No. _____

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN OF THE CENTRAL CALIFORNIA WOMEN'S FACILITY AT CHOWCHILLA, *Petitioner,*

v.

TARA SHENEVA WILLIAMS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a habeas petitioner's claim has been "adjudicated on the merits" for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

2. Whether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record.

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PETITION FOR WRIT OF CERTIORARI

Javier Cavazos, Acting Warden of the Central California Women's Facility (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-53a) is reported at 646 F.3d 626. The district court's order (App. 57a-58a) and the magistrate-judge's report and recommendation (App. 59a-78a) are unreported. The opinion of the California Court of Appeal (App. 87a-118a) is unpublished.

JURISDICTION

The Ninth Circuit's opinion was filed on May 23, 2011 (App. 1a), and rehearing was denied on July 13, 2011 (App. 119a). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

> (d) 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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. The State Court Trial

1. In 1999, respondent Williams and codefendant Carde Taylor were charged with the 1993 robbery-murder of Hung Mun Kim. At Williams's separate trial, the State produced evidence that Taylor had shot and killed Kim during a liquor store robbery; that Williams had told police that she had driven Taylor and another accomplice to Kim's liquor store and then had driven them away after the fatal shooting; and that Williams had been

the getaway driver in the prior robbery committed with Taylor.

2. During jury deliberations at Williams's trial, the judge received a jury note saying that one of the jurors had "expressed an intention to disregard the law" and had "expressed concern relative to the severity of the charge" of first degree murder. Outside the presence of the other jurors, the judge briefly questioned the juror foreperson about the note. Asked if the particular juror had committed misconduct by considering punishment or having a family member in a similar situation, the foreperson answered, "it's halfway to that," but the foreperson believed that the judge's clarification of a jury instruction (in response to another jury note) "may be sufficient to resolve [the] concern at this time." RT 1251-52. The judge then directed the jury to resume its deliberations.

The next day, the prosecutor requested additional questioning of the jury members and the discharge of Juror No. 6 for bias. Over the defense's objection, the judge allowed further inquiry.

a. Recalled for more questioning, the jury foreperson said that there had been a "fairly clear statement on [Juror No. 6's] part that connects the severity of the charge with—explicitly of first degree murder with his need for a higher standard of proof." RT 1271; see App. 97a-98a.

b. The judge expressed concern that Juror No. 6 was employing an illegal standard of proof by linking it to the severity of the charged offense. So he examined the juror. In that examination, Juror No. 6 denied using a higher burden of proof for the first-degree murder charge, and he denied that anyone had discussed the severity of the charge. But then, when asked if he had referred to the severity of the charge, Juror No. 6 "amend[ed]" his answer. He

now explained that he had said "'this is a very important case and we should be very convinced that if the defendant is found guilty that it is beyond a reasonable doubt." He explained that "convinced beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" were the same. Although agreeing that jurors should not use nullification, Juror No. 6 acknowledged that, in response to another juror "rais[ing] the question of whether juries always convict according to the law," he had answered that "sometimes they don't." RT 1278-82; see App. 98a-99a.

The judge said that he believed that Juror No. 6 had engaged in misconduct in that he was "applying a higher burden of proof than the law requires," and that, although Juror No. 6 "isn't lying, he had intentionally withheld honest information." The judge, however, undertook inquiry of the remaining jurors to develop a "fuller record." RT 1289; see App. 99a-102.

c. Most of the jurors stated that Juror No. 6 had expressed an unwillingness to follow the law. RT 1303-04 (Juror No. 2), 1309 (Juror No. 3), 1321 (Juror No. 5), 1329-30 (Juror No. 7), 1342-43 (Juror No. 10), 1347, 1350 (Juror No. 11), 1354 (Juror No. 12). Two jurors reported that Juror No. 6 had added, or felt he could add, words to the court's instructions to reflect what he thought the law should be. RT 1312-13, 1315 (Juror No. 3), 1342-43 (Juror No. 10). Another juror (No. 9) indicated that Juror No. 6 did not agree "with what the law said that [had been] read" to the jury and "didn't like [the law]." RT 1334.

Four jurors asserted that Juror No. 6 had been using a burden of proof higher than that of beyond a reasonable doubt. RT 1316 (Juror No. 3), 1325 (Juror No. 5), 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Two of these jurors explained that Juror No. 6

had expressed a need for proof beyond all doubt or "no doubt" and was requiring "[a]bsolute proof." RT 1347 (Juror No. 11), 1354, 1356 (Juror No. 12). Another juror (No. 10) said that Juror No. 6's "own beliefs" had been his standard and that his arguments had been based on a disagreement with the law and what he thought the law should say. RT 1344.

Similarly, many jurors reported that Juror No. 6 disagreed with California's vicarious-liability and felony-murder rules. For example, Juror No. 2 said that Juror No. 6 could not accept that Williams, who had not been the shooter, should face the same charge as her codefendant. RT 1303, 1305-06. Juror No. 5 said that Juror No. 6 felt "you can't charge somebody for something they didn't do if they weren't there at the time[.]" RT 1324. Juror No. 10 reported that Juror No. 6 had not believed that "the evidence showed that first degree murder should be the charge." RT 1346. According to Juror No. 11, the murder charge "kept coming into play" for Juror No. 6, "even when we were trying to discuss just the robbery." RT 1352. Juror No. 5, similarly, reported that Juror No. 6 had discussed the subject of penalty, RT 1321-23.

Two jurors reported that it was Juror No. 6 who had started the juror-nullification discussion; but they also said that Juror No. 6 had not expressed an intent to engage in nullification. RT 1294 (Juror No. 1), 1348 (Juror No. 11). Still, Juror No. 11 said that Juror No. 6 had discussed jurors "voting against" the law "in particular cases if they didn't agree with the law," and that Juror No. 6 felt that "the charge of murder was too strong in this case." RT 1347-49. Two other jurors that Juror No. 6, when asked if he had "social" or "political agenda," had responded by mentioning past trials in American history. RT

1326-27 (Juror No. 5), 1346 (Juror No. 10). Another juror (No. 7) said that one juror had discussed juror nullification and that, although the juror had not "sa[id] he was going to refuse to follow the law," he nevertheless had said that it is "a right of the jurors that if you didn't believe the law, . . . you were able to hang the jury." RT 1330.

d. On the other hand, Juror Nos. 9 and 12 opined that Juror No. 6 had simply been interpreting the law differently than the other jurors, RT 1335-39, 1354-55. Juror No. 4 agreed. RT 1319. And, when asked by defense counsel if there had been an "honest difference of opinion" between Juror No. 6 and the other jurors, Juror No. 1 answered, "Yes," and Juror No. 2 answered, "Well, I guess [Juror No. 6 is] being honest." RT 1291-92, 1305.

Juror No 1 reported that Juror No. 6 had not said he was applying a burden of proof higher than "beyond a reasonable doubt" because of the charge's severity, RT 1293; and Juror No. 12 did not feel that the charge's severity had entered into Juror No. 6's deliberation, RT 1354. Juror No. 9 said, further, that there had been no discussion of "historical juries." RT 1335.

At one point during the evidentiary hearing, the judge expressed his belief that Juror No. 6 lied to the court, stating that "a person would say that [Juror No. 6] is a liar and doesn't belong on the jury." He concluded "without any question, beyond any possible reasonable doubt that [Juror No. 6] was dishonest to us right here." RT 1301.

After all the jurors were examined, the judge dismissed Juror No. 6 for being "biased." RT 1359; App. 102a; see Cal. Penal Code § 1089 (permitting removal of a juror before or after submission of the case in the event of illness, death or other "good cause"). The judge explained: (1) that Juror No. 6

"had added his own words to the court's as to what the law is[,]" which indicated that he was "biased against the prosecution"; (2) that Juror No. 6 repeatedly referred to the severity of the charge in conjunction with bringing up juror nullification, indicating that he was improperly concerned about the severity of punishment; (3) that the challenged juror had been employing a burden of proof higher than that of "beyond a reasonable doubt"; (4) that the juror disagreed with the felony-murder rule; and (5) that the juror had been dishonest instating that no juror had discussed the severity of the charge or juror nullification. The judge concluded, "[I]n my opinion, [Juror No. 6] was lying in court. He has no business being a juror in this matter, and he is dismissed." RT 1359-61; see App.102a-103a.

3. Juror No. 6 was replaced. The jury convicted Williams the following day.

B. The State Appeal

On appeal, Williams claimed that the trial court had abused its discretion under California Penal Code section 1089 when it removed Juror No. 6 because the removal was unsupported by "good cause"—i.e., that there was insufficient evidence of "actual bias." She argued that the error was prejudicial because the removal of the "lone holdout" juror violated "her Sixth Amendment right to a unanimous jury[.]"

Describing Williams as "contend[ing] that the trial court erred by discharging one of the jurors during deliberations," the California Court of Appeal rejected her claim as "meritless." App. 97a.[1] The

[1] The California Court of Appeal previously had affirmed Williams's conviction in an earlier decision, but the (continued…)

appellate court explained that Penal Code section 1089 permits a trial court "to discharge a juror who 'upon . . . good cause shown to the court is found to be unable to perform [his or her] duty.'" App. 103a (ellipses in original). Observing that actual bias is "cause" to dismiss a juror under California law, the court defined "actual bias" in terms of whether the juror was "impartial" as defined both by this Court for "federal constitutional purposes" and by California courts under state law. App. 104a. It explained that a trial court's dismissal decision is reviewed for abuse of discretion, and, relying on *People* v. *Cleveland*, 25 Cal. 4th at page 474, that the trial court's ruling must be supported by substantial evidence and that the juror's inability to perform must appear on the record as a "demonstrable reality." App. 103a.

Here, the state appellate court concluded, "[t]he evidentiary hearing supported the trial court's finding of bias." "According to most of the jurors," the state court observed, "Juror No. 6 had either explicitly said he would not follow the law or he had implied as much." Juror No. 6 "apparently rejected the notion that, because of vicarious liability, Williams and Taylor might be guilty of the same crime." App. 104a. And "[t]he trial court was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest." App. 104a-105a.

(…continued)
California Supreme Court subsequently remanded the case to the Court of Appeal for reconsideration in light of the then-recent decision in *People* v. *Cleveland*, 25 Cal. 4th 466, 106 Cal. Rptr. 2d 313 (2001), authorizing a trial court to dismiss a juror if "it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *Cleveland*, 25 Cal. 4th at 484.

Rejecting Williams's argument that the trial court had erred under *Cleveland*, the panel accepted the trial judge's explanation that he had discharged Juror No. 6 "because he had shown himself to be biased, not because he was failing to deliberate or engaging in juror nullification." App. 105a. (original emphasis omitted).

The California Supreme Court denied further direct appellate review. App. 85a.

C. Habeas Corpus Proceedings

1. Williams filed a state habeas corpus petition, including the juror-removal claim, in the Los Angeles County Superior Court. That court denied the petition, ruling that the issues raised in the petition were "issues for direct appeal[,] not collateral attack." App. 83a-84a.

Williams next filed a federal habeas corpus petition in which she again challenged the removal of Juror No. 6. The federal district court stayed the proceedings to give Williams an opportunity to exhaust any available remedies in state court. So Williams filed state habeas petitions in the California Court of Appeal and California Supreme Court, again challenging the removal of Juror No. 6. Both courts denied the juror-removal claim because it had been raised and rejected on appeal and thus could not be raised again in a writ petition. See App. 15a n.4, 79a, 81a-82a.

2. After federal proceedings resumed, the magistrate judge filed a report recommending that Williams's petition be dismissed with prejudice. App. 59a-78a. The magistrate judge noted that the petition was governed by the deferential standard of review accorded to state-court merits adjudications under 28 U.S.C. § 2254(d). App. 65a-67a. Explaining that the trial court's factual finding of bias is entitled

to "special deference," the magistrate judge concluded that "the discharge of Juror 6 under the circumstances of this case did not constitute a constitutional violation[,]" and the "record amply supports the trial judge's determination that good cause existed for the discharge of Juror 6." App. 67a-70a. The district court adopted the report and recommendation and entered judgment dismissing the petition with prejudice. App. 55a, 57a-58a.

D. The Ninth Circuit Appeal

The Ninth Circuit Court of Appeals granted a certificate of appealability on the issue of "whether the trial court violated [Williams's] Sixth Amendment right to a fair trial when it dismissed juror number six." The parties argued the juror-removal issue expressly under the deferential-review standard of § 2254(d).

In a published opinion authored by Judge Reinhardt, the Ninth Circuit panel reversed the district court. The panel held, first, that the deferential-review standard in § 2254(d) did not apply because the California Court of Appeal had adjudicated "only [Williams's] section 1089 claim, but not her constitutional claim." App. 22a. According to the panel, Williams had presented "two arguments" on the juror removal claim: (1) "her section 1089 claim" that the trial court "abused the discretion accorded it by that statute to dismiss the jurors for cause"; and (2) "her constitutional claim . . . that the 'remov[al] and replace[ment]' of a holdout juror from 'a jury which had previously been deadlocked' violated her rights [to trial by an impartial jury] under the Sixth Amendment." App. 20a-21a; see App. 21a-23a n.8 & n.9. In the Ninth Circuit's view, the California Court of Appeal "did not consider . . .

whether the removal of the known holdout juror violated the Sixth Amendment." App. 22a.

In reaching that conclusion, the Ninth Circuit dismissed the state appellate court's quotation from a state-court precedent that, in turn had quoted this Court's opinions in its "discussion of the federal constitutional principle of impartiality." The panel said that the state court had relied on this Court's precedent only in the context of discussing the state-law claim. This was insufficient, in the panel's estimation, because "[t]he section 1089 issue was distinct from Williams's constitutional claim: that the removal of Juror No. 6 violated her right to a fair trial." App. 22a-23a n.9. Further, the Ninth Circuit cited the fact that the California Court of Appeal had "provided a lengthy, reasoned explanation for its denial of Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly." App. 23a; see App. 23a-25a. Also, the panel said, the state court of appeal's adjudication of the section 1089 claim did not necessarily entail the adjudication of the constitutional claim because "California [in its *Cleveland* decision] does not appear to have considered . . . how the federal constitution constrains a trial court's discretion to discharge a juror from deliberations[.]" App. 25a-26a. The Ninth Circuit reasoned that the state court of appeal had conducted a "purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089," but had not analyzed whether section 1089 was constitutional as applied. Thus, the deferential § 2254(d) standard was inapplicable. App. 28a.

Next, conducting *de novo* review of Williams's federal claim, the Ninth Circuit concluded that "the Sixth Amendment does not allow a trial judge to

discharge a juror on account of his views of the merits of the case." App. 31a-32a. "[I]n deciding whether to discharge a juror mid-deliberation," the Ninth Circuit explained that "the critical Sixth Amendment questions are whether, after an appropriately limited inquiry, it can be said that there is no reasonable possibility that the juror's discharge stems from his views of the merits, and whether the grounds on which the trial court relied are valid and constitutional." App. 34a.

Here, the Ninth Circuit found that the trial court's dismissal of the juror failed to satisfy those alleged constitutional criteria. App. 30a-52a. First, the panel held that Williams's "Sixth Amendment rights" were violated because, *even "presum[ing] all of the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1),"* "the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'" App. 39a (emphasis added) (quoting *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); see App. 34a-41a.

Second, as a reason for relief "independent" from the so-called "*Symington* violation," the Ninth Circuit determined that the "trial court lacked 'good cause' for removing the known holdout juror . . . ." App. 41a-42a. Specifically, it rejected the state court judge's bias finding—the "good cause" for discharging the juror—by rejecting the "reasons" or "bases" the state-court judge had given for that finding. App. 43a-44a. In this regard, the Ninth Circuit found, first, that the fact that "Juror No. 6 disagreed with the felony murder rule, . . . even if it constituted 'bias' under California law, was not 'good cause' for removing a deliberating juror, absent a finding that he was unwilling to follow the law due to his concerns about it." App. 44a-45a. The Ninth Circuit

next found that the trial court incorrectly determined that Juror No. 6 "was applying a higher-than-allowed burden of proof" and "clearly misstated what Juror No. 6 had testified to during the court's inquiry." App. 45a-48a. The Ninth Circuit further found that the trial court had incorrectly determined "that Juror No. 6 was concerned with the severity of the punishment, as opposed to the seriousness of the offense charged . . . ." App. 48a-49a. Finally, the Ninth Circuit found that the trial court wrongly determined that Juror No. 6 was "'lying in court'" based on the trial court's faulty "recollection of statements made in court by the juror," and not based on any "credibility determination . . . ." App. 50a-51a. The Ninth Circuit therefore concluded that "the removal of Juror No. 6 deprived Williams of her right to a fair trial by jury." App. 52a.

The State sought rehearing and hearing en banc. The State argued that § 2254(d) deference should have been applied because the California Court of Appeal had adjudicated Williams's federal juror-removal claim on the merits, and because the panel had failed to afford any deference to the trial court's factual findings. The Ninth Circuit denied the State's petition. App. 119a.

REASONS FOR GRANTING CERTIORARI

I. A SIGNIFICANT CIRCUIT CONFLICT EXISTS ON THE IMPORTANT QUESTION OF WHETHER THE DEFERENTIAL § 2254(D) STANDARD OF REVIEW APPLIES WHERE THE STATE COURT DENIED RELIEF IN AN EXPLAINED DECISION BUT DID NOT EXPRESSLY ACKNOWLEDGE THE ALLEGED FEDERAL BASIS FOR THE CLAIM

Last Term, this Court reversed the Ninth Circuit four times for its misapplication of the highly-deferential § 2254(d)[2] standard of review. Here, the Ninth Circuit held that deferential review did not apply in the first place because the state-court opinion explicitly referred to the federal basis for the petitioner's claim. The Ninth Circuit's "adjudication" ruling strikes at the heart of AEDPA's cornerstone reform of habeas corpus: deferential review of state court decisions rejecting the petitioner's federal claim on its merits.

This Court's opinions in *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam), and *Harrington* v. *Richter*, 131 S. Ct. 770, embrace an appropriately broader view of what qualifies as an adjudication on the merits. Thus, this Court held that § 2254(d) deference applied even when the state court's reasoned decision does not acknowledge this Court's

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[2] *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Harrington* v. *Richter*, 131 S. Ct. 770 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (per curiam); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011); see also *Swarthout* v. *Cooke*, 131 S. Ct. 859 (2011) (per curiam).

precedents (*Packer*) and even when the state court issued an unexplained summary denial of the petitioner's claim (*Richter*). In contrast, the Ninth Circuit's unduly narrow interpretation of "adjudication on the merits" conflicts with that of other circuits—most recently that of the Eleventh Circuit in its *en banc* decision, *Childers* v. *Ford*, 642 F.3d 953 (11th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3055 (U.S. Jul. 6, 2011) (No. 11-42).

1. In *Packer*, this Court afforded § 2254(d) deference to a state court's decision where the state court had evaluated the "same claim" that the defendant later pursued in federal court, even though the state court addressed the pertinent federal issue only by reference to analogous state law and without citing federal cases. *Packer*, 537 U.S. at 7-8. This Court held that the statute "does not require citation of our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* at 8 (original emphasis omitted).

Last Term, in *Richter*, this Court built on *Packer* and held that the state court's summary denial of a claim was an adjudication on the merits of the federal claim for § 2254(d) purposes. *Richter*, 131 S. Ct. at 784. It observed that "no text" in AEDPA "requir[es] a statement of reasons." *Id.*

2. Following *Packer* and *Richter,* a conflict now has developed in the circuit courts on the question of whether a claim has been "adjudicated on the merits" in an explained state-court merits decision when the state court does not expressly address the federal claim. Most recently, the Eleventh Circuit, in its en banc decision in *Childers*, 642 F.3d at 968-69, took an approach contrary to that of the Ninth Circuit here. Under *Childers*, the state-

court decision denying relief is accepted as an "adjudication on the merits" unless the state court clearly stated that its decision rested solely on a state procedural rule. The Eleventh Circuit explained that this approach followed from this Court's "broad" interpretation of "adjudication on the merits" in *Packer* and *Richter* and the deference to the state courts' autonomy and dignity underlying that broad interpretation.

Also contrary to the Ninth Circuit's approach, the Eighth Circuit in *Cox* v. *Burger*, 398 F.3d 1025, 1029-30 (8th Cir. 2005), focused on whether the state court's "decision," even if it never discussed federal law, contradicts this Court's precedent in its reasoning or result. As the Eighth Circuit reasoned in *Cox,* § 2254(d) deference applied because the state court, in a reasoned opinion, had "effectively adjudicated [the petitioner's] Confrontation Clause claim on the merits through its analysis of [a state-law hearsay-exception rule]." *Id*. at 1030. The Eighth Circuit explained that "[t]he pertinent question is not whether the [state court] explicitly discussed the Confrontation Clause but whether its *decision* contradicted applicable Supreme Court precedent in its reasoning or result." *Id.* (emphasis added).

3. In conflict with the Eighth and Eleventh Circuits, the Ninth Circuit's decision here relied on pre-*Richter* and even pre-*Packer* circuit precedents in concluding that the state court had not adjudicated Williams's federal constitutional claim. App. 27a-28a (citing *Lyell* v. *Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006) (*de novo* review where petitioner "presented federal polling and fair-trial claims to the state court of appeals[,]" but "the state court of appeals addressed [the] claims only in state-law terms in its decision"); *Canaan* v. *McBride*, 395 F.3d 376, 382-83

(7th Cir. 2005) ("When a state court is silent with respect to a habeas corpus petitioner's claim, that claim has not been 'adjudicated on the merits' for purposes of § 2254(d)."); *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (§ 2254(d) did not apply where the state court "did not mention [petitioner's] Sixth Amendment claims, and the opinion does not contain any language, general or specific, indicating that those claims were considered and denied on the merits"); *Hameen* v. *Delaware*, 212 F.3d 226, 246-48 (3d Cir. 2000) (*de novo* review applied because, even though the state court relied on a Supreme Court precedent, it had read the case "too broadly");[3] *Weeks* v. *Angelone*, 176 F.3d 249, 262-63 (4th Cir. 1999) (where the state court "failed to address" one of petitioner's claim, § 2254(d) did not apply"), *aff'd*, 528 U.S. 225 (2000)).[4]

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[3] *Hameen* conflicts with this Court's later *Packer* decision because the *Hameen* court assumed that a state court's consideration of "controlling Supreme Court decisions" was necessary for an "adjudication on the merits." Compare *Hameen*, 212 F.3d at 248 with *Packer*, 537 U.S. at 8.

[4] *Canaan*, *Norde*, and *Weeks* are inapposite. In all three cases, the claims deemed not to have been adjudicated by the state courts were independent of the adjudicated claims. *Canaan*, 395 F.3d at 381-82 (where petitioner presented two ineffective-assistance-of-counsel claims and the state court did not "address" the second claim, no adjudication on the merits of the latter claim); *Norde*, 294 F.3d at 410-11 (no § 2254(d) deference to Sixth Amendment right-to-be-present and right-to-counsel claims where the state court addressed only a sufficiency-of-evidence claim and two prosecutorial-misconduct claims); *Weeks*, 176 F.3d at 262-63 (no § 2254(d) deference because the state court, when discussing two separately numbered "assignments of error", used "the singular term 'this contention,'" which the federal habeas court concluded referred only one claim). Here, by contrast, Williams's Sixth Amendment argument presented to the California Court of

(continued…)

4. To be sure, Judge Reinhardt's opinion here asserted that *Richter*'s teaching, that a state court is presumed to have adjudicated the merits of a federal claim presented to it "'in the absence of any indication or state-law procedural principles to the contrary,'" *Richter*, 131 S. Ct. at 784-85, also stands for the proposition that the presumption is overcome when a state court provides "a lengthy, reasoned explanation" but the state-court's reasoning does not "address[]"the federal constitutional claim. App. 23a; see App. 24a-25a. App. 24a (citing *Richter*, 131 S. Ct. at 784-85). But that assertion is flawed in at least three significant respects.

First, contrary to the Ninth Circuit's view, it is very improbable "that the [state] court simply neglected the [federal] issue and failed to adjudicate the claim[,]" App. 24a-25a (quoting *Richter*, 131 S. Ct. at 785). "Under the Supremacy Clause, state courts are *obligated* to apply and adjudicate federal claims fairly presented to them." *Sellan* v. *Kuhlman*, 261 F.3d 303, 314 (2d Cir. 2001) (emphasis added) (citing U.S. CONST. art. VI, § 2, and *Testa* v. *Katt*, 330 U.S. 386 (1947)). Here, absent a plain statement from the state court that it somehow was declining to consider any federal-law aspects of the juror-removal claim, it is "pure speculation . . . to suppose that happened in this case." See *Richter*, 131 S. Ct. at 785.

(…continued)
Appeal was not independent of her statutory argument, but rather was inextricably intertwined with it: she had argued that the trial court abused its discretion by removing the juror because it lacked good cause and that, *accordingly,* her Sixth Amendment unanimous jury right was violated.

Tellingly, respondent Williams never seemed to believe that the California Court of Appeal had failed to adjudicate any part of her juror-removal claim; for she never petitioned for rehearing to that court on that ground. Instead, she expressly argued that § 2254(d) applied in her appeal to the Ninth Circuit.

Second, the Ninth Circuit opinion took the quoted *Richter* language out of context. *Richter* relied on *Harris* v. *Reed*, 489 U.S. 255, 265 (1989), and *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803 (1991). But *Harris* endorsed treating the state-court decision as resting on federal-law grounds in the absence of a plain statement to the contrary by the state court. *Ylst* dealt with whether an unexplained state-court ruling should be interpreted as forgiving a previously-imposed procedural bar. Neither dealt with "some more exotic explanation for the state's purported failure to adjudicate the petitioner's federal claim." *Childers*, 642 F.3d at 969 n.16.

5. The Ninth Circuit's decision here, further, is inconsistent. In essence, the Ninth Circuit assumed that the state court did *not* adjudicate the merits of the federal aspect of a claim because the state court had issued no explicit statement that it was adjudicating the federal question.

a. But under the "plain statement" rule recognized in the procedural-bar context by this Court in *Michigan* v. *Long*, 463 U.S. 1032 (1983), and *Coleman* v. *Thompson*, 501 U.S. 722 (1991), a habeas court must presume that a state court decided a federal issue on its merits unless the state court "'clearly and expressly'" states that its decision is based on "'bona fide separate, adequate, and independent state grounds.'" *Coleman*, at 733 (quoting *Long*, at 1041); see *Harris* v. *Reed*, 489 U.S. at 264 ("plain statement" rule applies to both direct review and habeas). The same or a similar

presumption should apply when a federal court considers whether a state court adjudicated the federal component of a claim: the state court should be presumed to have decided the federal issue on its merits in the absence of a plain statement to the contrary. See *Richter*, 131 S. Ct. at 784-85; but compare *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005), with *Richter*, 131 S. Ct. at 784.

Moreover, interpreting § 2254(d)'s "adjudicated on the merits" requirement as the Ninth Circuit has, and in a manner "which does not purport to rest on any textual basis, could lead to deleterious substantive consequences," such as encouraging state prisoners to obscure their federal constitutional claims in their state court pleadings in the hope that the state court will overlook them, "thus entitling the prisoner to *de novo* consideration of these claims on federal habeas review." *Sellan*, 261 F.3d at 313-14.

Here, there was no plain statement by the state appellate court that it was refraining from considering any federal aspect of Williams's juror removal claim. In fact, the circumstances strongly suggest that it considered and ruled on the federal question. Noting that "actual bias" such as a state of mind preventing the juror from acting impartially amounts to cause for dismissing the juror under California law, the state appellate court considered how juror impartiality is assessed for "federal constitutional purposes." App. 104a (internal quotation marks omitted). In doing so, it quoted a California Supreme Court case that, in turn, had quoted this Court's precedents for their explanation of the Sixth Amendment right to an impartial jury. App. 104a (quoting *People* v. *Nesler*, 16 Cal. 4th 561, 580-81 (1997), in turn quoting *United States* v. *Wood*, 299 U.S. 123, 145-46 (1936), *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961), and *Reynolds* v. *United States*, 98

U.S. 145, 155 (1878), and citing *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)). The state court thus equated the state-law definition of "actual bias"—i.e., the lack of entire impartiality—with the Sixth Amendment's guarantee of a fair trial by impartial jurors. See *Baker* v. *Blaine*, 221 F.3d 1108, 1112 (9th Cir. 2000) (state court adjudicates federal claim on merits if it either cites directly to federal authority or to cases that rest on federal authority).

b. In this respect, the Ninth Circuit's view in this case also conflicts with the First Circuit's decision last year in *Clements* v. *Clarke*, 592 F.3d 45, 53-55 (1st Cir. 2010), cert. denied, 130 S. Ct. 3475 (2010). There, the state-court opinion had cited only state cases in support of the state court's finding that "[t]he record shows no impropriety by the judge." *Clements*, 592 F.3d at 51-52. It found that there was a merits adjudication for AEDPA purposes. *Id.* at 52-56. "The real question," the First Circuit observed, "is not whether the state court opinion cited to any federal cases, but whether the opinion addresses a fairly raised federal issue." The "critical data point" was the state court's citation to a Massachusetts case that in turn had quoted this Court's decision, in *Irvin* v. *Dowd* that "'the right to a jury trial guarantees the criminally accused to a fair trial by a panel of impartial, "indifferent" jurors.'" *Clements*, 592 F.3d at 53-54. "Once the federal-rights backdrop is understood," the First Circuit concluded, "the [state] court's analysis was sufficient. AEDPA's trigger for deferential review is adjudication, not explanation." *Id.* While avoiding or overlooking a federal claim allows a federal court to "step into the breach," the First Circuit explained: "[J]udicial opacity is a far cry from judicial avoidance. It is the result to which we owe deference, not the opinion expounding it." See *id.* at 55-56.

The same is true here. Just as in *Clements*, the state appellate court here relied on a state-court precedent that in turn had relied on this Court's cases including *Irvin*. *Irvin* "was interpreting the Sixth Amendment right to a fair and impartial jury, the very same constitutional provision on which [Williams] stakes [her] claim for relief." See *Clements*, 592 F.3d at 54. Thus, as in *Clements*, "[o]nce the federal-rights backdrop is understood," the California Court of Appeal's decision was "sufficient" to trigger AEDPA deferential review in any event. See *id*. at 55.

* * * *

In sum, the Ninth Circuit's interpretation of "adjudication on the merits"—itself an important issue of nationwide concern—conflicts with the reasoning of this Court (*Richter*, *Packer*, *Coleman*, and *Long*) and with the decisions of the First Circuit (*Clements*), Eighth Circuit (*Cox*), and Eleventh Circuit (*Childers*).

II. THE NINTH CIRCUIT VIOLATED § 2254 BY INVOKING A RULE REQUIRING STATES TO SUFFER BIASED JURORS AND BY REJECTING FOR IMPERMISSIBLE REASONS THE STATE COURT'S FACTUAL FINDING THAT JUROR NO. 6 WAS BIASED

This Court should grant certiorari, further, because the Ninth Circuit erred in two other significant ways. First, in the name of the Sixth Amendment's right to a fair trial by an impartial jury, it required the State to suffer the presence of a juror found to be biased. Second, it impermissibly

rejected the state court's finding, rationally supported by the state-court record, that Juror No. 6 in fact was biased.

A. The Ninth Circuit Erred In Interpreting the Sixth Amendment as Precluding Removal of Juror No. 6 Even If He Were Biased

The Ninth Circuit erred in granting habeas corpus relief on the ground that the state court violated the Sixth Amendment by removing Juror No. 6 even if he were indeed biased. The Sixth Amendment guarantees a criminal defendant the right to a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722 (internal citations omitted); see *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment right to a fair trial by an impartial jury applies to state criminal defendants). It does not give the defendant a right to require retention of a biased juror. Here, however, the Ninth Circuit held that, even "presum[ing] all of the facts found by the state court to be correct," the dismissal was erroneous so as to require relief because "the record discloses a 'reasonable possibility that the impetus for [Juror No. 6's] dismissal stems from the juror's views on the merits of the case.'" App. 39a (brackets in original). The Ninth Circuit's conclusion was wrong under *de novo* review and even more obviously was wrong as a matter of this Court's "clearly established Federal law" under deferential § 2254(d) review.

1. The panel purported to rely on the Ninth Circuit's decision in *Symington*, 195 F.3d at 1087. But the Ninth Circuit itself had previously explained that *Symington* "did *not* establish that such juror dismissals were inappropriate as a matter of

constitutional right." *Brewer* v. *Hall*, 378 F.3d 952, 957 (9th Cir.), cert. denied, 543 U.S. 1037 (2004) (emphasis added). Rather, *Symington* based its analysis on Federal Rule of Criminal Procedure 23(b), which permits the federal district courts to dismiss jurors for cause after deliberations have begun. *Id*. (citing *Symington*, 195 F.3d at 1085). The *Symington* test cannot be the basis for finding a federal constitutional violation supporting habeas corpus relief. 28 U.S.C. § 2254; *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991). Not does it qualify as "clearly established" law binding on the states for purposes of § 2254(d)(1) review. *Early* v. *Packer*, 537 U.S. at 10.

The Ninth Circuit's opinion asserted that "the D.C. Circuit's decision in [*United States* v.] *Brown*[, 823 F.2d 591 (D.C. Cir. 1987)], upon which *Symington* relied and we rely, was indisputably a constitutional decision"; so, the panel concluded, "we see no reason why the Sixth Amendment standard should be any different from the one announced in *Symington* for Rule 23." App. 38a n.16. But the *Symington* test (like the *Brown* and *Thomas*[5] tests it was built upon) is inapplicable to state criminal defendants such as Williams. The *Brown-Thomas-Symington* test protects a *federal* criminal defendant's federal constitutional right to a unanimous jury. *United States* v. *Kemp*, 500 F.3d 257, 303 & 304 n.26 (3d Cir. 2007); *Symington*, 195 F.3d at 1085; *United States* v. *Thomas*, 116 F.3d at 621; *United States v. Brown*, 823 F.2d at 595. That right, however, is *not* among the Sixth Amendment rights extended to s*tate* criminal defendants. *Apodaca* v. *Oregon*, 406 U.S. 404 (1972); see *Johnson* v. *Louisiana*, 406 U.S. 356 (1972). Because Williams

[5] *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997).

did not possess a right to a unanimous jury under the "Constitution or laws or treaties of the United States," that right cannot form a basis for federal habeas relief. See § 2254(a), (d)(1). Thus, the Ninth Circuit was wrong to find a Sixth Amendment violation by applying a test inapplicable to Williams. And it would be even more wrong to conclude under the § 2254(d) deferential-review rule, that this Court's "clearly established Federal law" has dictated such an improbable rule that may be invoked by a federal habeas court as a basis for granting the writ.

2. Instead, the relevant Sixth Amendment inquiry for state convictions is whether the trial court's discharge of a juror violated the defendant's right to an impartial jury, irrespective of whether the juror was a holdout and irrespective of the party's motive for challenging the juror. Thus, "[o]ne touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith* v. *Phillips*, 455 U.S. at 217). That is, a juror may be removed for cause because of bias if the juror lacks impartiality; and the proper standard under the Sixth Amendment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985); see *United States* v. *Wood*, 299 U.S. at 133-34 ("[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias," defined alternatively as "actual partiality"). The opposite of impartiality is bias. "Actual bias is, in essence, bias in fact—the existence of a state of mind that leads to the inference that the person will not act with entire impartiality." *Estrada* v. *Scribner*, 512 F.3d 1227, 1240 (9th Cir. 2008).

Therefore, the removal of a biased juror cannot violate a state criminal defendant's Sixth Amendment right. In light of the trial court's finding of bias here, removal of the juror supports no Sixth Amendment basis for relief.

The Ninth Circuit's holding, that there was error in removing Juror No. 6 even if he were indeed biased, was a perversion of the Sixth Amendment right. And, in any event, it finds no support in this Court's "clearly established" law.

B. The Ninth Circuit Failed to Abide by the Habeas Corpus Statute's Protection for State-Court Fact-Finding

As an alternate basis for relief, independent of the so-called "*Symington* violation," the Ninth Circuit also opined that Williams's Sixth Amendment fair-trial right was violated because the trial court lacked "good cause" (see Cal. Penal Code § 1089) in removing Juror No. 6. App. 41a-42a. The Ninth Circuit, however, erroneously rejected the bias finding by rejecting the "reasons" or "bases" for the finding notwithstanding that it was rationally supported by the evidence presented to the state trial judge. App. 43a-44a; see App. 44a-52a.

A trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Wainwright* v. *Witt*, 469 U.S. at 429. A trial court's bias determination is "essentially one of credibility, and therefore largely one of demeanor," so it is entitled to "'special deference.'" *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984). As a "factual issue," it is accorded a presumption of correctness and may not be overruled by the federal court unless overcome by "clear and convincing

evidence." § 2254(e)(1); *Witt*, 469 U.S. at 429; *Yount*, 467 U.S. at 1038. Here, the state court's finding should have been accepted as correct because it was rationally supported by the state-court record. See § 2254(d)(2). The Ninth Circuit, however, did not properly apply the § 2254(e)(1) presumption or defer to the state court's reasonable factual conclusion. Instead of considering whether clear and convincing evidence rebutted that finding, see § 2254(e)(1), the Ninth Circuit primarily critiqued the reasoning process or the *reasons* given by the state court in making its factual finding of bias. App. 43a-52a; see App. 102a-103a (trial judge ruling that Juror No. 6 is "dismissed without any question in [the judge's] mind as a biased juror[,]" and then enumerating the "number of ways" that "[h]is bias is shown"). For example, the Ninth Circuit dismissed many of the trial court's "reasons" for the bias finding as "misstatement[s] of the record that made [the trial court's] conclusion[s] unreasonable." App. 46a, 49a, 51a (citing *Taylor* v. *Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)).

In relying on such criticisms, the Ninth Circuit failed to consider, let alone resolve, the determinative § 2254(e)(1) question: whether "clear and convincing" evidence refuted the state court's factual finding of bias. The (e)(1) presumption gives federal courts "no license to redetermine credibility of witnesses whose demeanor has been observed by the State trial court, but not by them." *Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1982); *Rushen* v. *Spain*, 464 U.S. 114, 121 n.6 (1983) (per curiam). "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Rice* v. *Collins*, 546 U.S. 333, 341-42. Neither § 2254(d)(2) nor (e)(1) allows a

federal habeas corpus court to reweigh the "cold" record of the state-court evidentiary hearing and reject state-court factual determinations rationally supported by the evidence simply just because it disagrees with it or is dissatisfied with the state court's reasoning process. See *Rice*, 546 U.S. at 341-42; *Witt*, 469 U.S. at 434.

The Ninth Circuit's dissection of the state-court reasoning underlying its factual finding of bias was beside the point, for it did not even purport to find that the state-court record provided no support for the finding or that clear and convincing evidence showed that Juror No. 6 had not been biased. To the contrary, as the state appellate court concluded, the trial-court evidentiary hearing "supported the trial court's finding of bias" because "[a]ccording to most of the jurors, Juror No. 6 had either explicitly said he would not follow the law or he had implied as much[]." Juror No. 6, moreover, "apparently rejected the notion that, because of vicarious liability principles, Williams and Taylor might be guilty of the same crime." App. 104a; see also App. 97a-102a (summary of jurors' testimony). The state court further explained that "[t]he trial judge was entitled to consider Juror No. 6's demeanor while being examined, and could properly come to the conclusion he had been dishonest." App. 105a. By examining the state court's underlying reasoning, instead of whether the evidence rationally supported the judge's ultimate finding of bias, and by concluding that those "reasons" did not support the juror's removal for cause, the Ninth Circuit asked and answered the wrong questions.

This Court, of course, has in the recent past twice reversed the Ninth Circuit—in *Felkner* v. *Jackson*, 131 S. Ct. 1305, and in *Rice* v. *Collins*, 546 U.S. 333—for similar judicial disregard of state-court

fact findings. Here, as in *Felkner* and in *Rice*, it once again strayed far beyond the bounds of appropriate federal habeas review of state-court fact finding.

* * * *

Having repeatedly misapplied AEDPA's highly-deferential standard of review, the Ninth Circuit here has circumvented it altogether. [6] As demonstrated by this Court's many grants of certiorari to review and reverse Ninth Circuit judgments flawed by "judicial disregard" of the deferential § 2254 standard, the Ninth Circuit's errors here warrant this Court's attention too.

[6] See, e.g., *Williams* v. *Adams*, No. 09-55192, 2011 WL 3605314, *1 n.1 (9th Cir. Aug 17, 2011).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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