No. 06-413

IN THE

Supreme Court of the United States

Jeffrey A. Uttecht,

Petitioner,

v.

Cal Coburn Brown,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICUS CURIAE*

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.[1]

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court has long recognized that the practice of death qualification, excluding individuals from capital juries based on their beliefs about the death penalty, must be strictly circumscribed in order to ensure a fair trial for the accused and to preserve the jury's historic role as the community's representative in rendering the gravest decision the criminal justice system is ever called upon to make. Both this Court's decisions and empirical studies reflect that the liberal dismissal of jurors who express reservations about capital punishment in general, or a reluctance to impose it except in restricted circumstances, skews capital juries toward death and undermines the representative nature of the jury and, thereby, public confidence in the capital sentencing process.

To balance these risks against the State's legitimate interest in removing jurors who are unwilling to follow the law, this Court established in *Wainwright v. Witt*, 469 U.S. 412 (1985), that a juror may not be excused for cause based on his views on capital punishment unless the prosecution demonstrates that those views prevent or substantially impair his ability to do his duty as a juror and follow his oath. In Washington, as in many states, that duty entails the exercise of substantial judgment and discretion about when death is appropriate or leniency warranted. In fact, by statute, a Washington jury is simply asked whether "sufficient mitigating circumstances merit leniency." Wash. Rev. Code § 10.95.060(4). In making that determination, the jury may consider any fact in mitigation, including "[w]hether there is a likelihood that the defendant will pose a danger to others in the future." *Id*. § 10.95.070(8). Only if a juror is incapable of exercising that broad discretion may he be dismissed for cause under *Witt*.

In this case, the trial court dismissed juror Richard Deal after the prosecution objected that Deal "never overcame [the] idea that [the defendant] must kill again . . . or be in a position to kill again" in order to warrant a death sentence. Pet. App. 241a-242a. Although Deal repeatedly expressed his

willingness and ability to consider either life or death as a possible sentence, the state supreme court upheld the dismissal. It did so principally on the ground that Deal's reluctance to vote for death in the absence of a risk of re-offense was, in that court's view, inconsistent with state law, which requires that those not sentenced to death be subject to life imprisonment without possibility of parole. The Ninth Circuit properly concluded that this decision constituted an unreasonable application of this Court's settled precedents.

Juror Deal's statements reflected nothing more than his belief that a lack of future dangerousness is an important mitigating factor counseling against imposition of the death penalty. Washington law expressly permits a juror to decline to impose the death penalty in light of that consideration. Moreover, Deal's views did not preclude him from considering death as a possible sentence, as he repeatedly and directly affirmed. Even if there is no prospect that a defendant charged with aggravated murder will ever be released into the community, he may nonetheless pose a risk to other inmates or prison officials while incarcerated. Deal made quite clear that if such a risk were proven, he would likely conclude that the death penalty was appropriate.

Nor can petitioner defend the trial court's ruling based solely on speculation that demeanor evidence, not apparent in ths record, provided the court with substantial grounds to doubt Deal's ability to follow the law. Neither court below indicated that it was basing its decision on anything other than the plain import of Deal's verbal answers as reflected in the transcript. Those answers plainly provided no constitutionally adequate ground for dismissal. To nonetheless withhold habeas relief because of the hypothetical possibility that the trial court could have found, without mentioning, that Deal's demeanor told a different story than his words, would effectively eliminate the Great Writ as a remedy for Sixth Amendment violations in the jury selection process.

ARGUMENT

I. Limitations On Striking Jurors For Cause Based On Their Views About The Death Penalty Are Necessary To Preserve The Integrity And Representativeness Of Capital Juries.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985), this Court established the constitutional balance between a state's legitimate interest in excluding jurors unable to perform their duties in capital cases and defendants' right to an impartial jury capable of expressing the broader community's judgment concerning life and death. Lax enforcement of the resulting constitutional standard threatens to undermine the fairness of the capital sentencing process, while also reducing the representative nature of capital juries and undermining public confidence in the administration of the death penalty. *See generally*, Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002).

1. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). This Court has long recognized that the unconstrained dismissal of capital jurors based on their views about the death penalty impairs the defendant's right to an impartial jury. To be sure, the State thus has a legitimate interest in excusing potential jurors who are "wholly unable even to consider imposing the death penalty, no matter what the facts of a given case." *Adams v. Texas*, 448 U.S. 38, 40 (1980). At the same time, however, permitting the liberal dismissal of jurors who express disagreement with the death penalty in general, or a reluctance to impose it, creates a constitutionally unacceptable risk of producing "a jury uncommonly willing to condemn a man to die." *Witherspoon*, 391 U.S. at 521. Removing jurors who have

qualms or hesitations about imposing the death penalty, but are able to fulfill their oaths and follow the court's instructions, inevitably skews the jury toward a capital sentence.[2] By removing those jurors who would think carefully about the evidence before choosing death, capital defendants are left with those jurors who will impose death less thoughtfully, and more readily, than a more representative jury would.

The constitutional limitation on the removal of jurors for cause from capital juries is also necessary to preserve the role of juries in representing the broader community's views on whether a defendant deserves death or leniency. *See Witherspoon*, 391 U.S. at 520; *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in the judgment). The Sixth Amendment "reflect[s] a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). In a capital case, that "community participation" takes on special significance. "[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a

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[2] One study attempted to quantify the effect of death qualification on a jury's willingness to impose the death penalty by surveying registered voters regarding conclusions they had drawn about actual, on-going capital trials in the interviewees' county. After asking whether the subject would vote to impose the death sentence in the local trial, the study then determined whether the subject would be subject to disqualification based on his or her views on the death penalty. The authors found that death qualification would exclude 7.4% of those who favored the death penalty in the local cases, and 50.5% of those who favored life imprisonment. Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 387 (1982).

defendant convicted in a capital case) is to maintain a link between between contemporary community values and the penal system." *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (citation omitted).

Permitting courts broad authority to dismiss jurors who express reservations about the death penalty in general, or who show a reluctance to apply it to a particular set of circumstances, undermines the jury's ability to express the moral judgment of the broader community it represents. The unwarranted dismissal of "prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (citation omitted).[3] Because reservations about the death penalty are not evenly distributed throughout the community, that narrowing of the jury pool also risks undermining the jury's ability to accurately reflect the membership and views of the community. For example, according to one poll, striking all death penalty opponents from capital juries would remove 24% of whites, but 49% of African Americans. Joseph Carroll, Gallup Poll: Who Supports the Death Penalty? (Nov. 16, 2004). At the same time, such exclusion would also eliminate 23% of men, but 32% of women. *Id*. Because "community participation in the administration of the criminal law" is "critical to public confidence in the fairness of the criminal justice system," *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), the systematic exclusion of any segment of that community risks

[3] Post-*Witherspoon* studies showed that excluding jurors who opposed the death penalty would eliminate almost a quarter of prospective jurors from the pool. Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1187 (1973). In 2000, it would have eliminated almost 40% of the community from serving on capital juries. Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 7, 10 (Stephen P. Garvey ed., 2003).

undermining public confidence in the fairness and integrity of the capital sentencing system.[4]

2. In light of these dangers, this Court has clearly established that the "State's power to exclude jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths.'" *Gray*, 481 U.S. at 658 (quoting *Witt*, 469 U.S. at 423). Accordingly, death penalty jurors may not be excused for cause unless their views would "'prevent or substantially impair the performance of [their] duties [as jurors] in accordance with [their] instructions and [their] oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In order to satisfy this standard, the prosecution must show more than that the juror is likely to be reluctant to impose the death penalty. *See, e.g.*, *Lockhart*, 476 U.S. at 176. Even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* The death qualification process therefore specifically does not disqualify those who "expressed conscientious or religious scruples against" the death penalty, *Morgan v. Illinois*, 504

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[4] These concerns have led the Court to construe the Sixth Amendment to require that the jury pool (although not each particular jury panel) reflect a representative cross-section of the community. *See, e.g., Taylor*, 419 U.S. at 530-31. The refusal to require that juries themselves represent a cross-section of the community is a "direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury." *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). But permitting the state to go further than is necessary in death-qualifying a jury would undermine the assumption that juries in death penalty cases are as representative of their community as juries in any other criminal case, sacrificing the legitimacy of and public confidence in the jury system.

U.S. 719, 732 (1992) (citation omitted), so long as they are also willing to perform "[their] duties [as jurors]," *Witt*, 469 U.S. at 424.

Nor must a juror be completely open to sentencing a defendant to death regardless of the mitigating circumstances of the case. The jury's function is to bring the community's moral sense to bear on the facts of each case. It is to be expected that some jurors will hold views that will make it difficult to obtain a sentence of death in some circumstances where the death penalty is nonetheless available. But the prosecution in a marginal capital case is not entitled to a jury composed only of those who would fail to recognize the weakness of its case, any more than a defendant accused of the most heinous crime is entitled to a jury composed only of those indifferent to his conduct.

Accordingly, jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon*, 391 U.S. at 522 n.21. Their oaths only require them to *consider* the facts of the case before them and to exercise their *moral judgment* whether the mitigating facts of the case warrant leniency. A juror able to perform that function cannot be excluded even if there is substantial reason to believe that his moral judgment will guide him under the facts of the case to one result or another.

II. The Dismissal Of Juror Deal Was Unconstitutional And Warranted Habeas Relief.

In light of the foregoing principles, the state courts' conclusion that Juror Deal was subject to removal for cause from respondent's capital jury was sufficiently erroneous as to require the issuance of habeas relief.[5]

A. The State Courts' Dismissal Of Juror Deal Was Based Upon A Fundamental Misconstruction Of This Court's Decisions.

The state supreme court upheld Deal's removal from the jury on two grounds: (1) Deal "misunderstood the State's burden of proof in a criminal case and understood it to be 'beyond a shadow of a doubt'" instead of beyond a reasonable doubt; and (2) Deal "indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. Neither ground constitutes a constitutionally permissible basis for dismissal under *Witt*.

1. Deal's Misarticulation Of The Burden Of Proof Was Not A Legitimate Basis For Dismissal.

In filling out his juror questionnaire at the outset of jury selection – prior to reading his juror's handbook and obviously prior to receiving any instructions from the court – Deal stated that he was generally in favor of the death penalty "if it is proved beyond a shadow of a doubt" that the defendant killed and would kill again. J.A. 69. When told during *voir dire* that the standard of proof was "beyond

[5] The error in the state courts' decision arises principally from a clear misconstruction and unreasonable application of this Court's clearly established precedents. Whether the resulting error is viewed as an unreasonable application of *Witt*, 28 U.S.C. § 2254(d)(1), or an unreasonable determination of the facts, *id.* § 2254(d)(2), makes no difference. In either case, the court of appeals' judgment should be affirmed.

reasonable doubt" rather than "beyond a shadow of a doubt," Deal quickly clarified that he "would be satisfied with a reasonable doubt standard" and "would be willing to follow the law." *Id.* 70. And when the judge questioned him specifically about his mistake, he remarked that it was probably terminology he heard while "watching Perry Mason or something," and he again confirmed that he understood and would apply the reasonable doubt standard. *Id.* 74.

Deal's inability to precisely articulate the standard of proof at the outset of the case, prior to receiving any instruction from the court, is a constitutionally impermissible basis for dismissal. The standard under *Witt* is whether the juror's views on the death penalty would substantially impair his ability to follow the court's instructions, not whether the juror requires instruction in the first place because he does not come to the court immersed in the finer points and distinctions of the law. *See* 469 U.S. at 424. As Judge Kozinski explained, "If all prospective jurors who did not fully understand the law before trial were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that)." Pet. App. 17a.

It is thus unsurprising that at trial the prosecution specifically disavowed any reliance on Deal's misunderstanding of the proper terminology to describe the state's burden of proof. J.A. 75. And it is notable that petitioner does not attempt to defend the state court's ruling on this ground in this Court.

2. Deal's Indication That He Would Give Substantial Weight To Whether The Defendant Might Kill Again Was Not A Legitimate Basis For Dismissal.

The state supreme court's second ground – that Deal "indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law," Pet. App. 173a – is both difficult to understand and plainly insupportable. Deal never purported

to be explaining his understanding of when state law would *permit* imposition of the death penalty, much less his understanding of the full set of circumstances under which a capital sentence may be imposed. He simply said he viewed death as an appropriate penalty when a defendant had killed and might kill again. J.A. 62, 69, 70. Petitioner nonetheless attempts to show that Deal's purported inclination to reserve the death penalty for cases in which a defendant poses a future threat to others rendered him incapable of fulfilling his duty as a capital juror. Pet. Br. 37-39. To the extent that conclusion was the basis for the state courts' decisions below, it constitutes an unreasonable application of this Court's clearly established precedents.

Under *Witt*, the "relevant inquiry is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987) (quoting *Witt*, 469 U.S. at 424) (internal quotation marks omitted). Accordingly, it is important to be clear on the nature and scope of a juror's duties under a particular state's sentencing regime. In Washington, a defendant convicted of aggravated murder and spared the death penalty is automatically sentenced to life without parole. Wash. Rev. Code § 10.95.030. The State leaves the choice between those options entirely to the discretion of the jury, which is required to answer a single sentencing question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060. In answering that question, the jury is permitted by statute "to consider any relevant factors, including but not limited to . . . whether there is a likelihood that the defendant will pose a danger to others in the future." *Id.* § 10.95.070(8).[6] How much weight to give

[6] The Solicitor General's assertion that "questions concerning whether the defendant might be released and kill again play no role under Washington law in the decision whether to impose a capital

that factor is left entirely to the judgment and discretion of each juror. *See id*.; *see also Smith v. Texas*, 543 U.S. 37, 46 (2004) (federal constitution requires that juries be allowed to give full consideration and effect to mitigating circumstances). Accordingly, in determining whether a defendant shall be put to death or sentenced to life without parole, a juror like Deal is permitted by statute to consider precisely the mitigating factor he indicated was important to him – whether the defendant might kill again if not sentenced to death. *See State v. Gentry*, 125 Wash. 2d 570, 641 (Wash. 1995); *State v. Finch*, 137 Wash. 2d 792, 864 (Wash. 1999).

Deal's right to give substantial mitigating weight to future dangerousness arises not simply from the relevant state statute, but also from the federal constitution. By 1986, this Court could say that it was "well established" that the Constitution "requires that in capital cases 'the sentencer . . . not be precluded from considering, *as a mitigating factor*, . . . any aspect of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)) (emphasis in original). And, in particular, the Court has held for more than twenty years that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Id*. at 5. Under this Court's clearly established precedents, "such evidence may not be excluded from the sentencer's consideration." *Id*.

Given the wide discretion that death-penalty juries necessarily possess, jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon*, 391 U.S. at 522 n.21. To the

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sentence," U.S. Br. 21, is thus quite inexplicable. As discussed below, even a defendant sentenced to life without parole may kill again while in prison, a circumstance juror Deal was entirely open to considering. *See infra* at 15.

contrary, sentencing systems like Washington's provide jurors broad discretion to choose between life and death based on any relevant factor precisely in order to ensure the jury's role in "express[ing] the conscience of the community on the ultimate question of life or death." *Lockhart v. McCree*, 476 U.S. 162, 182 (1986) (citation omitted). It is both expected and desirable that members of that community will be more willing to impose the death penalty in some cases rather than others and that they will bring those general views to bear in particular cases.

Accordingly, *Witt* does not entitle the prosecution to a jury made up of individuals willing to impose death in all circumstances, or even a jury indifferent to the particular mitigating and aggravating factors at issue in the case before them. In fact, this Court has held that it is unconstitutional for a state to exclude jurors who are unable to promise that their general views about the death penalty will have no effect on their deliberations. In *Adams v. Texas*, 448 U.S. 38 (1980), the Court recognized that even in a system that provides capital jurors substantially less discretion than Washington's, the rendering of a sentence "is not an exact science, and jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Id*. at 46. With that in mind, the Court held that "it is apparent that a Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*." *Id*. at 46-47. If a juror may not be excused when his deliberations will be affected by his general views on the death penalty (a wholly irrelevant consideration in the sentencing decision), it follows *a fortiori* that a juror may not be excused simply because he indicates that his decision will be influenced by his view of the importance of a particular mitigating factor that he is entitled to rely upon under state and federal law.

It makes no difference that the mitigating factor important to Deal will be present in every case under the Washington sentencing statute. Even if it were constitutionally permissible for a state to prohibit a jury from considering future dangerousness when there is no possibility of parole, *contra Skipper*, 476 U.S. at 5, Washington has not done so. In specifically providing that the jury may consider whether "there is a likelihood that the defendant will pose a danger to others in the future" as a fact mitigating against death, Wash. Rev. Code § 10.95.070(8), the State plainly left it to the jury to decide whether the unavailability of parole and its effect on future dangerousness warranted leniency. In indicating that he would consider future dangerousness an important factor in assessing the death penalty, Deal did nothing more than demonstrate an inclination to do what the law plainly allowed him to do.

Finally, the fact that Deal was sometimes confused by the questions or gave uncertain responses about his views on the death penalty provided no constitutionally permissible ground to dismiss him from the jury. *Contra* U.S. Br. 19-21. This Court has recognized that it is not uncommon or suspicious that a juror's testimony may be "ambiguous and at times contradictory." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984). Thus, in *Gray v. Mississippi*, 481 U.S. 648 (1987), this Court held that a juror was "clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria," *id*. at 658 (citation omitted), even though she was "somewhat confused," *id*. at 653, couldn't "make up her mind," *id*. at 654, and eventually was able only to say "I think I could" when asked whether she could vote for the death penalty, *id*. "It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed," and that prospective jurors "represent a cross section of the community, and their education and experience vary widely." *Patton*, 476 U.S. at 1039. Accordingly, "[n]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an

unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams*, 448 U.S. at 48. The law does not require a juror to have fully thought out his views on the death penalty before being deemed capable of serving on a capital jury. Nor is service limited to those who can easily follow and respond to lawyers' questioning. As the court of appeals rightly concluded, if the juror in *Gray* was unquestionably qualified to serve on a capital jury despite her inability to say for sure whether she could ever vote for the death penalty, there was no basis in this case to exclude Deal, who was able to repeatedly and decisively affirm his readiness to vote for death in an appropriate case. *See* Pet. App. 13a-14a & n.6.

B. There Was No Reasonable Basis For The State Courts To Conclude That Deal Was Unwilling To Consider The Death Penalty.

Although neither court below so found, petitioner implies that Deal went beyond indicating an intent to give lack of future dangerousness significant weight, and instead made clear that he would never vote for death nor consider it as an option in light of Washington's prohibition against parole in cases of aggravated murder. See Br. 38. That argument fails for several reasons.

First, Deal never said that he would be unwilling – or even reluctant – to impose the death penalty upon someone who is ineligible for parole. To the contrary, his concern focused not on whether "the defendant would be released," Pet. Br. 38, but on whether the defendant "would kill again." J.A. 69. He thus left entirely open that he might impose the death penalty in light of the risk that respondent would kill again while in prison. Indeed, prosecutors routinely argue that this risk to other prisoners and to prison staff is a reason to impose the death penalty rather than life without parole. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 149 n.2 (1998);

Kelly v. South Carolina, 534 U.S. 246, 253-54 (2002).[7] Moreover, even if Deal's answers could be understood to indicate that he would vote for the death penalty in more limited circumstances than might others, that is no basis for concluding that he was unable to fulfill his oath and exercise the broad discretion afforded juries under the Washington statute. *See Witherspoon*, 391 U.S. at 522 n.21.

Second, Deal never said that he would vote for death only if he were convinced that the defendant would kill again. The statements upon which petitioner relies were, for the most part, in response to broad questions that did not require Deal to describe the full set of circumstances in which he would vote, or decline to vote, for the death penalty. For example, in his juror questionnaire, Deal simply offered that he was "in favor of the death penalty . . . if a person has killed and would kill again." J.A. 69. He was not asked, and he did not say, whether this was the only circumstance in which he thought the death penalty would be appropriate. Likewise, it was in response to a generalized question – "why [do] you think the death penalty is appropriate, what purpose [does] it serve[]?" *Id.* 62 – that Deal stated, "if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." *Id.* Again, Deal was not asked for, and did not offer, a comprehensive catalogue of all the circumstances in which he would find the death penalty appropriate. He simply gave one example of a circumstance in which he would view death as a fitting punishment. When asked directly whether he could consider the death penalty even in the absence of any possibility of parole, Deal said on five separate occasions that he could.[8]

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[7] Neither the prosecution nor the trial court ever asked Deal whether the unavailability of parole would prevent him from voting for death in light of the danger respondent might pose while in prison.

[8] 1. "Q . . . Do you think that you could consider both options?

It is, of course, possible that Deal was lying or deluded. And if there were any indication that the trial court so concluded based on its observation of Deal's demeanor, respondent would have a difficult time overcoming the statutory presumption of correctness that would attach to that finding, for all the reasons petitioner and his *amici* explain at great length. But neither court made any such finding, and there is no reason to presume that they did so simply because the trial court excluded Deal and the state supreme court affirmed that decision. It is one thing to assume that the trial court implicitly found Deal excludable under the proper legal standard. *See Witt*, 469 U.S. at 430. It is quite another to assume from its silence that the court made every conceivable factual finding that might be helpful to the State in defending that decision in a subsequent habeas proceeding. Indeed, to do so would essentially eliminate habeas review of jury selection errors, for it is always possible to say that the trial

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A. Yes, I could." J.A. 62.

2. "Q . . . [D]oes that mean what I'm hearing you say is that you could consider either alternative?

   A. I believe so, yes." *Id.*

3. "Q . . . You would be willing to follow the law?

   A. Yes." J.A. 70.

4. "Q . . . I'm asking you, first, could you consider [the death penalty], and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

   A. Yes, sir." J.A. 72.

5. "Q. But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

   A. I could consider it, yes.

   Q. Then could you impose it?

   A. I could if I was convinced that was the appropriate measure." J.A. 73.

court may have harbored some unspoken belief that an excused juror's demeanor indicated an unwillingness to follow the law.[9] Or, as Judge Learned Hand explained the risk: "He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was. Thus, he would become the final arbiter in all cases where the evidence of witnesses present in court might be determinative." *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). This is not deference, but abdication. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

While Congress has plainly required federal habeas courts to give deference to the trial court's ability to gauge the demeanor of jurors and witnesses, it is equally clear that Congress did not intend to thereby render habeas relief unavailable to remedy constitutional violations in jury selection. A balance must therefore be struck. That balance is most appropriately achieved by acknowledging that even when the record evidence might otherwise support a federal court's conclusion that the trial court's findings were unreasonable under 28 U.S.C. § 2254(d)(2) and (e)(1), special hesitation is warranted when the state court indicates on the record that its findings are based in significant part on

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[9] In this case, there is an affirmative basis to believe that the trial court did *not* base its decision on demeanor evidence not reflected in the record. The "body language" of another juror was the topic of explicit discussion in the record. *See* J.A. 54 (prosecution noting that the juror "crossed her arms, held her hand up, crossed her arms and sat back at that particular time"); *id*. 55 (defense counsel taking care to note that the juror's "body language was accurately reported" but contending that the attitude reflected was not disqualifying); *id*. 56 (court finding the juror "substantially impaired given her responses"). Despite the demonstrated willingness of the trial court and trial counsel to make note of significant demeanor evidence on the record, only Mr. Deal's words themselves bore mention. *Id*. 75.

demeanor evidence not apparent in the cold transcript. Conversely, however, the Court should be equally clear that the mere theoretical possibility that an otherwise unreasonable factual finding could have been supported on the basis of demeanor evidence will not preclude habeas relief, lest the Great Writ be rendered ineffective.

In this case, as Judge Kozinski compellingly demonstrated, the record clearly and convincingly demonstrates that there was no reasonable basis to find that Juror Deal was substantially impaired in his ability to perform his duties as a juror. The decision to excuse him nonetheless was based on a fundamental misconstruction of this Court's clearly established precedents regarding the proper basis for dismissal of a capital juror.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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