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# The Non-Waivability of AEDPA Deference's Applicability

Andrew L. Adler

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# ARTICLES

## The Non-Waivability of AEDPA Deference's Applicability

ANDREW L. ADLER\*

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### INTRODUCTION

At the center of modern-day federal habeas jurisprudence is the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>1</sup> Designed by Congress to “further the principles of comity, finality, and federalism,”<sup>2</sup> AEDPA dramatically changed the law of habeas corpus.<sup>3</sup> Nowhere were these changes felt more than in the context of habeas petitions brought by state prisoners, which represent the “overwhelming

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

2. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

3. *See Felker v. Turpin*, 518 U.S. 651, 654 (1996) (recognizing that AEDPA “work[ed] substantial changes” to the law “authoriz[ing] federal courts to grant the writ of habeas corpus”). AEDPA established a one-year statute of limitations, limited the availability of evidentiary hearings, erected a nearly insurmountable bar on second or successive petitions, and (most relevant here) established deferential standards for reviewing state court decisions that adjudicated the merits of the petitioner’s federal habeas claim. NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 1 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>; see also *infra* Part I.

majority of the federal habeas docket.”<sup>4</sup> “[E]ach year, state prisoners file more than 18,000 cases seeking habeas corpus relief,” thereby “constitut[ing] about one out of every fourteen civil cases filed in U.S. District Courts.”<sup>5</sup> And among this large swath of cases are habeas petitions brought by state prisoners under sentence of death.<sup>6</sup>

Given the volume and importance of these habeas petitions, it is unsurprising that the Supreme Court has played an active role in the interpretation of AEDPA. Despite its shrinking docket,<sup>7</sup> the Supreme Court has accepted for review and decided a substantial number of AEDPA-related cases over the last few years.<sup>8</sup> But the Supreme Court is not alone in its interest. Hearing federal appeals from Alabama, Florida, and Georgia—three states authorizing capital punishment<sup>9</sup>—the U.S. Court of Appeals for the Eleventh Circuit shares a deep and abiding interest in AEDPA as well. Indeed, the Eleventh Circuit publishes approximately thirty opinions each year involving AEDPA,<sup>10</sup> many of

4. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 8 (2010). AEDPA also affected post-conviction motions for relief brought by federal prisoners under 28 U.S.C. § 2255. See, e.g., 28 U.S.C. § 2255(f) (2006 & Supp. 2011) (imposing a one-year statute of limitations); *id.* § 2255(h) (limiting second or successive motions).

5. KING ET AL., *supra* note 3, at 1.

6. Although AEDPA applies to all habeas petitions filed by state prisoners after the statute’s effective date, Congress particularly “intended to reduce delays and to promote the finality of criminal convictions and sentences” in the capital habeas context. *Id.*

7. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1224 (2012) (“The [Supreme] Court decides fewer cases per Term now than at any other time in its modern history.”).

8. See, e.g., *Johnson v. Williams*, 133 S. Ct. 1088 (2013); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012) (per curiam); *Wood v. Milyard*, 132 S. Ct. 1826 (2012); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (per curiam); *Howes v. Fields*, 132 S. Ct. 1181 (2012); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Greene v. Fisher*, 132 S. Ct. 38 (2011); *Bobby v. Dixon*, 132 S. Ct. 26 (2011); *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam); *Bobby v. Mitts*, 131 S. Ct. 1762 (2011) (per curiam); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); *Felkner v. Johnson*, 131 S. Ct. 1305 (2011) (per curiam); *Wall v. Kholi*, 131 S. Ct. 1278 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Premo v. Moore*, 131 S. Ct. 733 (2011); *Magwood v. Patterson*, 130 S. Ct. 2788 (2010); *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010); *Renico v. Lett*, 559 U.S. 766 (2010); *Berghuis v. Smith*, 559 U.S. 314 (2010); *Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam); *Wood v. Allen*, 558 U.S. 290 (2010); *Smith v. Spisak*, 558 U.S. 139 (2010); *Knowles v. Mirzayance*, 556 U.S. 111 (2009); *Waddington v. Sarausad*, 555 U.S. 179 (2009); *Jimenez v. Quarterman*, 555 U.S. 113 (2009); *Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam); see also *infra* notes 23–26, 30–33, 39–46 and accompanying text.

9. Notably, of the 37 jurisdictions with inmates currently on death row, Alabama, Florida, and Georgia respectively rank fifth, second, and ninth in number. DEATH PENALTY INFO. CTR., *Death Row Inmates by State*, DEATHPENALTYINFO.ORG, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Mar. 24, 2013).

10. A search of the Westlaw “Ctal1r” database for “AEDPA” and “habeas” reveals that the Eleventh Circuit has consistently published approximately thirty such decisions each year since 2007. The decision to publish an opinion tends to reflect the case’s importance to the Court. Under the Eleventh Circuit’s Local Rules, “[u]npublished opinions are not considered binding

which are of substantial length and generate spirited concurring and/or dissenting opinions.<sup>11</sup> Further illustrating the current Eleventh Circuit's collective interest is that, of the five cases it voted to re-hear *en banc* in 2011,<sup>12</sup> two involved AEDPA<sup>13</sup> (with a third involving a related area of federal habeas law).<sup>14</sup> And, in 2012, the Eleventh Circuit again voted to re-hear *en banc* two cases involving AEDPA.<sup>15</sup>

Rather than attempting a comprehensive review of the Eleventh Circuit's habeas jurisprudence, this Article instead seizes on a discrete issue that the *en banc* Eleventh Circuit identified, but left unresolved, in a footnote in *Childers v. Floyd*, one of the AEDPA decisions from 2011

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precedent," and an opinion will be unpublished unless a majority of the panel decides to publish it. 11TH CIR. R. 36-2.

11. One recent example is the Eleventh Circuit's divided decision in *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1231, 1274, 1275, 1294 (11th Cir. 2012), where the second judge in the majority concurred only in the judgment due to the sheer length of the majority opinion. Interesting examples of spirited opinions can be found in all three of the *en banc* habeas decisions decided in 2011. *Infra* notes 13–14.

12. Even more than the decision to publish, the decision to re-hear a case *en banc* tends to reflect the case's importance to the Court. Under the Federal Rules of Appellate Procedure, "[a]n *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a); *see also* 11TH CIR. R. 35-3 ("A petition for *en banc* consideration . . . is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding, and . . . is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of the Supreme Court or of this circuit. Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for *en banc* consideration.").

13. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*); *Childers v. Floyd*, 642 F.3d 953, 968 (11th Cir. 2011) (*en banc*), *cert. petition granted, judgment vacated, and case remanded*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013). For a summary of the former decision, see *Recent Cases, Federal Habeas Corpus – Death Penalty – Eleventh Circuit Rejects Challenge to Georgia's "Beyond a Reasonable Doubt" Standard for Defendants' Mental Retardation Claims – Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*), 125 HARV. L. REV. 2185 (2012). The latter decision is discussed below.

14. *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (*en banc*); *see generally* Nicholas Matteson, Comment, *Low Savings Rate: Applying the Section 2255 "Savings Clause" to Federal Sentencing Claims in Gilbert v. United States*, 53 B.C. L. REV. E. SUPP. 61 (2012) (summarizing and criticizing *Gilbert*). The other two *en banc* cases from 2011 involved the First and Fourth Amendments. *Coffin v. Brandau*, 642 F.3d 999 (11th Cir. 2011) (*en banc*) (addressing whether law enforcement officers violated the Fourth Amendment by entering a residential garage without a warrant, and, if so, whether they were nonetheless entitled to qualified immunity); *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 758 (11th Cir. 2011) (*en banc*) (addressing "whether a municipal ordinance that limits the number of feedings of large groups that any person or political organization can sponsor in centrally located parks violates the First Amendment.").

15. *Evans v. Sec'y, Dep't of Corrs.*, 703 F.3d 1316 (11th Cir. 2013) (*en banc*) (addressing ineffective assistance of counsel at the penalty phase of a capital trial); *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013) (*en banc*) (addressing timeliness).

referenced above. That issue focuses on the deferential standards established by AEDPA for reviewing a state court decision that has adjudicated the merits of the petitioner's federal claim. As explained below, these standards—commonly referred to as AEDPA deference—effectively preclude federal habeas relief in all but the most egregious cases. The specific issue identified in *Childers* and examined here is whether the applicability of AEDPA deference is capable of being waived by the parties. Given the profound and often dispositive impact of AEDPA deference, this issue is of great practical importance.

Nonetheless, the issue has not yet been fully examined. As explained below, there are only a handful of federal appellate decisions that have touched on the issue, and only a few of these decisions have offered any critical analysis. More troubling is that these decisions have reached different conclusions, reflecting an emerging circuit split of authority on this important issue of federal law. While some appellate courts have enforced a party's waiver without hesitation, others have held that the applicability of AEDPA deference is not waivable. And still other appellate courts have elected to bypass the waivability issue altogether. Despite its general interest in AEDPA, the Supreme Court has not yet examined this issue. Nor have scholars.

Using the *Childers* footnote as a springboard, this Article examines whether the applicability of AEDPA deference is waivable. Part I provides a brief background of AEDPA deference, emphasizing its demanding standards and its statutory pre-requisite that a state court "adjudicate the merits" of the petitioner's claim. Part II briefly discusses the Eleventh Circuit's *en banc* decision in *Childers* and places the waivability issue in context. Part III summarizes one line of decisional authority effectively allowing a party's waiver to determine the applicability of AEDPA deference. Part IV summarizes a second, contrary line of decisional authority holding that the applicability of AEDPA deference is not waivable by the parties. Part V introduces the element of judicial discretion and discusses a recent Eleventh Circuit decision bypassing the waivability issue. Part VI argues that, although the issue is not free from doubt, the second line of authority persuasively holds that the applicability of AEDPA deference is not waivable. This Article then briefly concludes.

## I. AEDPA DEFERENCE

One of the key ways in which AEDPA changed habeas law was by establishing a framework governing—or, more accurately, constraining—federal courts' review of habeas corpus petitions brought by state prisoners. That framework is codified at 28 U.S.C. § 2254(d). Fre-

quently interpreted and applied by the federal courts, this provision reads as follows:

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.<sup>16</sup>

Designed to “ensure both comity for and the finality of state court criminal convictions,”<sup>17</sup> this provision effectively requires federal courts sitting in habeas to defer substantially to a state court decision that has adjudicated the merits of the habeas petitioner’s claim.<sup>18</sup>

The practical impact of this so-called AEDPA deference cannot be understated. It has recently been reported that, since AEDPA’s enactment, “[o]nly a tiny fraction of . . . habeas petitioners [in state custody]—estimated at less than four-tenths of one percent—obtain any kind of relief . . . .”<sup>19</sup> To be sure, this stark figure is attributable in part to AEDPA’s many procedural hurdles.<sup>20</sup> But for those petitions that do get resolved on the merits, it is attributable in large part to § 2254(d),<sup>21</sup> which has been described as “one of the most uncharitable standards of review known to law.”<sup>22</sup>

In the last few years, the Supreme Court has repeatedly emphasized

16. 28 U.S.C. § 2254(d) (2006).

17. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 926 (2001).

18. Under AEDPA, state prisoners are generally required to exhaust their state court remedies before filing a federal habeas petition. 28 U.S.C. § 2254(b)(1).

19. Joseph L. Hoffman & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at WK8 (cross-referencing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>).

20. Such procedural hurdles and doctrines include timeliness, exhaustion of state remedies, state procedural default, non-retroactivity, and the bar on unauthorized second or successive petitions. KING ET AL., *supra* note 19, at 45–50; see also John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 453 (2011) (reiterating “the widely held belief that many meritorious habeas claims are never adjudicated because of the dizzying array of procedural traps.”).

21. See KING ET AL., *supra* note 19, at 58–59 (attributing the low rate of habeas relief to AEDPA’s procedural obstacles and the “more deferential standard of review for state decisions of both fact and law”).

22. Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 97 (2012).

the difficulty of satisfying AEDPA's deferential standards.<sup>23</sup> The Court has explained that AEDPA "creates 'a substantially higher threshold' for obtaining relief than *de novo* review,"<sup>24</sup> such that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable."<sup>25</sup> The Court has gone so far as to preclude federal habeas relief unless "there is no possibility [that] fairminded jurists could disagree that the state court's decision conflicts with th[e] [Supreme] Court's precedents."<sup>26</sup> Thus, the application of AEDPA deference will often make all the difference, especially in those difficult cases where a petitioner might be entitled to relief under a *de novo* review.

There is, however, an important caveat: AEDPA deference applies only where the state court has rendered an "adjudication on the merits" with respect to the petitioner's claim. Where the state court has done so, AEDPA deference serves to respect the dignity and autonomy of state courts and avoids having federal courts second-guess their judgments.<sup>27</sup> However, in cases where there has not been an adjudication on the merits, then there is no state court decision to which the federal habeas court can defer and it will review the petitioner's claim *de novo*.<sup>28</sup> Such *de novo* review ensures that a petitioner will receive at least one meaningful

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23. See, e.g., *Hill v. Humphrey*, 662 F.3d 1335, 1343–47 (11th Cir. 2011) (en banc) (reviewing seven such Supreme Court decisions from the 2010–11 term alone). The Supreme Court has repeatedly granted certiorari in order to correct a federal appellate court's failure to apply properly AEDPA's deferential standards. See, e.g., *Parker v. Matthews*, 132 S. Ct. 2148, 2149 (2012) (per curiam) ("The [Sixth Circuit's] decision is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'") (citation omitted); *Cash v. Maxwell*, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from denial of certiorari) (citing eight such habeas reversals of the Ninth Circuit alone); Douglas A. Berman, *Another SCOTUS Summary Reversal Again Stresses AEDPA Deference*, SENTENCING LAW & POLICY BLOG (Dec. 12, 2011, 11:18 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/12/another-scotus-summary-reversal-again-stresses-aedpa-deference.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/12/another-scotus-summary-reversal-again-stresses-aedpa-deference.html) (reporting a reversal by the Supreme Court that "once again correct[ed] a federal circuit court that did not show sufficient deference in federal habeas review to a state court decision upholding a criminal conviction"); Jonathan H. Adler, *Is the Sixth Circuit the New Ninth Circuit (At Least in Habeas Cases)?*, VOLOKH CONSPIRACY, (June 1, 2010, 10:44 AM), <http://www.volokh.com/2010/06/01/is-the-sixth-circuit-the-new-ninth-at-least-in-habeas-cases/> (reporting five habeas cases in which the Supreme Court reversed the Sixth Circuit in the 2009–10 term alone).

24. *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (citation omitted).

25. *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011).

26. *Id.*

27. See, e.g., *Childers v. Floyd*, 642 F.3d 953, 968 (11th Cir. 2011) (en banc), *cert. petition granted, judgment vacated, and case remanded*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013). ("Deference to the autonomy and dignity of the state courts underlies [a] broad definition of 'adjudication on the merits.'").

28. *Id.* at 967; *accord* *Cone v. Bell*, 556 U.S. 449, 472 (2009) ("Because the [State] courts did not reach the merits of Cone's *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. § 2254(d). Instead, the claim is reviewed *de novo*.").

and unconstrained opportunity to seek redress for constitutional violations.<sup>29</sup> Because an adjudication on the merits is a pre-requisite to AEDPA deference, and because the application of AEDPA deference often sounds the death knell for petitioners—quite literally for those under sentence of death—the meaning of this statutory phrase is of great importance.

Reflecting this importance, both the Supreme Court and the *en banc* Eleventh Circuit have recently interpreted the phrase. In *Harrington v. Richter*, the Supreme Court held that a state court's summary adjudication (*i.e.*, one without an accompanying statement of reasons) is presumed to be on the merits.<sup>30</sup> Specifically, the Court stated that “[w]hen 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 in the absence of any indication or state-law procedural principles to the contrary.”<sup>31</sup> The Court reasoned that “requiring a statement of reasons could undercut state practices designed to preserve the integrity of the case-law tradition” and disrupt a state court's ability “to concentrate its resources on the cases where opinions are most needed.”<sup>32</sup> Nonetheless, the Court explained that the “presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely.”<sup>33</sup>

Shortly thereafter, in *Childers v. Floyd*, the Eleventh Circuit sat *en banc* to consider the more difficult issue of whether the state court had adjudicated the merits of the petitioner's claim brought under the Confrontation Clause where it analyzed and purported to resolve the claim under Florida Rule of Evidence 90.403.<sup>34</sup> Applying *Richter*, the *en banc* majority presumed that the state court's decision was on the merits because it did not apply a procedural bar.<sup>35</sup> And, over spirited concurring<sup>36</sup> and dissenting opinions,<sup>37</sup> it rejected the argument that the state

29. See *Childers*, 642 F.3d at 981–82, 986–88 (Wilson, J., concurring in the judgment) (emphasizing that it is the federal habeas court's obligation to ensure that the petitioner receives one “actual and meaningful opportunity to seek redress for constitutional violations.”). Both state and federal prisoners, however, are unlikely to receive more than one such opportunity because AEDPA “imposes a nearly insurmountable bar against second or successive applications for habeas relief.” Blume et al., *supra* note 20, at 442; 28 U.S.C. §§ 2244(b), 2255(h) (2006); see also *In re Davis*, 565 F.3d 810, 816–19 (11th Cir. 2009) (explaining the background, purposes, and requirements of this statutory bar).

30. *Richter*, 131 S. Ct. at 784–85.

31. *Id.*

32. *Id.* at 784.

33. *Id.* at 785.

34. *Childers*, 642 F.3d at 957, 963–64.

35. *Id.* at 968–69.

36. See *id.* at 980–88 (Wilson, J., concurring in the judgment).

37. See *id.* at 988–92 (Barkett, J., dissenting).



court had misinterpreted (and therefore failed to adjudicate) the petitioner's claim, reasoning that the state court's Rule 403 analysis effectively "addressed the Confrontation Clause's concerns."<sup>38</sup>

Most recently, the Supreme Court revisited the adjudication on the merits pre-requisite in a factual scenario similar to *Childers*. In *Johnson v. Williams*, the Supreme Court held that *Richter's* presumption applies not only to cases where the state court issues a summary order resolving all of the defendant's claims, but also where "the state court addresses some of the claims raised by a defendant but not a claim that is later raised in a federal habeas proceeding."<sup>39</sup> The Court explained that, in such cases, "federal habeas courts could [not] assume that any unaddressed federal claim was simply overlooked . . . because it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference."<sup>40</sup> Nonetheless, the Court rejected the argument that this presumption was irrebuttable, stating it would be rebutted where the "federal claim is rejected as a result of sheer inadvertence" or where "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked."<sup>41</sup> The Court suggested this might occur where the legal standard governing the adjudicated state law claim was less protective or "quite different" than the standard governing the unresolved federal claim, or where a "provision of the Federal Constitution or a federal precedent was simply mentioned in passing [by the defendant] in a footnote or was buried in a string cite."<sup>42</sup>

Applying these standards, the Court in *Johnson v. Williams* concluded that it was "exceedingly unlikely" that the state court overlooked the defendant's federal claim.<sup>43</sup> The Court's conclusion rested primarily on the fact that, despite interpreting a state statute, the state Supreme Court decision upon which the state court relied "understood itself to be deciding a question with federal constitutional dimensions" and likely interpreted the statute to be at least as protective as the federal Constitu-

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38. *Id.* at 970 (majority opinion); *see id.* at 969–70 nn.17–18.

39. 133 S. Ct. 1088, 1091 (2013).

40. *Id.* at 1094. The Court identified three instances in which state courts might decline to address a federal claim: first, where "a line of state precedent is viewed as fully incorporating a related federal constitutional right," a "state appellate court may regard its discussion of the state precedent as sufficient to cover a claim based on the related federal right;" second, "a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim;" and, third, "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion." *Id.* at 1094–96.

41. *Id.* at 1096–97.

42. *Id.* at 1096.

43. *Id.* at 1099.

tion.<sup>44</sup> The Court explained that, regardless of whether the defendant's state and federal claims were coextensive, "the fact that these claims are so similar makes it unlikely that the [state court] decided one while overlooking the other."<sup>45</sup> The Court also observed that the defendant had "treated her state and federal claims as interchangeable, and it is hardly surprising that the state courts did so as well," noting that "[t]he possibility that the [state court] had simply overlooked [the defendant's federal] claim apparently did not occur to anyone until that issue was raised by two judges during the oral argument in the Ninth Circuit."<sup>46</sup>

## II. THE WAIVABILITY ISSUE

While the Supreme Court found an adjudication on the merits in *Johnson v. Williams*, its decision there will allow petitioners in future cases to continue to argue that the state court inadvertently overlooked his or her federal claim.<sup>47</sup> This litigation will essentially require federal habeas courts to analyze the totality of the circumstances, and certain cases may present difficult judgment calls. Indeed, because state courts do not always expressly or neatly resolve federal claims, it may be difficult to determine in a particular case whether the state court inadvertently overlooked the petitioner's federal claim or instead adjudicated it by implication. In addition to such difficulties in application, there are also legal issues surrounding the adjudication on the merits pre-requisite that remain unresolved after *Johnson v. Williams*; the *en banc* majority in *Childers* identified one such issue pertaining to ineffective-assistance-of-counsel claims.<sup>48</sup>

44. *Id.* at 1098.

45. *Id.*

46. *Id.* at 1099. A few days after issuing its opinion in *Johnson v. Williams*, the Supreme Court granted the pending petition for certiorari in *Childers*, vacated the judgment of the *en banc* Eleventh Circuit, and remanded the case for reconsideration in light of its decision. *Childers v. Floyd*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013). At the time of this writing, the case is currently on remand back to the Eleventh Circuit.

47. The Supreme Court acknowledged that its decision would have this effect, but found no reason to fear that it would "prompt an unmanageable flood of litigation." *Johnson v. Williams*, 133 S. Ct. at 1097. In a separate opinion, Justice Scalia disagreed. *See id.* at 1099, 1102 (Scalia, J., concurring in the judgment) (protesting that the majority's "case-by-case approach will guarantee protracted litigation," "will be a fertile source of litigation and delay," and will require "[f]uture litigation" to resolve unanswered questions).

48. Specifically, the *en banc* majority identified (but found unnecessary to resolve) a potential conflict between language in *Richter*, 131 S. Ct. at 784—stating that AEDPA deference "applies when a 'claim,' not a component of one, has been adjudicated"—and the Supreme Court's earlier decision in *Rompilla v. Beard*. *Childers v. Floyd*, 642 F.3d 953, 969 n. 18 (11th Cir. 2011) (*en banc*, *cert. petition granted, judgment vacated, and case remanded*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013). In *Rompilla*, the state court had denied the petitioner's ineffective assistance of counsel claim only on the deficient performance prong of the analysis and, as a result, the Supreme Court reviewed the prejudice prong *de novo*. 545 U.S. 374, 390 (2005) (citing

But the *en banc* majority also identified an equally important yet unresolved issue that, although noted only in passing, could have altogether obviated the adjudication on the merits dilemma.<sup>49</sup> That issue arose from the fact that the petitioner had not argued in the district court either that the state court failed to render an adjudication on the merits or that AEDPA deference was otherwise inapplicable.<sup>50</sup> This failure implicated the well-established common law rule of appellate procedure that arguments not raised below are deemed waived and will generally not be considered on appeal.<sup>51</sup> As a result, the *en banc* Eleventh Circuit instructed the parties to brief whether the petitioner's argument was "waivable" and, if so, whether the petitioner had waived it.<sup>52</sup> Ultimately, the *en banc* majority expressly declined to resolve that issue,<sup>53</sup> presumably because it concluded that there had in fact been an adjudication on the merits.

But the *en banc* majority could have potentially found that the peti-

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Wiggins v. Smith, 539 U.S. 510, 534 (2003)); accord Porter v. McCollum, 558 U.S. 30, 39 (2009) (per curiam). While dicta, the language in *Richter* is difficult to reconcile with this aspect of *Rompilla*. Given this tension, it remains unclear how AEDPA deference will apply in future petitions raising ineffective-assistance claims, a worrisome issue given the prevalence of such claims. KING ET AL., *supra* note 3, at 5. As another example of an unresolved legal issue, there is also the question of precisely how the federal habeas court should defer to a state court's summary adjudication. See generally Matthew Seligman, Note, *Harrington's Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469 (2012) (identifying this outstanding issue and proposing a solution).

49. *Childers*, 642 F.3d at 967 n.15.

50. *Id.* at 965 ("Nowhere did Childers argue that the [Florida] District Court of Appeal failed to render an adjudication on the merits of Childers's claim or that the federal district court should review the Florida court's ruling *de novo*.").

51. See, e.g., *Ramirez v. Sec'y, Dep't of Transp.*, 686 F.3d 1239, 1249 (11th Cir. 2012) ("It is well-settled that we will generally refuse to consider arguments raised for the first time on appeal."); see generally Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987) (discussing the history, justifications, exceptions, and potential reformation to this general rule); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985 (1989) (similar).

52. *Childers*, 642 F.3d at 966. Importantly, the petitioner's failure to raise the argument would technically fall under the rubric of forfeiture rather than waiver. See *Kontrick v. Ryan*, 540 U.S. 433, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (citation, quotation marks, and alteration omitted). Also sometimes referred to as "waiver," abandonment is another related rule of appellate procedure that applies where a party on appeal does not sufficiently raise an argument advanced in the court below. E.g., *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1318–19 (11th Cir. 2012). Federal appellate courts also generally refuse to consider arguments that are raised for the first time in a reply brief or at oral argument. E.g., *Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012) (oral argument); *United States v. Levy*, 379 F.3d 1241, 1244–45 (11th Cir. 2004) (reply brief). Although distinct, these forms of waiver all produce the same result: a federal appellate court declining to address an argument on the ground that it has not been properly preserved or sufficiently advanced.

53. *Childers*, 642 F.3d at 967 n.15.

tioner forfeited his argument. Had it done so, it would have been unnecessary to address whether there had been adjudication on the merits, and AEDPA deference would have applied by virtue of the petitioner's forfeiture. As illustrated below, there have been (and will likely continue to be) situations like *Childers*, where the petitioner does not properly preserve or sufficiently advance arguments contesting the application of AEDPA deference. More surprising is that there have also been situations where the State has not properly preserved or sufficiently advanced arguments supporting the application of AEDPA deference.<sup>54</sup> Unlike the *en banc* majority in *Childers*, and as illustrated below, courts may elect to apply general rules of appellate procedure and enforce such waivers,<sup>55</sup> especially where doing so will bypass difficult issues regarding AEDPA's applicability.<sup>56</sup>

But waiver raises its own distinct set of complexities in the AEDPA context, and these complexities have thus far gone largely overlooked.

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54. Aside from inadvertence, which is increasingly unlikely given the ubiquity of AEDPA deference, one possible reason why the State might waive reliance on AEDPA deference is if it seeks a favorable precedent on the underlying constitutional issue. Federal appellate courts often decline to resolve the underlying constitutional issue when applying AEDPA deference. *See, e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) ("Our own consideration of the merits of [the habeas petition], however, is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief."); *Shelton v. Sec'y, Dep't of Corr.*, 691 F.3d 1348, 1355 (11th Cir. 2012) ("To be clear, this Court expresses no view on the underlying constitutional question, as we limit our analysis to AEDPA's narrow inquiry."); *Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (en banc) ("Whether we agree with the Georgia Supreme Court or not, AEDPA requires us to affirm the denial of Hill's § 2254 petition. We do not decide whether Georgia's burden of proof is constitutionally permissible, but only that no decision of the United States Supreme Court clearly establishes that it is unconstitutional. Simply put, Hill has failed to show that no fair-minded jurist could agree with the Georgia Supreme Court's decision about the burden of proof, and thus this Court is without authority to overturn the reasoned judgment of the State's highest court.") (citation and quotation marks omitted); *Burgess v. Watters*, 467 F.3d 676, 681–82 (7th Cir. 2006) ("In this case, as in all cases that come to us under AEDPA, we emphasize that we are expressing no opinion about the correctness of the state court's ruling as a matter of first principles. Should a case in this area reach us through a different procedural avenue without the AEDPA constraints on review, we would be free to evaluate it for ourselves."). One habeas scholar has criticized this minimalist approach when employed by the Supreme Court. *See* Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595, 598 (2009) ("The effect of these two shortcomings—the Court's decisions not to reach the issue of error where the lower court's action survives AEDPA's deferential standard of review, and the Court's decision that only holdings and not dicta can provide the basis for relief under AEDPA—is significant. Until the Court does reach [constitutional] questions like the one it avoided in *Van Patten*, criminal defendants across the country may be convicted using procedures suffering from the same identified (and litigated) constitutional defect. And, because of AEDPA and the Court's unwillingness to apply its holdings retroactiv[ely], it will be all but impossible for those defendants to benefit from such a future Supreme Court decision unless their direct appeal is still pending when the later decision is handed down.").

55. *Infra* Part III.

56. *See, e.g., supra* note 48 (discussing difficulties surrounding "adjudication on the merits" after *Richter* and *Childers*).

Although the Supreme Court has repeatedly addressed the application of waiver to affirmative defenses in the federal habeas context,<sup>57</sup> it has not yet considered the application of waiver to AEDPA's deferential standards of review. Nor has this issue otherwise been fully explored by the federal appellate courts. As discussed below, there have only been a handful of federal appellate decisions to address the issue, and many of these decisions have eschewed critical analysis.

### III. THE FIRST LINE OF AUTHORITY

One line of authority would allow a party's waiver to determine the applicability of AEDPA deference. The *en banc* Eleventh Circuit suggested the viability of this approach in *Childers*. Although the *Childers* court ultimately found it unnecessary to resolve the issue, it did "note . . . that the Supreme Court has suggested that habeas petitioners can waive th[e] issue" of whether there was an adjudication on the merits.<sup>58</sup> For support, it cited a footnote from the Supreme Court's decision in *Knowles v. Mirzayance*.<sup>59</sup>

In *Knowles*, the Supreme Court noted that the petitioner had argued in the court of appeals that AEDPA did not apply, but then conceded in the Supreme Court that the court of appeals had correctly applied AEDPA deference.<sup>60</sup> After observing that the petitioner nevertheless proposed the application of a lesser "modified" form of deference, the Court stated: "Nonetheless, because [the petitioner] has not argued that § 2254(d) is entirely inapplicable to his claim or that the state court failed to reach an adjudication on the merits, we initially evaluate his claim through the deferential lens of § 2254(d)."<sup>61</sup> Appended to this sentence was a citation to cases holding that arguments not raised on appeal are deemed abandoned.<sup>62</sup> The Court proceeded to address and reject the petitioner's argument under both AEDPA's deferential standard and a *de novo* standard.<sup>63</sup>

Notwithstanding *Childers*' citation, it is apparent that the Supreme

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57. *Wood v. Milyard*, 132 S. Ct. 1826 (2012); *Day v. McDunough*, 547 U.S. 198 (2006); *Granberry v. Greer*, 481 U.S. 129 (1987) (pre-AEDPA). For further discussion of these cases, see *infra* notes 106, 113–118 and accompanying text.

58. *Childers*, 642 F.3d at 967 n.15.

59. *Id.* (citing *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009)).

60. *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009).

61. *Id.*

62. *Id.* (citing *United States v. International Business Machines Corp.*, 517 U.S. 843, 855, n. 3 (1996) (finding that party abandoned issue by failing to address it in the party's brief on the merits); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994) (same)).

63. *Id.* at 121–28; *see id.* at 114 ("Whether reviewed under the standard of review set forth in § 2254(d)(1) or *de novo*, *Mirzayance* failed to establish that his counsel's performance was ineffective.").

Court in *Knowles* did not squarely or thoroughly address whether AEDPA deference is capable of abandonment. It should therefore not be considered to have conclusively resolved the waivability issue. In fact, the precedential value of the footnote in *Knowles* is questionable. The footnote led the Court merely to “initially evaluate” the petitioner’s claim under AEDPA, and it ultimately considered and rejected the petitioner’s claim both under AEDPA and a *de novo* review.<sup>64</sup> Thus, the footnote was arguably dicta unnecessary to the Court’s decision.<sup>65</sup> On the other hand, the Supreme Court did appear to suggest, even if in dicta, that the petitioner was capable of abandoning the argument that AEDPA deference did not apply. Such dicta is not easily disregarded.<sup>66</sup>

Indeed, other circuits have actually applied *Childers*’ suggested interpretation of *Knowles*. In *McBride v. Superintendent, SCI Houtzdale*, the parties agreed that AEDPA deference applied,<sup>67</sup> but the Third Circuit independently expressed confusion regarding whether to defer to a state court decision in the ineffective-assistance context.<sup>68</sup> The Court ultimately found it unnecessary to resolve the confusion because the petitioner “affirmatively [took] the position that AEDPA deference applies.”<sup>69</sup> The Court then quoted the relevant language from both *Knowles* and *Childers* to support its conclusion that, “regardless of whether we are required to give AEDPA deference to the [state trial court’s] analysis of the performance prong, we do give it deference as a reasoned analysis to which [the petitioner] has acknowledged AEDPA applies.”<sup>70</sup> The Court thus applied AEDPA deference on the basis of the petitioner’s concession.<sup>71</sup>

The First Circuit employed a similar approach in *Young v. Murphy*.<sup>72</sup> In that case, the petitioner acknowledged in his appellate brief that his claims were subject to AEDPA deference, but then contended at oral

64. *Id.* at 114.

65. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . . .”); *United States v. Kaley*, 579 F.3d 1246, 1253 n. 10 (11th Cir. 2009) (“As our cases frequently have observed, dicta is defined as those portions of an opinion that are ‘not necessary to deciding the case then before us.’”) (citations omitted).

66. *See, e.g.*, *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“We have previously recognized that ‘dicta from the Supreme Court is not something to be lightly cast aside.’”) (citation omitted).

67. 687 F.3d 92, 100 (3d Cir. 2012).

68. *Id.* at 100 n.10.

69. *Id.*

70. *Id.*

71. Notably, this approach allowed the Court to avoid the tension identified in *Childers* between *Richter* and *Wiggins, Rompilla*, and *Porter*. *Id.*; *see supra* note 48.

72. 615 F.3d 59 (1st Cir. 2010).

argument that there had been no adjudication on the merits.<sup>73</sup> Citing cases holding that a party generally may not raise an argument for the first time at oral argument, the Court determined that the petitioner's "delayed" argument was "waived."<sup>74</sup> It further observed that the petitioner "present[ed] no persuasive argument as to why we should deviate from our established practice. Thus, we apply AEDPA's deferential standard of review to both of [his] claims."<sup>75</sup> The Court therefore applied AEDPA deference on the basis of a form of waiver and, notably, did so without independently ensuring that there had in fact been an adjudication on the merits.

The Ninth Circuit followed suit most recently in *James v. Ryan*.<sup>76</sup> In that case, the State had consistently argued that the state court had denied the petitioner's claim on procedural grounds, but then argued for the first time in a petition for rehearing that there had also been an adjudication on the merits.<sup>77</sup> As a result, the Ninth Circuit found that the "[S]tate has waived any contention that the [state] court adjudicated the merits of James's ineffective assistance of counsel claim."<sup>78</sup> The Court nonetheless went on to find that, even if the State's argument was not waived, there was no adjudication on the merits under *Richter*.<sup>79</sup> The Court thus applied *de novo* review and notably instructed the district court to grant habeas relief with respect to the petitioner's capital sentence.<sup>80</sup> The State subsequently filed a petition for a writ of certiorari with the Supreme Court, arguing, *inter alia*, that the Ninth Circuit's determination that AEDPA deference is waivable conflicts with decisions from other circuits.<sup>81</sup> Rather than take up the waiver issue, the Supreme Court instead granted the petition, vacated the Ninth Circuit's judgment, and remanded for reconsideration in light of its intervening decision in *Johnson v. Williams* clarifying the adjudication on the merits pre-requisite.<sup>82</sup>

Finally, and although not implicating the adjudication on the merits

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73. *Id.* at 65.

74. *Id.*

75. *Id.*

76. 679 F.3d 780 (9th Cir. 2012), *cert. petition granted, judgment vacated, and case remanded*, *Ryan v. James*, \_\_ S. Ct. \_\_, 2013 WL 1091753 (Mar. 18, 2013).

77. *Id.* at 802 ("The state has long agreed that the [state] court dismissed James's ineffective assistance of counsel claim as procedurally barred. However, in a petition for rehearing before this court, the state argued—for the first time—that the [state] court 'also' rejected the claim on the merits in a paragraph at the end of its opinion.")

78. *Id.*

79. *Id.* at 802–03.

80. *Id.* at 803, 805, 821.

81. Petition for Writ of Certiorari at 12–15, *Ryan v. James*, (June 28, 2012) (No. 12-11) 2012 WL 2586933.

82. *Ryan v. James*, \_\_ S. Ct. \_\_, 2013 WL 1091753 (Mar. 18, 2013).

pre-requisite, a handful of cases decided shortly after AEDPA's enactment applied a form of waiver in determining AEDPA's applicability. The Seventh, Ninth, and Eleventh Circuits all declined to apply AEDPA's new deferential standards at least in part because the parties did not rely on them on appeal.<sup>83</sup> In one case, then-Chief Judge Richard Posner expressly concluded that AEDPA deference was waivable:

The state has expressly waived reliance on the recently enacted Antiterrorism and Effective Death Penalty Act of 1996, which among other things curtails, in habeas corpus proceedings brought by state prisoners, the scope of federal judicial review of determinations by the state courts in the prisoner's case. The provisions of the new Act governing the scope of federal judicial review do not affect the subject-matter jurisdiction of the federal courts, and are therefore waivable.<sup>84</sup>

In short, and despite the lack of critical analysis, the above line of authority supports the proposition that the applicability of AEDPA deference can be waived by the parties, and appellate courts need not independently examine that issue.

#### IV. THE SECOND LINE OF AUTHORITY

At least three other circuits, however, have adopted the contrary view. In *Eze v. Senkowski*, the Second Circuit rejected the petitioner's argument that the respondent waived the applicability of AEDPA deference by failing to raise it in the district court.<sup>85</sup> The Court employed the following reasoning:

The gravamen of [the petitioner's] waiver argument is that procedural defenses can be waived if not raised by the defendant. AEDPA's

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83. *Miles v. Stainer*, 108 F.3d 1109, 1112 n.2 (9th Cir. 1997); *Huynh v. King*, 95 F.3d 1052, 1055 n.2 (11th Cir. 1996); *Watkins v. Meloy*, 95 F.3d 4, 5 (7th Cir. 1996) (Posner, C.J.); *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996) (Posner, C.J.). The State unsuccessfully filed a petition for a writ of certiorari in *Emerson*, "arguing that the question of whether [the] habeas petition should be reviewed under the prior Habeas Corpus Act or under the new AEDPA, was not waivable by the State." Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 386 n.434 (1997); see *Emerson v. Gilmore*, 520 U.S. 1122 (1997) (denying the petition for a writ of certiorari).

84. *Watkins*, 95 F.3d at 5–6 (internal citation omitted). It is well-established that subject-matter jurisdiction is not waivable by the parties, and federal courts are therefore obligated to ensure *sua sponte* that they have such jurisdiction at all times. See, e.g., *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Moreover, courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.") (internal citation omitted); *Thomas v. Crosby*, 371 F.3d 782, 801 (11th Cir. 2004) ("We are clearly obligated to raise questions concerning our subject-matter jurisdiction *sua sponte* in all cases.").

85. 321 F.3d 110, 120–21 (2d Cir. 2003).



standard of review, however, is not a procedural defense, but a standard of general applicability for all petitions filed by state prisoners after the statute's effective date presenting claims that have been adjudicated on the merits by a state court. The statute contains unequivocally mandatory language. *See* 28 U.S.C. § 2254(d) (instructing that a state prisoner's petition for a writ of habeas corpus "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") (emphasis added). Therefore, if the [state court] adjudicated [the petitioner's] federal ineffective assistance claim on the merits, we must apply AEDPA deference.<sup>86</sup>

In *Brown v. Smith*, the Sixth Circuit reached a similar conclusion.<sup>87</sup> In that case, the petitioner failed to argue in the district court that the state court had not rendered an adjudication on the merits.<sup>88</sup> As a result, the district court applied AEDPA deference, and the petitioner appealed.<sup>89</sup> Despite his failure to raise it below, the Court addressed the petitioner's new argument that there had not been an adjudication on the merits, reasoning that "a party cannot 'waive' the proper standard of review by failing to argue it."<sup>90</sup> For support, the Court cited two (non-AEDPA) cases standing for the general proposition that standards of review are not waivable because they must be determined by the court rather than the parties.<sup>91</sup> Notably, the Court went on to find that there

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86. *Id.* at 121 (internal citations omitted).

87. 551 F.3d 424, 428–29 & n.2 (6th Cir. 2008).

88. *Id.* at 428 n.2.

89. *Id.*

90. *Id.*

91. *Id.* (See *Worth v. Tyer*, 276 F.3d 249, 262 n. 4 (7th Cir. 2001) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived."); *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) (standard of review is a determination that the court makes for itself)). This proposition is relatively well-established. *E.g.*, *United States v. Williams*, 641 F.3d 758, 772–73 (6th Cir. 2011); *United States v. Bain*, 586 F.3d 634, 639 n.4 (8th Cir. 2009); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1519 n.24 (5th Cir. 1994); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n.4 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring in part and dissenting in part). As one court has explained:

[A]n appellate court must apply *some* standard of review to every issue it considers. Parties frequently brief and argue their view of the appropriate standard to guide the appellate court in choosing the correct one. Parties have this incentive because the standard chosen often affects the outcome of the case. The parties' failure to brief and argue properly the appropriate standard may lead the court to choose the wrong standard. But no party has the power to *control* our standard of review. A reviewing court may reject both parties' approach to the standard.

had been no adjudication on the merits and, after reviewing the petitioner's claim *de novo*, instructed the district court to grant his petition.<sup>92</sup>

In *Gardner v. Galetka*, the Tenth Circuit likewise concluded that the applicability of AEDPA deference was not waivable.<sup>93</sup> In that case, the State had erroneously conceded on appeal (against its own interests) that AEDPA deference did not apply on the ground that the state court had not rendered an adjudication on the merits.<sup>94</sup> Instead of simply enforcing the State's waiver, the Court independently asked whether "the congressionally mandated deferential standard of review [could] be waived by counsel[.] In other words, should this court apply a standard of review more searching than that dictated by AEDPA on account of the fact that the state's appellate lawyers mistakenly believed that the more searching standard applies?"<sup>95</sup> Despite observing that the State was capable of waiving procedural defenses under AEDPA, the Court agreed with *Eze* and *Brown* "that the correct standard of review under AEDPA is not waivable."<sup>96</sup> It reasoned:

[AEDPA deference] is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case. Congress set forth the standard in unequivocally mandatory language. It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose. We therefore will review this claim under AEDPA's deferential standard.<sup>97</sup>

In short, the above line of authority holds that parties may not waive arguments regarding the applicability of AEDPA deference. The reasoning of these cases, moreover, effectively requires federal appellate courts to determine independently whether there has been an adjudication on the merits, regardless of whether the parties have preserved or advanced the issue.

## V. AN INTERMEDIATE APPROACH

The two lines of authority above, however, are not the only approaches available to a federal appellate court, as illustrated by the Eleventh Circuit's recent decision in *Pope v. Secretary for Department*

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United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir. 1992) (internal citation omitted).

92. *Brown*, 551 F.3d at 428–30, 435.

93. 568 F.3d 862, 877–79 (10th Cir. 2009).

94. *Id.* at 877–78.

95. *Id.* at 878.

96. *Id.* at 879.

97. *Id.* (internal citations omitted).

of Corrections.<sup>98</sup> In that case, the Court addressed whether AEDPA applied to a habeas petition, which turned not on whether there was an adjudication on the merits, but rather on whether the petitioner had filed his habeas petition after the statute's effective date.<sup>99</sup>

As an initial matter, the Court arguably gave conflicting indications on whether that issue was waivable. On the one hand, it observed that the State had taken inconsistent positions on whether AEDPA applied throughout the litigation, and the Court therefore questioned whether it had waived the argument.<sup>100</sup> On the other hand, the Court inserted a footnote favorably quoting a footnote in a non-precedential Fourth Circuit decision stating that "Congress clearly intended the standard of review of the AEDPA to apply to habeas petitions filed after its enactment, and we will not hold that the appropriate standard of review is waived just because the parties did not realize what that standard was."<sup>101</sup> Given this discussion in *Pope*, as well as *Childers* (and *Huynh*, from 1996),<sup>102</sup> there is a degree of uncertainty in the Eleventh Circuit regarding whether the applicability of AEDPA deference is waivable.

Ultimately, however, the Court in *Pope* bypassed that issue. It stated: "Even if the State has waived the argument that AEDPA applies to Pope's petition . . . , we would nonetheless feel constrained to address it now."<sup>103</sup> In this regard, the Supreme Court has held that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."<sup>104</sup> Exercising this discretion, the Court in *Pope* elected to "address the AEDPA question—even if the State did not properly raise it—because plainly, it is an important federal issue, raises a threshold question crucial to our analysis, and most importantly, yields a clear answer."<sup>105</sup> This so-called "intermedi-

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98. 680 F.3d 1271 (11th Cir. 2012).

99. *Id.* at 1281–83.

100. *Id.* at 1281–82.

101. *Id.* at 1282 n.3 (quoting *Diaz v. Moore*, Nos. 97-6586, 97-6604, 1998 WL 112526, at \*2 n.6 (4th Cir. Mar. 16, 1998) (unpublished)) (emphasis and ellipsis omitted).

102. See *supra* note 83 and accompanying text.

103. *Pope*, 680 F.3d at 1281.

104. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Court declined to announce a general rule, but stated that "[c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result." *Id.* (citations omitted).

105. *Pope*, 680 F.3d at 1282; see *id.* at 1281–82 ("We have said that a circuit court of appeals has the power—even in the habeas corpus context—to consider *sua sponte* issues that a party fails to preserve either in the district court or on appeal. In [a prior case], we found that we could consider an issue *sua sponte* if it raises a sufficiently important federal issue or when it can fairly be characterized as a threshold matter to another question properly before it. Moreover, while we generally will not consider an issue or theory that was not raised in the district court, we have

ate” approach essentially permits an appellate court, in the exercise of its discretion, to determine whether the administration of justice and the interests of comity and federalism would be better served by addressing the issue, regardless of whether a party failed to preserve or advance it.<sup>106</sup>

*Pope*'s approach is attractive in several respects. It persuasively observed that AEDPA's applicability is both “an important federal issue” and a “threshold question crucial” to the analysis.<sup>107</sup> As mentioned above, whether a petitioner's claim is reviewed *de novo* or under AEDPA deference can make all the difference. Furthermore, as emphasized in *Eze*, *Brown*, and *Gardner*, by addressing AEDPA's applicability regardless of a party's waiver, the appellate court would ensure application of the correct legal standard. In doing so, it would respect Congress' mandate to apply AEDPA deference in all cases where statutorily required, and, equally important, to not apply such deference in cases where not statutorily required. Moreover, AEDPA deference was “founded on concerns broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries.”<sup>108</sup> In this regard, the issue may be characterized as one “of particular public interest or importance” justifying appellate intervention.<sup>109</sup> In addition, whether there has been an adjudication on the merits appears to be an issue of law capable of resolution by an appellate court.<sup>110</sup>

On the other hand, the particular circumstances of a given case

allowed for an exception to this rule when, *inter alia*, the proper resolution of the issue is beyond any doubt.”) (citations, quotation marks, and brackets omitted).

106. See *Granberry v. Greer*, 481 U.S. 129, 131, 134 (1987) (employing this “intermediate approach” in the federal habeas context of exhaustion).

107. *Pope*, 680 F.3d at 1282.

108. *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012) (referring to exhaustion); see *Childers v. Floyd*, 642 F.3d 953, 968 (11th Cir. 2011) (en banc), *cert. petition granted, judgment vacated, and case remanded*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013) (referring to AEDPA deference).

109. Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1564 (2012) (stating that “whether the issue is of particular public interest or importance” is one of the “key factors” that determines whether appellate courts will consider an argument raised for the first time on appeal); see, e.g., *Thomas v. Crosby*, 371 F.3d 782, 801 (11th Cir. 2004) (“We may raise nonjurisdictional issues *sua sponte* in habeas proceedings only if they implicate ‘important federal interests’ . . . Determining whether § 2241 or § 2254 was the proper federal statute under which a state prisoner may challenge the calculation of his parole date is a sufficiently important federal issue to consider *sua sponte*.”) (citations and alteration omitted).

110. See Steinman, *supra* note 109, at 1568 (“Appellate courts often say that they can decide new issues that are questions of law, as opposed to questions of fact and ‘mixed questions’ of law and fact. This position is grounded on the premise that the appellate courts’ competence to decide ‘pure’ questions of law is not compromised by the risk that the factual record will be incomplete or inadequate to allow for proper resolution of the new issue.”) (footnotes omitted).

could persuade an appellate court to enforce (rather than disregard) a party's waiver. For example, while the applicability of AEDPA deference is largely a question of law, that question may ultimately turn (as it did in *Pope*) on the factual issue of whether the habeas petition was filed after the statute's effective date. And, unlike *Pope*, there may be situations that require further factual development in the district court.<sup>111</sup> Furthermore, even in cases where the facts are clear, the applicability of AEDPA may not be. As illustrated by the circumstances in *Childers*, determining whether there has been an adjudication on the merits is not always straightforward. Where present, these factors could counsel an appellate court to exercise its discretion in favor of enforcing a party's waiver.

Perhaps the most critical factor, however, may be whether the party has affirmatively waived, rather than passively forfeited, an argument related to the applicability of AEDPA deference. Disregarding such a deliberate waiver would most strongly contravene the justifications underlying the general waiver rule—namely, to encourage parties to raise arguments in the district court, where errors can be avoided and corrected; to afford the opposing party an opportunity to avoid the challenged action or defend the trial court's action; and to promote the development of a complete record and the full ventilation of issues, thereby facilitating appellate review.<sup>112</sup> Moreover, in those cases of affirmative waiver—as well as in cases where a party has affirmatively conceded, rather than passively abandoned, an argument in the appellate court—the “principle of party presentation basic to our adversary system”<sup>113</sup> and attendant notions of fairness are likely to play key roles in an appellate court's exercise of discretion.

In this respect, the Supreme Court recently distinguished between forfeiture and waiver in the AEDPA context. In *Wood v. Milyard*, the

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111. For example, factual issues could arise surrounding the application of the prison mailbox rule. See *Houston v. Lack*, 487 U.S. 266 (1988) (holding that a prisoner's appeal was deemed filed when he delivered it to the prison authorities for forwarding to the court); see also *Johnson v. United States*, 544 U.S. 295, 300 n.2 (2005) (suggesting that the mailbox rule applies in determining whether the prisoner's post-conviction motion was filed after AEDPA's effective date).

112. Steinman, *supra* note 109, at 1565–66; Martineau, *supra* note 51, at 1029 (citing Pfeifer v. Jones & Laughlin Steel Corp., 678 F.2d 453, 457 n.1 (3d Cir. 1982)); Dennerline, *supra* note 51, at 987–88.

113. *Wood*, 132 S. Ct. at 1833; see also *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) (“In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. . . . [A]s a general rule, ‘our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.’”) (citation and alteration omitted).

Court held that federal appellate courts “have the authority—though not the obligation—to raise a forfeited timeliness defense [under AEDPA] on their own initiative.”<sup>114</sup> Significantly, however, the Court clarified that this holding applied only in “exceptional cases” of forfeiture, and that “[a] court [wa]s not at liberty . . . to bypass, override, or excuse a State’s deliberate waiver of a [statute of] limitations defense.”<sup>115</sup>

Needless to say, *Wood* does not resolve the waivability issue here. *Wood* and the cases upon which it relied involved procedural defenses available to the State and, as the Court recognized there, it is a well-established rule of civil and habeas procedure that such affirmative defenses can be waived.<sup>116</sup> The same cannot be said of AEDPA’s deferential standards.<sup>117</sup> But *Wood* is nonetheless important to the present inquiry because it sternly cautions federal appellate courts to exercise great restraint before disregarding a party’s forfeiture and extreme (if not absolute) restraint before disregarding a party’s waiver in the AEDPA context. Thus, while *Pope* disregarded the State’s potential waiver of AEDPA’s applicability, federal appellate courts will likely be reluctant to do so after *Wood*.<sup>118</sup> This resulting restriction on judicial discretion means that federal appellate courts will not be able to so easily sidestep the waivability issue; for while *Wood* counsels strongly in favor of enforcing a party’s waiver, appellate courts cannot enforce the waiver of an issue that is not capable of being waived.<sup>119</sup> It is therefore important

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114. 562 S. Ct. at 1834. This holding was dictated primarily by the Court’s prior decision in *Day v. McDunough*, which held that “district courts are permitted, but not obligated, to consider, *sua sponte*, the timeliness of a state prisoner’s habeas petition.” 547 U.S. 198, 209 (2006). *Day*, in turn, relied on *Granberry v. Greer*, 481 U.S. 129, 133 (1987) and *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), which respectively announced similar rules with respect to the procedural defenses of non-exhaustion and non-retroactivity. *See id.* at 205–09, 211; *see also* *Trest v. Cain*, 522 U.S. 87 (1997) (holding that a federal appellate court is not required to address *sua sponte* a petitioner’s potential procedural default, but declining to decide whether an appellate court is nonetheless permitted to address the issue); Jeffrey C. Metzcar, Note, *Raising the Defense of Procedural Default Sua Sponte: Who Will Enforce the Great Writ of Liberty?*, 50 CASE W. RES. L. REV. 869 (2000) (arguing that appellate courts should not be permitted to raise a habeas petitioner’s procedural default *sua sponte*).

115. *Wood*, 132 S. Ct. at 1830, 1832–35 & nn.4–5. Although the Court’s reasoning on this point was not entirely clear, its holding in this regard appeared to turn on the determination that the institutional interests served by AEDPA’s statute of limitations were outweighed in cases of waiver (but not in “exceptional cases” of forfeiture) by the principle of party presentation. *See also* *United States v. Olano*, 507 U.S. 725, 733 (1993) (“Mere forfeiture, as opposed to waiver, does not extinguish an ‘error’ under Rule 52(b)” of the Federal Rules of Criminal Procedure.).

116. *Wood*, 132 S. Ct. at 1832 (“An affirmative defense, once forfeited, is excluded from the case, and, as a rule, cannot be asserted on appeal.”) (citations and alteration omitted).

117. Only if the applicability of AEDPA deference is found to be waivable would the issue then arise whether *Wood*’s holding extended to the context of AEDPA deference.

118. Although *Pope* followed *Wood*, it did so by only three weeks, and there is no indication that the *Pope* Court was aware of *Wood*.

119. As explained below, federal appellate courts will not be required to resolve the

that the waivability issue be resolved.

## VI. A PROPOSED RESOLUTION

Although the issue is a difficult one, the arguments on balance weigh in favor of finding the applicability of AEDPA deference to be non-waivable by the parties. In reaching this conclusion, the courts in *Eze*, *Brown*, and *Gardner* persuasively emphasized two key points. First, AEDPA deference is not an affirmative defense, but rather an issue of governing law.<sup>120</sup> Where the statutory pre-requisites are satisfied, AEDPA deference constitutes the legal framework under which a state court's decision must be reviewed and effectively prescribes the legal standards that the petitioner's claim must satisfy to obtain relief. Significantly, allowing the parties' advocacy to alter this framework and these standards would impinge on the core function of the judiciary to construe and apply the law.<sup>121</sup>

In that vein, *Brown* persuasively analogized AEDPA deference to standards of appellate review, which must be determined by federal appellate courts regardless of the parties' arguments or advocacy.<sup>122</sup> AEDPA deference can also be analogized to the legal standards governing a motion to dismiss<sup>123</sup> or a motion for summary judgment,<sup>124</sup>

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waivability issue in every case where it arises, but that is for reasons unrelated to the intermediate approach. *See infra* notes 141–145 and accompanying text.

120. *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008); *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003).

121. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”).

122. *Brown*, 551 F.3d at 428 n.2; *see supra* note 91 (discussing the non-waivability of standards of appellate review).

123. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.”) (internal citations to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) omitted).

124. *See, e.g., City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1265 (11th Cir. 2011) (“Summary judgment is appropriate where, viewing the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party, there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law.”) (citation omitted), *cert. granted*, 132 S. Ct. 1543 (2012), and *rev'd sub nom. Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735 (2013).

which must be applied by federal appellate courts regardless of a party's arguments or advocacy.<sup>125</sup> In this respect, AEDPA deference may be characterized as a hybrid of sorts—one part standard of review (*vis-à-vis* the state court's decision) and one part substantive legal standard (*vis-à-vis* the habeas claim). Accepting this hybrid characterization bolsters the argument that the applicability of AEDPA deference is, by its nature, not waivable by the parties.

Although these analogies are admittedly imperfect,<sup>126</sup> one of the ways in which they are so is that, unlike standards of review and standards governing motions to dismiss and for summary judgment, AEDPA deference was established by Congress, not the courts.<sup>127</sup> This fact highlights the second key point in favor of its non-waivability.<sup>128</sup> In enacting AEDPA, Congress unequivocally provided that, where a state court has adjudicated the petitioner's claim on the merits, federal courts "shall not" grant habeas relief unless the stringent standards in § 2254(d) are satisfied.<sup>129</sup> This mandatory language, which is not contingent on the parties' advocacy,<sup>130</sup> effectively requires federal courts sitting in habeas to apply the prescribed deferential legal standards where the statute's pre-requisites are satisfied.<sup>131</sup> For courts to disregard these legal stan-

125. *Cf. Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1363 (11th Cir. 2011) ("We review *de novo* the district court's grant of summary judgment and use the same standard of review utilized by the district court.") (citation omitted); *Estate of Gilliam ex. rel. Waldroup v. City of Prattville*, 639 F.3d 1041, 1044 (11th Cir. 2011) ("We review a district court's denial of a motion to dismiss *de novo*, applying the same standard as the district court.")

126. While AEDPA deference can be characterized as a standard of review, it is not a traditional standard of appellate review, because the federal habeas petitioner is not appealing from the state court's decision. Illustrating this point is the fact that, while standards of appellate review are applied only by appellate courts, AEDPA deference is applied by the district courts as well as the appellate courts. And, unlike the legal standards governing motions to dismiss and motions for summary judgment, the focal point of AEDPA deference is the state court's decision rather than the petitioner's claim.

127. "[S]tandard[s] of [appellate] review generally evolved with the common law . . ." Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 30 (1994). And while the legal standards governing motions to dismiss and for summary judgment are grounded in the Federal Rules of Civil Procedure, they have been articulated primarily by the federal courts. *See supra* notes 123–124.

128. *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009); *Eze v. Senkowski*, 321 F.3d 110, 121 (2d Cir. 2003).

129. 28 U.S.C. § 2254(d) (2006).

130. By contrast, Congress expressly contemplated the State's ability to waive an exhaustion defense. *See* 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.")

131. The mandatory nature of AEDPA deference has been emphasized not only by *Eze* and *Gardner*, but also by courts holding that AEDPA deference applies even where the federal habeas court conducts an evidentiary hearing and new evidence is adduced. *See Wilson v. Mazzucca*, 570 F.3d 490, 500 (2d Cir. 2009) ("The standard of review set forth in AEDPA is not conditional. It is stated in mandatory terms—habeas relief 'shall not be granted with respect to any claim that was



dards where mandated by Congress would raise serious separation of powers concerns.<sup>132</sup>

It could also raise serious federalism and comity concerns if, for example, a federal appellate court declined to apply AEDPA deference by virtue of a State's waiver. As mentioned above, AEDPA deference was "founded on concerns broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries."<sup>133</sup> If federal appellate courts reviewed a state court's decision *de novo* on the basis of a State's waiver—without independently confirming that AEDPA's pre-requisites were not satisfied—then that could result in second-guessing the state court, exactly the result that Congress sought to avoid.<sup>134</sup> If, on the other hand, federal appellate courts independently examined whether AEDPA's pre-requisites were satisfied before applying *de novo* review, then that would avoid any such concerns.

Conversely, applying AEDPA deference where *not* mandated by Congress would raise concerns of its own. As a practical matter, federal habeas petitioners, a great many of whom act *pro se* and are unschooled in the law,<sup>135</sup> are more likely to waive an argument that AEDPA deference does not apply than the State is to waive an argument that AEDPA deference does apply.<sup>136</sup> If federal appellate courts were to enforce petitioners' waivers unflinchingly—without independently confirming, for

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adjudicated on the merits in State court proceedings . . . ,’ 28 U.S.C. § 2254(d) (emphases added)—and these terms do not lose their force because an intervening evidentiary hearing is held in federal court.”); *Valdez v. Cockrell*, 274 F.3d 941, 950 (5th Cir. 2001) (“[T]he statute provides that an application for a writ of habeas corpus ‘shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings.’ The word ‘shall’ is mandatory in meaning. Thus, we lack discretion as to the operation of this section. The use of ‘any’ makes clear that this section applies to all cases adjudicated on their merits in state court.”) (internal citations omitted).

132. Such concerns, of course, presume that AEDPA deference is itself a permissible exercise of Congress' constitutional authority. This Article operates under that presumption because every federal appellate court to consider such a constitutional challenge to AEDPA has rejected it, though not without strong dissent. See *Cobb v. Thaler*, 682 F.3d 364, 373–77 (5th Cir. 2012) (reaching this conclusion and citing the prior cases and separate opinions), *cert. denied*, 133 S. Ct. 933 (2013).

133. *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012) (referring to exhaustion); see *Childers v. Floyd*, 642 F.3d 953, 968 (11th Cir. 2011) (en banc), *cert. petition granted, judgment vacated, and case remanded*, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013) (referring to AEDPA deference).

134. See *supra* note 27 and accompanying text.

135. See Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 903 (2010) (quoting a study's finding that “all but 7% of non-capital prisoners proceed *pro se*”) (citation omitted).

136. Cf. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1223 (2012) (arguing that “AEDPA has shrouded the Great Writ in an impenetrable fog” through which *pro se* petitioners are unable to navigate).

example, that there was an adjudication on the merits—then that could result in the application of AEDPA deference in cases where Congress did not so require or intend.<sup>137</sup> If, however, federal appellate courts were to ensure independently that AEDPA's pre-requisites were satisfied before applying its deferential standards, then that would avoid such concerns.

Thus, requiring federal appellate courts to determine independently AEDPA's applicability would both avoid constitutional concerns<sup>138</sup> and ensure that Congress' intent was effectuated in every case. Moreover, as a practical matter, it would also remove from the equation judicial discretion and concomitant uncertainty in the law. In this regard, one commentator has criticized

the failure or inability of appellate courts to articulate any principled basis for determining when and under what circumstances a new issue will be considered. As a result, it is almost impossible to predict in a particular case whether or not the appellate court will consider a new issue raised by the appellant. This uncertainty reduces the value of being the successful party in the trial court and adds to the already overwhelming caseload of American appellate courts by encouraging appeals. Further, in many appeals, which would have been taken in any event, it can add two issues: whether or not to consider the new issue, as well as the merits of the issue itself.<sup>139</sup>

Such practical problems would be mitigated if federal appellate courts were required to examine independently AEDPA's applicability, regardless of a party's waiver. Removing judicial discretion in this regard would also preclude any argument that courts were enforcing or disregarding waivers in an inequitable fashion.

137. If that were to occur, petitioners would be deprived of one meaningful opportunity to seek redress for constitutional violations at the trial level. Although beyond the scope of this Article, and by no means clear, this deprivation could potentially raise concerns under the Suspension Clause. U.S. CONST. art. I, § 9, cl. 2. For competing views in the Eleventh Circuit on the scope of the Suspension Clause, compare *Gilbert v. United States*, 640 F.3d 1293, 1324–29 (11th Cir. 2011) (en banc) (Pryor, J., concurring), with *id.* at 1329–30 (Barkett, J., dissenting), and *id.* at 1330–36 (Martin, J., dissenting), and *id.* at 1336–37 (Hill, J., dissenting). In addition, and according to one commentator, this deprivation could raise due process concerns as well. See Justin F. Marceau, *Don't Forget Due Process: The Path (Not Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 7 (2010) (arguing that AEDPA deference violates due process “where a prisoner has not received a full and fair review of his constitutional claims, either in state or federal court”).

138. This is consistent with the canon of constitutional avoidance. See *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (explaining that “[t]he Court will not pass upon a constitutional question” if the case can be decided on other grounds).

139. Martineau, *supra* note 51, at 1024.

To be sure, requiring an independent judicial examination of AEDPA's applicability has costs. It would add to the already heavy workload of the federal appellate courts,<sup>140</sup> but the effect should be relatively modest. There are many cases presenting waiver issues that would ultimately not require additional judicial effort. For example, there will be cases where the court ultimately finds that the party did sufficiently preserve or advance an argument related to the applicability of AEDPA deference.<sup>141</sup> There will also be cases like *Childers*, where the potentially waived argument lacks merit and the appellate court would prefer to address (and reject) that argument regardless of any potential waiver.<sup>142</sup>

More importantly, federal appellate courts need not definitively resolve AEDPA's applicability either in those (not uncommon) cases where the petitioner's claim fails under a *de novo* review or in those (less common) cases where petitioner's claim satisfies AEDPA's deferential standards. At those two extremes, the applicability of AEDPA deference would not affect the outcome of the case. Rather, resolution would be required only in those truly difficult (and important) cases where the petitioner's claim might prevail under a *de novo* review but fails under AEDPA deference.<sup>143</sup>

Furthermore, in cases where a party has not advanced an argument relating to AEDPA's applicability, this failure will likely be due in many instances to the fact that the issue is beyond peradventure. Whether the habeas petition has been filed after AEDPA's effective date is an objective fact generally discernible from the face of the petition.<sup>144</sup> And while there remain difficult cases like *Childers* at the margins, determining whether the petitioner's claim has been adjudicated on the merits will

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140. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 321–25 (2011).

141. See, e.g., *Langston v. Smith*, 630 F.3d 310, 314 n.6 (2d Cir. 2011) (“Langston’s argument that the State waived its entitlement to section 2254(d) deference is unpersuasive. Even if we assume that this standard of review is waivable, the State’s ambiguous statements to the district court . . . cannot reasonably be construed as a waiver.”).

142. See, e.g., *Thomas v. Chappell*, 678 F.3d 1086, 1100 n.11 (9th Cir. 2012) (“We need not decide whether Respondent waived the AEDPA argument because, as explained in text, we hold that the argument fails on its merits.”).

143. At the same time, addressing the issue may also be preferable in cases where, although not required to resolve the case, the application of AEDPA deference would simplify the legal analysis.

144. There are, of course, exceptions. In addition to the mailbox rule example noted above, *supra* note 111, another example is reflected in the Eleventh Circuit’s holding in *Pope* that AEDPA applies “where a petition filed before April 1996 [the effective date] was dismissed without prejudice for non-exhaustion or on other procedural grounds and the petitioner filed an amended petition after April 1996.” *Pope v. Sec’y, Dep’t of Corr.*, 680 F.3d 1271, 1282 (11th Cir. 2012).

often be established.<sup>145</sup> Thus, requiring a federal appellate court to double-check the applicability of AEDPA should, in many cases, amount to a relatively modest task, akin to ensuring federal subject-matter jurisdiction where neither party has disputed it.<sup>146</sup>

The primary cost, rather, of requiring federal appellate courts to examine independently AEDPA's applicability is that it would undermine the policies underlying the general rule of waiver. Thus, it could conceivably discourage arguments related to AEDPA's applicability from being raised and resolved in the district court, prejudice the non-waiving party, and render appellate review more difficult.<sup>147</sup> Additionally, and as *Wood* indicates, requiring an independent judicial examination where there has been a deliberate waiver or concession would contravene the adversarial principle of party presentation and offend notions of fairness. These are plainly important considerations.<sup>148</sup>

But these considerations are no stranger to sacrifice.<sup>149</sup> They are most familiarly and frequently subordinated to the obligation of federal courts to inquire into the existence of subject-matter jurisdiction. That obligation is paramount and not waivable because it "serve[s] as an internal apparatus preserving separation of powers and limit[s] federal court activity to the domain assigned by the Constitution."<sup>150</sup> Although presenting different considerations, requiring appellate courts to examine independently the applicability of AEDPA deference would also preserve the separation of powers. It would ensure that courts properly construe and apply governing law, fulfilling their role in the constitutional order and effectuating the intent of Congress. And, in doing so,

145. See Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 960 (2012) (noting that the "great majority of claims" are adjudicated on the merits in state court).

146. See *supra* note 84 (explaining that subject-matter jurisdiction is not waivable by the parties).

147. But see Dennerline, *supra* note 51, at 989–90 (asserting that "[t]he main problem with the modern justification is that the [general waiver] rule does not actually encourage the raising of issues in the trial court").

148. However, appellate courts independently examining the applicability of AEDPA deference can somewhat restore the adversarial principle of party presentation by affording the parties notice of the issue and an opportunity to brief it. See *Day v. McDonough*, 547 U.S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."); Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 251 (2002) (arguing that appellate courts raising issues *sua sponte* must afford the parties an opportunity to brief the issue).

149. See Justin Pidot, *Jurisdictional Procedure*, 54 WM. & MARY L. REV. 1, 41–42 (2012) (arguing that, although the American legal system is primarily adversarial, it contains "numerous inquisitorial features"); *id.* at 42–43 (providing examples of appellate courts raising issues *sua sponte*); Milani & Smith, *supra* note 148, at 248 ("[R]aising issues *sua sponte* is not an uncommon practice.").

150. Pidot, *supra* note 149, at 36.

it would safeguard the important yet delicate balance struck in § 2254(d) between federalism (by respecting the judgment of state courts) and individual rights (by ensuring state prisoners one unconstrained opportunity to seek redress for constitutional violations). Allowing a party's waiver to determine the applicability of AEDPA deference would threaten that balance and the constitutional interests it embodies.

#### CONCLUSION

While the correct resolution of the waivability issue is subject to reasonable debate, that debate has surprisingly been slow to commence. As explained above, only a handful of federal appellate decisions have analyzed the issue, while the remaining decisions that touch on the issue have either bypassed it or applied a form of waiver without critical analysis.<sup>151</sup> Perhaps due to the *ad hoc* approach taken by some appellate courts, there is now a lack of uniformity on the waivability issue between the circuits, and arguably within the Eleventh Circuit. This disharmony and unpredictability is troubling given that a party's waiver can determine the applicability of AEDPA deference, which often plays a dispositive role in the evaluation of federal habeas petitions filed by state prisoners, including those under sentence of death. Thus, just as it is critically important to define AEDPA's key statutory pre-requisite (*i.e.*, "adjudication on the merits"), so too is it important to resolve whether the applicability of AEDPA deference is waivable. Although this Article has suggested a negative resolution to that issue, it has, at the very least, sought to ignite the debate by highlighting the issue's importance, framing its analysis, and unearthing some of its complexities.

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151. In this regard, the cases in the first of line of authority do not acknowledge the difficulties with applying waiver in the unique context of AEDPA deference. *See supra* Part III. This weakens the persuasive force of those decisions. Moreover, the decisions in that line of authority issued shortly after AEDPA's enactment came at a time before the nature and impact of AEDPA deference was fully apparent. *See* Marceau, *supra* note 22, at 88 ("[A] [l]eading habeas corpus scholar . . . characterized the first decade of AEDPA litigation as substantial 'hype' without any serious 'bite.' Both in terms of doctrinal shifts and recent empirical data, much has changed. The harshness of AEDPA's restrictions has come into focus over the past five years [preceding 2012].") (footnote omitted).