* No. 11-465. The petition for writ of certiorari in *Manchas v. Bickell,* No. 11-355, also raises a related issue. Noling believes the Court should grant his petition and review the issue he presents. However, in the alternative, should the Court grant review in *Childers, Cavazos,* or *Manchas,* Noling asks that the Court hold his petition pending the result in *Childers, Cavazos,* or *Manchas.*

§ 2254(d) to Noling's claim is inconsistent with numerous prior decisions of this Court.

The plain language of § 2254(d) places a limitation on federal court review only "with respect to any claim that was *adjudicated on the merits*." *Id.* (emphasis added). The absence of an adjudication on the merits removes a habeas petitioner's claim from § 2254(d). *Richter* itself is consistent with this reading of § 2254(d). While a summary denial is permissible, this Court made clear that the statute does require a "'decision,' which resulted in an 'adjudication.'" 131 S. Ct. at 784. Later in *Richter*, this Court made clear that the presumption of a merits adjudication, even in the face of a summary denial, can be overcome "if there is an indication to the contrary." *Id.* at 785. Where "there is reason to think some other explanation for the state court's decision is more likely" the presumption of an adjudication on the merits will not stand. *Id.* (*citing Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). Even in the context of a summary denial, *Richter* recognized the possibility that a state court may not adjudicate the merits of a habeas petitioner's claim.

Prior decisions of this Court also demonstrate that merely issuing an opinion does not equal an adjudication on the merits of every claim raised by a habeas petitioner. Instead, an "adjudication on the merits" actually requires the court to resolve the federal question presented by the petitioner. For nearly a

decade, in the context of ineffective assistance of counsel claims, this Court has refused to presume an adjudication on the merits, where the state court opinion clearly demonstrates the court failed to address one of the two prongs in the *Strickland* analysis.

As early as *Wiggins v. Smith*, 539 U.S. 510 (2003), this court applied de novo review to consideration of the prejudice prong of the ineffective assistance of counsel test found in *Strickland*. 539 U.S. at 534. ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis."). This Court addressed the issue of *Strickland*'s prejudice prong in *Rompilla v. Beard*, 545 U.S. 374 (2005). Again, this Court was confronted with a state court opinion that did not address the merits of one prong of the *Strickland* review. Absent that adjudication on merits in state court, this Court reviewed Rompilla's claim of prejudice de novo.[15] *Id.* at 389 (*citing Wiggins*, 539 U.S. at 534) ("Because the state courts found the representation adequate, they never reached the issue of prejudice . . . and so we examine this element of the *Strickland* claim *de novo*"). This Court's consideration of *Strickland*'s deficient performance prong was not constrained by the AEDPA where the state court

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[15]This Court noted in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388 (2011), that it reviewed prejudice de novo in *Rompilla* "because the state court did not reach the question." 131 S. Ct. at 1411.

failed to rule on that issue in *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (*citing Rompilla*, 545 U.S. at 390) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*.").

Similarly, where the state court affirmed a claim on a mistaken ground—the issue had been raised and determined previously—this Court did not apply the limitation of § 2254(d). *See Cone v. Bell*, 556 U.S. 449, ___, 129 S. Ct. 1769, 1784 (2009). Instead, "[b]ecause the Tennessee courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on merits in the State court proceedings.'" *Id.* Such a claim is subjected to de novo review. *Id.* (*citing Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534) (parenthetical omitted).

Much as the *Wiggins, Porter, Rompilla,* and *Cone* Courts missed or failed to rule on the habeas petitioner's claim (or some portion thereof), the Ohio Supreme Court, through inadvertence or choice, failed to rule on one of Noling's claims of prosecutorial misconduct. Certainly the plain language of § 2254(d) does not require the state court to provide a statement of reasons for denying the merits of a constitutional claim. *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 784 (2011). This Court appeared reticent to require such, noting that the state

courts should be able to allocate its scarce "resources to cases where opinions are most needed." *Richter*, 131 S. Ct. at 784.

In this instance, however, the Ohio Supreme Court chose to allocate its resources to drafting a detailed opinion addressing Noling's claims, an opinion that comprised some 33 pages. Addressing Noling's prosecutorial misconduct claim alone took nineteen paragraphs. *See Noling*, 781 N.E.2d at 108-11. When the state court opinion describes in detail the reasons for denying relief—without a single reference to Noling's claim that the prosecutor committed misconduct in his impeachment of St. Clair—*Richter*'s presumption of an adjudication on the merits is overcome. Pages 108 through 111 of the Ohio Supreme Court opinion signal that the state court did not reach this federal issue; it is more likely that the court failed to adjudicate Noling's claim on the merits.

Because the state court did not reach the merits of this claim, the Sixth Circuit's review was not circumscribed by § 2254(d). The Sixth Circuit's finding to the contrary is incompatible with the plain language of § 2254(d) and nearly a decade of this Court's jurisprudence.

Conclusion and Prayer for Relief

"The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ." *Richter*, 131 S. Ct. at 780. *Richter*

recognized the continued importance of habeas review, but the Sixth Circuit's decision in *Noling* eviscerates that safeguard. The Sixth Circuit faced a reasoned, detailed opinion denying Noling's claims, save one. Petitioner Noling prays that this Court grant his petition for writ of certiorari to clarify the plain meaning of an adjudication on the merits when presented with a reasoned opinion and the implications of § 2254(d) to such.

EXECUTED this 10th day of November, 2011.

JON M. SANDS
Federal Public Defender
District of Arizona

KELLY L. SCHNEIDER
Assistant Federal Public Defender
850 W. Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone No.: 602.382.2816
Facsimile No.: 602.889.3960
Counsel of Record

Ralph I. Miller - (DC 186510_
Stephen A. Gibbons (DC 493719)
Weil, Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
(202) 682-7000; Fax: (202) 857-0940
Ralp.Miller@Weil.com
Stephen.Gibbons@Weil.com

James A. Jenkins -(OH 0005819)
1370 Ontario, Ste. 2000
Cleveland, Ohio 44113
(216) 363-6003; Fax: (216) 363-6013
Jajenkins49@hotmail.com