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Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions

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POSTCARDS FROM THE BENCH: FEDERAL HABEAS REVIEW OF UNARTICULATED STATE COURT DECISIONS

I. INTRODUCTION

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA" or "the Act"). The Act amended 28 U.S.C. § 2254(d) to read:

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

As interpreted by the Supreme Court, the AEDPA requires federal habeas courts to limit issuance of the writ to petitioners’ applications arising from state court decisions that either contradict or unreasonably apply Supreme Court precedent. A federal habeas court may not grant a petition merely because its own holding would differ from that of the state’s court. While the term "deference" itself is not used in the statute, the review procedure implemented by the AEDPA is deferential, particularly when compared with the procedure it replaced. Prior to the enactment of the AEDPA, federal habeas courts owed deference only to

4. See id. at 412.
state court factual determinations. 6 Although opinions differ on the practical magnitude of change in federal habeas review of state petitions wrought by the enactment of the AEDPA, 7 the statute does mandate a level of federal deference to state court decisions on issues of federal law previously nonexistent. 8

Prior to the AEDPA's enactment, a state court's "postcard denial" 9 resolving a petitioner's claim presented no structural difficulties to a federal habeas court. Its standard of review on issues of law or mixed issues of law and fact did not depend on the reasonableness of the state court's decision. 10 A state petitioner did not risk the loss of federal de novo review because of the structure of his state decision. Since the federal standard of review did not depend on the nature of its decision, a state court risked nothing either. Whether its decision stood or fell rested on a federal court's disagreement with it, not on its reasonableness.

Unarticulated state court decisions raise many questions in the context of the AEDPA. How much deference is due a state court's simple holding that, "Appellant's claims are without merit," or more tersely, "Denied"? Does such a decision indicate whether the case was disposed of on substantive rather than procedural grounds? Is it clear from such holdings that the state court applied the correct federal law? Whether the state court even applied federal law at all? Does such a decision reflect "an unreasonable application of" federal law? Can it possibly reflect an "application," however characterized? Do such curt dispositions reflect procedurally sufficient adjudications in which confidence should be reposed and to which deference should be accorded?

These questions reflect structural concerns over how the statute's mandate and legislative purpose can effectively be implemented in the face of unarticulated state court decisions. Predicates to the AEDPA's

6. See Hobbs v. Pipersack, 301 F.2d 875, 880 (4th Cir. 1962); Hance v. Zant, 696 F.2d 940, 946 (11th Cir. 1983). While the pre-AEDPA version of § 2254(d) created a presumption of correctness for state court findings of fact, that presumption was awarded only where such findings were the result of "a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia." See id. at 946, n.1 (quoting the version of 28 U.S.C. § 2254(d) then in effect).
8. See Williams, 529 U.S. at 399 (O'Connor, J., concurring).
9. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002), mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002), (characterizing cursory state court decisions denying petitioner's claims unaccompanied by articulated reasoning as "postcard" denials).
10. See supra notes 5-6 and accompanying text.
applicability are arguably missing from a postcard denial. The questions 
reflect policy concerns over adequate protections of a petitioner's 
interest that the deprivation of his liberty or his life be constitutional, and 
a state’s interest in the finality of its decisions. Both of these interests are 
most at risk when postcard denials are accorded deferential AEDPA 
review. They also reflect constitutional concerns over what procedural 
minimums we are due before the state can deprive us of our liberty or 
more.

This Note will explore these questions in light of Supreme Court 
and circuit court interpretations of § 2254(d)(1), how similar issues in 
the context of different legislation, including other AEDPA amendments 
to § 2254, are addressed, the policies motivating the AEDPA, and 
practical implications for reviewed and reviewing courts. Part II gives a 
brief discussion of the AEDPA and how it changed federal habeas 
review of state court decisions. Part III clarifies what practically 
constitutes “deference” within the functioning of § 2254(d)(1) and 
discusses the dangers in invoking this term imprecisely. Part IV 
examines perfunctory or “postcard” denials, taking the position that 
summary state court decisions should not be treated as adjudications on 
the merits: (1) as consistent other prescriptions of the AEDPA; (2) as 
consonant with Supreme Court interpretation of § 2254(d)(1); (3) as 
furthering the joint goals of preventing unconstitutional detentions and 
respecting state court decisions; and (4) as maximizing the statute’s 
benefits to states while minimizing unnecessary burdens on petitioners. 
Part V examines the criteria held to be essential to the concept of 
adjudication and explores whether postcard denials can rightly be 
considered adjudication at all.

II. HABEAS REVIEW PRE- AND POST-AEDPA

Prior to the passage of the AEDPA, federal habeas review of state 
court prisoners’ detentions was “de novo in the strictest sense.”11 A state 
petitioner could succeed on his federal habeas petition merely because 
the federal court reached a different result than a state court applying the 
same legal principle to the same set of facts.12 Traditionally a federal 
habeas court had broad latitude, both jurisdictionally and temporally, in 
what it could consider as governing constitutional law.13 The court could

11. See Hertz & Liebman, supra note 5, § 32.1, at 1419.
12. See id. at 1419-20.
13. See id. at 1420.
look beyond Supreme Court precedent to federal circuit law.\textsuperscript{14} Additionally, until a 1989 Supreme Court decision held differently, federal habeas courts were free to apply constitutional principles that had not yet even been developed by the Supreme Court at the time of a petitioner’s state proceedings.\textsuperscript{15} A state’s decision in a petitioner’s case on issues other than those purely of fact has been described as “perilously close to irrelevant.”\textsuperscript{16}

The term “deference” often used to describe the prescriptions of the AEDPA can be misleading when one attempts to analyze practical applications of § 2254(d)(1). While taken as a whole, § 2254(d)(1) effects a level of deference to state court decisions previously not mandated by federal law, the mere fact that the state court has spoken does not qualify its pronouncements as deserving of deference.\textsuperscript{17} Where a federal habeas court considers petitioner’s federal issues as not adjudicated on their merits in the state court, the state court decision is not reviewed under the standards of the AEDPA at all.\textsuperscript{18} The import of this goes beyond the standard of review\textsuperscript{19} to encompass the law that binds the reviewing court.\textsuperscript{20} A district court thus finding that a petitioner’s claim was disposed of in the state courts on procedural rather than substantive grounds would review those decisions, where other applicable law permitted, de novo and in light of the pre-AEDPA standards enunciated in \textit{Teague} regarding the source of the applicable law at the time of the decision.\textsuperscript{21}

Neither does a determination that § 2254(d)(1) applies to a given state court decision guarantee that the state’s judgment will be deferred to.\textsuperscript{22} If a petitioner’s claim is resolved in the state courts on substantive grounds, § 2254(d)(1) mandates the writ will not issue unless one of two conditions are satisfied. First, a federal court can grant the petition if the adjudication “resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court.”\textsuperscript{23} A writ

\begin{thebibliography}{99}
\bibitem{14} See id at 1419-20.
\bibitem{16} See \textit{Hertz} \& \textit{Liebman}, supra note 5, § 32.1, at 1420. \textit{But see} \textit{Brown} v. \textit{Allen}, 344 U.S. 443, 458 (1953) (stating that in some “circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not res judicata.”).
\bibitem{18} See \textit{Hertz} \& \textit{Liebman}, supra note 5, § 32.1, at 1420.
\bibitem{20} See \textit{Fisher} v. \textit{Texas}, 169 F.3d 295, 305 (5th Cir. 1999).
\bibitem{21} See \textit{Hertz} \& \textit{Liebman}, supra note 5, § 32.1, at 1420-21.
\bibitem{22} See \textit{Williams}, 529 U.S. at 407 (O’Connor, J., concurring).
\end{thebibliography}
can also issue where the "decision... involved an unreasonable application of" Supreme Court precedent.\textsuperscript{24} The Supreme Court has not construed the statute as invoking deferential review in each of these scenarios.\textsuperscript{25}

The primary Supreme Court decision interpreting § 2254(d)(1) defined instances satisfying the first prong of § 2254(d)(1) as including, but not limited to, two scenarios.\textsuperscript{26} "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."\textsuperscript{27} Additionally, where "a state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent," such a result satisfies the "contrary to" prong of § 2254(d)(1).\textsuperscript{28} "[I]n either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause."\textsuperscript{29} This analysis supports the premise that not all decisions resulting from adjudications on the merits are to be accorded deference under the AEDPA. Clearly, those "decisions... contrary to... clearly established Federal law, as determined by the Supreme Court" do not constrain a federal habeas court's standard of review.

The Court in \textit{Williams} also discussed what constitutes an "unreasonable application of... clearly established federal law" within the context of the AEDPA.\textsuperscript{30} "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application of... clearly established Federal law.'"\textsuperscript{31} The effect of the word "unreasonable" is that "a federal habeas 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."\textsuperscript{32} While the term "deference" is

\textsuperscript{24} § 2254(d)(1).
\textsuperscript{25} See \textit{Williams}, 529 U.S. at 405-14 (O'Connor, J., concurring).
\textsuperscript{26} See id. at 405-06.
\textsuperscript{27} \textit{id}. at 405.
\textsuperscript{28} \textit{id}. at 406.
\textsuperscript{29} \textit{id}.
\textsuperscript{30} See \textit{id}. at 407-08.
\textsuperscript{31} \textit{id}.
\textsuperscript{32} \textit{id}. at 411.
used nowhere in the statute,\textsuperscript{33} permitting state courts’ decisions to stand regardless of whether a federal reviewing court would concur in them exemplifies deference.

III. WHAT DOES “AEDPA DEFERENCE” REALLY MEAN?

“One of the most effective ways of diluting... a constitutionally guaranteed right is to substitute for the crucial words... another word... more flexible and... less restricted in meaning.”\textsuperscript{34} The use of the term “deference,” admittedly an accurate reflection of the statute’s motivating philosophy, as a codeword for its prescriptions obscures the statute’s actual mechanics. While the premise that the AEDPA mandates deference to state court decisions is reiterated throughout federal habeas opinions, its practical application is inconsistent across the circuits, even subsequent to the Supreme Court’s decision in Williams. Federal habeas courts invoke AEDPA deference as the appropriate analytic framework once a state court decision is determined to be an adjudication on the merits.\textsuperscript{35} However, some construe the level of deference required by the AEDPA quite broadly, permitting state court decisions that concededly do not even reach the federal issues to escape considered review.\textsuperscript{36}

A. Deference to the Fact of State Court Proceedings

Decades of work seeking to limit or even eradicate federal courts’ power to conduct habeas review of state prisoners’ detentions bore some fruit with the enactment of the AEDPA.\textsuperscript{37} While this law did not go as far as some proponents had hoped,\textsuperscript{38} the AEDPA did move the analytic starting point for federal habeas review away from the fact of a state prisoner’s detention.\textsuperscript{39} The Act placed “a previous state court judgment as the starting point for federal habeas review away from the fact of a state prisoner’s detention,”\textsuperscript{\textsuperscript{40}} rather than treating such judgments “as if, in effect, a state court had not already adjudicated the same claims.”\textsuperscript{\textsuperscript{41}}

\begin{itemize}
  \item \textsuperscript{34} Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).
  \item \textsuperscript{35} See, e.g., Sellan v. Kuhlman, 261 F.3d 303, 313-14 (2d Cir. 2001).
  \item \textsuperscript{36} See Schoenberger v. Russell, 290 F.3d 831, 836 (6th Cir. 2002).
  \item \textsuperscript{37} See Yackle, supra note 7, at 381.
  \item \textsuperscript{38} See id. at 385.
  \item \textsuperscript{39} See id. at 383.
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Hertz & Liebman, supra note 5, § 32.1, at 1419.
\end{itemize}
B. Deference and Adjudications on the Merits

The above “deference” paid to the existence of a state decision requires the federal habeas court to examine that decision to answer a threshold question. A predicate for the application of § 2254(d)(1) is that the state court’s decision resulted from an “adjudication on the merits.” Within the context of habeas review, an adjudication on the merits is one that has been disposed of on other than procedural grounds. While it is generally true that “[a] defendant who has procedurally defaulted his or her claim . . . [is] precluded from a merits review on federal habeas,” there are exceptions. First, a state prisoner who can show “cause and prejudice” for the procedural default can be granted federal habeas merits review. Second, “[a] petitioner who fails to satisfy the cause-and-prejudice standard may nonetheless be entitled to habeas relief if he can show that the imposition of the procedural bar would constitute a miscarriage of justice—i.e., that the petitioner is actually innocent of the crime.” Third, a state failing to raise the existence of a procedural bar in federal habeas proceedings can be deemed to have waived it, thus qualifying the petitioner for merits review. Federal habeas review of these cases are not performed under the strictures of § 2254(d)(1).

The circuits are split over whether the existence of procedural grounds supporting a state court’s decision is an exclusive and sole predicate for finding that it did not result from an adjudication on the merits. Some districts apply a formalistic approach, finding any decisions not clearly and solely disposed of on purely procedural grounds to be adjudications on the merits. The Eleventh Circuit distinguished its rule that state court decisions not reaching the federal claim fail under a Williams analysis of § 2254(d)(1)’s first prong as separate from a determination of whether such decisions are adjudications on the merits. A decision under the former still qualifies as an adjudication on the merits to the extent it “does not rest on procedural grounds alone.” The Tenth Circuit applied this approach to

43. See, e.g., Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir.1999).
44. See Hertz & Liebman, supra note 5, § 32.2, 1422.
45. Steinman, supra note 5, at 1513 n.92.
47. Haley v. Cockrell, 306 F.3d 257, 263 (5th Cir. 2002).
49. See Wright v. Sec'y for Dep't of Corrs., 278 F.3d 1245, 1254-56 (11th Cir. 2002).
50. Id. at 1255.
a state court decision denying a petitioner review “because he had failed to raise [his] issue on direct appeal,” adding, “however, that [petitioner’s] claim was one previously rejected” by the state court.\textsuperscript{51}

The federal habeas court found that the state court’s reliance “on the merits as an alternative basis for its holding,” though dicta, nonetheless constituted an adjudication on the merits.\textsuperscript{52}

Some circuits construe the adjudication on the merits requirement as not applicable to decisions that do not reach the federal claim. In \textit{Fortini v. Murphy},\textsuperscript{53} the First Circuit held that AEDPA deference does not apply to state court decisions that do not address petitioners’ federal claims.\textsuperscript{54} The petitioner in \textit{Fortini} appealed his state court conviction for second-degree murder arguing that the exclusion of certain evidence violated his state and federal constitutional due process rights to a fair trial.\textsuperscript{55} Although the assertion of his federal claim was apparently only clearly made in a point heading to one section of his appellate brief, the first case cited in that section was the appropriate Supreme Court precedent.\textsuperscript{56} After finding that this sufficiently alerted both the state’s intermediate and highest courts to the existence of a federal issue, the court held that since it was not addressed by either in their review, their decisions were not owed deference by the federal habeas court under the AEDPA.\textsuperscript{57} Distinguishing these decisions from claims “adjudicated on the merits,” to which AEDPA deference applies, the court held that although the “AEDPA imposes a requirement of deference to state court decisions, . . . [this court] can hardly defer to the state court on an issue that the state court did not address.”\textsuperscript{58} Similarly, the Third Circuit, when confronted with a state court decision that discussed only state law in denying a petitioner’s claim of ineffective assistance of counsel under the Sixth Amendment, stated, “[t]he AEDPA standard of review does not apply unless it is clear from the face of the state court decision that the merits of the petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court.”\textsuperscript{59}

The Second and Fifth Circuits use a functional approach to determine whether a state court decision is an adjudication on the merits.

\textsuperscript{51} Johnson v. McKune, 288 F.3d 1187, 1191 (10th Cir. 2002).
\textsuperscript{52} Id. at 1192.
\textsuperscript{53} 257 F.3d 39 (1st Cir. 2001).
\textsuperscript{54} See id. at 47.
\textsuperscript{55} See id. at 44.
\textsuperscript{56} See id. at 44-45.
\textsuperscript{57} See id. at 45.
\textsuperscript{58} Id. at 47.
\textsuperscript{59} Everett v. Beard, 290 F.3d 500, 507-08 (3d Cir. 2002).
These circuits apply a test first enunciated in a pre-AEDPA case, but since applied to post-AEDPA decisions. The Green test considers three factors:

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 courts’ opinions suggest reliance upon procedural grounds rather than a determination on the merits.

In Mercadel, the Fifth Circuit considered whether a one-word decision issued by a state’s highest court denying a petition for state habeas relief constituted an adjudication on the merits of the petitioner’s claims. The petitioner filed his writ directly with the state’s highest court in the mistaken belief that this court had original jurisdiction to hear his claims. His petition was rejected in a one-word decision reading, “Denied.” The federal habeas court, applying the Green test, found that its third factor did “not come into play [as] the [state] Supreme Court’s one-word rejection of Mercadel’s petition is silent as to the reason for its denial of relief.” Since the state supreme court presumably knew of its lack of original jurisdiction over petitioner’s claim, consideration of the second Green factor led the federal habeas court to conclude that “the history of the case suggests that the [state] Supreme Court was aware of a ground for not adjudicating the case on the merits.” Finally, inquiry into Green’s first factor demonstrated that the state supreme court had “consistently refused to consider the merits of state court prisoners’ habeas petitions originally filed in its court.” “Consideration of these factors leads us to conclude that the [state] Supreme Court’s denial of relief on Mercadel was on procedural grounds, and therefore not on the merits.”

Application of the test in Green resulted in a finding that the petitioner’s claims were adjudicated on the merits in Dowthitt v.

60. See Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997).
61. See, e.g., Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999); Rudenko v. Costello, 286 F.3d 51 (2d Cir. 2002).
62. See Mercadel, 179 F.3d at 274.
63. See id. at 272-75.
64. See id. at 275.
65. Id. at 273.
66. Id. at 274.
67. Id.
68. Id. at 275.
69. Id. at 274.
Johnson, where the petitioner alleged the prosecutor’s misrepresentation of evidence on summation violated his due process rights. The petitioner did not object at trial or raise the issue in his appeals, arguing it for the first time in his state habeas proceedings. The state habeas court did not address this claim in its denial of relief, requiring the federal habeas court to inquire whether the denial was based on procedural or substantive grounds. The federal court determined Green’s first factor indicated the state habeas court’s decision was made on substantive grounds: the state courts had consistently determined that prosecutorial comments on summation, such as those made in petitioner’s case, were not so inflammatory as to be incurable, thereby excepting them from the law requiring timely objection. Consideration of Green’s second factor also weighed against a procedural basis for the state court’s denial. The history of the case indicated the state argued the merits of the petitioner’s due process claim, rather than simply raising the “contemporaneous objection rule” as a procedural bar. Further, the fact that state law treats a denial of habeas relief by the intermediate court as an automatic “denial on the merits” demonstrated the state court’s lack of reliance on procedural grounds as the basis for its denial.

While the Second Circuit also uses this test, its application is not consistent with the Fifth Circuit. The court in Selan stated, “[w]e adopt the Fifth Circuit’s succinct articulation of the analytic steps that a federal habeas court should follow in determining whether a federal claim has been adjudicated ‘on the merits’ by a state court.” However, after setting out the test, citing to Mercadel, the next paragraph concluded that the instant petitioner’s claims had been adjudicated on their merits, without analysis of how the test’s factors weighed in the determination. Subsequent decisions imply that the Second Circuit does not apply all

70. 230 F.3d 733 (5th Cir. 2000).
71. See id. at 754; see also Barrientes v. Johnson, 221 F.3d 741 (5th Cir. 2000).
72. See Dowthitt, 220 F.3d at 754.
73. See id.
74. See id.
75. See id.
76. See id.
77. See Ex parte Torres, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (distinguishing the words “dismiss” and “deny,” stating that the former means the court “declined to consider the claim for reasons unrelated to the claim’s merits,” while the latter “signifies [the court] addressed and rejected the merits of a particular claim”).
79. Id.
80. See id.
three factors where even a conclusory analysis of any factor supports a finding that a petitioner's claim was adjudicated on its merits. In Aparicio v. Artuz, the court found the petitioner's claims were adjudicated on the merits solely on the basis of the third Green factor. Without indicating any basis for the conclusion, the court stated, "there is nothing in [the] decision to indicate that the claims were decided on anything but substantive grounds." In a similarly unsupported conclusion in Brown v. Artuz, the court found an adjudication on the merits on the basis of the second and third Green factors. "[T]here is no basis either in the history of the case or the opinion of the [state court] for believing [the] claim was denied on procedural or any other nonsubstantive grounds . . . ."

The Second Circuit has also based findings that claims were not adjudicated on their merits on considering less than all three Green factors. In Norde, the state prisoner raised Sixth Amendment claims on appeal that were never addressed in the opinion affirming his conviction, although other state claims regarding sufficiency of evidence and prosecutorial misconduct were. He raised the same claims in his request for the appellate court to rehear his appeal; the one-sentence denial of this request again made no mention of his Sixth Amendment claims. These same claims were raised in the petitioner's state habeas proceedings and the state habeas court denied relief in a terse opinion that did not mention the Sixth Amendment at all.

The federal habeas court applied the Green test, analyzing only the last of its factors. Although no basis for the state habeas court's determination was evident, no inquiry into what the state had done in similar cases was made. No analysis of the case history's indication of a possible procedural basis was performed. The federal court relied on the multiple state opinions, stating that they "did not mention [petitioner's] Sixth Amendment claims, and . . . [do] not contain any language, general or specific, indicating that those claims were

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81. 269 F.3d 78 (2d Cir. 2001).
82. See id. at 94.
83. Id.
84. 283 F.3d 492 (2d Cir. 2002).
85. See id. at 498.
86. Id.
87. See, e.g., Norde v. Keane, 294 F.3d 401 (2d Cir. 2002).
88. See id. at 410.
89. See id.
90. See id.
91. See id.
92. See id.
considered and denied on the merits.”93 "Because the [state court] never indicated in any way that it had considered [petitioner’s] Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA’s new, more deferential standard of review does not apply.”94

Whether the Green test is applied as a “totality of the circumstances” test as in the Fifth Circuit, or as a multi-pronged exclusive “or” test as in the Second Circuit, the test itself does not deferentially review a state court’s basis for its disposition of a petitioner’s claim. Both of these methods, while “deferring” to the existence of the state court decision, do not invoke a deferential standard of review in the sense that the actual distinction of procedural from substantive grounds made by the federal court is informed by whether it considers the state court acted “reasonably.” While the test in the Second and Fifth Circuits looks to how such determinations have been made in a state court in the past and whether denials in similar fact scenarios have been made on procedural grounds, there is no deference given to what the term “procedural grounds” itself encompasses.

C. Deference and Decisions Contrary to Clearly Established Federal Law

According to the holding in Williams, no deference is accorded to state court decisions that apply a rule in direct contradiction to federal law as identified by Supreme Court precedent. The Eleventh Circuit has extended this ruling to include state court decisions that do not address a validly presented federal claim.95 In Romine, the court held that for the purposes of determining whether AEDPA deference adheres to a state court decision, “[f]ailure to apply ... governing [Supreme Court] law ... is tantamount to applying a rule that contradicts governing law.”96 The petitioner in Romine appealed his capital murder convictions on the grounds that the prosecutor’s closing argument invoking Biblical law as a basis upon which the jury should render its verdict violated the constitutional protections afforded him under the Due Process Clause.97 The state’s highest court dispensed with this claim in three short sentences, which did not mention the petitioner’s federal claim.98

93. Id.
94. Id.
95. See Romine v. Head, 253 F.3d 1349 (11th Cir. 2001).
96. Id. at 1365.
97. See id. at 1363.
98. See id.
Additionally, in supporting its assertion that there was “no reversible error,” the court provided a lengthy string-cite referring only to state court decisions.99 “It is far from clear what, if any, rule of federal law the [state supreme court] applied.”100 “[W]hen there is grave doubt about whether the state court applied the correct rule of governing federal law..... [a federal habeas court] proceed[s] to decide the issue de novo.”101

The imprecision surrounding the meaning of “deference” as used in the context of § 2254(d)(1) creates confusion when analyzing almost any issue regarding its application. For instance, the Second Circuit held that a state court decision that does not explicitly address a petitioner’s federal claims can nonetheless be considered “an ‘adjudication on the merits’ to which [the federal habeas court] owe[s] deference” if it passes the circuit test discussed above.102 A close reading of Morris, however, reveals that the “deference” referred to is limited to the restraints placed on the source of “clearly established Federal law,” as opposed to the deference accorded “unreasonable applications” of that law as mandated by the Supreme Court’s decision in Williams.103 “Because Morris’s double jeopardy claim was adjudicated on the merits, the district court correctly found that 2254(d) deference is due the state court decision. Therefore, this Court is constrained to apply ‘clearly established Federal law,’ as determined by the holdings, not dicta, of the United States Supreme Court.”104 The court conducted a full and independent review of the record, and cited Williams’ analysis in ultimately determining that the state court’s decision “‘contradict[ed] the governing law’ established by Supreme Court precedent ....”105 Finishing with a somewhat confusing conclusion, the court stated, “[c]onsequently, petitioner’s application ... falls within the constraints of § 2254(d)(1), and we therefore grant the petition for writ of habeas corpus.”106 The use of the term “constraint” here is particularly imprecise given the language in Williams, a decision quoted in the same paragraph, that specifically states, “a federal court will be unconstrained by § 2254(d)(1) because

99. Id.
100. Id. at 1365. The implications of the Supreme Court’s recent decision in Early v. Packer, 537 U.S. 3 (2002), see infra note 172, for the Eleventh Circuit’s approach have not, as of this writing, been addressed.
101. Romine, 253 F.3d at 1365.
103. See id.
104. Id.
105. Id. at 51.
106. Id.
the state-court decision falls within that provision's 'contrary to' clause.'

D. Deference and Decisions Involving Unreasonable Applications of Clearly Established Federal Law

The focus, per Williams, on the deference due a state court's decision on federal review is properly aimed at determining whether or not it represents a decision involving an unreasonable application of Supreme Court precedent to its given facts. Williams described the lineaments of this deference. "[A] federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly[;] that application must also be unreasonable."108

The Second Circuit expressed its conception of Williams' construction of § 2254(d)(1)'s unreasonableness as "[s]ome increment of incorrectness beyond error."109 Finding no guidance in Williams on what quantum of error in its decision "elevate[d] [the state court's] omission from 'merely erroneous' to 'objectively unreasonable,'"110 the court held that "the increment need not be great [or] habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.'"111 In Francis S., this narrow increment proved sufficient to deny habeas relief on petitioner's claim that the state procedure recommitting him for mental health treatment violated his equal protection rights.112

We consider it a close question . . . . As an initial question of federal constitutional law, unconstrained by section 2254(d)(1), we might well rule that an equal protection violation has been shown. Applying the standard of 'objective unreasonableness' required by section 2254(d)(1), however we cannot say that it was objectively unreasonable for the [state court] to reject Francis's equal protection claim. . . . Even if only a small increment beyond error is needed to meet the standard of 'objectively unreasonable,' we do not believe it is present [here].113

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108. Id. at 411.
110. Id. at 110.
111. Id. at 111.
112. See id. at 113.
113. Id.
The First Circuit formulates its understanding of reasonableness as lying within a range described by mere error or incorrectness at one end and by the simple possibility a competent court might agree at the other.\textsuperscript{114} “Within that range, if it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application.”\textsuperscript{115} The extent of this range beyond error alone “must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court.”\textsuperscript{116} These formulations highlight that the tangible benefits of deference under this prong are realized where the state court’s decision represents a close call on the federal question.\textsuperscript{117}

Circuits treating unarticulated state court decisions as adjudications on the merits justify deference under the unreasonable application prong as owing to a state court’s result.\textsuperscript{118} In conducting review of these silent state court decisions for compliance with § 2254(d)(1), these circuits do their own analysis of the facts and the governing law from the record.\textsuperscript{119} In the Ninth Circuit, the state court decision does not enter the analysis until the federal habeas court has determined the existence of constitutional error.\textsuperscript{120} The court then measures such error against § 2254(d)(1)’s reasonable benchmark.\textsuperscript{121}

In other circuits, the “full and independent review” is performed by the federal habeas court from the point of view of the state court, and passes on the reasonableness of all the interim steps it assumes the state court took on the way to its result.\textsuperscript{122} In essence, since the federal courts cannot look for support in the state court’s silent decision, they look to the record for any possible support for the state court’s decision. Construing § 2254(d)(1) in this way presumes the reasonableness of a

\begin{itemize}
\item \textsuperscript{114} See McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002).
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} See also HERTZ & LIEBMAN, supra note 5, § 32.3, at 1444 (stating “[w]hen ... the question is so close that the reviewing federal court can muster no confidence that the outcome it would reach de novo is more appropriate than the different outcome the state court reached, then the state court decision is not ‘an unreasonable application[] of clearly established’ Supreme Court precedent, and relief ‘shall be denied’”).
\item \textsuperscript{118} See, e.g., Harris v. Stovall, 212 F.3d 940, 943 n.1 (6th Cir. 2000) (stating “[w]here a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court’s decision”).
\item \textsuperscript{119} See Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999).
\item \textsuperscript{120} See Van Tran v. Lindsey, 212 F.3d 1143, 1155 (9th Cir. 2000).
\item \textsuperscript{121} See id.
\item \textsuperscript{122} See, e.g., Bell v. Jarvis, 236 F.3d 149, 167-75 (4th Cir. 2000).
\end{itemize}
decision the court can only defer to once it finds such decision reasonable.

Where the substance of a claim involves a standard placing heavy burdens on a petitioner to overcome it, the practical impact of this nearly automatic deference may actually be quite minimal. An example is the Strickland standard for ineffective assistance of counsel. Strickland’s presumption of professionalism and broad leeway accorded to counsel’s strategic and tactical choices, and its further requirement of prejudice effectively resolve all shades of gray against a petitioner. Such a standard seems inherently unlikely to often present the close situations where the narrow margin of deference matters. An examination of the cases involving perfunctory state court decisions analyzed under §2254(d)(1)’s unreasonable application prong shows that many involved Strickland claims or other standards difficult for petitioners to meet. Additionally, most of the federal decisions do not expressly rest on the narrow margin of deference. Even where they use such language as “not unreasonable for the state court to . . .”, it most often refers to clearly correct applications of federal law.

The Second Circuit opinion holding that unarticulated state court decisions are adjudications on the merits for the purposes of §2254(d)(1) described its deference as essential to its decision. The petitioner in Sellan sought habeas relief on the ground of ineffective assistance of appellate counsel. The petitioner argued that his counsel failed to raise on appeal a purportedly applicable state rule that would have resulted in the reversal of his conviction. Evidence generated during his state post-conviction relief proceedings showed that counsel’s decision was strategically grounded on a state intermediate court decision directly reflecting the facts of the petitioner’s case and devoid of any support for reversing his conviction. Since that opinion was rendered by the same department hearing her client’s case, counsel

124. See id. at 693.
125. See, e.g., Bell, 236 F.3d at 157; see also Luna v. Cambra, 306 F.3d 954, 961 (9th Cir. 2002), mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303, 308 (2d Cir. 2001).
126. See, e.g., James v. Bowersox, 187 F.3d 866, 870 (8th Cir. 1999) (holding that “trial court’s [exercise of its discretion in failing] to declare a mistrial sua sponte [did not] ‘so infect[] the trial with unfairness as to make the resulting conviction a denial of due process’”).
127. See Sellan, 261 F.3d at 309-10.
128. See id. at 307.
129. See id.
130. See id. at 316-17.
chose to focus on other arguments more likely to prevail and did not argue the specific rule the petitioner put forth.\textsuperscript{131}

The applicable standard of review was not directly presented to the court. The petitioner did not raise it, assuming the AEDPA standard governed by arguing the state court had unreasonably applied Supreme Court precedent.\textsuperscript{132} The decision in the district court posed the question briefly, and then only in dicta as its denial of relief was based on finding that the petitioner’s theory of ineffective assistance of counsel was not grounded in clearly established federal law.\textsuperscript{133} Indeed, the strength of the court’s assertion that the applicability of “AEDPA deference . . . [was] all but outcome-determinative,”\textsuperscript{134} is undercut by its weak characterization of the likely result de novo.\textsuperscript{135} Further, examination of the applicable circuit and Supreme Court cases cited in Sellan indicates the outcome would not have differed under de novo review. First, the Second Circuit had found ineffective assistance of counsel where appellate counsel failed to raise a particularly strong state law claim that “would require per se reversal under prevailing [state] case law.”\textsuperscript{136} The “prevailing [state] case law” on point was not the petitioner’s proffered state highest court’s case, but the intermediate court case which was unfavorable to him. This hardly qualifies as “a particularly strong” claim resulting in “per se reversal.” Second, the circuit court acknowledged that the Supreme Court held that “counsel is not required to raise every non-frivolous issue on appeal.”\textsuperscript{137} Nothing in the law or the facts of Sellan suggests that the narrow margin of “some element of incorrectness beyond error” made the difference there.

That such decisions would probably not be different under de novo review should not be taken as support for continuing to review them deferentially when rendered in the form of a postcard denial. I suggest only that they represent cases requiring no great exertion and posing no great risks for federal courts perceiving themselves constrained by a mandate to defer to state courts. As discussed below, even an ineffective assistance of counsel claim can present a close issue. Where it does, the

\begin{itemize}
\item \textsuperscript{131} See id. at 317.
\item \textsuperscript{132} See id. at 311, n.4.
\item \textsuperscript{133} See id. at 309.
\item \textsuperscript{134} Id. at 310.
\item \textsuperscript{135} See id. at 310. But see Hardaway v. Young, 302 F.3d 757, 759 (7th Cir. 2002) (denying habeas relief despite the court’s “gravest misgivings and only in light of the stringent standard of review” mandated by § 2254(d)(1)).
\item \textsuperscript{136} Sellan, 261 F.3d at 310.
\item \textsuperscript{137} Id.
\end{itemize}
lack of articulated reasoning most greatly threatens both states' and petitioners’ interests.

E. The Danger in “Deference”

Confusion is a relatively benign effect of an imprecise use of the term “deference.” A recent decision in the Sixth Circuit demonstrates a more sinister implication of imprecision. In Schoenberger v. Russell, the court affirmed a district court’s decision denying a state prisoner’s habeas corpus petition. The petitioner asserted that the admission of certain evidence violated his due process rights, and that counsel’s failure to object to the admissions constituted ineffective assistance.

In each of three separate claims, the state reviewing court failed to address the federal constitutional issues, applying only state law and making no reference to Supreme Court precedent. Quoting circuit precedent holding that misapplications of state evidentiary law rarely are appropriate considerations for federal habeas courts, the court found that given the AEDPA’s mandated level of deference, the state court’s determinations regarding the two instances of admission of evidence did not “contravene[] clearly established federal law.” The circuit court did not discuss, or even cite to, any Supreme Court case supporting this holding. The analysis stopped there, with no further inquiry conducted regarding whether the state court unreasonably applied Supreme Court precedent under the second prong of § 2254(d)(1). While the opinion did mention the test for ineffective assistance of counsel under the controlling Supreme Court precedent, its discussion of the petitioner’s claim was conducted under the state’s version of the federal test. No analysis of whether the state law complied with federal constitutional requirements was performed. The circuit court merely reiterated its interpretation of AEDPA’s deference as preventing it from holding that counsel’s failure to object to the evidence’s admission was “contrary to clearly established federal law.” Again, analysis under § 2254(d)(1) stopped there, with no

138. 290 F.3d 831 (6th Cir. 2002).
139. See id. at 834-37.
140. See id.
141. Id. at 835.
143. See Schoenberger, 290 F.3d at 837 (Keith, J., concurring).
144. See id.
145. Id. at 836-37.
examination of whether the state unreasonably applied governing Supreme Court precedent to the petitioner.

While the three-judge panel concurred in the result, it split over the issue of whether the state court’s failure to discuss and apply federal law was an “adjudication on the merits” triggering AEDPA “deference.” Two judges each wrote separately, urging the circuit to reconsider its precedent that held that AEDPA deference adheres “even to the constitutional claims that the state court never considered.”146 The concurring justices thought the Sixth Circuit should fall in line with “sister circuits who have addressed this issue and hold that a claim not actually decided upon by the state courts should not be reviewed under § 2254(d)(1)’s deferential standard, but the pre-AEDPA de novo standard of review.”147

What is most remarkable about both concurrences is that while each evinces a concern over what the proper test regarding state court decisions silent on federal claims should be, neither addresses the lead opinion’s complete misreading of the analysis mandated by Williams. The danger in finding that “AEDPA deference,” rather than the process mandated by § 2254(d)(1), applies to all federal claims “adjudicated on the merits” is clearly evidenced in Schoenberger’s deferential consideration of whether the state court decision was contrary to clearly established federal law. This is clearly counter to the process enunciated in Williams, which requires such deference be applied only after the federal habeas court determines that a state decision is not contrary to clearly established federal law.148

The danger in presumptively according state court decisions deference rather than performing the analysis prescribed by § 2254(d)(1) is demonstrated starkly by a recent Second Circuit case.149 Rudenko represented sixteen consolidated claims of fourteen state prisoners’ appealing denials of habeas relief in the district court, issued over a three year period from 1996 to 1999. Most of the district court opinions expressly based their denials on the state intermediate court’s “ambiguous opinions” and the state respondent’s “multi-alternative memoranda of law,” incorporating these by reference in terse paragraphs.150 The two judges who authored those opinions issued a

146. Id. at 838 (Keith, J., concurring) (citing Doan v. Brigano, 237 F.3d 722, 730-31 (6th Cir. 2001)).
147. Id.
149. See Rudenko v. Costello, 286 F.3d 51 (2d Cir. 2002).
150. Id. at 58-61, 81.
memorandum opposing the circuit court's granting of a certificate of appealability in one of the cases, setting out their understanding that the AEDPA required "that federal district courts considering habeas petitions by state prisoners give substantial deference to state court rulings [making] their adoptions of the state-court opinions particularly appropriate."151 After quoting § 2254(d)(1), emphasizing its threshold requirement of an adjudication on the merits,152 the court continued:

Most of the [state court] decisions adopted by the district court, which apparently were accorded AEDPA deference, were not clearly determinations of the merits of all of the constitutional claims asserted in the present habeas petitions. Some of the claims that are at issue here were not mentioned in the [state court] opinions and may not even have been presented to that court.153

The claims of thirteen of the fourteen petitioners suffered from this defect and were remanded to the district court for clarification of the basis for their original denials.154

While Rudenko is primarily a case about a federal habeas court's responsibility to provide unambiguous, if minimal, reasoning in its decisions, its illustration of the impact of misinterpreting the word deference as the sum and substance of the mechanics of § 2254(d)(1) is startling. Thirteen people were denied even the narrower post-AEDPA federal habeas review of their claims. Although these thirteen petitioners represented less than ten percent of the approximately 170 state habeas petitions decided in the district during that time,155 the systematic misapplication of the law caused by an overly broad conception of the word "deference" is more striking in the aggregate than any one decision standing on its own.

That federal courts fail to conduct the analysis mandated by § 2254(d)(1) and its interpretation by the Supreme Court is in itself problematic. In these cases, however, there was at least some reasoning in the underlying state court opinions that could have informed the reviewing federal courts. The likelihood that a federal reviewing court, unanchored by any findings of fact or legal analysis in a state postcard denial, could misapply § 2254(d)(1) is considerably magnified.

151. Id. at 57 (emphasis added) (internal citation omitted).
152. See id. at 68.
153. Id. at 69.
154. See id. at 81.
155. Result of Westlaw search on file with author.
IV. THE SUPREME COURT AND SUMMARY STATE COURT OPINIONS

The Supreme Court has yet to directly address the issue of what quantum of articulated analysis is necessary to qualify a state court opinion for review under § 2254(d)(1). Inferences favorable to all sides of the issue can be drawn from the Court's cases interpreting the statute. In Weeks v. Angelone, the Court reviewed, under § 2254(d)(1)'s "unreasonable application" prong, a petitioner's claim dispensed with in the state court in the following few brief sentences:

[D]efendant effectively presents no arguments in support of five of [forty-seven] alleged errors . . . . Typical of the argument in support of those five is the following conclusory statement on brief in support of No. 45: "This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States . . . . We have considered these so-called arguments and find no merit in any of the five."

Because the issue the Supreme Court actually reviewed in the petitioner's federal habeas proceedings was one of the "effectively" unargued claims, at least one circuit has relied on Weeks as authority for treating summary state court decisions as adjudications on the merits. While Weeks provides the strongest support for this view, this support is not absolute. A close reading of the state case makes clear that the state court did not find the petitioner's claim without merit, but his arguments in support of it. The state court did so only after considering those arguments. The state court provided detailed analysis of the rest of the petitioner's claims, taking approximately thirteen reporter pages to do so and citing to governing Supreme Court precedent in support of its holdings. This level of articulated reasoning bolsters confidence in the sufficiency of the consideration paid to the five unargued claims. Viewed in this light, Weeks at best supports the

156. 528 U.S. 225 (2000).
157. See id. at 234.
159. See Weeks, 528 U.S. at 236-37.
160. See Chadwick v. Janecka, 312 F.3d 597, 606 (3d Cir. 2002) (holding that per Weeks, "§ 2254(d) standards apply when a state supreme court rejects a claim without giving any indication of how it reached its decision").
161. See Weeks, 450 S.E.2d at 383.
162. See id.
view that state courts need only supply some minimal analysis for their decisions.

Importantly, Weeks neither addressed nor offered an explicit holding that perfunctory state court decisions are adjudications on the merits qualifying for federal habeas review under § 2254(d)(1). Although the Fourth Circuit opinion reviewed by the Court specifically addressed this issue, citing its own precedent “holding that a perfunctory decision constitutes an adjudication on the merits,” it analyzed the state court’s opinion closely, as above, emphasizing that the state court “considered” and found all of the petitioner’s “arguments” on the claim at issue without merit. Thus, absent a statement by the Supreme Court grounding its decision, its analysis under § 2254(d)(1) as easily validates requiring minimal articulated reasoning as it does of requiring none at all.

The majority opinion in Williams, decided after Weeks, frequently uses active phrases in describing the mechanics of § 2254(d)(1), such as: “if the state court applies a rule,”165 “a state-court decision . . . correctly identifies . . . controlling legal authority,”166 “[a] state court decision that correctly identifies the governing legal principle but applies it unreasonably,”167 “when a state-court decision unreasonably applies the law,”168 and “if a state court identifies . . . but unreasonably applies . . .”169 This suggests a presumption on the part of the Court that in order to be reviewable under § 2254(d)(1), a state court decision must provide articulated reasoning rather than merely a passive one word or one sentence denial. The Supreme Court relied heavily on the articulated state court opinion, “analyzing the reasoning employed by the State court in ways that would have been impossible if the State court had not identified the federal precedents under which it acted.”170 Additionally, the description in Williams of the state court’s articulated analysis denying the petitioner relief as an “adjudication”171 lends support for the view that such adjudications are defined by more than their mere results.

164. Weeks v. Angelone, 176 F.3d 249, 259 (4th Cir. 1999) (citing Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998)).
166. Id. at 406 (emphasis added).
167. Id. at 408 (emphasis added).
168. Id. at 409 (emphasis added).
169. Id. at 413 (emphasis added).
171. See Williams, 529 U.S. at 413 (O’Connor, J., concurring).
The Supreme Court most recently held that surviving the “contrary to” prong does “not require citation of [its] cases—indeed, it does not even require awareness of [them], so long as neither the reasoning nor the result of the state-court decision contradicts them.” 172 Early overturned the Ninth Circuit’s decision granting habeas relief based on its finding that the state court neither identified nor applied federal law. 173 The Supreme Court held that the state court’s reliance on its state rule, well established as providing defendants greater protection than its sister federal rule, was sufficient. 174 While the first clause of the quoted holding appears to relieve state courts of a burden in drafting their opinions, the second clause actually imposes one. By requiring both the state court’s result and reasoning not contradict Supreme Court precedent, the Court places an affirmative obligation on state courts to expose their rationale for review.

V. POSTCARD DENIALS AS ADJUDICATIONS ON THE MERITS

It is clear from the above discussion that the fact that a state court has issued a decision does not of necessity qualify that decision for the prescriptions of § 2254(d)(1), regardless of how voluminous its rationale. It is also clear that finding a postcard denial not to be an adjudication on the merits would provide a federal habeas court the broadest latitude when reviewing such decisions. The effect of the alternative finding, that such decisions are adjudications on the merits, is that the applicability of § 2254(d)(1) is triggered. This, as discussed, would require deference to these decisions only where they fall under its “unreasonable application” prong.

Holding summary state court decisions to be adjudications on the merits is problematic on many levels. First, it introduces practical difficulties in applying § 2254(d)(1), requiring judicial gymnastics on the part of federal courts extending well beyond a deferential bow. The methods applied in federal courts treating postcard denials as adjudications on the merits have adverse implications for the principles

172. Early v. Packer, 537 U.S. 3, 8 (2002) (emphasis added). The discussion of “awareness” in Early is dicta in that the state court’s actual knowledge of the existing federal rule was not at issue. However, if this statement accurately reflects the Supreme Court’s opinion that state courts need not actually be aware of federal law the Supremacy Clause binds them to uphold, it is extremely problematic: it undermines the very foundations upon which federal courts’ respect for state court decisions on issues of federal law rests. It is illogical to presume a state court unaware of Supreme Court precedent competent in the exercise of its concurrent jurisdiction applying it.
173. See id.
174. See id.
motivating the AEDPA. The real advantage of the deference accorded under § 2254(d)(1)’s “unreasonable application” prong is gained by state court decisions on close calls. This advantage is most at risk where a state court fails to support its conclusion with articulated analysis. Additionally, deferring to such decisions risks awarding deference where none is due, thus resulting in illegal detentions or executions. Finally, the burden imposed on petitioners, already heavy under other habeas reforms imposed by the AEDPA,\(^\text{175}\) is increased when confronted with a silent state court decision.

### A. Functional Implications

Deferential review under the AEDPA first requires a state court’s decision result from an adjudication on the merits. Such a decision must not then be the product of an unreasonable application of Supreme Court precedent. Postcard denials on their face provide no indications these requirements are met.

The First and Third Circuit approaches regarding whether a state court decision resulted from a merits determination\(^\text{176}\) would put an unarticulated state court decision outside § 2254(d)(1)’s reach: it neither provides clear evidence the federal issue was addressed nor is it clear from its face “that the merits of the petitioner’s constitutional claims were examined in light of federal law as established by the Supreme Court.”\(^\text{177}\) Finding postcard denials not reached by § 2254(d)(1) would obviate the additional analytic work required by the Green test applied in the Second and Fifth Circuits,\(^\text{178}\) placing the responsibility for making this determination clearly on the state courts making it.

Similarly, determining whether a state court unreasonably applied Supreme Court precedent from the void of a postcard denial can be problematic.\(^\text{179}\) In Helton, a district court discussed this problem upon being confronted with a series of summary state court denials of a prisoner’s petition for habeas corpus whose lack of articulated reasoning gave “no indication at all whether or not [they] applied” the appropriate Supreme Court precedent.\(^\text{180}\)


\(^{176}\) See supra notes 53-59 and accompanying text.

\(^{177}\) Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2002).

\(^{178}\) See supra notes 60-94 and accompanying text.

\(^{179}\) See, e.g., Helton v. Singletary, 85 F. Supp. 2d 1323 (S.D. Fla. 2000), aff’d by Helton v. Sec’y for the Dep’t of Corrs., 233 F.3d 1322 (11th Cir. 2000).

\(^{180}\) See id. at 1336.
This court could treat the issue, then, as a nullity, assume that the state courts did apply the [Supreme Court] analysis, and proceed to the third step . . . of determining whether the state courts' application of [Supreme Court precedent] was 'unreasonable.' Or this court could make the inverse assumption—that the state courts' perfunctory dispensations indicate the Supreme Court's decision . . . was ignored.\textsuperscript{181}

After deciding that it could not "reasonably find the state court applied federal precedent" in the complete absence of evidence it did so, the federal habeas court ruled that the state court decisions "were contrary to federal law."\textsuperscript{182} Further, the district court acknowledged that deference does not apply to such decisions, stating, "[u]nder § 2254(d)(1), the court need not be bound by those state court judgments."\textsuperscript{183} While this decision was rendered prior to the Supreme Court's decision in Williams, the Eleventh Circuit's opinion upholding it on appeal was given after Williams.\textsuperscript{184} The circuit court stated, "we are favored with no reasoning, analysis, findings of fact, or legal basis for the denials . . . [and] have, therefore, no basis for determining whether the state court properly applied [Supreme Court precedent] in denying the habeas claim. Accordingly, we find no error in our trial court's determination."\textsuperscript{185}

Forcing postcard denials through a deferential gatekeeper erects a tall barrier when applying § 2254(d)(1). Since most circuits directly addressing the issue have concluded that such perfunctory state court decisions either are or can be adjudications on the merits,\textsuperscript{186} placing

\begin{itemize}
  \item \textsuperscript{181} Id.
  \item \textsuperscript{182} Id.
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} See Helton v. Sec'y for the Dep't of Corrs., 233 F.3d 1322 (11th Cir. 2000).
  \item \textsuperscript{185} Id. at 1326-27. Again, the effect of the court's recent decision in Early, holding that surviving the "contrary to" prong does "not require citation of [its] cases—indeed, it does not even require awareness of [them]," see supra notes 172-74 and accompanying text, on the Eleventh Circuit's approach has not yet been addressed. However, given Early's reliance on the fact that the state court opinion cited state law that provided greater protections than the related federal rule, it is not clearly extensible to state court opinions that cite no law at all.
  \item \textsuperscript{186} See Chadwick v. Janecka, 312 F.3d 597 (3d Cir. 2002); Luna v. Cambra, 306 F.3d 954 (9th Cir. 2002) mandate recalled and reissued as amended by Luna v. Cambra, 311 F.3d 928 (9th Cir. 2002); Wright v. Sec'y for the Dep't of Corrs., 278 F.3d 1245 (11th Cir. 2002); Sellan v. Kuhlman, 261 F.3d 303 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000); Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999); James v. Bowersox, 187 F.3d 866 (8th Cir. 1999); Mercadel v. Cain, 179 F.3d 271 (5th Cir.1999). \textit{But see} Gruning v. DiPaolo, 311 F.3d 69 (1st Cir. 2002) (holding that the state court's rejection without opinion of petitioner's claims was not an adjudication on the merits qualifying for review under § 2254(d)(1) and reviewing the state court's decision to deny relief de novo).
\end{itemize}
deference ahead of the requisite § 2254(d)(1) determinations results in a level of deference much broader than contemplated by the term “unreasonable.”

An independent review that gives full § 2254(d)(1) deference to any possible grounds for affirming the state court would... seem unwarranted as the a federal court would then be granting extreme deference not only to the grounds the state court actually relied on, but to all grounds that they could have relied on... 187

The Second Circuit in *Rudenko v. Costello*,188 discussed above in the context of the implications of misplacing deference in § 2254(d)(1) determinations, went into detail about the difficulties of meaningful review in the absence of articulated reasoning.189 Although the discussion was in the context of federal circuit courts reviewing federal district courts, many of the practical difficulties are the same when applied to federal review of state court decisions, principles of comity notwithstanding.

Federal courts review a lower court’s findings of fact under a clearly erroneous standard.190 Issues of law and issues of mixed law and fact are reviewed de novo.191 Absent articulated reasoning, determining which of these scenarios formed the basis for a decision is difficult.

Whether the district court’s ultimate decision turns on factual determinations or on a choice between competing legal principles or on the manner in which the legal principles are applied to the facts, the district court must provide an indication of its rationale that is sufficient to permit meaningful appellate review.192

This distinction is paralleled in federal habeas review of state court decisions. Under § 2254(e)(1), a state court’s findings of fact are presumed to be correct unless rebutted by clear and convincing evidence.193 Section 2254(d)(1) mandates a less deferential standard than this, although more deferential than de novo, to applications of controlling Supreme Court precedent.194 How can the factual or legal

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187. Schoenberger v. Russell, 290 F.3d 831, 840 n.6 (6th Cir. 2002) (Keith, J., concurring).
188. 286 F.3d 51 (2d Cir. 2002).
189. See id. at 65-69.
190. See FED. R. CIV. P. 52(a).
191. See Rudenko, 286 F.3d at 64-65.
192. Id. at 65.
194. See supra notes 17-33 and accompanying text.
basis of a state court’s decision, necessary to determine the standard of federal habeas review, be divined from the single word, “Denied”? Rudenko further examined the issue in the context of the very deferential abuse of discretion standard.195

[E]ven when the district courts have “wide discretion . . . discretionary choices are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles. . . . [T]he exercise of judicial discretion hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.” . . . “If we are to be satisfied that a district court has properly exercised its discretion, we must be informed by the record of why the district court acted as it did.”196

A federal appellate court remands cases to the district court for further clarification where the record is “insufficiently clear to permit [it] to determine the basis for the district court’s decision.”197 Principles of federalism prevent a federal habeas court from remanding an unclear or ambiguous decision to a state court for clarification; it can only grant or deny the writ based on the record before it.198 If that record is insufficient to adequately inform a federal habeas court’s review of the basis for the state court’s decision, surely the standard of “reasonable” deference does not mean “shielded from . . . review” any more than the more lenient abuse of discretion standard does.199

B. Policies Motivating the AEDPA

How are the interests motivating the AEDPA’s amendments to § 2254(d)(1) served by treating postcard denials as adjudications on the merits? Depending on the interest involved, it is either served not at all or actually frustrated. One policy motivating the Act was that of protecting a state’s interest in the finality of its judgments.200 This

195. See Rudenko, 286 F.3d at 65.
196. Id. (internal citations omitted).
197. Id. at 66.
198. See Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
200. See, e.g., 141 CONG. REC. H1425-03 (1996) (statements of Representative Cox) (“[I]f . . . statutory habeas corpus is available simply to throw out the whole State judicial system, why do we have it in the first place? If we are going to look at these questions from scratch, de novo, facts, evidence, law, the whole thing, as if the State proceeding had never happened, then [a death row prisoner] would be able to, in the future, [further] delay his execution . . . .”).
interest can only be valid, however, where the judgment results from a proper adjudication of a petitioner’s federal claim—a state has no interest in judgments resulting from the misapplication of or disregard for federal law. A silent state court opinion gives as much evidence that a state court adequately exercised its concurrent jurisdiction as it does that the state court failed in this exercise: it provides no support at all. Under § 2254(d)(1), such a silent opinion is accorded only a minimal level of deference until certain threshold questions are answered. This deference is limited to asking those questions of the state court decision. If the words of the judgment itself do not provide the requisite answers, there is simply no basis for extending it the deference due opinions under the “unreasonable application” prong.

Another of the AEDPA’s goals, according a due modicum of respect to state courts exercising concurrent jurisdiction, is defeated by treating postcard denials as adjudications on the merits. First, federal deference to unarticulated state court decisions demonstrates a lack of respect for state courts whose diligence results in a reviewable opinion. Second, where a state court is silent on the reasoning behind its decision, a federal habeas court is practically forced to provide its own in order to comply with § 2254(d)(1)’s prescriptions. Determining whether a perfunctory state court decision contradicted Supreme Court precedent requires the federal habeas court to identify the correct precedent; determining whether such precedent was applied unreasonably to the facts further requires the federal court to do so itself. Such review extends well beyond the review of an articulated opinion that encompasses a search for support of the state court’s holding. It effectively requires a federal court to determine any possible basis for the state court’s decision and to pore through the record for any possible support. Not only is judicial economy ill served, certainly comity is offended where a federal court presumes to speak for a state court, pronouncing what it must have meant, whether or not the end results differ.

Finally, treating postcard denials as adjudications on the merits creates a perverse incentive for state courts to ultimately not consider their petitioners’ federal claims at all. Where silence represents a state

201. U.S. CONST. art. VI, cl. 2.
202. See, e.g., 141 CONG. REC. H1425-03 (1996) (statements of Representative Cox) (reading a letter to Representative Hyde from a group of state attorneys general stating, “[t]he central problem underlying federal habeas corpus review is a lack of comity and respect for state judicial decisions”).
203. See supra notes 118-22 and accompanying text.
court’s failure to consider an issue, it will reap the same deferential benefit as if it had spoken, at least where its result is not contrary to Supreme Court precedent. This would permit “a state court that flagrantly ignored the governing law [to] thwart independent federal habeas review,” and “profoundly undermine any incentive for state courts to openly participate in constitutional adjudication.”

The disincentive, however, is functionally much greater. Given the work required of a federal court applying § 2254(d)(1) to postcard denials, a state court practically receives the additional benefit of an extremely well qualified law clerk. Why wouldn’t a busy state court avail itself of this golden opportunity to conserve its resources?

C. State Court Burdens and Benefits

Proffering the deference accorded under § 2254(d)(1) only to articulated state court decisions is the best way to guarantee a state court receives its benefits. It is also the only way to avoid the risk that the petitioner’s detention does not rest on violations of his due process rights. Further, rather than imposing burdens on state courts, not treating perfunctory state court decisions as adjudications on the merits can be viewed as honoring state courts’ resource management choices while protecting petitioners’ rights to review.

1. The Benefits of Articulated Reasoning

Even federal courts distasteful of imposing structural requirements on state court opinions recognize the benefit of articulated decisions. “[O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review.” A state court’s explanation of its reasoning would avoid the risk that we might misconstrue the basis for the determination, and consequently diminish the risk that we might conclude the action unreasonable . . . . The magnitude of this risk depends in large part on the nature of the federal law in question. Rules requiring a fact intensive totality of the circumstances determination, where the balances can be delicate, present greater risks a state court will be misconstrued absent articulated reasoning supporting its decision.

204. Steinman, supra note 5, at 1520.
205. Id. at 1522.
206. Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
207. Aycox v. Lytle, 196 F.3d 1174, 1178 n.3 (10th Cir. 1999).
In *Hardaway v. Young*, the Seventh Circuit relied heavily on the analysis in the state court's decision when it applied § 2254(d)(1)'s "unreasonable application" prong to the petition of a fourteen year old convicted murderer who sought habeas relief on the basis of the involuntariness of his confession. A confession's voluntariness is determined based on a consideration of the totality of the circumstances surrounding it, weighing such factors as the personal characteristics of the defendant as well as whether he was subject to physical mistreatment and psychological coercion. Where a defendant is a minor, evaluation of his personal characteristics specifically includes his "age, experience, education, background and intelligence." The *Hardaway* court further recognized that "[t]he Supreme Court... has spoken of the need [for] 'special caution' when assessing the voluntariness of a juvenile confession."

Since the state court correctly identified the applicable constitutional test and acknowledged the special care required of it due to Hardaway's age, the federal court analyzed the claim as one involving an "unreasonable application" of Supreme Court precedent. After performing its own totality of the circumstances analysis, the court stated it "might well find that on balance [there was evidence] enough to exclude the confession," but held it could not grant relief. "As the state courts pointed out, there are arguments that pass the lenient test of 'reasonableness' in favor of finding the confession voluntary." The federal habeas court then went into a detailed discussion of the factors considered in the state courts' opinions. It continued:

[T]he trial court stated that it weighed all relevant factors, and after doing so, it concluded that the lack of any apparent coercion by the police, Hardaway's recitation of his rights, his mental capacity, and his past experience with the criminal justice system on balance rendered his confession voluntary and admissible. Even assuming that the weighing of factors by the... state courts... was incorrect, the

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208. 302 F.3d 757 (7th Cir. 2002).
209. See id. at 761-63.
215. Hardaway v. Young, 302 F.3d 757, 762 (7th Cir. 2002).
216. See id. at 762.
217. Id. at 766.
218. Id. at 767.
219. See id. at 767-68.
balance is close enough that, in the final analysis, it is not unreasonable.\textsuperscript{220}

The federal court "reluctantly conclude[d]" that the state court did not unreasonably apply the totality of the circumstances test to Hardaway's confession.\textsuperscript{221} It denied habeas relief despite its "gravest misgivings and only in light of the stringent standard of review" mandated by § 2254(d)(1).\textsuperscript{222}

Surely, the deference due under § 2254(d)(1)'s "unreasonable application" prong made a difference in this close case. However, it is unlikely, given the federal court's inclination to find the confession involuntary, that the state court would have received the benefit of this deference absent the articulated reasoning supporting its decision. Detailing the analysis they performed enabled the state courts to convince a "reluctant" federal court, over its own "misgivings," that it was owed the small increment of deference that mattered here.

2. The Risks of Silence

A passage from Williams, discussing the standard for the prejudice prong under the Strickland test for ineffectiveness of counsel,\textsuperscript{223} provides the basis for a hypothetical highlighting a mirror issue, that of awarding a state court the essential benefit of deference where no deference is deserved.

If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be [contrary to] our clearly established precedent...\textsuperscript{224}

For the sake of argument, suppose the state decision also found the prisoner had shown there was a reasonable probability the result would have differed. Where a state court clearly evidences such a basis for its decision, per Williams, a federal habeas court does not owe it the benefit of deference under § 2254(d)(1).\textsuperscript{225} However, where a state court is silent as to the rationale for this decision, treating it as an adjudication on

\textsuperscript{220} Id.
\textsuperscript{221} Id. at 759.
\textsuperscript{222} Id.
\textsuperscript{223} See Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that the test for prejudice is the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").
\textsuperscript{225} See id. at 406.
the merits risks a federal court awarding the state court a deferential windfall. For instance, the federal court might assume state court’s decision was based on an analysis that the petitioner demonstrated a quantum short of the necessary “reasonable probability” the outcome would have differed. A federal court upholding the state’s rejection under the “unreasonable application” prong, based on its own review of the record, would not only be legally inappropriate in this situation, it runs counter to specifically enunciated Congressional intent behind the AEDPA. It also effectively nullifies the likely decision by the state that, based on a correct understanding of Strickland, the petitioner was due relief.

3. Relieving State Court Burdens

Judge Guido Calabresi offered a vision of state empowerment rather than disrespect if perfunctory state court decisions are not treated as adjudications on the merits qualifying for deferential review under § 2254(d)(1). Affording states a mechanism by which they can refuse the “first opportunity to review [a federal constitutional] claim and provide any necessary relief,” accords a state the same respect that comity requires as does offering it the opportunity to begin with. In this view, a state would signal its intention not to shoulder the “heavy, and sometimes unwanted and unmanageable, burden” of deciding “what can be very complicated questions of federal law” by issuing an opinion failing to address them. Reviewing these postcard denials de novo enables state “courts that believe their energy and resources are better employed elsewhere . . . . to exercise that control over their judicial resources which a true respect for state sovereignty requires,” while fully protecting petitioners’ rights.

The Second Circuit did not ultimately share Judge Calabresi’s vision, due in part to its lack of “textual” support within the statute. Support, however, can be found in the related area of exhaustion. The exhaustion doctrine mandates that “[f]ederal habeas relief is available to state prisoners only after they have exhausted their claims in state court.” The exhaustion doctrine, as codified in 28 U.S.C. §

229. See Washington, 255 F.3d at 63.
230. Id. at 62.
231. Id. at 63.
233. O’Sullivan, 526 U.S. at 839.
§§ 2254(b)(1) and (c), is a “rule of comity . . . designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts.” In O'Sullivan, the Supreme Court held that the mere fact a state’s highest court’s review was discretionary did not make such review unavailable and relieve a petitioner from the obligation of seeking it in order to fulfill the exhaustion requirement. While recognizing that “some state courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court [and that in these circumstances . . . the increased, unwelcome burden on state supreme courts [may disserve] . . . comity,” it held that “the creation of a discretionary review system does not, without more, make [such] review . . . unavailable.” This requirement of “more” is satisfied where a state supreme court decision or order includes specific language stating a petitioner has exhausted all available state remedies when he presents his claims to the state’s intermediate court. “Disregarding a state supreme court’s explicit attempt to control its docket and to decline the comity extended to it by the federal court goes against the very purpose of the exhaustion doctrine and obliterates . . . comity.”

One can argue that the Supreme Court’s requirement of “more” and the lower courts’ focus on the positive declarations of state courts satisfying it, militate against a presumption that a state court’s passive silence is an effort on its part to “decline the comity extended to it” or to “exercise . . . control over [its] judicial resources.” While certainly even a coded expression that a state court’s failure to address the merits of a petitioner’s federal constitutional claim was intentional would be helpful, such a presumption is not without basis. Prior to the passage of the AEDPA, a state court did not need to communicate its intent in

234. Id. at 845.
235. See id at 846.
236. Id. at 847.
237. Id. at 848.
238. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999) (holding a state supreme court’s decision “that [s]ince the defendant has been given the appeal to which he has a right, state remedies have been exhausted” . . . [mean] review need not be sought before the [state’s supreme court] in order to exhaust state remedies.”); Mattis v. Vaughn, 128 F. Supp. 2d 249, 261 (E.D. Pa. 2001) (holding that a state supreme court order “removes a petition for discretionary review from one full round of [the state’s] ordinary review process, and therefore makes discretionary review unavailable for the purpose of the exhaustion requirement in § 2254”).
239. Mattis, 128 F. Supp. 2d at 259.
240. Id.
242. See supra note 77.
this regard to avoid risking a petitioner’s otherwise available opportunity for de novo federal review.243 In any event, an affirmative declaration that unarticulated state court decisions will not be treated as adjudications on the merits obviates the need for this presumption and allows a state court’s silent “less” to be “more.”

D. Petitioners’ Burdens

Rudenko also addressed the effect of perfunctory decisions on petitioners themselves.244

Specifications of the grounds on which the district court denied a habeas petition would seem especially necessary where . . . the petitioner is not represented by counsel. Without an explanation of the court’s rationale, it hardly seems likely that these prisoners proceeding pro se would be able to make an intelligent decision as to whether—and as to what issues—to attempt an appeal, or to make any orderly presentation in support of an appeal, given that the application of AEDPA is believed to be “particularly difficult” even “for law clerks who serve . . . one year, to master.”245

Again, while this argument was made regarding federal appellate review of federal habeas decisions, its principles are still apt when applied to federal review of state habeas decisions. A state pro se petitioner is no more able to intelligently effectuate complex habeas strategy simply because a federal district court has not yet had the opportunity to review his petition. A compelling argument can be made that terse, unarticulated denials of relief in state court proceedings unfairly prejudice pro se habeas petitioners, and, as such, states should not be permitted to take advantage of the structure of their courts’ opinions in countering these prisoners’ claims.

Support for this argument can also be found in the Supreme Court’s interpretation of a different AEDPA amendment to federal habeas review of state prisoners’ petitions.246 Under § 2254(e)(2), a federal habeas court cannot grant a state petitioner an evidentiary hearing where he has “failed to develop the factual basis of a claim in state court,”

243. See supra note 8.
244. See Rudenko v. Costello, 286 F.3d 51, 64 (2d Cir. 2002).
245. Id. at 67 (internal citations omitted).
246. See Michael Williams v. Taylor, 529 U.S. 420 (2000). I refer to this case using the petitioner’s full name as this opinion, interpreting another subsection of § 2254 amended by the AEDPA, involved a different state petitioner named “Williams” and was decided on the same day as Williams v. Taylor, 529 U.S. 362 (2000) interpreting § 2254(d)(1).
except in two narrow circumstances. "To be... a ‘failure’ under [§ 2254(e)(2)] the deficiency in the record must reflect something the petitioner did or omitted."248 "[W]here an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, 2254(e)(2)" does not apply, and the federal habeas court retains full discretion over whether or not to conduct the hearing.249 Here, comity cedes to the habeas petitioner's right to meaningful review of the legality of his detention.250 The AEDPA does not permit a state court to "insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts."251 In Michael Williams, the Court agreed with the circuit court cases discussed here, specifically citing to them.252 The Court further stated that "comity is not served by saying a prisoner ‘has failed to develop the factual basis of a claim’ where he was unable to develop his claim in state court despite diligent effort."253

The only arguable basis for distinguishing a state court's development of factual issues from a state court's exposition of legal issues is that its factual determinations are accorded more deference than are its legal determinations.254 This margin is narrowly limited to the difference between "presumed correct" unless rebutted by clear and convincing evidence255 and "[s]ome increment of incorrectness beyond error."256 However, a pro se petitioner developing a legal rather than factual basis for his petition is confronted with an inherently more difficult task, being most likely far more familiar with even the disputed facts of his case than with the law applied to them. Treating summary state court decisions as adjudications on the merits in the context of pro se petitioners is therefore inapposite to the policy motivating the broader latitude generally accorded them.257 Since there is no constitutional right to counsel in federal habeas proceedings,258 all state prisoners are potentially pro se petitioners: whether they will be represented in any

248. Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997).
250. See id. at 337-38.
251. Burris, 116 F.3d at 259.
253. Id. at 438.
254. See supra note 189 and accompanying text.
256. Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000).
257. See, e.g., U.S. v. Garth, 188 F.3d 99, 105 n.7 (3d Cir. 1999) (stating, "[w]e generally accord wide latitude to pro se petitions for relief").
possible future proceedings can only be known after the state court has ruled.

VI. THE POSTCARD DENIAL AS ADJUDICATION: JUST BECAUSE JUDGE POSNER SAID IT, DOESN’T MAKE IT SO

Addressing whether or not postcard denials should be treated as adjudications on the merits presupposes that they represent the results of adjudication. A question fundamental to the animating spirit behind the writ of habeas corpus is whether a perfunctory, unarticulated state court decision can be properly considered adjudication at all, let alone adjudication that may or may not have reached the merits of a petitioner’s federal constitutional claims. In its decision holding that a state court need not articulate the rationale underlying its decision for it to be reviewed under § 2254(d)(1), the Second Circuit began its task of statutory construction by presuming that “[w]hen Congress uses a term of art... it speaks consistently with the commonly understood meaning of the term.” Its own “well settled meaning” included reference to an adjudication’s “res judicata effect.” The court then cited as support a legal dictionary’s definition of adjudication as “the legal process of resolving a dispute; the process of judicially deciding a case,” a definition at odds with its own result oriented decision. However, the court made no inquiry into any other areas where Congress used the term.

Federal habeas review of state prisoner petitions is not the only area of tension between judicial review and respect for a coordinate branch of government where Congress has found the concept of adjudication to be important. In the area of administrative law, an agency’s responsibilities and the rights of those affected by an agency’s conduct depend on whether such conduct is adjudicatory or rulemaking in nature. The Administrative Procedures Act defines “adjudication [as] agency process for the formulation of an order.” An “order” is defined as “the

261. Id.
262. Id. (citing BLACK’S LAW DICTIONARY (7th ed. 1999)).
whole or a part of a final disposition.”266 In this context, Congress has clearly conceived of the “process” of adjudication as more than its ultimate result in a “final order.” The Administrative Procedures Act also imposes structural requirements on decisions resulting from agency adjudications, requiring they “include a statement of . . . findings and conclusions, and the reasons or basis therefor [sic], on all material issues of fact, law or discretion . . . on the record.”267 Congress thereby required a published decision reflect the adjudicatory “process by which an agency applies either law or policy, or both, to the facts of a particular case in order to determine past and present rights and responsibilities.”268

Further,

[a]n adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including . . . [a] formulation of issues of law and fact in terms of the application of rules . . . [and] other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, . . . and the opportunity of the parties to obtain evidence and formulate legal contentions.269

These structural requirements are motivated by concerns of preventing arbitrary agency action,270 and enabling meaningful judicial review.271

The writ of habeas corpus is similarly motivated by concerns of preventing arbitrary government conduct.272 Review of state postcard denials is no less infected with guesswork than judicial review of unclear or incomplete agency decisions. The two different contexts also share similar concerns about the appropriate level of deference under which

[^268]: 2 AM. JUR. 2d Administrative Law, § 261 (defining agency adjudication).
[^269]: RESTATEMENT (SECOND) OF JUDGMENTS § 83 (2002); see also United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (stating “[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose”).
[^270]: See Armstrong v. Commodities Futures Trading Comm’n, 12 F.3d 401, 404 (3d Cir. 1993).
[^271]: See id.; see also NLRB v. Clement-Blythe Co., 415 F.2d 78, 82 (4th Cir. 1969) (stating “the reasons for the [agency’s] decision become essential, for lack of clarity in the administrative process infects review with guesswork”).
judicial review should be conducted. Tracing the history of judicial review of agency decision-making, Judge Patricia Wald wrote:

The concerns that animate that debate—the desire for a check on ... absolutism ... and a means of insuring that laws are actually carried out as intended—are still pitted against a deep seated conviction, rooted in our constitutional format of separation of powers, that the courts should not take [inappropriate] control ... from [coordinate] political branches. This may result in an unavoidable and irreducible tension inherent in any attempt to accommodate deference and scrutiny in the same jurisprudential doctrine. At different periods, one goal trumps the other, and usually the winner reflects forces outside the boundaries of the law, the government or the courthouse.

Judge Wald could just as easily be describing the issues surrounding federal habeas review of state court denials of post-conviction relief. The Administrative Procedures Act's requirements on the structure of decisions resulting from agency adjudications were enacted in a period of "almost obsequious [judicial] deference to agency decisions." It is highly appropriate then to import the process dependent agency concept of adjudication into the context of § 2254(d)(1), enacted also during a period when deference was philosophically trumping scrutiny. Doing so would result in the inevitable conclusion that postcard denials, lacking "the essential elements of adjudication," such as "a statement of... the reasons or basis" for their conclusions "on all material issues of fact [or] law ... on the record," are not reflective of adjudication at all.

In a Seventh Circuit decision often cited as supporting a result-oriented approach to applying § 2254(d)(1), Judge Richard Posner determined administrative review requirements to be inappropriate in the habeas context. He found this so because they merely reflected a...
federal court’s unquestioned ability to remand administrative decisions back to the issuing agency for further clarification, an option not available to a federal court reviewing a state court’s decision.282 However, it is precisely because there is no mechanism for further clarification in this context that there is a premium on an “articulate[d] . . . rational path connecting the law and the evidence to the outcome.”283 The greater risks generally posed to a state habeas petitioner fallen “victim [to] a failure of judicial articulateness”284 further increase the value of this premium.

That federal habeas review should focus on the quality of the process by which a state petitioner was imprisoned is merely a reflection of the primary and traditional concern of the writ. “[T]he Great Writ is . . . a mode of procedure . . . . Vindication of due process is precisely its historic office.”285 “The result of a proceeding can be rendered unreliable” by a defect in the process that spawned it.286 This is as true of proceedings at the trial court level as it is of proceedings in higher, reviewing courts. The deference mandated by the AEDPA is not intended to apply to unreliable applications of federal law, only to reasonable ones.

VII. CONCLUSION

Laying aside due process concerns raised by postcard denials, treating unarticulated state court decisions as qualifying for review under the AEDPA poses functional barriers to federal courts’ ability to determine specific predicates necessary for review. First, an unarticulated state court decision provides no insight regarding whether the merits of the petitioner’s federal claims were reached, and thus, whether or not de novo review should apply. Second, such a decision’s lack of rationale obscures the factual or legal basis grounding it necessary to determine the standard of review under the AEDPA. Third, a federal habeas court reviewing a postcard decision is forced to make assumptions about how the state court arrived at its conclusion. This can lead to misunderstandings having negative implications for both the state and the petitioner. Where a federal court’s back-filling analysis results in a decision at odds with the state court, the state court risks losing the

282. See id.
283. Id.
284. Id.
benefit of the doubt that the AEDPA provides when the issue is a close one. Where the federal court agrees with the state court, lack of articulated analysis can mask an incorrect application of federal law making the petitioner’s custody unlawful. Finally, a silent state court opinion offers no guidance to a pro se petitioner in making an intelligent decision about whether to pursue federal habeas relief and, if so, over which issues. Treating unarticulated state court decisions as not qualifying for review under the AEDPA would protect both states’ and petitioners’ interests alike, while minimizing the risks that reasonable state court decisions will be obviated and petitioners will be held in illegal custody.

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