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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Harrington v. Richter held that although a California court's unexplained collateral review order is presumptively a merits adjudication, a state rule, or, a more-likely explanation, rebuts that presumption. Here, on direct appeal, the State's brief ignored Ms. Williams' fairly presented Sixth Amendment juror-discharge claim, and the state appellate court followed suit, analyzing the issue exclusively under a state statute that provides less protection than the Sixth Amendment standard. Did the panel below correctly conclude Ms. Williams overcame *Richter*'s presumption?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF

Ms. Tara Sheneva Williams submits this brief to support affirming the Ninth Circuit's judgment.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."[1]

California Constitution Article I, § 16 provides: "Trial by jury is an inviolate right. . . . In criminal actions in which a felony is charged, the jury shall consist of 12 persons."[2]

California Constitution Article VI, § 14 provides: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."[3]

California Penal Code Section 1089 (Section 1089) provides:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to

[1] U.S. Const. amend. VI.

[2] Cal. Const. art. I, § 16.

[3] Cal. Const. art. VI, § 14.

> perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.[4]

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[5] provides in relevant 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 –
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> (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
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> (2) resulted in a decision that was based on an unreasonable determination

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[4] Cal. Penal Code § 1089 [hereinafter Section 1089].

[5] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, § 104 (1996).

of the facts in light of the evidence presented in the State court proceeding.[6]

STATEMENT OF THE CASE

One afternoon, Ms. Williams agreed to drive Carde Taylor and Schantel W. around so they could case stores for a potential robbery that was to take place 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 and Ms. Williams eventually admitted to being present and confirmed 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.[7]

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,

[6] 28 U.S.C. § 2254(d) (emphasis added).

[7] State's Appendix to Petition for Writ of Certiorari 6a [hereafter PA].

which resulted in a sentence of life imprisonment without the possibility of parole.[8]

But Ms. Williams was convicted only after the trial court dismissed a known holdout juror (Juror No. 6), and replaced him with an alternate.[9] That dismissal forms the basis for habeas relief.

After two days of deliberations, the jury foreperson delivered two notes to the trial court. The first note referenced California's anti-jury nullification instruction and indicated that one juror had expressed: (1) an intention to disregard the law; and (2) concern relative to the severity of the charge (1st degree murder).[10] The second note asked if it was permissible for a juror to interpret 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.[11]

The trial judge told the jurors that the answer to note number two was "no." After excusing all the jurors other than the foreperson, the trial judge questioned him about the first note. After confirming that no juror had expressed concern about punishment, the trial judge asked what the foreperson meant by the phrase "has expressed concern relative

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[8] PA 6a.

[9] PA 7a.

[10] PA 7a-8a.

[11] PA 8a.

to the severity of the charge." The foreperson responded that the juror in question "has probably ten or fifteen times in our conversations so far expressed that . . . *he does not believe that there's sufficient evidence*. . . ."[12]

During further questioning by the court, the foreperson indicated that the judge's answer to note number two "may be sufficient to resolve our concern at this time." But the judge, upon the State's motion, and over Ms. Williams' objection, halted jury deliberations and questioned the foreperson again the next day. The foreperson then described comments that Juror No. 6 made during deliberations about historical instances of jury nullification and about the "need for a higher standard" of proof given the severity of the first-degree murder charge.[13] The foreperson stated that Juror No. 6 had tried to explain "the basis for his reasonable doubt. . . ."[14]

The judge then questioned Juror No. 6, who confirmed that he was not engaging in jury nullification,[15] but admitted saying during deliberations that given the importance of the case (i.e., the severity of the murder charge) "we should be *very* convinced that if the defendant is found guilty that it is beyond a

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[12] PA 8a (emphasis added).

[13] PA 8a-9a.

[14] PA 9a-10a.

[15] PA 11a-12a.

reasonable doubt."[16] The court asked Juror No. 6 what the difference was between convinced beyond a reasonable doubt and "very" convinced. Juror No. 6 responded that they are the same thing: "[C]onvinced 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."[17]

The prosecutor asked the court to remove Juror No. 6, and the judge indicated that he was inclined to rule that the juror committed misconduct by applying a higher burden of proof than the law requires and by intentionally withholding information from the court about linking the severity of the charge with the burden of proof.[18] But to develop a "fuller record," the court questioned all remaining ten jurors about Juror No. 6.[19]

After questioning all the jurors, the trial court dismissed Juror No. 6 under Section 1089. The trial court dismissed Juror No. 6 "not because he's not deliberating and not because he's not following the law," but because he was "biased" because "his mind is bent . . . against the prosecution."[20]

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[16] PA 11a (emphasis added).

[17] PA 11a (emphasis added).

[18] PA 12a.

[19] PA 12a-13a.

[20] PA 13a, 42a n.18.

The following day, the alternate juror that replaced Juror No. 6 voted with the majority in returning a guilty verdict.[21]

Ms. Williams appealed, claiming that the trial court had abused its discretion in applying Section 1089, and also violated her Sixth Amendment rights, by dismissing Juror No. 6.[22]

Her direct appeal opening brief challenged the trial court's decision to exclude holdout Juror No. 6.[23] That brief stated that replacing Juror No. 6 during deliberations violated her "Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed."[24] That brief also cited, and discussed, three federal appellate cases that define the Sixth Amendment standard designed to protect the jury-trial right by minimizing invasive questioning of deliberating jurors and by prohibiting dismissing jurors based on their views on the merits of the case: (1) *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987); (2) *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); and (3) *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999).[25]

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[21] PA 14a.

[22] PA 14a.

[23] Joint Appendix (JA) 24-67.

[24] JA 29.

[25] JA 30-31.

Because the federal Sixth Amendment protection is distinct from and greater than that provided by Section 1089, Ms. Williams' opening brief quoted at length from *Thomas*[26] concerning the protective Sixth Amendment standard: "[I]f the record evidence discloses *any possibility* that a complaint about a juror's conduct stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request. . . ."[27]

And in her one-paragraph "Conclusion," Ms. Williams' brief contended that discharging Juror No. 6 violated her "Sixth Amendment right to a unanimous jury."[28] To support this contention, Ms. Williams again cited *Brown*, 823 F.2d at 597, and also cited *Perez v. Marshall*, 119 F.3d 1422, 1426-28 (9th Cir. 1997). The Ninth Circuit in *Perez*, facing a Sixth Amendment challenge on federal habeas, analyzed a California trial court's Section 1089 finding that good cause existed to remove a holdout juror.[29] *Perez* recognized that Section 1089's facial constitutionality does not mean its *application* is constitutional because removing a juror under Section 1089 would violate the Sixth Amendment if motivated by that deliberating juror's views on the merits of the case.[30]

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[26] JA 35-36 n.12.

[27] JA 32 n.10 (emphasis added).

[28] JA 67.

[29] *Perez*, 119 F.3d at 1426.

[30] *Id.* at 1428. *See* JA 67 (citing *Perez*, 119 F.3d at 1426-28).

Instead of responding to Ms. Williams' Sixth Amendment claim, the State's appellate brief analyzed her juror-discharge challenge solely in terms of Section 1089, without any reference whatsoever to her Sixth Amendment claim.[31]

Ms. Williams' state-appellate reply brief reiterated her Sixth Amendment argument.[32]

As with the State's appellate brief, the state appellate court's 29-page opinion,[33] which contains a detailed analysis of Section 1089, says nothing directly or indirectly about Ms. Williams' Sixth Amendment claim.[34] The state appellate court explicitly adjudicated only Ms. Williams' Section 1089 claim, but not her constitutional claim. It held that the trial court did not abuse its discretion under Section 1089, because sufficient evidence supported the trial court's finding that Juror No. 6 met the definition of "actual bias" under the statute. It did not mention, however, whether removing the known holdout juror violated the Sixth Amendment.[35]

Ms. Williams petitioned the California Supreme Court to review her direct appeal loss.[36] That court

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[31] JA 2, 68-95.

[32] JA 2, 96-108.

[33] JA 2.

[34] PA 14a, 103a-105a.

[35] PA 22a.

[36] JA 3.

granted the petition for review and summarily vacated and remanded for further consideration[37] in light of *People v. Cleveland*.[38] *Cleveland* explicitly rejected the distinct, more-protective federal Sixth Amendment standard "that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.' "[39] Instead of applying this federal standard, *Cleveland* explicitly "adhere[d] to" the distinct California rule that gives trial judges broad leeway to question deliberating jurors where a juror may not be participating in deliberations "and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[40] Ms. Williams and the State submitted supplemental briefs addressing *Cleveland*.[41]

The state appellate court then issued a slightly modified version of its previous reasoned opinion, again affirming Ms. Williams' conviction in a new 29-page decision.[42] That second 29-page opinion constitutes the state court's last reasoned opinion.[43] It too did not address Ms. Williams' Sixth Amendment challenge, at

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[37] JA 3.

[38] 21 P.3d 1225 (Cal. 2001).

[39] *Id.* at 1236-27.

[40] *Id.* at 1237.

[41] JA 4-5.

[42] JA 5; PA 87a-118a.

[43] *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991).

all.[44] The portion of the state appellate court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying Section 1089.[45] The state appellate court wrote:

> Penal Code section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform [her] duty." We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. If there is any substantial evidence supporting the trial court's ruling, we will uphold it. We also have stated, however, that a juror's inability to perform as a juror "must appear in the record as a demonstrable reality." (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)[46]

Ms. Williams filed a second Petition for Review in the California Supreme Court requesting discretionary review of her second direct appeal loss.[47] The Petition for Review argued that relief was warranted under *Cleveland*. It also argued that discharging Juror No. 6 violated the "Sixth Amendment" jury-trial right because the trial court discharged Juror No. 6 "after [Juror No. 6] actively participat[ed] in

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[44] PA 14a.

[45] PA 14a, 103a-105a.

[46] PA 103a (internal quotation marks and citations omitted).

[47] JA 5-6.

deliberations during which he 'probably ten or fifteen times' said that he did not believe 'that there's sufficient evidence' for conviction."[48] But the California Supreme Court declined discretionary review in a one-page order without explanation or citation to authority.[49] Looking through this unexplained order,[50] the state appellate court's opinion on direct appeal constitutes the last reasoned opinion in the California courts. Thus, the parties and the federal courts below looked to that opinion in reviewing Ms. Williams' federal petition.[51]

Ms. Williams, proceeding pro se, timely filed a federal habeas petition in the appropriate district court, containing about 9 exhausted and 4 unexhausted claims.[52] Grounds 10-13 all raised unexhausted jury instruction claims. But grounds 2-9, presented segregated factual facets of the juror-discharge challenge at issue here. The State moved to dismiss the petition because it contained some unexhausted claims.[53] The United States district court indicated that the State's Motion to Dismiss "apparently concedes that [Ms. Williams] has in fact exhausted Grounds 2 through 9 in her Petition for Review filed in the California

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[48] JA 148.

[49] PA 85a.

[50] *Ylst*, 501 U.S. at 803-06.

[51] PA 87a-118a.

[52] JA 9.

[53] JA 10 (Docket No. 9).

Supreme Court."[54] But because other grounds, not at issue here, were not exhausted, the district court stayed the case to allow for complete exhaustion of state-court remedies.[55] After Ms. Williams spent many months exhausting her new claims via state-court habeas petitions,[56] the United States district court let her file an amended habeas petition.[57]

Ms. Williams found an attorney who substituted in to file an amended federal habeas petition for her.[58] As the district court noted, that attorney's First Amended Habeas Petition abandoned Ms. Williams' newly exhausted claims, and presented only the claims that appellate counsel had previously presented, and exhausted, on direct appeal.[59]

Because Ms. Williams' first amended petition only presented the claims that had been exhausted on direct appeal, Ms. Williams' state habeas petitions and their dispositions are irrelevant to this case. But a summary is footnoted here to clarify the record.[60]

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[54] JA 14 (Minute Order, Docket No. 14, p. 2).

[55] JA 10-11.

[56] JA 10-11.

[57] JA 11.

[58] JA 11 (Substitution of Attorney, Docket No. 54).

[59] JA 12 (Docket No. 56).

[60] Ms. Williams filed pro se habeas petitions in the state appellate court and supreme court. Those petitions contain numerous challenges that are similar to those that had been raised on appeal. Although the petition filed in the state appellate court invoked the Sixth Amendment in the middle of one

(Continued on following page)

The United States district court dismissed Ms. Williams' first amended petition in 2007 on the merits.[61]

Following Ms. Williams' notice of appeal,[62] the Ninth Circuit granted Ms. Williams' request for a certificate of appealability.[63] The Ninth Circuit held oral argument on August 2, 2010,[64] at which time it asked the State: "Where in its decision did the Court of Appeal decide the question of whether there was a Sixth Amendment violation?"[65] The State responded: "The Court of Appeal does not discuss the Sixth Amendment."[66]

Given this concession, the published panel opinion below found AEDPA deference inapplicable, but only after finding no plausible explanation, other than oversight, for the state court's failure to mention

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paragraph, JA160, the petition she filed in the California Supreme Court did not mention the Sixth Amendment, but instead presented the juror challenge as a due process challenge. U.S. Dist. Ct. Docket No. 71, Lodgment No. 21 (Cal. Supreme Ct. Petition S122165). Both the state appellate and supreme courts denied habeas relief, not on the merits, but on the ground that the juror-discharge challenge had already been raised and rejected on direct appeal. PA 79a, 81a. Thus, those courts did not reach the merits of the juror-discharge claim, but instead expressly avoided deciding the claim.

[61] JA 14.

[62] JA 14.

[63] JA 17.

[64] JA 21.

[65] PA 20a.

[66] PA 21a. *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011).

the federal claim directly or indirectly.[67] 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,"[68] the panel below observed that the "state court did not address [Ms. Williams'] 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."[69]

Because the state appellate court did not address Ms. Williams' Sixth Amendment claim in any fashion, even indirectly,[70] that court did not mention, nor did it apply, the following Sixth Amendment standard governing juror discharge challenges: "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 the case, the court must not dismiss the juror."[71] Instead, applying an abuse-of-discretion standard, the state appellate court only asked whether the dismissal was supported by record

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[67] PA 18a-28a.

[68] PA 23a-24a n.10 (quoting *Murdoch v. Castro*, 609 F.3d 983, 990 n.6 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011)).

[69] PA 23a-24a n.10.

[70] PA 14a, 23a, 27a.

[71] PA 38a n.16 (quoting *Symington*, 195 F.3d at 1087).

evidence of the juror's "inability to perform as a juror. . . ."[72]

Although *Harrington v. Richter* by its terms applies only to summary, *unreasoned* orders on collateral review,[73] the Ninth Circuit assumed that *Richter*'s presumption applied to the *reasoned* state appellate opinion at issue here. Thus, the Ninth Circuit opinion applied *Richter* to this case, and concluded that the exception to *Richter*'s presumption applies.[74] In applying *Richter*'s exception, the Ninth Circuit assessed the available, relevant information in determining whether there really was reason to conclude that the state court had simply missed or ignored the Sixth Amendment claim.

The panel below noted that the state appellate court engaged in an extended discussion of Ms. Williams' statutory claim, but made no mention whatsoever of her more fundamental constitutional claim.[75] The panel found this was a compelling "indication" under *Richter* that the state appellate court either overlooked or disregarded her Sixth Amendment claim entirely, rather than adjudicating the claim, but offering no explanation at all for its decision.[76] Applying *Richter*, the panel acknowledged that when a court simply says "claims denied," and nothing more,

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[72] PA 103a.

[73] 131 S. Ct. 770 (2011)

[74] PA 16a-23a.

[75] PA 14a, 22a-28a.

[76] PA 24a.

courts presume that the denial is on the merits and as to all claims. 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 the federal claim, "there is reason to think" that it "is more likely" that the court simply neglected the issue and failed to adjudicate the claim.[77]

Given this "more likely" explanation under *Richter*, the Ninth Circuit reviewed Ms. Williams' Sixth Amendment juror-discharge claim *de novo*, and remanded to the district court with instructions to grant the writ based on the dismissal of the holdout juror where there was a reasonable possibility the dismissal stemmed from the deliberating juror's views on the merits of the case.[78]

The State moved for panel rehearing and rehearing en banc.[79] But the Ninth Circuit denied rehearing after no Circuit Judge requested a vote.[80]

This Court granted certiorari on the AEDPA adjudication-on-the-merits question, but denied certiorari on the substantive Sixth Amendment claim.[81]

[77] PA 24a-25a.

[78] PA 1a-52a.

[79] JA 22.

[80] JA 22-23.

[81] JA 23.

SUMMARY OF ARGUMENT

By its terms, § 2254(d) applies to a claim for federal habeas relief only if that claim has previously been "adjudicated on the merits" by a state court. And in the vast majority of cases, whether such an adjudication occurred is easily determined from the face of the state court opinion.

But as this Court's cases have recognized, it is sometimes necessary to: infer the basis of the state court decision from less than complete information, or acknowledge that the state court's resolution of the merits was only partial or expressly nonexistent.

The first situation was addressed in *Harrington v. Richter*, which held that: "When a federal claim has been presented to a state court and the state court has denied relief [on collateral review in an *unexplained* order], it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."[82]

The second situation arose in a series of decisions (*Wiggins v. Smith*,[83] *Rompilla v. Beard*,[84] and *Porter v. McCollum*[85]), in which the state court's *reasoned* opinion made plain that while one component of the

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[82] 131 S. Ct. at 784-85.

[83] 539 U.S. 510 (2003).

[84] 545 U.S. 374, 390 (2005).

[85] 130 S. Ct. 447 (2009) (per curiam).

prisoner's two-pronged federal claim was addressed, the other was not. Similarly, the second situation also arises, as in *Cone v. Bell*, where the state court's *reasoned* opinion expressly indicates that it was not adjudicating the prisoner's federal claim at all because of a state procedural bar.[86]

The issue presented here falls somewhere between the two categories represented by (1) *Richter* and (2) the *Wiggins-Rompilla-Porter-Cone* line of decisions.

Simply stated, the question here is how to determine whether a state court has adjudicated the merits of a fairly presented federal claim when the state court's *reasoned* opinion speaks exclusively in terms of state, rather than federal, law. The answer to this question is not fully provided by *Richter*'s rebuttable presumption, which is a blunt instrument that is necessary only when faced with an *unexplained* state court decision.

Instead, determining whether a reasoned state court decision (like the one here) includes an adjudication of the merits of a federal claim is best (i.e., most accurately) accomplished by analyzing the actual content of the state court's reasoned opinion. First, that is how this Court has analyzed the issue in the analogous contexts illustrated in *Wiggins*, *Rompilla*, *Porter*, and *Cone*. Second, this Court's mode

[86] 556 U.S. 449, 472 (2009).

of analysis in *Early v. Packer*[87] shows that a determination of whether a *reasoned* opinion adjudicates a federal claim involves analysis of that reasoned opinion's content. Finally, this approach is also how the lower federal courts have analyzed the issue since § 2254(d)'s "adjudicated on the merits" requirement became a consideration in federal habeas cases.

While this method requires a "case by case" assessment,[88] the number of cases in which it is necessary is quite small (much smaller than the flow of unexplained state habeas decisions in California), and the analysis necessary to make the assessment is not particularly challenging.

The federal courts of appeals have developed a set of logical, easily administrable criteria for determining whether a state court decision speaking only in state law terms should nevertheless be construed as an adjudication on the merits of a federal constitutional claim. Those criteria appear at pages 31-35 below.

This approach has worked for the federal courts for years, and it does not need to be changed. Unlike the unrebuttable presumption advocated by the state, the traditional approach relies on tangible information to reach an informed result, as the exception to *Richter*'s presumption appears designed to do.

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[87] 537 U.S. 3 (2002) (per curiam).

[88] *Brown v. Luebbers*, 371 F.3d 458, 461 (8th Cir. 2004) (en banc).

Under this approach, the Ninth Circuit determined that the state court decision in this case rested only on a state-law ground that was materially distinct from, and less protective than, the federal standard governing Ms. Williams' Sixth Amendment claim. Therefore, the state decision did not adjudicate the merits of that claim.

The state-law standard that the state court applied here (Section 1089) only looks to whether a state judge abuses his or her discretion in discharging a deliberating juror based on evidence in the record that the juror was unable to perform as a juror.[89] In contrast, the federal standard requires reversal if a trial judge dismisses a deliberating juror where there is a reasonable possibility that the impetus for the discharge stems from the juror's views on the merits of the case.[90] Because the California Supreme Court has explicitly declined to enforce this distinct (more protective) federal standard, and because the state court opinion here ignored it, it would be illogical to conclude that adjudicating the distinct and less protective state standard somehow adjudicated Ms. Williams' Sixth Amendment claim.

So said the panel below. The panel assumed that *Richter* extends to reasoned opinions, and applying this Court's unanimous opinion in *Richter*, found

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[89] PA 103a.

[90] PA 37a-39a.

Richter's adjudication-on-the-merits presumption overcome, under the unique facts of this case.

Ms. Williams squarely asserted a Sixth Amendment claim in her state appellate briefs on direct appeal. But the State's opposing brief ducked the constitutional issue by discussing her claim purely in state statutory terms. The state appellate court followed suit and affirmed Ms. Williams' conviction on a purely statutory ground.

Following this Court's precedent, the panel below correctly reviewed the state appellate court's citations for the possibility of an indirect adjudication of the Sixth Amendment right. None of the cited state-court opinions, however, disposed of her Sixth-Amendment-based challenge to the discharge of a holdout juror.

Affirming the decision below will not open the floodgates to *de novo* review of state court convictions. Nor would affirmance hurt the California courts. A ruling for Ms. Williams would simply hold either that: (1) *Richter*'s presumption only applies to *unexplained* orders, which takes this case outside of *Richter*; or (2) under the rare circumstances where a petitioner like Ms. Williams can overcome *Richter*'s presumption, the federalism principles AEDPA seeks to preserve through § 2254(d) deference are not at play where the "more likely" explanation for the state court's *reasoned* opinion's silence is that the state court merely overlooked a fairly presented federal claim.

ARGUMENT

A. The question here is how to determine whether a state has adjudicated the merits of a fairly presented federal claim when the state court's *reasoned* opinion speaks exclusively in terms of state, rather than federal, law.

The issue presented here falls somewhere between the two categories represented by (1) *Richter* on the one hand, and (2) the *Wiggins-Rompilla-Porter* and *Cone* line of decisions on the other hand.

B. The answer to this question is not fully provided by *Richter*'s rebuttable presumption, which is a blunt instrument that is necessary only when faced with an *unexplained* state court decision.

Richter's presumption only applies to summary orders, not orders accompanied by an opinion; so this case arguably falls outside *Richter*. The question *Richter* addressed was narrow: "whether § 2254(d) applies when a state court's order is *unaccompanied by an opinion*."[91] And such were the facts of *Richter* – the California Supreme Court denied relief in a one-sentence order. *Richter* is therefore limited, by its own terms, to summary state court dispositions. Thus, the presumption arguably has no place here where the question is whether the state court adjudicated the

[91] 131 S. Ct. at 784 (emphasis added).

claim at all, particularly when the state court has provided indications that it did not, in an opinion that addressed other claims but not the federal one at issue.

But even if *Richter*'s presumption is extended to apply to *reasoned* opinions, as the Ninth Circuit assumed here, the presumption is rebutted as the Ninth Circuit found from a close analysis of the actual content of the state court's reasoned opinion.

C. The determination of whether a *reasoned* state court decision (like the one here) adjudicated a federal claim on the merits is best (i.e., most accurately) made by referring to the state court opinion's content for clues.

1. That is how this Court has analyzed the issue in the analogous contexts illustrated in *Wiggins*, *Rompilla*, *Porter*, and *Cone*.

In 2003, in *Wiggins v. Smith*,[92] this Court found the state court's application of *Strickland*'s two-prong test to be factually and legally unreasonable in assuming that defense counsel adequately investigated mitigating evidence in a capital case.[93] Thus, this Court found that it was not constrained by § 2254(d)

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[92] 539 U.S. 510 (2003).

[93] *Id.* at 528-29 (discussing *Strickland v. Washington*, 466 U.S. 668 (1984)).

and determined "*de novo*" that defense counsel failed to reach beyond readily available records in investigating Wiggins' background.[94]

Similarly, in 2005, in *Rompilla v. Beard*,[95] this Court citing *Wiggins*, again employed *de novo* review in an AEDPA case to one component of a federal claim that the state court opinion did not reach: "Because the state courts found [defense counsel's] representation adequate, they never reached the issue of prejudice, . . . and so we examine this element of the *Strickland* claim *de novo*."[96]

In 2009, in *Porter v. McCollum*,[97] a state court again considered an ineffective-assistance-of-counsel claim, and found that claim "meritless."[98] The state court ruled only that Porter suffered no prejudice.[99] In unanimously reversing the Eleventh Circuit's denial of habeas relief, this Court, in *Porter*, applied deferential review to the state court's resolution of *Strickland*'s adjudicated "prejudice" prong.[100] But consistent with *Wiggins* and *Rompilla*, *Porter* held that "[b]ecause the state court did not decide whether

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[94] *Id.* at 531.

[95] 545 U.S. 374, 390 (2005).

[96] *Id.* at 390.

[97] 130 S. Ct. 447, 452 (2009) (per curiam).

[98] *Porter v. Crosby*, 840 So. 2d 981, 985 (Fla. 2003).

[99] *Id.* at 985-86.

[100] *See Porter*, 130 S. Ct. at 453-55.

Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*."[101]

Finally, in *Cone*, "[b]ecause the Tennessee courts did not reach the merits of Cone's *Brady* claim" and instead rejected that claim on procedural default grounds, this Court held under those circumstances that "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*."[102]

In *Wiggins*, *Rompilla*, and *Porter*, this Court determined that AEDPA deference does not apply to the unadjudicated portion of a two-prong federal claim. Therefore, it would make little sense for AEDPA deference to apply to a completely unadjudicated federal claim. Moreover, since *Cone* held that a completely unadjudicated claim is entitled to *de novo* review, this Court should find *Cone*'s rule applies in this analogous situation where the "more likely" explanation is that the state appellate court overlooked Ms. Williams' federal claim.

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[101] *Id.* at 452.

[102] *Id.* at 472.

2. Further, this Court's mode of analysis in *Early v. Packer*[103] shows that a determination of whether a *reasoned* opinion adjudicates a federal claim involves analysis of that reasoned opinion's content.

Early's mode of analysis can be synthesized into the following question and answer: *Is the state-law standard used in the state's reasoned opinion on par with, or more protective than, the applicable federal standard?* If so, the state court's reasoned opinion can be said to have indirectly adjudicated the federal claim.

In *Early*, this Court recognized that 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. The federal claim in *Early* was that an instruction to a deadlocked jury was coercive and thus violated Early's Sixth Amendment jury-trial right. The state appellate decision did not mention federal law, but instead found the instruction proper under the California Supreme Court decision of *People v. Gainer*,[104] which "impose[s] even *greater* restrictions for the avoidance of potentially coercive jury instructions"[105] than the federal constitutional standard.[106]

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[103] 537 U.S. at 8.

[104] 566 P.2d 997, 1006 (Cal. 1977).

[105] *Early*, 537 U.S. at 8.

[106] *See Gainer*, 566 P.2d at 1000-06.

Because *Gainer* provided *greater* protection than the federal standard, *Early* found that the less-protective federal right had been adjudicated. Without doubt, *Early* did not apply a presumption to the state court's reasoned opinion; instead, *Early* analyzed the reasoned opinion's content.

3. And that is also how the lower federal courts have analyzed the issue since § 2254(d)'s "adjudicated on the merits" requirement became a consideration in federal habeas cases.

Like this Court did in *Early*, the federal courts of appeals have developed a set of logical, easily administrable criteria for determining whether a state court that has been fairly presented with a federal claim and renders a *reasoned* opinion that analyzes the issue exclusively in state-law terms should nevertheless be deemed an "adjudication on the merits" of the federal constitutional claim. Those overlapping criteria include:

(1) Whether the state law standard used in the opinion is on par with, or more protective than, the applicable federal standard.[107]

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[107] *See Early*, 537 U.S. at 8 (giving deference where the state standard provided *more* protection than the federal standard). *Cf. Williams v. Runnels*, 432 F.3d 1102, 1104-05 (9th Cir. 2006) (reviewing *de novo* where the state court applied a *less* rigorous state-law standard to a *Batson v. Kentucky* claim).

(2) Whether the opinion failed to "mention" the relevant federal claim (much less adjudicate the merits) in its disposition.[108]

(3) Whether the opinion's analysis of the state claim covers "nearly identical" concerns as the federal claim.[109]

(4) Whether the opinion's analysis is similar to the requisite constitutional analysis.[110]

(5) Whether there is any indication that the state court considered the federal claim.[111]

(6) Whether the opinion misconstrued the federal claim and thus adjudicated a different claim, but not the right claim.[112]

(7) Whether the opinion discusses the issue at length under a distinct and less protective state law standard while not mentioning the federal standard at all.

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[108] *See, e.g., Holloway v. Horn*, 355 F.3d 707, 718-19 (3d Cir. 2004).

[109] *Id.* at 970.

[110] *See, e.g., Filliaggi v. Bagley*, 445 F.3d 851, 854 (6th Cir. 2006).

[111] *See, e.g., Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006).

[112] *See, e.g., Canaan v. McBride*, 395 F.3d 376, 381-83 (7th Cir. 2005); *Davis v. Secretary, Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam).

(8) Whether the opinion addresses issues raised by the prisoner's brief, except a federal claim.[113]

(9) Whether the opinion suggests reliance upon procedural grounds rather than a determination on the merits.[114]

This mode of reasoned analysis works well when construing *reasoned* state court opinions.

4. This Court's decision in *Cone v. Bell* and appellate court decisions broadly hold that when a state court issues a reasoned opinion that completely fails to address a federal claim, federal habeas courts review that claim *de novo*.

Here, applying the mode of analysis used in *Early* and most federal courts of appeals, the panel below found that the state appellate "court simply failed to decide the [federal] claim without explanation."[115] As this Court stated in *Cone v. Bell*, in 2009, when the "[state] courts did not reach the merits of [the petitioner's constitutional] claim, federal habeas review is . . . *de novo*."[116]

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[113] *See, e.g.*, *Ellsworth v. Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc); *Morris v. Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003); *Duckett v. Mullin*, 306 F.3d 982, 990-91 n.1 (10th Cir. 2002); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002).

[114] *Norde*, 294 F.3d at 410.

[115] PA 18a.

[116] 556 U.S. at 472.

The federal appellate court cases construing reasoned state court opinions are more on point than *Cone* (where the federal claim was expressly not reached), and those courts broadly agree that the content of a reasoned opinion should be analyzed (as this Court did in *Early*) to determine whether that opinion adjudicated a fairly presented federal claim.

Indeed, the first case *Richter* cited approvingly, as confirming that AEDPA deference is owed to a state court's summary adjudication, illustrates this federal-appellate-court consensus. In *Chadwick v. Janecka*,[117] then-Judge Alito, writing for the Third Circuit panel, distinguished between "when a claim is rejected without explanation" by a state court, and "when the opinion of a state court reveals that it did not adjudicate a claim."[118] Describing three Third Circuit precedents governing the latter situation, he explained that those earlier opinions "stand for the proposition that, if an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."[119] This divergent treatment between summary dispositions, on the one hand, and reasoned opinions with glaring omissions, on the other, was hardly unique to the Third Circuit. As the representative cases cited below

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[117] 312 F.3d 597 (3d Cir. 2002).

[118] *Id.* at 606.

[119] *Id.*

show, before *Richter*, seven other circuits (including five cited approvingly in *Richter* for their rule as to summary orders)[120] agreed that, if a state court issued a reasoned opinion, it would be deemed to have "adjudicated on the merits" a federal claim only if the opinion gave *some* indication that the court had engaged with that claim.

The federal circuit courts around the country have long held that § 2254(d) deference is not applied to a state court's *reasoned* opinion where that opinion's framing or analysis of the claims reflects no direct or indirect consideration of the relevant *federal* claim.[121] The following examples illustrate the point:

- *Wynne v. Renico*, 606 F.3d 867, 870 (6th Cir. 2010) (reviewing *de novo* Wynne's "federal claim because the state courts addressed only his state law grounds for relief, . . . which means they did not 'adjudicate[ ]' the federal claim 'on the merits'").
- *Cristini v. McKee*, 526 F.3d 888, 899 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1991 (2009) (reviewing federal prosecutorial misconduct claim *de novo* where the state court resolved the claim purely on state-law grounds, but applying AEDPA deference to harmless error analysis).

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[120] *Richter*, 131 S. Ct. 784.

[121] Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, § 32.2, at pp. 1752-55 & n.7 (6th ed. 2011) (collecting cases).

- *Billings v. Polk*, 441 F.3d 238, 252 (4th Cir. 2006) (Luttig, J.) (reviewing without AEDPA deference where the state court limited its analysis of a Sixth Amendment claim "to the state-law question" and thus "did not adjudicate Billings' Sixth Amendment claim on the merits").
- *Williams v. Runnels*, 432 F.3d 1102, 1104-05 (9th Cir. 2006) (reviewing *de novo* where the state court applied a less rigorous, state-law standard to a *Batson* claim).
- *Canaan v. McBride*, 395 F.3d 376, 381-83 (7th Cir. 2005) (not applying § 2254(d) deference because the state court misconstrued Canaan's federal claim and thus did not adjudicate it).
- *Rodriguez v. Chandler*, 382 F.3d 670, 673 (7th Cir. 2004) (reviewing harmless-error issue, tied to erroneous disqualification of defense counsel, without § 2254(d) deference where the state court never addressed the issue).
- *Holloway v. Horn*, 355 F.3d 707, 718-19 (3d Cir. 2004) (reviewing Holloway's *Batson* claim *de novo* where he raised the claim on direct appeal but the state court "failed to even mention the claim (much less adjudicate the merits) in its disposition").
- *Davis v. Secretary, Dep't of Corr.*, 341 F.3d 1310, 1313 (11th Cir. 2003) (per curiam) (not deferring to the state court where it ignored Davis's claim that his counsel "failed to preserve his *Batson* claim").

- *Ellsworth v. Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc) (although the state court reached Ellsworth's confrontation-clause claim warranting § 2254(d) deference, "[t]he state court did not address Ellsworth's other two claims, and thus our review of those claims is *de novo*").
- *Morris v. Burnett*, 319 F.3d 1254, 1267 (10th Cir. 2003) (reviewing Morris's federal constitutional claim *de novo* because "[w]hen the state court addresses the great bulk of the issues raised by the petitioner's brief in that court but omits to address a particular claim, we have inferred that the claim was not decided 'on the merits' in the state court").
- *Duckett v. Mullin*, 306 F.3d 982, 990-91, n.1 (10th Cir. 2002) (according no deference to one federal claim where the state appellate court "overlooked" it as evidenced by that court's detailed treatment of all other claims).
- *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) (conducting *de novo* review where "[t]he [state] court [addressed other claims on the merits but] did not mention Norde's Sixth Amendment claims, and . . . [did not use] any language, general or specific, indicating that those claims were considered and denied on the merits").

The State's position is that if a state court discusses a state-law claim, it should be presumed to have adjudicated any federal-law claim arising from the same underlying facts unless the state expressly invokes a procedural bar. The State's authority for its interpretation of *Richter* is the outlier Eleventh

Circuit case of *Childers v. Floyd*,[122] which held that "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."[123] But this standard makes *Richter*'s rebuttable presumption irrebuttable (i.e., renders *Richter*'s more-likely-explanation exception surplusage) where a state court issues a reasoned opinion that either ignores or overlooks a federal claim. Essentially the State urges this Court to abandon a fundamental component of this Court's very recent and unanimous opinion in *Richter*.

Although *Richter* cited *Rompilla*,[124] and *Wiggins*,[125] without any expression of disapproval,[126] *Childers* created its own rule, which the *Childers* concurrence and dissent stressed is difficult to square with *Rompilla* and *Wiggins*.[127] And *Childers*' dissent quoted the Seventh Circuit's refusal to "assume that [*Richter*] overruled *sub silentio* its holding in *Wiggins* – a

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[122] *Childers v. Floyd*, 642 F.3d 953 (11th Cir. 2011) (en banc), *petition for cert. filed* (July 6, 2011) (No. 11-42).

[123] *Id.* at 969.

[124] 545 U.S. 374 (2005).

[125] 539 U.S. 510 (2003).

[126] 131 S. Ct. at 789.

[127] *See Childers*, 642 F.3d at 986 (Wilson, J., concurring); *id.* at 988 (Barkett, J., dissenting).

precedent [of recent vintage that is] so important to the daily work of the lower federal courts."[128]

Rather than create an irrebuttable presumption – which would nullify *Richter*'s explicit exception to the presumption – logic dictates that this Court do what it did in *Early* and what most appellate courts do: examine the state court's *reasoned* opinion's contents to determine if the state court adjudicated the federal claim in question.[129]

When dealing with a summary order, *Richter*'s presumption makes perfect sense because "[t]he issuance of *summary* dispositions in many *collateral* attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed."[130]

But here there *was* a reasoned opinion on direct review, where opinions are most needed. Ms. Williams' state appellate court did not issue a summary disposition like *Richter*'s postcard denial; rather, the state appellate court issued a 29-page opinion on direct appeal that analyzed Ms. Williams' juror-discharge claim exclusively under Section 1089, without mentioning her Sixth Amendment claim.

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[128] *Childers*, 642 F.3d at 986 (Barkett, J., dissenting) (quoting *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011)).

[129] *See supra* pp. 30-35.

[130] *Richter*, 131 S. Ct. at 784 (emphasis added).

The State, which buries *Richter*'s more-likely-explanation standard in a block quote from *Richter*, does not address its plain import.[131] Yet, this standard is the crux of this case.

Where, as here, the state court reduces its reasoning to a written opinion, and where the written opinion indicates that the federal claim was not "adjudicated on the merits," *Richter*'s presumption either does not apply or is overcome.

5. This approach worked in *Early*, has worked for the federal courts of appeals for years, and is not in need of change.

Unlike the irrebuttable presumption advocated by the state, the traditional approach relies on tangible information to reach an informed result – much like the exception to *Richter*'s presumption appears designed to do.

Applying the criteria developed by the courts of appeals, the state court decision in this case rested only on a state-law ground (Section 1089) that is materially distinct from, and less protective than, the federal standard governing Ms. Williams' Sixth Amendment claim. Therefore, the state court's reasoned opinion did not adjudicate the merits of that claim.

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[131] State's Merits Br. at 37.

D. Assuming *Richter*'s presumption applies to reasoned opinions, it is overcome here because the "more likely" explanation for the state appellate court's silence regarding Ms. Williams' Sixth Amendment claim is that the claim was merely overlooked, not adjudicated directly or indirectly.

1. The state appellate court most likely overlooked Ms. Williams' fairly presented Sixth Amendment claim because the State's brief described the dismissal of Juror No. 6 in purely statutory terms.

Ms. Williams' state appellate court briefs squarely raised and fairly presented her Sixth Amendment claim. Her opening brief clearly contends that replacing holdout Juror No. 6 during deliberations violated her "Sixth Amendment right to a unanimous jury, requiring her conviction to be reversed."[132] Her opening brief also cited, and discussed, three federal appellate cases that define the Sixth Amendment standard designed to protect the jury-trial right by prohibiting dismissing jurors based on their views on the merits.[133] In fact, Ms. Williams quoted the protective Sixth Amendment standard at issue here: "[I]f the record evidence discloses *any possibility* that a complaint about a juror's conduct stems from the

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[132] JA 29.

[133] JA 30-31.

juror's view of the sufficiency of the government's evidence, the court must deny the request. . . ."[134] And her opening brief concluded that discharging Juror No. 6 violated her "Sixth Amendment right to a unanimous jury."[135]

Ms. Williams' state appellate reply brief again emphasized that the State ignored "the undeniable conclusion [that] [her] Sixth Amendment right was violated and her conviction must be reversed."[136] And as with her opening brief, Ms. Williams concluded by asking for reversal based on the denial of her Sixth Amendment jury-trial right.[137]

Because the government in Ms. Williams' case chose to *ignore* her Sixth Amendment challenge, it is likely that the state appellate court *overlooked* it. After all, the state appellate court was sure to rely on the State's brief and trust it to accurately describe the claims. But whether the state appellate court *ignored* or *overlooked* Ms. Williams' federal claim, either cause for the omission is more likely than presuming that the state-appellate court's 29-page opinion silently adjudicated Ms. Williams' Sixth Amendment claim on the merits.[138]

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[134] JA 32 n.10.

[135] JA 67 (citing *Brown*, 823 F.2d at 597, and *Perez*, 119 F.3d at 1426-28).

[136] JA 97-98.

[137] JA 108.

[138] PA 24a-25a.

Given both the government's and the state appellate court's obvious omissions, the Ninth Circuit had good reason, under *Richter*, to conclude that Ms. Williams' fairly presented Sixth Amendment claim had been overlooked. First, it noted "the court engaged in an extended discussion of [Ms. Williams'] statutory claim, but made no mention whatsoever of her more fundamental constitutional claim."[139] The Ninth Circuit found this to be a compelling "indication" under *Richter* that the state appellate 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."[140] Second, the panel below respectfully explained its reason for concluding that "some other explanation for the state court's decision 'is more likely.'"[141] That conclusion "comes . . . from common sense and our own experience as sometimes-fallible judges . . . " who in writing long, thorough decisions sometimes neglect to address a particular claim, "because we so focused on the remainder of the opinion that we overlooked the issue we did not mention directly or indirectly."[142] Thus, here "it 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

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[139] PA 24a.

[140] PA 24a.

[141] PA 24a.

[142] PA 25a n.11.

right, which it chose to deny on the merits without saying a word."[143]

2. This Court's precedents support the Ninth Circuit's determination that the state court overlooked or ignored Ms. Williams' Sixth Amendment claim.

Eighteen years before AEDPA, this Court acknowledged that state appellate courts sometimes ignore federal claims. In 1978, in *Smith v. Digmon*,[144] this Court found that the state appellate court's decision ignored a federal claim, despite a contrary finding by the federal district court. Although the federal district court found it "inconceivable" that Smith fairly presented his federal claim in the state appellate court because if he had, that court would "have written to it," and not ignored it,[145] this Court unanimously reversed that finding. By reviewing the briefs Smith filed, this Court conclusively determined that the state court, in fact, "ignored" a properly raised federal claim.[146] Thus, this Court unanimously held "that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to *ignore* in its opinion a

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[143] PA 25a n.11.

[144] 434 U.S. 332 (1978) (per curiam).

[145] *Digmon*, 434 U.S. at 332-33.

[146] *Id.* at 333.

federal constitutional claim" where the petitioner raised it.[147]

Even after AEDPA, in 2005, this Court unanimously found in *Dye v. Hofbauer*,[148] that a Michigan appellate court "chose to ignore" Dye's claim that prosecutorial misconduct violated the federal constitution, not just state law.[149]

As *Digmon* and *Dye* show, the panel opinion below comports with this Court's unanimous habeas authority, acknowledging that state appellate courts sometimes ignore or simply overlook federal claims.

The State argues that Ms. Williams bears fault for failing to draw a sharp dividing line between her Sixth Amendment claim and her statutory claim.[150] But the State's concession that the claim was thoroughly exhausted,[151] and *Dye*,[152] dispose of any argument that Ms. Williams failed to present the

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[147] *Id.* at 333.

[148] *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam).

[149] *Id.* (quoting *Digmon*, 434 U.S. at 333).

[150] State's Merits Br. 48.

[151] *See* JA 19, Appellee's Br. in the Ninth Circuit Court of Appeals, No. 07-56127 (submitted ECF May 15, 2009) at p. 12, n.6 ("Petitioner exhausted her claim too much by filing a duplicative claim on habeas corpus."). Notably, the over-exhaustion scenario here is the same or analogous to what occurred in *Cone*, which is another reason for this Court to conclude that the panel below's application of *de novo* review was appropriate. *See Cone*, 556 U.S. at 463-71.

[152] 546 U.S. at 4.

federal nature of her claim. In *Dye*, this Court found that a state court brief adequately presents a federal claim when it cites the pertinent federal constitutional provisions and cites federal decisions in support – even if it addresses both the federal and state portions of that argument under the same heading. In *Dye*, it was sufficient that "[t]he state-court brief was clear that the prosecutorial misconduct claim was based, at least in part, on a federal right."[153]

The State's briefing practice – rather than any alleged deficiency in Ms. Williams' brief – most likely led to the state appellate court's oversight. Its discussion of "Applicable Law" began and ended with Section 1089 and California's "abuse of discretion" standard, with no mention of the Sixth Amendment.[154]

This omission from the State's briefs was not an isolated incident. In *People v. Allen*,[155] the two defendants each raised Sixth Amendment challenges to a juror's removal.[156] But inexplicably, the State, arguing the issue purely in statutory terms, ignored the constitutional challenges.[157] The State did the same

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[153] *Dye*, 546 U.S. at 4.

[154] JA 90-92.

[155] 264 P.3d 336, 340 (Cal. 2011).

[156] *See* 264 P.3d at 340; Appellant's Opening Br. in *People v. Allen*, No. S066939, 2005 WL 760027 at *647-650 (Jan. 25, 2005).

[157] Resp't's Br., in *People v. Allen*, No. S066939, http://www.courts.ca.gov/15084.htm, at 238-68 (last visited on May 7, 2012).

thing in *People v. Barnwell*.[158] So the State's complaint about Ms. Williams not invoking the federal constitution in a heading fails under *Dye* and lacks conviction because even when appellants like Allen and Barnwell do so, the State still ignores the federal constitutional claim.

Moreover, this Court's precedent shows that what the State's brief argued in state court matters here. In *Ylst*, this Court had to determine whether a state court's unexplained order rested upon the merits of a federal claim, or upon a procedural bar. Ultimately, *Ylst* reversed the Ninth Circuit's conclusion that the order "constitute[d] a decision on the merits" of the federal claim.[159] To reach this conclusion, *Ylst* invoked the approach used in *Coleman v. Thompson*,[160] which involved looking at the circumstances surrounding the order, "*in particular* the fact that *the State had rested its argument entirely upon* a procedural bar," which "indicated that the basis [of the state court's order] was procedural default."[161] This same analysis applies here. Because the "State had rested its argument entirely upon" Section 1089, it is fair to

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[158] *Compare* Appellant's Opening Br., S055528, 2004 WL 2981918 at *38-55 (raising Sixth Amendment claim) *with* Resp't's Br. 2005 WL 1031414 at *53-76 (ignoring Sixth Amendment claim).

[159] 501 U.S. at 802.

[160] 501 U.S. 722 (1991).

[161] *Ylst*, 501 U.S. at 802 (emphasis added) (citing *Coleman*, 501 U.S. at 740).

conclude that the state appellate court's decision rests exclusively on Section 1089.

3. California law requirements for appellate opinions indicate that the state appellate court likely overlooked the federal claim.[162]

As *Richter* recognized: Only "the California courts or Legislature," not the federal courts, can "alter the State's practices or elaborate more fully on their import."[163] Article VI, § 14 of the California Constitution requires that appellate opinions "shall be in writing with reasons stated."[164] Lengthy analysis is not required; something as concise as, "Defendant's remaining contentions do not merit discussion" will do.[165] But *something* must be said to indicate the court is aware of the remaining issues and has resolved rather than overlooked them.[166]

Despite its need to comply with Article VI, § 14, Ms. Williams' state appellate court opinion, which was fully reasoned on statutory law, failed to include

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[162] *See* 5 Cal. Jur. 3d *Appellate Review* § 706.

[163] *Richter*, 131 S. Ct. at 785.

[164] Cal. Const. art. VI, § 14.

[165] *See Lewis v. Superior Court*, 970 P.2d 872, 893-95 (Cal. 1999).

[166] *People v. Rojas*, 174 Cal. Rptr. 91, 92 (Ct. App. 1981) (per curiam).

even the most cursory or catch-all reference to her Sixth Amendment claim.

In *People v. Kelly*,[167] the California Supreme Court held the Court of Appeal to the requirements of Article VI, § 14, and discussed the purposes and importance of having a written opinion on direct appeal. First, "the written decision . . . provid[es] guidance to the parties and the judiciary in subsequent litigation arising out of the same 'cause'. . . ."[168] Second, requiring a written opinion "promot[es] a careful examination of each case and a result supported by law and reason."[169] Third, allocating judicial resources on direct appeal helps prevent "the unnecessary expenditure of *additional* judicial resources" if the appellate opinion provides at least "the bare information necessary for other courts to recognize which contentions asserted by the defendant have been considered and found lacking in arguable merit and which were considered unreviewable due to an inadequate record."[170] Besides saving *state* judicial resources, requiring "[b]rief written reasons for the appellate court's decision also may assist *federal* courts, which otherwise would be unable to determine whether claims have been exhausted in the state courts."[171] Thus, a California appellate court's opinion

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[167] 146 P.3d 547, 556 (Cal. 2006).

[168] *Kelly*, 146 P.3d at 556.

[169] *Id.*

[170] *Id.*

[171] *Id.* (emphasis added).

on direct appeal "must reflect the contentions [raised] and the reasons that they fail,"[172] regardless of whether the claims are raised pro se or "by counsel."[173]

Because *Kelly* directs state courts to focus their resources on issuing written opinions in a direct appeal (like that of Ms. Williams), a ruling for Ms. Williams would support the proper balance and respect for state procedures.

The State places great emphasis on *Kelly*'s statement that the "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."[174] But *Kelly*, in finding that the state appellate court can abuse this discretion, elaborated on this standard. The written decision should: (1) describe the contentions; and (2) briefly state why the contention fails, or cite "pertinent case or statutory authority" if that is a "more efficient way of identifying the reason a contention raises no arguable issue, *as long as the citation clearly reveals the basis upon which the Court of Appeal so finds.*"[175]

This emphasized language, which the State replaced with an ellipsis in its quotation from *Kelly*,[176]

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[172] *Id.* at 548.

[173] *Id.* at 555-56.

[174] *Id.* at 559 (quoting *Lewis*, 970 P.2d at 894).

[175] *Id.* at 556 n.4 (emphasis added).

[176] State's Merits Br. at 31.

is critical. Under California law, a citation is sufficient to dispose of a claim only if the cited case actually addressed that claim. Here, as the panel below found, none of the state appellate court's citations implicitly adjudicated Ms. Williams' Sixth Amendment claim because Section 1089 decisions do not dispose of a Sixth Amendment claim.[177]

Here, in its discussion of applicable law, the state appellate court cited four California decisions dealing with Section 1089, not the Sixth Amendment.[178]

The closest the state appellate court came to addressing the Sixth Amendment claim was in the context of defining "bias" and "impartiality" by citing *People v. Nesler*,[179] 16 Cal. 4th 561, 580 (1997),[180] which discussed federal law, but only for general propositions about what the terms "biased" and "impartial" mean.[181] Thus, the state appellate court's *Nesler* citation – for background propositions about bias and impartiality – did not as a matter of California law adjudicate Ms. Williams' Sixth Amendment juror-discharge claim.

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[177] PA 25a-27a.

[178] PA 105a.

[179] 941 P.2d 87, 100 (Cal. 1997).

[180] PA 104a.

[181] *Nesler*, 941 P.2d at 100.

4. Under California law, an adjudication of a Section 1089 claim does not include adjudication of a Sixth Amendment claim as the panel's survey of California cases shows.

The Ninth Circuit panel below correctly found that California courts have not interpreted Section 1089 to be on par with or more protective than the Sixth Amendment standard.[182] In *People v. Collins*, in 1976, the California Supreme Court held that Section 1089's good-cause standard is not a constitutional standard but a rule of judicial economy: "Substitution of an alternate juror upon a showing of good cause is desirable to maintain judicial efficiency. By means of substitution retrial of lengthy cases may be avoided."[183]

Twenty-five years after *Collins*, and while Ms. Williams was pursuing direct appeal, the California Supreme Court held, in *People v. Cleveland*, that a trial court abused its discretion under Section 1089 by discharging a juror without a sufficient evidentiary record of his refusal to deliberate.[184] But the *Cleveland* majority analyzed this issue by applying Section 1089's abuse-of-discretion framework, without resort to a constitutional standard.[185]

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[182] PA 26a-27a.

[183] 552 P.2d 742, 745 (Cal. 1976).

[184] 21 P.3d at 1238.

[185] *Id.*

In fact, although *Cleveland* identified and quoted the federal safeguard,[186] *Cleveland* then explicitly *declined to adopt* the federal-appellate-court standard "that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'"[187] Instead, *Cleveland* "adhere[d] to established California law authorizing a trial court . . . to conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation] and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate."[188]

Thus, Section 1089 is distinct from, not on par with, and not more protective than, the federal constitutional rule. The Ninth Circuit was therefore correct in concluding, from a survey of California decisions under Section 1089, that the state appellate court's "determination that the trial court did not abuse its discretion under section 1089 . . . did not resolve [Ms. Williams'] Sixth Amendment claim, even indirectly."[189]

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[186] *Id.* at 1235.

[187] *Id.* at 1236-37 (quoting *Symington*, 195 F.3d at 1087).

[188] *Id.* at 1237.

[189] PA 27a.

5. As applied here, Section 1089 did not indirectly adjudicate Ms. Williams' Sixth Amendment claim, as the panel's opinion shows.

Stating the rules – as applied – next to each other shows that the federal standard can be violated (and was violated here), even though Section 1089 (as applied here) permitted the holdout juror's discharge:

> **Federal standard:** (1) restricts a trial judge's authority to inquire into whether a juror is unable or unwilling to deliberate, and (2) precludes dismissal of a juror mid-deliberations whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case."[190]
>
> **Section 1089 standard:** as applied in this case, let a trial judge dismiss a known holdout juror for "bias," which the trial judge found was "good cause" (i.e., under Section 1089 the "juror's inability to perform as a juror"), but without consideration or regard for whether the impetus for the juror's dismissal stemmed from that juror's views on the merits of the case.[191]

Citing two reasons, the Ninth Circuit agreed with Ms. Williams' contention that the trial court violated her Sixth Amendment jury-trial right by

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[190] PA 38a n.16 (quoting *Symington*, 195 F.3d at 1087).

[191] PA 103a.

dismissing a juror who was known to be the lone holdout for acquittal: "(1) there was a reasonable possibility that the request for the juror's discharge stemmed from his views of the merits of the case, and (2) the grounds on which the court relied did not amount to 'good cause' to remove a known holdout juror, and thus violated the Sixth Amendment."[192]

After comparing the facts here with those in *Symington*, the panel concluded that, as in *Symington*, "notwithstanding the cause that the trial court believed it possessed to discharge the juror whom it knew to be the one vote for acquittal, it was not justified in acting upon that cause because there was a 'reasonable possibility' that the request for removal was directly connected to the juror's views on the merits."[193] Thus, as in *Brown* and *Symington*, the panel below determined that it could reverse on this basis alone.[194] But the panel also concluded that "the trial court's lack of 'good cause' for removing the known holdout juror provides an independent reason" for concluding that the Sixth Amendment was violated warranting the grant of habeas relief.[195]

The Ninth Circuit acknowledged that "refusing to follow the law or refusing to deliberate would be 'good cause' for discharging a juror," but noted that "the

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[192] PA 40a.

[193] PA 41a.

[194] PA 41a-42a.

[195] PA 42a.

trial court expressly disclaimed any finding that Juror No. 6 was guilty of either, and the [California] Court of Appeal affirmed that determination."[196] Instead, the trial judge believed that "actual bias" existed, which created good cause under Section 1089 for dismissing Juror No. 6.[197] But as the panel below noted, the trial judge "did not find, however, that Juror No. 6 was 'biased' in any traditional sense of the term. . . ."[198] Instead, the trial judge found Juror No. 6 was "biased" against the prosecution as shown by: his desire to be "very convinced" beyond a reasonable doubt before finding Ms. Williams guilty given the severity of the charge; his discussion of jury nullification; his disagreement with the felony murder rule; and his dishonesty in saying that no juror had discussed the severity of the charge or juror nullification.[199]

The panel analyzed whether the trial judge's bases for discharge constitute "good cause" for removing a known holdout juror for Sixth Amendment purposes.[200] First, the panel began with the trial judge's determination that Juror No. 6 disagreed with the felony murder rule.[201] Such disagreement is not the type of bias that can justify removing a juror for

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[196] PA 42a.

[197] PA 42a-43a.

[198] PA 42a.

[199] PA 43a.

[200] PA 43a-44a.

[201] PA 44a.

good cause mid-deliberations because there is no requirement that jurors agree with the law, so long as they agree to apply it impartially – which Juror No. 6 did here, according to the trial court.[202]

Next, the panel addressed the trial judge's bias findings regarding Juror No. 6's "concern" with the "severity of the charge," which the trial judge erroneously felt meant that Juror No. 6 was applying a higher-than-allowed burden of proof.[203] Juror No. 6 testified, when questioned by the court, "I can remember saying [during the jury deliberations] 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." The panel found that sentiment is not "good cause" for the dismissal of a deliberating juror.[204] Moreover, neither the trial judge nor the state appellate court concluded that Juror No. 6 would not follow the law.[205] Thus, the trial judge's concern did not constitute "good cause" under the Sixth Amendment sufficient to justify removing a holdout juror.[206]

The panel next found that the trial judge's belief that Juror No. 6 was concerned with the severity of the punishment – as opposed to the seriousness of the offense charged – was contrary to the record and thus

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[202] PA 44a.

[203] PA 45a.

[204] PA 46a.

[205] PA 47a.

[206] PA 47a.

failed to amount to good cause for his dismissal.[207] Almost all the jurors agreed that punishment had not been discussed.[208] Thus, the panel concluded that there could not have been good cause to dismiss Juror No. 6 for being concerned about the severity of Ms. Williams' potential sentence.[209]

The panel also determined that the trial judge's concerns about Juror No. 6 being dishonest when questioned by the court about what had been discussed during deliberations is directly contradicted by the record, is manifestly erroneous, and thus cannot provide good cause for his removal.[210]

The panel thus concluded that none of the elements of the trial judge's "bias" determinations regarding Juror No. 6, individually or collectively, served to establish the "good cause" required by the Sixth Amendment to remove a deliberating juror, particularly one who was neither refusing to follow the law nor unwilling to deliberate.[211] The panel listed this as a separate reason, independent of the *Symington* violation, to support its holding that the dismissal of Juror No. 6, a known holdout juror, was unconstitutional.[212]

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[207] PA 48a.

[208] PA 49a.

[209] PA 49a-50a.

[210] PA 50a-51a.

[211] PA 52a.

[212] PA 52a.

Because the state appellate court's Section 1089 ruling never adjudicated the Sixth Amendment claim, the Ninth Circuit's *de novo* review, discussed above, was warranted.

E. The ruling below afforded appropriate respect to the California Court of Appeal, consistent with federalism principles.

The State is wrong in arguing that the Ninth Circuit presumed error by the state court.[213] Instead, before concluding that *de novo* review applied, the Ninth Circuit applied a rigorous analysis: it assumed *Richter* applies even though this case involves a *reasoned* state court opinion, not an *unexplained* denial; it cited and discussed *Richter*'s adjudication-on-the-merits presumption; it explained why reasoned decisions were different from the unexplained denial at issue in *Richter*; it noted the State's inability to identify where the state appellate court addressed the Sixth Amendment claim; it raised various doctrines by which a federal claim may be implicitly adjudicated or by which the failure to adjudicate the claim may be moot; and it ultimately found those doctrines inapplicable.[214] Nothing in the Ninth Circuit's analysis presumed error by the state appellate court.

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[213] State's Merits Br. at 22.

[214] PA 15a-30a.

Epitomizing the disconnect between the Ninth Circuit's reasoning and the State's characterization of that reasoning, the State phrases its question presented as whether AEDPA deference applies "where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim."[215] But the opinion below acknowledged that deference could apply if adjudicating the Section 1089 claim implicitly included adjudicating the Sixth Amendment claim.[216] The panel below further acknowledged that "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."[217] Thus, assuming Richter's presumption applies to *reasoned* opinions, the panel's reasoning below represented an objectively correct and faithful application of *Richter* and this Court's AEDPA precedents.

The State is also wrong in implying that the Ninth Circuit should not have raised the applicability of AEDPA deference *sua sponte*. It is common for a reviewing court – believing that the parties' briefs set forth an incorrect standard of review – to raise the issue *sua sponte*.[218] Indeed, this Court in *Harrington v. Richter* itself questioned the appropriate standard of review *sua sponte*: "In addition to the question

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[215] State's Merits Br. at i.

[216] PA 25a.

[217] PA 23a.

[218] *See, e.g.*, *Morris*, 319 F.3d at 1267.

presented, parties are directed to brief and argue the following question: Does AEDPA deference apply to a state court's summary disposition of a claim . . . ?"[219]

The State is also wrong to suggest requiring that criminal appellants file a petition for rehearing with the appellate court whenever that court appears to have overlooked a federal claim. Federal habeas contains no such super-exhaustion requirement. Besides, the State's argument fails because the State concedes that Ms. Williams exhausted state remedies.[220]

F. A narrow ruling for Ms. Williams will not burden state courts or open the floodgates to federal habeas relief.

A ruling for Ms. Williams will not have the dire consequences the State and amici predict. The ruling below was narrow, with minimal consequences for future cases.

The State and amici are wrong to suggest that affirmance would permit criminal defendants to game the system by minimally preserving federal constitutional claims to lure state courts into overlooking them. The State's argument is a strawman for at least three reasons.

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[219] 130 S. Ct. 1506, 1506-07 (2010) (Mem.).

[220] *See supra* note 151.

First, Ms. Williams did not engage in such illogical and subversive behavior.[221]

Second, there are no incentives for anyone else to do so, especially since federal habeas relief is unavailable unless a prisoner fairly presents her federal claims to the state courts so they have an opportunity to adjudicate those claims.[222]

Third, because appellate courts generally review "determinations of law under a nondeferential standard, which is independent or *de novo* relief,"[223] a defendant has every incentive to press her state and federal legal claims on direct appeal.

Thus if the State is legitimately concerned that criminal defendants might offer stealth federal claims on direct review in the hopes of leaving open the door to *de novo* federal habeas review, the facts of this case present an easy solution. On direct appeal, the State should address prisoners' federal claims instead of ignoring them. Instead of ignoring the fact that Ms. Williams repeatedly invoked the Sixth Amendment, the State could have addressed the Sixth Amendment claim in its state appellate brief. But here the State chose to ignore Ms. Williams' federal claim.[224] Under these circumstances, affirmance would encourage the

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[221] *See supra* Part D.1.

[222] *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

[223] *People v. Cromer*, 15 P.3d 243, 245 (Cal. 2001).

[224] *See supra* Part D.1.

State to aid the California Court of Appeal in its duties under *Kelly* and Article VI, § 14.

Notwithstanding the 31-state amicus brief, the ruling in this case need have no effect beyond California because *Richter*'s presumption is overcome by California Constitution Article VI, § 14 (California's procedural rule requiring reasoned, written appellate decisions). Consistent with the federalism principles underlying AEDPA, federal courts look to "state-law procedural principles" in determining whether a claim was adjudicated on the merits, leaving it to a state's courts or legislatures to "alter the State's practices or elaborate more fully on their import."[225]

Thus, while the State and amici contend that affirmance would penalize state courts for issuing reasoned opinions, that concern is misplaced in California. Article VI, § 14, as interpreted by the California Supreme Court, requires written opinions.[226]

Accordingly, a ruling against Ms. Williams in this case would in no way reduce the workload for California state appellate judges, nor should it affect their opinion-writing practices. And if the citizens of California determine that Article VI, § 14 places too high a burden on their courts, they can amend it. Given the panel's exceptionally narrow, fact-based holding,

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[225] *Richter*, 131 S. Ct. at 785.

[226] *Kelly*, 146 P.3d at 556.

and dutiful application of *Richter* and *Early*,[227] it is difficult to see how this case could possibly handicap the State of California in advocating for AEDPA deference in future cases.

CONCLUSION

This Court should hold either that this case falls outside *Richter*, or that *Richter*'s adjudication-on-the merits presumption is overcome under the circumstances presented here: (1) the State's state-court appellate brief ignored a fairly presented federal claim; and (2) the state appellate court's reasoned decision likely overlooked that federal claim, while analyzing it exclusively under a less protective state statute.

Respectfully submitted,

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[227] PA 23a.