No. 11-465

In The Supreme Court of the United States

DEBORAH K. JOHNSON, Acting Warden,

Petitioner,

v.

TARA SHENEVA WILLIAMS,

Respondent.

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

BRIEF ON THE MERITS FOR PETITIONER

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QUESTION PRESENTED

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.

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OPINIONS BELOW

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 The opinion of the California Court of Appeal (PA 87a-118a) is unpublished.

JURISDICTION

The petition for writ of certiorari was filed on October 10, 2011, and was granted on January 13, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment 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.

STATEMENT OF THE CASE

A. The State Court Trial

1. In 1999, respondent Tara 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 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 a prior robbery committed with Taylor. See PA 88a-90a.

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. Reporter's Transcript, Los Angeles County Superior Court case no. NA039425, U.S. District Court docket no. 71, lodgment 14 (RT) 1246. Outside the presence of the other jurors, the judge briefly questioned the jury foreperson (Juror No. 8) about the note. RT 1250-52. 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 1252. The jury resumed its deliberations. RT 1252.

The next day, the prosecutor requested additional questioning of the jurors and the discharge of Juror No. 6 for bias. RT 1257-62; Clerk's Transcript, Los Angeles County Superior Court case no. NA039425, U.S. District Court docket no. 71, lodgment 13 (CT) 203-06. Williams's defense counsel, relying on *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999), objected that further inquiry and removal of Juror No. 6 would violate Williams's "right to a fair trial and a unanimous jury under the Sixth Amendment to the United States Constitution and under the California Constitution." RT 1264. The judge allowed further inquiry. RT 1265.

a. Upon further questioning, the jury foreperson said that "currently" there was 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, 1273, 1278; see PA 97a-98a. While initially having reported that Juror No. 6 expressed his belief that there was insufficient evidence, RT 1251, the foreperson explained that the charge's severity influenced Juror No. 6's interpretation of the evidence and his use of an "extraordinary standard" of "beyond reason," RT 1267-68.

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. RT 1274, 1276-77. During the examination that followed, Juror No. 6 denied using a higher burden of proof for the first degree murder charge, and 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, admitting 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 asserted that convinced "beyond a reasonable doubt" and "very convinced beyond a reasonable doubt" were the same. And, although agreeing that jurors should not use nullification, Juror No. 6 admitted 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 PA 98a-99a.

The judge said 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 PA 99a-102a.

c. In that inquiry, most of the jurors stated that the juror 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),[1] 1342-43 (Juror No. 10), 1347, 1350 (Juror No. 11), 1354 (Juror No. 12). Two of those jurors further reported that the juror 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 the juror 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 the juror had been using a burden of proof higher than 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 the juror 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 the juror's "own beliefs" had been his "standard of proof" and that his arguments had been based on a

[1] The Reporter's Transcript misidentifies Juror No. 7 as "Juror No. 6."

disagreement with the law and what he thought the law should say. RT 1344.

Many jurors reported that the juror disagreed with California's vicarious-liability and felony-murder rules. Juror No. 2, in explaining how Juror No. 6 had expressed an unwillingness to follow the law, reported that the juror could not accept that, even though Williams was not the shooter, she nevertheless faced the same "penalty" as the codefendant who shot the gun. RT 1303; see RT 1305-06. Juror No. 5 said that the juror felt "you can't charge somebody for something they didn't do if they weren't there at the time because" he "d[id]n't think the burglary or robbery and . . . a first degree murder charge can be tied together in one sentence." RT 1324. Juror No. 5 also reported that the juror had discussed penalty, RT 1321-23, and expressed an unwillingness to follow the law by saying, "'There's no way that I could . . . come to a decision with that kind of penalty for that kind of charge[,]' " RT 1322. Juror No. 10 reported that the juror did not believe that "the evidence showed that first degree murder should be the *charge*." RT 1346 (emphasis added). And, according to Juror No. 11, the murder charge "kept coming into play" for the juror, "even when we were trying to discuss just the robbery." RT 1352.

Regarding "nullification," Juror No. 7 said that one unidentified juror had mentioned "jurors not following the law or 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 1329-30. Two jurors reported that the juror had started the juror-nullification discussion, although they also said that the juror had not expressed an intent to nullify. RT 1294 (Juror No. 1), 1348 (Juror No. 11). Still, Juror No. 11 said that the juror had discussed jurors "vot[ing] against" the law "in particular cases if they didn't agree with the law," and that the juror felt that "the charge of murder was too strong in this case." RT 1347-49. Two other jurors reported that the juror, when asked if he had a "social" or "political agenda," had responded by mentioning past trials in American history. RT 1326-27 (Juror No. 5), 1346 (Juror No. 10).

d. On the other hand, Juror No. 9 and Juror No. 12 opined that the juror simply interpreted 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, 1302, 1305. Juror No. 9 said, further, that there had been no discussion of "historical juries." RT 1335. Similarly, in Juror No. 1's account, Juror No. 6 never said that 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 the juror's deliberation. RT 1354.

e. During the hearing, Williams's counsel told the trial judge that, even if Juror No. 6 had a "faulty understanding of what reasonable doubt was," the remedy would be to reinstruct the jury or declare a mistrial. He argued that the Ninth Circuit's *Symington* test—which he described as a "constitutional standard" that prohibited the dismissal of a juror if "there is any reasonable possibility that this issue is really about the merits"—prohibited dismissing Juror No. 6 because it "deprive[d] the defendant of the right to a unanimous jury." RT 1300.

The judge responded that *Symington* had involved the issue of "meaningful deliberations" whereas "the issue is whether you have a biased juror here who is dishonest, not only during voir dire, but right before the Court, and therefore, if he is dishonest, and so far it seems to me that he is, then he can't be trusted when he says he's going to follow the Court's instructions as to what is a conspiracy and what is the appropriate burden of proof." RT 1300-01. The judge added: "Not to be blunt about it, but a person would say that [Juror No. 6] is a liar and doesn't belong on the jury." He concluded that, "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. The judge explained that Juror No. 6: (1) "had added his own words to the court's instructions as to what the law is[,]" which indicated that he was "biased

against the prosecution"; (2) had 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) had been employing a burden of proof higher than that of "beyond a reasonable doubt"; (4) disagreed with the felony-murder rule; and (5) had been dishonest in stating that no juror had discussed the severity of the charge or juror nullification. The judge concluded, "in 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 PA 102a-103a.

Juror No. 6 was replaced. RT 1362. The jury began deliberations anew, and convicted Williams the following afternoon. RT 1362-69.

3. Williams filed a motion for new trial. CT 297-301. As one of her grounds, and relying in part on *Symington*, she claimed that her "right to a fair trial and due process, as well as her right to a unanimous jury, were violated when the court granted the prosecution's request to remove the juror who was consistently voting for acquittal." CT 300-01. The trial court denied the motion, stating that its prior rulings "were appropriate." RT 1371-72.

B. The State Court Appeal

On direct review in the California Court of Appeal, Williams presented a juror-removal claim under a single argument heading. Joint Appendix (JA) 25-67. She argued that the trial court had abused its

discretion under California Penal Code section 1089, authorizing removal of a juror in a criminal case in the event of illness, death, or other "good cause," because the removal of Juror No. 6 was unsupported by "good cause" in that there had been insufficient evidence of "actual bias." JA 25, 27-28. She argued that the "improper[ ] remov[al]" of Juror No. 6 from a "deadlocked" jury was prejudicial and "accordingly" violated "her Sixth Amendment right to a unanimous jury[.]" JA 29; see JA 67.

The California Court of Appeal, in affirming her conviction, described Williams's claim as the trial court having "erred by discharging one of the jurors during deliberations," and concluded, "This claim is meritless." Opinion, California Court of Appeal case no. B137365, U.S. District Court docket no. 10, lodgment 4 (Cal. Ct. App. Opn. (3/27/01)) 10; see JA 2. The panel explained that "[t]he evidentiary hearing supported a conclusion that Juror No. 6 was biased." Cal. Ct. App. Opn. (3/27/01) 13. It concluded that the trial court had "not abuse[d] its discretion in removing Juror No. 6." *Id*. at 17.

The California Supreme Court granted review of the case, and remanded it back to the Court of Appeal for reconsideration under the state supreme court's then-recent decision in *People* v. *Cleveland*, 25 Cal. 4th 466, 21 P.3d 1225 (2001). JA 3. *Cleveland* authorized the trial court to remove a juror during deliberations where it appears as a "'demonstrable reality' that the juror is unable or unwilling to deliberate." *Cleveland*, 25 Cal. 4th at 484. In setting out the

"demonstrable reality" standard, *Cleveland* rejected the "any reasonable possibility" test employed in the Second, Ninth, and D.C. Circuits. *Id*. As the state supreme court later explained, the demonstrable-reality test's "heightened standard" of review "reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." *People* v. *Barnwell*, 41 Cal. 4th 1038, 1052, 162 P.3d 536 (2007). But *Cleveland* agreed with the federal circuits that (1) "a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence"; and (2) a court's inquiry must be limited so as not to undermine the sanctity of jury deliberations. *Id.* at 483-85 ("the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts . . . does not constitute a refusal to deliberate and is not a ground for discharge").

On remand, the California Court of Appeal requested supplemental briefing on the effect of *Cleveland*. See JA 3. Williams argued that, under *Cleveland*, the trial court had abused its discretion, JA 109, 118-21, and that she "was accordingly denied her Sixth Amendment right to a unanimous jury when Juror No. 6 was discharged," JA 121.

Again describing Williams as "contend[ing] that the trial court erred by discharging one of the jurors during deliberations," the California Court of Appeal again rejected the claim as "meritless." PA 97a. The state appellate court's written opinion explained

that 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.'" PA 103a (ellipsis in original). Citing *Cleveland*, the panel explained that a trial court's dismissal decision is reviewed for abuse of discretion, that the trial court's ruling must be supported by substantial evidence, and that the juror's inability or unwillingness to perform must appear on the record as a "demonstrable reality." PA 103a (internal quotation marks omitted).

Given that the trial court's stated reason for discharging Juror No. 6 was that he was a "'biased juror,'" see PA 102a, the state appellate court examined whether the removal of Juror No. 6 for bias was proper. PA 104a-105a. Relying on *People* v. *Nesler*, 16 Cal. 4th 561, 580-81, 941 P.2d 87 (1997), a state supreme court decision that had considered whether the presence of a biased juror violated the defendant's state and federal constitutional rights to an impartial jury and his state constitutional right to a unanimous jury, the court of appeal considered "'[w]hat constitutes "actual bias"'" in terms of *both* "'federal constitutional purposes'" and California state law. PA 104a.

The state appellate court then concluded, "[t]he evidentiary hearing supported the trial court's finding of bias." "According to most of the jurors," the state appellate 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." PA

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." PA 104a-105a. Rejecting Williams's argument that the trial court had erred under *Cleveland*, the California Court of Appeal 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." PA 105a (original emphasis omitted).

The California Supreme Court denied further appellate review. PA 85a.

C. The Habeas Corpus Proceedings

1. Williams filed a 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." PA 83a-84a.

2. Williams next initiated federal habeas proceedings. See JA 9. Echoing the language that the California Court of Appeal had used to describe her juror-removal claim, Williams claimed in her amended federal petition that, "[t]he trial court erred in its dismissal of the lone holdout juror." Amended Pet. at 5. She argued that the dismissal of Juror No. 6 violated state and federal law. Amended Pet., Mem. of P. & A. 15-30.

The district court stayed the proceedings to give Williams an opportunity to exhaust any available remedies in state court. See JA 10. Williams filed state habeas petitions in the California Court of Appeal and California Supreme Court, again challenging the removal of Juror No. 6. In the court of appeal, she listed eight separate "Argument[s]" regarding the juror's removal, JA 150-64, including one where she asserted that the trial court "violated [her] Sixth Amendment Rights by discharging a deliberating juror whom it believed was engaged in jury nullification amongst other misconduct," JA 160. In the supreme court, she again separately enumerated her juror-removal arguments. Habeas Pet., Cal. Supreme Ct. case no. S122165, U.S. District Court docket no. 71, lodgment 21 at 5-14. 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 state habeas petition. See PA 15a n.4, 79a, 81a-82a.

3. After federal proceedings resumed, the magistrate judge filed a report recommending that Williams's petition be denied and dismissed with prejudice. PA 59a-78a. The magistrate judge described Williams's juror-removal claim as follows:

> In Ground One [Williams] contends that the trial judge erred when he dismissed juror number six ("Juror 6"). [Williams] argues that it was violative of her rights under state and federal law to discharge the "lone holdout juror" during deliberations.

PA 67a. The magistrate judge noted that the petition was governed by the provisions of AEDPA, and discussed the deferential standard of review accorded to state-court merits adjudications under 28 U.S.C. § 2254(d). PA 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." PA 68a, 70a. The district court adopted the report and recommendation and entered judgment dismissing the petition with prejudice. PA 55a, 57a-58a.

D. The Ninth Circuit Appeal

1. 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." See JA 17. The parties argued the juror-removal issue expressly under § 2254(d)'s deferential standard of review. Appellant's Opening Brief, case no. 07-56127, (AOB) 29-30, 44, 57; Appellee's Brief, case no. 07-56127, 8-13; see JA 19-20. In her opening brief, Williams acknowledged that the California Court of Appeal, in its direct appeal opinion, had adjudicated her federal constitutional juror-removal claim. Specifically, she wrote that she had "challenged her conviction, in part on the ground that the trial court had violated her Sixth Amendment right to a fair trial by dismissing the lone holdout juror[,]" and "[t]he

California Court of Appeal rejected [her] claims in a unpublished opinion, finding" that "[t]he evidentiary hearing supported the trial court's finding of bias." AOB 28.

2. 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 Penal Code] section 1089 claim, but not her constitutional claim." PA 22a. According to the panel, Williams had presented "two arguments" concerning the juror's removal: (1) her Penal Code section 1089 "argu[ment] 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 under the Sixth Amendment." PA 20a-21a (brackets in original); see PA 21a-23a nn.8 & 9. In the Ninth Circuit panel's view, the California Court of Appeal "did not consider . . . whether the removal of the known holdout juror violated the Sixth Amendment." PA 22a; see PA 22a-23a n.9.

In reaching this conclusion, the panel dismissed the state appellate court's quotation from *Nesler*, which had quoted this Court's opinions in its "discussion of the federal constitutional principle of impartiality." In the panel's estimation, 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." PA 22a-23a n.9.

The Ninth Circuit panel acknowledged that, in this Court's recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), a federal habeas court faced with an unexplained state-court decision "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.'" PA 23a (original brackets). But the panel ruled that the merits-adjudication presumption had been "overcome" because 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." PA 23a-24a. Because the state court opinion "made no mention whatsoever" of the "constitutional claim," the panel found that this was a "compelling 'indication' that the court either had overlooked or disregarded [Williams's] Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision." PA 24a (emphasis omitted) (citing *Richter*, 131 S. Ct. at 785); see PA 24a-25a.

While the panel acknowledged an exception where the state court in rejecting the claim had relied on a rule that comported with the federal Constitution, it said that the state court of appeal's adjudication of

the Penal Code 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[.]" PA 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 that statute was constitutional as applied. PA 28a. Thus, the deferential § 2254(d) standard was inapplicable. PA 28a.

Next, conducting *de novo* review of Williams's federal claim, the Ninth Circuit panel 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." PA 31a-32a. "[I]n deciding whether to discharge a juror mid-deliberation," the panel explained, "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." PA 34a.

Here, the Ninth Circuit panel found that the trial court's dismissal of Juror No. 6 failed to satisfy those alleged constitutional criteria. PA 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.'" PA 39a (quoting *United States* v. *Symington*, 195 F.3d at 1087); see PA 34a-41a. The panel equated a Sixth Amendment violation with satisfying the *Symington* test—indeed, it referred to the Sixth Amendment violation as the "*Symington* violation." PA 42a.

Second, as a basis for relief "independent" from the so-called "*Symington* violation," the panel determined that the trial court lacked "'good cause' for removing the known holdout juror. . . ." PA 41a-42a. Specifically, it rejected the trial judge's finding of bias—the "good cause" for discharging the juror—by rejecting the "reasons" or "bases" the trial judge had given for that finding. PA 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." PA 44a. The panel 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." PA 45a-46a. The panel 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. . . ." PA 48a (original emphasis omitted). Finally, the panel

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 "this [was] not a case in which a credibility determination was based on intangible factors, such as demeanor. . . ." PA 50a-51a. The panel therefore concluded that the removal of Juror No. 6 "deprived Williams of her right to a fair trial by jury." PA 52a.

3. The State sought rehearing and rehearing 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 declined to rehear the case. PA 119a.

SUMMARY OF ARGUMENT

To "adjudicate" a claim so as to trigger deferential § 2254(d) review in later federal habeas corpus proceedings, a state court is not required to expressly discuss the federal-law basis of the claim. Rather, when the state court has addressed the alleged error, it has adjudicated the claim. That adjudication is on the merits absent a plain statement to the contrary.

This interpretation is correct for several reasons. It appreciates that state courts do not ignore federal constitutional arguments presented to them when

the validity of the argument might determine the result. State courts have a duty to enforce the federal Constitution and they are presumed to perform their duties. As this Court has repeatedly recognized—and as Congress recognized in AEDPA—the state courts are trusted to take that duty seriously. Indeed, state substantive law often necessarily reflects federal constitutional principles. Accordingly, where the state court's opinion actually grapples with the substance of the alleged error—as it did in this case—it confirms that the state court adjudicated the entirety of the claim, irrespective of the various state-law and federal-constitutional arguments presented.

This realistic approach toward state courts also reflects state courts' opinion-writing practices. Because states such as California permit their state courts to summarize the issues in their decisions, § 2254(d)'s application should not require state courts to separately identify each contention or argument to ensure later deference on federal habeas review. Indeed, permitting state courts to summarize or generalize their description of the issues in a case makes sense because state courts decide *both* state-law and federal-constitutional questions, whereas federal habeas courts reviewing state-court convictions decide *only* federal-constitutional questions. And, given that this Court and the lower federal courts view their own silence as to presented arguments as an implicit rejection of them, federal-state comity counsels that the state courts' opinions be afforded the same treatment.

The State's interpretation—that a state court adjudicates a claim on the merits when it discusses the alleged error on substantive grounds in denying relief—is in harmony with this Court's precedents, which take a realistically broad view of what qualifies as an adjudication on the merits. This Court's "plain statement" cases authorize a conclusive presumption where the most reasonable explanation for a state-court ruling is that the state court decided the case the way it did because federal law required it to do so. In such situations, a federal court must conclude that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary.

The Ninth Circuit's contrary rationale—built upon a presumption of error by the state courts—is unrealistic and disrespectful of state courts. It engaged in an improbable and untoward assumption, based merely on a slight negative inference, that the state court failed to comply with its duty to address a potentially determinative federal claim for relief. Further, the Ninth Circuit's view inappropriately would require state courts to employ particular language to ensure that federal habeas courts will accord their rulings the deference required by § 2254(d). The comity principle reflected in AEDPA, however, militates against any obligation to use such "magic words." Finally, the Ninth Circuit's approach amounted to a "do-it-yourself" circumvention of § 2254(d) deference. A federal habeas court would have been forbidden, by the § 2254(d) deference rule, to rely on only its own

circuit-centric view of the law to grant relief on a habeas corpus claim adjudicated on the merits in state court. Here, however, the Ninth Circuit panel resorted, under the guise of deciding the triggering "adjudication" question, to that same view of its own law to short-circuit § 2254(d) deferential review at the threshold.

The circumstances of this case confirm the wisdom of treating state-court decisions as merits-adjudications of fairly-presented federal claims where the state court addresses the substance of the claimed error and denies relief. Given the integrated manner in which Williams presented her state-law and federal-constitutional arguments regarding the juror's removal, it was natural for the state appellate court to treat the arguments as a single, integrated juror-removal claim. The state court reasonably could have concluded that the "ultimate question for disposition" posed by both arguments was the same—namely, whether the juror was impartial. Also, the state court relied on California substantive law that had its foundation in federal constitutional principles. Further, the state court used general encompassing language in describing and rejecting the claim. And, in any event, the state court later expressly indicated that it earlier had rejected Williams's federal claim in the original appeal.

Because the California Court of Appeal's opinion came to grips with the substance of the claimed erroneous removal of the juror, it adjudicated the entirety of Williams's juror-removal claim on the

merits. Federal habeas review should have been conducted under the highly-deferential standard of § 2254(d).

ARGUMENT

To Adjudicate a Claim on the Merits for Purposes of § 2254(d), a State Court Does Not Need to Expressly Identify the Federal-Law Basis or Nature of the Claim

Where a claim has been "adjudicated on the merits" by a state court, the petitioner must surpass the "'difficult'" and "'highly deferential'" review standard of § 2254(d). *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1398 (2011); *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010). The question in this case is whether a claim has been "adjudicated on the merits" where the state court issues an explained decision, but does not expressly acknowledge the federal-law nature of the claim.

The answer is yes—at least where the state court addressed the alleged error on substantive grounds in denying relief. It does not matter whether the state court expressly acknowledges or discusses the federal-law basis or nature of the claim.

A. When the state court has addressed the alleged error on substantive grounds, it has adjudicated the entire claim "on the merits" under § 2254(d) absent a plain statement to the contrary

1. In determining whether a state court has adjudicated the merits of a state prisoner's federal claim—or instead has stopped short of it—federal habeas courts must be mindful of the state courts' duty to enforce the federal Constitution. As this Court has reiterated, "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause[.]" *Printz* v. *United States*, 521 U.S. 898, 928-29 (1997); see *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999) ("State courts, like federal courts, are obliged to enforce federal law."); *Arizona* v. *Evans*, 514 U.S. 1, 8 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution."). Indeed, "[t]his Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood* v. *Drown*, 129 S. Ct. 2108, 2114 (2009). Accordingly, when a state court is considering the substance of a claim alleging a federal constitutional violation, a state court is duty-bound to adjudicate the federal question before it may deny relief.

Likewise, California has long recognized that "[t]he supremacy clause of the federal Constitution precludes a state court from arbitrarily refusing to consider 'federal questions' of law." *In re Panchot*, 70

Cal. 2d 105, 107 n.4, 448 P.2d 385 (1968); *Gerry of California* v. *Superior Court*, 32 Cal. 2d 119, 122, 194 P.2d 689 (1949) (concluding that the state courts' "concurrent jurisdiction with the federal courts to enforce federal law . . . creates the duty to exercise it"). Accordingly, in California, if a defendant raises both state-law and federal-constitutional arguments on appeal and there is no state-law error upon which to grant relief, then the state court must resolve the federal question. See, *e.g.*, *People* v. *Cowan*, 50 Cal. 4th 401, 455, 236 P.3d 1074 (2010) ("Because defendant is not entitled to relief on his claimed statutory violation, we turn to his federal constitutional claim."), cert. denied, 131 S. Ct. 1784 (2011); *People* v. *Brown*, 31 Cal. 4th 518, 534-39, 73 P.2d 1137 (2003) (where defendant raised both statutory and constitutional arguments, the California Supreme Court addressed the statutory arguments first and, "[t]here being no statutory basis to find the trial court erred," it then "turn[ed] to defendant's constitutional arguments"); see also *Loder* v. *City of Glendale*, 14 Cal. 4th 846, 865, 927 P.2d 1200 (1997) ("Having found that plaintiff's sole statutory challenge to the city's drug testing program is without merit, we turn to plaintiff's constitutional contentions.").

This duty to decide federal constitutional issues is all the more apparent in the context of challenges made by state prisoners. State courts, which "handle the vast bulk of all criminal litigation in this country," "are required to apply federal constitutional standards" to federal issues presented by state criminal

defendants. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1995). Moreover, the AEDPA reforms of the federal habeas statute were designed to give primacy to the states in adjudicating such claims. *Pinholster*, 131 S. Ct. at 1398-99; *Richter*, 131 S. Ct. at 787; see also *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982). The conclusion that a state court decided, rather than ignored, a federal issue presented to it is also supported by the "presumption of regularity"—i.e., "in the absence of *clear evidence* to the contrary," public officers are presumed to "have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (emphasis added); accord *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); see also Cal. Evid. Code § 664; cf. *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997) ("presumption of regularity" applied to a state court judge, and rebutted by affirmative evidence).

2. The presumption that state courts carry out their constitutional obligations is corroborated in instances, such as this case, where the state court opinion denying relief actually discussed the substance of the asserted trial error. "[A]n issue may be considered to be adjudicated on the merits 'even when the state court does not specifically mention the claim but uses general language referable to the merits.'" *Eze* v. *Senkowski*, 321 F.3d 110, 122 (2d Cir. 2003) (quoting *Norde* v. *Keane*, 294 F.3d 401, 410 (2d Cir. 2002)). This Court has recognized that "[o]bviously there are instances in which 'the ultimate question

for disposition,' will be the same despite variations in the legal theory or factual allegations urged in its support." *Picard* v. *Connor*, 404 U.S. 270, 277 (1971) (internal citation omitted). Accordingly, when a state court resolves the alleged error—*e.g.*, a juror was improperly removed, inadmissible evidence was allowed at trial, the prosecutor committed misconduct—on substantive grounds, the state court has adjudicated the claim on the merits, even if claim implicated various state-law and federal-constitutional theories.

For example, in *Childers* v. *Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), petition for cert. filed, 80 U.S.L.W. 3055 (U.S. Jul. 6, 2011) (No. 11-42), the Eleventh Circuit explained that "[d]eference to the autonomy and dignity of the state courts underlies [a] broad definition" of "adjudication on the merits." *Id*. at 968. It thus held that "an 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar." *Id*. Accordingly, "unless the state court clearly states that its decision was based solely on a state procedural rule, we will presume that the state court has rendered an adjudication on the merits when the petitioner's claim 'is the same claim rejected' by the state court." *Id*. at 969 (quoting *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam)).

3. Another reason to treat a state court's denial of relief as an "adjudication on the merits" where the defendant raises related federal- and state-law theories for relief is that substantive state law often reflects constitutional principles. Sometimes "state

opinions purporting to apply state constitutional law will derive principles by reference to federal constitutional decisions from this Court." *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991). Explicit reliance on state law often necessarily reflects consideration of federal law.

4. Williams might argue that, to qualify for deference under § 2254(d), an explained state-court decision must address the specific federal-constitutional arguments she raised in that court. But that would not be a sufficient reason to depart from the rule advocated by the State.

As this Court has previously explained in reference to its own opinions, specific arguments presented to a court in support of a claim are "implicitly rejected" when the court "refus[es] to address them." *Clemons* v. *Mississippi*, 494 U.S. 738, 747 n.3 (1990) ("We note also that although *Hicks* and a due process rationale were argued by the respondent in *Zant* v. *Stephens*, 462 U.S. 862 . . . (1983), . . . , and by the dissenters in *Barclay* v. *Florida*, 463 U.S. 939, 985-986 . . . (1983), the Court implicitly rejected those arguments in both cases by refusing to address them."); see *Castille* v. *Peoples*, 489 U.S. 346, 351 (1989) ("the claim has been presented as of right but ignored (and therefore impliedly rejected)"). Federal appellate courts adhere to the same rule: when federal courts reject a claim without addressing specific legal arguments in support of it, they implicitly reject those arguments. See, *e.g.*, *Stewart* v. *Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002) (construing the district

court's silence on the issue of Eleventh Amendment immunity as an implicit denial of the defendant state's claim to immunity); *Savage* v. *Hadlock*, 296 F.2d 417, 419 (D.C. Cir. 1961) (concluding that the district court's ruling in favor of the plaintiff constituted an "implicit rejection" of the defendant's argument where the defendant actually raised the argument before the court and "[t]he issue was clearly presented and all the relevant papers were before that court"). And the Ninth Circuit previously has recognized that, given a state court's "conscious[ness] of its duty to respect the dictates of [the federal Constitution]," a state court's "decision not to address [a federal] constitutional issue . . . was an implicit rejection of any error." *Comer* v. *Schriro*, 480 F.3d 960, 983 (9th Cir. 2007) (en banc). Comity counsels treating state-court opinions the same way. See *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976).

5. This realistic approach toward state courts—reflecting appreciation of the fact that they do not ignore federal constitutional arguments in denying relief to criminal defendants—also best reflects the state courts' opinion-writing practices. For example, the California Constitution generally requires state appellate courts to issue written decisions "with reasons stated." Cal. Const. art. VI, § 14; see *People* v. *Kelly*, 40 Cal. 4th 106, 116-17, 146 P.2d 547 (2006). But California does not require its courts to expressly identify each contention raised. Rather, it permits courts to summarily describe them and the reasons they fail. *Kelly*, 40 Cal. 4th at 121; see *id*. at 122.

A citation alone may be used to "identify[ ] the reason a contention raises no arguable issue. . . ." *Id*. at 121 n.4. Moreover, "'[t]he author of an opinion . . . must follow his [or her] own judgment as to the degree of elaboration to be accorded to the treatment of any proposition and *as to the questions which are worthy of notice at all*.'" *Lewis* v. *Superior Court*, 19 Cal. 4th 1232, 1262, 970 P.2d 872 (1999) (ellipsis and brackets in *Lewis*; emphasis added; internal quotation marks omitted). And, California's state constitutional requirement "does not compel the court to discuss all its reasons for rejecting the various arguments of counsel." *Id*. at 1264. Accordingly, because California permits its state courts to summarize the contentions made and leaves the degree of elaboration up to the opinion-writer, § 2254(d) should not require California state courts to separately identify each contention or argument to ensure later application of § 2254(d) deference to their explained decisions.

Nor is there good reason to expect state courts to delineate federal and state claims separately. In sharp contrast to federal habeas courts, see § 2254(a), California courts decide *both* state-law and federal-constitutional questions. In the federal habeas context, it is therefore unsurprising that this Court has defined "claim" in special ways. In the successive-petition context, a claim is "an asserted federal basis for relief from a state court judgment." *Gonzalez* v. *Crosby*, 545 U.S. 524, 530 (2005). In the "exhaustion" context, a claim comprises "reference to a specific federal constitutional guarantee, as well as a statement

of the facts that entitle the petitioner to relief." *Gray* v. *Netherland*, 518 U.S. 152, 162-63 (1996); see *Picard* v. *Connor*, 404 U.S. at 277-78. This standard corresponds with a federal habeas petitioner's "demanding" pleading requirements. See *Mayle* v. *Felix*, 545 U.S. 644, 655 (2005).

But, a federal habeas court's rigid conception of "claim"—necessitated by its limited jurisdiction and the exhaustion requirement—is an ill-fitting construct for state courts, which decide both state-law and federal-law issues and often decide related ones together. No jurisdictional requirements or exhaustion concerns compel a state court to formally separate a claim into a "state-law claim" and a "federal-law claim." Drawing these technical distinctions would be an artificial construction for a state court.

Rather, "claim" should be interpreted "in a commonsense way to mean a right or demand." *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1729 (2011). A single "claim" in state court may consist of a factual predicate with one or more legal theories or arguments. See, *e.g.*, *People* v. *Brown*, 31 Cal. 4th at 534 (noting that the appellant "raises both [federal] constitutional and [state-law] statutory arguments against the admission of [the witness's] testimony," but addressing them under a single "discussion" subheading). And, "different legal theories . . . do not multiply the number of claims for relief." *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992). Thus, while a federal habeas court might subsequently conclude that a

"state-law claim" exists separately from a "federal-law claim," a state court need not have viewed it that way.

B. The State's interpretation fits comfortably within this Court's "adjudication" and "plain statement" precedents

The conclusion that the state court adjudicated the merits of Williams's entire juror-removal claim—when it denied relief based on its rejection of the contention that the removal of the juror was improper—fits comfortably within this Court's closely-related precedents. *Early* v. *Packer* and *Harrington* v. *Richter* embrace a similar view of whether a state court adjudicated a claim on the merits. And, *Michigan* v. *Long*—applicable to habeas corpus cases under *Harris* v. *Reed*, 489 U.S. 255, 263 (1989)—sets out a similar approach of presuming a decision on the merits of the federal claim in the absence of a plain statement to the contrary.

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 petitioner later pursued in federal court, even though the state court analyzed the error only by reference to analogous state law and without citing federal cases. *Packer*, 537 U.S. at 7-8. There, when rejecting the defendant's claim that the trial judge's comments to a lone hold-out juror and to the jury "were coercive and denied him his due process right to a fair and impartial jury[,]" the California Court of Appeal applied a

state-court precedent, *People* v. *Gainer*, 19 Cal. 3d 835, 852, 566 P.2d 997 (1977), on coercive comments that threaten a criminal defendant's right under the California Constitution to a unanimous jury. *Packer*, 537 U.S. at 6-7; see *Gainer*, 19 Cal. 3d at 848-49. The state appellate court concluded, under *Gainer*, that comments made or not made by the trial judge "'did not coerce a particular verdict or deny [the defendant] any constitutional rights.'" *Packer*, 537 U.S. at 7. On federal habeas review, the Ninth Circuit granted relief upon finding that the state appellate court's decision was "contrary to established federal law for two, and possibly three, reasons." *Id*. at 8.

This Court reversed the Ninth Circuit. As a preliminary matter, this Court observed that "[t]he jury-coercion claim in [the defendant's] habeas petition is the same claim rejected on the merits in his direct appeal to the state appellate court, and the Ninth Circuit correctly recognized that § 2254(d) was therefore applicable." *Packer*, 537 U.S. at 8. This Court then held that a state court's decision is not "contrary to" clearly established federal law under § 2254(d)(1) just because the state court failed to cite this Court's cases, reasoning that the subsection "does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id*.

Thus, *Packer* teaches that there is an "adjudication on the merits" under § 2254(d) when the state court resolves the same claim the petitioner later pursues in federal court, even if the state court's analysis

is confined to state law. Since deference under § 2254(d)(1) does not hinge on whether a state court is aware of federal law, the threshold "adjudication" determination does not turn on whether a state court referred to federal law.

Other federal circuits agree. Relying on *Packer*, they have afforded § 2254(d) deference even where, as here, the state court analyzed the presented claim solely under state law. See, *e.g.*, *Childers*, 642 F.3d at 968-69; *Cox* v. *Burger*, 398 F.3d 1025, 1029-30 (8th Cir. 2005) (rejecting the petitioner's argument that the state court had "failed to directly address the constitutional implications of his Confrontation Clause claim and thus did not adjudicate it on the merits"; explaining that, in light of *Packer*, the "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"; and finding that the state court had "effectively adjudicated [the] Confrontation Clause claim on the merits through its analysis of [state law]"); *Hill* v. *Ozmint*, 339 F.3d 187, 195-96 (4th Cir. 2003) (concluding that the state court had adjudicated a defendant's Sixth Amendment claim on the merits when it had "referenced only state law in resolving the claim"; AEDPA's deferential standard of review applied because "the state court, in rejecting [the defendant's] claim, adjudicated it on the merits, regardless of whether it referenced relevant federal law"); *Cook* v. *McKune*, 323 F.3d 825, 830-31 (10th Cir. 2003) (in light of *Packer*, concluding that

the state court had adjudicated a defendant's Sixth Amendment claim on the merits when it had analyzed it under state law rather than discussing the Confrontation Clause precedents and thus concluding § 2254(d)(1) applied).

More recently, this Court held in *Richter* that a state court's summary denial—an order denying a state habeas petition without a statement of reasons—is an adjudication on the merits for purposes of § 2254(d). *Richter*, 131 S. Ct. at 785 ("[Section] 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"). This is because "[t]here is no text in the statute requiring a statement of reasons. The statute refers only to a 'decision,' which resulted from an 'adjudication.'" *Id*. at 784. The plain language of § 2254(d), therefore, focuses on the result—a judicial ruling on the claim.

Moreover, in deciding "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied[,]" this Court in *Richter* set forth a presumption of a merits-adjudication, stating:

> When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Cf. *Harris* v. *Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (presumption of a merits

> determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis). [¶] The presumption may be overcome when there is reason to think some other explanation is more likely. See, *e.g.*, *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

Richter, 131 S.Ct. at 784-85. This presumption illustrates the broad view that this Court has taken of the phrase "adjudication on the merits."

And, both before and after *Richter*, federal circuit courts have agreed that "[a]n 'adjudication on the merits' is best defined as any state court decision that does not rest solely on a state procedural bar." *Childers*, 642 F.3d at 968 (explaining that, in *Richter*, 131 S. Ct. at 784-85, "the Supreme Court essentially defined the term as such"); *Thomas* v. *Horn*, 570 F.3d 105, 117 (3d Cir. 2009) ("[F]or the purposes of Section 2254(d), a claim has been 'adjudicated on the merits in State court proceedings' when a state court has made a decision that finally resolves the claim based on its substance, not on a procedural, or other, ground."); *Sellan* v. *Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (a merits adjudication for AEDPA purposes requires only that a federal claim be raised and then disposed of on substantive, rather than procedural, grounds).

This Court's recent *Packer* and *Richter* opinions thus embrace the proposition that § 2254(d) deference applies even when a state court's explained decision

does not acknowledge this Court's precedents (*Packer*) and even when the state court issues an unexplained summary denial of the petitioner's claim (*Richter*). Those precedents harmonize with the interpretation proposed here: "adjudication on the merits" under § 2254(d) does not require a state court to explicitly discuss the federal Constitution; rather, when a state court rules that no error occurred, it has adjudicated on the merits a federal claim predicated on the allegation of the same error.

2. This Court's "plain statement" cases—*Long*, *Harris*, and *Coleman*—further support the State's argument. Beginning with the appellate decision in *Long*, which was extended to habeas cases in *Harris*, this Court has held that, when faced with ambiguous state court decisions, a federal court must presume that a state court decided a case on federal-law grounds unless a state court makes a plain statement to the contrary. *Harris*, 489 U.S. at 261-63; *Long*, 463 U.S. at 1038-41. This Court adopted this conclusive presumption because the "most reasonable explanation" in such cases is that "the state court decided the case the way it did because it believed that federal law required it to do so." *Long*, 463 U.S. at 1040-41.

Coleman, it is true, rejected a broader rule that would have applied the *Long/Harris* presumption in all cases in which a habeas petitioner simply presented his federal claims to the state court. *Coleman*, 501 U.S. at 735-40. Such a view, this Court explained,

did not comply with the "'most reasonable explanation'" for the state court's decision. *Id*. at 737-38.

Here, however, the State's approach is supported not just by the fact that Williams's claim was fairly presented and rejected, but on the confidence-inspiring fact that the state court opinion explicitly came to grips with the error—here, the propriety of removing Juror No. 6—that Williams alleged in her state-court pleadings.

C. The Ninth Circuit's contrary approach is unrealistic and disrespectful of co-equal state courts

The Ninth Circuit's contrary approach—in essence, that any presumption of merits adjudication is overcome if the state court's otherwise explained decision does not mention the specific federal theory urged by the petitioner—cannot be countenanced because it is unrealistic and undermines the principle of comity that guides application of AEDPA.

1. The Ninth Circuit purported to use the *Richter* presumption to overturn a merits adjudication here. PA 23a-25a. But following *Richter*, this Court requires deference under § 2254(d) even where the state courts said nothing at all. Accordingly, in a case like this where the state court issued an explained opinion that explicitly dealt with the substance of the claim, the guiding principles of *Richter* direct that the state-court decision is entitled to no less deference. No mere inference should suffice to permit such a view of the state-court decision. Here, the panel

believed that the sufficient "indication" to overcome the presumption of a merits adjudication was the state court's alleged silence on the Sixth Amendment issue. PA 23a-24a. But it makes little sense to give such determinative effect to a mere negative inference, i.e., that the absence of an explicit discussion of a federal constitutional issue conclusively demonstrates that the state court failed to adjudicate it. As explained above, see Arg. (A), *ante*, the most reasonable reading of an explained decision that actually confronts and discusses the error alleged by the petitioner is that the state court adjudicated the petitioner's demand for relief and rejected it on its merits.

The inadequacy of the negative inference the Ninth Circuit treated as a determinative "indication" is made clear when it is contrasted with this Court's view of what would amount to such a sufficient "indication." In this Court's jurisprudence, "indication" means a "plain statement." In explaining when the merits-adjudication presumption is overcome, *Richter* cited *Harris* v. *Reed*, a "plain statement" case, on the "indication" question. See *Richter*, 131 S. Ct. at 784-85 (citing *Harris*, 489 U.S. at 265). On the cited page of *Harris*, this Court made two points: (1) the doctrine of an independent and adequate state law ground has been extended to federal habeas; and (2) the "plain statement" rule is used to determine whether the state court judgment rested on an independent and adequate state law ground. *Harris*, 489 U.S. at 265. Given this reliance on *Harris*, the term "indication"

as used in *Richter* should be read as meaning a "plain statement." See, *e.g.*, *Brown* v. *Bobby*, 656 F.3d 325, 329 (6th Cir. 2011) (applying the *Richter* presumption and concluding that "the mere fact that the Ohio Court of Appeals did not specifically explain it was ruling on [the defendant's] Sixth Amendment claim does not prevent this court from deferring to that court's opinion on habeas review"), petition for cert. filed, 80 U.S.L.W. 3428 (Dec. 28, 2011) (No. 11-807).

Moreover, given that state courts are presumed to know that they must enforce the federal Constitution, a negative inference from a state court's alleged silence as to the federal issue should not be accepted as sufficient to rebut the presumption of a merits adjudication. See also *Garrett* v. *United States*, 471 U.S. 773, 793 (1985) (legislative silence does not rebut presumption permitting cumulative sentences where Congress creates two distinct offenses); *Albernaz* v. *United States*, 450 U.S. 333, 341-42 (1981) ("[I]f anything is to be assumed from the congressional silence . . . , it is that Congress was aware of the . . . rule and legislated with it in mind.")

To be sure, this Court sometimes has drawn a negative inference from silence. See, *e.g.*, *Lindh* v. *Murphy*, 521 U.S. 320, 329 (1997) (drawing a negative inference from one AEDPA provision's explicit reference to pending cases to conclude that a second AEDPA provision did not apply to pending cases). But, as Justice Scalia, joined by Justices Thomas and Alito, later explained: "The negative inference of *Lindh* rested on the fact that '*[n]othing* . . . but a different

intent explain[ed] the different treatment.'" *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 662 (2006) (Scalia, J., dissenting) (emphasis added; brackets and ellipsis in *Hamdan*) (citing *Lindh*, 521 U.S. at 329). Here, by contrast, there are compelling reasons to conclude that the state court adjudicated the federal issue on the merits. As discussed above, it is presumed that state courts know the law and performed their duty. And that conclusion is confirmed by the fact that the state court opinion addressed the *substance* of the federal issue, i.e., the propriety of the juror's removal, on its merits.

2. The Ninth Circuit's view would also inappropriately require state courts to employ particular language to ensure that federal habeas courts will accord their rulings the deference required by § 2254(d). But the comity principle reflected in AEDPA militates against any obligation to use such "magic words." As this Court has explained, federal courts "have no power to tell state courts how they must write their opinions." *Coleman*, 501 U.S. at 739. This Court "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case." *Id*.

Requiring the state courts to employ particular language to trigger AEDPA deference impermissibly interferes with the state opinion-writing practices

that properly "are influenced by considerations other than avoiding scrutiny by collateral attack in federal courts." *Richter*, 131 S. Ct. at 784. For example, in California, the degree of elaboration required "is not subject to measurement by objective criteria," but rather is a "subjective determination." *Lewis* v. *Superior Court*, 19 Cal. 4th at 1262. Requiring inclusion of certain "magic words" would conflict with California's approach. Telling state courts how to write their opinions in order to avoid scrutiny by collateral attack in federal courts undermines comity and "smacks of a 'grading papers' approach that is outmoded in the post-AEDPA era." *Wright* v. *Secretary for Dept. of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). Federal habeas corpus is "not a license to penalize a state court for its opinion-writing technique." *Lafler* v. *Cooper*, No. 10-209, 2012 WL 932019, *17 (U.S. Mar. 21, 2012) (Scalia, J., dissenting).

3. The Ninth Circuit's rule, moreover, is built upon an unlikely and untoward circumstantial inference—that the state appellate courts just overlooked or disregarded the federal claim. See PA 24a-25a & 25a n.11. But, it ill-behooves comity for a federal court, through the use of a negative inference, to ascribe to the state court negligence in derogation of its duty to enforce federal law. This readiness to attribute error to the state courts is "inconsistent with the presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (internal citations omitted); accord *Lafler* v. *Cooper*, 2012 WL 932019 at *17

(Scalia, J., dissenting); see also *Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976) (dismissing "policy arguments" that "stem[med] from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights").

The cases upon which the Ninth Circuit relied to find that a state court failed to pass upon the federal constitutional argument, see PA 27a-28a, suffer from the same flaws. In *Canaan* v. *McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005), where the federal circuit court found no adjudication on the merits where the petitioner had argued that his trial counsel was ineffective for failing to call a witness and failing to discuss that decision with him, and the state court "never addressed" the failure-to-consult "argument." But *Canaan* cannot be reconciled with this Court's precedent, discussed at pages 29-30, *ante*, that a court's refusal to discuss an argument means that it rejected it. The same is true of *Weeks* v. *Angelone*, 176 F.3d 249, 262-63 (4th Cir. 1999). Additionally, because "adjudication on the merits" does not require a state court to discuss the federal Constitution, the Sixth Circuit's decision in *Lyell* v. *Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006)—applying *de novo* review where a 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"—cannot stand. Finally, the Ninth Circuit analogized the instant case to *Hameen* v. *Delaware*, 212 F.3d 226, 246-48 (3d Cir. 2000), a pre-*Packer* case concluding that *de novo* review

applied because, even though the state court relied on a Supreme Court precedent, it had read the case "too broadly." But, *Hameen* assumed that a state court's consideration of "controlling Supreme Court decisions" was necessary for an "adjudication on the merits," *id*. at 248, and thus cannot survive this Court's rejection of that view in *Packer*.

In any event, a state-court remedy already exists to forestall the possibility that a claim can simply be ignored: a petition for rehearing. California has long held that "[p]etitions for rehearing are permitted . . . to direct the attention of the court to matters presented at the argument which may have been overlooked in the decision." *San Francisco* v. *Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891) (per curiam); see also Cal. Ct. R. 8.500(c)(2) (party petitioning for review should have "called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing"). Other states similarly provide this remedy for alleged omissions. See, *e.g.*, Ill. S. Ct. R. 367(a) (rehearing petition "shall state briefly the points claimed to have been overlooked or misapprehended by the court"); *Sheehan Const. Co., Inc.* v. *Continental Cas. Co.*, 938 N.E.2d 685, 687 n.1 (Ind. 2010) ("'A petition for rehearing is a vehicle that affords the reviewing court the opportunity to correct its own omission or errors.'"); *Kennedy* v. *South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) ("In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.");

Marriott Int'l, Inc. v. *Perez-Melendez*, 855 So.2d 624, 632 (Fla. App. 2003) (permitting "motion for rehearing to bring to the court's attention a point of law or fact that the court has overlooked or misapprehended"). In light of this broadly-available remedy, there is even less reason for a federal court to merely assume that a state court has overlooked a federal claim.

Tellingly, Williams never argued that the California Court of Appeal failed to adjudicate any part of her juror-removal claim. She never complained in state court that, either by petition for rehearing or in her petition for review, the California Court of Appeal had failed to adjudicate her Sixth Amendment argument. Likewise, nowhere in federal court, either in her petition or in her Ninth Circuit briefing, did she make that complaint. Instead, in her Ninth Circuit briefing, she explicitly stated that "[t]he California Court of Appeal rejected [her] claims" and acknowledged that § 2254(d) controlled the disposition of the case. AOB 28-29.

Indulging in facile inferences that a state court has ignored a federal claim would lead to "deleterious substantive consequences" at odds with the spirit of AEDPA. See *Sellan* v. *Kuhlman*, 261 F.3d at 313-14.

> [It] could encourage state prisoners to press their federal claims in state court in an essentially cursory manner—just enough to exhaust state remedies and to avoid default or waiver, but not too strongly—with the hope that the state court will not 'refer to' or engage in any lengthy discussion of their

> federal claims, thus entitling the prisoner to *de novo* consideration of these claims on federal habeas review.

Id. This segregation of claims—state claims to state courts, and federal claims to federal habeas courts—would "be at odds with the animating spirit of AEDPA which respects the state court's adjudication of *all* claims." *Id*. at 314 (original emphasis).

4. The Ninth Circuit's approach also should be condemned as a "do-it-yourself" circumvention of § 2254(d) deference. Here, the Ninth Circuit inferred that there had been no adjudication of Williams's "constitutional claim" because the California precedent the state appellate court had relied on, *Cleveland*, has "expressly rejected the juror-discharge standard adopted by the Second, Ninth, and D.C. Circuits." PA 26a (original emphasis omitted). But the Ninth Circuit would have been forbidden by the § 2254(d) deference rule from relying only on the peculiarities of the law to grant relief on a habeas corpus claim adjudicated on the merits in state court. *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006); *Williams (Terry)* v. *Taylor*, 529 U.S. 362, 412 (2000). Likewise, the panel here must not be allowed, under the guise of deciding the triggering "adjudication" question, to resort to that same view of its own law to short-circuit § 2254(d) deferential review at the threshold.

D. The particular circumstances of this case validate the State's approach

The underlying features of Williams's case confirm the wisdom of a per se rule recognizing an adjudication on the merits of a federal claim under § 2254(d) whenever the state court denied relief to the prisoner and its opinion addressed the error or malfunction about which the prisoner complained. Here, there can be no dispute that the California Court of Appeal resolved the question of the alleged erroneous removal of the juror on substantive grounds. The court examined whether the record supported the trial court's determination that Juror No. 6 was biased, PA 97a-103a, concluded that it did, PA 104a-05a, and denied relief for that reason.

Treating Williams's complaint that way was natural. On direct appeal, Williams did not separate her Sixth Amendment argument from her state-law argument. Rather, under a single argument heading—which under California law signals one claim, Cal. Ct. R. 8.204(a)(1)(B) ("[s]tate each point under a separate heading or subheading")—she presented one integrated juror-removal claim, alleging that her state and federal rights had been violated. JA 25-67. Moreover, her federal-constitutional argument was intertwined with, and dependent upon, her state-law argument: she argued that "[t]he [trial] court clearly abused its discretion in discharging Juror No. 6 and [Williams] was *thereby* denied her Sixth Amendment right to a unanimous jury." JA 67 (emphasis added); see JA 27-29; JA 108; see also JA 121 (arguing Juror

No. 6 did not commit misconduct under *Cleveland*, and thus Williams "was *accordingly* denied her Sixth Amendment right to a unanimous jury when Juror No. 6 was discharged" (emphasis added)). Given this integrated construction, the California Court of Appeal would have had no reason to separate it into two distinct claims. Instead, the state court appropriately described Williams's "claim" as "contend[ing] the trial court erred by discharging one of the jurors during deliberations." PA 97a.

This resolution of the asserted alleged error adjudicated both the state-law and federal-constitutional aspects of her single claim because the state court reasonably could have concluded that the "ultimate question for disposition" posed by the state-law component of the claim—whether "good cause" existed for removing the juror pursuant to California Penal Code section 1089—and by the Sixth Amendment question—whether section 1089 was unconstitutional as applied—was the same. See *Picard* v. *Connor*, 404 U.S. at 277. The ultimate question was whether the juror was improperly removed. And that turned on deciding whether the juror was biased, i.e., whether he lacked impartiality, because keeping a biased juror on the panel would have violated the requirement of an impartial jury. See, *e.g.*, *United States* v. *Wood*, 299 U.S. 123, 133 (1936) (the Sixth Amendment requires trial by an impartial jury, and "[a]ll persons otherwise qualified for jury service are subject to examination as to actual bias"); *Nesler*, 16 Cal. 4th at 578, 590 (presence of biased juror violated state and federal

constitutional requirements of an impartial jury, and the state constitutional guarantee of a unanimous jury). Thus, the state appellate court adjudicated the Sixth Amendment issue when, by concluding that the finding of bias justified the removal of the juror, it rejected on substantive grounds the allegation that the removal of the juror was improper.

c. In addition, the California Court of Appeal relied on California substantive law that had its foundation in federal constitutional principles. See *Coleman*, 501 U.S. at 732. When examining whether "the trial court erred in discharging [Juror No. 6] during deliberations[,]" PA 97a, the state appellate court considered what constitutes "actual bias" in terms of both state law and the federal Constitution. PA 104a. "'In assessing whether a juror is "impartial" for federal constitutional purposes,'" it quoted language from this Court's Sixth Amendment impartial-jury-right jurisprudence, explaining that impartiality is "'"a state of mind"'"—"'"a juror who has formed an opinion cannot be impartial[ ]"'" whereas "'[a]n impartial juror is someone capable and willing to decide the case solely on the evidence presented at trial.'" *Id*. (quoting *Nesler*, 16 Cal. 4th at 580-81, quoting in turn, *United States* v. *Wood*, 299 U.S. at 145-46, *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961), *Reynolds* v. *United States*, 98 U.S. 145, 155 (1878), and *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)). The California Court of Appeal did this as part of its explicit reliance on the California Supreme Court's opinion in *Nesler*, itself a case that had considered

whether a biased juror's presence on a jury panel had violated a state criminal defendant's state and federal constitutional "right to a trial by 12 impartial jurors." See *Nesler*, 16 Cal. 4th at 578, 580. The state appellate court explained that California law defines actual bias in terms of a juror's state of mind lacking "entire impartiality," and that a sitting juror's actual bias "renders the juror unable to perform his or her duties and thus subject to discharge." PA 104a (quoting *Nesler*, 16 Cal. 4th at 581) (internal quotation marks omitted).

"Actual bias" (i.e., a lack of entire impartiality) sufficient to subject a juror to discharge in California thus was derived from the Sixth Amendment protection of a trial by an impartial jury. The common "federal-rights backdrop" provides a further reason to conclude that the California Court of Appeal recognized and adjudicated the claimed federal-constitutional aspect of Williams's juror-removal claim. *Clements* v. *Clarke*, 592 F.3d 45, 53-55 (1st Cir.), cert. denied, 130 S. Ct. 3475 (2010) (state-court opinion addressed the fairly raised federal issue by its citation of a state 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 [] a fair trial by a panel of impartial, "indifferent" jurors'"). Absence of an express acknowledgement of the federal-law basis for a claim, therefore, is not determinative of whether the state court adjudicated the federal constitutional issue. As one circuit court has said:

"[J]udicial opacity is a far cry from judicial avoidance." See *Clements*, 592 F.3d at 55.

The California Court of Appeal's use of general language, broad enough to encompass both the state-law and federal-constitutional aspects of Williams's claim, also corroborates the conclusion that it adjudicated the entirety of her challenge to the juror's removal. Here, in conformity with state law, the California Court of Appeal's opinion framed the issue in general but accurate language: "Williams contends the trial court erred by discharging one of the jurors during deliberations." PA 97a. It also rejected the claim using general language, concluding: "This claim is meritless." *Id*. The court further explained, "The evidentiary hearing supported the trial court's finding of bias." PA 104a. The court of appeal did not limit the claim, or its rejection thereof, to state law. Rather, the state appellate court's language encompassed both state-law and federal-constitutional legal theories. See *Eze* v. *Senkowski*, 321 F.3d at 122.

Finally, the California Court of Appeal later expressly ruled that it had not overlooked the claim. Williams reiterated her juror-removal challenge in a habeas petition filed in the state appellate court, raising eight separately enumerated "arguments," JA 150-64, and specifically referring to the Sixth Amendment, JA 160. In denying habeas relief, the California Court of Appeal considered all of Williams's juror-removal arguments to be raising a single claim—"the *propriety* of the discharge of juror no. 6"—and ruled it had been "raised and rejected on

appeal[.]" PA 81a (emphasis added). That broadly-stated ruling "provides strong evidence that the claim has already been given *full* consideration by the state courts. . . ." See *Cone* v. *Bell*, 129 S. Ct. 1769, 1781 (2009) (emphasis added).

Under all these circumstances, the conclusion that the state court adjudicated the merits of the federal-component of the claim is the only reasonable one.

* * *

In sum, a state court is not required to expressly discuss the federal-law basis of the claim in order to "adjudicate" it "on the merits" for purposes of § 2254(d) review in later federal habeas corpus proceedings. Rather, when the state court has addressed the substance of the alleged error, it has adjudicated the claim. That adjudication is on the merits absent a plain statement to the contrary.

Here, the California Court of Appeal denied relief in an explained decision discussing the propriety of removing Juror No. 6. It therefore adjudicated the entirety of Williams juror-removal claim on the merits. The Ninth Circuit erred in failing to review that adjudication deferentially under § 2254(d). The California Court of Appeal adjudicated the entirety of Williams's juror-removal claim on the merits for purposes of § 2254(d) when it denied relief in an explained decision discussing the propriety of removing Juror No. 6.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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MARCH 28, 2012