

No. 08-1470

IN THE
Supreme Court of the United States

MARY BERGHUIS,
Petitioner,

vs.

VAN CHESTER THOMPKINS,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

(Intentionally left blank)

QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U. S. C. § 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins' guilt allowed the State court to reasonably reject the claim.

(Intentionally left blank)

TABLE OF CONTENTS

Questions presented i
Table of authorities
Interest of *amicus curiae* 1
Summary of facts and case 2
Summary of argument 4
Argument 6

I

The state court reasonably determined the facts . . . 6

II

The state court reasonably (and correctly) rejected
the argument made to it, which was different
from the Sixth Circuit’s theory 7

III

The state court’s conclusion on the *Miranda* issue
was not contrary to the law clearly established by
this Court’s precedent 10

IV

Broad deference must be given to the state court’s
application of a very broad rule 15

V

On the ineffective assistance claim,
the Sixth Circuit committed the same error
as in *Woodford v. Visciotti* 19

Conclusion 21

TABLE OF AUTHORITIES

Cases

Baldwin v. Reese, 541 U. S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004)	21
Bell v. Kelly, 555 U. S. ___, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008)	8
Brown v. Payton, 544 U. S. 133, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005)	17
Colorado v. Spring, 479 U. S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987)	11, 12
Commonwealth v. Kindler, 536 Pa. 228, 639 A. 2d 1 (1994)	10
Gorham v. Franzen, 760 F. 2d 786 (CA7 1985) . . .	15
Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)	15
Michigan v. Mosley, 423 U. S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)	9
Middleton v. McNeil, 541 U. S. 433, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004)	20
Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)	11, 17
Muth v. Frank, 412 F. 3d 808 (CA7 2005)	10
North Carolina v. Butler, 441 U. S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)	12, 17
People v. Catey, 135 Mich. App. 714, 356 N. W. 2d 241 (1984)	9

People v. Davis, 55 N. Y. 2d 731, 431 N. E. 2d 634 (1981)	15
People v. McReavy, 436 Mich. 197, 462 N. W. 2d 1 (1990)	9
People v. Slocum, 219 Mich. App. 695, 558 N. W. 2d 4 (1996)	9
State v. Kirtdoll, 281 Kan. 1138, 136 P. 3d 417 (2006)	13, 14
State v. Williams, 334 N. C. 440, 434 S. E. 2d 588 (1993)	15, 16
Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	19
Tague v. Louisiana, 444 U. S. 469, 100 S. Ct. 652, 62 L. Ed. 2d 622 (1980)	13
Thompkins v. Berghuis, 547 F. 3d 572 (CA6 2008)	passim
Thompson v. Keohane, 516 U. S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)	6
Weeks v. Angelone, 528 U. S. 225, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000)	10
Williams v. Taylor, 529 U. S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)	12
Withrow v. Williams, 507 U. S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)	16
Woodford v. Visciotti, 537 U. S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)	19, 20
Yarborough v. Alvarado, 541 U. S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) . . .	16, 18

Yarborough v. Gentry, 540 U. S. 1, 124 S. Ct. 1,
157 L. Ed. 2d 1 (2003) 19

United States Statute

28 U. S. C. § 2254(d) 6, 7, 8, 10, 14

Secondary Sources

141 Cong. Rec. 15,058 (1995) 6

LaFave, W., Israel, J., King, N., & Kerr, O.,
Criminal Procedure (3rd ed. 2007) 15

Scheidegger, Habeas Corpus, Relitigation, and the
Legislative Power, 98 Colum. L. Rev. 888
(1998) 6

(Intentionally left blank)

IN THE
Supreme Court of the United States

MARY BERGHUIS,

Petitioner,

vs.

VAN CHESTER THOMPKINS,

Respondent.

**BRIEF *AMICUS CURIAE* OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the state court's resolution of an issue where this Court has established a general rule,

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

but given little concrete guidance—when a waiver of *Miranda* rights may be inferred from the words and actions of an arrestee who neither expressly waives nor expressly invokes his rights. The resolution of such an issue is necessarily a “judgment call” on the part of the court. Such issues very often do not have a clearly right or clearly wrong answer.

For issues such as this, Congress decided that the state court decision should stand, and the question should not be relitigated on federal habeas. The Sixth Circuit conducted what amounts to *de novo* review in this case, paying only lip service to the AEDPA standard. Such decisions, all too common 13 years after AEDPA, are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In January 2000, Van Chester Thompkins and three to four other men encountered Samuel Morris and Frederick France outside of a deli in Southfield, Michigan. App. to Pet. for Cert. 42a. Thompkins and his friends followed Morris and France in their car, eventually pulling up beside the two men and opening fire on the driver’s side of Morris’s vehicle. *Id.*, at 43a. Morris was killed and France was injured. *Id.*, at 42a-43a.

After his arrest, Thompkins was initially interrogated by Southfield Police Detective Christopher Helgert and his partner. *Id.*, at 46a. According to Helgert’s testimony at the suppression hearing, Thompkins was read his *Miranda* warnings and refused to sign the advice of rights form, J. A. 8a-9a, but never requested an attorney or indicated that he did not wish to speak to the officers. J. A. 10a. The interview continued for two hours and forty-five minutes, with Thompkins giving limited responses to questions. Detective

Helgert testified that Thompkins responded by saying “yeah,” “no,” or “I don’t know,” and by making eye contact, nodding his head, and looking up at officers during the interview. J. A. 21a-23a.

Toward the end of the interview, Detective Helgert asked Thompkins if he prayed to God. J. A. 11a. When Thompkins answered affirmatively, Detective Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” *Ibid.* Helgert testified that Thompkins said “yes” and immediately looked down. *Ibid.* The interview ended shortly thereafter. *Ibid.*

Thompkins moved to suppress his statements. The trial court denied the motion with a written opinion and order. J. A. 25a-28a. The court noted, “The detective understood that the defendant was engaging in conversation when he made nonverbal communication.” J. A. 26a. After noting the absence of any indication of coercion, see J. A. 27a-28a, the trial court concluded:

“Here, the evidence showed that the detectives read the defendant his rights, and that he responded that he understood them. The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, ‘I don’t know’. Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights.” J. A. 28a.

Thompkins was convicted of first-degree murder, assault with the intent to commit murder, and several firearm offenses. App. to Pet. for Cert. 39a-40a. He appealed to the Michigan Court of Appeals. That court rejected his claim that his *Miranda* rights had been violated. *Id.*, at 75a-76a. The Michigan Court of Appeals did not find grounds to infer that Thompkins’ conduct invoked his right to remain silent, and held

that the trial court “did not clearly err in concluding that the defendant voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence.” *Id.*, at 75a. The court also found that defense counsel’s failure to request certain jury instructions was not prejudicial, without addressing whether that failure constituted deficient performance. See *id.*, at 80a. The Michigan Supreme Court denied discretionary review. *Id.*, at 73a.

Thompkins filed a petition for a writ of habeas corpus in federal court. The district court denied the petition, but granted a certificate of appealability. *Id.*, at 40a. The Sixth Circuit found the Michigan Court of Appeals decision to be “based on an unreasonable determination of the facts in light of the evidence” presented and “an unreasonable application of clearly established Federal law.” *Id.*, at 29a. The Sixth Circuit also found Thompkins’ counsel ineffective because he had failed to request a jury instruction. *Id.*, at 33a-37a.

This Court granted certiorari on September 30, 2009.

SUMMARY OF ARGUMENT

The state courts in this case reasonably determined the facts. The conclusion that Thompkins “continued to talk with the officer, albeit sporadically,” is reasonable when one considers that speech and silence for the purpose of *Miranda v. Arizona* are not confined to the literal meaning of those words. Nonverbal communication is speech and not silence for this purpose.

The state appellate court reasonably decided the argument presented to it. While the Sixth Circuit is correct that invocation and waiver are distinct inquiries, the appellant’s argument on direct appeal focused

on invocation. No argument of any substance on implied waiver was made to the state court. A reasonable decision of the question as the appellant chose to present it is all that is required for 28 U. S. C. § 2254(d) to preclude collateral attack on the judgment.

The decisions of the state trial and appellate courts are not contrary to the clearly established federal law as set forth in this Court's precedents. The trial court found implied waiver under all the circumstances, consistently with the rule of law established in *Butler v. North Carolina* and *Tague v. Louisiana*. Neither of these cases is "materially indistinguishable" from the present case.

The state court decisions are not an unreasonable application of the law to the facts. Given the breadth of the governing rule and the fact-intensive nature of the inquiry, *Yarborough v. Alvarado* requires broad deference to the state court decision. On a *de novo* review, reasonable judges could decide the implied waiver issue either way on these facts. Under AEDPA, the state court resolution must stand.

On the ineffective assistance issue, the Sixth Circuit committed the same error as in *Woodford v. Visciotti* when it pounced on a single sentence rather than reading the state court's discussion fairly as a whole. The state court correctly mentioned the lack of any prosecutor argument urging the jury toward a forbidden inference from the accomplice's conviction. This is a legitimate factor in deciding the likelihood of prejudice from the jury instructions, as this Court has recognized in closely analogous contexts. Taken as a whole, the state court opinion applied the correct standard, reasonably found no prejudice, and declined to make a holding on performance, as *Strickland v. Washington* expressly permits.

ARGUMENT

I. The state court reasonably determined the facts.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted 28 U. S. C. § 2254(d). This subsection is a modified rule of res judicata, forbidding relitigation of previously rejected claims, subject to two exceptions. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); 141 Cong. Rec. 15,058, cols. 1-2 (1995) (statement of Sen. Biden); Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell v. Kelly*, No. 07-1223, pp. 9-13. The second exception is for “a decision that was based on an unreasonable determination of the facts” 28 U. S. C. § 2254(d)(2). The Sixth Circuit held that this exception applies to the present case. See *Thompkins v. Berghuis*, 547 F. 3d 572, 584-585 (2008). Specifically, that court found fault with the state court’s “finding that Thompkins ‘continued to talk with the officer, albeit sporadically.’” *Ibid.*

First, it is important to note that this case involves no dispute about the facts at the most basic level. The evidence on the *Miranda* question consisted of the testimony of a single witness, the investigating officer. There is no dispute that during the two hours and 45 minutes Thompkins was “ [l]argely silent,” *id.*, at 585-586, n. 5 (quoting testimony, emphasis added), but also engaging in nonverbal communication such as nodding in response to questions.

Findings of facts are not limited to basic “what happened” facts, though. They can include conclusions and inferences. See *Thompson v. Keohane*, 516 U. S. 99, 111 (1995) (noting competency to stand trial and juror bias as factual determinations under former

§ 2254(d)). The characterization of Thompkins' communication with the officer falls easily within the category of factual determinations.

Second, the assessment of communications should consider verbal and nonverbal communications as equivalent. For the purpose of *Miranda's* "right to remain silent," there is no difference between nodding one's head and speaking the word "yes." The officer's testimony that Thompkins was largely silent in the literal sense does not necessarily mean he was not communicating.

Third, the Sixth Circuit's repeated assertions that the officer did not identify the specific statements Thompkins made or the specific questions to which he responded, 547 F. 3d, at 585-587, does not negate the reasonableness of a finding that he did communicate sporadically. Those communications may be entitled to less weight in the step of applying the law to the facts because of the lack of specificity, but the state court's finding that Thompkins did communicate sporadically throughout the interview is well within the bounds of reasonableness. The second exception to 28 U. S. C. § 2254(d) does not apply to this case.

II. The state court reasonably (and correctly) rejected the argument made to it, which was different from the Sixth Circuit's theory.

This case presents once again the Puzzle of the Morphing Claim. The pattern is by now familiar. In the state court, the defendant presents certain evidence and makes a certain legal argument. The state court rejects the argument made on the evidence presented, and its decision is correct or at least within the bounds of reasonable disagreement. On federal habeas corpus, either the habeas petitioner or the court *sua sponte*

creates a variation on the theme. The claim still comes under the same broad heading, such as a *Miranda* claim or an ineffective assistance claim, but the precise question is different from the one asked and answered in the state court.

Last term in *Bell v. Kelly*, No. 07-1223, petitioner claimed that his “significant new evidence” introduced for the first time in federal court had “transform[ed]” his claim into a new one so that 28 U. S. C. § 2254(d) did not apply. See Brief for Petitioner in *Bell v. Kelly* 26-27. *Amicus* CJLF argued that the state court decision was entitled to deference if it reasonably decided the claim on the evidence before it. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell v. Kelly* 4-23, <http://www.cjlf.org/briefs/BELLE.pdf>. That question remains unanswered, however, because the Court dismissed the writ of certiorari as improvidently granted. See *Bell v. Kelly*, 555 U. S. ___, 129 S. Ct. 393, 172 L. Ed. 2d 353 (2008).

Discussing the *Miranda* claims in the present case, the Sixth Circuit noted, “the Supreme Court has cautioned that ‘[i]nvocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.’ *Smith v. Illinois*, 469 U. S. 91, 98 (1984).” *Thompkins v. Berghuis*, 547 F. 3d 572, 582 (2008). That is correct, but what the Sixth Circuit failed to grasp is that *Thompkins*, not the Michigan Court of Appeals, chose to state the case as one of invocation of *Miranda* rights as distinguished from failure of the state to establish waiver.

On state direct appeal, *Thompkins*’ *Miranda* discussion consisted of only 4 pages of a 47-page argument. This brief (“Direct Appeal Brief”) is available on CJLF’s Web site at <http://www.cjlf.org/files/ThompkinsStateBrief.pdf>. The argument is nearly identical to pages 6-9 of the Brief in Opposition filed in this Court. *Thomp-*

kins insisted that the police continued to question him after he *invoked* his right to remain silent. He sought to distinguish *Michigan v. Mosley*, 423 U. S. 96 (1975), a case that only becomes relevant once there has been an affirmative invocation. See Direct Appeal Brief 7-8. Thompkins also cited three state cases, none of which is an implied waiver case raising the distinct issue later discovered by the Sixth Circuit. *People v. Catey*, 135 Mich. App. 714, 719, 723, 356 N. W. 2d 241, 243, 245 (1984), involved an express waiver following an ambiguous statement that defendant claimed was an invocation. *People v. Slocum*, 219 Mich. App. 695, 697, 558 N. W. 2d 4, 5 (1996), involved a reinitiation of questioning following an express invocation. *People v. McReavy*, 436 Mich. 197, 205, 462 N. W. 2d 1, 4 (1990), involved inferences from selective silence following an express waiver.

Waiver, as distinct from invocation, is barely mentioned in the brief. At page 8, the Direct Appeal Brief says, “the detective admitted that the appellant never indicated that he was willing to waive his rights.” That cannot be considered a substantial argument. None of the cases discussing implied waiver, see *infra*, at 15; Brief for Petitioner 26-27, n. 21, are even mentioned, much less distinguished.

The state appellate court considered and reasonably decided the argument that was made to it. That argument was based on a contention that Thompkins had invoked his right to remain silent, not an argument on the insufficiency of a case of implied waiver. Courts may reach out and raise *sua sponte* an argument an

appellant does not make, but they have no obligation to do so as a general rule.²

A decision that reasonably applies clearly established law to the argument the appellant makes is all that Congress has required to preclude a grant of federal habeas relief. See 28 U. S. C. § 2254(d). There is no exception for a distinct inquiry under the same claim on which the appellant made no substantial argument.

III. The state court’s conclusion on the *Miranda* issue was not contrary to the law clearly established by this Court’s precedent.

The state trial court in this case found implied waiver from the totality of the circumstances. See *supra*, at 3. The state appellate court concluded, “The trial court did not clearly err in concluding that defendant voluntarily waived his right to remain silent” App. to Pet. for Cert. 75a. For the reasons discussed in Part II, *supra*, there is no discussion in the appellate opinion of why the facts support a finding of implied waiver, as distinct from invocation. Discussion is not required, however. The standard of 28 U. S. C. § 2254(d) applies to all state court dispositions on the merits of the claim, even those made in summary dispositions with no opinion at all. *Muth v. Frank*, 412 F. 3d 808, 815 (CA7 2005), collects numerous circuit cases on this point and notes that it is implicit in *Weeks v. Angelone*, 528 U. S. 225, 237 (2000).

2. In some states, particularly in capital cases, appellate courts may be required to review certain issues regardless of whether the appellant raises them. See, e.g., *Commonwealth v. Kindler*, 536 Pa. 228, 234, n. 3, 639 A. 2d 1, 4, n. 3 (1994). No such issue is present in this case.

Although the state court's reasonable (and correct) disposition of the argument made to it is sufficient to reverse the decision of the Sixth Circuit, if this Court does proceed further, then the first question is whether the finding of waiver is contrary to any of this Court's precedents.

Miranda v. Arizona, 384 U. S. 436 (1966), established the acceptable limits of government conduct and similarly defined the scope of court review. When the government fails to satisfy its "heavy burden" of demonstrating knowing and voluntary waiver, *Miranda* prevents the statement from being used against the defendant. *Id.*, at 475. The onus therefore rests on the government to "demonstrate[] the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. Once safeguards have been established, a court must decide on a case-by-case basis whether the defendant waived or invoked his right to silence. *Ibid.* In many cases, *Miranda's* guidelines make this an easy question to answer, but, as the disagreements among courts in the present case illustrates, resolution of the issue is sometimes not so simple.

The sole purpose of the *Miranda* warnings is to protect against coercion. "The *Miranda* warnings protect this [Fifth Amendment] privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him." *Colorado v. Spring*, 479 U. S. 564, 574 (1987). It is not the job of the prosecution to convince the court that it was wise

for the defendant to waive the right. See *id.*, at 577. It must only convince the court that police conducted themselves according to *Miranda*'s rules and that any waiver and statement were not compelled. Once this is done, a trial court may conclude that the prosecution has met its "heavy burden."

How exactly the prosecution satisfies this burden may be determined on a case-by-case basis. The two Supreme Court cases that have addressed implied waiver have provided limited guidance for assessing Thompkins' claim. Neither of the two cases is "materially indistinguishable" from the present case. Cf. *Williams v. Taylor*, 529 U. S. 362, 405 (2000).

North Carolina v. Butler, 441 U. S. 369, 371 (1979), examined whether a defendant had waived his right to counsel when he stated, "I will talk to you but I'm not signing any form." In examining whether his conduct could be interpreted as a waiver of his Sixth Amendment right, this Court noted that *Miranda* "held that an express statement can constitute a waiver, and that silence alone after such a warning cannot do so. But the [*Miranda*] Court did not hold that such an express statement is indispensable to a finding of waiver." *Id.*, at 373. Reasoning that a "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" may support a trial court's conclusion of waiver, the decision leaves room for courts to decide "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Ibid.* "Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.*, at 374-375 (quoting *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)).

The next term, *Tague v. Louisiana*, 444 U. S. 469 (1980) (*per curiam*), reviewed a finding of waiver on far less evidence. The arresting officer testified that he had read Tague his rights but could not remember what the rights were, whether he had asked Tague if he understood those rights, or whether he had taken steps to insure that Tague was literate or understood the rights as they were read. *Id.*, at 469. The state court held that the burden of proof was on the defendant to show lack of understanding. *Id.*, at 469-470. This Court recognized that in *Butler* it had held waiver could be “inferred from the actions and words of a person interrogated,” but in *Tague*, the evidence was insufficient to make such an inference. *Id.*, at 471. *Tague* further supports *Miranda*’s proposition that waiver of the Fifth Amendment right cannot be presumed merely from the fact that a confession is eventually obtained. The prosecution must do more, and show that the defendant knew his rights and conducted himself in such a way to show that he was waiving his rights.

These two cases discussing implied waiver serve as the bookends on a wide spectrum of conduct when there is neither an express invocation nor an express waiver. *Tague* says a confession is not enough, and *Butler* says evidence of voluntary conduct may be enough to allow the inference. The many cases that fall somewhere in between have been left to other courts to decide based on the particular facts and circumstances surrounding the case.

State v. Kirtdoll, 281 Kan. 1138, 136 P. 3d 417 (2006), illustrates the fact-intensive nature of this inquiry. Kirtdoll had been read his *Miranda* rights, acknowledged that he understood his rights, and then was asked whether he went by the names of Bryon, “Tru,” or “Blu.” *Id.*, at 1144-1145, 136 P. 3d, at 423. After answering a few questions about his name,

Kirtdoll asked for an attorney and questioning ceased. *Ibid.* The trial court found it “very, very clear from the [video]tape he was *Mirandized*[,]” that “he understood the questions and showed no hesitancy in his answers and *there is nothing that I have heard or seen that suggests that he was otherwise influenced by anything else.*” *Id.*, at 1145, 136 P. 3d, at 423 (emphasis in original). The Supreme Court of Kansas agreed. It reasoned that because “substantial competent evidence supports the district court’s findings . . . under the totality of the circumstances, Kirtdoll’s *Miranda* rights were knowingly and voluntarily waived and his statement was voluntarily and knowingly given.” *Id.*, at 1147, 136 P. 3d, at 424. The Kansas Supreme Court reasoned that the circumstances surrounding the interrogation—its length, its lack of coercion, the fact that Kirtdoll “had already been in custody for several months prior to the interview,” and no evidence of low intellect or officer unfairness—the district court was correct to reject Kirtdoll’s claim that lack of waiver was insufficient to show that his statement was involuntary. *Ibid.*

Like the court in *Kirtdoll*, the state trial court in this case rejected Thompkins claim based on the particular facts surrounding Thompkins’ case, and concluded he had voluntarily waived his Fifth Amendment right. The appellate court affirmed this holding. App. to Pet. for Cert. 75a. On its facts, the case falls somewhere between the bookends established by *Butler* and *Tague*.

The state court decision is not contrary to the rule established by this Court’s precedents, which is that waiver need not be express and may be implied by conduct. It is distinguishable on its facts from the only two Supreme Court precedents on the question. That is sufficient to resolve the “contrary to” prong of 28

U. S. C. § 2254(d)(1). The next issue to be decided is whether there has been an unreasonable application of the rule of law to the facts.

IV. Broad deference must be given to the state court's application of a very broad rule.

Finding waiver of a constitutional right often does not rest on a single fact. See *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938) (discussing totality of circumstances test for waiver of counsel). The federal and state courts that have found implied waiver, see 2 W. LaFare, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 6.9(d), pp. 830-832 (3d ed. 2007), have based their determinations on all of the circumstances surrounding the defendant's knowing and intelligent waiver. "In reviewing the totality of the circumstances, it is important to remember that an explicit statement of waiver is not invariably necessary . . ." *Gorham v. Franzen*, 760 F. 2d 786, 794 (CA7 1985). In *Gorham*, the court stressed the defendant's extensive prior history with the criminal justice system, as well as his acknowledgment that he understood his rights as they had been given to him, to determine that Gorham had waived his rights. *Ibid.*

A similar approach was taken in *People v. Davis*, 55 N. Y. 2d 731, 733, 431 N. E. 2d 634, 634 (1981), when the court inferred waiver from the suspect's conduct partly because the "defendant had been arrested on approximately 11 prior occasions." Of course, familiarity with officers and the criminal justice system is not the only circumstance that may be relied upon to demonstrate waiver. In *State v. Williams*, 334 N. C. 440, 462, 434 S. E. 2d 588, 601 (1993), the defendant responded affirmatively to the officer's question of whether he understood his *Miranda* rights, and "nei-

ther promises, nor threats, nor trickery were used to elicit defendant's statements" The court concluded that the evidence was "sufficient to justify the trial court's ruling that he impliedly waived his rights." *Id.*, at 464, 434 S. E. 2d, at 602. The court reached this conclusion even though Williams "stood mute" when asked if he wished to waive his rights. *Id.*, at 463, 434 S. E. 2d, at 601.

When a general rule—such as totality of the circumstances—is being used, application of the rule necessarily "demand[s] a substantial element of judgment." *Yarborough v. Alvarado*, 541 U. S. 652, 664 (2004). *Alvarado* explains that the "reasonable judgment" of the state court must be assessed against "the nature of the relevant rule." A specific rule may have a narrow range of reasonable judgment, but "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Ibid.*

Some aspects of the *Miranda* rule are quite specific, and that specificity is one of the rule's virtues. See *Withrow v. Williams*, 507 U. S. 680, 694 (1993). However, some aspects of *Miranda* remain general. The question of when a person is in custody is sometimes general. See *Alvarado*, 541 U. S., at 664-665. In a case such as the present one that lies somewhere in the broad range between the bookends of *Butler* and *Tague*, the question of implied waiver is similarly general.

On one hand, the facts of Thompkins' interrogation could be interpreted to find that Thompkins did not waive his right. Thompkins did not say much throughout the course of the interrogation, and much of his communication was nonverbal. *Thompkins v. Berghuis*, 547 F. 3d 572, 585-586 (CA6 2008). He also gave simple answers to questions, and often responded to Detective Helgert by saying, "I don't know." *Id.*, at 585. The record also demonstrates that it was not until

Detective Helgert asked Thompkins about his faith, near the end of the interview, that Thompkins made a statement that would incriminate him. *Ibid.* These facts could be interpreted by a fair-minded jurist to fit within *Miranda*'s rule that "a valid waiver will not be presumed simply from the silence of the accused after the warnings are given, or simply from the fact that a confession was eventually obtained." *Miranda*, 384 U. S., at 475.

Other facts point in the opposite direction, and are consistent with a holding that Thompkins did waive his rights. See *North Carolina v. Butler*, 441 U. S. 369, 373 (1979). Detective Helgert did testify that Thompkins talked "very sporadically" with the officers throughout the course of interrogation. *Thompkins*, 547 F. 3d, at 585; J. A. 9a. He made eye contact with the officers, nodded his head, and as far as Detective Helgert and the Michigan courts were concerned, indicated through his conduct that he had no objections to continuing the interrogation. See App. to Pet. for Cert. 75a; see also *Butler*, *supra*, at 373, n. 4 ("in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated"). The Michigan Court of Appeals implicitly concluded that this was the kind of "course of conduct" that *Butler* indicated could demonstrate waiver. See App. to Pet. for Cert. 75a-76a. "Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." *Brown v. Payton*, 544 U. S. 133, 143 (2005).

The Sixth Circuit placed heavy emphasis on Detective Helgert's answers to loaded questions asked by defense counsel on cross-examination. See *Thompkins*, 547 F. 3d, at 585, and n. 5. For example, when asked by defense counsel if Thompkins had "consistently . . . for two hours and fifteen (15) minutes every time you gave

[Thompkins] an opportunity to participate meaningfully in the conversation he exercised his right to remain silent,” Helgert replied, “[l]argely he remained silent, that’s correct.” *Id.*, at 585, n. 5 (emphasis added); see also J. A. 18a-19a. But other jurists might have reviewed the same testimony and concluded from the word “largely” that Helgert was testifying that Thompkins engaged in some conversation. The same is true of defense counsel’s characterization of Thompkins conduct as remaining silent “continuously for two hours and forty-five (45) minutes in terms of substantive responses to your attempts” *Ibid.*; see also J. A. 20a. It evoked Detective Helgert’s similar, qualified response, of “[m]uch of the time. Most of the time, yes.” *Ibid.*; see also J. A. 20a. Counsel clearly wanted Detective Helgert to characterize the interrogation as entirely one-sided, but Helgert maintained that Thompkins remained communicative, albeit minimally. On these facts, nothing in this Court’s jurisprudence compels a conclusion that Thompkins desired to cut off interrogation or forbids a conclusion that he implicitly waived his *Miranda* rights. The Michigan Court of Appeals ruling fits within this Court’s Fifth Amendment matrix.

A federal court should not “grant relief under AEDPA by conducting [its] own independent inquiry into whether the state court was correct as a *de novo* matter.” *Alvarado*, 541 U. S., at 665. A reasonable jurist looking at the same facts could have applied *Butler*’s general rule and held the prosecution had met its burden of showing knowing and intelligent waiver. *Alvarado* instructs that federal courts cannot grant relief under this standard unless the state’s conclusion was “objectively unreasonable.” *Id.*, at 665-666 (citing *Williams v. Taylor*, 529 U. S., at 410; *Lockyer v. Andrade*, 538 U. S. 63, 75 (2003)). Given the generality of the governing rule and the resulting breadth of deference

required, it was error to overturn the state court's judgment in this case.

**V. On the ineffective assistance claim,
the Sixth Circuit committed the same error
as in *Woodford v. Visciotti*.**

In the present case, at the beginning of the effective assistance portion of its opinion, see App. to Pet. for Cert. 79a, the state appellate court correctly stated the standard of *Strickland v. Washington*, 466 U. S. 668, 687 (1984). The fact that the state court cited state case law incorporating the *Strickland* standard rather than citing *Strickland* directly does not matter. See *Yarborough v. Gentry*, 540 U. S. 1, 6 (2003) (*per curiam*). As in *Gentry*, we have a statement of the correct standard and a conclusion that the defendant has not met the standard. Compare *ibid.*, with App. to Pet. for Cert. 79a, 81a.

The Sixth Circuit stated that “the Michigan Court of Appeals appeared to accept that counsel’s failure to request a limiting instruction was error and simply denied Thompkins’ ineffectiveness claim because it found a lack of prejudice . . .” *Thompkins v. Berghuis*, 547 F. 3d 572, 590 (2008). However, the state appellate court opinion says nothing about the performance prong of *Strickland*, and that silence does not imply a finding. *Strickland* is quite clear that a court may address the prejudice prong first and deny the claim on that basis without deciding the performance prong. See 466 U. S., at 697.

The Sixth Circuit’s ineffective assistance of counsel holding is the same sort of overly critical review that this Court has rejected before. In *Woodford v. Visciotti*, 537 U. S. 19 (2002) (*per curiam*), this Court found the Ninth Circuit had mischaracterized the state court

opinion in finding that it had used the wrong standard to determine prejudice. *Id.*, at 22. This Court took issue with the Ninth Circuit's readiness to attribute error to the state court's reasoning, *id.*, at 23-24, and found it inconsistent with the presumption that state courts know and follow the law. *Id.*, at 24. The Ninth Circuit's conclusion was also inconsistent with § 2254(d)'s highly deferential standard. *Ibid.*

In the present case, quoting a single sentence from the state court opinion, the Sixth Circuit concluded that "[t]he Michigan Court of Appeals applied *Strickland* in an objectively unreasonable manner in this case because its analysis of prejudice was fundamentally flawed." *Berghuis*, 547 F. 3d, at 591. Read fairly, and as a whole, the state court's opinion shows that it understood and applied the correct standard. See App. to Pet. for Cert. 79a-81a.

In its decision, the Sixth Circuit found the state court's analysis of prejudice to be unreasonable by relying on the latter's statement, "the record does not disclose an attempt to argue [regarding Purifoy's] conviction for an improper purpose." *Thompkins*, 547 F. 3d, at 591. The Michigan Court of Appeals finding was not based on that fact alone. Rather, its decision was based on its belief that Thompkins had not shown prejudice. App. to Pet. for Cert. 80a-81a. The state court's statement quoted above is not fairly read as referring to the prosecution's motive, as the Sixth Circuit read it. See *Thompkins*, *supra*, at 591-592. Rather, this statement is more naturally read to say that the prosecution did not argue to the jury that they should consider the statement for an improper purpose. Such argument, or lack of it, is a relevant fact in deciding the likelihood that the jury actually did misuse the evidence. Cf. *Middleton v. McNeil*, 541 U. S. 433, 438 (2004) (*per curiam*) (role of prosecutor's argument

in assessing likelihood jury was misled by conflicting instructions). That likelihood in turn is relevant to the assessment of prejudice under *Strickland*.

Finally, given the number of appeals that state courts must address, a state appellate court decision cannot be expected to be a detailed discourse on every issue. State appellate courts have heavy workloads. See *Baldwin v. Reese*, 541 U. S. 27, 31 (2004). So long as the court demonstrates that it knows and follows the law, it is not unreasonable to ask the habeas court to afford its written opinion some leeway.

The Michigan Court of Appeals applied the correct Supreme Court standard, and reached a reasonable conclusion based on that standard. The Sixth Circuit was incorrect to grant habeas on ineffective assistance grounds.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

December, 2009

Respectfully submitted,

KENT S. SCHEIDEGGER
LAUREN J. ALTDOERFFER
Attorneys for Amicus Curiae
Criminal Justice Legal Foundation