No. 20-1084

In the Supreme Court of the United States

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

MATTHEW REEVES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICI CURIAE THE STATES OF ARIZONA, ARKANSAS, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND UTAH IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The amici states have an interest in promoting "the principles of comity, finality, and federalism" that motivated Congress to enact the Antiterrorism and Effective Death Penalty Act (AEDPA). *Williams v. Taylor,* 529 U.S. 420, 436 (2000). The question here impacts those interests, as it involves the degree of deference federal courts must afford state court judgments entered on direct and collateral review. The failure of federal courts to follow AEDPA's dictates burdens states by leading to time-consuming retrials and other litigation, often decades after the initial trial. Further, even before cases leave the state court systems, the threat of federal judicial overreach compels state courts to devote extra resources to shielding their opinions from federal courts standing ready to attribute error. The 13 amici states therefore submit this amicus brief in support of Petitioner.[1]

SUMMARY OF ARGUMENT

This Court has emphasized that "readiness to attribute error" to a state court decision is incompatible with both "the presumption that state courts know and follow the law" and AEDPA's "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (citations and internal quotation marks omitted). It has also cautioned federal courts that "[t]he caseloads shouldered by many state appellate

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[1] All counsel of record received notice of this brief's filing under Rule 37.2(a), Rules of the United States Supreme Court. All parties have consented to this brief's filing.

courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Johnson v. Williams*, 568 U.S. 289, 300 (2013) (footnote omitted).

In the present case, the Eleventh Circuit failed to afford the state court's decision the deference required by 28 U.S.C § 2254(d)(1) and instead affirmatively read error into the state court's resolution of Reeves' ineffective assistance of counsel claim. The court did not merely violate AEDPA; it also frustrated the principles of federalism and comity AEDPA was intended to protect. In short, the court did not abide by the "basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). The circuit court's decision thus runs afoul of § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy,* 521 U.S. 320, 333 n.7 (1997), which demands that state court decisions be given the benefit of the doubt, *Visciotti*, 537 U.S. at 24, and forbids such skepticism about state court competence.

Beyond the immediate consequences, should the Eleventh Circuit's erroneous decision endure, it will serve as a blueprint for subjecting every state court opinion to *de novo* review in federal court, thus placing federal courts in the "tutelary relation to the state courts that [AEDPA was] designed to end." *Hennon v. Cooper,* 109 F.3d 330, 335 (7th Cir. 1997). This result would perpetuate and lengthen litigation in already overburdened state courts, forcing them to expend their already limited resources either

shielding their opinions from intrusive federal review or, even worse, re-litigating convictions and sentences that, in most capital cases, are decades old. This repetitive and unnecessary litigation, in turn, undermines finality, re-traumatizes victims, weakens public confidence, and delays the resolution of meritorious capital appeals. The Eleventh Circuit's failure to uphold the principles of federalism, finality, and comity is an affront to the fundamental principles of AEDPA and warrants review and summary reversal.

ARGUMENT

I. The Eleventh Circuit's Willingness To Read Error Into The State Court's Opinion Defies AEDPA And Frustrates Comity, Finality, And Federalism.

AEDPA limits a federal court's ability to grant a writ of habeas corpus as to claims that were decided on the merits in state court. 28 U.S.C. § 2254(d). A state court's adjudication must stand unless it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or resulted in a decision that was based on an unreasonable determination of the facts[.]" *Id.* "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." *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Where, as here, a federal habeas court reviews a state court's resolution of an ineffective assistance of counsel claim under *Strickland v. Washington*, 466

U.S. 668 (1984), review is even more deferential: the federal court must apply both AEDPA deference and the deference required by *Strickland* itself. Thus, under § 2254(d)(1), a federal court must determine "whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. "This is different from asking whether defense counsel's performance fell below *Strickland*'s standard," because that would be "no different than" a *de novo* analysis conducted on direct review. *Id.* Rather, "[w]hen § 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." *Id.* at 105.

"There is no doubt Congress intended AEDPA to advance [the] doctrines" of comity, federalism, and finality, *Williams,* 529 U.S. at 436, and to be "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). This is because "'[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Richter*, 562 U.S. at 103 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)).

The Eleventh Circuit's decision here contains no measure of deference; rather, it evidences a willingness to attribute error to the state court and eviscerates the interests AEDPA was intended to protect. In denying relief on Reeves' ineffective assistance of counsel claim, the state appellate court noted that Reeves had failed to call defense counsel to testify at the post-conviction hearing. App. 272a,

277a. The court then analyzed Reeves' claim and, after considering the entire trial record, concluded that he had failed to overcome *Strickland's* presumption that counsel's actions constituted reasonable trial strategy. App. 275a-278a. Because the record contained no direct evidence explaining the reasons for counsel's decisions, Reeves' claim failed:

> The burden was on Reeves to prove by a preponderance of the evidence that his counsel's challenged decisions were not the result of reasonable strategy, *i.e.,* the burden was on Reeves to present evidence overcoming the strong presumption that counsel acted reasonably. However, because Reeves failed to call his counsel to testify, the record is silent as to [trial counsel's strategy]. . . . Where the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.

App. 277a-279a (quotations and citation omitted). The court thus concluded that, "*[i]n this case*, Reeves's failure to call his attorneys to testify [was] fatal to his claims of ineffective assistance of counsel." App. 272a (emphasis added).

Nonetheless, despite the state court's express qualification that its analysis and conclusion was limited to the facts and evidence of Reeves' case, the Eleventh Circuit plucked from a lengthy block quote a single sentence of dicta, which the court then

misconstrued as a "holding," to conclude that the state court had relied upon a prohibited "categorical rule" that a *Strickland* claim cannot succeed unless trial counsel testifies. App. 24a-31a. The Eleventh Circuit then erroneously concluded that, because the state court had unreasonably applied *Strickland*, AEDPA deference did not apply and it was free to review the ineffective assistance claim *de novo*, ultimately granting relief. App. 31a-45a.

Thus, instead of abiding by the presumption that state courts know and follow the law, the circuit court went out of its way to read error into the state court ruling in order to enable *de novo* review. In doing so, the court bypassed the deference required under AEDPA. This "was not just wrong," it was a "fundamental error[] that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018). And it was an error that directly violates the principles of finality, comity and federalism and threatens far-reaching consequences for every state court.

Arizona is all too familiar with this type of AEDPA defiance. Earlier this Term, this Court summarily reversed a Ninth Circuit decision that distorted the state court's facially reasonable decision to find error; the court then reviewed *de novo* and granted relief. *See Shinn v. Kayer*, 141 S. Ct. 517 (2020). This Court concluded that the Ninth Circuit had resolved Kayer's case in a manner "fundamentally inconsistent with AEDPA[]" by replacing deference with *de novo* review. *Id*. at 523–24. *Kayer* is the most recent addition to a growing list of cases in which this Court has reversed the Ninth Circuit for sidestepping, ignoring, or otherwise disregarding AEDPA. *See Beaudreaux*, 138 S. Ct. at 2558; *Kernan*

v. Cuero, 138 S. Ct. 4, 9 (2017); *Davis v. Ayala*, 576 U.S. 257, 275–76 (2015); *Lopez v. Smith*, 574 U.S. 1, 6 (2014); *Johnson*, 568 U.S. at 297; *Cavazos v. Smith*, 565 U.S. 1, 7 (2011); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *Premo v. Moore*, 562 U.S. 115, 123 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009); *Uttecht v. Brown*, 551 U.S. 1, 10, 22 (2007); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *Rice v. Collins*, 546 U.S. 333, 342 (2006); *Visciotti*, 537 U.S. at 25.

The Eleventh Circuit's decision below is comparable to these Ninth Circuit cases; the Eleventh Circuit, like the Ninth, used "federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010); *cf.* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963) ("What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth.'").

This Court's willingness to summarily reverse circuit court decisions based on AEDPA errors is a testament to the grave and wide-reaching impact of those errors. "The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Johnson*, 568 U.S. at 300. This is particularly so in the capital context, where, as discussed below, appeals typically involve lengthy trials, voluminous records, and numerous complex issues. To impose the precision seemingly required by the Eleventh Circuit here would add to the burden the state courts already carry by requiring

them to predict ways in which federal courts could find error. Further, the decision here, if allowed to stand, would invite other federal courts to affirmatively read error into state court decisions, thus freeing themselves from AEDPA's constraints and ignoring this Court's recognition that "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Lee v. Commissioner, Al. Dept. of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013) (quoting *Johnso*n, 568 U.S. at 299-300); *see Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) ("[W]e are determining the reasonableness of the state courts' 'decision,' . . . not grading their papers.").

This Court should once again correct the lower court's inability to respect and apply the principles of AEDPA and the deference due state court decisions. *See Johnson*, 568 U.S. at 299-300 (providing that circuit courts should be encouraged to "expeditiously" resolve cases while properly applying AEDPA deference). Failure to do so threatens endless litigation of state court convictions in this and other cases, forcing states to expend their limited time and resources re-defending convictions and sentences that, in many cases, are decades old.

II. The Failure To Faithfully Apply AEDPA Deference Leads To Additional Litigation In Already Overburdened State Courts.

In addition to furthering comity, finality, and federalism, AEDPA was also intended to conserve judicial resources, promote judicial efficiency, and ensure the accuracy of state court judgments by fostering their prompt resolution. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007). Federal court

deference to state court decisions thus lessens the burdens on both the state and federal court systems, especially as it pertains to capital cases. Conversely, allowing circuit courts to forego AEDPA deference and engage in *de novo* review contravenes AEDPA's goals and further burdens the state judicial systems.

State courts already expend substantial resources litigating capital cases before they reach the federal system—resources that are wasted when federal courts evade AEDPA and second-guess the state courts' judgments. This is particularly so in the capital context, where appeals typically involve lengthy trials, voluminous records, and numerous complex issues. On appeal, defense attorneys often raise a multitude of issues, citing a perceived obligation to litigate all claims that are "arguably meritorious." *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1(C) (2003).

To compensate for the complexity of capital appeals, many states have expanded the word and page limitations in capital case appellate briefs. *See* Fla. R. App. P. 9.210(a)(2)(C) (initial and answer briefs in capital cases allowed 25,000 words, compared to 13,000 in non-capital briefs); Ky. R. Civ. P. 76.12(4)(b)(iii) (upon showing of good cause, initial briefs can be extended from 50 pages to 150 pages); La. Sup. Ct. R. 7(2) (capital case briefs not to exceed 85 legal size pages compared to 35 pages in non-capital cases); M.R.A.P. 27(b)(5) (allowing increase from 50 to 125 pages); Tex. R. App. P. 9.4(i)(2)(A) (37,500 words for initial briefs, compared to 15,000 in non-capital cases); Va. R. Sup. Ct. 5:22(e) (100 pages, compared to 50 pages in non-capital cases).

In Arizona, for example, capital case opening and answering briefs on direct appeal may contain 28,000 words, Ariz. R. Crim. P. 31.14(a), while non-capital case briefs are limited to 14,000 words. Ariz. R. Crim. P. 31.12(a). Appellants can also seek permission to exceed the word limits. *See State v. Johnson*, 447 P.3d 783, 828 (Ariz. 2019) (granting appellant 42,000 words for the opening brief). With these increased word limits, it is not uncommon for defendants to raise up to fifty claims for relief on direct appeal, including claims raised solely for preservation on federal review. *See id.* at 829 (appellant's brief totaled 209 pages, raised twenty-one arguments and preserved thirty-two claims for federal review); *State v. Riley*, 459 P.3d 66 (Ariz. 2020) (appellant's brief totaled 140 pages, raised sixteen arguments, and preserved thirty-four claims for federal review). The Arizona Supreme Court has exclusive jurisdiction over capital cases, so it is the only court reviewing the multiple issues raised on direct appeal. Ariz. Const. art. VI, § 5(3); Ariz. Rev. Stat. Ann. § 13-4031. Additionally, it considers all petitions for review from denials of post-conviction relief, and defendants are allowed unlimited successive petitions. Ariz. Rev. Stat. Ann. § 13-4031; Ariz. R. Crim. P. 32.16(k). From direct appeal to execution, the Arizona Supreme Court devotes significant time and resources to reviewing capital cases.

Federal courts that readily attribute error to state court decisions can nullify years of work by those courts and further burden them with additional litigation. If a federal court remands for a new trial, the passage of time between the crime and habeas relief is often significant and "diminishes the chances

of a reliable criminal adjudication." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (citations omitted); *see also Panetti*, 551 U.S. at 945.

Even when a federal court grants conditional relief short of a retrial, the ensuing litigation can significantly burden state appellate courts. This burden is exemplified by the case of two Arizona death row inmates – James McKinney and Charles Hedlund. Co-defendants McKinney and Hedlund were convicted and sentenced to death in 1993, and their death sentences were affirmed on direct appeal by the Arizona Supreme Court in a joint opinion. *State v. McKinney*, 917 P.2d 1214 (Ariz. 1996). Both defendants were denied habeas relief in federal district court and appealed.

McKinney's case reached the Ninth Circuit, where a three-judge panel affirmed the dismissal of his habeas petition. *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013). However, the Ninth Circuit subsequently granted rehearing *en banc* and reversed the panel decision in a six-to-five opinion. *McKinney v. Ryan*, 813 F.3d 798, 827 (9th Cir. 2015). The slim *en banc* majority held that the Arizona Supreme Court applied an unconstitutional causal nexus test to non-statutory mitigation in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). *Id.* To reach this conclusion, the Ninth Circuit failed to consider whether the trial judge's application of *Eddings* was worthy of debate among fairminded jurists—"the only question that matters under § 2254(d)(1)." *Richter*, 562 U.S. at 102 (quotations omitted). Worse still, the court inverted AEDPA and created a presumption of *error* in a swath of Arizona Supreme Court opinions decided in the same time period as McKinney's, thereby ensuring litigation

under the court's non-AEDPA-compliant standard in each of those individual cases. *McKinney*, 813 F.3d at 802–03.

The case's trajectory has since consumed an inordinate amount of state resources. The case returned to the Arizona Supreme Court in 2018 and that court conducted another independent review to correct the perceived error, reweighed the aggravation and mitigation, and upheld McKinney's death sentence. *State v. McKinney*, 426 P.3d 1204, 1208 (Ariz. 2018). This Court granted certiorari and denied McKinney's claim that he was entitled to a jury resentencing pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). *McKinney v. Arizona*, 140 S. Ct. 702, 709 (2020).

After this Court's decision, McKinney returned to state court to file a successive petition for post-conviction relief where he intends to challenge, *inter alia*, aspects of the 2018 independent review. If he is denied relief, McKinney can seek review from the Arizona Supreme Court, and then will surely attempt to pursue federal habeas relief again. The Ninth Circuit's AEDPA violation has created additional, unnecessary litigation in both Arizona and federal courts and delayed justice for the families of the victims of McKinney's violence.

As for Hedlund, the Ninth Circuit adopted the conclusion in *McKinney,* 813 F.3d 798, and granted a conditional writ of habeas corpus. The Arizona Supreme Court conducted an independent review and affirmed Hedlund's death sentence. *State v. Hedlund*, 431 P.3d 181, 191 (Ariz. 2018). Hedlund petitioned this Court for certiorari but his petition was denied after this Court decided *McKinney,* 140

S. Ct. 702. *Hedlund v. Arizona*, 140 S. Ct. 1270 (Mem) (2020). While his certiorari petition was pending, Hedlund filed a petition for writ of habeas corpus in federal district court. The State argued that his petition was second or successive under 28 U.S.C. § 2244, but the district court held that the claims challenging the 2018 independent review are not. *Hedlund v. Shinn*, No. CV-19-05751-PHX-DLR, 2020 WL 4933629 at *3 – 4 (D. Ariz. Aug. 24, 2020) (citing *Panetti*, 551 U.S. at 947; and *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011)). Hedlund will surely appeal to the Ninth Circuit if his habeas petition is dismissed.

These cases epitomize the perilous consequences of a federal court applying de novo review and acting as a "super appellate court," sitting in judgment of state court rulings. Alabama will face even worse consequences here, in the form of a new trial, based on the Eleventh Circuit's failure to afford the deference required by AEDPA. As in *Hedlund* and *McKinney*, the ultimate result will be further taxation of limited state resources.

CONCLUSION

This Court should grant the petition for writ of certiorari.

March 11, 2021

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