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COURT OF APPEALS
DIVISION II
SERVICE
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Mr. Jordan McCabe
PO Box 6324
Bellevue, WA 98008-0324

STATE OF WASHINGTON
BY Cm DEPUTY CLERK
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 10, 2011,
Port Orchard, WA B-W
Original filed at the Court of Appeals
Ste. 300, 950 Broadway
Tacoma WA 98402-4454

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

THE STATE OF WASHINGTON,)
) No. 41413-9-II
 Respondent,)
) STATE'S STATEMENT OF ADDITIONAL
 v.) AUTHORITIES
)
 STATE V. JOSEPH KOROSHES,)
)
 Appellant.)

RESPONDENT, the State of Washington, respectfully requests that the Court consider the following additional authority, pursuant to RAP 10.8, copies of which are attached:

Premo v. United States, -- U.S. --, 131 S.Ct. 733, -- L.Ed. --, 2011 WL 148253 (2011) (no ineffective assistance where attorney advised the defendant to accept a plea offer without first filing motions to suppress confession).

Harrington v. Richter, -- U.S. --, 131 S.Ct. 770, -- L.Ed. --, 2011 WL 148587 (2011) ("An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.").

United States v. Kent, --- F.3d. ----, 2011 WL 383977 (9th Cir. 2011) ("We have sanctioned the conditioning of plea arguments on acceptance of terms apart from



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pleading guilty, including waiving appeal, disclosing evidence, providing testimony, and cooperating as an informant against others. If prosecutors may permissibly demand these conditions, it follows that they may make good on threats to enhance charges if these conditions are not accepted.”)

DATED March 11, 2011

DEBORAH KELLEY,
PROSECUTING ATTORNEY



BRIAN PATRICK WENDT
WSBA No. 40537
Deputy Prosecuting Attorney



Westlaw

Page 1

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(Cite as: 131 S.Ct. 733)

H

Supreme Court of the United States
 Jeff PREMO, Superintendent, Oregon State Penitentiary, Petitioner,
 v.
 Randy Joseph MOORE.

No. 09-658.
 Argued Oct. 12, 2010.
 Decided Jan. 19, 2011.

Background: Following affirmance of state conviction for felony murder, 151 Or.App. 464, 951 P.2d 204, and exhaustion of state postconviction remedies, state prison inmate sought federal habeas relief. The United States District Court for the District of Oregon, Anna J. Brown, J., denied the petition. Inmate appealed. The United States Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 574 F.3d 1092, reversed and remanded with instructions. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

- (1) state postconviction court's conclusion that defense counsel did not perform deficiently, as element of ineffective assistance of counsel, in advising inmate to enter a quick no-contest plea, without counsel having brought a motion to suppress one of inmate's confessions, was not an unreasonable application of clearly established federal law as determined by the Supreme Court, and
- (2) state postconviction court's conclusion that inmate was not prejudiced by counsel's allegedly deficient performance was not an unreasonable application of clearly established federal law as determined by the Supreme Court.

Judgment of Court of Appeals reversed; remanded.

Justice Ginsburg filed an opinion concurring in the judgment.

Justice Kagan took no part in the consideration or decision of the case.

West Headnotes

[1] Criminal Law 110 ↪1881

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1879 Standard of Effective Assistance in General
 110k1881 k. Deficient representation and prejudice in general. Most Cited Cases
 To establish ineffective assistance of counsel, a defendant must show both deficient performance by counsel and prejudice. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 ↪1920

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1920 k. Plea. Most Cited Cases
 Acknowledging guilt, and accepting responsibility by an early plea, respond to certain basic premises in the law and its function, and those principles are eroded if a guilty plea is too easily set aside, on a determination that counsel performed deficiently, as element of ineffective assistance of counsel, in advising the defendant to plead guilty, based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 ↪1920

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues

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110k1920 k. Plea. Most Cited Cases

Strict adherence to the *Strickland* standard for deficient performance, as element of ineffective assistance of counsel, is all the more essential when reviewing the choices an attorney made at the plea bargain stage, because failure to respect the latitude *Strickland* requires can create at least two problems in the plea context: first, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real, and second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect. U.S.C.A. Const.Amend. 6.

[4] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

In determining how searching and exacting their review of counsel's performance must be, when a state prisoner alleges ineffective assistance of counsel, federal habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[5] Criminal Law 110 ↪1882

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1882 k. Deficient representation in general. Most Cited Cases

Whether before, during, or after trial, when the

Sixth Amendment applies, the formulation of the standard for deficient performance, as element of ineffective assistance of counsel, is the same: reasonable competence in representing the accused. U.S.C.A. Const.Amend. 6.

[6] Criminal Law 110 ↪1871

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1871 k. Presumptions and burden of proof in general. Most Cited Cases

In applying and defining the standard for deficient performance, as element of ineffective assistance of counsel, substantial deference must be accorded to counsel's judgment. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ↪1920

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1920 k. Plea. Most Cited Cases

When determining whether counsel has performed deficiently, as element of ineffective assistance of counsel, in the case of an early plea, the absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered. U.S.C.A. Const.Amend. 6.

[8] Habeas Corpus 197 ↪486(3)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

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197k486 Adequacy and Effectiveness of Counsel

197k486(3) k. Arraignment and plea. Most Cited Cases

State postconviction court's conclusion that defense counsel did not perform deficiently, as element of ineffective assistance of counsel, in advising defendant to enter a quick no-contest plea to felony murder, before State had decided on the charges, in order to avoid a possible sentence of life without parole or death, without counsel having brought a motion to suppress one of defendant's confessions, was not an unreasonable application of clearly established federal law as determined by the Supreme Court, as would provide a basis for federal habeas relief; counsel could have reasonably believed that a swift plea bargain would allow defendant to take advantage of State's aversion to cost of litigation and risk of trying their case without defendant's confession, there was a chance that prosecutors might have convinced an accomplice to testify against defendant in exchange for a better deal, delaying the plea for further proceedings would have given State time to uncover additional incriminating evidence that could have formed the basis of a capital prosecution, and State had at its disposal two witnesses able to relate another confession by defendant. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[9] Criminal Law 110 ↪1920

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1920 k. Plea. Most Cited Cases

To establish prejudice, as element of ineffective assistance of counsel, as to counsel's allegedly deficient performance in advising defendant to plead guilty, defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. U.S.C.A. Const.Amend. 6.

[10] Habeas Corpus 197 ↪773

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k773 k. Counsel. Most Cited Cases

Deference by a federal habeas court, to a state court's determination of prejudice, as element of ineffective assistance of counsel, is all the more significant in light of the uncertainty inherent in plea negotiations; the stakes for defendants are high, and many elect to limit risk by forgoing the right to assert their innocence. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[11] Criminal Law 110 ↪1920

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1920 k. Plea. Most Cited Cases

A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice, as element of ineffective assistance of counsel, when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence. U.S.C.A. Const.Amend. 6.

[12] Habeas Corpus 197 ↪486(3)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(3) k. Arraignment and plea. Most Cited Cases

State postconviction court's conclusion that defendant was not prejudiced, as element of ineffect-

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ive assistance of counsel, by counsel's allegedly deficient performance in advising defendant to enter a quick no-contest plea to felony murder before State had decided on the charges, but without counsel having brought a motion to suppress one of defendant's confessions, was not an unreasonable application of clearly established federal law as determined by the Supreme Court, as would provide a basis for federal habeas relief; state postconviction court reasonably could have determined that defendant would have accepted the plea agreement even if his confession to police had been ruled inadmissible, since by the time the plea agreement had cut short investigation of defendant's crimes, State's case was already formidable and included two witnesses to another, admissible confession, and defendant's decision to plead no contest allowed him to avoid a possible sentence of life without parole or death. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

***735 Syllabus** ^{FN*}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Moore and two accomplices attacked and bloodied Kenneth Rogers, tied him up, and threw him in the trunk of a car before driving into the Oregon countryside, where Moore fatally shot him. Afterwards, Moore and one accomplice told Moore's brother and the accomplice's girlfriend that they had intended to scare Rogers, but that Moore had accidentally shot him. Moore and the accomplice repeated this account to the police. On the advice of counsel, Moore agreed to plead no contest to felony murder in exchange for the minimum sentence for that offense. He later sought postconviction relief in state court, claiming that he had been denied effective assistance of counsel. He complained that his lawyer had not moved to suppress his confession to police in advance of the

lawyer's advice that Moore considered before accepting the plea offer. The court concluded the suppression motion would have been fruitless in light of Moore's other admissible confession to two witnesses. Counsel gave that as his reason for not making the motion. He added that he had advised Moore that, because of the abuse Rogers suffered before the shooting, Moore could be charged with aggravated murder. That crime was punishable by death or life in prison without parole. These facts led the state court to conclude Moore had not established ineffective assistance of counsel under ***736** *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moore sought federal habeas relief, renewing his ineffective-assistance claim. The District Court denied the petition, but the Ninth Circuit reversed, holding that the state court's conclusion was an unreasonable application of clearly established law in light of *Strickland* and was contrary to *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302.

Held: Moore was not entitled to the habeas relief ordered by the Ninth Circuit. Pp. 739 - 746.

(a) Under 28 U.S.C. § 2254(d), federal habeas relief may not be granted with respect to any claim a state court has adjudicated on the merits unless, among other exceptions, the state-court decision denying relief involves “an unreasonable application” of “clearly established Federal law, as determined by” this Court. The relevant federal law is the standard for ineffective assistance of counsel under *Strickland*, which requires a showing of “both deficient performance by counsel and prejudice.” *Knowles v. Mirzayance*, 556 U.S. ----, ----, 129 S.Ct. 1411, 173 L.Ed.2d 251. Pp. 739 - 740.

(b) The state-court decision was not an unreasonable application of either part of the *Strickland* rule. Pp. 740 - 745.

(1) The state court would not have been unreasonable to accept as a justification for counsel's action that suppression would have been futile in light of Moore's other admissible confession to two wit-

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nesses. This explanation confirms that counsel's representation was adequate under *Strickland*, so it is unnecessary to consider the reasonableness of his other justification—that a suppression motion would have failed. Plea bargains involve complex negotiations suffused with uncertainty, and defense counsel must make strategic choices in balancing opportunities—pleading to a lesser charge and obtaining a lesser sentence—and risks—that the plea bargain might come before the prosecution finds its case is getting weaker, not stronger. Failure to respect the latitude *Strickland* requires can create at least two problems. First, the potential for distortions and imbalance that can inhere in a hindsight perspective may become all too real; and habeas courts must be mindful of their limited role, to assess deficiency in light of information then available to counsel. Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect because prosecutors must have assurances that a plea will not be undone in court years later. In applying and defining the *Strickland* standard—reasonable competence in representing the accused—substantial deference must be accorded to counsel's judgment. The absence of a developed and extensive record and well-defined prosecution or defense case creates a particular risk at the early plea stage. Here, Moore's prospects at trial were anything but certain. Counsel knew that the two witnesses presented a serious strategic concern and that delaying the plea for further proceedings might allow the State to uncover additional incriminating evidence in support of a capital prosecution. Under these circumstances, counsel made a reasonable choice. At the very least, the state court would not have been unreasonable to so conclude. The Court of Appeals relied further on *Fulminante*, but a state-court adjudication of counsel's performance under the Sixth Amendment cannot be “contrary to” *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about *Strickland*'s effectiveness standard. Pp. 740 - 743.

*737 (2) The state court also reasonably could have concluded that Moore was not prejudiced by counsel's actions. To prevail in state court, he had to demonstrate “a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203. Deference to the state court's prejudice determination is significant, given the uncertainty inherent in plea negotiations. That court reasonably could have determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible. The State's case was already formidable with two witnesses to an admissible confession, and it could have become stronger had the investigation continued. Moore also faced the possibility of grave punishments. Counsel's bargain for the minimum sentence for the crime of conviction was thus favorable, and forgoing a challenge to the confession may have been essential to securing that agreement. Again, the state court's finding could not be contrary to *Fulminante*, which does not speak to *Strickland*'s prejudice standard or contemplate prejudice in the plea bargain context. To the extent *Fulminante*'s harmless-error analysis sheds any light on this case, it suggests that the state court's prejudice determination was reasonable. Pp. 743 - 746.

574 F.3d 1092, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment. KAGAN, J., took no part in the consideration or decision of the case. John R. Kroger, Attorney General, Salem, OR, for petitioner.

Steven T. Wax, Portland, OR, for respondent.

John R. Kroger, Attorney General of Oregon, Counsel of Record, Mary H. Williams, Solicitor General, Counsel of Record, Rolf C. Moan, Assistant Attorney General, Salem, OR, for petitioner.

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Steven T. Wax, Counsel of Record, Federal Public Defender, Anthony D. Bornstein, Assistant Federal Public Defender, Federal Public Defender for the District of Oregon, Portland, OR, for respondent.

For U.S. Supreme Court Briefs, See:2010 WL 2569161 (Pet.Brief)2010 WL 3251630 (Resp.Brief)2010 WL 3594710 (Reply.Brief)

Justice KENNEDY delivered the opinion of the court.

This case calls for determinations parallel in some respects to those discussed in today's opinion in *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, --- L.Ed.2d ---, 2011 WL 148587. Here, as in *Richter*, the Court reviews a decision of the Court of Appeals for the Ninth Circuit granting federal habeas corpus relief in a challenge to a state criminal conviction. Here, too, the case turns on the proper implementation of one of the stated premises for issuance of federal habeas corpus contained in 28 U.S.C. § 2254(d), the instruction that federal habeas corpus relief may not be granted with respect to any claim a state court has adjudicated on the merits unless, among other exceptions, the state court's decision denying relief involves "an unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." And, as in *Richter*, the relevant clearly established law derives from *738*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which provides the standard for inadequate assistance of counsel under the Sixth Amendment. *Richter* involves a California conviction and addresses the adequacy of representation when counsel did not consult or use certain experts in pretrial preparation and at trial. The instant case involves an unrelated Oregon conviction and concerns the adequacy of representation in providing an assessment of a plea bargain without first seeking suppression of a confession assumed to have been improperly obtained.

I

On December 7, 1995, respondent Randy Moore and two confederates attacked Kenneth Ro-

gers at his home and bloodied him before tying him with duct tape and throwing him in the trunk of a car. They drove into the Oregon countryside, where Moore shot Rogers in the temple, killing him.

Afterwards, Moore and one of his accomplices told two people-Moore's brother and the accomplice's girlfriend-about the crimes. According to Moore's brother, Moore and his accomplice admitted:

"[T]o make an example and put some scare into Mr. Rogers ..., they had blind-folded him [and] duct taped him and put him in the trunk of the car and took him out to a place that's a little remote.... [T]heir intent was to leave him there and make him walk home ... [Moore] had taken the revolver from Lonnie and at the time he had taken it, Mr. Rogers had slipped backwards on the mud and the gun discharged." App. 157-158.

Moore and his accomplice repeated this account to the police. On the advice of counsel Moore agreed to plead no contest to felony murder in exchange for a sentence of 300 months, the minimum sentence allowed by law for the offense.

Moore later filed for postconviction relief in an Oregon state court, alleging that he had been denied his right to effective assistance of counsel. He complained that his lawyer had not filed a motion to suppress his confession to police in advance of the lawyer's advice that Moore considered before accepting the plea offer. After an evidentiary hearing, the Oregon court concluded a "motion to suppress would have been fruitless" in light of the other admissible confession by Moore, to which two witnesses could testify. *Id.*, at 140. As the court noted, Moore's trial counsel explained why he did not move to exclude Moore's confession to police:

"Mr. Moore and I discussed the possibility of filing a Motion to Suppress and concluded that it would be unavailing, because ... he had previously made a full confession to his brother and to [his accomplice's girlfriend], either one of whom

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could have been called as a witness at any time to repeat his confession in full detail.” Jordan Affidavit (Feb. 26, 1999), App. to Pet. for Cert. 70, ¶ 4.

Counsel added that he had made Moore aware of the possibility of being charged with aggravated murder, which carried a potential death sentence, as well as the possibility of a sentence of life imprisonment without parole. See Ore.Rev.Stat. § 163.105(1)(a) (1995). The intense and serious abuse to the victim before the shooting might well have led the State to insist on a strong response. In light of these facts the Oregon court concluded Moore had not established ineffective assistance of counsel under *Strickland*.

Moore filed a petition for habeas corpus in the United States District Court for the District of Oregon, renewing his ineffective-assistance claim. The District Court denied the petition, finding sufficient evidence to support the Oregon court’s conclusion *739 that suppression would not have made a difference.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. *Moore v. Czerniak*, 574 F.3d 1092 (2009). In its view the state court’s conclusion that counsel’s action did not constitute ineffective assistance was an unreasonable application of clearly established law in light of *Strickland* and was contrary to *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Six judges dissented from denial of rehearing en banc. 574 F.3d, at 1162.

We granted certiorari. 559 U.S. ----, 130 S.Ct. 1882, 176 L.Ed.2d 361 (2010).

II

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is defined by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

“(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

AEDPA prohibits federal habeas relief for any claim adjudicated on the merits in state court, unless one of the exceptions listed in § 2254(d) obtains. Relevant here is § 2254(d)(1)’s exception “permitting relitigation where the earlier state decision resulted from an ‘unreasonable application of’ clearly established federal law.” *Richter*, --- U.S., at ----, 131 S.Ct. 770. The applicable federal law consists of the rules for determining when a criminal defendant has received inadequate representation as defined in *Strickland*.

[1] To establish ineffective assistance of counsel “a defendant must show both deficient performance by counsel and prejudice.” *Knowles v. Mirzayance*, 556 U.S. ----, ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251 (2009). In addressing this standard and its relationship to AEDPA, the Court today in *Richter*, --- U.S., at ---- - ----, 131 S.Ct. 770, gives the following explanation:

“To establish deficient performance, a person challenging a conviction must show that ‘counsel’s representation fell below an objective standard of reasonableness.’ [*Strickland*,] 466 U.S., at 688 [104 S.Ct. 2052]. A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable profes-

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sional assistance. *Id.*, at 689 [104 S.Ct. 2052]. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' *Id.*, at 687 [104 S.Ct. 2052].

"With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' ...

" 'Surmounting *Strickland*' s high bar is never an easy task.' *Padilla v. Kentucky*, 559 U.S. ----, ---- [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010). An ineffective-assistance claim can function *740 as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690 [104 S.Ct. 2052]. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.*, at 689 [104 S.Ct. 2052]; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly defer-

ential,' *id.*, at 689 [104 S.Ct. 2052]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at ----, 129 S.Ct., at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ---- [129 S.Ct., at 1420]. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."

III

The question becomes whether Moore's counsel provided ineffective assistance by failing to seek suppression of Moore's confession to police before advising Moore regarding the plea. Finding that any "motion to suppress would have been fruitless," the state postconviction court concluded that Moore had not received ineffective assistance of counsel. App. 140. The state court did not specify whether this was because there was no deficient performance under *Strickland* or because Moore suffered no *Strickland* prejudice, or both. To overcome the limitation imposed by § 2254(d), the Court of Appeals had to conclude that both findings would have involved an unreasonable application of clearly established federal law. See *Richter*, --- U.S., at ---- - ----, 131 S.Ct. 770. In finding that this standard was met, the Court of Appeals erred, for the state-court decision was not an unreasonable application of either part of the *Strickland* rule.

A

The Court of Appeals was wrong to accord scant deference to counsel's judgment, and doubly wrong to conclude it would have been unreasonable to find that the defense attorney qualified as counsel for Sixth Amendment purposes. *Knowles*, *supra*, at ----, 129 S.Ct., at 1420; *Strickland*, 466 U.S., at 687, 104 S.Ct. 2052. Counsel gave this ex-

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planation for his decision to discuss the plea bargain without first challenging Moore's confession to the *741 police: that suppression would serve little purpose in light of Moore's other full and admissible confession, to which both his brother and his accomplice's girlfriend could testify. The state court would not have been unreasonable to accept this explanation.

Counsel also justified his decision by asserting that any motion to suppress was likely to fail. Reviewing the reasonableness of that justification is complicated by the possibility that petitioner forfeited one argument that would have supported its position: The Court of Appeals assumed that a motion would have succeeded because the warden did not argue otherwise. Of course that is not the same as a concession that no competent attorney would think a motion to suppress would have failed, which is the relevant question under *Strickland*. See *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Richter*, --- U.S., at --- - ---, 131 S.Ct. 770. It is unnecessary to consider whether counsel's second justification was reasonable, however, since the first and independent explanation—that suppression would have been futile—confirms that his representation was adequate under *Strickland*, or at least that it would have been reasonable for the state court to reach that conclusion.

[2] Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the

case grows stronger and prosecutors find stiffened resolve. A risk, in addition to the obvious one of losing the chance for a defense verdict, is that an early plea bargain might come before the prosecution finds its case is getting weaker, not stronger. The State's case can begin to fall apart as stories change, witnesses become unavailable, and new suspects are identified.

[3][4] These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage. Failure to respect the latitude *Strickland* requires can create at least two problems in the plea context. First, the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real. The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision. There are, moreover, special difficulties in evaluating the basis for counsel's judgment: An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial. In determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel. *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). AEDPA compounds the imperative of judicial caution.

Second, ineffective-assistance claims that lack necessary foundation may bring instability to the very process the inquiry seeks to protect. *Strickland* allows a defendant “to escape rules of waiver and *742 forfeiture,” *Richter*, --- U.S., at ---, 131 S.Ct. 770. Prosecutors must have assurance that a plea will not be undone years later because of infidelity to the requirements of AEDPA and the teachings of *Strickland*. The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel's decisions while failing to accord the latitude *Strickland* mandates or disregarding the struc-

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ture dictated by AEDPA could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one.

[5][6] Whether before, during, or after trial, when the Sixth Amendment applies, the formulation of the standard is the same: reasonable competence in representing the accused. *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052. In applying and defining this standard substantial deference must be accorded to counsel's judgment. *Id.*, at 689, 104 S.Ct. 2052. But at different stages of the case that deference may be measured in different ways.

[7] In the case of an early plea, neither the prosecution nor the defense may know with much certainty what course the case may take. It follows that each side, of necessity, risks consequences that may arise from contingencies or circumstances yet unperceived. The absence of a developed or an extensive record and the circumstance that neither the prosecution nor the defense case has been well defined create a particular risk that an after-the-fact assessment will run counter to the deference that must be accorded counsel's judgment and perspective when the plea was negotiated, offered, and entered.

[8] Prosecutors in the present case faced the cost of litigation and the risk of trying their case without Moore's confession to the police. Moore's counsel could reasonably believe that a swift plea bargain would allow Moore to take advantage of the State's aversion to these hazards. And whenever cases involve multiple defendants, there is a chance that prosecutors might convince one defendant to testify against another in exchange for a better deal. Moore's plea eliminated that possibility and ended an ongoing investigation. Delaying the plea for further proceedings would have given the State time to uncover additional incriminating evidence that could have formed the basis of a capital prosecution. It must be remembered, after all, that Moore's claim that it was an accident when he shot the victim through the temple might be disbelieved.

It is not clear how the successful exclusion of the confession would have affected counsel's strategic calculus. The prosecution had at its disposal two witnesses able to relate another confession. True, Moore's brother and the girlfriend of his accomplice might have changed their accounts in a manner favorable to Moore. But the record before the state court reveals no reason to believe that either witness would violate the legal obligation to convey the content of Moore's confession. And to the extent that his accomplice's girlfriend had an ongoing interest in the matter, she might have been tempted to put more blame, not less, on Moore. Then, too, the accomplices themselves might have decided to implicate Moore to a greater extent than his own confession did, say by indicating that Moore shot the victim deliberately, not accidentally. All these possibilities are speculative. What counsel knew at the time was that the existence of the two witnesses to an additional confession posed a serious strategic concern.

Moore's prospects at trial were thus anything but certain. Even now, he does not deny any involvement in the kidnaping and killing. In these circumstances, and with a potential capital charge lurking, *743 Moore's counsel made a reasonable choice to opt for a quick plea bargain. At the very least, the state court would not have been unreasonable to so conclude. Cf. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (explaining that state courts enjoy "more leeway" under AEDPA in applying general standards).

The Court of Appeals' contrary holding rests on a case that did not involve ineffective assistance of counsel: *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). To reach that result, it transposed that case into a novel context; and novelty alone—at least insofar as it renders the relevant rule less than "clearly established"—provides a reason to reject it under AEDPA. See *Yarborough*, *supra*, at 666, 124 S.Ct. 2140 ("Section 2254(d)(1) would be undermined if habeas

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courts introduced rules not clearly established under the guise of extensions to existing law ... [, although c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt"). And the transposition is improper even on its own terms. According to the Court of Appeals, "*Fulminante* stands for the proposition that the admission of an additional confession ordinarily reinforces and corroborates the others and is therefore prejudicial." 574 F.3d, at 1111. Based on that reading, the Court of Appeals held that the state court's decision "was contrary to *Fulminante*." *Id.*, at 1102. But *Fulminante* may not be so incorporated into the *Strickland* performance inquiry.

A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be "contrary to" *Fulminante*, for *Fulminante*-which involved the admission of an involuntary confession in violation of the Fifth Amendment-says nothing about the *Strickland* standard of effectiveness. See *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) ("A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts"). The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one. The state court accepted counsel's view that seeking to suppress Moore's second confession would have been "fruitless." It would not have been unreasonable to conclude that counsel could incorporate that view into his assessment of a plea offer, a subject with which *Fulminante* is in no way concerned.

A finding of constitutionally adequate performance under *Strickland* cannot be contrary to *Fulminante*. The state court likely reached the correct result under *Strickland*. And under § 2254(d), that it reached a reasonable one is sufficient. See *Richter*, --- U.S., at ---, 131 S.Ct. 770.

B

[9] The Court of Appeals further concluded that it would have been unreasonable for the state postconviction court to have found no prejudice in counsel's failure to suppress Moore's confession to police. To prevail on prejudice before the state court Moore had to demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[10][11] Deference to the state court's prejudice determination is all the more significant in light of the uncertainty inherent in plea negotiations described *744 above: The stakes for defendants are high, and many elect to limit risk by forgoing the right to assert their innocence. A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.

[12] The state court here reasonably could have determined that Moore would have accepted the plea agreement even if his second confession had been ruled inadmissible. By the time the plea agreement cut short investigation of Moore's crimes, the State's case was already formidable and included two witnesses to an admissible confession. Had the prosecution continued to investigate, its case might well have become stronger. At the same time, Moore faced grave punishments. His decision to plead no contest allowed him to avoid a possible sentence of life without parole or death. The bargain counsel struck was thus a favorable one-the statutory minimum for the charged offense-and the decision to forgo a challenge to the confession may have been essential to securing that agreement.

Once again the Court of Appeals reached a contrary conclusion by pointing to *Fulminante*: "The state court's finding that a motion to suppress a recorded confession to the police would have been 'fruitless' ... was without question contrary to clearly established federal law as set forth in *Fulminante*." 574 F.3d, at 1112. And again there is no

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sense in which the state court's finding could be contrary to *Fulminante*, for *Fulminante* says nothing about prejudice for *Strickland* purposes, nor does it contemplate prejudice in the plea bargain context.

The Court of Appeals appears to have treated *Fulminante* as a *per se* rule of prejudice, or something close to it, in all cases involving suppressible confessions. It is not. In *Fulminante* five Justices made the uncontroversial observation that many confessions are powerful evidence. See, e.g., 499 U.S., at 296, 111 S.Ct. 1246. *Fulminante*'s prejudice analysis arose on direct review following an acknowledged constitutional error at trial. The State therefore had the burden of showing that it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (paraphrasing *Fulminante*, *supra*). That standard cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant who entered into a plea agreement. Many defendants reasonably enter plea agreements even though there is a significant probability—much more than a reasonable doubt—that they would be acquitted if they proceeded to trial. Thus, the question in the present case is not whether Moore was sure beyond a reasonable doubt that he would still be convicted if the extra confession were suppressed. It is whether Moore established the reasonable probability that he would not have entered his plea but for his counsel's deficiency, *Hill*, *supra*, at 59, 106 S.Ct. 366, and more to the point, whether a state court's decision to the contrary would be unreasonable.

To the extent *Fulminante*'s application of the harmless-error standard sheds any light on the present case, it suggests that the state court's prejudice determination was reasonable. *Fulminante* found that an improperly admitted confession was not harmless under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) because the remaining evidence against the defendant

was weak. The additional evidence consisted primarily of a second confession that *Fulminante* had *745 made to the informant's fiancée. But many of its details were not corroborated, the fiancée had not reported the confession for a long period of time, the State had indicated that both confessions were essential to its case, and the fiancée potentially "had a motive to lie." 499 U.S., at 300, 111 S.Ct. 1246. Moore's plea agreement, by contrast, ended the government's investigation well before trial, yet the evidence against Moore was strong. The accounts of Moore's second confession to his brother and his accomplice's girlfriend corroborated each other, were given to people without apparent reason to lie, and were reported without delay.

The State gave no indication that its felony-murder prosecution depended on the admission of the police confession, and Moore does not now deny that he kidnapped and killed Rogers. Given all this, an unconstitutional admission of Moore's confession to police might well have been found harmless even on direct review if Moore had gone to trial after the denial of a suppression motion.

Other than for its discussion of the basic proposition that a confession is often powerful evidence, *Fulminante* is not relevant to the present case. The state postconviction court reasonably could have concluded that Moore was not prejudiced by counsel's actions. Under AEDPA, that finding ends federal review. See *Richter*, --- U.S., at ---, 131 S.Ct. 770.

Judge Berzon's concurring opinion in the Court of Appeals does not provide a basis for issuance of the writ. The concurring opinion would have found the state court's prejudice determination unreasonable in light of *Kimmelman*. It relied on *Kimmelman* to find that Moore suffered prejudice for *Strickland* purposes because there was a reasonable possibility that he would have obtained a better plea agreement but for his counsel's errors. But *Kimmelman* concerned a conviction following a bench trial, so it did not establish, much less clearly establish,

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the appropriate standard for prejudice in cases involving plea bargains. See 477 U.S., at 389, 106 S.Ct. 2574. That standard was established in *Hill*, which held that a defendant who enters a plea agreement must show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” 474 U.S., at 59, 106 S.Ct. 366. Moore’s failure to make that showing forecloses relief under AEDPA.

IV

There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those, like this one, where a plea was entered even before the prosecution decided upon all of the charges. A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. Still, hindsight cannot suffice for relief when counsel’s choices were reasonable and legitimate based on predictions of how the trial would proceed. See *Richter*, --- U.S., at ---, 131 S.Ct. 770.

Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial or, as in this case, even before the prosecution decided on the charges. The added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral *746 challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place. The substantial burden to show ineffective assistance of counsel, the burden the claimant must meet to avoid the plea, has not been met in this case.

The state postconviction court’s decision involved no unreasonable application of Supreme Court precedent. Because the Court of Appeals erred in finding otherwise, its judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KAGAN took no part in the consideration or decision of this case.

Justice GINSBURG, concurring in the judgment.

To prevail under the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner for federal habeas corpus relief must demonstrate “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial,” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). As Moore’s counsel confirmed at oral argument, see Tr. of Oral Arg. 32, Moore never declared that, better informed, he would have resisted the plea bargain and opted for trial. For that reason, I concur in the Court’s judgment.

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H

Supreme Court of the United States
Kelly HARRINGTON, Warden, Petitioner,

v.

Joshua RICHTER.

No. 09-587.

Jan. 19, 2011.

Argued Oct. 12, 2010.

Decided Jan. 19, 2011.

Background: Following affirmance of his convictions for murder, attempted murder, burglary, and robbery, state inmate filed petition for writ of habeas corpus. The United States District Court for the Eastern District of California, James K. Singleton, Senior District Judge, 2006 WL 769199, denied petition, and inmate appealed. The United States Court of Appeals for the Ninth Circuit, Beezer, Circuit Judge, 521 F.3d 1222, affirmed. On rehearing en banc, the Court of Appeals, Reinhardt, Circuit Judge, 578 F.3d 944, reversed and remanded with directions to grant the writ. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

- (1) Antiterrorism and Effective Death Penalty Act (AEDPA) applied in reviewing state court's summary denial of inmate's ineffective assistance claim;
- (2) state court's determination that counsel was not deficient in not consulting blood evidence experts was not an unreasonable application of *Strickland*;
- (3) state court's determination that counsel was not deficient in failing to expect the prosecution would offer such experts was not an unreasonable application of *Strickland*; and
- (4) state court's determination that inmate was not prejudiced by counsel's performance was not an unreasonable application of *Strickland*.

Reversed and remanded.

Justice Ginsburg filed an opinion concurring in the judgment.

Justice Kagan took no part in the consideration or decision of the case.

West Headnotes

[1] Habeas Corpus 197 ↪ 201

197 Habeas Corpus

197I In General

197I(A) In General

197I(A)1 Nature of Remedy in General

197k201 k. In general. Most Cited

The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.

[2] Habeas Corpus 197 ↪ 201

197 Habeas Corpus

197I In General

197I(A) In General

197I(A)1 Nature of Remedy in General

197k201 k. In general. Most Cited

Judges must be vigilant and independent in reviewing petitions for writ of habeas corpus, a commitment that entails substantial judicial resources, but those resources are diminished and misspent, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.

[3] Habeas Corpus 197 ↪ 450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Ter-

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ritorial Cases

197k450.1 k. In general. Most Cited

Cases

The availability of federal habeas relief is limited with respect to claims previously adjudicated on the merits in state-court proceedings. 28 U.S.C.A. § 2254(d).

[4] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited

Cases

Habeas Corpus 197 ↪452

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k452 k. Federal or constitutional questions. Most Cited Cases

Habeas Corpus 197 ↪766

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k766 k. Adequacy or effectiveness of state proceeding; full and fair litigation. Most Cited Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) bars relitigation of any claim adjudicated on the merits in state court, subject only to the exceptions for state court determinations that resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established fed-

eral law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Determining whether a state court's decision resulted from an unreasonable legal or factual conclusion, as would warrant federal habeas relief, does not require that there be an opinion from the state court explaining the state court's reasoning. 28 U.S.C.A. § 2254(d)(1, 2).

[6] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Where a state court's decision is unaccompanied by an explanation, the federal habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief; this is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for federal habeas statute applies when a claim, not a component of one, has been adjudicated. 28 U.S.C.A. § 2254(d).

[7] Habeas Corpus 197 ↪766

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

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197k765 State Determinations in Federal Court

197k766 k. Adequacy or effectiveness of state proceeding; full and fair litigation. Most Cited Cases

When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits, within the meaning of Antiterrorism and Effective Death Penalty Act (AEDPA), in the absence of any indication or state-law procedural principles to the contrary, but this presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely. 28 U.S.C.A. § 2254(d).

[8] Habeas Corpus 197 486(2)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(2) k. Particular issues and problems. Most Cited Cases

Habeas Corpus 197 773

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k773 k. Counsel. Most Cited Cases

Petitioner's speculative assertion, that the California Supreme Court denied his state habeas petition asserting an ineffective assistance of counsel claim in a one-sentence summary order because the members of that court did not agree on the reasons for denying his petition, was insufficient to overcome presumption that the state court had adjudic-

ated the ineffective assistance claim on the merits, and thus the Antiterrorism and Effective Death Penalty Act (AEDPA) applied to petitioner's subsequent assertion of the ineffective assistance claim in his federal habeas petition. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[9] Habeas Corpus 197 769

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k769 k. Existence and adequacy of record or findings. Most Cited Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) does not require a state court to give reasons before its decision can be deemed to have been adjudicated on the merits. 28 U.S.C.A. § 2254(d).

[10] Habeas Corpus 197 450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Habeas Corpus 197 452

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k452 k. Federal or constitutional questions. Most Cited Cases

Federal habeas relief may not be granted for claims subject to the Antiterrorism and Effective Death Penalty Act (AEDPA) unless it is shown that

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the earlier state court's decision was contrary to federal law then clearly established in the holdings of the Supreme Court, or that it involved an unreasonable application of such law, or that it was based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C.A. § 2254(d)(1, 2).

[11] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

The pivotal question in reviewing an ineffective assistance of counsel claim under the Antiterrorism and Effective Death Penalty Act (AEDPA) is whether the state court's application of the *Strickland* standard was unreasonable; this is different from asking whether defense counsel's performance fell below *Strickland's* standard. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[12] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

For purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA), an unreasonable application of federal law is different from an incorrect application of federal law. 28 U.S.C.A. § 2254(d)(1).

[13] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

In reviewing an ineffective assistance of counsel claim under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself. 28 U.S.C.A. § 2254(d).

[14] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision. 28 U.S.C.A. § 2254(d).

[15] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Evaluating whether a state court's application of a legal rule was unreasonable, and thus warrants federal habeas relief, requires considering the rule's specificity; the more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. 28 U.S.C.A. § 2254(d).

[16] Habeas Corpus 197 ↪450.1

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197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

It is not an unreasonable application of clearly established federal law, and thus does not warrant federal habeas relief, for a state court to decline to apply a specific legal rule that has not been squarely established by the Supreme Court. 28 U.S.C.A. § 2254(d)(1).

[17] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a habeas court must determine what arguments or theories supported, or could have supported, the state court's decision, and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of the Supreme Court. 28 U.S.C.A. § 2254(d).

[18] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable, as would warrant federal habeas relief. 28 U.S.C.A. § 2254(d)(1).

[19] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

If the Antiterrorism and Effective Death Penalty Act (AEDPA) standard for granting federal habeas relief is difficult to meet, that is because it was meant to be. 28 U.S.C.A. § 2254(d).

[20] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Habeas Corpus 197 ↪766

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(C) Proceedings

197III(C)4 Conclusiveness of Prior Determinations

197k765 State Determinations in Federal Court

197k766 k. Adequacy or effectiveness of state proceeding; full and fair litigation. Most Cited Cases

The Antiterrorism and Effective Death Penalty Act (AEDPA) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. 28 U.S.C.A. § 2254(d).

[21] Habeas Corpus 197 ↪450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

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197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) preserves authority to issue habeas writ in cases where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents; it goes no farther. 28 U.S.C.A. § 2254(d).

[22] Habeas Corpus 197 450.1

197 Habeas Corpus

197I In General

197I(D) Federal Court Review of Petitions by State Prisoners

197I(D)4 Sufficiency of Presentation of Issue or Utilization of State Remedy

197k362 Particular Remedies or Proceedings

197k366 k. Direct review; appeal or error. Most Cited Cases

Habeas Corpus 197 450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

The Antiterrorism and Effective Death Penalty Act (AEDPA) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. 28 U.S.C.A. § 2254(d).

[23] Habeas Corpus 197 450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Ter-

ritorial Cases

197k450.1 k. In general. Most Cited Cases

As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. 28 U.S.C.A. § 2254(d).

[24] Habeas Corpus 197 450.1

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(A) Ground and Nature of Restraint

197k450 Federal Review of State or Territorial Cases

197k450.1 k. In general. Most Cited Cases

Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights, and it disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority. 28 U.S.C.A. § 2254(d).

[25] Habeas Corpus 197 319.1

197 Habeas Corpus

197I In General

197I(D) Federal Court Review of Petitions by State Prisoners

197I(D)1 In General

197k319 Exhaustion of State Remedies

197k319.1 k. In general. Most Cited Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. 28 U.S.C.A. § 2254(d).

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[26] Habeas Corpus 197 ↪319.1

197 Habeas Corpus
 197I In General
 197I(D) Federal Court Review of Petitions
 by State Prisoners
 197I(D)1 In General
 197k319 Exhaustion of State Remedies
 197k319.1 k. In general. Most Cited

Cases

Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C.A. § 2254(b).

[27] Habeas Corpus 197 ↪401

197 Habeas Corpus
 197I In General
 197I(D) Federal Court Review of Petitions
 by State Prisoners
 197I(D)5 Availability of Remedy Despite
 Procedural Default or Want of Exhaustion
 197k401 k. In general. Most Cited

If the state court rejects a petitioner's claim on procedural grounds, the claim is barred on federal habeas review unless one of the exceptions to the doctrine of *Wainwright v. Sykes* applies.

[28] Habeas Corpus 197 ↪319.1

197 Habeas Corpus
 197I In General
 197I(D) Federal Court Review of Petitions
 by State Prisoners
 197I(D)1 In General
 197k319 Exhaustion of State Remedies
 197k319.1 k. In general. Most Cited

Cases

Antiterrorism and Effective Death Penalty Act (AEDPA) complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding. 28 U.S.C.A. § 2254(d).

[29] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus
 197II Grounds for Relief; Illegality of Restraint
 197II(B) Particular Defects and Authority for
 Detention in General
 197k482 Counsel
 197k486 Adequacy and Effectiveness
 of Counsel

197k486(1) k. In general. Most Cited Cases

To have been entitled to relief on claim of ineffective assistance of counsel raised in state habeas proceeding, petitioner had to show both that his counsel provided deficient assistance and that there was prejudice as a result. U.S.C.A. Const.Amend. 6 .

[30] Criminal Law 110 ↪1882

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1879 Standard of Effective Assistance in General

110k1882 k. Deficient representation in general. Most Cited Cases

To establish deficient performance, as element of claim of ineffective assistance of counsel, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. U.S.C.A. Const.Amend. 6.

[31] Criminal Law 110 ↪1871

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1871 k. Presumptions and burden of proof in general. Most Cited Cases

A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. U.S.C.A.

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Const.Amend. 6.

[32] Criminal Law 110 🔑1882

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1879 Standard of Effective Assistance in General

110k1882 k. Deficient representation in general. Most Cited Cases

The challenger's burden on claim of ineffective assistance of counsel is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. U.S.C.A. Const.Amend. 6.

[33] Criminal Law 110 🔑1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general. Most Cited Cases

With respect to prejudice, as element of claim of ineffective assistance of counsel, a challenger must demonstrate a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

[34] Criminal Law 110 🔑1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general. Most Cited Cases

To establish prejudice, as element of claim of ineffective assistance of counsel, it is not enough to show that counsel's errors had some conceivable effect on the outcome of the proceeding. U.S.C.A. Const.Amend. 6.

[35] Criminal Law 110 🔑1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general. Most Cited Cases

To be prejudicial, as element of claim of ineffective assistance, counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[36] Criminal Law 110 🔑1870

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1870 k. In general. Most Cited Cases

Surmounting *Strickland's* high bar is never an easy task. U.S.C.A. Const.Amend. 6.

[37] Criminal Law 110 🔑1870

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)I In General

110k1870 k. In general. Most Cited Cases

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is

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meant to serve. U.S.C.A. Const.Amend. 6.

[38] Criminal Law 110 ↪1888

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1888 k. Determination. Most

Cited Cases

Even under de novo review, the standard for judging counsel's representation is a most deferential one. U.S.C.A. Const.Amend. 6.

[39] Criminal Law 110 ↪1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General

110k1882 k. Deficient representation in general. Most Cited Cases

The question under deficiency prong of claim of ineffective assistance of counsel is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom. U.S.C.A. Const.Amend. 6.

[40] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

The standards created by *Strickland* and the Antiterrorism and Effective Death Penalty Act (AEDPA) are both highly deferential, and when the two apply in tandem, review is doubly so. U.S.C.A.

Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[41] Criminal Law 110 ↪1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General

110k1882 k. Deficient representation in general. Most Cited Cases

The *Strickland* standard is a general one, so the range of reasonable applications is substantial. U.S.C.A. Const.Amend. 6.

[42] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under the Antiterrorism and Effective Death Penalty Act (AEDPA). U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[43] Habeas Corpus 197 ↪486(1)

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k482 Counsel
197k486 Adequacy and Effectiveness of Counsel

197k486(1) k. In general. Most Cited Cases

When Antiterrorism and Effective Death Penalty Act (AEDPA) applies, the question on a claim

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of ineffective assistance of counsel is not whether counsel's actions were reasonable; the question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[44] Habeas Corpus 197 ↪486(4)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(4) k. Evidence; procurement, presentation, and objection. Most Cited Cases

State court's determination, that counsel's failure to consult blood evidence experts in developing defense strategy to murder prosecution or to offer their testimony at trial was not deficient performance, was not an unreasonable application of *Strickland*, and thus did not warrant federal habeas relief; counsel could reasonably have decided to forgo inquiry into the blood evidence, given that instead of supporting petitioner's contention that his co-defendant shot one victim in self defense and the second victim was killed in the crossfire and was later moved by the first shooting victim, such inquiry may have exposed petitioner's version of events as an invention. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

[45] Criminal Law 110 ↪1891

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1891 k. Preparation for trial. Most Cited Cases

Strickland permits counsel to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[46] Criminal Law 110 ↪1884

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1884 k. Strategy and tactics in general. Most Cited Cases

There are countless ways for counsel to provide effective assistance in any given case; even the best criminal defense attorneys would not defend a particular client in the same way. U.S.C.A. Const.Amend. 6.

[47] Criminal Law 110 ↪1884

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1884 k. Strategy and tactics in general. Most Cited Cases

A defense attorney can, consistent with the Sixth Amendment, avoid activities that appear distracting from more important duties. U.S.C.A. Const.Amend. 6.

[48] Criminal Law 110 ↪1891

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1891 k. Preparation for trial. Most Cited Cases

An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. U.S.C.A. Const.Amend. 6.

[49] Criminal Law 110 ↪1870

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

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110XXXI(C)1 In General
110k1870 k. In general. Most Cited

Cases

Criminal Law 110 ↪1884

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1884 k. Strategy and tactics in general. Most Cited Cases

Although courts may not indulge post hoc rationalization for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. U.S.C.A. Const.Amend. 6.

[50] Criminal Law 110 ↪1871

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and burden of proof in general. Most Cited Cases

There is a strong presumption that defense counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. U.S.C.A. Const.Amend. 6.

[51] Criminal Law 110 ↪1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient representation in general. Most Cited Cases

Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not

counsel's subjective state of mind. U.S.C.A. Const.Amend. 6.

[52] Criminal Law 110 ↪1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In general. Most Cited Cases

Strickland does not guarantee perfect representation, only a reasonably competent attorney. U.S.C.A. Const.Amend. 6.

[53] Criminal Law 110 ↪1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In general. Most Cited Cases

Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial. U.S.C.A. Const.Amend. 6.

[54] Criminal Law 110 ↪1880

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1880 k. In general. Most Cited Cases

Criminal Law 110 ↪1891

110 Criminal Law
110XXXI Counsel

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110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1891 k. Preparation for trial. Most Cited Cases

Just as there is no expectation that competent counsel will be a flawless strategist or tactician, a defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. U.S.C.A. Const.Amend. 6.

[55] Habeas Corpus 197 ↪ 486(4)

197 Habeas Corpus
 197II Grounds for Relief; Illegality of Restraint
 197II(B) Particular Defects and Authority for Detention in General
 197k482 Counsel
 197k486 Adequacy and Effectiveness of Counsel

197k486(4) k. Evidence; procurement, presentation, and objection. Most Cited Cases

State court's determination, that counsel was not deficient because he had not expected the prosecution in murder case to offer expert testimony on blood evidence from crime scene and therefore was unable to offer expert testimony in response, was not an unreasonable application of *Strickland*, and thus did not warrant federal habeas relief; the prosecution itself did not expect to present forensic testimony and had made no preparations for doing so on the eve of trial, and counsel represented petitioner with vigor and conducted a skillful cross-examination of the prosecution's experts, eliciting concessions and drawing attention to weaknesses in their conclusions. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

[56] Criminal Law 110 ↪ 1931

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1921 Introduction of and Objections to Evidence at Trial

110k1931 k. Experts; opinion testimony. Most Cited Cases

Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. U.S.C.A. Const.Amend. 6.

[57] Criminal Law 110 ↪ 1883

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1879 Standard of Effective Assistance in General
 110k1883 k. Prejudice in general. Most Cited Cases

While in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. U.S.C.A. Const.Amend. 6.

[58] Criminal Law 110 ↪ 1883

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)1 In General
 110k1879 Standard of Effective Assistance in General
 110k1883 k. Prejudice in general. Most Cited Cases

In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. U.S.C.A. Const.Amend. 6.

[59] Criminal Law 110 ↪ 1883

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation

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110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general.

Most Cited Cases

Strickland's prejudice prong asks whether it is reasonably likely the result would have been different. U.S.C.A. Const.Amend. 6.

[60] Criminal Law 110 1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general.

Most Cited Cases

Strickland's prejudice standard does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. U.S.C.A. Const.Amend. 6.

[61] Criminal Law 110 1883

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1883 k. Prejudice in general.

Most Cited Cases

Under *Strickland's* prejudice standard, the likelihood of a different result must be substantial, not just conceivable. U.S.C.A. Const.Amend. 6.

[62] Habeas Corpus 197 486(4)

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k482 Counsel

197k486 Adequacy and Effectiveness of Counsel

197k486(4) k. Evidence; procurement, presentation, and objection. Most Cited Cases

State habeas court's determination, that petitioner was not prejudiced by counsel's failure to consult blood evidence experts or to offer their testimony in murder prosecution, was not an unreasonable application of *Strickland*, and thus did not warrant federal habeas relief; although petitioner claimed blood evidence supported his assertion that his co-defendant shot one victim in self defense and the second victim was killed in the crossfire and was later moved by the first shooting victim, the expert serology evidence he presented in state habeas proceeding established nothing more than theoretical possibility that second victim's blood was in area where petitioner said he was shot, and sufficient circumstantial evidence pointed to petitioner's guilt. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1), (2).

776 Syllabus FN

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In 1994, deputies called to drug dealer Johnson's California home found Johnson wounded and Klein fatally wounded. Johnson claimed that he was shot in his bedroom by respondent Richter's codefendant, Branscombe; that he found Klein on the living room couch; and that his gun safe, a pistol, and cash were missing. His account was corroborated by evidence at the scene, including, relevant here, spent shell casings, blood spatters, and blood pooled in the bedroom doorway. Investigators took a blood sample from a wall near the bedroom door, but not from the blood pool. A search of Richter's home turned up the safe and ammunition matching evidence at the scene. After his arrest on murder

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and other charges, Richter initially denied his involvement, but later admitted disposing of Johnson's and Branscombe's guns. The prosecution initially built its case on Johnson's testimony and the circumstantial evidence, but it adjusted its approach after Richter's counsel, in his opening statement, outlined the theory that Branscombe shot Johnson in self-defense and that Klein was killed in the crossfire in the bedroom doorway, and stressed the lack of forensic support for *777 the prosecution's case. The prosecution then decided to call an expert in blood pattern evidence, who testified that it was unlikely that Klein had been shot outside the living room and then moved to the couch, and a serologist, who testified that the blood sample taken near the blood pool could be Johnson's but not Klein's. Under cross-examination, she conceded that she had not tested the sample for cross-contamination and that a degraded sample would make it difficult to tell if it had blood of Klein's type. Defense counsel called Richter to tell his conflicting version of events and called other witnesses to corroborate Richter's version. Richter was convicted and sentenced to life without parole. He later sought habeas relief from the California Supreme Court, asserting, *inter alia*, that his counsel provided ineffective assistance, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, when he failed to present expert testimony on blood evidence, because it could have disclosed the blood pool's source and bolstered Richter's theory. He also offered affidavits from forensics experts to support his claim. The court denied the petition in a one-sentence summary order. Subsequently, he reasserted his state claims in a federal habeas petition. The District Court denied his petition. A Ninth Circuit panel affirmed, but the en banc court reversed. Initially it questioned whether 28 U.S.C. § 2254(d)-which, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), limits the availability of federal habeas relief for claims previously "adjudicated on the merits" in state court-applied to Richter's petition, since the State Supreme Court issued only a summary denial. But it found the state-court decision unreasonable

anyway. In its view, trial counsel was deficient in failing to consult blood evidence experts in planning a trial strategy and in preparing to rebut expert evidence the prosecution might-and later did-offer.

Held:

1. Section 2254(d) applies to Richter's petition, even though the state court's order was unaccompanied by an opinion explaining the court's reasoning. Pp. 783 - 785.

(a) By its terms, § 2254(d) bars relitigation of a claim "adjudicated on the merits" in state court unless, among other exceptions, the earlier state-court "decision" involved "an unreasonable application" of "clearly established Federal law, as determined by" this Court, § 2254(d)(1). Nothing in its text-which refers only to a "decision" resulting "from an adjudication"-requires a statement of reasons. Where the state-court decision has no explanation, the habeas petitioner must still show there was no reasonable basis for the state court to deny relief. There is no merit to the assertion that applying § 2254(d) when state courts issue summary rulings will encourage those courts to withhold explanations. The issuance of summary dispositions can enable state judiciaries to concentrate resources where most needed. Pp. 783 - 785.

(b) Nor is there merit to Richter's argument that § 2254(d) does not apply because the California Supreme Court did not say it was adjudicating his claim "on the merits." When a state court has denied relief, adjudication on the merits can be presumed absent any contrary indication or state-law procedural principles. The presumption may be overcome by a more likely explanation for the state court's decision, but Richter does not make that showing here. Pp. 784 - 785.

2. Richter was not entitled to the habeas relief ordered by the Ninth Circuit. Pp. 785 - 792.

*778 (a) That court failed to accord the required deference to the decision of a state court ad-

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judicating the same claims later presented in the federal habeas petition. Its opinion shows an improper understanding of § 2254(d)'s unreasonableness standard and operation in the context of a *Strickland* claim. Asking whether the state court's application of *Strickland's* standard was unreasonable is different from asking whether defense counsel's performance fell below that standard. Under AEDPA, a state court must be granted a deference and latitude that are not in operation in a case involving direct review under *Strickland*. A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of that decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938. And the more general the rule being considered, "the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid*. The Ninth Circuit explicitly conducted a *de novo* review and found a *Strickland* violation; it then declared without further explanation that the state court's contrary decision was unreasonable. But § 2254(d) requires a habeas court to determine what arguments or theories supported, or could have supported, the state-court decision; and then to ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with a prior decision of this Court. AEDPA's unreasonableness standard is not a test of the confidence of a federal habeas court in the conclusion it would reach as a *de novo* matter. Even a strong case for relief does not make the state court's contrary conclusion unreasonable. Section 2254(d) is designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Pp. 785 - 787.

(b) The Ninth Circuit erred in concluding that Richter demonstrated an unreasonable application of *Strickland* by the state court. Pp. 787 - 792.

(1) Richter could have secured relief in state court only by showing both that his counsel provided deficient assistance and that prejudice resulted. To be deficient, counsel's representation must

have fallen "below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; and there is a "strong presumption" that counsel's representation is within the "wide range" of reasonable professional assistance, *id.*, at 689, 104 S.Ct. 2052. The question is whether counsel made errors so fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Prejudice requires demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694, 104 S.Ct. 2052. "Surmounting *Strickland's* high bar is never ... easy." *Padilla v. Kentucky*, 559 U.S.----, ----, 130 S.Ct. 1473, 176 L.Ed.2d 284. *Strickland* can function as a way to escape rules of waiver and forfeiture. The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom. Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is even more difficult, since both standards are "highly deferential," 466 U.S. at 689, 104 S.Ct. 2052, and since *Strickland's* general standard has a substantial range of reasonable applications. The question under § 2254(d) is not whether counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. Pp. 787 - 788.

*779 (2) The Ninth Circuit erred in holding that because Richter's attorney had not consulted forensic blood experts or introduced expert evidence, the State Supreme Court could not reasonably have concluded counsel provided adequate representation.

A state court could reasonably conclude that a competent attorney could elect a strategy that did not require using blood evidence experts. Rare are the situations in which the latitude counsel enjoys will be limited to any one technique or approach. There were any number of experts whose insight might have been useful to the defense. Counsel is

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entitled to balance limited resources in accord with effective trial tactics and strategies. In finding otherwise the Ninth Circuit failed to “reconstruct the circumstances of counsel's challenged conduct” and “evaluate the conduct from counsel's perspective at the time.” *Strickland, supra*, at 689. Given the many factual differences between the prosecution and defense versions of events, it was far from evident at the time of trial that the blood source was central to Richter's case. And relying on “the harsh light of hindsight” to cast doubt on a trial that took place over 15 years ago is precisely what *Strickland* and AEDPA seek to prevent. See *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914. Even had the value of expert testimony been apparent, it would be reasonable to conclude that a competent attorney might elect not to use it here, where counsel had reason to question the truth of his client's account. Making blood evidence a central issue could also have led the prosecution to produce its own expert analysis, possibly destroying Richter's case, or distracted the jury with esoteric questions of forensic science. Defense counsel's opening statement may have inspired the prosecution to present forensic evidence, but that shows only that the defense strategy did not work out as well as hoped. In light of the record here there was no basis to rule that the state court's determination was unreasonable.

The Court of Appeals erred in dismissing such concern as an inaccurate account of counsel's actual thinking, since *Strickland* examined only the objective reasonableness of counsel's actions. As to whether counsel was constitutionally deficient for not preparing expert testimony as a response to the prosecution's, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for remote possibilities. Here, even if counsel was mistaken, the prosecution itself did not expect to present forensic testimony until the eve of trial. Thus, it is at least debatable whether counsel's error was so fundamental as to call the trial's fairness into doubt. Even if counsel should have foreseen the prosecution's tactic, Richter

would still need to show it was indisputable that *Strickland* required his attorney to rely on a rebuttal witness rather than on cross-examination to discredit the witnesses, but *Strickland* imposes no such requirement. And while it is possible an isolated error can constitute ineffective assistance if it is sufficiently egregious, it is difficult to establish ineffective assistance where counsel's overall performance reflects active and capable advocacy. Pp. 788 - 792.

(3) The Ninth Circuit also erred in concluding that Richter had established prejudice under *Strickland*, which asks whether it is “reasonably likely” the verdict would have been different, 466 U.S. at 696, 104 S.Ct. 2052, not whether a court can be certain counsel's performance had no effect on the outcome or that reasonable doubt might have been established had counsel acted differently. There must be a substantial likelihood of a different result. The State Supreme Court could have reasonably concluded that Richter's *780 prejudice evidence fell short of this standard. His expert serology evidence established only a theoretical possibility of Klein's blood being in the blood pool; and at trial, defense counsel extracted a similar concession from the prosecution's expert. It was also reasonable to find Richter had not established prejudice given that he offered no evidence challenging other conclusions of the prosecution's experts, e.g., that the blood sample matched Johnson's blood type. There was, furthermore, sufficient conventional circumstantial evidence pointing to Richter's guilt, including, e.g., the items found at his home. Pp. 791 - 792.

578 F.3d 944, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, BREYER, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment. KAGAN, J., took no part in the consideration or decision of the case. Harry J. Colombo, Sacramento, CA, for petitioner.

Clifford Gardner, San Francisco, CA, for respondent.

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For U.S. Supreme Court Briefs, See:2010 WL 1919618 (Pet.Brief)2010 WL 2770109 (Resp.Brief)2010 WL 3353143 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

[1][2] The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and mispent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance. That judicial disregard is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review. The Court of Appeals, in disagreement with the contrary conclusions of the Supreme Court of the State of California and of a United States District Court, ordered habeas corpus relief granted to set aside the conviction of Joshua Richter, respondent here. This was clear error.

[3] Under 28 U.S.C. § 2254(d), the availability of federal habeas relief is limited with respect to claims previously “adjudicated on the merits” in state-court proceedings. The first inquiry this case presents is whether that provision applies when state-court relief is denied without an accompanying statement of reasons. If it does, the question is whether the Court of Appeals adhered to the stat-

ute's terms, in this case as it relates to ineffective-assistance claims judged by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A second case decided today, *Premo v. Moore*, *post*, p. ---, presents similar issues. Here, as in that case, it is *781 necessary to reverse the Court of Appeals for failing to accord required deference to the decision of a state court.

I

It is necessary to begin by discussing the details of a crime committed more than a decade and a half ago.

A

Sometime after midnight on December 20, 1994, sheriff's deputies in Sacramento County, California, arrived at the home of a drug dealer named Joshua Johnson. Hours before, Johnson had been smoking marijuana in the company of Richter and two other men, Christian Branscombe and Patrick Klein. When the deputies arrived, however, they found only Johnson and Klein. Johnson was hysterical and covered in blood. Klein was lying on a couch in Johnson's living room, unconscious and bleeding. Klein and Johnson each had been shot twice. Johnson recovered; Klein died of his wounds.

Johnson gave investigators this account: After falling asleep, he awoke to find Richter and Branscombe in his bedroom, at which point Branscombe shot him. Johnson heard more gunfire in the living room and the sound of his assailants leaving. He got up, found Klein bleeding on the living room couch, and called 911. A gun safe, a pistol, and \$6,000 cash, all of which had been in the bedroom, were missing.

Evidence at the scene corroborated Johnson's account. Investigators found spent shell casings in the bedroom (where Johnson said he had been shot) and in the living room (where Johnson indicated Klein had been shot). In the living room there were two casings, a .32 caliber and a .22 caliber. One of

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the bullets recovered from Klein's body was a .32 and the other was a .22. In the bedroom there were two more casings, both .32 caliber. In addition detectives found blood spatter near the living room couch and bloodstains in the bedroom. Pools of blood had collected in the kitchen and the doorway to Johnson's bedroom. Investigators took only a few blood samples from the crime scene. One was from a blood splash on the wall near the bedroom doorway, but no sample was taken from the doorway blood pool itself.

Investigators searched Richter's residence and found Johnson's gun safe, two boxes of .22-caliber ammunition, and a gun magazine loaded with cartridges of the same brand and type as the boxes. A ballistics expert later concluded the .22-caliber bullet that struck Klein and the .22-caliber shell found in the living room matched the ammunition found in Richter's home and bore markings consistent with the model of gun for which the magazine was designed.

Richter and Branscombe were arrested. At first Richter denied involvement. He would later admit taking Johnson's pistol and disposing of it and of the .32-caliber weapon Branscombe used to shoot Johnson and Klein. Richter's counsel produced Johnson's missing pistol, but neither of the guns used to shoot Johnson and Klein was found.

B

Branscombe and Richter were tried together on charges of murder, attempted murder, burglary, and robbery. Only Richter's case is presented here.

The prosecution built its case on Johnson's testimony and on circumstantial evidence. Its opening statement took note of the shell casings found at the crime scene and the ammunition and gun safe found at Richter's residence. Defense counsel offered explanations for the circumstantial evidence and derided Johnson as a drug *782 dealer, a paranoid, and a trigger-happy gun fanatic who had drawn a pistol on Branscombe and Richter the last time he had seen them. And there were inconsisten-

cies in Johnson's story. In his 911 call, for instance, Johnson first said there were four or five men who had broken into his house, not two; and in the call he did not identify Richter and Branscombe among the intruders.

Blood evidence does not appear to have been part of the prosecution's planned case prior to trial, and investigators had not analyzed the few blood samples taken from the crime scene. But the opening statement from the defense led the prosecution to alter its approach. Richter's attorney outlined the theory that Branscombe had fired on Johnson in self-defense and that Klein had been killed not on the living room couch but in the crossfire in the bedroom doorway. Defense counsel stressed deficiencies in the investigation, including the absence of forensic support for the prosecution's version of events.

The prosecution took steps to adjust to the counterattack now disclosed. Without advance notice and over the objection of Richter's attorney, one of the detectives who investigated the shootings testified for the prosecution as an expert in blood pattern evidence. He concluded it was unlikely Klein had been shot outside the living room and then moved to the couch, given the patterns of blood on Klein's face, as well as other evidence including "high velocity" blood spatter near the couch consistent with the location of a shooting. The prosecution also offered testimony from a serologist. She testified the blood sample taken near the pool by the bedroom door could be Johnson's but not Klein's.

Defense counsel's cross-examination probed weaknesses in the testimony of these two witnesses. The detective who testified on blood patterns acknowledged that his inferences were imprecise, that it was unlikely Klein had been lying down on the couch when shot, and that he could not say the blood in the living room was from either of Klein's wounds. Defense counsel elicited from the serologist a concession that she had not tested the bedroom blood sample for cross-contamination. She

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said that if the year-old sample had degraded, it would be difficult to tell whether blood of Klein's type was also present in the sample.

For the defense, Richter's attorney called seven witnesses. Prominent among these was Richter himself. Richter testified he and Branscombe returned to Johnson's house just before the shootings in order to deliver something to one of Johnson's roommates. By Richter's account, Branscombe entered the house alone while Richter waited in the driveway; but after hearing screams and gunshots, Richter followed inside. There he saw Klein lying not on the couch but in the bedroom doorway, with Johnson on the bed and Branscombe standing in the middle of the room. According to Richter, Branscombe said he shot at Johnson and Klein after they attacked him. Other defense witnesses provided some corroboration for Richter's story. His former girlfriend, for instance, said she saw the gun safe at Richter's house shortly before the shootings.

The jury returned a verdict of guilty on all charges. Richter was sentenced to life without parole. On appeal, his conviction was affirmed. *People v. Branscombe*, 72 Cal.Rptr.2d 773 (Cal.App.1998) (officially depublished). The California Supreme Court denied a petition for review, *People v. Branscombe*, No. S069751, 1998 Cal. LEXIS 4252 (June 24, 1998), and Richter did not file a petition for certiorari with this Court. His conviction became final.

*783 C

Richter later petitioned the California Supreme Court for a writ of habeas corpus. He asserted a number of grounds for relief, including ineffective assistance of counsel. As relevant here, he claimed his counsel was deficient for failing to present expert testimony on serology, pathology, and blood spatter patterns, testimony that, he argued, would disclose the source of the blood pool in the bedroom doorway. This, he contended, would bolster his theory that Johnson had moved Klein to the couch.

He offered affidavits from three types of forensic experts. First, he provided statements from two blood serologists who said there was a possibility Klein's blood was intermixed with blood of Johnson's type in the sample taken from near the pool in the bedroom doorway. Second, he provided a statement from a pathologist who said the blood pool was too large to have come from Johnson given the nature of his wounds and his own account of his actions while waiting for the police. Third, he provided a statement from an expert in bloodstain analysis who said the absence of "a large number of satellite droplets" in photographs of the area around the blood in the bedroom doorway was inconsistent with the blood pool coming from Johnson as he stood in the doorway. App. 118. Richter argued this evidence established the possibility that the blood in the bedroom doorway came from Klein, not Johnson. If that were true, he argued, it would confirm his account, not Johnson's. The California Supreme Court denied Richter's petition in a one-sentence summary order. See *In re Richter*, No. S082167 (Mar. 28, 2001), App. to Pet. for Cert. 22a. Richter did not seek certiorari from this Court.

After the California Supreme Court issued its summary order denying relief, Richter filed a petition for habeas corpus in United States District Court for the Eastern District of California. He reasserted the claims in his state petition. The District Court denied his petition, and a three-judge panel of the Court of Appeals for the Ninth Circuit affirmed. See *Richter v. Hickman*, 521 F.3d 1222 (2008). The Court of Appeals granted rehearing en banc and reversed the District Court's decision. See *Richter v. Hickman*, 578 F.3d 944 (2009).

As a preliminary matter, the Court of Appeals questioned whether 28 U.S.C. § 2254(d) was applicable to Richter's petition, since the California Supreme Court issued only a summary denial when it rejected his *Strickland* claims; but it determined the California decision was unreasonable in any event and that Richter was entitled to relief. The court held Richter's trial counsel was deficient for

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failing to consult experts on blood evidence in determining and pursuing a trial strategy and in preparing to rebut expert evidence the prosecution might-and later did-offer. Four judges dissented from the en banc decision.

We granted certiorari. 559 U.S. ---- (2010).

II

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

“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 *784 application of, clearly established Federal law, as determined by the Supreme Court of the United States”; or

“(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

As an initial matter, it is necessary to decide whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied.

[4][5][6] By its terms § 2254(d) bars relitigation of any claim “adjudicated on the merits” in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a “decision,” which resulted from an “adjudication.” As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require

that there be an opinion from the state court explaining the state court's reasoning. See *Chadwick v. Janecka*, 312 F.3d 597, 605-606 (C.A.3 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1253-1254 (C.A.11 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 311-312 (C.A.2 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-162 (C.A.4 2000) (en banc); *Harris v. Stovall*, 212 F.3d 940, 943, n. 1 (C.A.6 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177-1178 (C.A.10 1999); *James v. Bowersox*, 187 F.3d 866, 869 (C.A.8 1999). And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (*per curiam*). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a “claim,” not a component of one, has been adjudicated.

There is no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings because applying § 2254(d) in those cases will encourage state courts to withhold explanations for their decisions. Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court. Cf. *In re Robbins*, 18 Cal.4th 770, 778, n. 1, 77 Cal.Rptr.2d 153, 959 P.2d 311, 316, n. 1 (1998) (state procedures limiting habeas are “a means of protecting the integrity of our own appeal and habeas corpus process,” rather than a device for “insulating our judgments from federal court review” (emphasis deleted)). At the same time, requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition. The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed. See Brief for California Attorneys for

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Criminal Justice et al. as *Amici Curiae* 8 (noting that the California Supreme Court disposes of close to 10,000 cases a year, including more than 3,400 original habeas corpus petitions).

[7] There is no merit either in Richter's argument that § 2254(d) is inapplicable because the California Supreme Court did not say it was adjudicating his claim "on the merits." The state court did not say it was denying the claim for any other reason. When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the *785 claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Cf. *Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

[8] The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely. See, e.g., *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Richter, however, does not make that showing. He mentions the theoretical possibility that the members of the California Supreme Court may not have agreed on the reasons for denying his petition. It is pure speculation, however, to suppose that happened in this case. And Richter's assertion that the mere possibility of a lack of agreement prevents any attribution of reasons to the state court's decision is foreclosed by precedent. See *ibid.*

[9] As has been noted before, the California courts or Legislature can alter the State's practices or elaborate more fully on their import. See *Evans v. Chavis*, 546 U.S. 189, 197, 199, 126 S.Ct. 846, 163 L.Ed.2d 684 (2006). But that has not occurred here. This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been "adjudicated on the merits." Richter has failed to show that the California Supreme Court's decision

did not involve a determination of the merits of his claim. Section 2254(d) applies to his petition.

III

[10] Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court, § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2).

The Court of Appeals relied on the second of these exceptions to § 2254(d)'s relitigation bar, the exception in § 2254(d)(1) permitting relitigation where the earlier state decision resulted from an "unreasonable application of" clearly established federal law. In the view of the Court of Appeals, the California Supreme Court's decision on Richter's ineffective-assistance claim unreasonably applied the holding in *Strickland*. The Court of Appeals' lengthy opinion, however, discloses an improper understanding of § 2254(d)'s unreasonableness standard and of its operation in the context of a *Strickland* claim.

[11][12][13] The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." *Williams, supra*, at 410, 120 S.Ct. 1495. A state court must be granted a deference and latitude that are not in operation when the case involves review under the

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Strickland standard itself.

*786 [14][15][16] A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). And as this Court has explained, "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Ibid.* "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. ----, ----, 129 S.Ct. 1411, 1413-14, 173 L.Ed.2d 251 (2009) (internal quotation marks omitted).

[17] Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review, 578 F.3d, at 952; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d, at 969. AEDPA demands more. Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)." *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

[18] The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had mer-

it, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. See *Renico v. Lett*, 559 U.S. ----, ----, 130 S.Ct. 1855, 1866, 176 L.Ed.2d 678 (2010). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. See *Lockyer, supra*, at 75, 123 S.Ct. 1166.

[19][20][21][22][23] If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. Cf. *Felker v. Turpin*, 518 U.S. 651, 664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an *787 error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

[24] The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v. Thompson*, 523 U.S. 538, 555-556, 118 S.Ct. 1489, 140 L.Ed.2d 728

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(1998) (internal quotation marks omitted). It “disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.” *Reed*, 489 U.S., at 282, 109 S.Ct. 1038 (KENNEDY, J., dissenting).

[25][26][27][28] Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court. 28 U.S.C. § 2254(b). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), applies. And if the state court denies the claim on the merits, the claim is barred in federal court unless one of the exceptions to § 2254(d) set out in §§ 2254(d)(1) and (2) applies. Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding, see *id.*, at 90, 97 S.Ct. 2497.

Here, however, the Court of Appeals gave § 2254(d) no operation or function in its reasoning. Its analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.

IV

[29] The conclusion of the Court of Appeals that Richter demonstrated an unreasonable application by the state court of the *Strickland* standard now must be discussed. To have been entitled to relief from the California Supreme Court, Richter had to show both that his counsel provided deficient as-

sistance and that there was prejudice as a result.

[30][31][32] To establish deficient performance, a person challenging a conviction must show that “counsel's representation fell below an objective standard of reasonableness.” 466 U.S. at 688, 104 S.Ct. 2052. A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel's representation was within the “wide range” of reasonable professional assistance. *Id.*, at 689, 104 S.Ct. 2052. The challenger's burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*, at 687, 104 S.Ct. 2052.

[33][34][35] With respect to prejudice, a challenger must demonstrate “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*, at 694, 104 S.Ct. 2052. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be “so serious*788 as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687, 104 S.Ct. 2052.

[36][37][38][39] “Surmounting *Strickland*'s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is

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“all too tempting” to “second-guess counsel's assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

[40][41][42][43] Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” *id.*, at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles*, 556 U.S., at ---, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ---, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

A

With respect to defense counsel's performance, the Court of Appeals held that because Richter's attorney had not consulted forensic blood experts or introduced expert evidence, the California Supreme Court could not reasonably have concluded counsel provided adequate representation. This conclusion was erroneous.

1

[44][45] The Court of Appeals first held that Richter's attorney rendered constitutionally deficient service because he did not consult blood evidence experts in developing the basic strategy for

Richter's defense or offer their testimony as part of the principal case for the defense. *Strickland*, however, permits counsel to “make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691, 104 S.Ct. 2052. It was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here.

[46] Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, “countless ways to provide effective assistance in any given case. Even the *789 best criminal defense attorneys would not defend a particular client in the same way.” *Id.*, at 689, 104 S.Ct. 2052. Rare are the situations in which the “wide latitude counsel must have in making tactical decisions” will be limited to any one technique or approach. *Ibid.* It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it. Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding the pool in the doorway to Johnson's bedroom.

[47] From the perspective of Richter's defense counsel when he was preparing Richter's defense, there were any number of hypothetical experts-specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines-whose insight might possibly have been useful. An attorney can avoid activities that appear “distractive from more important duties.” *Bobby v. Van Hook*, 558 U.S. ---, ---, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009) (*per curiam*). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See *Knowles, supra*, at 787 -

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788, 129 S.Ct. at 1421-22; *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Strickland*, 466 U.S., at 699, 104 S.Ct. 2052.

In concluding otherwise the Court of Appeals failed to “reconstruct the circumstances of counsel’s challenged conduct” and “evaluate the conduct from counsel’s perspective at the time.” *Id.*, at 689, 104 S.Ct. 2052. In its view Klein’s location was “the single most critical issue in the case” given the differing theories of the prosecution and the defense, and the source of the blood in the doorway was therefore of central concern. 578 F.3d, at 953-954. But it was far from a necessary conclusion that this was evident at the time of the trial. There were many factual differences between prosecution and defense versions of the events on the night of the shootings. It is only because forensic evidence has emerged concerning the source of the blood pool that the issue could with any plausibility be said to stand apart. Reliance on “the harsh light of hindsight” to cast doubt on a trial that took place now more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent. *Cone*, 535 U.S., at 702, 122 S.Ct. 1843; see also *Lockhart*, 506 U.S., at 372, 113 S.Ct. 838.

[48] Even if it had been apparent that expert blood testimony could support Richter’s defense, it would be reasonable to conclude that a competent attorney might elect not to use it. The Court of Appeals opinion for the en banc majority rests in large part on a hypothesis that reasonably could have been rejected. The hypothesis is that without jeopardizing Richter’s defense, an expert could have testified that the blood in Johnson’s doorway could not have come from Johnson and could have come from Klein, thus suggesting that Richter’s version of the shooting was correct and Johnson’s a fabrication. This theory overlooks the fact that concentrating on the blood pool carried its own serious risks. If serological analysis or other forensic evidence demonstrated that the blood came from Johnson

alone, Richter’s story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the *790 defense. *Strickland*, *supra*, at 691, 104 S.Ct. 2052. Here Richter’s attorney had reason to question the truth of his client’s account, given, for instance, Richter’s initial denial of involvement and the subsequent production of Johnson’s missing pistol.

It would have been altogether reasonable to conclude that this concern justified the course Richter’s counsel pursued. Indeed, the Court of Appeals recognized this risk insofar as it pertained to the suggestion that counsel should have had the blood evidence tested. 578 F.3d, at 956, n. 9. But the court failed to recognize that making a central issue out of blood evidence would have increased the likelihood of the prosecution’s producing its own evidence on the blood pool’s origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter’s case. Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether Johnson was telling the truth, or transform the case into a battle of the experts. Accord, *Bonin v. Calderon*, 59 F.3d 815, 836 (C.A.9 1995).

True, it appears that defense counsel’s opening statement itself inspired the prosecution to introduce expert forensic evidence. But the prosecution’s evidence may well have been weakened by the fact that it was assembled late in the process; and in any event the prosecution’s response shows merely that the defense strategy did not work out as well as counsel had hoped, not that counsel was incompetent.

To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option. If this case presented

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a *de novo* review of *Strickland*, the foregoing might well suffice to reject the claim of inadequate counsel, but that is an unnecessary step. The Court of Appeals must be reversed if there was a reasonable justification for the state court's decision. In light of the record here there was no basis to rule that the state court's determination was unreasonable.

[49][50][51] The Court of Appeals erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking. Although courts may not indulge “*post hoc* rationalization” for counsel's decisionmaking that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U.S., at 526-527, 123 S.Ct. 2527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a “strong presumption” that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (*per curiam*). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S., at 688, 104 S.Ct. 2052.

2

The Court of Appeals also found that Richter's attorney was constitutionally deficient because he had not expected the prosecution to offer expert testimony and *791 therefore was unable to offer expert testimony of his own in response.

[52][53][54] The Court of Appeals erred in suggesting counsel had to be prepared for “any contingency,” 578 F.3d, at 946 (internal quotation marks omitted). *Strickland* does not guarantee perfect representation, only a “‘reasonably competent attorney.’” 466 U.S. at 687, 104 S.Ct. 2052 (quoting *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)); see

also *Gentry*, *supra*, at 7, 124 S.Ct. 1. Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. *Strickland*, *supra*, at 686, 104 S.Ct. 2052. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

[55] Here, Richter's attorney was mistaken in thinking the prosecution would not present forensic testimony. But the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt.

[56] Even if counsel should have foreseen that the prosecution would offer expert evidence, Richter would still need to show it was indisputable that *Strickland* required his attorney to act upon that knowledge. Attempting to establish this, the Court of Appeals held that defense counsel should have offered expert testimony to rebut the evidence from the prosecution. But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.

[57] In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. And while in some instances “even an isolated error” can support an ineffective-assistance claim if it is “sufficiently egregious and prejudicial,” *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here Richter's attorney represented him with vigor and conducted a skillful cross-ex-

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amination. As noted, defense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators had left the crime scene. For all of these reasons, it would have been reasonable to find that Richter had not shown his attorney was deficient under *Strickland*.

B

The Court of Appeals further concluded that Richter had established prejudice under *Strickland* given the expert evidence his attorney could have introduced. It held that the California Supreme Court would have been unreasonable in concluding otherwise. This too was error.

[58][59][60][61] In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *792 *Wong v. Belmontes*, 558 U.S. ---, ---, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (*per curiam*) (slip op., at 13); *Strickland*, 466 U.S., at 693, 104 S.Ct. 2052. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id.*, at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. *Id.*, at 693, 104 S.Ct. 2052.

[62] It would not have been unreasonable for the California Supreme Court to conclude Richter's evidence of prejudice fell short of this standard. His expert serology evidence established nothing more than a theoretical possibility that, in addition to blood of Johnson's type, Klein's blood may also have been present in a blood sample taken near the bedroom doorway pool. At trial, defense counsel extracted a concession along these lines from the

prosecution's expert. The pathology expert's claim about the size of the blood pool could be taken to suggest only that the wounded and hysterical Johnson erred in his assessment of time or that he bled more profusely than estimated. And the analysis of the purported blood pattern expert indicated no more than that Johnson was not standing up when the blood pool formed.

It was also reasonable to find Richter had not established prejudice given that he offered no evidence directly challenging other conclusions reached by the prosecution's experts. For example, there was no dispute that the blood sample taken near the doorway pool matched Johnson's blood type. The California Supreme Court reasonably could have concluded that testimony about patterns that form when blood drips to the floor or about the rate at which Johnson was bleeding did not undermine the results of chemical tests indicating blood type. Nor did Richter provide any direct refutation of the State's expert testimony describing how blood spatter near the couch suggested a shooting in the living room and how the blood patterns on Klein's face were inconsistent with Richter's theory that Klein had been killed in the bedroom doorway and moved to the couch.

There was, furthermore, sufficient conventional circumstantial evidence pointing to Richter's guilt. It included the gun safe and ammunition found at his home; his flight from the crime scene; his disposal of the .32-caliber gun and of Johnson's pistol; his shifting story concerning his involvement; the disappearance prior to the arrival of the law enforcement officers of the .22-caliber weapon that killed Klein; the improbability of Branscombe's not being wounded in the shootout that resulted in a combined four bullet wounds to Johnson and Klein; and the difficulties the intoxicated and twice-shot Johnson would have had in carrying the body of a dying man from bedroom doorway to living room couch, not to mention the lack of any obvious reason for him to do so. There was ample basis for the California Supreme Court to think any real possibil-

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ity of Richter's being acquitted was eclipsed by the remaining evidence pointing to guilt.

* * *

The California Supreme Court's decision on the merits of Richter's *Strickland* claim required more deference than it received. Richter was not entitled to the relief ordered by the Court of Appeals. The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

*793 Justice KAGAN took no part in the consideration or decision of this case.

Justice GINSBURG, concurring in the judgment.

In failing even to consult blood experts in preparation for the murder trial, Richter's counsel, I agree with the Court of Appeals, "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The strong force of the prosecution's case, however, was not significantly reduced by the affidavits offered in support of Richter's habeas petition. I would therefore not rank counsel's lapse "so serious as to deprive [Richter] of a fair trial, a trial whose result is reliable." *Ibid.* For that reason, I concur in the Court's judgment.

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C

United States Court of Appeals,
 Ninth Circuit.
 UNITED STATES of America, Plaintiff-Appellee,
 v.
 Jay KENT, Defendant-Appellant.

No. 10-10011.
 Argued and Submitted Nov. 2, 2010.
 Filed Feb. 8, 2011.

Background: Defendant pleaded guilty in the United States District Court for the Northern District of California, Maxine M. Chesney, Senior District Judge, to drug distribution offenses. Defendant appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

- (1) district court properly accepted government's courtroom filing of information alleging defendant's prior felony convictions, and
- (2) government's filing was not improperly motivated by vindictiveness toward defendant.

Affirmed.

West Headnotes

[1] Criminal Law 110  **633.11**

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in General
 110k633.11 k. Management of Courtroom in General. Most Cited Cases

Criminal Law 110  **1153.1**

110 Criminal Law
 110XXIV Review
 110XXIV(N) Discretion of Lower Court
 110k1153 Reception and Admissibility of

Evidence

110k1153.1 k. In General. Most Cited Cases

Judges exercise substantial discretion over what happens inside the court-room, and when considering such decisions as accepting the filing of a document, the review by Court of Appeals is for abuse of that discretion.

[2] Sentencing and Punishment 350H  **1366**

350H Sentencing and Punishment
 350HVI Habitual and Career Offenders
 350HVI(K) Proceedings
 350Hk1363 Recidivist or Habitual Offender Charge

350Hk1366 k. Time for Filing or Instituting Proceedings. Most Cited Cases

District court properly accepted the government's courtroom filing of an information alleging defendant's prior felony convictions, thereby substantially raising the penalty range applicable to defendant's sentence, just after defense counsel announced at status conference that defendant intended to enter an unconditional guilty plea to drug distribution charges, where defendant's plea was not yet entered and the requirements of Rule 11 had not been satisfied. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411, 21 U.S.C.A. § 851; Fed.Rules Cr.Proc.Rules 11, 49(d), 18 U.S.C.A.; Fed.Rules Civ.Proc.Rules 5(d)(2), 5(d)(3), 28 U.S.C.A.; U.S.Dist.Ct., N.D. Cal., Gen. Ord. 45(VI)(A).

[3] Criminal Law 110  **633.11**

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in General
 110k633.11 k. Management of Courtroom in General. Most Cited Cases
 All federal courts are vested with inherent powers enabling them to manage their cases and

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courtrooms effectively.

[4] Criminal Law 110 ↪633.11

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k633.11 k. Management of Courtroom in General. Most Cited Cases

The federal appellate courts should hesitate to intrude upon the broad inherent powers of district courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

[5] Criminal Law 110 ↪1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited

Cases

Where the vindictive prosecution inquiry turns upon a district court's proper application of the law, Court of Appeals' review is de novo.

[6] Constitutional Law 92 ↪4527(2)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)3 Law Enforcement

92k4521 Conduct of Police and Prosecutors in General

92k4527 Charging Decisions; Prosecutorial Discretion

92k4527(2) k. Misuse or Abuse.

Most Cited Cases

A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right. U.S.C.A. Const.Amend. 5.

[7] Criminal Law 110 ↪37.15(1)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37.15 Vindictive Prosecution

110k37.15(1) k. In General. Most

Cited Cases

A defendant may establish vindictive prosecution by producing direct evidence of the prosecutor's punitive motivation, or by showing that the circumstances establish a reasonable likelihood of vindictiveness, thus giving rise to a presumption that the Government must in turn rebut.

[8] Criminal Law 110 ↪37.15(1)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37.15 Vindictive Prosecution

110k37.15(1) k. In General. Most

Cited Cases

When additional charges are added during pre-trial proceedings, the prosecutor's vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.

[9] Criminal Law 110 ↪37.15(2)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37.15 Vindictive Prosecution

110k37.15(2) k. Particular Cases. Most

Cited Cases

There was no evidence that the government was improperly motivated by vindictiveness toward defendant when it filed an information alleging defendant's prior felony convictions, thereby substantially raising the penalty range applicable to defendant's sentence, after defendant had refused to enter a cooperation plea agreement and instead sought to enter unconditional guilty plea to drug distribution charges; the government carried out its

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plea threat to file the information unless defendant agreed to plead guilty pursuant to a cooperation agreement, which defendant effectively rejected by stating his intention to enter an unconditional plea. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411, 21 U.S.C.A. § 851.

[10] District and Prosecuting Attorneys 131 ↪ 8(6)

131 District and Prosecuting Attorneys
131k8 Powers and Proceedings in General
131k8(6) k. Charging Discretion. Most Cited Cases

The deference accorded a prosecutor's pretrial charging decisions is not limited to only enhanced charges that arise from the context of explicit plea negotiations.

[11] Criminal Law 110 ↪ 37.15(1)

110 Criminal Law
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37.15 Vindictive Prosecution
110k37.15(1) k. In General. Most Cited Cases

Although enhanced charges will often accompany failed plea negotiations, prosecutors may add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence.

[12] Criminal Law 110 ↪ 37.15(1)

110 Criminal Law
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37.15 Vindictive Prosecution
110k37.15(1) k. In General. Most Cited Cases

Defendants challenging pretrial charging enhancements cannot avail themselves of a presumption of prosecutorial vindictiveness.

[13] Criminal Law 110 ↪ 37.15(1)

110 Criminal Law
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37.15 Vindictive Prosecution
110k37.15(1) k. In General. Most Cited Cases

Although the pretrial enhancement of charges cannot give rise to a presumption of prosecutorial vindictiveness, a defendant may still establish vindictive prosecution by adducing direct evidence that punitive motives precipitated the harsher charges, but the filing of additional charges to make good on a plea bargaining threat will not establish the requisite punitive motive.

[14] Criminal Law 110 ↪ 37.15(1)

110 Criminal Law
110II Defenses in General
110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
110k37.15 Vindictive Prosecution
110k37.15(1) k. In General. Most Cited Cases

In the give-and-take of plea bargaining, there is no element of punishment or retaliation, as would support claim of prosecutorial vindictiveness, so long as the accused is free to accept or reject the prosecution's offer.

[15] Criminal Law 110 ↪ 273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases

The government may, in the course of plea bargaining, offer to reduce charges or threaten indictment under more serious charges, and it may make good on either promise; it may do the same in

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seeking cooperation in related prosecutions.

[16] Criminal Law 110  **273.1(2)**

110 Criminal Law

110XV Pleas

110k272 Plea of Guilty

110k273.1 Voluntary Character

110k273.1(2) k. Representations,

Promises, or Coercion; Plea Bargaining. Most Cited Cases

A prosecutor who, in the plea negotiation context, threatens enhanced charges to induce a defendant's cooperation as an informant may carry out that threat if the defendant declines to cooperate, regardless of the defendant's willingness to plead guilty unconditionally to the lesser charges.

[17] Constitutional Law 92  **2620**

92 Constitutional Law

92XX Separation of Powers

92XX(D) Executive Powers and Functions

92k2620 k. Nature and Scope in General.

Most Cited Cases

Under the separation of powers doctrine, the decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General or his delegates, the United States Attorneys.

[18] District and Prosecuting Attorneys 131  **8(6)**

131 District and Prosecuting Attorneys

131k8 Powers and Proceedings in General

131k8(6) k. Charging Discretion. Most Cited

Cases

A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.

[19] Constitutional Law 92  **4703**

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)6 Judgment and Sentence

92k4703 k. Discrimination or Vindictiveness in General. Most Cited Cases

Due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights. U.S.C.A. Const.Amend. 5.

Appeal from the United States District Court for the Northern District of California, Maxine M. Chesney, Senior District Judge, Presiding. D.C. No. 3:08-cr-00890-MMC-2. Barry J. Portman, Federal Public Defender, and Daniel P. Blank (argued), Assistant Federal Public Defender, San Francisco, CA, for defendant-appellant Jay Kent.

Joseph P. Russoniello, United States Attorney, and Amber S. Rosen (argued), Assistant United States Attorney, San Jose, CA, for plaintiff-appellee United States of America.

Before RONALD M. GOULD and CONSUELO M. CALLAHAN, Circuit Judges, and EDWARD R. KORMAN, Senior District Judge.^{FN*}

OPINION

GOULD, Circuit Judge:

*1 Jay Kent's appeal of his conviction and sentence for drug distribution offenses requires us to decide two questions: First, once a defendant has stated before the district court his or her intention to enter a guilty plea, is it an abuse of that court's discretion to accept a prosecutor's filing of enhanced charges against the defendant? Second, does a prosecutor act with impermissible vindictiveness when he or she makes good on a plea bargaining threat to enhance charges against a defendant, despite the defendant's willingness to plead guilty unconditionally? Answering both questions in the negative, we affirm Kent's conviction and sentence.

I

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Kent delivered 22.7 grams of crack cocaine to an FBI source on July 16, 2008, in San Francisco. He was arrested and charged by indictment for conspiring to possess with intent to distribute five grams or more of crack cocaine and possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 841(b)(1)(B)(iii). The Government did not initially file an information pursuant to 21 U.S.C. § 851 alleging Kent's prior felony convictions, which filing would have very substantially raised the penalty range applicable to Kent's sentence, as it would be changed from between five and forty years, absent the prior felonies, to between ten years and life imprisonment.

After an initial exchange of discovery, Assistant United States Attorney Drew Caputo told Kent's attorney, Daniel Blank, that the Government sought Kent's cooperation as an informant as part of a plea agreement, and that the Government would file the § 851 information if Kent pushed the case toward trial. Blank asked if the Government would file the § 851 information if Kent agreed to plead guilty without cooperating as an informant. Caputo answered, according to Blank, that Caputo believed it would not.^{FN1}

Several days later, Blank left a voicemail message for Caputo conveying Kent's intention to plead unconditionally to the indictment, as well as Kent's lack of interest in a cooperation agreement. Caputo then called back to tell Blank that the Government intended to file the § 851 information unless Kent agreed to cooperate, despite his willingness to plead guilty. Caputo next mailed a letter to Blank, dated February 10, 2009, memorializing the Government's position:

[W]e intend to file an information alleging your client's prior felony drug convictions unless Mr. Kent agrees to plead guilty pursuant to a plea agreement entered into with the United States. At present, the only plea agreement that the United States is prepared to contemplate entering into with your client is a cooperation agreement.

The United States characterizes this as an offer in the context of plea negotiations, but Blank argues that formal negotiations were never initiated, or, stated differently, that Blank never began negotiating a plea agreement.

Further communications between counsel occurred when they arrived for a status conference in the district court and before the district judge on February 25, 2009. Upon their arrival to court, Blank told Caputo that his client would, at that hearing, seek to enter an unconditional guilty plea. The advantage he sought to exploit in offering a surprise plea was to prevent the Government from enhancing charges against Kent by filing the § 851 information.

*2 Blank began the proceeding by saying, "Good afternoon, your Honor. Daniel Blank on behalf of Mr. Kent. Mr. Kent is in custody. He is hoping to plead today." Within moments, Caputo unequivocally responded:

[T]he United States is going to file right now an Information for increased punishment by reason of prior felony drug conviction under 21 United States Code Section 851.... I'm handing the original to your [Honor's] deputy clerk. I'm handing a service copy to Mr. Blank ..., and I would ask that the Court arraign Mr. [Kent] on that 851 information in the sense of notifying him of the increased punishment that's specified in paragraph 5 of the information in advance of his entry of the open guilty plea.

In other words, Caputo sought to file, in court, a paper copy of the § 851 information, which had not yet been filed electronically. Blank objected to the courtroom filing, and urged that the district court take Kent's plea before accepting the information. Blank proposed that the court allow the parties an opportunity to prepare briefs, after which the court would decide whether to accept filing of the information before entry of the plea. In a long colloquy with the attorneys, the court stated its view that filing was a party's unilateral act, accepted the

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information as filed, and instructed Caputo to deliver the document to the clerk's office for electronic docketing. Blank then opted to defer his client's plea until the parties had briefed whether the now-filed information should be struck.

The parties next appeared before the district court to present argument as to whether the § 851 information should be struck for prosecutorial vindictiveness. Although it was not disputed that the Government filed the § 851 information in response to Kent's stated intention to plead guilty unconditionally rather than pursuant to a cooperation agreement, the district court denied Kent's motion to strike the information. Months later, Kent, with the Government's consent, entered conditional guilty pleas, reserving his right to appeal the issues described above. At a subsequent hearing, the district court sentenced Kent to ten years imprisonment, which is the enhanced mandatory minimum sentence.

Kent timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II

[1] We first address whether the district court erred in accepting the courtroom filing of the § 851 information after Kent had said he wanted to enter a guilty plea. “[J]udges exercise substantial discretion over what happens *inside* the court-room,” *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir.1991), and when considering such decisions as accepting the filing of a document, our review is for abuse of that discretion. *See Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir.1998) (stating that litigation management decisions are reviewed for abuse of discretion); *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir.1993) (reviewing application of local rules for abuse of discretion).

*3 [2] Federal and local rules govern the proper mode of filing. Federal Rule of Criminal Procedure 49 states that filing must be made “in a manner

provided for a civil action.” Fed.R.Crim.P. 49(d). The corollary civil rule, Federal Rule of Civil Procedure 5, provides, “A paper is filed by delivering it ... to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.” Fed.R.Civ.P. 5(d)(2). Further, “[a] court may, by local rule, allow papers to be filed ... by electronic means” Fed.R.Civ.P. 5(d)(3). The Northern District of California's applicable local rule provides, “In any case subject to electronic filing, all documents required to be filed with the Clerk shall be filed electronically on the ECF web site, *except as ... authorized otherwise by the court.*” N.D. Cal. Gen. Ord. 45(VI)(A) (emphasis added). Here, the district court's decision to authorize the courtroom filing of an information was entirely permissible under these controlling rules.

Kent relies upon Ninth Circuit precedents that bar district courts from rejecting entered pleas. *E.g.*, *Garcia-Aguilar v. U.S. Dist. Ct. for S. Dist. of Cal.*, 535 F.3d 1021, 1025 (9th Cir.2008); *In re Vasquez-Ramirez*, 443 F.3d 692, 695-96 (9th Cir.2006). But, as we see it, these precedents have no relevance to this appeal. First, the district court never rejected Kent's plea. Kent was free to plead at the hearing, but instead opted to wait in light of the court's acceptance of the § 851 information. Second, these precedents involve rejection of pleas that have satisfied the requirements of Rule 11. *See Vasquez-Ramirez*, 443 F.3d at 695-96 (“[I]t is clear that a court must accept an unconditional guilty plea, so long as the Rule 11(b) requirements are met.”). Here, the plea was not entered and the requirements of Rule 11 had not been satisfied.

[3][4] A district court need not drop everything to conduct a Rule 11 colloquy the moment a defendant offers to enter a guilty plea. “All federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively....” *Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 964-65 (9th Cir.2004) (per curiam) (quoting *F.J. Hanshaw Enters., Inc. v. Emerald*

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River Dev., Inc., 244 F.3d 1128, 1136 (9th Cir.2001)). The federal appellate courts should hesitate to intrude upon the “broad inherent powers [of district courts] to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Sherman v. United States*, 801 F.2d 1133, 1135 (9th Cir.1986) (internal citation and quotation marks omitted). We hold that the district court committed no error when, before taking Kent's plea, it first accepted the Government's filing of an information.

III

We next address whether a prosecutor who carries out a plea bargaining threat to enhance charges against a defendant, despite the defendant's willingness to plead guilty unconditionally, acts with impermissible vindictiveness.

A

*4 [5] For more than two decades, our vindictive prosecution cases have said that the standard of review is unsettled in this circuit. *E.g.*, *United States v. Gann*, 732 F.2d 714, 724 (9th Cir.1984). In recent years, all of our vindictive prosecution cases, after mentioning the uncertainty of our precedents, have proceeded to apply de novo review. *E.g.*, *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir.2007); *United States v. Lopez*, 474 F.3d 1208, 1211 (9th Cir.2007). Review for abuse of discretion may have been appropriate when district judges based determinations of vindictive prosecution, like other findings of attorney misconduct, on their subjective perceptions of the litigation unfolding in their courtrooms. *See, e.g.*, *United States v. Griffin*, 617 F.2d 1342, 1348 (9th Cir.1980) (“Consideration of the vindictive prosecution claim necessitates, in some cases, an ad hoc determination of whether the defendant has reason to perceive a vindictive motive.”). Review for clear error may have been appropriate and may still be appropriate when a determination of vindictive prosecution turned upon factual findings. *See, e.g.*, *United States v. DeMarco*, 550 F.2d 1224, 1226 (9th Cir.1977) (holding that factual findings necessary

to determination of vindictive prosecution were “amply supported by the record”). Since a robust doctrine of vindictive prosecution has developed, however, our review is now more commonly for mistakes of law, for which de novo review is appropriate. *See United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir.2006). We therefore take this opportunity to clarify that where our vindictive prosecution inquiry turns upon a district court's proper application of the law, our review is de novo.

B

[6][7] “A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir.2000) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)). A defendant may establish vindictive prosecution (1) “by producing direct evidence of the prosecutor's punitive motivation ...,” *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir.2007), or (2) by showing that the circumstances establish a “reasonable likelihood of vindictiveness,” thus giving rise to a presumption that the Government must in turn rebut, *United States v. Goodwin*, 457 U.S. 368, 373, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

[8] The latter route is unavailable where a prosecutor enhances charges pretrial. *Id.* at 381-84. “[W]hen the additional charges are added during pretrial proceedings ... vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right.” *Gamez-Orduno*, 235 F.3d at 462.^{FN2} For good reasons, the Supreme Court has urged deference to pretrial charging decisions. “In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At [the pretrial] stage ..., the prosecutor's assessment of the proper extent of prosecution may not have crystallized.” *Goodwin*, 457 U.S. at 381. Also, in the

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plea negotiation context, the prosecutor's latitude to threaten harsher charges to secure a plea agreement advances the interest in avoiding trial shared by the prosecutor, defendant, and public. *Bordenkircher*, 434 U.S. at 363-64.

*5 Finally, prompting prosecutors to file the harshest possible charges at the outset "would [cause] prejudic[e] to defendants, for an accused 'would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea.'" *Goodwin*, 457 U.S. at 378 n. 10 (quoting *Bordenkircher*, 434 U.S. at 368 (Blackmun, J., dissenting)). Allowing prosecutors the leeway at first to withhold more severe charges also spares defendants damage to their reputation that could result from the piling on of charges. *Id.* For these reasons, the prosecutor's "initial [charging] decision should not freeze [his or her] future conduct." *Goodwin*, 457 U.S. at 382.

[9][10][11][12] We reject Kent's argument that pretrial charging decisions merit deference only when enhanced charges arise from the context of explicit plea negotiations. Our cases do not draw this distinction, *Austin*, 902 F.2d at 745, and we are admonished against expanding the class of cases to which the vindictiveness presumption applies, *Wasman v. United States*, 468 U.S. 559, 566-67, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Although enhanced charges will often accompany failed plea negotiations, prosecutors may add charges pretrial for any number of permissible reasons, such as coming to a new understanding of the crime or evidence. *Goodwin*, 457 U.S. at 381. The Supreme Court has urged deference to a prosecutor's discretion to elevate charges in light of the pretrial "timing" of such conduct, not just its factual context. *Id.* Thus, defendants challenging pretrial charging enhancements cannot avail themselves of a presumption of vindictiveness.

Kent's argument fails for a second reason: The enhanced charges in his case *did* arise in the plea negotiation context. By letter to Kent's attorney

dated February 10, 2009, the Government made a plea offer, threatening to file the § 851 information "unless Mr. Kent agrees to plead guilty pursuant to ... a cooperation agreement." At the February 25th hearing, Kent effectively rejected this plea offer by stating his intention to enter an unconditional plea rather than cooperate. In response, the United States carried out its plea threat by filing the § 851 information. Kent offers no authority for the untenable proposition that a defense attorney who does not respond to a written plea offer has unilaterally opted out of negotiations. Our cases suggest just the opposite. *See, e.g., Gamez-Orduno*, 235 F.3d at 463 (holding that a prosecutor's letter threatening to seek a superceding indictment established "the context of plea negotiations"). But even if we accept Kent's premise that he stopped short of engaging in plea negotiations, it does not alter the prosecutor's broad discretion to make a charging decision. As a general matter, prosecutors may charge and negotiate as they wish.

C

[13][14] Although the pretrial enhancement of charges cannot give rise to a presumption of prosecutorial vindictiveness, a defendant may still establish vindictive prosecution by adducing direct evidence that punitive motives precipitated the harsher charges. *See id.* at 384 ("[W]e of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's [pretrial] charging decision was motivated by a desire to punish him...."). As a matter of law, the filing of additional charges to make good on a plea bargaining threat—as occurred here—will not establish the requisite punitive motive, however. "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher*, 434 U.S. at 363.

*6 [15] Kent argues that a prosecutor may carry out a plea bargaining threat of enhanced charges only when a defendant has refused to plead

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guilty, not when he or she has rejected other Government conditions. Our precedent has rejected this position. In *United States v. North*, we stated, “The government may, in the course of plea bargaining, offer to reduce charges or threaten reindictment under more serious charges, and it may make good on either promise. *It may do the same in seeking cooperation in related prosecutions.*” 746 F.2d 627, 632 (9th Cir.1984) (emphasis added) (citations omitted), *abrogated on other grounds by Jacobson v. United States*, 503 U.S. 540, 547 n. 1, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). We reaffirm this rule.

[16] We have sanctioned the conditioning of plea agreements on acceptance of terms apart from pleading guilty, including waiving appeal, *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir.1990), disclosing evidence, *United States v. Acuna*, 9 F.3d 1442, 1445 (9th Cir.1993), providing testimony, *Morris v. Woodford*, 273 F.3d 826, 836 (9th Cir.2001), and cooperating as an informant against others, *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir.1980). If prosecutors may permissibly demand these conditions, it follows that they may make good on threats to enhance charges if these conditions are not accepted. *See United States v. Stanley*, 928 F.2d 575, 579 (2d Cir.1991) (“[S]o long as the defendant was free to accept or reject the prosecutor’s offer, the prosecutor may carry out his threat.” (citing *Bordenkircher*, 434 U.S. at 363-65)). We hold that a prosecutor who, in the plea negotiation context, threatens enhanced charges to induce a defendant’s cooperation as an informant may carry out that threat if the defendant declines to cooperate, regardless of the defendant’s willingness to plead guilty unconditionally to the lesser charges.^{FN3}

[17][18][19] “[U]nder our system of separation of powers, the decision whether to prosecute, and the decision as to the charge to be filed, rests in the discretion of the Attorney General or his delegates, the United States Attorneys.” *United States v. Edmonson*, 792 F.2d 1492, 1497 (9th Cir.1986). “A

prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution.” *Goodwin*, 457 U.S. at 382. “[D]ue process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights.” *Wasman*, 468 U.S. at 568. The record here is devoid of evidence that the Government, in filing the § 851 information, was motivated by vindictiveness toward Kent.

AFFIRMED.

FN* The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

FN1. Caputo disputes that he said this. However, the United States has said that this disputed fact is immaterial, and that Kent’s account may be taken as true in resolving this appeal.

FN2. *See also United States v. Austin*, 902 F.2d 743, 745 (9th Cir.1990) (“That the prosecution adds charges pretrial after a defendant asserts some right does not establish a presumption of vindictiveness.” (citing *Goodwin*, 457 U.S. at 381)); 4 Wayne R. LaFare, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 13.5(a) (3d ed.2010) (stating that the presumption of vindictiveness does not apply “in a pretrial setting because a realistic likelihood of vindictiveness was deemed not to exist at that stage”); *id.* at § 13.7(c) n.43 (citing First, Sixth, Seventh, Eighth, and Ninth Circuit cases for this proposition).

FN3. We recently said in a related context in *United States v. Morris*:

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Unlike *Bordenkircher*, the government's offer was conditioned on Morris's testifying in another trial. But we have repeatedly held that deals conditioned on cooperation are permissible. *See, e.g., United States v. Gardner*, 611 F.2d 770, 773 (9th Cir.1980); *see also People of the Territory of Guam v. Fegurgur*, 800 F.2d 1470, 1472 (9th Cir.1986). The government premised the plea bargain on Morris giving up many rights, including his statutory right to seek release. Relinquishment of such rights is an acceptable part of most plea deals.

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