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Lies, Damn Lies, and White Ink: The Convenient Fiction of Adjudication on the Merits in *Murdoch v. Castro*

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LIES, DAMN LIES, AND WHITE INK: THE CONVENIENT FICTION OF ADJUDICATION ON THE MERITS IN *MURDOCH V. CASTRO*

Abstract: On June 21, 2010, in *Murdoch v. Castro*, the U.S. Court of Appeals for the Ninth Circuit held that under the habeas reform provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), state court decisions presumptively adjudicate federal claims on the merits even where no state court has made any mention of the federal claim raised in the habeas petition. In so doing, the Ninth Circuit gives federal courts license to overlook errors, ignore contradictory state law and dismiss compelling constitutional claims raised by state prisoners. This Comment argues that following the approach advocated by Chief Judge Kozinski in dissent would better allow federal courts to keep faith with the goals of comity and federalism that motivated AEPDA.

Introduction

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), state court adjudications of federal claims are entitled to a heightened level of deference whenever state court petitioners file habeas corpus petitions in federal court.[1] This Comment examines whether AEDPA deference is appropriate when the last state court opinion "clearly overlooked" the federal claim.[2] Congress intended AEDPA to end the flood of habeas petitions filed in federal court by decreasing the incentive for state prisoners to file federally.[3] Treating state court decisions with more deference would also enhance "comity, finality, and federalism" by allowing state criminal convictions to become final more quickly.[4] In the nearly fifteen years since its passage, AEDPA has been harshly criticized by scholars for being poorly drafted

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[1] *See* 28 U.S.C. § 2254(d) (2006); Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 St. John's L. Rev. 616–17 (2004); Margery I. Miller, Note, *A Different View of Habeas: Interpreting "Adjudicated on the Merits" when Habeas Corpus Is Understood as an Appellate Function of Federal Courts*, 72 Fordham L. Rev. 2593, 2595 (2004).

[2] *See infra* notes 16–96 and accompanying text.

[3] Sloane, *supra* note 1, at 616–17.

[4] Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443, 444–45 (2007).

and has also proven difficult for federal courts to apply uniformly.[5] The federal circuits are particularly divided on how to approach state court decisions that do not address properly raised federal claims.[6]

In 2010, in *Murdoch v. Castro*, the U.S. Court of Appeals for the Ninth Circuit demonstrated how a federal court reviewing a habeas corpus petition can cheapen both respect for state law and prisoners' federal rights by holding that a state court adjudicated a claim on the merits when that claim was clearly overlooked.[7] Like most federal circuits, the Ninth Circuit generally assumes that all issues properly before a state appellate court have been adjudicated on the merits wherever there is a final disposition on non-procedural grounds.[8] In *Murdoch*, however, a properly raised federal claim, supported by binding state and federal Supreme Court precedent, went completely unmentioned by the state appellate court opinion.[9] As Chief Judge Kozinski persuasively argued in dissent, it disdains state law to find that a claim that was never mentioned was in fact adjudicated on the merits because "[c]ourts just don't do that kind of work in white ink."[10] This Comment sides with Chief Judge Kozinski and concludes that federal courts applying AEDPA must review the state court record diligently to deter-

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[5] *See id.* at 493–96 (describing circuit splits regarding the interpretation of § 2254(d)); Sloane, *supra* note 1, at 619–20 (same); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 41–44 (1997) (proposing an alternative interpretation of § 2254(d)). *See generally* 28 U.S.C § 2254(d) (passed in 1996).

[6] *See* Brittany Glidden, Note, *When the State Is Silent: An Analysis of AEDPA's Adjudication Requirement*, 27 N.Y.U. Rev. L. & Soc. Change 177, 184 n.37 (2002); Ezra Spilke, Comment, *Adjudicated on the Merits?: Why the AEDPA Requires State Courts to Exhibit Their Reasoning*, 39 J. Marshall L. Rev. 995, 997, 1008–10 (2006); Claudia Wilner, Note, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. Rev. 1442, 1443 (2002).

[7] *See* 609 F.3d 983, 989, 990 n.6 (9th Cir. 2010).

[8] *See id.* This approach to adjudication on the merits is firmly established in the Ninth Circuit. *See* Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006) ("[T]his court must assume that the state court has decided all the issues."); Pham v. Terhune, 400 F.3d 740, 742 (9th Cir. 2005); Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2002). The "any non-procedural disposition" approach is also established in other federal circuits. *See, e.g.*, Neal v. Puckett, 239 F.3d 683, 686 (5th Cir. 2001); *accord* Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 158–59 (4th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999). *But see* Lyell v. Renico, 470 F.3d 1177, 1181–82 (6th Cir. 2006); Gruning v. Dipaolo, 311 F.3d 69, 71 (1st Cir. 2002).

[9] *See Murdoch*, 609 F.3d at 1000 (Kozinksi, C.J., dissenting).

[10] *See id.* at 1001.

mine if the federal claim has actually been adjudicated on the merits and not overlooked in error.[11]

Part I provides background on AEDPA and the circuit split over how it requires federal courts to treat state court opinions silent on federal claims.[12] Part II examines the Ninth Circuit's decision to deny habeas relief in *Murdoch* and explains how this decision exemplifies the major issues of AEDPA jurisprudence.[13] Part III studies Chief Judge Kozinski's dissent in *Murdoch* and shows that it presents a novel approach to determining whether federal claims have been overlooked by state courts.[14] Finally, Part IV concludes that Chief Judge Kozinski's approach is the best way to respect both prisoners' rights and state law.[15]

I. The Controversy Over AEDPA Review and Silent State Court Opinions

A. *AEDPA's Application and Silent State Court Opinions*

AEDPA, passed in response to the Oklahoma City bombing of 1995, was designed to create new tools to apprehend and prosecute terrorists by making all criminal convictions final more quickly.[16] Congress enacted § 2254(d) to "streamline Federal appeals for convicted criminals sentenced to the death penalty." [17] Beyond this goal of reducing delays in achieving final decisions in criminal cases, the AEDPA's legislative history provides very little insight into the way Congress intended the provision to function in practice.[18] Section 2254(d) reads:

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[11] *See id.* ("When a state court doesn't decide a federal claim but we defer nevertheless, a petitioner is stripped of his right to have some court, any court, determine whether he's 'in custody in violation of the Constitution or laws or treaties of the United States.'").

[12] *See infra* notes 16–45 and accompanying text.

[13] *See infra* notes 46–65 and accompanying text.

[14] *See infra* notes 66–74 and accompanying text.

[15] *See infra* notes 75–96 and accompanying text.

[16] Miller, *supra* note 1, at 2610. Although AEDPA's title suggests it might only apply in cases involving terrorism or the death penalty, § 2254 reformed habeas for any petition filed in federal court; thus, anyone incarcerated by the state—whether awaiting execution or serving a term of years—is subject to AEDPA. *Id. See generally* 28 U.S.C § 2254(d) (2006).

[17] Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630, 631 (Apr. 24, 1997).

[18] *See* Carrie M. Bowden, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 Wash. & Lee L. Rev. 185, 223–28 (2003). Bowden explains that the word deference was removed from the legislation after compromises aimed to limit the original drafters' intent to eliminate virtually all federal review of habeas petitions filed in state court. *Id.* at 224–25.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[19]

According to the plain meaning of § 2254(d), AEDPA's deferential standard of review only applies when the petitioner's claim was adjudicated on the merits in state court.[20] Only after a federal court determines that this threshold inquiry is satisfied can that court apply the substance of the act to determine if the state court adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[21] If the state court adjudication was not on the merits, the substance of AEDPA is not triggered and the federal court reviews the claim de novo.[22] When evaluating state court opinions that are silent with respect to federal claims, the federal circuits are split both with regard to how to address the threshold question of adjudication and with regard to the correct way to interpret the substance of AEDPA's deference provision.[23]

When a petitioner properly raises a federal claim and the state court does not address that claim in the text of its decision, the result is a "silent state court opinion"—a decision that provides no hint of why the particular federal claim was rejected.[24] There are two common ways state courts remain silent on properly raised federal claims:[25] first, a state court issues a summary disposition;[26] second, a state court issues a full opinion addressing other claims but not the specific federal claim

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[19] 28 U.S.C. § 2254(d).

[20] *See id.*; Sloane, *supra* note 1, at 616.

[21] *See* 28 U.S.C. § 2254(d); Spilke, *supra* note 6, at 1004.

[22] *See* Murdoch v. Castro, 609 F.3d 983, 990 n.6 (9th Cir. 2010).

[23] *See* Kovarsky, *supra* note 4, at 493–97.

[24] *See* Wilner, *supra* note 6, at 1455–56.

[25] *See id.*

[26] *See id.*

subsequently raised in the federal habeas petition.[27] *Murdoch* falls into the second category.[28]

Frequently, the fate of a habeas petition depends on whether a state's silent denial of a federal claim constitutes an adjudication on the merits.[29] If a decision is not on the merits, AEDPA does not apply and a federal court may review the claim afresh and apply both circuit and Supreme Court precedent.[30] If, however, a silent denial is found to be an adjudication on the merits, AEDPA only allows a federal court to decide whether the decision was objectively unreasonable according to clearly established Supreme Court precedent.[31] To make this determination, a federal court must evaluate whether the state court opinion, which makes no reference to a federal claim, is contrary to or involves an unreasonable application of federal law.[32] The curious result of this analysis is that a reviewing court may uphold state court decisions that make invisible, but "objectively reasonable," constitutional errors.[33] The "difficult and artificial" nature of this sort of review reveals a problem that permeates AEDPA analysis of state court opinions that are silent on a contested federal claim: how, if at all, can a habeas court defer to reasoning which is "not merely undiscoverable but nonexistent?"[34]

B. *Circuit Splits on "Adjudication on the Merits"*

Consensus among the circuits regarding how to treat silent state court opinions eludes the federal courts.[35] Initially, a slim majority of the federal circuits, including the Ninth Circuit, held "adjudication on the merits" to be "a term of art that refers to whether a court's disposi-

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[27] *See id.*

[28] *See* 609 F.3d at 989. The Supreme Court addressed the first situation in January and determined summary dispositions can be adjudications on the merits when there are no state law procedural principles that indicate otherwise. *See* Harrington v. Richter, 131 S. Ct. 770, 784–85 (2011). The method for determining when an opinion provides such an indication was beyond the scope of the decision. *See id.*

[29] *See* Kovarsky, *supra* note 4, at 493.

[30] *See e.g.*, Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 520–21 (2003).

[31] *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003); Williams v. Taylor, 529 U.S. 362, 405–06, 409 (2000).

[32] *See Lockyer*, 538 U.S. at 71; *Williams*, 529 U.S. at 409.

[33] *See e.g.*, Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 520–21 (2003).

[34] *See* Ylst v. Nunnemaker, 501 U.S. 797, 803 (1992) (describing the difficulty of determining the effect of a summary disposition issued by the California Supreme Court).

[35] *See* Wilner, *supra* note 6, at 1456.

tion of the case was substantive as opposed to procedural."[36] Circuits that apply AEDPA to silent state court opinions are hopelessly fractured, however, on how to analyze when silent opinions apply federal law unreasonably.[37]

A growing minority of circuits, including the First and Sixth Circuits, hold that to be adjudicated on the merits a federal claim must have at least been mentioned by the state court.[38] Under this approach, both types of silent state court opinions—summary dispositions and otherwise reasoned decisions that fail to address the federal claim at issue—fail to pass the threshold inquiry of AEDPA; thus, the federal court may review the claim de novo.[39] Because these circuits never apply the substance of AEDPA to silent state court opinions, they avoid the difficulty of trying to determine whether an opinion which never addressed a federal claim involved an unreasonable application of federal law.[40]

In the Ninth Circuit, however, a decision that a silent state court opinion has in fact been adjudicated on the merits results from a somewhat convoluted review of whether the state court arrived at its decision through an "objectively unreasonable" application of federal law.[41] This inquiry requires a reviewing court to analyze whether a re-

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[36] *See, e.g.*, Neal v. Puckett, 239 F.3d 683, 686 (5th Cir. 2001); Sellan v. Kuhlman, 261 F.3d 303, 312 (2d Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 158, 159 (4th Cir. 2000); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999). *But see* Lyell v. Renico, 470 F.3d 1177, 1182 (6th Cir. 2006); Gruning v. Dipaolo, 311 F.3d 69, 71 (1st Cir. 2002); Neill v. Gibson, 278 F.3d 1044, 1051, 1053 (10th Cir. 2001).

[37] *See* Kovarsky, *supra* note 4, at 496–98. This Comment does not discuss the split over how to apply the substance of AEDPA to silent state court opinions; for a discussion of that issue, see *id.* at 496–502 (discussing whether courts should focus on the result or the reasoning of state court opinions when determining if a petitioner is entitled to habeas relief under AEDPA).

[38] *See, e.g.*, *Lyell*, 470 F.3d at 1182 (holding a federal claim was not adjudicated on the merits when state opinion only discussed it in state law terms); *Gruning*, 311 F.3d at 71 ("[W]e can hardly defer to the state court on an issue that the state court did not address." (quoting Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001))); *Neill*, 278 F.3d at 1051, 1058 (reviewing ineffective assistance claim de novo because the state appellate court did not reach the merits of the claim).

[39] *See* Kovarsky, *supra* note 4, at 493–96. At least as applied to summary dispositions, this approach is wrong after the Supreme Court's 2011 decision in *Harrington v. Richter*. *See* 131 S. Ct. at 783–84. The courts currently applying the minority approach, however, have done so with respect to fully written opinions and not summary dispositions. *See supra* note 38 and accompanying text.

[40] *See id.*

[41] *See* Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006); Pham v. Terhune, 400 F.3d 740, 742 (9th Cir. 2005); Delgado v. Lewis, 223 F.2d 976, 982 (9th Cir. 2000).

sult is unreasonable without evidence of a state court's reasoning.[42] Further, the U.S. Supreme Court has held that state courts need not cite or even be aware of federal case law to adjudicate a claim reasonably.[43] Although this makes sense because a court need not cite a case to determine and apply the correct legal principle, it is unclear whether a decision should be entitled to deference if a court has applied no principle at all in reaching its conclusion or has erroneously overlooked a claim.[44] This was the situation in *Murdoch*.[45]

II. The Ninth Circuit's Approach to Adjudicated on the Merits

More than a decade after a 1983 robbery at the Horseshoe Bar in Long Beach, California, police arrested Dino Dinardo after improvements in fingerprint technology uncovered his prints on the cash register.[46] Following his arrest, Dinardo identified Murdoch as his accomplice.[47] Dinardo was charged with and convicted of a murder that happened during the robbery.[48] After assurances from the trial judge that his life sentence would be reduced if he testified against Murdoch, Dinardo became the state's key witness at Murdoch's murder trial.[49] Before his trial ended, however, Dinardo wrote a letter to his attorney claiming he was coerced by the police into implicating Murdoch in the crime.[50] When Murdoch's counsel sought to use the letter to impeach Dinardo in cross-examination, the trial court held attorney-client privilege barred the introduction of the letter.[51] Murdoch was convicted of first-degree murder and sentenced to life in prison without parole.[52]

On appeal, Murdoch argued that he was unable to cross-examine Dinardo effectively, in violation of his Sixth Amendment right to confront his accuser.[53] Without reference to the Confrontation Clause, the California Court of Appeals affirmed Murdoch's conviction and denied

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[42] *See, e.g.*, *Murdoch*, 609 F.3d at 989; *Reynoso*, 462 F.3d at 1109.
[43] Early v. Packer, 537 U.S. 3, 8 (2002).
[44] *See* Kovarsky, *supra* note 4, at 493–96.
[45] *See Murdoch*, 609 F.3d at 990 n.6.
[46] Murdoch v. Castro, 609 F.3d 983, 985 (9th Cir. 2010).
[47] *Id.*
[48] *Id.* at 985, 986.
[49] *Id.* at 986.
[50] *Id.* at 987.
[51] *Id.*
[52] *Murdoch*, 609 F.3d at 987.
[53] *Id.* at 987–88.

his petition for a writ of habeas corpus.[54] Murdoch then filed a petition for the writ in federal court, which ultimately led to the Ninth Circuit's en banc opinion denying habeas relief under AEDPA.[55]

Murdoch presents an extreme example of the silent state court opinion problem.[56] Not only did the California Court of Appeals fail to mention the Confrontation Clause or cite any relevant state or federal precedent, it also neglected to include the perfunctory language "defendants remaining contentions do not merit discussion."[57] As a result, under California law, Murdoch's federal claim was arguably not adjudicated on the merits.[58] Moreover, because Murdoch's brief cited two California cases dealing with attorney-client privilege and the Confrontation Clause—including one decided by California's Supreme Court— it appears the appeals court overlooked Murdoch's Sixth Amendment argument.[59]

Nevertheless, the Ninth Circuit, sitting en banc, held that the California Court of Appeals had adjudicated Murdoch's Confrontation Clause claim on the merits.[60] In reaching this conclusion, the Ninth Circuit addressed the issue only summarily, citing to a handful of cases that apparently required the Ninth Circuit to assume all issues properly before the state court were decided on the merits.[61] None of the cited de-

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[54] *Id.*

[55] *See id.* The procedural history of the case is more complicated than this text indicates; it has been abridged for the sake of clarity. *See id.* (detailing the history of Murdoch's journey through the Ninth Circuit).

[56] *See id.* at 990 n.6.

[57] *See id.* at 1000 (Kozinski, C.J., dissenting). The majority, however, concluded that the California court did address Murdoch's Confrontation Clause argument because, while discussing another argument of Murdoch's, the court quoted *People v. Godlewski*, a case that discussed attorney-client privilege and the Confrontation Clause. *See Murdoch*, 609 F.3d at 990 n.6 (majority opinion); People v. Godlewski, 21 Cal. Rptr. 2d 796, 800 (Ct. App. 1993).

[58] *See Murdoch*, 609 F.3d at 1000 (Kozinski, C.J., dissenting) (citing Lewis v. Superior Court, 970 P.2d 872 (Cal. 1999); People v. Rojas, 173 Cal. Rptr. 64 (Ct. App. 1981)). In *People v. Rojas*, the California Court of Appeals held that California courts must show that they "necessarily and carefully analyzed the contentions" and that failure to do so may lead to reversal. 173 Cal. Rptr. at 64. This holding seemingly requires at least a statement that any unaddressed issues lack merit. *See Murdoch*, 609 F.3d at 1000 (Kozinski, C.J., dissenting).

[59] *See Murdoch*, 609 F.3d at 1001 (discussing People v. Mincey, 827 P.2d 388, 440–41 (Cal. 1992) (holding that the right to cross-examine a cooperating witness for bias trumps the attorney-client privilege); Vela v. Superior Court, 208 Cal. App. 3d 141, 150 (Ct. App. 1989) (holding that defendant's right to cross examine police officers testifying against him trumps officers' claims of attorney-client privilege)).

[60] *See id.* at 995–96 (majority opinion).

[61] *See id.* at 986–90 (citing Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006); Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2002); Hunter v. Aispuro, 982 F.2d 344, 346–48 (9th Cir. 1992)).

cisions, however, stated that all state court decisions not clearly based on procedural grounds adjudicate federal claims on the merits for purposes of AEDPA.[62] In fact, the only case that addressed, in any depth, how to treat unreasoned opinions was a pre-AEDPA decision involving whether summary dispositions can be treated as resting on adequate and independent state law grounds.[63] The majority in *Murdoch*, following in the footsteps of earlier Ninth Circuit decisions, failed to consider whether adjudicated on merits has special meaning in the context of AEDPA.[64] After applying AEDPA's deferential standard of review, the majority simply held that Murdoch's imprisonment was not contrary to clearly established federal law as determined by the U.S. Supreme Court.[65]

III. Chief Judge Kozinski's Approach to Adjudication on the Merits

Chief Judge Kozinski's dissent in *Murdoch* presents an interesting approach to evaluating silent state court opinions that aims to uncover how state courts have resolved the question of adjudication on the merits when faced with similar situations.[66] He suggests that comity and federalism—the statutory purposes often cited to support deference to state court decisions—require more in-depth analysis of what the state court actually decided.[67] Particularly, when considering "white ink" and "the sounds of silence," federal courts should not show contrived deference by assuming that state courts have decided issues that they clearly have not.[68]

To follow Chief Judge Kozinski's approach, courts should perform a two-tiered inquiry: first, examine the state court record to determine if compelling arguments, whether based on federal or state precedent, were raised in the briefs but subsequently ignored in the decision; and second, examine state law on the meaning of adjudication of the merits.[69] In evaluating Murdoch's claim, Chief Judge Kozinski reviewed

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[62] *See Reynoso*, 462 F.3d at 1109 (stating that when it is clear that the state court has not decided an issue, courts review that question de novo); *Lambert*, 393 F.3d at 969.

[63] *See Hunter*, 982 F.2d at 346.

[64] *See Murdoch*, 609 F.3d at 986–90 (citing *Reynoso*, 462 F.3d at 1109; Lambert, 393 F.3d at 969; *Hunter*, 982 F.2d at 346–48).

[65] S*ee id.* at 995–96.

[66] *See* 609 F.3d 983, 998–1002 (9th Cir. 2010) (Kozinski, C.J., dissenting).

[67] *Id.* at 998.

[68] *See id.* at 1001.

[69] *See id.* at 998–1001.

three major sources: the text of the California appellate court's decision, the text of Murdoch's briefs and any state and federal precedent cited therein, and California's appellate rules and case law on the meaning of adjudication on the merits.[70]

Thus, rather than blindly assuming that all issues before the state court were decided, Chief Judge Kozinski suggests that courts must review the lower court record to determine if the federal claim was overlooked or adjudicated on the merits.[71] When petitioners raise a federal claim supported by precedent binding on the state court, and the state court issues a decision contrary to that precedent without attempting to distinguish it, federal courts should be willing to find that the state court did not decide the issue.[72] Federal court review of the state court record would serve the interest of comity by ensuring that controlling state precedent was not ignored.[73] Because Chief Judge Kozinski's approach to AEDPA review acknowledges that there is some work courts do not do in "white ink," his approach would prevent federal courts from deferring to fictional adjudications on the merits that arrive at results contrary to state law.[74]

IV. Why Chief Judge Kozinski's Approach Furthers Comity, Finality, and Federalism

Applying Chief Judge Kozinski's approach to adjudication on the merits would clarify AEDPA's threshold inquiry when state courts are silent on federal claims, and would limit any artificial application of AEDPA's substance to silent state court opinions.[75] This middle-of-the-road approach still allows for AEDPA review to silent state court opinions when the state record, in its totality, suggests the claim was considered rather than overlooked.[76] This approach would allow silent state court opinions to be reviewed consistently with the Supreme Court's 2011 decision in *Harrington v. Richter*, which held that summary dispositions can be presumed to be adjudications on the merits.[77]

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[70] *Id.*

[71] *Id.* at 998–1000.

[72] *See Murdoch*, 609 F.3d at 998–1001 (Kozinski, C.J., dissenting).

[73] *See id.* at 998, 1009.

[74] *See id.* at 1001.

[75] *See* Murdoch v. Castro, 609 F.3d 983, 998–1002 (9th Cir. 2010) (Kozinski, C.J., dissenting).

[76] *See id.* at 998, 1009.

[77] *See* 131 S. Ct. 770, 784–85 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court

The First Circuit's approach—not applying AEDPA to *any* silent state court opinion—permits too much de novo review.[78] AEDPA aimed to increase judicial efficiency by decreasing the relitigation of claims that had already been heard in state court.[79] Problematically, as the Supreme Court acknowledged in *Harrington*, an approach that treats all silent state court opinions the same would allow federal court review even when state courts summarily dismiss claims without explanation because the claims are completely lacking in merit.[80] This is undoubtedly part of what AEDPA sought to avoid.[81] In fact, more than half of the states disagree with this approach because of how frequently their courts rely on summary dispositions to resolve habeas petitions.[82]

In contrast, the approach taken by the Ninth Circuit in *Murdoch* reaches illogical results when applied to written opinions that overlook properly raised federal claims.[83] Under this approach, constitutional errors justified only in "white ink" can be allowed to stand so long as they are reasonable, even if compelling federal precedent and *binding* state precedent dictate the result is incorrect.[84] The result is not deference to state law; it is indifference towards it.[85] Furthering the interest of comity undoubtedly requires federal courts to at least examine state law before determining whether a claim has been adjudicated on the merits.[86] Comity should also encourage an evaluation of the record as a whole to ensure that the state court actually decided a claim before a federal court deems it adjudicated on the merits.[87] When a court takes the time to give reasons for its decision and then fails to reach or address a crucial part of a petitioner's claim, there is little reason to be-

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adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.").

[78] *See* Gruning v. Dipaolo 311 F.3d 69, 71 (1st Cir. 2002); *see also* Lyell v. Renico 470 F.3d 1177, 1181–82 (6th Cir. 2006).

[79] *See* Kovarsky, *supra* note 4, at 455–57.

[80] *See generally* Brief of Texas et al. as Amicus Curiae in Support of Petitioner at 4–7, Harrington v. Richter, No. 09–587, 2010 WL 2005329 (2010) (thirty-three states arguing it would be overly burdensome to require a written opinion for an adjudication on the merits).

[81] *See* Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 Am. J. Crim. L. 223, 242 (2002) (arguing that AEDPA "requires federal court deference to a state-court decision which is clearly on the merits of a federal question, even if unaccompanied by an articulated rationale").

[82] *See generally* Brief of Texas et al., *supra* note 80.

[83] *See Murdoch*, 609 F.3d at 998, 1009 (Kozinski, C.J., dissenting).

[84] *See id.*

[85] *See id.*

[86] *See* Ylst v. Nunnemaker, 501 U.S. 797, 801–03 (1992).

[87] *See Murdoch*, 609 F.3d at 998, 1009 (Kozinski, C.J., dissenting).

lieve the issue was adjudicated on the merits.[88] Indeed, in this situation, the text of the decision suggests it was not.[89]

Moreover, if a relatively controversial issue is clearly overlooked or ignored at the state court level, the federal court should review the issue de novo to encourage state courts to explain their opinions on controversial issues and contribute to the constitutional dialogue.[90] Federal courts should not reward state courts by deferring to their opinions when they deliberately or carelessly fail to reach or discuss controversial issues because deferring too often to unreasoned opinions will have a negative impact on the development of constitutional law.[91] Ignoring legitimate prisoner claims, which have not been addressed by any court, will stifle the development of constitutional criminal procedure by decreasing the number of opinions that completely reason through difficult constitutional issues.[92] AEDPA already limits how many courts can evaluate the federal constitutional issues.[93] Correspondingly, the number of state habeas cases heard by the Supreme Court has declined in recent years.[94] It is undesirable to impose further limitations at the risk of making federal law more unclear.[95] Both state and federal courts, however, have an obligation to contribute to the federal constitutional dialogue by addressing legitimate constitutional claims.[96]

Conclusion

Murdoch exemplifies the struggle federal courts continue to face when applying AEDPA's deferential standard of review to silent state court opinions. Because genuine habeas review is vital to vindicating

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[88] *See* Wiggins v. Smith, 539 U.S. 510, 534 (2003) (reviewing de novo the second prong of a federal ineffective assistance of counsel claim because the state opinion stated it only reached the first prong).

[89] *See id.*; *Murdoch*, 609 F.3d at 998, 1009.

[90] *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 215, 227 (2008).

[91] *See id.* at 227.

[92] *See id.* at 222–27 (stating that AEDPA has effectively ended the conversation because under AEDPA federal courts lack the power to resolve emerging constitutional issues in the context of state prisoners' federal habeas petitions).

[93] *See id.* at 227.

[94] *See* Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1357 (2010) (stating that the reduction in the Supreme Court's criminal docket occurred entirely in state criminal cases and habeas cases).

[95] *See id.*

[96] *See id.*

federal constitutional rights, the federal circuits must retain their power to say what the law is by reviewing valid federal claims that no court has reasoned through. Principles of federalism and comity do not bar federal courts from examining state law and the state appellate record; in fact, these principles ought to encourage it. When state courts ignore controversial issues or overlook contested claims by issuing decisions supported by reasoning performed in "white ink," they disregard their obligation to defend or interpret the federal Constitution, and any federal court that blindly defers to such a decision is complicit in transforming habeas corpus from the Great Writ to a convenient fiction.

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