No. 21-5972

IN THE

Supreme Court of the United States

ALFREDO CAMARGO,

Petitioner,

v.

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

Respondents.

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

REPLY BRIEF FOR PETITIONER

JON M. SANDS
Federal Public Defender
MOLLY A. KARLIN
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
molly_karlin@fd.org

Counsel for Petitioner

January 12, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes & Rules

ARGUMENT

Far from refuting the circuit splits presented in the petition, Respondents' opposition confirms that the courts of appeals are in conflict as to both Questions Presented. As Petitioner showed, respecting Question I, the decision below departs from the Second and Sixth Circuits as to whether a COA should routinely issue under 28 U.S.C. § 2253 where the magistrate judge and district court disagreed over the viability of a habeas claim. Pet. 8–11. Likewise for Question II, the Ninth Circuit below stands contrary to the Third,[1] Sixth, and Seventh Circuits in applying the "look-through" presumption that *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), and *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), established for unreasoned summary decisions to the reasoned non-merits decision of a state appellate court. Pet. 13–14. In neither instance do Respondents so much as mention these circuits' conflicting rulings, much less attempt to reconcile them with the decision below. These divisions among the courts of appeals are thus effectively undisputed.

---

[1] The Question Presented mistakenly refers to the Second Circuit instead of the Third. Pet. i. Question II should read:

> Whether, under *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), and *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018), a federal court should "look through" the last reasoned procedural decision of a higher state court to the reasoned merits decision of a lower state court in assessing the merits of a federal habeas claim, as the Ninth Circuit ruled below, or whether the "last reasoned decision" may rest on procedural grounds, as the Third, Sixth, and Seventh Circuits have held and as it did in *Ylst*.

Pet. i (alteration underlined).

Respondents' only rejoinder is their insistence that the decision below is correct on the merits. But every circuit to address these issues (save for the Ninth Circuit below, and, as to Question I, a single Eleventh Circuit judge) disagrees, and Respondents offer little explanation, and no authority whatsoever, for their strained interpretations.

Respondents' opposition also betrays, as to Question II, a startling ignorance of core principles of federal habeas law. Their position—accepted below—that a reasoned procedural decision should be afforded "look-through" treatment is profoundly wrong, as it conflates that reasoned ruling with a summary order, which by its very nature contains no reasoning. And it expressly contradicts Respondents' contention in petitioner's prior appeal that a state-court ruling based on timeliness was the last reasoned one. The "last reasoned decision" is not a moving target.

Finally, Respondents do not dispute the decisive nature of both Questions in habeas cases across the board. The Court should grant review, or summarily reverse for the issuance of a COA, on either or both Questions.

I. Respondents Fail to Dispel the Circuit Split Over Whether Actual Disagreement Between Reasonable Jurists Compels the Issuance of a COA.

Respondents offer no response to Petitioner's showing that the Ninth Circuit below departed from its sister circuits regarding whether a COA should routinely issue where "reasonable jurists" have actually disagreed over the proper resolution of a habeas petition. Pet. 8–11. The division of authority is clear and warrants review.

1. As the petition demonstrated (at 8–10), the Second and Sixth Circuits, like district courts nationwide, but unlike the Ninth Circuit below and a single Eleventh

Circuit judge, have held that a disagreement between the magistrate judge and the district court on this question compels the issuance of COA. *Blalock* v. *Fisher*, 480 F. App'x 39, 40 n.1 (2d Cir. 2012); *Cadavid-Yepes* v. *United States*, No. 14-02210, slip op. at 4 (6th Cir. Feb. 5, 2015) (ECF No. 10); see Pet. 9–11 (citing district court cases). The Fifth and Seventh Circuits, along with three justices of this Court, have concluded likewise (save for exceptional circumstances that require an explanation) in the face of debate among state jurists. Pet. 10–11 (discussing *Rhoades* v. *Davis*, 852 F.3d 422, 429 (5th Cir. 2017); *Jones* v. *Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011); and *Jordan* v. *Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, Ginsburg, & Kagan, JJ., dissenting from denial of certiorari)). But Respondents do not even address any of these cases, much less explain how they can be reconciled with the decision below. Rather, Respondents appear to concede the existence of a conflict, arguing that this Court should deny review "regardless of" these opposing views. BIO 10. The circuit split is therefore functionally undisputed.

2. Unable to refute the conflict, Respondents assert on the merits that an actual debate among jurists "does not make an automatic showing that 'reasonable jurists could debate'" the question because the COA test requires a petitioner to "prove something more than the absence of frivolity or the existence of mere 'good faith' on his or her part." BIO 9 (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 338 (2003)). That does not follow. A "reasonable jurist" will not "find the district court's assessment of the constitutional claims debatable or wrong[,]" *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000), *unless* the claims are more substantial than merely non-

frivolous or made in good faith. Respondents' failure to appreciate that these are merely different articulations of the same test—not multiple tests, each of which the petitioner must independently satisfy—underscores the need for further clarity from this Court.

3. Respondents miss the point in arguing (BIO 9–10) that review is unwarranted based on the district court's conclusion that the claim fails under AEDPA. The petition does not argue otherwise. Indeed, were a COA to issue on Question I, Petitioner would argue (as he does in Question II) that AEDPA deference does not apply. The magistrate judge and district court *both* concluded, correctly, that the claim is substantial if AEDPA does *not* govern because the Ninth Circuit has expressly recognized a right to counsel unencumbered by an irreconcilable conflict, while this Court has not. Pet. App. 60a–63a; *Camargo* v. *Ryan*, No. 2:13-cv-02488-NVW, at 594–601, 603 (D. Ariz. Apr. 16, 2015) (ECF No. 38), *report and recommendation accepted* (D. Ariz. May 4, 2015) (ECF No. 40)); see *Carter* v. *Davis*, 946 F.3d 489, 508 (9th Cir. 2019) (per curiam). Respondents' reliance on the district court's assessment of the claim *as reviewed under AEDPA* (BIO 9–11) simply highlights the COA- and case-dispositive nature of both Questions.

II. Respondents Fail to Dispel the Circuit Split Over Whether the "Look-Through" Doctrine Applies to Reasoned Procedural Decisions.

The petition does *not* (*contra* BIO 11–14) seek review of whether the PCR court's decision rested on the merits, but rather asks whether the PCR court's decision was the "last reasoned" in light of the appellate court's subsequent, reasoned procedural decision. Pet. i. The circuit conflict over that question is neither

"conjure[d]" nor "invent[ed]." *Contra* BIO 5, 11. Rather, the decision below leaves the courts of appeals irretrievably divided.

1. As Petitioner showed (at 13–14), the Third, Sixth, and Seventh Circuits each have held that the "last reasoned decision" is the last that contains an explanation, *not* the last expressly to address the merits. *Thomas* v. *Horn*, 570 F.3d 105, 114–17 (3d Cir. 2009); *Barton* v. *Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 462–64 (6th Cir. 2015) (per curiam); *Liegakos* v. *Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997). For all their rhetoric, Respondents again fail to address *any* of these cases. The circuit conflict is irreconcilable and unrefuted.

2. The parties agree (Pet. 11–13; BIO 11, 14) that *Ylst* should control, but Respondents' interpretation of that case is conclusory and untenable. Respondents insist (BIO 14) that "the last *explained* state-court judgment" described in *Ylst*, 501 U.S. at 805, means the last explained state-court judgment *on the merits*, but they offer neither support for that assertion nor an explanation of how that can be so when the "last reasoned decision" in *Ylst* itself "unequivocally rested upon a state procedural default[,]" *id.* at 806. Respondents indeed acknowledged as much in petitioner's prior appeal, arguing that the "last reasoned decision" with respect to his second PCR notice (not at issue here) was the PCR court's ruling dismissing the second notice on timeliness grounds. Respondents-Appellees' Answering Brief at 23 & 26, *Camargo* v. *Ryan* (*Camargo I*), 684 F. App'x 607 (9th Cir. 2017) (No. 15-16014) (ECF No. 40).

Respondents' attempt to address *Wilson*, 138 S. Ct. 1188, further reveals its gross misunderstanding of the "look-through" doctrine. In *Wilson*, as well as *Premo* v. *Moore*, 562 U.S. 115 (2011), upon which Respondents also rely (BIO 14), the Court looked through a higher state court's *summary affirmance* to the lower court's reasoned decision, which, in those cases, rested on the merits. *Wilson*, 138 S. Ct. at 1193; BIO at 14 (noting that *Premo* involved the "reviewing court's summary affirmance"). *Wilson* and *Premo* thus reaffirmed the point, undisputed here, that the presumption applies to *unexplained* decisions. This petition, by contrast, does not concern a summary affirmance but rather a reasoned appellate decision rejecting relief on explicitly different grounds than the court below it.

Respondents' conflation of a summary affirmance with a reasoned non-merits decision also makes little sense when considered in light of the presumption's purpose, which is to ascertain the basis for the higher state court's decision. *Wilson*, 138 S. Ct. at 1196–97. The presumption thus holds that a "silent state higher court opinion" generally "adopt[s]" the reasoning set forth by the court below it. *Id.* at 1195; *Ylst*, 501 U.S. at 804 ("The maxim is that silence implies consent"). Here, Respondents *agree* that the appellate court did not "adopt" the PCR court's reasoning but instead dismissed the case for a wholly different reason. BIO 13–14. In this circumstance, the presumption has no role to play. See *Kernan* v. *Hinojisa*, 578 U.S. 412, 415 (2016) (where the highest state court's decision "quite obviously rest[s] upon some different ground" than that of the lower court, "*Ylst*'s 'look-through' approach is … inapplicable").

3. Respondents' defense of the district court's conclusion that the PCR court based its decision on the merits, and its quarrel with the magistrate judge's conclusion otherwise (BIO 12–14), is a red herring. The petition does *not* (*contra* BIO 12–14) dispute the grounds for the PCR court's decision; to the contrary, it assumes correct the district court's finding that the PCR court ruled on the merits. Instead, the petition presents the question whether the relevant decision for the purpose of federal merits review is that of the PCR court or the subsequent, reasoned ruling of the state appellate court. If the appellate court's decision controls, as Petitioner contends, then the PCR court's reasoning is irrelevant.

4. It is not Petitioner (*contra* BIO 14–15) but rather Respondents who are trying to "have it both ways" by first acknowledging the state appellate timeliness decision as controlling for the purpose of precluding federal review but then switching positions after Petitioner overcame that bar. It is well-established that, where the state court fails to reach the merits of a properly-presented claim, "federal habeas review is not subject to the deferential standard that applies under AEDPA …. Instead, the claim is reviewed *de novo*." *Cone* v. *Bell*, 556 U.S. 449, 472 (2009); accord *Porter* v. *McCollum*, 558 U.S. 30, 39 (2009); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005). *Ylst* makes clear that the relevant state court decision for that purpose is the "last reasoned" one—even if the reason given was procedural. See *Ylst*, 501 U.S. at 806. *Wilson* then confirmed that the same rule applies to merits decisions under AEDPA. 138 S. Ct. at 1194–95.

That result obtains where, inter alia, the last reasoned decision imposes a procedural bar that is later excused in federal proceedings. *Floyd* v. *Filson*, 949 F.3d 1128, 1151 (9th Cir. 2020), *cert. denied sub nom. Floyd* v. *Gittere*, 141 S. Ct. 660 (2020); *Williams* v. *Alabama*, 791 F.3d 1267, 1273 (11th Cir. 2015); *Douglas* v. *Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009); *Clark* v. *Perez*, 510 F.3d 382, 394 (2d Cir. 2008); *Henderson* v. *Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003); *Appel* v. *Horn*, 250 F.3d 203, 210 (3d Cir. 2001); *Weeks* v. *Angelone*, 176 F.3d 249, 258 (4th Cir. 1999), *aff'd*, 528 U.S. 225 (2000). The Ninth Circuit's holding in Petitioner's prior appeal that his federal petition was timely, *Camargo I*, 684 F. App'x at 610, did *not* (*contra* BIO 14–15) "erase[]" the state appellate court's reasoned decision for the purpose of merits review any more than does a federal court's decision to excuse a procedural default.

The application of *de novo* review here would hardly (*contra* BIO 13–15) be unfair to Respondents. As the Ninth Circuit held in *Camargo I*, Respondents could have informed the Arizona Court of Appeals that the petition for review was, in fact, timely, thereby enabling that court to reach the merits, but Respondents failed to do so. 684 F. App'x at 610. Respondents should not be rewarded for their negligence or bad faith with deferential review of a lower court decision that, through no fault of Petitioner's own and despite his diligence, was never reviewed on the merits by a higher court. *Id.*; see *Sellan* v. *Kuhlman*, 261 F.3d 303, 314 (2d Cir. 2001) (citing U.S. CONST. art. VI, cl. 2, and *Testa* v. *Katt*, 330 U.S. 386 (1947)) ("Under the Supremacy Clause, state courts are obligated to apply and adjudicate federal claims fairly

presented to them."). The comity concerns animating AEDPA are not implicated because the Arizona Court of Appeals had the opportunity to pass on the merits of Petitioner's claim but did not for a reason that Respondents now, belatedly, admit was erroneous. See *Williams* v. *Taylor*, 529 U.S. 420, 437 (2000) ("Comity … dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts *should have the first opportunity* to review this claim and provide any necessary relief.") (emphasis added); *McCleskey* v. *Zant*, 499 U.S. 467, 493 (1991) (noting that procedural doctrines barring federal review are "designed to lessen the injury to a State that results through reexamination of a state conviction *on a ground that the State did not have the opportunity to address at a prior, appropriate time*") (emphasis added), *superseded on other grounds by statute as stated in Banister* v. *Davis*, 140 S. Ct. 1698 (2020).

III. The Questions Presented Are Exceptionally Important and Recurring, and Respondents' Vehicle Objections Are Misplaced.

Respondents fail to refute the importance of the Questions Presented, and their vehicle objections misunderstand the issues.

1. Respondents do not dispute that the petition presents issues critical to, if not dispositive of, the relevant analysis and outcome in numerous federal habeas cases. See Pet. 16–18. Their contention that the petition is not "compelling" (BIO 7 (citing SUP. CT. R. 10)) instead rests on a disregard for (as to Question I) and a failure to appreciate (as to the Question II) the circuit conflicts, and their unsurprising assessment that the decision below is correct. But, as described above, the courts of appeals are indeed divided on both questions, and Respondents' merits arguments

are circular, unsupported, and unpersuasive. Its argument that Question II represents mere "quibbling" over which state court decision is the "last reasoned" (BIO 13) is belied by the fact that this issue not only drives the analysis but is often outcome-determinative, both here and in countless other cases.

2. Respondents' assertion that "the factual and procedural history of this case" renders it an inappropriate vehicle (BIO 7) arises, as to both Questions, from the mistaken premise that Petitioner's claim is subject to AEDPA deference. But that is exactly the issue set forth in Question II, and it would be the threshold issue on remand were this Court to reverse for the issuance of a COA on Question I. That is a not a reason to deny review, but rather to grant it.

CONCLUSION

The petition should be granted or the case summarily reversed for the issuance of a COA.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
MOLLY A. KARLIN
Assistant Federal Public Defender
Counsel of Record
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2700
molly_karlin@fd.org

Counsel for Petitioner

January 12, 2022