No. 11–465

In the
Supreme Court of the United States

Javier Cavazos, Acting Warden,
Petitioner,

v.

Tara Sheneva Williams,
Respondent.

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

Motion for Leave to Proceed In Forma Pauperis

Ms. Williams asks leave to file the attached Brief in Opposition *in forma pauperis*. Ms. Williams has previously been granted leave to proceed *in forma pauperis* with appointed counsel under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (CJA), in the Ninth Circuit Court of Appeals.

Executed on _____ _____

Kurt David Hermansen
CJA Counsel of Record

No. 11–465

In the
Supreme Court of the United States

Javier Cavalos, Acting Warden
Petitioner,

v.

Tara Sheneva Williams,
Respondent.

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

Brief in Opposition

Kurt David Hermansen*
Law Office of Kurt Hermansen
110 West C Street, Suite 1903
San Diego, California 92101
(619) 236–8300
kdh@kurtdavidhermansen.com
* Counsel of Record

Steven M. Klepper
Kramon & Graham, P.A.
One South Street, Suite 2600
Baltimore, Maryland 21202
(410) 752–6030
sklepper@kg-law.com

Counsel for Respondent

Questions Presented

1. *Harrington v. Richter* clarified that, although a state court adjudication is presumptively a merits adjudication for federal habeas purposes, that presumption only survives absent any contrary (1) indication or (2) state-law procedural principle. Here, the panel determined Ms. Williams overcame the presumption because all evidence indicated that the state appellate court ignored Ms. Williams's Sixth Amendment claim while analyzing the holdout juror's mid-deliberation dismissal — at length — exclusively under a state statute. Did the panel properly apply *Richter*?

2. The Sixth Amendment prohibits discharging a juror based on his or her views on the merits of the case; thus, judges are not supposed to question a holdout juror's views. Here, a state trial judge granted a prosecutor's motion to dismiss a known holdout juror without good cause and based on the juror's mid-deliberations view that insufficient evidence existed to prove felony murder. Did the panel below properly find a Sixth Amendment violation?

Parties to the Proceeding

Petitioner: Although Petitioner's brief lists Javier Cavazos as Acting Warden of the Central California Women's Facility at Chowchilla, California, he is no longer in that position. His successor is listed as Lydia C. Hense, Warden (A).[1/] This Court should automatically substitute Lydia C. Hense,[2/] or to avoid further name changes, substitute Matthew Cate,[3/] Secretary of the California Department of Corrections and Rehabilitation, as successor Petitioner.[4/]

Respondent: Tara Sheneva Williams is the Respondent.

[1/] California Department of Corrections and Rehabilitation, http://twww.cdcr.ca.gov/Facilities_Locator/CCWF.html (last visited Dec. 13, 2011).

[2/] Sup. Ct. R. 35.3.

[3/] California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/About_CDCR/cate.html (last visited Dec. 13, 2011).

[4/] Fed. R. App. P. 43(c)(2).

Table of Contents

Table of Authorities

Cases

Statutes

Other Materials

Statutory Provision Involved

Under 28 U.S.C. § 2254(d), federal courts may grant habeas relief to a state prisoner "with respect to any claim that was *adjudicated on the merits* in State court proceedings" only if that adjudication "(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."[5/]

Statement of the Case

One afternoon in 1993, Respondent Tara Sheneva Williams agreed to drive around Carde Taylor and Schantel W., to case stores for a potential robbery later that night. One store they visited was a liquor store, which Taylor and Schantel entered while Ms. Williams waited in the car. The two emerged a few seconds later, but then Taylor went back in, pointed a gun at the proprietor and, in the course of emptying the cash register, shot and killed him. Taylor

---

[5/] 28 U.S.C. § 2254(d) (emphasis added).

and Ms. Williams eventually admitted to being present and that Taylor had killed the owner. Ms. Williams told the police that, while she knew Taylor was armed, there had never been a plan to rob the store during daylight hours.[6/]

Taylor and Ms. Williams were each charged with special circumstances murder and a firearm enhancement; they were tried separately. After a five-day jury trial, Ms. Williams was found guilty of special-circumstances murder and the firearm enhancement, which resulted in a sentence of life imprisonment without the possibility of parole (LWOP).[7/]

But Ms. Williams was convicted only after the trial court dismissed a known holdout juror (No. 6) mid-deliberations and replaced him with an alternate.[8/] This dismissal resulted in federal habeas relief and Petitioner's certiorari petition.

Two days after the jurors began deliberations, the jury foreman wrote the trial court a note indicating that Juror No. 6 expressed an intention to disregard the law and expressed concern about

---

[6/] Pet'r's app. 6a.

[7/] *Id.*

[8/] Pet'r's app. 7a.

the severity of the first-degree-murder charge. The trial court then questioned the foreman without the other jurors present.[9/]

Jury foreman (Juror No. 8) confirmed that no juror had "expressed any concern about punishment or the punishment that one might expect to flow from a certain conviction," which the jury had been expressly instructed it could not do. When asked what was meant by his note's phrase "has expressed concern relative to the severity of the charge," the foreman replied that Juror No. 6 repeatedly (10 or 15 times) expressed his belief that there was *insufficient evidence*. Because the trial court had just instructed all jurors that it was *not* permissible for a juror to interpret page 32 of the jury instructions to mean that the conspiracy should involve a plan to commit a *specific* robbery, rather than a general plan to commit robberies in the future, the foreman opined that that instruction "may be sufficient to resolve [the jurors'] concern [about Juror No. 6] at this time."[10/]

[9/] Pet'r's app. 7a-8a.

[10/] Pet'r's app. 9a.

Despite the foreman's opinion that the jurors' concern about Juror No. 6 may be resolved, upon the prosecutor's motion, and over Ms. Williams's objection, the trial court halted jury deliberations and questioned the foreman again the next day. According to the foreman, on the first day of deliberations, Juror No. 6 had brought up historical instances "when juries have refused to follow the law," such as in pre-Civil War prosecutions for harboring fugitive slaves and during the Vietnam War era for burning draft cards. The foreman expressed his opinion that Juror No. 6 had "a belief … that [there] is a civic responsibility to — there's a name for this — civil disobedience. There's a responsibility to be disobedient in that case." But when the foreman asked Juror No. 6 "if that's what was going on here," Juror No. 6 said "no."[11/]

The foreman testified that Juror No. 6 had expressed his view that first degree murder was a severe charge, which affected the "way he interprets the evidence and the standard he uses for doubt." Juror No. 6, according to the foreman, had made a "fairly clear statement … that connects the severity of the charge with — explicitly of

---

[11/] *Id.*

first degree murder with his need for a higher standard." But the foreman conceded that Juror No. 6 had not expressed an unwillingness to follow the law or the jury instructions on the standard of proof. The foreman also agreed that Juror No. 6 tried to explain "the basis for his reasonable doubt" to the other jurors many times and had actively engaged in "intellectual conversation with them, listening to their questions, trying to answer them."[12/]

Juror No. 6 then testified that no juror had indicated being motivated by the issue of possible punishment in the case, and that no juror had even used the word "punishment." He denied using a higher burden of proof based on the severity of the first degree murder charge, and stated, *"I think that the same burden of proof should be used for any criminal offense, higher than a civil trial, but all criminal trials should have — whether it's first degree murder or not should have the same burden of proof."* He recalled the court's instruction regarding what constituted proof beyond a reasonable doubt, and testified that he agreed to follow it as he understood it. He expressed his understanding of the instruction as: "not proof —

[12/] *Id.*

there's always some possible doubt in any human affair, but if you have a reasonable doubt based on the evidence and only on the evidence that was presented at trial, if you have a reasonable doubt about a defendant's guilt, under the law, you are required to vote not guilty."[13/]

Although Juror No. 6 could not initially recall anyone discussing the severity of the charge, he amended his answer because he remembered saying that this is a very important case and that jurors should be *very convinced* that a guilt finding is based on proof that meets the beyond-a-reasonable-doubt standard. Other than that, Juror No. 6 denied mentioning the severity of the charge.[14/]

When asked about the difference between proving a criminal charge under the standard of "beyond a reasonable doubt" and proving the same charge under the standard of "very convinced beyond a reasonable doubt," Juror No. 6 began to answer "No, they're the same standards as far as —" when the court cut him off, asking, "What does 'very convinced' add?" Juror No. 6 responded, *"It just means … it's a good idea to pay particular attention to what evidence*

[13/] Pet'r's app. 10a.

[14/] Pet'r's app. 10a-11a.

was presented at the trial and make sure before we decide on a verdict, that we are convinced — if the verdict is guilty, that we are convinced beyond a reasonable doubt by the evidence that was presented at the trial."[15/]

Juror No. 6 even reiterated that *"convinced beyond a reasonable doubt is the standard, and I don't think that there is a difference between convinced beyond a reasonable doubt and very convinced beyond a reasonable doubt. I think it's the same thing."*

While admitting that he had discussed historical examples of jury nullification because another juror had raised the issue, Juror No. 6 testified that he rejected jury nullification and that jurors should base their decision solely on the evidence presented at trial.[16/]

The prosecutor asked the court to remove Juror No. 6. The court stated that it was "inclined to rule that the juror has engaged in misconduct. He's applying a higher burden of proof than the law requires … and … he isn't lying, but intentionally withheld honest information."[17/] The court noted that Juror No. 6 had "contradicted

---

[15/] Pet'r's app. 11a (emphasis added).

[16/] *Id.*

[17/] Pet'r's app. 12a.

himself," because he initially answered that no juror had discussed juror nullification or the seriousness of the charge, but later admitted that he had responded to a juror's question about jurors not following the law. But the court decided to first question the other jurors about Juror No. 6, in order to develop a "fuller record."[18/]

Six jurors (Nos. 3, 5, 7, 10, 11, and 12) stated that, in their opinion, Juror No. 6 was not following the law. But when questioned further, four of those six (Nos. 5, 7, 11, and 12) acknowledged that Juror No. 6 had never said as much, but two (Nos. 3 and 10) reported that Juror No. 6 had said, "in essence," that he would not follow the law. The other four (Nos. 1, 2, 4, and 9) thought that Juror No. 6 was following the law, and, in the words of Juror No. 2, was "being honest." Those jurors thought there was just a difference in opinion over how the law applied to the facts of the case. Juror No. 9, for example, explained that Juror No. 6 had tried to explain his view, "but none of us really understood it the way he did." Only five jurors (Nos. 1, 2, 5, 7, and 11) mentioned jury nullification at all, of which just one (No. 2) thought Juror No. 6 might actually be engaging in

---

[18/] *Id.*

the practice. Additionally, two jurors (Nos. 2 and 5) felt that Juror No. 6 disapproved of the theory of accomplice liability. Six jurors (Nos. 2, 3, 4, 9, 10, and 11) explained that Juror No. 6 did not believe that the evidence was sufficient to prove guilt of murder beyond a reasonable doubt.[19/]

After interrogating the jurors for two hours, mid-deliberations, the court dismissed Juror No. 6, under California Penal Code section 1089, which provides for the discharge of jurors for good cause. Notably, the court ruled that its dismissal of Juror No. 6 was "[1] *not* because he's not deliberating and [2] *not* because he's not following the law."[20/]

Instead, the trial court dismissed Juror No. 6 "as a biased juror," because "his mind is bent … against the prosecution," as evidenced by his statements concerning the government's burden of proof, his disagreement with the felony-murder rule, and his "dishonest[y]" in recounting whether anyone had discussed the severity of the charge or juror nullification.[21/]

[19/] Pet'r's app. 12a-13a.

[20/] Pet'r's app. 13a (emphasis added).

[21/] Pet'r's app. 13a-14a.

An alternate juror immediately replaced Juror No. 6. The next day, the jury returned a guilty verdict against Ms. Williams for first degree murder,[22] which resulted in a sentence of life without the possibility of parole (LWOP).[23]

Ms. Williams appealed, claiming that the trial court had (1) abused its discretion in applying section 1089, and (2) violated her Sixth Amendment rights, by dismissing Juror No. 6. The California Court of Appeal affirmed her conviction on the state-law ground, but completely ignored her Sixth Amendment claim.[24]

Reasons for Denying the Writ

1. There is no split in authority warranting this Court's intervention.

This case presents an unremarkable application of *Harrington v. Richter*.[25] *Richter* clarified that, although state court adjudications are presumptively "on the merits," that presumption survives only absent "any indication or state-law procedural principles to the

---

[22] Pet'r's app. 14a.

[23] Pet'r's app. 6a.

[24] Pet'r's app. 14a.

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

contrary."[26] *Richter* states that the "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely."[27] Here, the Ninth Circuit thoroughly reviewed (1) *Richter*, (2) the principles of federalism underlying AEDPA, and (3) the record in this case, and determined that, as a factual matter, Ms. Williams overcame the presumption of a merits adjudication because the state appellate court's detailed analysis of the state-law claim revealed that that court simply overlooked the federal claim.

The complete lack of dissent in the entire Ninth Circuit shows that this case is not certiorari worthy. Notably, in recent years, where Ninth Circuit panels have erroneously eschewed AEDPA's strictures, other Ninth Circuit Judges have issued sharp dissents. The following cases, including *Richter*, illustrate this fact:

- *Smith v. Mitchell*, 453 F.3d 1203, 1208 (9th Cir. 2006) (Bea, J., dissenting from denial of rehearing en banc), *rev'd sub nom. Cavazos v. Smith*, 132 S. Ct. 2 (2011);

---

[26] *Id.* at 785.

[27] *Id.*

- *Moore v. Czerniak*, 574 F.3d 1092, 1162–65 (9th Cir. 2009) (Callahan, J., dissenting from denial of rehearing en banc), *rev'd sub nom. Premo v. Moore*, 131 S. Ct. 733 (2011);
- *Richter v. Hickman*, 578 F.3d 944, 969–78 (9th Cir. 2009) (Bybee, J., dissenting from en banc opinion), *rev'd sub nom. Harrington v. Richter*, 131 S. Ct. 770 (2011); and
- *Pinholster v. Ayers*, 590 F.3d 651, 684–85 (9th Cir. 2009) (Kozinski, C.J., dissenting from en banc opinion), *rev'd sub nom. Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

Here, however, not only was there no dissent, not a single one of the 26 then-active judges of the Ninth Circuit even requested a vote for rehearing en banc.[28/] This complete lack of dissent shows that granting certiorari is not warranted here where the panel expressly followed *Richter*.

[28/] Pet'r's app. at 119a.

In addition, Petitioner's circuit-conflict claim is overblown. The chief conflicting authority, according to the Petition, is the Eleventh Circuit's opinion in *Childers v. Floyd*.[29/] But, no matter how this Court rules on the petition for certiorari in that case, there is no conflict between this case and *Childers*.

First, *Childers* is easily distinguishable because nine of the Florida appellate court judges discussed Childers's federal Confrontation Clause claim. But here the California appellate panel ignored Ms. Williams's federal claim completely.

In *Childers*, although the Florida appellate court's 15-page per curiam opinion did not mention the federal claim, that "opinion did not speak for all of the court's judges."[30/] Nine judges "wrote [20-pages of] separate opinions concurring in or dissenting from the court's judgment."[31/] Several judges "specifically referenced United States Supreme Court precedent concerning the Confrontation

---

[29/] *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011) (certiorari petition No. 11–42 pending).

[30/] *Id.* at 965 (citing concurring and dissenting opinions from *Childers v. State*, 936 So. 2d 585, 599–619 (Fla. Dist. Ct. App. 2006)).

[31/] *Id.*

Clause."[32] In fact, some dissenting judges, including the chief judge, concluded that the per curiam opinion violated Childers's Confrontation Clause right.[33] And another judge found that the trial court did not violate Childers's Confrontation Clause rights.[34] Thus, *Richter*'s merits-review presumption obviously could not be overcome in *Childers* because numerous concurring and dissenting Florida appellate judges did, in fact, discuss the Confrontation Clause issue, which shows that the state court did not overlook it.

In contrast, Ms. Williams's case involves a classic example of a state appellate court, made up of fallible human beings, that failed to address the federal nature of Ms. Williams challenge to the trial judge's decision to jettison the holdout juror mid-deliberations. As the panel below found, "here the state court did not address [Ms.] Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the [California] Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed

---

[32] *Id.*

[33] *Id.*

[34] *Id.*

at length."[35] Further, "the total disparity between" the California court's treatment of "[Ms.] Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong 'indication' [under *Richter*] that the claim was never adjudicated on the merits."[36] Thus, under *Richter*, the presumption is easily overcome.

The Ninth Circuit's "'reason to think some other explanation for the state court's decision is more likely,' [*Richter*, 131 S. Ct. at 784–85]" came "in part from common sense" and from the court's "own experience as sometimes-fallible judges."[37] When judges "write thorough 29-page decisions as the state court did here, yet completely fail to address a particular issue, even in an oblique, tangential, or summary manner, it is most often because [the court] so focused on the remainder of the opinion that [the court] overlooked the issue [that it] did not mention directly or indirectly."[38] Any court is capable of occasionally making mistakes or overlooking an argument

---

[35] Pet'r's app. 23a-24a n.10.

[36] Pet'r's app. 24a n.10.

[37] Pet'r's app. 25a n.11.

[38] *Id.*

raised on appeal. Here, "[i]t is most unlikely that the state court methodically analyzed each issue presented on appeal except one, a substantial claim of the violation of a federal constitutional right, which it chose to deny on the merits without saying a word."[39/]

Second, there is a critical analytical difference between *Childers*, involving review of a Florida conviction, and this case, involving review of a California conviction. Under Florida law, a party has no right to a reasoned opinion.[40/] By contrast, the California constitution requires that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."[41/] Because non-meritorious contentions are often included in briefs, a California appellate court can simply state at the end of its opinion that the remaining issues "do not merit discussion."[42/] But the state appellate court did not state that here.

[39/] *Id.*

[40/] *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989 (Fla. 2004).

[41/] Cal. Const. art. 6, § 14.

[42/] *People v. Rojas*, 174 Cal. Rptr. 91, 92–93 (Ct. App. 1981). *See generally* Jon B. Eisenberg, et al., Cal. Prac. Guide Civ. App. & Writs ch. 11-C § 2.

The differences noted above control. *Richter* recognized that California's courts and legislature define California's appellate (and collateral review) procedures, which in turn determines the significance under AEDPA of the state court's failure to expressly address a federal claim.[43/] *Richter*'s rule makes sense in California. In Fiscal Year 2008–2009, original criminal writs filed in the California Supreme Court, a single court consisting of seven justices, numbered 3,262. In contrast, in the same period, 6,819 direct criminal appeals were filed in the California Court of Appeal, a court comprised of six districts in which 105 appellate justices decide appeals. Given these numbers, California's appellate justices obviously have far more time to produce reasoned decisions in *direct criminal appeals* than California Supreme Court justices have to issue reasoned decisions denying *habeas* petitions.[44/]

Article 6, section 14, of the California Constitution requires a reasoned merits decision on direct appellate review. But that

---

[43/] *Richter*, 131 S. Ct. at 785.

[44/] *2010 Court Statistics Report*, Judicial Council of California, at pp. IX-X, http://www.courts.ca.gov/12941.htm (last visited Dec. 16, 2011).

constitutional provision did not come into play in *Richter* because Richter filed a state *habeas* petition with the California Supreme Court, which was summarily denied. "[U]nlike an appeal, a writ petition may be summarily denied without a written opinion."[45/] There was thus no reasoned opinion at any level in *Richter*.[46/] But as *Richter* noted, issuing summary dispositions on habeas corpus lets California courts concentrate judicial resources where most needed, i.e., on direct review.[47/] Here, the state decision at issue — the California Court of Appeal's decision on direct review — is just such a decision in which the California legislature has directed the California courts to take the time to issue reasoned decisions. The lack of a reasoned decision, or even acknowledgment of Ms. Williams's Sixth Amendment argument, in the direct review decision, strongly suggests that it simply was not considered.

[45/] *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd.* 81 Cal. Rptr. 3d 486, 494 (Ct. App. 2008).

[46/] *Richter*, 131 S. Ct. at 783.

[47/] *Id.* at 783–85.

Richter established that, although federal habeas courts apply *Ylst v. Nunnemaker*'s look-through doctrine,[48] and thus look through to the "last reasoned state-court opinion,"[49] a federal habeas petitioner cannot avoid AEDPA's adjudication-on-the-merits presumption where state law gave him no right to any reasoned opinion as with California's *habeas* rules. But here, unlike the prisoners in *Richter* and *Childers*, Ms. Williams had a state constitutional right to a decision "in writing with reasons stated,"[50] because the last reasoned state-court opinion was on direct, not collateral habeas, review.

Under *Ylst v. Nunnemaker*, the Ninth Circuit properly reviewed the last reasoned state-court opinion in this case, the court of appeal opinion of January 18, 2002,[51] to determine whether AEDPA deference was warranted under *Richter*.[52] By its terms, the Ninth Circuit's AEDPA holding was narrow and strictly followed *Richter*.

---

[48] *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

[49] *Id.*

[50] Cal. Const. art. 6, § 14.

[51] Pet'r's app. 87a-118a.

[52] *See* Pet'r's app. 18a-28a.

This is a "rare case[ ]"[53] where the state appellate court's "decision was *not* 'unaccompanied by an opinion explaining the reasons relief has been denied,' [*Richter*, 131 S. Ct.] at 784; rather, the [state appellate] court provided a lengthy, reasoned explanation for its denial of [Ms.] Williams's appeal, but none of those reasons addressed her Sixth Amendment claim in any fashion, even indirectly."[54] As the Ninth Circuit recognized, "[m]ost of the time," "the strictures of § 2254(d) apply" because the state court will have considered the federal claim.[55] Here, that presumption does not apply under *Richter*'s strictures.

The Ninth Circuit also recognized, "a state court may adjudicate the merits of a constitutional claim without citing federal precedent, and such a decision would be entitled to AEDPA deference."[56] "And under *Richter*, even 'when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied,' [fed-

---

[53] Pet'r's app. 20a.

[54] Pet'r's app. 23a.

[55] Pet'r's app. 18a.

[56] Pet'r's app. at 23a (citing *Early v. Packer*, 537 U.S. 3, 8 (2002)).

eral habeas courts] … must 'presume[ ] that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary*.'"[57/]

The Ninth Circuit avoided AEDPA deference only after finding no plausible explanation, other than oversight, for the state court's failure to discuss the federal claim. Distinguishing a prior en banc Ninth Circuit plurality opinion that enforced AEDPA deference where there was at least an "indication" that the state court had addressed a federal claim, albeit "only obliquely,"[58/] the panel below observed that the "state court did not address [Ms.] Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the [California] Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length."[59/]

Here, the state appellate "court simply failed to decide the [federal] claim without explanation."[60/] As this Court stated in *Cone*

[57/] *Id.* (quoting *Richter*, 131 S. Ct. at 784–85) (emphasis added).

[58/] Pet'r's app. 23a-24a n.10 (quoting *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir. 2010) (en banc)).

[59/] *Id.*

[60/] Pet'r's app. 18a.

v. Bell, in 2009, when, as here, it is clear that the "[state] courts did not reach the merits of [the petitioner's constitutional] 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*."[61/]

De novo review is appropriate because Ms. Williams properly raised her constitutional claim, and the state court ignored that claim. Here, "[i]t is obvious, not "theoretical" or "speculat[ive]," that Ms. Williams's constitutional claim was not adjudicated at all, and so *Richter*'s presumption is overcome under *Richter*'s own terms.[62/]

That the state appellate court discussed Ms. Williams's *statutory* claim at length, "but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling 'indication' that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision."[63/]

[61/] *Cone v. Bell*, 556 U.S. 449,129 S. Ct. 1769, 1784 (2009).

[62/] *Richer*, 131 S. Ct. at 785.

[63/] Pet'r's app. 24a (citing *Richter*, 131 S. Ct. at 785).

"[W]hen a court simply says "claims denied," and nothing more," courts "presume the denial is on the merits and as to all claims, [*Richter*, 131 S. Ct. 784–85] but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, 'there is reason to think' that it 'is more likely' that the court simply neglected the issue and failed to adjudicate the claim."[64/]

Given this exceptionally narrow, fact-based holding, and strict application of *Richter*, it is difficult to see how this case could possibly handicap the State of California in advocating for AEDPA deference in future cases. Although Ms. Williams disagrees with Petitioner's various assignments of error, the Ninth Circuit's rigorous *Richter* analysis places this case squarely within the principle that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[65/] Even accepting all of Petitioner's critiques, there is no reason to believe that the panel decision will have a significant impact beyond its rare facts.

[64/] Pet'r's app. 24a-25a.

[65/] Sup. Ct. R. 10.

Reduced to its essence, the Petition's argument is that, if this Court should decide to grant certiorari in *Childers*, the Court may as well grant certiorari in this case based on a superficial inconsistency between the two cases. Ultimately, however, there is no reason that a ruling by this Court in *Childers* should affect the result in this case. Unlike *Childers*, which granted deference to a published en banc state court decision, where the dissenting state-court judges cited the federal claims that the majority overlooked,[66/] the Ninth Circuit in this case found not a scintilla of evidence that the unpublished state decision actually adjudicated the Sixth Amendment claim. Beyond these factual distinctions, the federalism principles guiding AEDPA review do not demand perfect consistency between *Childers* and this case, given the fundamental differences between California's and Florida's divergent appellate and collateral review systems. This Court should, therefore, deny the Petition.

2. The panel opinion below is a correct application of federal law and correct factually.

Habeas relief was appropriate based on a Sixth Amendment violation because (1) a reasonable possibility exists that the prose-

[66/] *See Childers v. State*, 936 So. 2d 585 (Fla. Dist. Ct. App. 2006).

cutor's request for the juror's discharge stemmed from his views of the merits of the case, and (2) the trial judge lacked "good cause" to remove the known holdout juror mid-deliberations.

a. The panel below followed federal law in ruling on Ms. Williams's Sixth Amendment claim.

This Court, in 1968 in *Duncan v. Louisiana*,[67] made clear that the Sixth Amendment, which applies to the states, does not allow a trial judge to discharge a juror based on his or her views of the merits of the case. In 1970, in *Williams v. Florida*,[68] this Court confirmed that the jury as a *group*, not the judge, decides guilt or innocence. And in 1933, in *Clark v. United States*,[69] Justice Cardozo eloquently explained why judges are not even supposed to be aware of a known holdout juror's views during deliberations.[70] "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[71] Here, the holdout juror's argu-

[67] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

[68] *Williams v. Florida*, 399 U.S. 78, 100 (1970).

[69] *Clark v. United States*, 289 U.S. 1, 13, 16 (1933).

[70] Pet'r's app. 33a.

[71] *Id.* (quoting *Clark*, 289 U.S. at 13).

ments were revealed to the prosecutor, who then succeeded in eliminating that holdout juror mid-deliberations.

The Ninth Circuit correctly asked whether the juror's discharge stemmed from his views of the merits, and whether the grounds on which the trial court relied in dismissing the known holdout juror were constitutional.[72/]

Consistent with prior circuit decisions in the Ninth, Second, and D.C. Circuits, the Ninth Circuit panel relied upon cases that were decided years before Ms. Williams's conviction became final in 2002, namely: (1) *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999); (2) *United States v. Thomas*, 116 F.3d 606, 623 (2d Cir. 1997); and (3) *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987).[73/]

"Following *Brown*'s holding and *Syminton*'s reasoning," the panel here held that, to comply with the Sixth Amendment, "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of

---

[72/] Pet'r's app. 34a.

[73/] Pet'r's app. 29a, 33a-34a, 36a.

the case, the court must not dismiss the juror."[74/] Under this standard, "the discharge of Juror No. 6 violated [Ms.] Williams's Sixth Amendment rights.[75/] Two-thirds of the jury panel stated — mid-deliberations — that Juror No. 6 did not believe that the evidence was sufficient to prove guilt beyond a reasonable doubt.[76/]

Based on hours of rigorous questioning into the thought processes and reasoning of Juror No. 6, the prosecutor knew about Juror No. 6's views regarding the insufficiency of the evidence at that point in the deliberations.[77/] As in *Brown*,[78/] "[g]iven the [reasonable] possibility" that the request to discharge the juror "stemmed from his belief that the evidence was inadequate to support a conviction," the panel here found "that his dismissal violated" Ms. Williams's Sixth Amendment right to a fair jury trial.[79/]

[74/] Pet'r's app. 37a-38a, 39a.

[75/] Pet'r's App. 39a.

[76/] Pet'r's App. 39a-40a.

[77/] Pet'r's app. 40a.

[78/] *Brown*, 823 F.2d at 597.

[79/] Pet'r's App. 40a-41a.

b. The panel's detailed analysis shows there was no basis for concluding that the holdout juror was biased against the government merely because he wanted evidence that would convince him beyond a reasonable doubt of guilt.

Last, Petitioner argues that the Ninth Circuit failed to defer to the trial judge's factual findings.[80/] This argument fails.

Petitioner tries to compare the panel opinion in this case to *Felkner v. Jackson*,[81/] and *Rice v. Collins*,[82/] because in those cases this Court reversed the Ninth Circuit for disregarding state court factual findings. But this case is nothing like *Felkner* or *Rice*. Both *Felkner* and *Rice* were *Batson* cases. Under *Batson*,[83/] when a prosecutor strikes a juror and proffers a race-neutral reason for exercising a peremptory strike, the defendant must prove that the prosecutor really had a race-based reason for striking the juror. A trial judge ruling on a *Batson* challenge must determine whether the prosecutor's race-neutral reason is true or whether the prosecutor's

---

[80/] Cert. Pet. 26–29.

[81/] *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (per curiam).

[82/] *Rice v. Collins*, 546 U.S. 333 (2006).

[83/] *Batson v. Kentucky*, 476 U.S. 79 (1986).

strike was racially motivated.[84/] In contrast, the issue raised here has nothing to do with *Batson*, and the focus is not on a prosecutor's proffered reasons. Rather, the issue here is whether the trial judge had good cause for finding that the holdout juror was biased. As Petitioner concedes, bias is defined as actual bias, or partiality.[85/] The only support the trial court had for its conclusion that the holdout juror was "biased" is the fact that, mid-deliberations, Juror No. 6 wanted to be very convinced that the evidence supported the murder charge before he would find Ms. Williams guilty and some jurors were frustrated by this. But as the panel below found, there was no support in the record for a finding of actual bias. First, "*none* of the jurors expressed the view that Juror No. 6 was biased."[86/] Second, the trial judge did not find Juror No. 6 biased under any traditional definition.[87/] And none of the trial court's reasons for

---

[84/] *Rice*, 546 U.S. at 338.

[85/] Cert. Pet. 25.

[86/] Pet'r's app. 41a.

[87/] Pet'r's app. 42a.

finding bias actually constitute bias.[88/] Wanting to be very convinced does not constitute bias.

More important, as Petitioner acknowledges, the panel below held that "even if we presume all the facts found by the state court to be correct, 28 U.S.C. § 2254(e)(1), we conclude that 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.'"[89/] This is so because the facts found by the state court do not support a finding that Juror No. 6 was biased against the prosecution. As the panel's discussion of the juror comments makes clear, the jurors revealed Juror No. 6's belief — at that stage of the deliberations — that the evidence was not sufficient on the felony murder charge.[90/] The jury comments about their deliberations speak for themselves. Once Juror No. 6's beliefs about the evidence were revealed in open court, a reasonable possibility exists that the prosecutor moved to dismiss Juror No. 6 and the judge granted that motion based on Juror No. 6's views on the evidence.

[88/] Pet'r's app. 43a-48a.

[89/] Pet'r's app. 40a (quoting *Symington*, 195 F.3d at 1087).

[90/] Pet'r app. 40a.

Although this reason alone is enough to require granting habeas relief, the trial court's lack of "good cause" for removing the known holdout juror, independently supports the same result.[91/] The panel below carefully analyzed the trial court's decision to dismiss the holdout juror and the jurors's comments that ostensibly supported that decision.[92/] First, the record shows that Juror No. 6 was willing to follow the law.[93/] Second, and most important, Juror No. 6 did not seek to apply an incorrectly heightened standard more onerous than the beyond-a-reasonable-doubt standard. The panel's illumination of the record shows this beyond a shadow of a doubt.[94/] Third, the record manifestly shows that Juror No. 6 never discussed punishment, as opposed to the seriousness of the felony murder charge.[95/] Finally, the record and the trial court's own earlier comments patently show that Juror No. 6 did not lie or withhold information during the court's mid-deliberation interrogation of the jur-

---

[91/] Pet'r's app. 41a-42a.

[92/] Pet'r's app. 44a-51a.

[93/] Pet'r's app. 44a-45a.

[94/] Pet'r's app. 45a-48a.

[95/] Pet'r's app. 48a-50a.

ors.[96] Thus, none of the trial court's determinations, individually or collectively, regarding Juror No. 6, established the "good cause" required by the Sixth Amendment to remove an actively deliberating juror. This is a separate reason, independent of the *Symington* violation, that supports the panel's holding that the dismissal of a known holdout juror was unconstitutional here.[97]

Thus, here, either of two conclusions, standing alone, warranted reversal. Together, the constitutional violation is pellucid.[98] First, there is at least a reasonable possibility that Juror No. 6's discharge stemmed from his disagreement with his peers over their views of the merits of the case. Second, there was no good cause to justify the juror's discharge. Jettisoning holdout Juror No. 6, mid-deliberations, deprived Ms. Williams of her constitutional right to a fair jury trial.[99] Thus, granting Petitioner's certiorari petition is not warranted because the panel followed *Richter* and reached the correct legal and factual conclusion.

---

[96] Pet'r's app. 50a-51a.

[97] Pet'r's app. 52a.

[98] *Id.*

[99] Pet'r's app. 52a-53a.

Conclusion

For the foregoing reasons, the Court should deny certiorari.

Respectfully submitted:

_____

Kurt David Hermansen*
Law Office of Kurt Hermansen
110 West C Street
Suite 1903
San Diego, California 92101
(619) 236–8300
kdh@kurtdavidhermansen.com
* Counsel of Record

Steven M. Klepper
Kramon & Graham, P.A.
One South Street
Suite 2600
Baltimore, Maryland 21202
(410) 752–6030
sklepper@kg-law.com

Counsel for Respondent

Certificate of Compliance

Under Supreme Court Rule 33.1(g)-(h)

I certify that:

The attached is Brief in Opposition is proportionately spaced, has a typeface of 14 points or more and contains 6,408 words, which is less than the 9,000-word limit indicated in Supreme Court Rule 33.1(g)(ii).

_____

Kurt David Hermansen
Counsel of Record

No. 11–465

In the

Supreme Court of the United States

Javier Cavazos, Acting Warden,
Petitioner,
v.
Tara Sheneva Williams,
Respondent.

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

Proof of Service

I, Kurt David Hermansen, do declare that on_____, as required by Supreme Court Rule 29, I have served the enclosed **Motion to Proceed *in Forma Pauperis* and Brief in Opposition** on each party to the above-proceeding or on that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid.

I served the aforementioned on the following in the manner described above:

1. Stephanie C. Brenan, Deputy Attorney General, 300 South Spring St., Ste. 1702, Los Angeles, CA 90013;
2. Tara Sheneva Williams, CDCR# W82693, Central California Women's Facility, P.O. Box 1508, Chowcilla, CA 93610.
3. Clerk, Supreme Court of the United States, Washington, D.C. 20543.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ _____
Kurt David Hermansen, Declarant