No. _____

IN THE

Supreme Court of the United States

BRIAN KEITH FIGGE

Petitioner,

v.

SCOTT FRAUENHEIM, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a trial court violate a criminal defendant's Sixth Amendment right to trial by jury when it dismisses a defense holdout juror on the third day of deliberations for "failing to deliberate," even though other jurors report that the juror had been participating in the deliberations by discussing the case, discussing his point of view, and listening to the other jurors?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Brian Keith Figge and Respondent Scott Frauenheim, Warden. The California Attorney General represents Respondent.

On December 14, 2012, Figge was convicted by jury in the Riverside County Superior Court in *People v. Brian Keith Figge*, case no. SWF1100774, Judge Albert J. Wojcik, presiding, of several counts of child sexual assault. Petitioner's Appendix filed concurrently herewith ("Pet. App.") 33-34, 44; reporter's transcript of trial ("RT"), docket 20, lodgment 2, at 582-588.[1] On May 10, 2013, Judge Wojcik sentenced Figge to a total prison term of 60 years to life and entered judgment against him. Clerk's transcript of trial ("CT"), docket 20, lodgment 1, at 438-439; Pet. App. 44.

The California Court of Appeal, per the Honorable Judith L. Haller, Judith McConnell, Presiding Judge, and James A. McIntyre, affirmed the judgment on appeal in an unpublished opinion filed on April 6, 2015 in *People v. Brian Keith Figge*, case no. D066962. *People v. Figge*, 2015 WL 1573874

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[1] Unless otherwise noted, all references to "docket" are to the district court docket in Figge's habeas corpus case. The magistrate judge granted the State's request to file the state court record under seal on the ground that the transcripts, briefs, and California Court of Appeal opinion had been filed under seal in state court because "they contain[ed] information about child molest victims." *See* Pet. App. 101-109; *see especially* Pet. App. 105-106.

(Apr. 6, 2015).[2] The California Supreme Court denied Figge's petition for review on July 22, 2015 in case no. S226535. Pet. App. 45.

Figge filed several habeas corpus petitions in the California Court of Appeal. *Id.* The court denied them on August 12, 2016 (case no. D070761); July 13, 2017 (case no. D072398); and July 26, 2017 (case no. D072500). On November 9, 2016, the California Supreme Court denied Figge's habeas petition in case no. S237141. *Id.* On October 11, 2017, the California Supreme Court denied Figge's habeas petition in case no. S243707.

On October 4, 2016, Figge filed a federal habeas corpus petition in *Brian Figge v. Scott Frauenheim, Warden*, C.D. Cal. case no. CV 16-07408-DSF-KES. Pet. App. 46. He filed the operative second amended petition on December 2, 2016. *Id.*; docket 10. On March 30, 2018, United States Magistrate Judge Karen E. Scott filed a report recommending that Figge's petition be denied and the action dismissed with prejudice.[3] On June 6, 2018, United States District Judge Dale S. Fischer accepted the report, dismissed

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[2] Figge cites the publicly-filed version of the opinion available online. This version redacts information regarding the witnesses who testified at trial that Petitioner sexually assaulted them. *Id.*

[3] The magistrate judge publicly filed a version of the report redacting information pertaining to the witnesses who testified that Petitioner sexually assaulted them. Pet. App. 41. Figge has filed this redacted version of the report in his Appendix. Pet. App. 41-100. The complete report, filed under seal, is contained in district court docket 44.

the petition with prejudice, and entered judgment against Figge. Pet. App. 39-40. Judge Fischer granted a certificate of appealability on the issue raised in this petition. Docket 48.

On July 24, 2020, without holding oral argument, the Ninth Circuit, per the Honorable Kim McLane Wardlaw, Deborah L. Cook, United States Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation, and Danielle J. Hunsaker, affirmed the judgment in an unpublished memorandum opinion in *Figge v. Frauenheim*, case no. 18-55855. Pet. App. 33-38.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brian Keith Figge petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in his habeas corpus action.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the judgment against Figge is unreported. Pet. App. 33-38. The district court's judgment and its order accepting the magistrate judge's report and recommendation and dismissing the habeas action against Figge with prejudice are unreported. Pet. App. 39-40.

The opinion by the California Court of Appeal affirming Figge's judgment on appeal is unreported. Pet. App. 45; *Figge*, 2015 WL 1573874. The order by the California Supreme Court denying Infante's petition for review is unreported. Pet. App. 45.

JURISDICTION

The Ninth Circuit's judgment affirming the judgment against Figge was filed and entered on July 24, 2020. Pet. App. 33; Ninth Circuit docket

61. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.1 and the Court's order of March 19, 2020 extending the filing deadline for certiorari petitions by another 60 days because of Covid-19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)

"(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

STATEMENT OF THE CASE

I. Evidence Presented at Trial

As recounted in the redacted report publicly filed by the magistrate judge, Jane Doe 1 testified at trial that Petitioner forced her to have oral sex with him three times when she was between the ages of 11 and 13. Pet. App. 42. She claimed that on a fourth occasion, she told him that she was "'not doing this anymore'" and he responded, "'I'm sorry, I'm sorry . . . .'" *Id.* There were no further incidents. *Id.* She testified that she did not tell anyone about the alleged assaults until she was 17 years old, when she told a boyfriend. The boyfriend then contacted the police. Pet. App. 43. Jane Doe 2 testified at trial that Petitioner sodomized her when she was 10 years old and that she told her mother over a year later. *Id.*

There was no testimony at trial that anyone else had witnessed Figge sexually abuse Jane Doe 1 or Jane Doe 2, nor that Jane Doe 1 had told anyone about the abuse prior to when she told her boyfriend. Jane Doe 1's mother Ellen, half-sister Katharine, and half-brother Andrew testified that Jane Doe 1 didn't regularly lie. Dr. Laura Brodie, a clinical and forensic

psychologist, testified for the prosecution about child sexual abuse accommodation syndrome and the behaviors manifested by children who have been abused.

As recounted in more detail below, the judge removed a defense holdout juror during jury deliberations. After the juror was replaced, the jury found Figge guilty of committing a lewd act, oral copulation, and aggravated sexual assault of a child during three different occasions with respect to Jane Doe 1; and guilty of a forcible lewd act, sodomy, and aggravated sexual assault of a child in 2010 with respect to Jane Doe 2. Pet. App. 44. The judge sentenced Figge to four terms of 15 years to life for each of the aggravated sexual offense convictions, for a total of 60 years to life, and stayed the sentences on the remaining convictions. *Id.*

II. Jury Deliberations

The jury retired to deliberate at 1:40 p.m. on December 10, 2011. CT 250. That afternoon, the jury requested read-backs of "all the testimony on if Brian Keith Figge apologized and said he was abused as a kid. Re: direct on [Jane Doe 1] testified he wasn't the type to apologize," and on "Officer Harwick's testimony about Dillan's [sic] report about [Jane Doe 1]." CT 252-253.

The next morning the jury requested a read-back of more testimony. CT 256. Later that day, the jury reported two separate times that it was

"unable to come to a final agreement," but on both occasions the court directed it to continue deliberating. CT 257-258.

The next morning, the jury asked for a read-back of "[Jane Doe #2]'s testimony." CT 261. Then, at 11:40 a.m., the deputy stated that some jurors had a message for the court that "[Juror] No. 11 is refusing to deliberate." RT 541. The court questioned the four complaining jurors (Jurors 2, 4, 7, and 8) one by one in chambers, and then briefly questioned Juror 11. RT 550-571.

It became apparent through the questioning that Juror 11 was the "lone holdout juror" for a not guilty verdict. Pet. App. 58 ("Some of the jurors' statements . . . indicate[d] that they were frustrated with Juror No. 11 simply because he was the lone 'holdout' juror."); *see also* RT 567-572 (prosecutor was fighting hard to have Juror 11 dismissed, while the defense attorney was arguing strongly to keep him); RT 570 (Juror 11: "We first went into the room and . . . one of the jurors said, okay, you know, my mind's made up, he's . . . guilty as . . . hell. And I said no.").

Juror 11 stated that he was deliberating and "keeping an open mind" but that the other jurors "don't like it that [his] opinions are different" to the "extent that one of the jurors got up and swore at [him]," "another juror was badgering [him]," and other jurors were 'just asking [him the] same things over and over . . . [and] making statements to [him] over and over . . . ." RT 570. He said that although another juror had declared at the beginning that

Figge was "guilty as hell," he was the one who "started discussing and turned it into a discussion" to "discuss [the counts] and started . . . with Count 1." RT 569-570.

The court found the four complaining jurors to be credible, and found Juror 11's "demeanor . . . different than the demeanor of the other four . . . and "[h]e just seemed to be trying to hide something." RT 574. The judge dismissed Juror 11 for failing to deliberate and sent the jury home for the day. RT 574-575.

The following day, the jury resumed deliberations with a new juror in place of Juror 11. CT 262. At 10:45 a.m., the jury requested a read-back of "when [Jane Doe 1] said her mom was strangled and told not to leave him. All portions when it was mentioned." CT 264. At 3:15 p.m., the jury asked for a readback of "[Jane Doe l]'s testimony." CT 265.

Juror deliberations resumed the next day. CT 266. At 9:24 a.m., Jury Request #3A was made, asking "Do we have to choose guilty and not guilty[.] Can we do undisided [sic]." CT 268. At 11 a.m., the jurors declared a verdict, finding Figge guilty on all 12 counts. CT 266-267.

III. State Direct Appeal

Figge challenged the removal of Juror 11 on direct appeal. The California Court of Appeal denied his claim in an unpublished opinion. Pet. App. 49-55; *Figge*, 2015 WL 1573874, at *2-5. Figge reasserted his claim in a

petition for review in the California Supreme Court, which was denied on July 22, 2015. Pet. App. 45.

IV. Federal Habeas Action

Figge challenged the removal of Juror 11 in ground one of his federal habeas petition. Pet. App. 46. The district court denied relief on the claim. Pet. App. 39, 40, 100. Figge raised the claim in his appeal to the Ninth Circuit. The Ninth Circuit affirmed the judgment against Figge in an unpublished memorandum filed and entered on July 24, 2020. Pet. App. 33-38.

REASONS FOR GRANTING THE WRIT

I. Standard of Review and AEDPA Standards

The Court reviews the denial of Figge's habeas corpus petition *de novo*. *Curiel v. Miller*, 830 F.3d 864, 868 (9th Cir. 2016) (en banc). The Court reviews *de novo* questions of law and mixed questions of law and fact. *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001) (en banc). The application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") is a mixed question of law and fact. *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016) (en banc). "To the extent it is necessary to review findings of fact made in the district court, the clearly erroneous standard applies." *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002).

Figge filed his federal habeas petition after AEDPA's effective date; therefore, his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 205, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-737 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The relevant state court decision for purposes of federal review is the last reasoned decision that resolves the claim at issue. *Curiel*, 830 F.3d at 869. Where, as here, the California Supreme Court summarily denies a petition for review on direct appeal, the federal court "'look[s] through' th[at] unexplained decision to the last reasoned state-court decision that does provide a relevant rationale," *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), *i.e.*, the Court of Appeal opinion. *See, e.g., Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013).

There is a rebuttable presumption that a state court adjudicated the merits of a federal claim—triggering the application of § 2254(d)—when it denies the claim in an opinion that addresses some issues but does not expressly address the federal claim in question. *Williams*, 568 U.S. at 293.

When a federal claim has been adjudicated on the merits in a state court opinion, § 2254(d) analysis is limited to evaluating the "state court's actual decisions and analysis." *Frantz*, 533 F.3d at 737 (original emphasis); *Wilson*, 138 S. Ct. at 1192.

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). A governing legal principle or principles may result from decisions in one or more Supreme Court opinions. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246-256 (2007) (canvassing myriad Supreme Court opinions to discern and apply the governing rule that capital sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence); *Brewer v. Quarterman*, 550 U.S. 286, 288-89 (2007) (same).

A "'state court decision is "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of

the Supreme Court and, nevertheless, arrives at a result different from its precedent.'" *Cudjo v. Ayers*, 698 F.3d 752, 761 (9th Cir. 2012) (original emphasis).

A state court unreasonably applies federal law when it identifies the correct governing legal principle but unreasonably applies it to the facts of the case. *Id.* "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) ("[a] federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'").

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported or contradicted by the record or when the fact-finding process itself was defective. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277-2282 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

When a federal court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated. *Panetti*, 551 U.S.

at 953-954; *Frantz*, 533 F.3d at 735; *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

II. The State Court Decision Is Based on an Unreasonable Determination of the Facts and Therefore 28 U.S.C. § 2254(d) Does Not Bar Relief

A. Applicable federal law

It is clearly established federal law that the Sixth and Fourteenth Amendments guarantee state criminal defendants the right to a fair trial by a panel of impartial jurors. *Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992) (collecting cases). An impartial juror is one who "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

No good cause exists to remove a juror unless his "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Merced v. McGrath*, 426 F.3d 1076, 1080-1081 (9th Cir. 2005) (*Witt* is clearly established federal law for assessing the removal of jurors in non-capital cases).

"[R]emoval of a holdout juror" "violate[s] the Sixth Amendment where it was [not] based on 'good cause' and where there was . . . 'evidence to suggest that the trial court's decision was motivated by the juror's views on the merits' — i.e., because the juror was the lone holdout." *Frank v.*

Lizarraga, 721 Fed. Appx. 719, 720 (9th Cir. May 2, 2018) (Mem.) (quoting *Perez v. Mitchell*, 119 F.3d 1422, 1426 (9th Cir. 1997)). Figge meets all the relevant tests for relief.

B. The California appellate court ruling

When evaluating the trial court's ruling in Figge's case, the appellant court applied the standard in *People v. Cleveland*, 25 Cal. 4th 466, 485 (2001), Pet. App. 52, which held that a trial court has "good cause" to dismiss a juror under Cal. Penal Code § 1089 if the juror is unable to or refuses to perform her "duty to deliberate." This Court has found that the court in *Cleveland* simultaneously adjudicated the federal constitutionality of the trial court's decision to dismiss a holdout juror in its resolution of a juror dismissal claim under § 1089. *See Johnson*, 568 U.S. at 304-305.[4] Under *Cleveland*:

> A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process;

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[4] As discussed in the magistrate judge's Report, "[m]any courts have noted . . . that the discharge of a juror under Cal. Penal Code section 1089 implicates a criminal defendant's Sixth Amendment right to a fair trial by a panel of impartial, indifferent jurors, and that a claim alleging a violation of section 1089 "overlaps with' or is 'intertwined with' a Sixth Amendment claim." Pet. App. 56 (citing *Bell v. Uribe*, 748 F.3d 857, 864 (9th Cir. 2014)); *see also Johnson*, 568 U.S. at 304-305 (finding that a California court's resolution of a juror dismissal claim under § 1089 also incorporated the Petitioner's claim under the Sixth Amendment, because the opinion discussed *Cleveland*); *Bell*, 748 F.3d at 868 ("We have consistently held that 'the California substitution procedure' outlined in § 1089 'preserve[s] the 'essential feature' of the jury required by the Sixth and Fourteenth Amendments.").

> that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include . . . expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury . . . .

Id. The court in *Cleveland* also recognized, however, that:

> [t]he circumstance that . . . a juror . . . disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts . . . does not constitute a refusal to deliberate. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.

25 Cal. 4th at 485.

The appellate court deferred to the trial court's finding that the four complaining jurors credibly described Juror No. 11's conduct and that Juror No. 11's description of what occurred was not credible, and determined that "[b]ased on the showing that Juror No. 11 was unwilling to gate in the deliberative process, the court did not err by discharging him." Pet. App. 53-55. Additionally it found that:

> although Juror No. 11 was speaking and listening during the discussions, he had made up his mind from the outset of the deliberations and was not willing to consider other points of view. . . . As described by these jurors, during the deliberations Juror No. 11 . . . was not engaging in an evaluation of

> other jurors' opinions and he at times withdrew from the deliberations because he did not want to consider the points raised by other jurors. Their descriptions reflect that he was not deliberating in a meaningful manner because he had already decided the case in his mind and he was not willing to give other jurors an opportunity to change his views. The jurors consistently stated that Juror No. 11 engaged in this intransigent approach from the beginning of the deliberations, which reflects this is not a situation where a juror has deliberated with an open mind for a reasonable period and is not simply communicating that he or she has made a final decision . . . . Although Juror No. 11 clearly had the right to adhere to his position after good faith deliberations, the four jurors that the court interviewed showed that Juror No. 11 was adamantly maintaining his opinion without giving other jurors' opinions any consideration.

Pet. App. 53-54. As shown below, the California appellate court's decision runs afoul of 28 U.S.C. § 2254(d)(2) and therefore AEDPA does not bar relief.

C. The California appellate court ignored key contradictory testimony in making its determination

The state appellate court failed to consider significant contradictory evidence in making its determination that Juror No. 11 failed to deliberate. "Failure to consider key aspects of the record is a defect in the fact-finding process." *Taylor*, 366 F.3d at 1007 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)). In making findings, a judge must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings. *Id.* "The process of explaining and reconciling seemingly

inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. *Id.*

Here, while the state appellate court deferred to the trial court's assessment that the four complaining jurors (Jurors 2, 4, 7, and 8) were credible while Juror 11 was not, the appellate court failed to resolve the fact that the four "credible" complaining jurors made statements directly contrary to the appellate court's key findings and that they contradicted each other on key points. Most importantly, the court ignored the critical misunderstanding that the complaining jurors believed the holdout juror was "failing to deliberate" when he was simply failing to change his mind to a guilty verdict.

a) Some of the statements made by the four "credible" jurors contradicted the California appellate court's key findings, but the court failed to explain why it ignored this important inconsistent testimony

First, some of the statements made by two of the four "credible" complaining jurors contradicted the appellate court's key factual findings, yet the appellate court did not explain how it "reconciled these seemingly inconsistent parts of the record." *Taylor*, 366 F.3d at 1001 ("[T]he state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim.").

Statements by Jurors 2 and 4 directly contradicted the appellate court findings that "Juror No. 11 was not willing to engage in the deliberative process," "was not engaging in an evaluation of other jurors' opinions," and that "this is not a situation where a juror has deliberated with an open mind for a reasonable period and is now simply communicating that he or she has made a final decision." Pet. App. 54. Contrary to the appellate court's findings of fact, Juror 2 informed the trial court that Juror 11 was listening to the readbacks, listening to other jurors when they were talking, and also participating in the deliberations alongside the other jurors, but that he was at a point where it was clear he was not going to change his mind so "they were not getting anywhere with the deliberations" all signs that Juror 11 had wholly participated in the jury deliberations:

> [Prosecutor]: . . . Do you feel that he is actually failing to deliberate and participate in the process?
>
> Juror No. 2: No. He's giving it to us to deliberate. It's just we're not getting anywhere with the deliberations.
>
> * * *
>
> [Defense counsel]: And you said when there's readbacks and people are talking, he's listening?
>
> Juror No. 2: Yes.
>
> [Defense counsel]: And he is participating?
>
> Juror No. 2: Sometimes, yeah.

> [Defense counsel]: Okay. He is just at a point where it's clear to you he's just not gonna change his mind?
>
> Juror No. 2: Exactly.

RT 566.

Similarly, Juror 4 indicated to the trial court that Juror 11, by discussing his point of view and listening to other points of view, did in fact engage in the deliberative process by giving other jurors' opinions consideration, but at a certain point he made a final decision and felt that there was nothing further that the other jurors could do to change his mind. RT 551-552. The following colloquy occurred:

> The Court: Okay. For me be devil's advocate. Maybe he said, you know, we've discussed this, I've discussed my point of view, I've heard your point of view, I don't think there is anything you can do to convince me otherwise. I've got my mind made up. I discussed it. No further discussion is going to help or I just don't want to hear anything from anybody. Leave me alone. I'm not going to participate. So which way is this?
>
> Juror No. 4: The first one.
>
> The Court: Uh-huh.
>
> Juror No. 4: The first one that you mentioned, yeah.

RT 551. Here, Juror 4 agreed with the first part of the judge's hypothetical which would indicate that Juror 11 was engaging in the deliberative process and simply had come to a different conclusion than the other jurors.

These exchanges between the trial court and Jurors 2 and 4 are directly contrary to the central findings of the state appellate court. *Taylor*, 366 F.3d at 1001 ("To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored evidence must be highly probative and central to petitioner's claim."). When making its findings, however, the court did not explain why it ignored this conflicting testimony of these two jurors on these key points and instead solely included in its opinion snippets of testimony that supported its findings. *Taylor*, 366 F.3d at 1001 (holding that the state court makes an "unreasonable determination of fact" when it "fail[ed] to consider and weigh relevant evidence that was properly presented to the state courts and made part of the state court record.").

Moreover, as these determinations turn on Juror 11's internal mental state at the time of the deliberations, the appellate court did not clarify how else, aside from participating in the deliberations, discussing the case, discussing his point of view, and listening to the other jurors, could the four complaining jurors have possibly determined whether Juror 11 was evaluating "other jurors' opinions" or "engaging in the deliberative process" except by confusing his failure to change his mind with a failure to deliberate. *Id.* at 1001.

For example, in *Cleveland*, the holdout juror was less cooperative with the other jurors than in this case, but the California Supreme Court held that the trial court's findings of fact that he was not deliberating were erroneous because even though the other jurors stated that the holdout juror "was not deliberating," he refused to participate at times, and he "refuse[d] to respond" when asked "specific questions as to elements and facts", the juror "attempted to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient to prove an attempted robbery, and he listened, even if less than sympathetically, to the contrary views of his fellow jurors." *Cleveland*, 25 Cal.4th at 486; *see also People v. Bradford*, 15 Cal. 4th 1229, 1350-1352 (1997) (affirming that no misconduct occurred when a few "hostile jurors" had expressed a fixed view of the case before all the evidence had been reviewed and caused other jurors to feel they could not continue deliberations). Here, as in *Cleveland*, the holdout juror also explained his point of view and listened to the other jurors.

State courts that have dismissed a holdout juror during deliberations without violating the Sixth Amendment have generally done so when the

juror himself informs the court he is not able to deliberate,[5] was inebriated,[6] consulted outside sources and acted as a mental health expert,[7] falsely responded to bias questions on *voir dire*,[8] was biased because he would not follow the law since he disagreed with it,[9] or did not discuss his point of view or listen to other jurors and refused to look at the victims in the courtroom.[10] Noting like that is present here.

b) The four complaining jurors contradicted each other and themselves in describing Juror 11's behavior in the jury room, but the California appellate court did not explain why it disregarded these significant inconsistencies

The four complaining jurors contradicted each other in explaining the behavior of Juror 11, but the California appellate court did not explain why it ignored these key inconsistencies. *Taylor*, 366 F.3d at 1001.

As described above, with regard to Juror 11's behavior in the jury room, Jurors 2 and 4 testified that Juror 11 had been participating in the

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[5] *Perez*, 119 F.3d at 1427; *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987).

[6] *Miller v. Stagner*, 757 F.2d 988, 995 (9th Cir. 1985), *amended*, 768 F.2d 1090.

[7] *Bell*, 748 F.3d at 868-869.

[8] *Lizarraga*, 721 Fed. Appx. 719.

[9] *Williams v. Johnson*, 840 F.3d 1006, 1008-1010 (9th Cir. 2016).

[10] *People v. Thomas*, 26 Cal. App. 4th 1328, 1333 (1994).

discussions, was listening to the read-backs, had listened to other juror's opinions, and had shared his opinions. RT 551, 566.

However, Juror 8 contradicted Jurors 2 and 4 by telling the court that Juror 11 was failing to deliberate because from the beginning he was not giving feedback, staring at the other jurors, and was not saying anything.

> [Prosecutor]: I just have one question. Do you feel that he is failing to deliberate?
>
> Juror No. 8: Absolutely.
>
> The Court: Counsel?
>
> [Defense counsel]: And when did you start feeling that?
>
> * * *
>
> Juror No. 8: From the first time we sat down . . . . Just from the very beginning. And I -- you know, I've -- I'm pretty easygoing and, you know, after teaching for 35 years I've dealt with some really crazy characters. I mean, I'm not saying this guy's crazy. Strike that. But there's -- like, there's nothing -- there's no feedback. You know? It's like you're staring at me and I'm gonna keep talking and you're not gonna say anything.

RT 559. Juror 8's description of Juror No. 11's behavior was completely different from that of Jurors 2 and 4, as Juror 8 described him as someone very quiet, unresponsive, and potentially mentally ill.

However, by contrast (and as described above), Juror 4 agreed that "[i]n the very beginning," Juror 11 "listen[ed], participate[d], argue[d], express[ed]

a point of view." RT 552. Furthermore, the fourth complaining juror, Juror 7, contradicted all three of the other complaining jurors. Juror 7 did not describe Juror 11 as someone who would not talk and was unresponsive; instead, Juror 7 described Juror 11 as someone who had been talking about the case with the group but was getting very frustrated, defensive, and annoyed by the others when they interrupted and "badgered" him, and thus he was threatening not to continue to interact with them. RT 562.

Juror 8 also contradicted herself: she told the court that "from our discussions I feel that [Juror No. 11] has -- he made up his mind before we ever entered the jury room," RT 556, but when she described Juror 11's statements she made it sound as if he were confused as to his opinion on the evidence by stating that "he just said 'I just don't see any of it. I don't see -- I can't put this together. It just does not make sense to me.'" *Id.* If Juror 11 was making statements like "I can't put this together" and "it just does not make sense to me," during the jurors' discussions, it does not appear that he had made up his mind before entering the jury room. However, the appellate court did not explain why it believed one statement made by Juror 8 over another.

While the four jurors described very different and contradictory behaviors by Juror 11, the appellate court did not explain how it was possible to find that all four complaining jurors' testimony was credible while Juror 11

was not credible, nor did it explain why it believed some of their descriptions of Juror 11 but not others.

c) The appellate court failed to address obvious confusion by the "credible" jurors; the complaining jurors believed Juror 11 was "failing to deliberate" because he had refused to change his mind to the majority view

From the transcript it is apparent that the complaining jurors believed Juror No. 11 was "failing to deliberate" because he refused to change his mind to the majority view and convict Figge, yet the California appellate court patently ignored this obvious-yet-damning misunderstanding. *See Milke v. Ryan*, 711 F.3d 998, 1008 (9th Cir. 2013 ("[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rending the resulting factual finding unreasonable."); *Taylor*, 366 F.3d at 1001.

Compounding this key misunderstanding, the trial court never made it clear to the jurors what a "failure to deliberate" was; instead, the judge repeatedly used terms like failing to "cooperate" or "not [being] on the same wavelength," which would indicate solely that the juror was not joining the group consensus of a guilty verdict. RT 561-564.

Indeed, as described by the federal magistrate judge in her report, it is obvious from the jurors' testimony that the Juror 11 was the "lone 'holdout'" who disagreed with the majority view and the other jurors were getting frustrated because he would not change his mind. Pet. App. 58 ("Some of the jurors' statements did indicate that they were frustrated with Juror No. 11 simply because he was the lone 'holdout' juror.").

For example, Juror 2 explained that she believed Juror 11 "was not cooperating" and "had a closed mind" from "the first hour" of deliberations because "he had his own opinion." RT 563-565.

However, 'it is not uncommon for a juror . . . to come to a conclusion about the strength of a prosecution's case early in the deliberative process and then refuse to change his or her mind despite the persuasive powers of the remaining jurors." *People v. Bowers*, 87 Cal. App. 4th 722, 734 (2001); *People v. Engelman*, 28 Cal. 4th 436, 446 (2002) (holding that a court "may not discharge a juror for failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence in support of the majority view.").

Juror 2 further testified that Juror 11 was "not willing" to deliberate because even though they were "all talking," he was "not changing his mind in any way," and that even though they'd had "three or four readbacks," he was not willing to deliberate since "nothing's changing." RT 565.

Similar to Juror 2, Juror 4 explained that she believed Juror 11 wasn't deliberating because he had a strong opinion and hadn't changed his mind to the majority view during the three days of deliberations. RT 552 ("He hasn't, you know, changed his mind.").

Juror 8 also made statements showing that she, too, believed Juror 11 was failing to deliberate because they were "making no progress" in changing his mind even though another juror "has explained everything in all different . . . angles." RT 557. Juror 8 agreed with the court that Juror 11 was "unwilling to discuss the case with the others toward reaching some kind of resolution," again seeming to indicate in that context that Juror 11 was not willing to change his mind to resolve the case. RT 558.

Juror 7 also made it clear that Juror 11 was participating, but felt Juror 11 had an "attitude" and was "not willing to cooperate," because he told the other jurors that they were "all badgering him" when he was talking, thus referencing the mutual frustration that was occurring when he was not changing his mind to their view. RT 562.

Juror 11 explained that he believed he was fulfilling his "role in deliberating, discussing, keeping an open mind," but that the other jurors "don't like that my opinions are different," and were getting frustrated that he wouldn't change his mind. RT 570.

In *Cleveland*, although the eleven other jurors complained that the holdout juror "failed to deliberate" and "was unwilling to apply the law," the California Supreme Court acknowledged that, like here, "it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it." *Cleveland*, 25 Cal. 4th at 486. The court in *Cleveland* thus found that the trial court abused its discretion in excusing the holdout juror. *Id.*

Because here the appellate court ignored, misapprehended, or misstated the record with regard to this "material factual issue that is central to [Figge's] claim," its fact-finding process was "fatally undermined" in determining that the holdout juror was failing to deliberate. *See Milke*, 711 F.3d at 1008. There was no good cause to remove Juror 11, as it is clear from the record that Juror 11 was deliberating and his views would not "prevent or substantially impair the performance of his duties as a juror." *Witt*, 469 U.S. at 424; *see also Perez*, 119 F.3d at 1426; *Lizarraga*, 721 Fed. Appx. at 719-720. Accordingly, the appellate court's findings were unreasonable. *See id.*

d) The process employed by the state court was defective because the court only briefly spoke with the holdout juror, no inquiry was made of the non-complaining jurors, and no effort was made to preserve the originally empaneled jury

The process employed in this case was also defective because the trial court spoke only briefly with Juror 11, spoke at length with the four

complaining jurors, and failed completely to question the jury foreperson or the six other non-complaining jurors. *See Milke*, 71 F.3d at 1007 (holding that a "state court's finding" on a claim "amounted to an unreasonable determination of the facts under section 2254(d)(2)" when the state judge made "her finding based on an unconstitutionally incomplete record"); *see also People v. Barber*, 102 Cal. App. 4th 145 (2002) (finding that "the court's inquiry was inadequate" because "its findings were derived from a stacked evidentiary deck" when the trial court only interviewed the six complaining jurors but failed to interview the other jurors); *Cleveland*, 25 Cal.4th at 486 (questioning all twelve jurors before making a determination with regard to whether the holdout juror was failing to deliberate). The process was further defective because the court failed to take any action to "preserve the original empaneled jury." *Bell*, 748 F.3d at 868; *Perez*, 119 F.3d at 1426-1427.

Here, unlike in *Perez* and *Bell* where the state trial courts "took great pains to preserve the original empaneled jury" and spoke at length with the holdout juror to encourage the juror to properly participate in the deliberations, the trial judge here solely held one brief hearing where he spoke little with Juror 11 and gave him no chance to improve his behavior before dismissing him. *Bell*, 748 F.3d at 868 (finding no violation under § 2254(d) because "[t]he record reflects that the state trial judge took great pains to preserve the originally empaneled jury and declined to remove Juror

No. 7 on four separate occasions in response to juror notes and complaints to the court."); *Perez*, 119 F.3d at 1426-1427 (finding key to its holding of no Constitutional violation that the trial court "conducted a lengthy interview with Juror Robles . . . where the juror repeatedly indicated that she was not willing and able to continue as a juror," the trial judge "persuaded her to return to the jury room" shortly after "the foreperson was forced to discontinue deliberations because of Robles's emotional state," and the court again spoke with the juror before excusing her). Here, unlike in *Bell* and *Perez*, no discussion whatsoever was had with Juror 11 to encourage him to deliberate, nor were additional chances given to him correct his behavior before excusing him.

Because the state court made its determination that the holdout juror had "failed to deliberate" based on a critically incomplete record and without taking "great pains to preserve the original empaneled jury," the fact-finding process itself was defective, which amounted to an unreasonable determination of facts under section 2254(d)(2). *Milke*, 71 F.3d at 1007; *Taylor*, 366 F.3d at 999-1001; *Bell*, 748 F.3d 868; *Perez*, 119 F.3d at 1426-1427.

III. On *De Novo* Review, the Court Should Grant Relief

A. Figge's Sixth Amendment rights were violated

For the same reasons that 28 U.S.C. § 2254(d)(2) is satisfied, the Court should grant relief on de novo review. *Frantz*, 533 F.3d at 736 ("a holding on habeas review that a state court error meets the § 2254(d) standard will often simultaneously constitute a holding that the § 2254(a)/§ 2241 requirement is satisfied as well, so no second inquiry will be necessary"). As described above, Juror 11's views would not "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," *Witt*, 469 U.S. at 424, his removal was not based on good cause, and there was "evidence to suggest" (via the many comments of the complaining jurors explained above), that the "decision to remove him was motivated" by his "views on the merits" of the case, since he "was the lone holdout." *See Lizarraga*, 721 Fed. Appx. at 719-720 (*quoting Perez*, 119 F.3d at 1426).

B. The Sixth Amendment violation prejudiced Figge

The removal of the lone defense holdout juror requires relief on its own without a showing of prejudice. *See, e.g., Sanders v. LaMarque*, 357 F.3d 943 (9th Cir. 2004). But even this claim is subject to harmless error review, the removal of jury 11 clearly prejudiced Figge, since Juror 11 was the only juror who was in favor of a not guilty verdict. Pet. App. 58. Indeed, the prejudice

of removing Juror 11 was demonstrated when, after he was removed, the jury turned in guilty verdicts on all twelve counts just one day after beginning their deliberations with the new juror. CT 262-267. Accordingly, this Court should grant relief.

CONCLUSION

For the foregoing reasons, the Court should grant Figge's petition, reverse the judgment of the Ninth Circuit, and grant relief.

Respectfully submitted,

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