NOTE

HARRINGTON'S WAKE: UNANSWERED QUESTIONS ON AEDPA'S APPLICATION TO SUMMARY DISPOSITIONS

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In this Note, I propose a new solution to the problem of the Antiterrorism and Effective Death Penalty Act's application to state court summary dispositions. The "reasonableness" standard of review in AEDPA seems to presuppose a written opinion memorializing the state court's reasoning, which the federal court can subsequently analyze—and so it is unclear whether, and how, AEDPA should apply in the absence of a written opinion. I first argue that the Supreme Court was correct to hold, in Harrington v. Richter*, that summary dispositions are adjudications on the merits for the purposes of § 2254(d)(1). But even if AEDPA applies to summary dispositions, there remains the further crucial question of how that deference should apply. When is a state court decision "unreasonable" if it provides no reasons?*

To answer this question, I reorient the debate away from the question of whether AEDPA applies and toward an examination of the state court's deliberative processes in generating its decision. I distinguish between record-based claims, which are predicated on evidence contained in the trial record, and extra-record claims, which are predicated on evidence outside that record, such as a claim for ineffective assistance of counsel under Strickland v. Washington*. When a state court decides a record-based claim by summary disposition, a federal court cannot assume that the state court failed to examine the evidence it had before it. However, in certain procedural contexts, the issuance of a summary disposition necessarily entails that the state court never examined extra-record evidence. Such summary dispositions of extra-record claims are unreasonable because, as the Supreme Court itself recognized in* Williams v. Taylor*, it is always unreasonable to apply law in the absence of fact. Accordingly, in such pro-*

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cedural contexts a state court's deliberative process culminating in the issuance of a summary disposition was unreasonable.

INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[1] significantly changed the relationship between state criminal courts and federal habeas courts.[2] Prior to the statute's enactment,[3] various procedural bars might have blocked a prisoner from obtaining habeas relief in federal court,[4] and a state court's determinations of fact were due deference,[5] but a state court's conclusions of law were subject to de novo review.[6] AEDPA changed this paradigm by limiting the availability of habeas relief even further, under 28 U.S.C. § 2254(d), to those cases in which the state court's decision is not merely legally incorrect—the writ may be granted only when the state court decision was "contrary to, or involved an unreasonable application of" clearly established law, or was "based on an unreasonable determination of the facts."[7] In

1. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

2. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001) (outlining the dramatic changes to federal habeas brought about by AEDPA); *see also* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (providing an overview of the new "basic framework" implemented by AEDPA).

3. *See generally* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 941-1007 (4th ed. 2001) (providing an overview of federal habeas corpus, including the state of the law prior to AEDPA's enactment).

4. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (harmless error); Teague v. Lane, 489 U.S. 288 (1989) (new rules not applied retroactively); Wainwright v. Sykes, 433 U.S. 72, 84-87 (1977) (procedural default).

5. *See* Cuyler v. Sullivan, 446 U.S. 335, 341 (1980).

6. *See* Brown v. Allen, 344 U.S. 443, 459 (1953); *see also* Miller v. Fenton, 474 U.S. 104, 112 (1985); *Cuyler*, 446 U.S. at 341 (holding that under the pre-AEDPA version of § 2254, state court determinations of law were to be reviewed de novo, in contrast to questions of fact).

7. 28 U.S.C. § 2254(d) (2006); *see* Williams v. Taylor, 529 U.S. 362, 405 (2000).

the Supreme Court's foundational case interpreting AEDPA's standard of review, *Williams v. Taylor*, Justice O'Connor, writing for the Court, explained that the new paradigm places substantive constraints on federal courts' authority to grant the writ, by limiting the writ's issuance to cases in which the state court's decision was "unreasonable."[8]

This new paradigm of deference is premised on an ideal of reasoned dialogue between state courts and federal courts sitting in habeas.[9] This ideal assumes that state courts will conscientiously and transparently adjudicate criminal cases at trial, on direct appeal, and in any available state habeas proceeding, by diligently examining the evidence and faithfully applying the law. It further assumes that the federal habeas court will be able to examine the state court's deliberative process to determine whether the decision the state court issued at the conclusion of this deliberative process was unreasonable. This reasoned dialogue is most fully manifest when a state court issues a written opinion addressing relevant issues of law and fact, which a federal court can then analyze under AEDPA's paradigm of deference. If, and only if, the state court's decision was unreasonable, then the federal court may issue the writ—itself accompanied by a written opinion explaining its decision.

However, this ideal scenario is just that—an ideal. State courts do not always issue written opinions in deciding criminal cases, either on direct review or in state habeas proceedings. Instead, state courts frequently issue "summary dispositions," which are decisions unaccompanied by a written opinion—in California, upwards of 97% of prisoners' claims are decided this way.[10] When a state criminal case is decided by summary disposition, it is unclear how a federal habeas court should proceed. This question confounded the federal courts of appeals. In the decade and a half following AEDPA's enactment, the circuit courts deployed a variety of solutions to the problem of summary dispositions, ranging from great deference to de novo review.[11]

The Supreme Court recently addressed the question of AEDPA's application to state court summary dispositions in *Harrington v. Richter*.[12] In *Richter v. Hickman*,[13] the Ninth Circuit granted habeas relief on a *Strickland* ineffective assistance of counsel claim.[14] The prisoner's trial counsel failed to intro-

8. 529 U.S. at 404-05, 407-11; *see* 28 U.S.C. § 2254(d)(1).

9. *See* Williams, *supra* note 2, at 926-28. *See generally* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

10. *See infra* Appendix.

11. *Compare* DiBenedetto v. Hall, 272 F.3d 1, 6-7 (1st Cir. 2001) (de novo review), *and* Hameen v. Delaware, 212 F.3d 226, 247 (3d Cir. 2000) (same), *with* Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) (en banc) (highly deferential review). More recently, the circuit courts have moved toward more deferential review. *See infra* notes 65-68 and accompanying text.

12. 131 S. Ct. 770 (2011).

13. 578 F.3d 944 (9th Cir. 2009) (en banc).

14. *Id.* at 969.

duce potentially exculpatory forensic evidence relating to blood-spatter patterns, and the Supreme Court of California denied relief without providing a written opinion.[15] Its summary denial stated in full, "Petition for writ of habeas corpus is DENIED."[16] The District Court for the Eastern District of California[17] and a panel of the Ninth Circuit denied relief.[18] Both denials acknowledged AEDPA's deferential standard of review,[19] but held that relief would not be warranted even under a de novo application of the *Strickland* standard to the facts.[20] Sitting en banc, and over vigorous dissent,[21] the Ninth Circuit reversed the panel decision on the merits, holding that relief was warranted, even under AEDPA's deferential standard of review. The Ninth Circuit conspicuously declined to hold that AEDPA's deferential standard of review applies to state court summary dispositions, reserving that question "[b]ecause we would grant the writ whether we reviewed the state court's decision de novo or for objective unreasonableness."[22] Accordingly, although the Ninth Circuit "appl[ied] the stricter unreasonableness standard," it did "not determine whether or when an unreasoned state court decision warrants AEDPA deference."[23] California appealed the Ninth Circuit's decision on the substantive *Strickland* claim.[24] In granting certiorari, the Supreme Court added a second question presented, asking the parties to brief whether AEDPA should apply to summary dispositions.[25]

The Supreme Court unanimously reversed the Ninth Circuit's en banc decision in a strongly worded opinion by Justice Kennedy.[26] The Court held that

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15. *See id.* at 951 n.5.

16. Joint Appendix at 129, *Harrington*, 131 S. Ct. 770 (No. 09-587), 2010 WL 1902992.

17. Richter v. Hickman, No. S-01-CV-0643-JKS, 2006 WL 769199 (E.D. Cal. Mar. 24, 2006).

18. Richter v. Hickman, 521 F.3d 1222 (9th Cir. 2008).

19. *Id.* at 1229; *Hickman*, 2006 WL 769199, at *6.

20. *See Hickman*, 521 F.3d at 1230-34; *Hickman*, 2006 WL 769199, at *6-10.

21. Richter v. Hickman, 578 F.3d 944, 969 (9th Cir. 2009) (en banc) (Bybee, J., dissenting).

22. *Id.* at 951 n.5 (majority opinion).

23. *Id.*

24. *See* Petition for Writ of Certiorari at 12, Harrington v. Richter, 130 S. Ct. 1506 (2010) (No. 09-587), 2009 WL 3841844.

25. Harrington v. Richter, 130 S. Ct. 1506. That the Supreme Court added this question presented sua sponte indicates the importance of the issue to the judicial administration of federal habeas corpus.

26. Harrington v. Richter, 131 S. Ct. 770, 780 (2011) ("[C]onfidence in the writ and the law it vindicates [is] undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance. That judicial disregard is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review."). The case was decided 8-0, with Justice Kagan recused. Justice Ginsburg concurred in the judgment, agreeing with the Ninth Circuit that Richter's counsel performed deficiently, but agreeing with the Court that there was no prejudice. *Id.* at 793 (Ginsburg, J., concurring in the judgment). Her

"§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"[27] The Court succinctly addressed the question of whether AEDPA deference applied to the case, noting that "[t]here is no text in the statute requiring a statement of reasons."[28] The Court explained that "[b]y its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)."[29] These two exceptions require "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion," which in turn "does *not* require that there be an opinion from the state court explaining the state court's reasoning."[30] Instead, the habeas petitioner bears the affirmative burden to "show[] there was no reasonable basis for the state court to deny relief."[31] Because Richter had not made this showing, habeas relief was precluded.

The Court's decision in *Harrington*, I argue in this Note, is undoubtedly correct in holding that summary dispositions must be reviewed deferentially pursuant to § 2254(d)(1) and § 2254(d)(2). There is no basis in the statute's text to deny that AEDPA applies to all state court decisions, including decisions issued without a written opinion, so long as the decision is an adjudication on the merits. A state court decision is not disqualified as an adjudication on the merits simply because it lacks a written opinion. Indeed, the *Harrington* Court went even further, holding that the presumption should be that a silent decision is an adjudication on the merits: "When a federal claim has been presented to a state court and the state court has denied relief, it may be *presumed* that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[32]

But this holding, as far as it goes, does not address the crucial issue of *how*—and not just *whether*—AEDPA deference applies to state court summary dispositions. In the absence of a written opinion, a federal court may have no basis to determine whether the state court's decision was reasonable or not. While it is the state court *decision*, and not the written opinion, that is the object of a federal court's analysis according to AEDPA's text,[33] a written opinion may provide the best, and perhaps only, ground for determining the reasonableness of the decision that it accompanies.[34] Under AEDPA, federal

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short concurrence did not address the issue of AEDPA's application to summary dispositions. *See id.*

27. *Id.* at 785 (majority opinion).

28. *Id.* at 784.

29. *Id.*

30. *Id.* (emphasis added).

31. *Id.*

32. *Id.* at 784-85 (emphasis added).

33. *See id.* at 784; *see also* Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002); Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999).

34. *See Aycox*, 196 F.3d at 1178 n.3.

courts must deny a habeas petition *unless* the state court's decision is contrary to, or involves an unreasonable application of, clearly established federal law.[35] If the federal habeas court cannot affirmatively determine that the state court's decision was unreasonable because there is no written opinion, then AEDPA apparently requires that the federal court deny the petition. The fatal error in such petitions would simply be the inability of the federal court to *determine* the reasonableness of the state court's decision one way or the other, by no fault of the prisoner.

Summary dispositions are opaque, giving no outward indication of the deliberative processes utilized by the issuing court. A summary disposition may result from a conscientious evaluation of the evidence in light of a reasonable interpretation of governing federal law—the state court might have done everything it would normally do prior to issuing a written opinion, but for some reason (perhaps judicial economy) decided not to issue or publish an opinion memorializing that deliberative process. Or, it may result from a haphazard glance at the evidence and a cursory review of the law. Indeed, for all outward indications, a summary disposition may be the result of no deliberation at all. State courts could very well issue summary dispositions without examining the evidence at all or reviewing the claim in light of federal law. They may, in short, automatically issue summary denials of relief to every prisoner's petition.

The existing literature does not provide satisfying answers to the question of how AEDPA should apply to summary dispositions. Some commentators have argued that summary dispositions are not due AEDPA deference because they are not adjudications on the merits.[36] Others have argued summary dispositions are per se unreasonable applications of law, simply by virtue of the fact that a written opinion is absent.[37] Both of these approaches are incorrect. The first approach is properly foreclosed by the Court's decision in *Harrington*. The second approach, I shall argue, holds little promise either. Instead, the questions that remain in *Harrington*'s wake—questions regarding not just whether, but also *how* AEDPA deference should apply to summary dispositions—await answers. This Note takes a new approach by arguing that summary dispositions

35. 28 U.S.C. § 2254(d)(1) (2006).

36. *See, e.g.*, Brittany Glidden, *When the State is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 182 (2002); Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 618 (2004); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After* Williams v. Taylor*?*, 2001 WIS. L. REV. 1493, 1495; *see also* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 293-94 (2006). *But see* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223 (2002) (arguing on textual and policy grounds that AEDPA deference applies to summary dispositions).

37. *See* Claudia Wilner, Note, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1444 (2002).

in certain cases are unreasonable applications by virtue of their failure to account for relevant evidence.

This Note proceeds as follows. In Part I, I argue that *Harrington*'s holding—that AEDPA applies to summary dispositions because they are, in general, adjudications on the merits—is correct under a proper reading of AEDPA's text and justifications, but leaves open the important question of how that deference applies. In support of the conclusion that *Harrington*'s holding was correct, I trace the development of the law in the circuit courts as they sorted out the issue in the years leading up to the Supreme Court's decision.

In Part II, I address the crucial question left in *Harrington*'s wake: whether there are circumstances in which a summary disposition necessarily constitutes an unreasonable application of federal law. Answering this question requires addressing a practically related, but conceptually separate problem: how should federal courts treat state court decisions that were made without examining the evidence proffered to support the claim? I argue that in certain procedural contexts summary dispositions of claims requiring the development of a collateral record (which I call "extra-record" claims), including some claims under *Strickland v. Washington* and *Brady v. Maryland*, should be reviewed de novo. In these procedural contexts, we can infer from the state court's issuance of a summary disposition that it did not consider evidence outside the trial record, even though such evidence is central to the claim advanced. Such summary dispositions are always unreasonable applications of law to fact. The concern that animates opposition to AEDPA deference to summary dispositions can largely be understood as a concern with the deliberative process the state court employed in light of its failure to consider the relevant evidence.

This solution to the problem of summary dispositions is only a partial solution. The existing literature's approaches are not viable because they focus on the state court's written opinion rather than on its deliberative process. My approach rectifies this mistake by focusing on what the issuance of a summary disposition can tell federal courts about a state court's deliberative process. In this Note I identify one way a federal court can look through an opaque summary disposition to see a failure in state courts' deliberative processes. There may be other ways as well for which my approach can serve as a model. Moreover, the failure I point to is an important one, and not only because it is likely to arise in a great number of cases. It also captures the central purpose of post-conviction habeas: to protect prisoners by protecting the integrity of the adjudicatory process.

I. PRIOR JUDICIAL TREATMENTS OF AEDPA AND SUMMARY DISPOSITIONS

AEDPA was passed in 1996 in the wake of the Oklahoma City terrorist bombing. Its explicit purpose was to remedy what were perceived to be endless

and frivolous appeals that undermined the effectiveness of the death penalty.[38] To achieve this purpose, the statute placed a new substantive barrier to state prisoners seeking to secure habeas relief in federal court.[39] The key provision is § 2254(d):

> 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—
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> (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 . . . .[40]

This statutory provision consists of three primary doctrinal points. First, the standard of review expressed in § 2254(d)(1) applies only if the prisoner's claim was "adjudicated on the merits."[41] Second, a prisoner's application for a writ of habeas corpus may be granted only if the state court's decision was either "contrary to," or involved an "unreasonable application of," clearly established federal law. Third, the standard of review contemplates that federal law can only be clearly established by the Supreme Court,[42] thereby excluding points of law that have been clearly established by the lower courts but on which the Supreme Court has not announced a rule.[43]

A series of Supreme Court opinions addressed these three primary doctrinal points. The Court in *Williams v. Taylor* determined the standard of review to be applied when federal courts decide a habeas petition from a state prisoner.[44] Writing for the Court, Justice O'Connor provided the authoritative interpretation of the statutory phrases "contrary to" and "unreasonable application of."[45] Under the "contrary to" prong, a federal court may grant a habeas petition only if the state court arrives at a conclusion of law opposite to that reached by the Supreme Court, or if it decides a case differently from a Supreme Court case with materially indistinguishable facts.[46] Under the "unreasonable application of" prong, a federal court may grant a habeas petition only

38. *See, e.g.*, 142 CONG. REC. S3367-68 (daily ed. Apr. 16, 1996) (statement of Sen. Nickles).

39. *See id.* at S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Specter).

40. 28 U.S.C. § 2254(d).

41. *See* Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001).

42. *See* Williams v. Taylor, 529 U.S. 362, 405 (2000).

43. *See id.*

44. *Id.* at 405-13. Justice O'Connor delivered the opinion of the Court with respect to the proper interpretation of § 2254(d)'s standard of review. *Id.* at 412-13. Justice Stevens delivered the opinion of the Court with respect to the substantive ineffective assistance of counsel claim. *Id.* at 390-99. He also offered an opinion with respect to the standard of review, stating he would have retained a less deferential standard. *Id.* at 377 (opinion of Stevens, J.).

45. *See id.* at 405-13 (majority opinion).

46. *Id.* at 405-06, 412-13; *see also* Bell v. Cone, 535 U.S. 685, 694 (2002).

if the state court's application of the legal rule was not only incorrect but also unreasonable.[47]

Although Justice O'Connor did not provide an affirmative conception of what constitutes an unreasonable application of law to fact, the Court explicitly distinguished between decisions that are unreasonable and those that are merely incorrect.[48] As the Court later explained, "[t]he question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether the determination was unreasonable—a substantially higher threshold."[49] The implication is that there are some state court decisions that a federal court would find to be incorrect, but not unreasonably so—and, under AEDPA, the federal court must accord those decisions deference by declining to grant habeas relief.

In light of the prevalence of summary dispositions,[50] the federal courts of appeals inevitably faced the problem of whether and how to adopt AEDPA's deferential standard of review with respect to state court summary dispositions. The circuit courts focused first on the threshold question of whether AEDPA deference applies to summary dispositions in the first place. They approached this question primarily by addressing AEDPA's first doctrinal point—whether a summary disposition renders a claim "adjudicated on the merits" for the purposes of § 2254(d). If summary dispositions do not qualify as adjudications on the merits, then the standard of review in § 2254(d) does not apply and the federal habeas court may review the petition's claims de novo.

The Supreme Court definitively answered this question in *Harrington*, holding that AEDPA deference applies. But its ironically terse decision does not explain at any length the reasoning supporting its conclusion. The Court's opinion cites the consensus among the circuit courts, relying on those cases to elaborate on the reasoning for its holding.[51] Accordingly, it is worthwhile to trace the treatment of the question in the federal circuit courts.

The early post-AEDPA circuit court opinions[52] argued that, although summary dispositions are decisions, as a category they do not qualify as adju-

47. 529 U.S. at 409-11, 413; *see also* Wiggins v. Smith, 539 U.S. 510, 520 (2003).

48. 529 U.S. at 410. In rejecting the Fourth and Fifth Circuits' "subjective" approach, which focused on whether the state court decision was one which "reasonable jurists would all agree is unreasonable," *id.* at 409-10, the Court simply stated that the correct approach is to evaluate whether the state court opinion is "objectively unreasonable," *id.* at 409.

49. Schriro v. Landrigan, 550 U.S. 465, 473 (2007).

50. *See infra* Appendix.

51. Harrington v. Richter, 131 S. Ct. 770, 784 (2011) (citing Chadwick v. Janecka, 312 F.3d 597, 605-06 (3d Cir. 2002); Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1253-54 (11th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 311-12 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 161-62 (4th Cir. 2000) (en banc); Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177-78 (10th Cir. 1999); James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999)).

52. *See, e.g.*, Washington v. Schriver, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring).

dications on the merits that trigger the deferential review of § 2254(d). Many commentators have since echoed this view.[53] The Second Circuit, in a thoughtful opinion by Judge Katzmann in *Washington v. Schriver*, outlined the competing positions on the status of summary dispositions as adjudications on the merits without deciding the issue.[54] In favor of the view that summary dispositions are not adjudications on the merits, Judge Katzmann noted that at least six Justices in *Williams v. Taylor* appeared to envision that a federal habeas court would examine the state court's written opinion in applying § 2254(d)(1)'s standard of review.[55] According to this view, these Justices recognized that the deferential standard of review requires an analysis that "cannot be performed if the state court decision does not identify in some fashion the legal rule through which the result was reached."[56]

Judge Katzmann also noted that weighty policy concerns counsel in favor of state courts providing written reasoning. Providing written opinions for federal habeas courts to examine might promote judicial efficiency by streamlining the application of AEDPA's standard of review, and might promote accuracy by making explicit the state court's reasoning.[57] Judge Calabresi, in concurrence, added a creative argument:

> [I]f 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).[58]

This dovetails with the oft-voiced concerns regarding AEDPA's impact on judicial comity by requiring federal habeas courts to pronounce state courts to be "unreasonable"—hardly a descriptor that promotes comity—in order to grant a prisoner relief.[59]

Another powerful policy concern, not mentioned by Judge Katzmann or Judge Calabresi in *Schriver*, is the perverse incentives for state courts to issue summary dispositions. State criminal courts are heavily overworked, and issuing summary dispositions provides a shortcut that bypasses a substantial amount of time-consuming labor.[60] Additionally, since summary dispositions render a state court's decision more difficult to overturn in federal habeas, state

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53. *See supra* note 36.

54. 255 F.3d at 52-55.

55. *Id.* at 53-54 (citing Williams v. Taylor, 529 U.S. 362, 406 (2000) (O'Connor, J.); *Williams*, 529 U.S. at 394 (Stevens, J.)).

56. *Id.* at 54; *see also* Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000).

57. *See Schriver*, 255 F.3d at 54; *see also* Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999).

58. 255 F.3d at 62 (Calabresi, J., concurring).

59. *Id.* (invoking the "highly undesirable [outcome] of having federal courts reviewing State court decisions on habeas frequently declare such decisions to be not just mistaken but also unreasonable").

60. *But see infra* text accompanying note 138.

courts may be tempted to use them as a safe harbor to avoid being reversed. This final consideration taps into a core intuition that animates opposition to AEDPA deference to summary dispositions. Summary dispositions may, to an extent, provide a mechanism by which state courts can undermine or bypass real meaningful review on federal habeas. State courts might use summary dispositions not in spite of the difficulty they present to a federal habeas court in granting relief, but because of it.[61] Although Congress clearly intended to place a "new constraint" on federal courts' ability to grant habeas petitions,[62] the legislative history also clearly demonstrates that Congress meant to retain habeas as a guarantee of meaningful review.[63] Because that guarantee would be undermined by granting summary dispositions AEDPA deference, this argument concludes, federal courts should not treat summary dispositions as adjudications on the merits.

The Supreme Court in *Harrington* correctly followed the emerging consensus[64] in the circuits rejecting this position. After vacillating for several years,[65] the circuit courts' dominant position settled on the view that summary dispositions qualify as adjudications on the merits, and so AEDPA deference applies[66]—all but the Ninth Circuit clearly adopted it.[67] The Second Circuit, for

61. Interview with Michael McConnell, Professor, Stanford Law Sch., in Stanford, Cal. (Mar. 27, 2010) (indicating that based on his experience as a federal appellate judge, McConnell worried that state court judges would use summary disposition not just as a labor-saving device, but as a mechanism to make a grant of federal habeas relief less likely).

62. *See* Williams v. Taylor, 529 U.S. 362, 412 (2000).

63. *See* 142 CONG. REC. S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy) (characterizing AEDPA as providing "one bite at the apple," but arguing that one bite is not sufficient to protect state prisoners' rights); *id.* at S3376 (daily ed. Apr. 16, 1996) (statement of Sen. Gorton) (explaining that the standard of review in § 2254(d) acts "not to deny a right of appeal, but in effect—except under extraordinary circumstances—to give only a single bite at the apple through the Federal court system"); 141 CONG. REC. S7826 (daily ed. June 7, 1995) (statement of Sen. Hatch) ("We have provided for protection of Federal habeas corpus, but we do it one time and that is it . . . ."); *see also* Holland v. Florida, 130 S. Ct. 2549, 2565 (2010) (finding AEDPA one-year filing period subject to equitable tolling, in part to retain a "single opportunity for federal habeas review of the lawfulness of [a prisoner's] imprisonment and . . . death sentence").

64. The Ninth Circuit, of course, was the exception to this emerging consensus. The *Hickman* court stated in a footnote that it "need not determine whether or when an unreasoned state court decision warrants AEDPA deference" because it "would grant the writ whether [it] reviewed the state court's decision de novo or for objective unreasonableness." Richter v. Hickman, 578 F.3d 944, 951 n.5 (9th Cir. 2009) (en banc). This footnote may have stoked the Supreme Court's interest in the problem of summary dispositions in the case, particularly in light of prior Ninth Circuit statements on the issue.

65. *See, e.g.*, Washington v. Schriver, 255 F.3d 45, 52-55 (2d Cir. 2001) (reserving the question of whether a summary disposition is an adjudication on the merits); Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000); Delgado v. Lewis, 168 F.3d 1148, 1152 (9th Cir. 1999) ("[A] 'postcard denial[]' does not warrant the deference we might usually apply.").

66. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1262 (6th ed. 2009). *But see Hickman*, 578 F.3d at 951 n.5.

example, adopted this approach in *Sellen v. Kulhman*, resolving the question left open by *Schriver* by finding that summary dispositions are adjudications on the merits.[68] This approach is grounded in the distinction between a judicial decision and a judicial opinion.[69] The text of § 2254(d) refers to state court *decisions*[70]—a federal court may not grant a habeas petition regarding a claim adjudicated on the merits unless the state court's *decision* satisfies the deferential conditions in § 2254(d)(1).[71] The statutory text makes no mention of requiring a written opinion to accompany the decision.[72] Summary dispositions are decisions, in that they dispose of the case—the only salient difference between summary dispositions and dispositions accompanied by a written opinion is the presence of the written opinion. Chief Judge Walker, writing for the Second Circuit in *Sellan*, interpreted the phrase "adjudication on the merits" as it appears in AEDPA to carry its well-settled meaning from other contexts in the

67. *See, e.g.*, Clements v. Clarke, 592 F.3d 45, 55-56 (1st Cir. 2010) ("It is the result to which we owe deference, not the opinion expounding it."); Irick v. Bell, 565 F.3d 315, 320 (6th Cir. 2009) ("[W]e must 'focus on the result of the state court's decision, applying' AEDPA deference to the result reached, not the reasoning used." (quoting Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000))); Brown v. Luebbers, 371 F.3d 458, 462 (8th Cir. 2004) (en banc) ("[T]he 'summary nature' of the [state court's] discussion of the federal constitutional question does not preclude application of the AEDPA standard."); Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003) ("Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion."); Chadwick v. Janecka, 312 F.3d 597, 605-06 (3d Cir. 2002); Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002) ("When the state court decision being reviewed by a federal habeas court fails to provide any rationale for its decision, we still apply the deferential standard of review mandated by Congress [in AEDPA] . . . ."); Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("The statutory language focuses on the result, not on the reasoning that led to the result, and nothing in that language requires the state court adjudication that has resulted in a decision to be accompanied by [a written] opinion . . . ."); Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001) ("Several circuits have noted that, in making the 'reasonable application' determination, they would look to the *result* of a state court's consideration of a criminal defendant's claim." (emphasis added)); Hough v. Anderson, 272 F.3d 878, 897 n.7 (7th Cir. 2001) ("Under AEDPA, it is a state court's resolution of an issue, as opposed to its reasoning process, that must be treated with deference."); 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.").

68. Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001); *see also* Neal v. Puckett, 239 F.3d 683, 686-87 (5th Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000) (en banc); *Harris*, 212 F.3d at 943; James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999); *Delgado*, 181 F.3d at 1093; Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).

69. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 261 (2d ed. 1921); Note, *Decisions Without Opinions*, 34 HARV. L. REV. 314, 315 (1921) (referring to "an opinion as distinguished from the actual decision").

70. 28 U.S.C. § 2254(d) (2006).

71. *See, e.g.*, *Wright*, 278 F.3d at 1255.

72. 28 U.S.C. § 2254(d); *see Puckett*, 239 F.3d at 696 ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision.").

law: "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."[73] The question of whether a claim was adjudicated on the merits thus depends on whether it was disposed of on substantive or procedural grounds, rather than on the existence (or extent) of the written expression of that disposition.[74]

Moreover, this conception of "adjudication on the merits" as contrasted with a disposition on procedural grounds dovetails with the existing pre-AEDPA habeas framework. Prior to AEDPA, a prisoner seeking habeas relief in federal court faced four significant hurdles: exhaustion,[75] intended to further the interests of federalism and judicial comity by providing every opportunity to state courts to resolve issues through the faithful application of federal law;[76] procedural default on "adequate and independent state grounds";[77] nonretroactivity;[78] and harmless error.[79] A primary doctrinal guidepost for AEDPA's

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73. *Sellan*, 261 F.3d at 311 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)).

74. *See* Rompilla v. Beard, 545 U.S. 374 (2005) (deciding the prejudice prong of a *Strickland* claim de novo, after the state court had rejected the claim by finding counsel's performance to be constitutionally sufficient).

75. *See* 28 U.S.C. § 2254(b)-(c) (listing elements of the federal habeas statute predating AEDPA and requiring a prisoner to exhaust all possible state remedies prior to filing his petition in federal court); *see also* 2 HERTZ & LIEBMAN, *supra* note 3, at 941-1007.

76. *See* 2 HERTZ & LIEBMAN, *supra* note 3, at 941.

77. Wainwright v. Sykes, 433 U.S. 72, 81 (1977). Procedural default may be overcome by showing cause and prejudice. *Id.* at 84-85. Since procedural default is often the result of actions taken by the prisoner's attorney, the most promising avenue of showing cause and prejudice is to show ineffective assistance of counsel. As a result, a petition that must overcome procedural default under *Wainwright* often includes a nested claim under *Strickland*. Such errors can take place at trial (for example, the failure to make a timely objection), or in the process of appeal (for example, the failure to abide by state appellate procedure). *See* 2 HERTZ & LIEBMAN, *supra* note 3, at 1133 n.2.

78. *See* Teague v. Lane, 489 U.S. 288 (1989). There are two exceptions to the "new rule" bar in *Teague*: (1) when the primary conduct underlying the conviction is protected by the Constitution, or (2) when the new rule attains "watershed" status by resting on principles "implicit in the concept of ordered liberty." *See id.* at 307, 311 (plurality opinion). The first exception would allow a federal court to provide relief when the substantive state criminal law prohibited constitutionally protected conduct. For example, if *Roe v. Wade*, 410 U.S. 113 (1973), or *Lawrence v. Texas*, 539 U.S. 558 (2003), were brought to federal court as habeas petitions after a criminal conviction, under *Teague*'s first exception the federal court could grant relief. The second exception would allow a federal court to grant habeas relief in a case like *Gideon v. Wainwright*, 372 U.S. 335 (1963).

79. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (holding that a prisoner may not be granted relief for a trial error unless the constitutional violation had a "substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))). The harmless error doctrine applies only to those trial errors that might be corrected by jury instructions, such as the admission of evidence in violation of a constitutional right. It does not apply to "structural defects" like the absence of counsel that implicate the fundamental fairness of the criminal proceeding. *See* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991).

drafters was procedural default under *Wainwright v. Sykes*.[80] Interpreting AEDPA's phrase "adjudication on the merits" to mean a disposition on substantive rather than on procedural grounds would establish a coherent, if highly deferential, overall framework: if a state court disposes of a claim on state procedural grounds, then a federal habeas court may not grant relief. If, on the other hand, a state court disposes of a claim on substantive, nonprocedural grounds then a federal habeas court may grant relief, but only via AEDPA's deferential standard of review.[81] Because this conception of "adjudication on the merits" leads to a coherent overall framework for the administration of federal habeas, it is reasonable to infer that Congress intended "adjudication on the merits" to be interpreted this way.

In addition to the text, judicial interpretation of AEDPA has been animated by concerns of judicial comity and federalism.[82] Even before AEDPA, the Supreme Court expressed aversion to "impos[ing] on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim," and that federal courts "have no power to tell state courts how they must write their opinions."[83] The circuits inferred from this principle that the federal courts should not impose on state courts a responsibility to write an opinion at all. In support of this inference, several circuits have deployed the metaphor of a teacher and a pupil to signal that the proper object of habeas review is the state court's decision and not its written opinion—the proper role of a federal habeas court is not to "grade the papers" of the state court.[84] On this

80. 433 U.S. 72.

81. *See* Harrington v. Richter, 131 S. Ct. 770, 787 (2011) ("If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes* applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies." (citation omitted)).

82. *See, e.g.*, Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1255 (11th Cir. 2002) ("Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity."); Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (en banc) ("[The] state court did not articulate the rationale underlying its rejection of [a federal] claim. However, we may not 'presume that [the] summary order is indicative of a cursory or haphazard review of [the] petitioner's claims.'" (third and fourth alteration in original) (quoting Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998))).

83. Coleman v. Thompson, 501 U.S. 722, 739 (1991).

84. *See* Rashad v. Walsh, 300 F.3d 27, 45 (1st Cir. 2002) ("It is not our function, however, to grade a state court opinion as if it were a law school examination. Rather, we review the state court's ultimate findings and conclusions to ascertain whether they constitute an unreasonable application of clearly established Supreme Court precedent."); *Wright*, 278 F.3d at 1255 ("Requiring state courts to put forward rationales for their decisions so that federal courts can examine their thinking smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era."); Cruz v. Miller, 255 F.3d 77, 86 (2d Cir. 2001) ("[W]e are determining the reasonableness of the state courts' 'decision,' not grading their papers." (citation omitted) (quoting 28 U.S.C. § 2254(d)(1) (2006)); Hennon v. Cooper, 109 F.3d 330, 334-35 (7th Cir. 1997) (stating that focusing on "the quality of the reasoning process articu-

view, it would be at least as damaging to judicial comity for federal courts to demand a written work product for them to evaluate.

In light of these textual and policy arguments, the Supreme Court correctly held that summary dispositions are due the same deferential review as written opinions. Once it is determined that a summary disposition did not dispose of the claim on procedural grounds[85]—not always a simple task[86]—the federal habeas court must then apply AEDPA's deferential standard of review. The legitimate concerns regarding summary dispositions are, at bottom, not about whether the state court genuinely decided the issue but rather about the quality of the deliberative process the state court employed in arriving at that decision. If state court summary dispositions do not facilitate real, meaningful review in federal habeas courts—if they undermine the "one bite at the apple"[87] that Congress intended to preserve and guarantee in passing AEDPA—it is not because the state court did not genuinely adjudicate the claim. It is, instead, that it may not have adjudicated the claim well or meaningfully. This fault is more properly understood as an error in the *way* the state court adjudicated on the merits—that is, in its deliberative process—rather than *whether* it adjudicated on the merits. Consequently, the proper question to ask regarding state court summary dispositions is *how* AEDPA's deferential standard of review should apply. I turn to this question in the next Part.

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lated by the state court" would "place the federal court in just the kind of tutelary relation to the state courts that [AEDPA was] designed to end").

85. Recall that the Supreme Court's test in *Harrington* has a high presumption in favor of a summary disposition being an adjudication on the merits: "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 131 S. Ct. at 784-85.

86. In *Sellan*, the Second Circuit adopted the Fifth Circuit's test in *Mercadel v. Cain*, 179 F.3d 271 (5th Cir. 1999). Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001). Under this test, a federal habeas court determines whether a federal claim has been adjudicated on the merits by considering:

> (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the merits.

Id. (quoting *Mercadel*, 179 F.3d at 274). While the third factor would seem to drop out when applied to summary dispositions, the Second Circuit applied this test to the facts of *Sellan* by mentioning that the summary disposition used the word "denied." *Id.* Some states signal whether a summary disposition is on the merits by use of a particular word. *See, e.g.*, *Ex parte* Torres, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (en banc) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits.").

87. *See* 142 CONG. REC. S3458 (daily ed. Apr. 17, 1996) (statement of Sen. Kennedy).

II. AN ANALYSIS OF AEDPA DEFERENCE AS APPLIED TO SUMMARY DISPOSITIONS

Given that summary dispositions render claims "adjudicated on the merits" for the purposes of § 2254(d), federal habeas courts must apply AEDPA's deferential standard of review. The question thus arises: how should a federal court apply this standard of review, in the absence of a written opinion? In approaching the problem of the application of AEDPA to state court summary dispositions, the circuit courts prior to *Harrington* focused only on the question of *whether* AEDPA deference applies. And the Supreme Court in *Harrington* answered explicitly only the question presented: "[*d*]*oes* AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?"[88] But even if AEDPA applies to summary dispositions, there remains the further crucial question of *how* that deference should apply. When is a state court decision "unreasonable," if it provides no reasons?

At the outset, it is important to distinguish between two contexts in which a federal habeas court reviews a state court summary disposition. First, the state court summary disposition may summarily affirm a denial of relief from a lower court, where the lower court issued a written opinion explaining its reasons for rejecting the claim. Second, the state court summary disposition may be the only state court judgment on the issue—either because the claim was not reviewed by any other state court, or because the claim was denied by summary disposition in all the state courts in which it was adjudicated.

The former context—when the state court summary disposition affirms a lower court's written opinion—does not pose significant problems. For example, under Ninth Circuit law, a federal habeas court "'look[s] through' the summary disposition to the last reasoned state court decision."[89] This methodology is grounded in the view that when the underlying claim was previously litigated and denied in a written opinion by a lower court, a summary denial of a habeas petition simply affirms the reasoning expressed in the written opinion of the lower court. Thus, the summary denial incorporates by reference the explicit reasoning of the lower court opinion. The federal court sitting in habeas can then apply AEDPA's deferential standard of review directly to the lower state court opinion.

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88. Harrington v. Richter, 130 S. Ct. 1506-07 (2010) (emphasis added); *see also Harrington*, 131 S. Ct. at 785 (answering only the question presented).

89. Richter v. Hickman, 578 F.3d 944, 951 (9th Cir. 2009) (en banc) (citing Plascencia v. Alameida, 467 F.3d 1190, 1198 (9th Cir. 2006)). The "look through" methodology derives from *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), which held that the plain statement rule does not apply to summary dispositions. Under the plain statement rule, a federal habeas court presumes that a state court reached the merits of the federal question absent an explicit statement to the contrary. *See id.* at 802-04. The Court in *Ylst* established the exception that a federal court reviewing a state court summary disposition should "look through" that summary disposition to the last reasoned state court decision in determining whether the state decision was on the merits or on state procedural grounds. *Id.* at 804.

However, this methodology is inapplicable when there is no lower court written opinion to which the summary denial could potentially refer—that is, when the claim in the habeas petition has been denied by summary disposition by every court to which it has been submitted. In *Harrington*, the Supreme Court confronted such a situation—no state court had issued a written opinion on the petitioner's ineffective assistance of counsel claim.[90] In such circumstances, a federal habeas court must conduct "an independent review of the record to determine whether the state court's decision was objectively unreasonable."[91] In the absence of a written opinion, this approach is the only alternative.[92] But the question remains: in its independent review, how can a federal court determine whether the state court's decision manifest in the summary disposition was unreasonable?

In this Part, I address whether a federal court can ever infer, from the mere issuance of a summary disposition, that the state court's decision was unreasonable. To answer this question, much neglected by courts and by commentators, I refocus the reasonableness inquiry by focusing on the deliberative process the state court employed in generating its decision, rather than the mere absence of a written opinion. My approach focuses on whether the state court considered all the relevant evidence. In what follows, I first draw out the distinction between record-based and extra-record claims. Then I examine its implications for each of the three doctrinal steps: I conclude that summary dispositions of extra-record claims are adjudications on the merits, that they only rarely violate AEDPA's "contrary to" prong, but that they may often violate its "unreasonable application" prong. I thus identify one way in which federal courts can infer from the issuance of a summary disposition that the state court's decision was unreasonable.

A. *A Novel Analytic Framework: Record-Based Versus Extra-Record Claims*

In this Subpart, I propose a novel framework for analyzing the application of AEDPA's "reasonableness" standard of review to summary dispositions. This analytic framework is grounded in the evidentiary basis of the claim asserted in the federal habeas petition. AEDPA deference toward state court summary dispositions should operate differently depending on the nature of the claim asserted in the petition. On the one hand, some claims are based entirely on the record developed at trial and available on direct review. Call these claims "record-based claims." A paradigmatic record-based claim is a *Batson*

90. *See Harrington*, 131 S. Ct. at 783.

91. Sass v. Cal. Bd. of Prison Terms, 461 F.3d 1123, 1127 (9th Cir. 2006), *overruled on other grounds by* Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc).

92. *See, e.g.*, Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (en banc); Aycox v. Lytle, 196 F.3d 1174, 1178 (10th Cir. 1999).

claim for race-based use of peremptory challenges of jurors in violation of the Equal Protection Clause.[93] All the evidence required to make out a *Batson* claim will be contained in the trial record—the prosecution's use of peremptory challenges, the race of the prospective jurors, any race-neutral explanation for the peremptory challenges proffered by the prosecution, and so on.[94] On the other hand, some claims generally require evidence that is not contained in the trial record available on direct appeal. Call these claims "extra-record claims." Two paradigmatic varieties of extra-record claims are ineffective assistance of counsel, especially for a failure to investigate, under *Strickland v. Washington*,[95] and the failure by the prosecution to disclose material and potentially exculpatory evidence to defense counsel under *Brady v. Maryland*.[96] These claims are predicated on evidence that, by definition, is not in the record—for example, the witnesses that defense counsel might have interviewed but did not, or the evidence the prosecutor might have disclosed but did not.

There are thus two overlapping distinctions: first, between summary dispositions and written opinions, and second, between record-based and extra-record claims. These twin distinctions pick out two conceptually distinct but practically related issues. The first distinction, between summary dispositions and decisions with a written opinion, concerns the written output of the adjudication. The second distinction, between record-based and extra-record claims, concerns the deliberative process the state court employed in arriving at its decision. In particular, a court deciding an extra-record claim may or may not consider the extra-record evidence underlying that claim, thus manifesting deliberative processes of fundamentally differing quality.

At first glance, these distinctions appear orthogonal: a record-based claim may be decided either by summary disposition or by written opinion, and similarly an extra-record claim may be decided by either. In practice, however, the distinctions interact in an important way because a written opinion memorializes the court's deliberative process. When an extra-record claim is decided by written opinion, it is apparent whether the court considered the extra-record evidence. However, a summary disposition gives no *direct* indication of the deliberative process the court employed. This connection between summary dispositions and the state court's deliberative process explains the basis of the normative concerns regarding summary dispositions. When issuing a summary disposition, a state court could conceivably deny relief without a thought and without even considering the evidence, in what might be termed a rubber-stamp denial. Without a written opinion, reviewing courts simply do not know wheth-

93. *See* Batson v. Kentucky, 476 U.S. 79 (1986).

94. *See* Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

95. 466 U.S. 668 (1984).

96. 373 U.S. 83 (1963).

er this happened, a problem that does not arise with decisions accompanied by a written opinion.

This matters because in some procedural contexts, the federal court can be certain that the state court did not consider the extra-record evidence. This is precisely what happened in *Harrington*: the issuance of a summary disposition entailed that the petition never became a cause, and therefore the state court could never consider evidence outside the trial record. In California[97] and other jurisdictions,[98] a summary disposition precludes holding an evidentiary hearing. Under California appellate procedure, a summary denial of a state habeas petition means that the petition never becomes a cause.[99] The court of appeal may only order an evidentiary hearing if the petition first becomes a cause, which then must be decided by written opinion.[100] Consequently, a state court summary disposition of an extra-record claim decides a claim without officially considering the evidence on which the claim is predicated. The vast number of summary dispositions[101] combined with the frequency of *Strickland* ineffective assistance claims ensures that a great number of prisoners' claims are channeled through this procedural backwater.

The interaction of these two distinctions in such a procedural context is outlined in the following table:

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97. *See infra* Appendix.

98. *See, e.g.*, ALA. R. CRIM. PROC. 32.7(d) (permitting a summary disposition prior to an evidentiary hearing, but requiring that if the court proceeds with an evidentiary hearing it must make specific findings of fact as to each material issue); ARIZ. REV. STAT. ANN. § 13-4236(c) (2011) ("If after identifying all precluded claims the court determines that no material issue of fact or law exists which would entitle the defendant to relief under this article and that no purpose would be served by any further proceedings, the court *shall* order the petition dismissed. If the court does not order the petition dismissed, the court *shall* set a hearing within thirty days on those claims that present a material issue of fact or law." (emphasis added)); LA. CODE CRIM. PROC. ANN. art. 929 (2011) (permitting a summary disposition only prior to an evidentiary hearing, on the basis of the application, answer, trial transcript, and other documents); W. VA. R. GOVERNING POST-CONVICTION HABEAS CORPUS P. 4(c)-(d), 7-9 (permitting either summary dismissal prior to an evidentiary hearing, or else introduction of further evidence and a "comprehensive order" including findings of fact and conclusions of law).

99. *See* CAL. R. CT. 8.385(d); *id.* advisory committee cmt. (clarifying that the court may issue an order to show cause *or* "deny[] the petition summarily," among other things). In California, as in the states whose procedures are cited above in note 98, a petition encounters a procedural forking path: the petition can be denied by summary disposition, *or* the court can proceed to provide the opportunity to introduce new evidence (in California, by issuing an order to show cause).

100. *See* People v. Romero (*In re* Romero), 883 P.2d 388, 393 (Cal. 1995) ("The issuance of either the writ of habeas corpus or the order to show cause creates a 'cause,' thereby triggering the state constitutional requirement that the cause be resolved 'in writing with reasons stated.' Thus, the writ or order is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined." (citations omitted) (quoting CAL. CONST. art. VI, § 14)).

101. *See infra* Appendix.

TABLE 1
The Intersection of the Two Distinctions

	Record-based claim	Extra-record claim
Written Opinion	1. State court's reasoning is explicit in the written opinion, available for review by the federal court.	2. State court's reasoning and the role played by extra-record evidence is explicit in the written opinion, available for review by the federal court.
Summary Disposition	3. Although there is no written opinion to memorialize the state court's reasoning, it had available to it all the relevant evidence.	4. *Extra-record evidence supporting claim is proffered, but the procedural context may preclude the state court from considering that evidence. Thus, it may be clear to the federal court that the state court did not consider the extra-record evidence.*

In the following Subparts, I analyze AEDPA's application to summary dispositions of record-based and extra-record claims in procedural contexts that foreclose the consideration of evidence outside the record. First, I will consider and reject the view that summary dispositions of extra-record claims are not adjudications on the merits. Next, I analyze the application of each of § 2254(d)'s two prongs—"contrary to" and "involves an unreasonable application of" federal law—to both record-based and extra-record claims. Under the first prong, the two varieties of claims should be treated substantially similarly. However, under the second prong the treatment of the two varieties of claims should be sharply different. Federal habeas courts should be attuned to the procedural context in which a summary disposition is issued. In some cases—including *Harrington v. Richter*—that procedural context reveals that the state court necessarily failed to contemplate the extra-record facts in deciding the case. This, I argue, constitutes an unreasonable application of law to fact. As a result, such state court decisions should be reviewed by a federal habeas court de novo.

B. *Adjudication on the Merits Redux*

In *Wilson v. Workman*, the Tenth Circuit held that AEDPA deference did not apply to a decision by the Oklahoma Court of Criminal Appeals denying a prisoner's ineffective assistance of counsel claim when the state court declined

to order an evidentiary hearing regarding the extra-record evidence on which that claim was based.[102] The court reached this holding by concluding that the state court decision was not an adjudication on the merits of the claim presented to the federal habeas court, because the decision failed to address and examine the prisoner's alleged new evidence. Since many summary dispositions of extra-record claims will share this feature, extending the Tenth Circuit's argument might point toward a solution. According to this argument, such summary dispositions of extra-record claims are not adjudications on the merits (and are thus not due AEDPA deference) not because they are summary, but because the state court did not have before it the evidence on which the claim was based.[103]

The petitioner in *Workman* was convicted of first-degree murder and sentenced to death.[104] He appealed his conviction on the basis that his trial counsel

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102. 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc); *see also* Winston v. Kelly, 592 F.3d 535, 555-56 (4th Cir.) ("If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."), *cert. denied*, 131 S. Ct. 127 (2010); Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) (stating that § 2254(d)(2) "applies most readily to situations where petitioner challenges the state court's findings based entirely on the state record"); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 322-23 (proposing that habeas claims based on evidence outside the state record be reviewed by district courts, while claims based on only the state record be reviewed by circuit courts); Rachel E. Wheeler, Note, *AEDPA Deference and the Undeveloped State Factual Record:* Monroe v. Angelone *and New Evidence*, 46 WM. & MARY L. REV. 1887, 1890 (2005) (arguing on fairness grounds that "evidence available to, but not actually considered by, state courts should be treated in the same manner as evidence revealed for the first time in federal court, without deference to the state court"). *But see* Atkins v. Clarke, 642 F.3d 47, 49 (1st Cir. 2011) (relying on *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), to find that a state court decision is still an adjudication on the merits even if the state court did not hear the new evidence that the petitioner now seeks to present).

103. In *Holland v. Jackson*, the Supreme Court acknowledged that "[w]here new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer [under § 2254(d)]." 542 U.S. 649, 653 (2004) (per curiam). In 2008, the Supreme Court granted certiorari to resolve whether the Fourth Circuit erred when "it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims 'adjudicated on the merits' in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing." Petition for a Writ of Certiorari at i, Bell v. Kelly, 553 U.S. 1031 (2008) (No. 07-1223), 2008 WL 819276. However, the writ was subsequently dismissed as improvidently granted. 555 U.S. 55 (2008). Last Term, in *Cullen v. Pinholster*, Justice Sotomayor raised this possibility in her dissent. 131 S. Ct. at 1417 (Sotomayor, J., dissenting). The majority reserved the question without deciding it. *See id.* at 1401 n.10, 1402 n.11 (majority opinion). As a result, the law is still unsettled on this point. *Pinholster* did definitively settle that federal courts may not consider evidence first presented in federal court in determining whether a state court's decision was unreasonable. *Id.* at 1400.

104. 577 F.3d at 1287.

failed to investigate potentially mitigating mental health evidence,[105] which then allegedly prejudiced the jury's decision to impose the death sentence at the sentencing phase of trial.[106] Oklahoma appellate procedure restricts appellate review of a criminal conviction to the trial record, unless supplemented via an evidentiary hearing.[107] In the context of an ineffective assistance of counsel claim, the Oklahoma court will order such a hearing if it finds "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence."[108] The Oklahoma court declined to order a hearing in *Workman*, and rejected the petitioner's ineffective assistance of counsel claim.[109]

The Tenth Circuit, sitting en banc, held that this disposition did not qualify as an adjudication on the merits of the claim presented in federal court for the purposes of § 2254(d).[110] Writing for the court, Judge McConnell distinguished between the claim that was decided by the Oklahoma Court of Criminal Appeals, and the claim that was presented to the district court sitting in habeas. A claim, on this view, "is more than a mere theory on which a court could grant relief; a claim must have a factual basis, and an adjudication of that claim requires an evaluation of that factual basis."[111] According to Judge McConnell, although the claim presented to the state court was genuinely adjudicated, that claim was not the same as the one that was presented to the federal habeas court.[112] So although the claim adjudicated by the state court would warrant deference under § 2254(d), the claim presented to federal habeas court was never adjudicated on the merits by the state court and so could be decided de novo.[113]

This conception of "adjudication on the merits" in *Workman* is inconsistent with Congress' intent in passing AEDPA, and with the overall habeas framework it established. Congress was in large part motivated by a desire to prevent the relitigation of *issues* in federal court,[114] even though the prisoner

105. *See id.* at 1288.

106. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 390 (2005).

107. *See* OKLA. R. CT. CRIM. APP. 3.11(B)(3)(b).

108. Dewberry v. State, 954 P.2d 774, 776 (Okla. Crim. App. 1998) (quoting OKLA R. CT. CRIM. APP. 3.11(B)(3)(b)).

109. Wilson v. State, 983 P.2d 448, 472 & n.8 (Okla. Crim. App. 1998).

110. *Workman*, 577 F.3d at 1300.

111. *Id.* at 1291.

112. *See id.*

113. Generally, a prisoner bringing a habeas petition in federal court may not raise claims that were not fairly presented in state court. 28 U.S.C. § 2254(b)-(c) (2006). However, this likely would not bar the presentation of the "new" claim in *Workman*, because the denial of an evidentiary hearing presumably falls under the exception for "circumstances . . . that render [the state remedial] process ineffective to protect the rights of the applicant." § 2254(b)(1)(B)(ii).

114. *See* 142 CONG. REC. S3446 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("Federal habeas review does not take place until well after conviction and numerous rounds

might proffer new evidence in federal court to support his claim. Drawing a distinction between the claim that was adjudicated in state court and the one presented in federal habeas court—when these claims differ only in the evidence considered—undermines this purpose. Moreover, Congress contemplated the possibility that a habeas petition would present evidence that the state court did not consider. Accordingly, it established a mechanism by which such evidence could be developed in federal habeas court via an evidentiary hearing.[115]

Moreover, the Tenth Circuit's position fails to comport with the proper conception of "adjudication on the merits" grounded in the distinction between dispositions based on substantive grounds and dispositions based on procedural grounds. At first glance, that distinction may not seem apposite to the Tenth Circuit's view—the theory isn't that the claim was disposed of on procedural rather than substantive grounds, but rather that the claim was never actually disposed of at all because the underlying evidence was never considered. But the proper conception of "adjudication on the merits" is tied to those dispositions that have res judicata effect.[116] When a decision has res judicata effect, courts that consider new evidence are not thought to be considering a new claim. This conception comports with the fact that the claim was initially decided on substantive, rather than procedural grounds—and therefore, to consider the same nominal legal issue again would be to consider on the merits the same claim again.

I conclude, therefore, that the Tenth Circuit's approach in *Workman* is not viable. As a result, it cannot be extended to the context of summary dispositions. Summary dispositions, whether of record-based or of extra-record claims, are properly considered adjudications on the merits for the purposes of § 2254(d) so long as the claim was disposed of on substantive rather than procedural grounds.

C. *The Contrary Prong*

Because state court summary dispositions of both record-based and extra-record claims are adjudications on the merits for the purposes of § 2254(d), federal courts must apply AEDPA's deferential standard of review. Accordingly, they may not grant the habeas petition unless one of the two exceptions in § 2254(d)(1) is satisfied. The first exception is if the state court's decision is

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of direct and collateral review."); *id.* at S3447 ("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. 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.").

115. *See* 28 U.S.C. § 2254(e)(2); *see also* Williams v. Taylor, 529 U.S. 420, 437 (2000) (holding a prisoner preserved a claim he had raised in state court which was now buttressed by new evidence never presented in state court).

116. *See supra* text accompanying note 73.

"contrary to . . . clearly established Federal law."[117] The Supreme Court, recall, held that a state court decision is not contrary to clearly established federal law unless the state court "applies a rule that contradicts the governing law" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent."[118]

Summary dispositions of either record-based or extra-record claims will violate this prong of AEDPA's standard of review only rarely.[119] First, a summary disposition will never explicitly "apply a rule that contradicts governing law." A decision announced by written opinion might violate the contrary prong in this manner by citing the incorrect legal rule.[120] Such a decision would clearly be based on law "diametrically different" from clearly established federal law.[121] However, a summary disposition contains no written opinion and therefore cites no legal rules. It is thus impossible for a federal court to determine that the state court applied the wrong legal rule. Second, a summary disposition might dispose of a case with "materially indistinguishable" facts from a Supreme Court case that was decided the other way. The summary disposition would be "contrary to clearly established Federal law," and so the federal court could, consistent with AEDPA, grant the petition. Such cases, however, will be rare. Very few cases are likely to contain facts "materially indistinguishable" from a previous Supreme Court case. And in those rare cases that do arise with materially indistinguishable facts, only the most recalcitrant or most incompetent of state courts would decide the case in a way that would be "diametrically different" from the Supreme Court's resolution.

There is an added complication for extra-record claims that makes it even more improbable that a summary disposition will violate this prong of the test. The operative facts for an extra-record claim are, by definition, not in the trial record presented to the state court. Consequently, the state court will not have "confront[ed] a set of facts materially indistinguishable" from a prior Supreme Court case, because the relevant prior cases *include* those extra-record facts. The facts confronted by the state court would instead be a proper subset of the facts ruled on by the relevant Supreme Court case, and thus not identical to the set of facts in that Supreme Court case. For example, a state court that fails to consider extra-record evidence in a *Strickland* failure-to-investigate claim would not confront any evidence of the witnesses that the defense counsel failed to interview. The federal court may thus be bound by § 2254(d) to deny the prisoner's petition, because the state court's failure to consider extra-record

117. 28 U.S.C. § 2254(d)(1).

118. *Williams*, 529 U.S. at 405-06.

119. *See, e.g.*, Sellan v. Kuhlman, 261 F.3d 303, 314 n.6 (2d Cir. 2001).

120. *See, e.g.*, *Williams*, 529 U.S. at 391 (finding that "[t]he Virginia Supreme Court erred in holding that our decision in *Lockhart v. Fretwell* modified or in some way supplanted the rule set down in *Strickland*" (citation omitted)).

121. *See id.* at 405-06.

facts makes *its* record distinguishable from that of the Supreme Court case in which relief was granted. This follows from the Supreme Court's holding last Term in *Cullen v. Pinholster* that federal courts may not consider evidence first introduced in federal court in determining whether the state court's decision violates § 2254(d)(1).[122]

As a result, summary dispositions of either record-based or extra-record claims will only rarely violate § 2254(d)(1)'s "contrary to" prong. State courts, by utilizing summary dispositions, can disable federal habeas courts from granting a prisoner's petition that might have been granted under the "contrary" prong had the state court issued a written opinion. Summary dispositions thus provide a safe harbor—by writing nothing, the state court protects itself from reversal, with no guarantee that the state court even looked at the relevant evidence. This may strike some as absurd or even tyrannical. Nonetheless, this conclusion is dictated by the text and structure of § 2254(d), which establishes the default position that a federal habeas court may not grant the petition, *unless* one of the exceptions is satisfied. It may be that no reasonable interpretation of Congress's intent would permit this draconian rule, even if the text seems to suggest otherwise. It may be that the best understanding of Congress's intent is that it simply did not anticipate the widespread use of summary dispositions. However, I bypass this difficult point because, as we shall see in the next Part, these cases can and should be resolved under § 2254(d)(1)'s "unreasonable application" prong.

D. *The Unreasonable Application Prong*

The final step is to consider whether summary dispositions violate the "unreasonable application" prong of § 2254(d)(1).[123] The Supreme Court interpreted this prong to allow federal habeas courts to grant a petition only if the state court's decision was "objectively unreasonable."[124] A federal court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[125] This Delphic statement of legal principle gives little guidance, but clearly entails that there are some state court decisions that are incorrect, but are not so incorrect as to be unreasonable.[126] Applying this rule to summary

122. 131 S. Ct. 1388, 1400 (2011).

123. 28 U.S.C. § 2254(d)(1) (2006).

124. *Williams*, 529 U.S. at 409.

125. *Id.* at 411.

126. *See, e.g.*, Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000) ("Some increment of incorrectness beyond error is required. . . . [T]he increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.'" (quoting Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 889 (3d Cir. 1999) (en banc))).

dispositions is not straightforward. The obvious method of evaluating whether a state court *decision* is unreasonable is to evaluate whether the state court's accompanying *written opinion* is unreasonable. Because this is not an option with summary dispositions, federal courts must utilize a different method.

One possibility, suggested by commentator Claudia Wilner, is that summary dispositions are ipso facto unreasonable applications of clearly established federal law.[127] On this view, "if a state court result is incorrect as a matter of clearly established Supreme Court precedent, and the state court provides no reasoning to explain why its decision could be construed as reasonable, that decision constitutes an 'unreasonable application' of clearly established federal law under § 2254(d)."[128] Wilner concludes that federal habeas courts owe no deference to state court summary dispositions, and consequently should review petitions arising from such decisions de novo.[129] In support of this conclusion, Wilner notes that "in the absence of [a written] opinion, a federal court cannot tell what federal law the state court applied or whether the state court applied federal law at all."[130] She further argues that this reading of the statute is consistent with the statutory text and AEDPA's federalism and comity goals, and is supported by important public policy considerations.[131]

This proposal might be interpreted in two ways, and under either interpretation it fails. Under the first interpretation, Wilner's argument is that state court summary dispositions violate the unreasonable application prong of § 2254(d)(1) because federal courts cannot apply that test in the absence of a written opinion. This version of the argument suggests that because a premise underlying the test is violated, the test itself is violated. This version of the argument ignores the structure of § 2254(d). The statute is structured as a default rule that relief shall not be granted. The default rule prevails unless an exception applies under the two prongs of § 2254(d)(1). That the state court might disable federal habeas courts from granting relief in meritorious cases raises the policy concerns noted in the previous Part, but the clarity of the text on this point is a strong indicator of Congress's intent to withhold federal habeas relief unless a petitioner can affirmatively demonstrate that the state court was unreasonable.

Under the second interpretation of Wilner's argument, a state court summary disposition is ipso facto unreasonable because issuing a decision without an explanation in a written opinion is an unreasonable thing for a court to do. Under this version of the argument, the fears of tyranny that animate opposition to AEDPA's application to state court summary dispositions fit neatly into the

127. *See* Wilner, *supra* note 37.

128. *Id.* at 1473.

129. *See id.*

130. *Id.* at 1472 (citing Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999) ("Unfortunately, when a state court does not articulate the rationale for its determination, a review of that court's 'application' of clearly established federal law is not possible.")).

131. *Id.* at 1473-74.

"unreasonable application" prong of § 2254(d)(1). On this view, deciding cases without issuing a written opinion is tyrannical, and a fortiori doing so is unreasonable. Thus, a federal habeas court may review a petition de novo whenever it is predicated on a state court summary disposition. This version of the argument has intuitive force, but misapprehends the nature of the unreasonable application standard. The standard addresses the state court's application of law to fact.[132] The Supreme Court explained that the unreasonable application prong is implicated when a state court applies the "governing legal principle to a set of facts different from those of the case in which the principle was announced."[133] The Court later elaborated that "the 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably *applies* that principle to the facts' of petitioner's case."[134]

So, for example, a state court denying a prisoner's *Strickland* claim for ineffective assistance of counsel when his trial attorney failed to investigate his prior convictions for possible mitigating evidence would be an unreasonable application of the legal principle from *Strickland* to the particular facts of the case.[135] Similarly, a state court denying a prisoner's *Brady* claim alleging that the prosecution failed to disclose evidence implicating a government informant in the crime for which the prisoner was convicted would be an unreasonable application of the legal principle from *Brady* to the particular facts of the case.[136] That a disposition is summary does not speak to how the legal principle was applied to the facts of the case, for it does not speak at all. Moreover, both the Supreme Court and the circuit courts have clearly indicated that they will not dictate to state criminal courts how to write their opinions. Lastly, this presumption that state courts are unreasonable unless they provide specific evidence in their written opinion to demonstrate otherwise profoundly violates the principles of comity that form the core of AEDPA's restructured relationship between state and federal courts.

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132. *See* 142 CONG. REC. S3472 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) ("[U]nder the bill deference will be owed to State courts' decisions on the application of Federal law to the facts. Unless it is unreasonable, a State court's decision applying the law to the facts will be upheld."); 141 CONG. REC. S7597 (daily ed. May 26, 1995) (statement of Sen. Hatch) ("[W]e allow a Federal court to overturn a State court decision only if it is contrary to clearly established Federal law or if it involves an 'unreasonable application' of clearly established Federal law to the facts . . . .").

133. Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (citing Williams v. Taylor, 529 U.S. 362, 407 (2000)).

134. Wiggins v. Smith, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413 (emphasis added)) (citing Bell v. Cone, 535 U.S. 685, 694 (2002)).

135. *See* Rompilla v. Beard, 545 U.S. 374, 383 (2005) (holding that the state court was unreasonable in failing to find that such a failure to investigate violated *Strickland*'s performance prong).

136. *See* Kyles v. Whitley, 514 U.S. 419 (1995).

A state court summary disposition, then, is not unreasonable for the purposes of § 2254(d)(1) simply by virtue of the fact that it lacks a written opinion. The crucial inquiry is instead whether the state court's decision, manifest in the summary disposition, constitutes an unreasonable application of legal principle to the particular facts of the case. In particular, the focus is not whether a federal habeas court will be able to *tell* whether the state court's decision is unreasonable—for we have seen that the default structure of § 2254(d) withholds relief if the federal court cannot make an affirmative determination that the state court decision violated one of the two prongs of § 2254(d)(1). The inquiry instead is whether the summary disposition *is* an unreasonable application of federal law. In this inquiry, the distinction between record-based and extra-record claims becomes critical because of what a summary disposition of each class of claims reveals about the nature of the state court's deliberative process.

Consider first a record-based claim. In a record-based claim, a state court has before it all of the facts relevant to making a determination. A summary disposition of a record-based claim reduces the state court's application of law to fact to either a grant or (more typically) a denial of relief. Under a simple model of AEDPA review, habeas petitions of record-based claims are straightforward to process. In reviewing a state court summary disposition denying relief for a record-based claim, a federal habeas court may proceed by determining whether the state court's denial was within the margin of error of the federal court's independent determination of the correct disposition. That is, the federal habeas court may first determine if, in its independent judgment, relief is warranted on the basis of the evidence proffered—the same proffer that was made to the state court, for the evidence is all contained in the trial record. If not, it follows that the state court's application of law to fact was reasonable. If the federal court determines that, contra the state court's determination, relief is warranted, it must evaluate whether the state court's application of law to fact was within the incorrect-but-reasonable range. If the federal habeas court finds that the state court's determination falls within this range, then it must deny relief even though it would have decided the case differently in the first instance. So on this simple model, the mechanics of deploying the unreasonable application prong of § 2254(d)(1) to a state court summary disposition of a record-based claim does not differ dramatically from doing so to a state court decision with a written opinion.

This simple model of AEDPA review fails to capture the complexity of adjudication. On this simple model, state court decisions of record-based claims exist on a single continuum from most to least reasonable. Only decisions that fall on the far side of the critical threshold level of reasonableness may be reversed under AEDPA's deferential standard of review. This linear model of reasonableness is flawed. In support of a denial of relief, a state court might have relied on any number of justifications. Each of these justifications may, or may not, be reasonable. A federal habeas court reviewing a summary disposition has no indication of which, if any, of these justifications are actually impli-

cit in the state court's decision. For example, suppose the defense counsel at trial in a capital case failed to contest his client's guilt, and instead only presented mitigating evidence at the sentencing phase. A state court denial of an ineffective assistance of counsel claim might be predicated on either of the following justifications. First, the state court might have reasoned that the right to counsel does not include the right to an attorney who will advocate on his client's behalf even if he thinks the client is guilty. Second, the state court might have reasoned that an attorney who makes a strategic decision to concede his client's guilt in the face of overwhelming evidence in order to conserve credibility for the sentencing phase is not constitutionally ineffective. The former justification is unreasonable, but the latter is not. A state court summary denial of this ineffective assistance of counsel claim gives the federal court no indication of which of these two justifications it relied on.

This more realistic, nonlinear model of review requires two stages of analysis. First, the federal court must determine which justification it will attribute to the state court. Second, it must determine whether that justification is reasonable. Under the *Harrington* Court's methodology, federal habeas courts confronted with such a decision must survey all the possible justifications for the decision, and attribute to the state court the most defensible. If that justification is objectively reasonable, then the federal court must deny relief. The flaw in this approach is that it attributes to the state court a justification it may not have employed. As a result, it grants deference to a reasoning that may not have existed. In this sense, a federal court would be deferring "to that which does not exist"[137]—but a *rationale* that did not exist, rather than an adjudication.

But this alone does not mean that a federal habeas court may conclude the state court's decision was an unreasonable application of federal law. The difficulty is that, as with the "contrary to" prong, the federal court lacks affirmative indication that the state court relied on an unreasonable justification for its decision. This raises the same policy problem of perverse incentives as with the "contrary to" prong—state courts can protect themselves from reversal by declining to issue a written opinion—but it also appears to trap the federal courts behind the same default rule denying relief. Thus, even on the nonlinear model of review, it appears that AEDPA requires that summary dispositions of record-based claims be reviewed in a substantially similar manner as written opinions of those claims, by attributing to the state court the most reasonable justification the federal court can think of.

The possibility that state courts may review a prisoner's claim conscientiously and in detail and then deny the claim via summary disposition is not merely hypothetical. A state court might examine the evidence and engage in the same deliberative process that it would in issuing a written opinion and then

137. *Cf.* Wright v. Sec'y for the Dep't of Corr., 278 F.3d 1245, 1254 (11th Cir. 2002) (stating that the court "would not defer to that which did not exist," referring to nonexistent adjudications on the merits when a federal issue had not been raised in state court).

decide the case by summary disposition. Justice Moreno of the Supreme Court of California explained that his court performs a rigorous analysis of the facts and of the law when it issues a summary disposition, on the same order as the level of analysis that goes into a written opinion.[138] The only substantial difference, according to Justice Moreno, is the process of converting that in-chambers analysis into a written opinion fit for publication.[139] This highlights the fact that, when presented with a summary disposition of a record-based claim, a federal court may be suspicious or skeptical of the deliberative process employed by the state court, but it cannot be *certain* that the state court's deliberative process was unreasonable—at least, it cannot be certain solely on the basis of the fact that the case was decided by summary disposition.[140]

However, in contrast to record-based claims, a federal court sometimes *can* be certain that the state court's deliberative process was unreasonable when issuing a summary disposition of an extra-record claim. An extra-record claim is predicated on facts beyond the scope of the trial, and therefore on evidence not contained in the trial record. As a result, this evidence is not available for review on direct appeal or in collateral state proceedings unless the proffer is admitted via a supplementary evidentiary hearing. As we saw in Part II.A, procedure in some states precludes the possibility of an evidentiary hearing when issuing a summary disposition. As a result, the federal court reviewing the summary disposition can be *certain* that the state court did not rely on a reasonable justification in support of its decision, for any reasonable justification would require the consideration of all the relevant evidence.[141] So in contrast to

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138. Interview with Justice Carlos Moreno, Assoc. Justice, Supreme Court of Cal., in Stanford, Cal. (Apr. 12, 2010). It is not known whether the courts of appeal in California, or criminal courts in other states, are similarly diligent.

139. *Id.*

140. There may be subcategories of record-based claims that a federal court can be certain were not decided by the state court using a reasonable deliberative process, and so may be reviewed de novo just as I argue extra-record claims may be. Nothing in the argument above precludes this possibility.

141. In some states, a judge might consider extra-record evidence in issuing a summary disposition, including any proffer made by the prisoner attached to his petition. *See* E-mail from J. Bradley O'Connell, Assistant Dir., First Dist. Appellate Project, to author (July 29, 2010, 3:38 PM) (on file with author). But that is equally true of the extra-record evidence the state court failed to admit into evidence in *Workman*. *See supra* Part II.B. And in *Harrington* itself, the state court did not permit the defendant's trial counsel to testify at an evidentiary hearing, which of necessity limited the extra-record evidence it considered even if Richter attached exhibits to his petition. *See* Amicus Curiae Brief of National Ass'n of Criminal Defense Lawyers in Support of Respondent at 32-33, Harrington v. Richter, 131 S. Ct. 770 (2011) (No. 09-587), 2010 WL 2811206. In *Cullen v. Pinholster*, the Supreme Court explained its understanding that "[u]nder California law, the California Supreme Court's summary denial of a habeas petition on the merits reflects that court's determination that 'the claims made in th[e] petition do not state a prima facie case entitling the petitioner to relief.'" 131 S. Ct. 1388, 1402 n.12 (2011) (second alteration in original) (quoting *In re* Clark, 855 P.2d 729, 741-42 (Cal. 1993)). The Court also explained that "[i]t appears that the court generally assumes the allegations in the petition to be true, but does not accept wholly con-

record-based claims, the federal court cannot attribute to the state court *any* reasonable justification of its denial of relief. Thus, under state procedures that preclude the consideration of extra-record evidence (because of a bar on evidentiary hearings, or for some other reason) when issuing summary dispositions, the issuance of a summary disposition conclusively establishes that the decision was an unreasonable application of federal law.

The view that a failure to consider relevant evidence constitutes an unreasonable application of federal law enjoys firm support in precedent: the Supreme Court recognized this point in *Williams v. Taylor*. The Supreme Court of Virginia had declined to consider potential mitigating evidence in evaluating whether *Strickland*'s prejudice prong was satisfied. So it did not consider the mitigators in determining whether there was a reasonable probability that, but for counsel's unconstitutional errors, the jury would not have returned a death verdict. Justice O'Connor's opinion explained that "[t]he Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. For that reason . . . I believe that the Virginia Supreme Court's decision 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"[142] This reasoning applies whenever a state court fails to consider evidence critical to the adjudication of the claim before it.

Therefore, although summary dispositions of extra-record claims are genuine adjudications of those claims,[143] in these procedural contexts, they apply legal principle to the facts of the case unreasonably. Summary dispositions of extra-record claims issued by courts that never considered relevant evidence purport to apply a legal rule to a heavily impoverished set of facts. It is always an unreasonable application of law to fact to apply law in the absence of fact. For example, it is unreasonable to purport to apply the legal rule governing ineffective assistance of counsel claims, under *Strickland*, without even considering the evidence proffered to support the claim that the petitioner's counsel was constitutionally ineffective—the witnesses not interviewed, the exculpatory evidence not introduced, and so on. Because summary dispositions of extra-record claims will, in these procedural contexts, necessarily involve the application of law in the absence of the relevant facts, such summary dispositions are per se unreasonable. Because such a state court summary disposition of an extra-record claim is per se an unreasonable application of clearly established federal law under § 2254(d)(1), a federal habeas court may grant relief.

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clusory allegations." *Id.* (citing People v. Duvall, 886 P.2d 1252, 1258 (Cal. 1995)). Even if the state court is required to accept the prisoner's *pleadings* as true in determining whether to hold the evidentiary hearing, as in California, it has still failed to consider the evidence that would be adduced in that hearing by denying the petition summarily prior to holding one.

142. Williams v. Taylor, 529 U.S. 362, 416 (2000) (O'Connor, J., concurring in part and concurring in the judgment) (second omission in original) (citation omitted).

143. *See supra* Part II.B.

In this Subpart, I have argued that in certain procedural contexts a state court's summary denial of an extra-record claim necessarily results from a fundamentally flawed deliberative process. When the procedural context entails that the state court did not consider extra-record evidence in disposing of an extra-record claim, its decision is per se an unreasonable application of federal law. This solution, I believe, captures the heart of critics' fear of granting AEDPA deference to state court summary dispositions. That fear is that a state prisoner will never be afforded the opportunity to have his claim truly and fully reviewed, thereby denying him the one (but only one) real chance at review that Congress meant to retain in enacting AEDPA. The distinction between record-based and extra-record claims separates those claims in which principles of comity require federal courts to presume state courts evaluated diligently in light of the relevant proffered evidence, from those claims in which the procedural context of the summary disposition conclusively establishes that the state court did not. By basing AEDPA's application to summary dispositions on this analytic framework, federal courts can be true to the text of the statute, and to Congress's intent to retain a meaningful review in federal court with proper deference to state courts.

CONCLUSION

In this Note, I have argued that the *Harrington* Court was right to hold that summary dispositions are adjudications on the merits for the purposes of § 2254(d)(1), but that it left open crucial questions regarding how AEDPA deference should apply. Federal courts should recognize that in some procedural contexts summary dispositions entail that the state court never examined evidence outside the trial record. Because certain habeas claims—including, for example, some ineffective assistance of counsel claims under *Strickland*—are predicated on facts outside the record, the state court issuing a summary disposition has never examined evidence crucial to the fair adjudication of the claim. Because the state court's deliberative process in such a case was fatally and irredeemably flawed, as the Supreme Court recognized in *Williams v. Taylor*, this constitutes an unreasonable application of federal law. Recognizing that such summary dispositions are unreasonable applications of federal law resolves the concern that summary dispositions' opacity conceals a deliberate disregard for conscientious adjudication. The resulting framework would respect the great deference that Congress intended, while ensuring that the writ retains its historical role as a safeguard of liberty.

APPENDIX: EMPIRICAL DATA ON SUMMARY DISPOSITIONS

Summary dispositions are the dark matter of the judicial universe. By definition they lack a written opinion, and so they are not published in reporters of decisions and thus do not appear in standard searches of cases. As a result, their prevalence is not easily ascertainable via the typical tools of legal research. The existing scholarly literature contains snippets of data.[144] This Appendix provides a short background on state court summary dispositions, and then presents empirical data on their frequency. Some empirical data was previously available, but contained significant methodological flaws. The Appendix concludes with new empirical data from the California state courts.

A summary disposition may arise in a variety of contexts. The details will vary by jurisdiction in accordance with each state's rules of criminal appellate procedure, but the basic structure is essentially the same across states. I focus on criminal appeals and habeas corpus in the state of California.[145] The California constitution requires that state appellate courts decide "causes" by written opinion, with reasons stated.[146] Since direct appeals are "causes," it follows that all direct appeals at the state courts of appeal, and those given discretionary review at the state supreme court, must be decided by written opinion with reasons stated.[147] However, the written opinions issued on direct appeal are often cursory, and may thus largely resemble a summary disposition. Such cursory opinions arise often in the context of *Wende*[148] appeals—the California state analogue of an *Anders*[149] appeal in federal court. A *Wende* appeal arises when an indigent defendant directs his appointed counsel to file a first appeal as of right, but the appointed counsel is unable to find genuine appealable issues. The appointed counsel must then file a brief containing anything in the record arguably supporting an appeal.[150] A court of appeal opinion in a *Wende* appeal often contains nothing more than a few sentences rehearsing the facts, and a rote

144. *See* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 262 (1995) (reporting that, in a study of state courts in Alabama, California, New York, and Texas, "about seventy-five percent of [habeas] petitions were dismissed or denied summarily without a reason"); *see also* COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2007 STATE COURT CASELOADS tbl.16 (2009) (describing opinions reported by state appellate courts across the country).

145. California is of particular interest, both because it is the source of the summary disposition in *Harrington*, and because it incarcerates over ten percent of the national total of state inmates. *See* PEW CTR. ON THE STATES, PRISON COUNT 2010, at 7 (2010), *available at* http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf (reporting that as of January 1, 2010, California incarcerated 169,413 inmates out of 1,404,053 state prisoners nationwide).

146. CAL. CONST. art. VI, § 14.

147. Excepting, again, those appeals that suffer from a fatal procedural defect.

148. *See* People v. Wende, 600 P.2d 1071 (Cal. 1979).

149. *See* Anders v. California, 386 U.S. 738 (1967).

150. *Wende*, 600 P.2d at 1073-74; *see also Anders*, 386 U.S. at 744.

statement affirming the conviction because no issues advanced in the appointed defense counsel's *Wende* brief were meritorious. Recently, in *People v. Kelly*, the Supreme Court of California held that the state constitutional requirement that direct appeals be decided by written opinion applies to *Wende* appeals.[151] It further held that the court of appeal's single-page opinion, which did not address the substance of any issues raised in the *Wende* brief, did not satisfy this constitutional requirement. Nonetheless, recent court of appeal opinions in *Wende* appeals do not appear to address the substance of the potentially appealable issues in any significant depth.[152]

After exhausting direct appeals, a prisoner in California may file a petition for a writ of habeas corpus with the state court of appeal.[153] The court of appeal responds to the petition either by issuing an order to show cause, or by denying the petition. Since a petition is not yet a "cause" until the court of appeal issues an order to show cause,[154] the state constitutional requirement to issue a written opinion does not apply. As a result, a petition may be denied summarily. A summary denial of a petition may simply state, in a single sentence, that the petition is denied. Such denials are often communicated via a postcard, and consequently are colloquially known as "postcard denials."[155] Since appeals on direct review in California are limited to the trial record, claims that require supplemental evidence—such as ineffective assistance of counsel—can only be raised in state habeas. As a result, such claims never pass through state proceedings subject to the written opinion state constitutional requirement. Thus, a postcard denial may be the only judicial treatment given to certain claims raised by a convicted criminal defendant.

Over thirty states signed on to an amicus brief submitted in support of the petitioner in *Harrington*, authored by the State of Texas.[156] The States' brief included some of the following data:

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151. People v. Kelly, 146 P.3d 547, 555 (Cal. 2006).

152. *See, e.g.*, *In re* D.G., No. E053301, 2011 WL 4601049, at *1 (Cal. Ct. App. Oct. 6, 2011) (discussing the facts of the case in less than a page before summarily stating that "[p]ursuant to the mandate of *People v. Kelly*, we have independently reviewed the record for potential error and find no arguable issues" (citation omitted)); People v. Schueller, No. H035451, 2010 WL 2842275 (Cal. Ct. App. July 21, 2010) (citing *People v. Kelly*, but only in a cursory statement that there are no appealable issues); *In re* Julio N., No. B219054, 2010 WL 2332897 (Cal. Ct. App. June 11, 2010) (same).

153. *See generally* J. Bradley O'Connell, *The Uncharted World of Non-Capital State Habeas Corpus Practice*, 1998 CAL. CRIM. DEF. PRAC. REP. 637, 644 (providing an overview of California habeas corpus).

154. *See* CAL. R. CT. 8.385(d); People v. Romero, 883 P.2d 388, 394 (Cal. 1994).

155. Harris v. Superior Court, 500 F.2d 1124, 1125 (9th Cir. 1974); *see also* La Rue v. McCarthy, 833 F.2d 140, 141 (9th Cir. 1987).

156. Brief of Texas et al. as Amici Curiae in Support of Petitioner, Harrington v. Richter, 131 S. Ct. 770 (2011) (No. 09-587), 2010 WL 2005329. With respect to the data in Table 2, see *id.* at 5-7.

TABLE 2

State	Total Number of Relevant Cases Decided	Number of Relevant Cases Decided by Summary Disposition	Rate
Texas (court of criminal appeals, FY 2009)[157]	4921	946	19.2%
Texas (court of criminal appeals, FY 2008)[158]	5290	1058	20%
Texas (court of criminal appeals, FY 1996)[159]	4232	2704	63.9%
Alabama (supreme court, FY 2008)[160]	1758	1506	85.7%
Alaska (supreme court, FY 2009)[161]	160	40	25%
Alaska (court of appeals, FY 2009)[162]	205	157	76.6%

157. OFFICE OF COURT ADMIN., COURT OF CRIMINAL APPEALS ACTIVITY: FY 2009 (2009), *available at* http://www.courts.state.tx.us/pubs/AR2009/cca/cca-activity-report-2009.pdf (counting dispositions of applications for habeas corpus).

158. OFFICE OF COURT ADMIN., COURT OF CRIMINAL APPEALS ACTIVITY: FY 2008 (2008), *available at* http://www.courts.state.tx.us/pubs/AR2008/cca/cca-activity-report-2008.pdf (counting dispositions of applications for habeas corpus).

159. OFFICE OF COURT ADMIN., COURT OF CRIMINAL APPEALS: ACTIVITY FOR THE YEAR ENDED AUGUST 31, 1996 (1996), *available at* http://www.courts.state.tx.us/pubs/ar96/ccadoc96.pdf (counting dispositions of applications for habeas corpus).

160. ALA. ADMIN. OFFICE OF THE COURTS, ALA. UNIFIED JUDICIAL SYS., FY 2008 ANNUAL REPORT & STATISTICS 8 (2009), *available at* http://www.alacourt.gov/Annual%20Reports/2008AOCAnnualReport.pdf (counting dispositions of all cases).

161. *See* OFFICE OF THE ADMIN. DIR., ALASKA COURT SYS., ANNUAL STATISTICAL REPORT 2009, at 6 (2010), *available at* http://www.courts.alaska.gov/reports/annualrep-fy09.pdf (counting summary dispositions on the merits and dispositions by published opinions for all cases).

162. *See id.* at 14 (counting summary dispositions on the merits and dispositions by published opinions for all cases).

State	Total Number of Relevant Cases Decided	Number of Relevant Cases Decided by Summary Disposition	Rate
Connecticut (court of appeals, two years, FY 2006-08)[163]	399	101	25.3%
Florida (courts of appeals, criminal cases)[164]	N/A	N/A	38%
Florida (courts of appeals, postconviction)[165]	N/A	N/A	65.8%
Hawaii (supreme court and court of appeals, FY 2008-09)[166]	198	160	80.8%
Illinois (court of appeals, 2008)[167]	3755	850	22.6%
North Dakota (supreme court, 2009)[168]	130	34	26.2%
Wisconsin (court of appeals, 2009)[169]	N/A	N/A	28%

163. *See* CONN. JUDICIAL BRANCH, BIENNIAL CONNECTICUT JUDICIAL BRANCH REPORT AND STATISTICS 2006-2008, at 37 (2008), *available at* http://www.jud.ct.gov/Publications/BiennialReport2006-08.pdf (counting dispositions of criminal cases).

164. *See* DIST. COURT OF APPEAL WORKLOAD & JURISDICTION ASSESSMENT COMM., REPORT AND RECOMMENDATIONS app. A at 12 (2006), *available at* http://www.floridasupremecourt.org/pub_info/documents/DCAWorkload/2006_DCAReport.pdf (reporting rate of per curiam affirmance).

165. *See id.* (reporting rate of per curiam affirmance).

166. *See* JUDICIARY, STATE OF HAW., 2009 ANNUAL REPORT STATISTICAL SUPPLEMENT tbl.1 (2009), *available at* http://www.courts.state.hi.us/docs/news_and_reports_docs/annual_reports/Jud_Statistical_Sup_2009.pdf (counting criminal appeals).

167. ADMIN. OFFICE OF THE ILL. COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY 130 (2008), *available at* http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008_Statistical_Summary.pdf (counting dispositions of criminal cases).

168. N.D. COURT SYS., 2009 ANNUAL REPORT 9 (2010), *available at* http://www.ndcourts.gov/_court/News/ndcourtsar2009.pdf (counting dispositions of criminal cases).

169. WIS. COURT SYS., COURT OF APPEALS ANNUAL REPORT 2009, at 3 (2010), *available at* http://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=47578 (counting all cases).

These data begin to show the scope of the summary disposition phenomenon, but they have limitations. They mix rates from state supreme courts and state courts of appeals, which obscures the reality that the latter are responsible for the vast majority of state postconviction relief dispositions because state supreme court review is typically discretionary.[170] They compare states across different years, and do not account for differences between state procedures. For example, some states review certain types of claims that would typically be reviewed in collateral proceedings on direct review. Perhaps most importantly for my purposes, these data omit California, which incarcerates more people and whose courts review more postconviction relief petitions than any other state.

To surmount these problems, I collected new empirical data on summary dispositions in California state courts directly from the state court system. These data demonstrate that summary dispositions are the dominant form of resolution of state habeas proceedings in California—far more so than the previously available data from other states suggested.

Drawing on data from the Office of Court Research at the Judicial Council of California, a stark pattern of summary dispositions emerges.[171] The previously available data on the use of summary dispositions did not provide separate statistics for habeas petitions, and thus did not distinguish summary dispositions of habeas petitions from summary dispositions of other types of cases such as reviews of agency actions.[172] Using the Appellate Case Management System, on my request the Judicial Council compiled data for four calendar years from 2006 to 2009. These data include all petitions for a writ of habeas corpus filed in the six courts of appeal in California, and whether the petition was disposed of with a written opinion or by summary disposition.

The data, available for the first time, are presented in the following table:

170. Only "typically" because some states, including California, have mandatory state supreme court review in death penalty cases.

171. The data were collected via a request to Dag McLeod, Manager of the Office of Court Research for the Judicial Council of California, and are on file with the author.

172. *See* JUDICIAL COUNCIL OF CAL., 2009 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1998-1999 THROUGH 2007-2008, at ix (2009), *available at* http://www.courts.ca.gov/documents/csr2009.pdf (reporting that in fiscal year 2007-2008, the California courts of appeal disposed of 4907 of 16,098 appeals without written opinion and 9275 of 9906 original proceedings without written opinion).

TABLE 3
Summary Dispositions of State Habeas Petitions in California, 2006-2009

Year	Total Number of Petitions Decided	Written Opinion	Summary Disposition	Rate
2006	3958	108	3850	97.27%
2007	5811	133	5678	97.71%
2008	14,544	350	14,194	97.59%
2009	4913	159	4752	96.72%
Total	29,226	750	28,474	97.43%

Of the 29,226 petitions for a writ of habeas corpus filed in the courts of appeal of California during these four years, 97.43% were decided by summary disposition.[173]

The existing data demonstrated that summary dispositions play a central role in state criminal justice systems. The new data collected from California, however, show something more: a California state habeas petition is almost certain to be denied summarily. Consequently, a federal court reviewing a habeas petition from a California state prisoner is essentially guaranteed to confront a state court summary disposition. As a result, the question of how to treat summary dispositions in federal habeas proceedings under AEDPA is not just pressing—in some jurisdictions, it arises in virtually all federal habeas petitions.

173. The spike in total habeas petitions and summary dispositions in 2008 is unexplained. However, the ratio of written opinions to summary dispositions in that year does not differ significantly from other years. In 2007, the percentage of petitions decided by summary disposition was 97.71%; in 2008, it was 97.59%. Accordingly, the 2008 spike in the total number of petitions decided does not materially affect the percentages reported for the four-year period.