No. 07-56127

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TARA SHEVENA WILLIAMS,

Petitioner-Appellant,

v.

DEBORAH K. JOHNSON, Warden of
The Central California Women's
Facility in Chowchilla,

Respondent-Appellee.

On Remand from the Supreme Court of the United States

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amici National Association of Criminal Defense Lawyers ("NACDL") and California Attorneys for Criminal Justice ("CACJ") have no parent corporations. No publicly held company holds 10% or more stock in NACDL or CACJ.

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STATEMENT OF INTEREST OF AMICI

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 including affiliates' members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the ABA House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous amicus briefs each year in this Court and other federal and state courts, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

California Attorneys for Criminal Justice ("CACJ") is a non-profit organization of criminal defense lawyers founded in 1972. Most of CACJ's membership practices in the Federal and State courts located throughout California. CACJ has among its stated specific purposes the preservation of due process and equal protection of the law for the benefit of all persons. CACJ is one of the largest

affiliated organizations of NACDL, and has often appeared as an amicus curiae in combination with NACDL on matters of importance to the fair administration of justice. CACJ's appearance here underscores its interest in ensuring the presentation of arguments aimed at preserving the right to a jury trial as provided by the Sixth Amendment.

Amici file this brief and accompanying Motion for Leave to File pursuant to Fed. R. App. P. 29(b) and Ninth Circuit Rule 29-2. No party or party's counsel authored this brief in whole or in part. No person contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

I. The panel's split decision upholds a conviction pursuant to a California state criminal procedure that three Supreme Court Justices have deemed "troublesome." California's procedure, which departs dramatically from this Circuit's own rule, permits trial courts to obtain convictions by questioning and excusing holdout jurors mid-deliberation. That approach threatens defendants' fundamental right to an impartial jury by undermining the legitimate role that holdout jurors play in criminal trials.

Indeed, while many assume that holdout jurors seek to "nullify" defendants' crimes, empirical research shows that they play an important function in jury deliberations. Often, they are motivated by genuine doubts about the evidence, and in some cases they are able to convince their fellow jurors that a defendant is not guilty. Research further indicates that disruptive inquiries into jury deliberations—such as occurred in this case—can pressure holdout jurors to change their votes.

Amici acknowledge that under controlling law, this Court may not impose its own Sixth Amendment jurisprudence on the California court system. But by the same token, California's permissive approach to the questioning of holdout jurors must operate within constitutional limits. Even within the limited context of habeas proceedings under the Antiterrorism and Effective Death Penalty Act ("AEDPA"),

this Court has the authority—and the obligation—to provide relief in such situations. En banc review is now essential to achieve this.

II. This Court should also grant en banc review because the panel's decision is inconsistent with both California and Ninth Circuit law regarding the proper role of the California appellate courts in reviewing findings of fact. Specifically, in this case, the California Court of Appeal made a factual finding on appeal that contradicted the trial record—despite the fact that under California law, appellate courts are not permitted to make findings of fact in jury cases. The Court of Appeal's error should trigger relief under AEDPA, which requires a federal habeas court to reject a state court decision based on an unreasonable interpretation of the record. The panel here erred in affirming the California appellate court's decision that it could uphold Williams's conviction based on its *own* factual determinations, notwithstanding California law to the contrary.

The panel's decision also ignores Ninth Circuit habeas case law on point. This Court has previously affirmed a trial court decision explicitly predicated on the understanding that California appellate courts *cannot* make factual findings in jury cases. The panel's departure from this Circuit's law requires en banc review because only an en banc court can harmonize conflicting panel decisions.

The panel's decision also eliminates one of the few, narrow paths to federal habeas review remaining under AEDPA for state-court petitioners. By holding that

a state appellate court *can* make its own factual findings, the panel effectively eviscerated AEDPA's explicit command that federal habeas review should be available when state appellate courts unreasonably misread the record. This Court should review the panel's decision and preserve state-court defendants' access to federal collateral review as Congress intended.

ARGUMENT

Under our Constitution, there may be no right more "exceptional[ly] importan[t]," Fed. R. App. P. 35(b)(1)(B), than the Sixth Amendment right to an "impartial jury." U.S. Const. amend. VI. This federal right is particularly important in California, where there were 8,269 criminal jury trials in 2014 alone,[1] and where over 100,000 people are incarcerated.[2]

As this case illustrates, however, California allows judges to question juries about their deliberations, and to dismiss jurors found to stand in the way of a conviction. California frames this power as merely allowing judges to dismiss a juror

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[1] Judicial Council of California, 2015 Court Statistics Report: Statewide Caseload Trends 2004-2005 Through 2013-2014 at 79, http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf. In Fiscal Year 2014, there were 5,545 felony jury trials and 2,724 misdemeanor jury trials.

[2] Cal. Dep't of Corrections and Rehabilitations, Office of Research Population Reports, http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Population_Reports.html (last visited Aug. 18, 2016); *see also Brown v. Plata*, 131 S. Ct. 1910, 1923-24 (2011) (noting that, in 2011, California's prison population was almost double the 80,000 planned for).

during deliberations if there is a "demonstrable reality" that the juror is disqualified because of bias. *People v. Barnwell*, 162 P.3d 596, 605 (Cal. 2007). As a practical matter, however, this far-reaching and intrusive authority can be exercised on the basis of mere allegations: If the trial court possesses information which, "if proven to be true," would justify doubting a juror's ability to perform her duties, it is "*required*" to conduct an inquiry that necessarily interferes with the jury's secret deliberations and subjects holdout jurors to intense pressure. *People v. Cleveland*, 21 P.3d 1225, 1233 (Cal. 2001); *Barnwell*, 162 P.3d at 604 (emphasis in original).

This Circuit, in contrast, *bars* a trial court from dismissing a holdout juror if there is a "reasonable possibility" that her position stems from her views on the merits of the case. Moreover, under this Circuit's law, the trial court must "refrain[] from exposing the content of jury deliberations." *United States v. Symington*, 195 F.3d 1080, 1086-87 (9th Cir. 1995). This may mean that the trial court "lacks the investigative power that, in the typical case, puts it in the best position to evaluate the jury's ability to deliberate," *id.* at 1087 (internal quotation marks omitted)—but, to preserve the sanctity of jury deliberations, the trial court's options are nonetheless limited to declaring a mistrial or sending the jury back for more deliberations. *Id.* at 1087.

Both standards are, on their face, solicitous of jury deliberations and the defendant's right to the benefits of those deliberations. But again, in practice, by

requiring a hearing to determine whether to disqualify a juror, California mandates a major intrusion into jury deliberations that may pressure a juror to give up her sincere beliefs about a defendant's innocence. This Circuit, in contrast, protects the secrecy—and therefore the integrity—of deliberations even at the risk of a mistrial. Because of this deep tension between this Court's approach and that of California—which three Supreme Court Justices and the dissent find "troublesome"—this Court should carefully police the federal constitutional limits on when California's less protective standard may apply.

I. CALIFORNIA LAW ALLOWING HOLDOUT JURORS TO BE DISMISSED AFFECTS MATTERS OF EXCEPTIONAL IMPORTANCE, AND THIS COURT SHOULD GRANT EN BANC REVIEW TO ENSURE THAT THE LAW WAS NOT MISAPPLIED.

The panel's decision approved a result under California law that is at odds with this Court's Sixth Amendment jurisprudence. Although AEDPA and the Supreme Court's decisions in this case do not allow this Court to substitute its own law for California's, AEDPA still requires this Court to ensure that the California courts respect defendants' constitutional rights—including the right to an impartial jury verdict. The important questions raised by this case call for en banc review.

A. Holdout Jurors Play an Essential Role in the Criminal Justice Process.

This case merits en banc review because the protection of holdout jurors, like the one in Williams's case, is essential to ensuring criminal defendants receive a fair

and meaningful trial. Neither courts nor jurors should assume that a juror who will not vote to convict is unwilling to follow the law. The California Court of Appeal has specifically warned that "[j]urors will sometimes make the mistake of concluding that a juror's strong disagreement with the majority is equivalent to a refusal to deliberate." *People v. Barber*, 102 Cal. App. 4th 145, 152-53 (Cal. Ct. App. 2002). If California judges are permitted to dismiss holdout jurors essentially free from review, they will effectively be authorized to veto a vote to acquit with which they may disagree. This is a dangerous result because "[e]ven if a judge is convinced beyond all doubt that a defendant committed a crime, we have made the fundamental choice that a jury of the defendant's peers, and that jury alone, retains the right to declare his guilt or innocence." Slip Op. at 17 (Reinhardt, J., dissenting). As Justice Sotomayor said, referring to Williams's trial in this case, "the degree of being convinced is the very essence of jury deliberations." Tr. of Oral Arg., *Johnson v. Williams*, No. 11-465 at 21:16-17. For a trial by jury to be meaningful, unconvinced jurors must be permitted to vote against conviction without being removed, and to try to persuade their fellow jurors to do the same.

Although holdout jurors are often viewed with suspicion that they are trying to "nullify" the law criminalizing a defendant's conduct, empirical scholarship suggests that a considerable majority of holdout jurors actually are simply not convinced by the evidence, and are just doing their jobs. For example, in a study of

hung juries by the National Center for State Courts, out of 46 cases where the jury hung or acquitted despite strong evidence of guilt, juror concerns about "fairness"—suggesting nullification—only played a role in 12 cases, and were the sole factor in hanging or acquitting in only 3. Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Centers for State Courts Study on Hung Juries*, 78 Chi.-Kent L. Rev. 1249, 1273 (2003).

Empirical evidence also confirms that holdout jurors can be crucial participants in deliberations, sometimes forcing other jurors to reexamine their beliefs and ensuring that defendants are not convicted on insufficient evidence. As Professor Hans has noted, one line of research showed that in 5% of jury trials examined, jurors in the minority persuaded jurors in the majority to change their verdict—usually in favor of acquittal. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 Chi.-Kent L. Rev. 579, 584 (2007). Applying even this relatively small percentage to California's 8,269 criminal trials in 2014 would yield a difference between conviction and acquittal on the merits for more than 400 California defendants. Deliberation that forces jurors to confront their biases, examine their views, and share their collective wisdom is the essence of our jury system and its important function in our democracy. A system of legal rules that too easily excuses jurors who are unwilling to convict undermines these

processes, which are critical to the protections that our jury system provides defendants.

Holdout jurors also need to be protected, because they often face tremendous pressure to change their vote. Holdouts in group deliberations are often "isolated, punished, and eventually rejected by the majority altogether." Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J. L. Reform 569, 610 (2007). "As the holdout juror becomes more and more isolated, his participation in the deliberation process decreases in direct proportion." *Id.* And anecdotal evidence abounds that jurors who do not wish to convict may face hostility from their fellow jurors. *See, e.g.*, Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xix (2015).

B. California Defendants are Entitled to Juries that can Decide their Cases Independently and Conscientiously.

Any legal regime permitting courts to tinker with jury composition mid-deliberation demands exacting scrutiny, and California defendants deserve the full Court's consideration of the important question presented here.

Both California and federal law recognize that intruding into the jury's deliberative process threatens the legitimacy of trials. The California Supreme Court has noted that "[g]reat caution is required in deciding to excuse a sitting juror. A court's intervention may upset the delicate balance of deliberations." *People v. Allen*, 264 P.3d 336, 344 (Cal. 2011). In the *Symington* case cited above, this Court went

further, emphasizing the paramount importance of preserving the secrecy of deliberations when determining whether to dismiss a holdout juror. 195 F.3d at 1086. Similarly, the Federal Rules of Evidence prohibit jurors from revealing "any statement made or incident that occurred during the jury's deliberations," even to determine the validity of a verdict or indictment. Fed. R. Evid. 606(b)(1).

In short, it is so well established as to require little discussion that courts must jealously protect the integrity of jury deliberations. But the California standard for dismissing jurors who refuse to convict fails to do so—as noted above, the California approach involves an "intrusive inquiry when a juror holding out against an overwhelming majority has been identified." *See* Reichelt, *supra* p. 10, at 585-88. Accordingly, while the standard is nominally intended "to protect a defendant's fundamental rights to . . . trial by an unbiased jury," *Barnwell*, 162 P.3d at 605, the required hearing on whether to dismiss disrupts jury deliberations and imposes coercive pressure on the holdout juror. Even while allowing this practice, the California Supreme Court has acknowledged that "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations." *Cleveland*, 21 P.3d at 1231. Recognizing this risk, at oral argument in an earlier stage of this very case, Justices Kennedy, Ginsburg, and Sotomayor all described California's procedure for dismissing holdout jurors as "troublesome." Tr. of Oral Arg., *Johnson v. Williams*, No. 11-465 at 18:19, 25; 19:25; 21:17-18. Justice

Sotomayor put it succinctly: "I must say that, like Justice Kennedy, I'm deeply troubled when trial judges intrude in the deliberative process of juries." *Id.* at 21:8-10.

In contrast to California law, the rule in this Circuit is "one of the most protective . . . when it comes to the treatment of holdout jurors by trial courts." Reichelt, *supra* p. 10, at 593. Thus in California, the perspective of a lone juror who is not convinced of a defendant's guilt may be carefully safeguarded or subject to overt pressure to align with other jurors, depending solely on whether she sits on a state or federal jury.

In this case, the panel recognized that this Court's more protective rule more appropriately safeguards the rights of both jurors and defendants, noting that "[w]e don't approve of what the trial court did in this case. Our rule in *Symington* is preferable."[3] Slip Op. at 11. But the panel believed that AEDPA left it no choice but to affirm the denial of habeas relief. Amici respectfully contend, as did the dissent, that the panel was mistaken. Given the stark difference between California and Ninth Circuit law in this area of fundamental importance, defendants in Williams's

[3] The California Supreme Court has "agree[d] with the observation[] in . . . *Symington* that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence," *Cleveland*, 21 P.3d at 1236, but it ultimately declined to adopt the *Symington* rule. *Id.* at 1236-37.

situation deserve a clear decision from the en banc Court. The full Court should determine whether, within the context of habeas review, California's less protective standard goes as far as the panel believed it does—whether it permits dismissal of a holdout juror even where the trial judge has explicitly stated that the juror is *not* being dismissed for failure to follow the law. Williams's trial shows the danger to defendants when trial courts—as in California—are permitted to substitute jurors who are not willing to convict for those who are. As further set forth below, while this Court's ability to review California's "troublesome" system is limited under AEDPA, it is not altogether foreclosed. The full court should reconsider en banc whether Williams is entitled to habeas relief.

II. CALIFORNIA DEFENDANTS HAVE A RIGHT TO AN APPELLATE SYSTEM THAT FUNCTIONS AS THE CALIFORNIA CONSTITUTION AND AEDPA INTENDED.

This case calls for en banc review because the panel allowed the California Court of Appeal to uphold Williams's conviction based on its own factual findings, even though California appellate courts are prohibited from making such findings, and even though the appellate court's findings here *contradicted* those of the trial court. The state appellate court's ruling in this area—based as it is on an "unreasonable" determination of the facts—falls squarely within the narrow set of state court actions susceptible of federal review under AEDPA.

A. The Panel's Decision Eliminates one of the Few Paths to Federal Review that AEDPA Preserves for State-Court Defendants.

The Court should review the panel's decision en banc to clarify that appellate court decisions supported by unlawful appellate factual findings cannot be sustained under AEDPA.

As Judge Reinhardt's dissent points out, the Court of Appeal in this case rejected a key factual finding of the trial court and substituted its own. Specifically, when the trial judge dismissed the holdout juror, he explicitly stated that "I'm going to dismiss the juror, but . . . *not because he's not following the law*." Slip. Op. at 12 (Reinhardt, J., dissenting) (emphasis added by Reinhardt, J.). Yet the California Court of Appeal found that the trial judge's dismissal was supported by the evidence because "[a]ccording to most of the jurors, Juror No. 6 had either explicitly said he *would not follow the law* or he had implied as much." *People v. Taylor*, No. B137365, 2002 WL 66140, at *8 (Cal. Ct. App. Jan. 18, 2002) (emphasis added).

The California Constitution unambiguously provides that appellate courts may make factual findings only in limited circumstances, and only in cases not involving a jury trial. Cal. Const. art. 6 § 11; *see also* Cal. Civ. Proc. Code § 909 (same). California case law is also clear that when reviewing a trial court's decision to dismiss a juror, "a reviewing court does not *reweigh* the evidence[.]" *Barnwell*, 162 P.3d at 606 (emphasis in original). Again, however, that is what happened here—the Court of Appeal upheld Williams's conviction based on a factual finding

inconsistent with the trial court's stated reason for dismissing the holdout juror. Slip Op. at 12 (Reinhardt, J., dissenting).

Under AEDPA, the federal courts retain authority to review state appellate court decisions based on an unreasonable reading of the record. 28 U.S.C. § 2254(d)(2). The Court of Appeal's finding that the juror was dismissed for refusal to follow the law—when the trial judge expressly stated the opposite—was unreasonable. The panel's contrary determination dramatically curtails defendants' recourse under AEDPA. Judge Reinhardt's dissent illustrates that the panel's holding that the Court of Appeal can "make its own factual findings, *unconstrained by what the trial court did*," Slip Op. at 11 (emphasis added), essentially writes the "unreasonable determination of the facts" provision out of AEDPA. 28 U.S.C. § 2254(d)(2).

For state-court defendants whose claims were adjudicated on the merits, this means that one of only two avenues remaining for federal habeas review will be cut off. This issue accordingly has implications far beyond this case. Allowing courts of appeals to engage in creative factfinding to affirm convictions will undermine AEDPA's very limited remaining safeguards.[4]

[4] As the panel identifies, a state-court defendant whose claims have been considered on the merits in a state proceeding can only receive federal habeas relief if the state-court decision was contrary to clearly established Supreme

Judge Kozinski has described AEDPA as "a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice." Kozinski, *supra* p. 10, at xlii. Yet by permitting AEDPA to "allow words to have the direct opposite meaning of what they are commonly understood to have and of [what] was clearly intended by the speaker," Slip Op. at 13 (Reinhardt, J., dissenting), the panel further erodes the "federal court safety-valve" that AEDPA has already largely eliminated. Kozinski, *supra* p. 10, at xli. Given the critical—albeit diminished—role of habeas review in the judicial system, this decision is so consequential for so many state-court defendants in California and throughout this Circuit, that it requires the consideration of the full Court.

B. The Panel's Treatment of Appellate Court Factfinding is Inconsistent with This Court's Prior Practice.

The panel's decision is also inconsistent with this Court's own prior treatment of appellate factfinding in habeas cases. In *Hillery v. Pulley*—which both this Court and the Supreme Court affirmed—the Eastern District of California held that the California Supreme Court's affirmance of a trial decision could not constitute factual findings because California appellate courts cannot make independent findings of

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Court precedent, or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2).

fact. 563 F. Supp. 1228 (E.D. Cal. 1984), *aff'd* 733 F.2d 644 (9th Cir. 1984), *aff'd sub nom. Vasquez v. Hillery*, 474 U.S. 254 (1986).

Hillery involved a habeas challenge alleging that the petitioner's conviction was improper under the Equal Protection clause because blacks had been excluded from the grand jury that indicted him. 563 F. Supp. at 1234. The California Supreme Court had affirmed the defendant's conviction despite his Equal Protection challenge. *Id.* at 1236. While the district court recognized that, under AEDPA's predecessor, it owed a presumption of correctness to factual determinations made by the Court of Appeal, it held that the California Supreme Court's affirmance of the petitioner's conviction was not a factual finding and noted that "[a] fundamental principle of the California court system is that the reviewing court's function is to correct errors of law and not to pass on questions of fact." *Id.*

In affirming *Hillery*, this Court thus confirmed that a California appellate court cannot cure factual defects in a trial record. Yet the panel's holding appears to depart from that understanding. This departure alone requires en banc review because a panel opinion is binding on subsequent panels unless it is overruled en banc. *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009).

* * *

Every year, thousands of defendants in California place their freedom in the hands of juries, while the "troublesome" practice of questioning and dismissing

holdout jurors who stand in the way of convictions repeats itself time and again. *See* Slip Op. at 16 (Reinhardt, J., dissenting) (chronicling repeated incidents of improper dismissal of holdout jurors). Holdout jurors safeguard defendants' rights and the integrity of the criminal justice system, and the full Court should review the panel's decision to ensure California defendants get the greatest protection possible even under AEDPA. The full Court should also review the panel's novel treatment of appellate factfinding. Not only is it inconsistent with California law and this Court's precedent, but it risks cabining the rights of habeas petitioners throughout this Circuit. The rights to a fair jury deliberation and to seek federal habeas corpus relief are among the most important in our legal system, and the significant reach of the panel's decision calls for en banc review.

August 22, 2016

Respectfully submitted,

/s/ Timothy J. Simeone

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Signature Timothy J. Simeone

Attorney for NACDL and CACJ

Date August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, the foregoing was filed with the Clerk of Court and served on all counsel of record electronically through the Court's CM/ECF system.

/s/ Timothy J. Simeone
Timothy J. Simeone