No. _____

In the Supreme Court of the United States

MELVIN WOFFORD,

***Petitioner*,**

v.

JEFFREY WOODS, Warden,

***Respondent*.**

PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNITY DEFENDER
Colleen P. Fitzharris
Counsel for Petitioner

613 Abbott St., Suite 500
Detroit, Michigan 48226
Telephone No. (313) 967-5542
colleen_fitzharris@fd.org

QUESTION PRESENTED FOR REVIEW

Over the course of six days of deliberation in Melvin Wofford's murder case, the jury sent notes revealing that they were deadlocked 11 to 1, one person had doubts about the case, and the holdout was a woman. On the sixth day of deliberation, the parties learned the identity of the holdout juror because she contacted a lawyer to report being harassed by other jurors. She did not discuss the case or her views on the case. Both parties suggested a mistrial. Without talking to this juror, the trial judge dismissed and replaced her with an alternate. The newly constituted jury convicted Mr. Wofford in less than an hour and a half. This petition presents the following question:

> Does a trial court violate the defendant's Sixth Amendment right to a unanimous jury verdict when the record establishes a reasonable possibility that the judge replaced a deliberating juror because of the juror's views on the merits of the case?

Table of Contents

TABLE OF AUTHORITIES

Supreme Court Cases

D.C. Circuit Cases

2d Circuit Cases

3d Circuit Cases

5th Circuit Cases

6th Circuit Cases

7th Circuit Cases

8th Circuit Cases

9th Circuit Cases

11th Circuit Cases

District Court Cases

State Cases

Statutes

Constitutional Provisions

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Melvin Wofford respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Sixth Circuit Court of Appeals reversed the district court's grant of a writ of habeas corpus on August 13, 2020. Therefore, under the Court's March 19, 2020 Order, this petition is timely because it was filed on the first business day 150 days after the date of the lower court judgment.

OPINIONS BELOW

The Sixth Circuit's published opinion reversing the district court's opinion and order granting the writ of habeas corpus is included at A-1 and is available at *Wofford v. Woods*, 969 F.3d 685 (6th Cir. 2020). The District Court's opinion and order granting the writ of habeas corpus is included at A-2 and is available at *Wofford v. Woods*, 352 F. Supp. 3d 812 (E.D. Mich. 2018).

The Michigan Supreme Court's order denying Mr. Wofford's application for leave to appeal is included at A-3 and available at *People v. Wofford*, 869 N.W.2d 598 (Mich. 2015). Mr. Wofford's application for leave to appeal to the Michigan Supreme Court is included at A-4. The Michigan Court of Appeals' opinion affirming Mr. Wofford's conviction is included at A-5 and available at *People v. Wofford*, No. 318642, 2015 WL 1214463, at *1 (Mich. Ct. App. Mar. 17, 2015). Mr. Wofford's appellant brief in the Michigan Court of Appeals is included at A-6. The prosecutor's appellee brief in the Michigan Court of Appeals is included at A-7. The transcripts of the trial proceedings during which the parties discussed the jury deadlock and the holdout juror was removed are included at A-8.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

> 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 defence.

U.S. Const. amend. XIV § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Melvin Wofford was convicted of first-degree murder and sentenced to life without parole because the trial judge removed and replaced the juror who doubted his guilt.

A. The case against Mr. Wofford

In 1993, Thomas Gilmore's body was found in the bushes during the second day of an investigation into a burglary of a roofing company located in the same building as Gilmore's business. He had been beaten and strangled to death. The police collected evidence from both crime scenes, but the case went cold.

Nearly two decades after the murder, the police department received a grant to conduct DNA testing in cold cases. DNA testing matched Mr. Wofford to two blood drops and a few stray hairs found in the roofing company's workshop during the investigation of the burglary. A drop of his blood was found on a workbench in the workshop and another drop was found on a wall in the workshop. DNA testing also matched two hairs stuck to duct tape near the burglar's suspected entry point. Mr. Wofford worked as a roofer for the company, and so he regularly used dangerous tools and left his shoulder-length hair about.

None of the forensic evidence collected at the murder scene, outside the building in the bushes, matched Melvin Wofford. Four of the blood samples taken from the body contained DNA belonging to someone other than Gilmore. Mr. Wofford was excluded as a possible donor. All of the other DNA collected near the murder scene matched Gilmore, and Mr. Wofford was excluded as the donor. Analysts

determined that the footwear impressions taken from the scene did not match Mr. Wofford's shoes. Police did not find any of Gilmore's blood near the drops of blood that matched Mr. Wofford's or inside the workshop. In fact, none of Gilmore's blood was found in the workshop.

After the lab results, the Oakland County Prosecutor's Office charged Mr. Wofford with first degree murder. The theory was that Mr. Wofford broke into the workshop to steal petty cash or tools from his employer, but Gilmore caught him in the act. The prosecutor argued that Mr. Wofford lured Gilmore outside, and then beat him and strangled him for 90 seconds to cover up the break-in, a misdemeanor offense. The prosecutor speculated that none of the forensic evidence found near Gilmore's body matched Mr. Wofford because he threw away the pair of work boots he wore during the murder. The prosecutor also argued that Mr. Wofford displayed a "guilty conscience" because he did not go to work the day after the murder and stopped working at the roofing company shortly thereafter.

Testimony established that Mr. Wofford had been drinking heavily with coworkers until 2:30 am and was seen the next morning wearing the same clothes as the night before. His hands, face, and clothes showed no signs of a bloody fight in the grass and mud. Testimony further established that Mr. Wofford remained in his roofing crew after the murder and through the summer of 1993. And the prosecution could not explain why Gilmore inexplicably left behind his loaded revolver on his desk after allegedly discovering the break-in or how Gilmore and Mr. Wofford ended up outside.

It is no surprise that Juror M had doubts about Mr. Wofford's guilt.

B. The jurors deliberate for days and then reveal that they are deadlocked 11 to 1

Trial began in August 2013. After three weeks of testimony and argument, the jurors finally began deliberating. The following Monday, after seven hours of deliberations, the judge received a note from the jury: "[W]e are eleven to one with no chance of the one moving their view." A-8, APP_260. After reading the note, the court remarked, "Of course this is a violation of my instructions, but it is what it is." *Id.* The court decided to read the deadlocked-jury instruction. *Id.*, APP_263–64.

C. A letter reveals that eleven want to convict

An hour later, the court received a letter from a male juror other than the foreperson. *Id.*, APP_266–67. It read, "Excuse me, Judge, one of our jury's [sic] doubts are unreasonable, what do we do?" *Id.,* APP_267. Rather than respond to the note directly, the court read the jury the following instruction:

> If you want to communicate with me while you're in the jury room please have your foreperson write a note and give it to the court clerk. It is not proper for you to talk directly with the Judge, lawyers, court officers or other people involved in the case. As you discuss the case you must not let anyone, even me, know how your voting stands. Therefore, until you return with a unanimous verdict do not reveal this to anyone outside the jury room.

Id., APP_270–71.

D. A letter reveals the gender of the juror with doubts

The next day, the court received three additional notes from the jury revealing hostility towards one juror who had doubts. The first stated, "[W]e, the jury, have a member who is not cooperating and refuses to deliberate or prove to us her vote." The

writer provided additional information about the holdout juror: her gender. The note continued, "She just wants a hung jury. She also stated she had looked up the phrase to see what it meant before deliberation even started. Please advise us on what you do in this case. Thank you." *Id.*, APP_275; A-7, A-6, APP_154.

The second note provided evidence that this juror with doubts wanted to acquit Mr. Wofford. It read: "[W]e have a jury member who SERIOUSLY doesn't understand what REASONABLE DOUBT is!! We have a hung jury and we need instructions!!! HELP!!!" A-8, APP_275; A-6, APP_155. The third note was a substantive question: "Can you explain to us why, if someone commits robbery, why are they [sic] considered guilty of murder, example get-away driver." A-8, APP_276; A-6, APP_154.

The prosecutor acknowledged that the letter identified the gender of this juror, and suggested reading the deadlocked-jury instruction again or dismissing the juror who researched hung juries. A-8, APP_276–77. Without the benefit of a transcript, defense counsel mistakenly believed the note from the previous day identified the holdout juror as a man, and so he believed the jury's vote count had changed since the original note. *See id.*, APP_177–78. Ultimately, however, he expressed concern that an alternate juror would feel pressure to follow the lead of the group, and so he suggested asking the jurors whether they were, indeed, deadlocked. *See id.*, APP_278–79.

The court decided to read the reasonable-doubt and aiding-abetting instructions again and emphasized that the jurors must follow the law. *Id.*, APP_280, 283–86. In addition, the court chose to read the jury a second deadlocked-jury

instruction. *Id.*, APP_281, 286–87. At 3:21 PM, the judge excused the jury after informing them that he would not be available to answer questions the following day. *Id.*, APP_287. The record does not reveal whether the jury chose not to deliberate on Wednesday.

E. Juror M is identified as the holdout juror

Two days passed without any notes from the jury, and then, nearly a week after deliberations began, the court received word of an additional jury issue. One of the female jurors, Juror M, had contacted an attorney because she felt that other members of the jury were harassing and verbally abusing her. A-8, APP_292.

As instructed by the court, Juror M did not "talk directly with the Judge, lawyers, court officers or other people involved in the case." *Id.*, APP_270–71. She did not disregard the court's instructions to communicate through the foreperson "while . . . in the jury room." *Id.*, APP_270. And, as instructed, she did not "let anyone . . . know how [the] voting st[ood]." (*Id.,* PgID 2095.) Feeling ganged up upon and intimidated, Juror M instead contacted this attorney and, as the attorney explained, "didn't discuss any facts of the case or discuss anything about a vote or anything like that." *Id.*, APP_292.

The attorney advised her to "notify the Court through a note to the bailiff or whoever was watching the jury, . . . follow the law as instructed by the Court and . . . apply the facts to the law." *Id.*, APP_292–93. Juror M was uncomfortable and was concerned that she would not be able to contact the court. *Id.*, APP_293. Given her discomfort, the attorney offered to notify the court on her behalf. *Id.* Before finishing,

the attorney reiterated that he did not "know any of the facts" or anything "about the case other than what [the defense attorney] told" him in the hall. *Id.*

When Juror M's attorney finished speaking, the prosecutor suggested the best course was to ask the jury to continue deliberating. *Id.*, APP_294. Defense counsel pointed out that Juror M was the likely holdout and expressed concern that she may feel coerced if the judge read another deadlocked-jury instruction. *Id.*, APP_294–95. He also expressed concern that the harassment of Juror M must be quite extreme for her to retain an attorney. *Id.*

Unconcerned about the harassment of Juror M, the court suggested that she had flagrantly violated the instruction not to discuss the case by disclosing "the climate of the jury room." *Id.*, APP_295. Defense counsel interjected and explained that his understanding of the instruction was that the jurors could not disclose the facts of the case, which Juror M had not done. *Id.*, APP_296. In light of his concern about a coerced verdict, he requested a mistrial. *Id.*, APP_296–97.

In response, the prosecutor argued that the jury should continue to deliberate. *Id.*, APP_297. In the alternative, the prosecutor proposed finding manifest necessity to declare a mistrial. *Id.*, APP_298. Rejecting both suggestions, the court proposed striking the juror for the alleged violation of the rules without conducting any voir dire and replacing her with an alternate. *Id.*, APP_298–99. The prosecutor could not "find fault with the Court's reasoning," but continued to suggest that, if the court declared a mistrial, there should be an express finding of manifest necessity. *Id.*, APP_299.

Defense counsel highlighted the obvious: the jurors were deadlocked, tensions in the jury room were running high, and Juror M's action was an unusual response to the animosity in the jury room. *See id.*, APP_300–01. "I don't see how," he argued, "there wouldn't be some type of coercion for a new juror to come in there when they're going to say one got removed because they wouldn't go with us." *Id.*, APP_302.

Ultimately, the court chose to dismiss Juror M for cause and replace her with an alternate juror. *Id.*, APP_303, 306. Juror M tried to speak after the court informed her that she would be excused for cause. *Id.*, APP_307. The trial court did not permit her to speak. *Id.* The alternate juror joined forty-five minutes later. *Id.*, APP_312. Before excusing the jury to continue deliberations, the court reminded the group that, if they wished to render a verdict, they had to do so by 4:30 p.m. *Id.*, APP_314.

Just an hour and a half passed before the jury was ready with a verdict in time for their 4:30 deadline and a holiday weekend. *See id.*, APP_315, 320. They found Mr. Wofford guilty of first-degree premediated murder and first-degree felony murder. *Id.*, APP_317.

F. Mr. Wofford's raises a Sixth Amendment claim on direct appeal

Mr. Wofford promptly appealed. Represented by court-appointed counsel, Mr. Wofford identified a Sixth Amendment issue: the trial court violated "his Sixth Amendment right to have his jury decide his fate" when it "dismiss[ed] a holdout juror." A-6, APP_123. The first issue had at least two components—one based on Michigan law and a federal constitutional claim. Counsel pointed out the dual nature of the claim in the standard-of-review portion of the brief, noting that, under

Michigan law, violations of court rules (such as Michigan Court Rule 768.18) are reviewed for an abuse of discretion, whereas constitutional violations are reviewed de novo. *Id.*, APP_144.

In the brief, counsel identified the precise nature of the Sixth Amendment violation—the right to a unanimous jury—and flagged *United States v. Thomas*, 116 F.3d 606, 621 (2d Cir. 1997), as persuasive authority. *Id.*, APP_145. Counsel argued that Mr. Wofford's right to a unanimous jury verdict was violated "[i]f the record raises any possibility that the juror's views on the merits of the case, rather than a purposeful intent to disregard the court's instructions." *Id.* (quoting *Thomas*, 116 F.3d at 622 n.11).

G. The Michigan Court of Appeals finds that the trial court did not abuse its discretion under the state-court rule, but ignored the constitutional question

In its brief legal analysis, the Michigan Court of Appeals did not mention the Sixth Amendment or the federal authority cited in Mr. Wofford's brief. Instead, the court exclusively focused on whether the trial judge abused its discretion to replace a juror mid-deliberation under Michigan Court Rule 768.18. *People v. Wofford*, No. 318642, 2015 WL 1214463, at *1–2 (Mich. Ct. App. Mar. 17, 2015), A-5, APP_177–179. The court did not answer the follow up question: Did the removal of Juror M violate the Sixth Amendment's guarantee of a unanimous jury verdict even if the conduct did not violate the court rule? *See id.*

In denying the claim, the court of appeals stated there was no evidence of "which way the majority was leaning," "the identity of the holdout," or "the potential

division." *Wofford*, 2015 WL 1214463, at *2, A-5, APP_119. The court also believed the record established that Juror M showed "blatant disregard for the court's instructions." *Id.*

Mr. Wofford promptly applied for leave to appeal to the Michigan Supreme Court. *See* A-4. He was summarily denied review. *People v. Wofford*, 869 N.W.2d 598 (Mich. 2015), A-3, APP_067.

H. Mr. Wofford identifies the Sixth Amendment as a reason to grant a writ of habeas corpus

Within one year of the Michigan Supreme Court's decision, Mr. Wofford filed a pro se petition for a writ of habeas corpus. Mr. Wofford mentioned the dismissal of the holdout juror as the basis for one of his claims.

The district court correctly identified that Mr. Wofford had raised a Sixth Amendment claim. *Wofford v. Woods*, 352 F. Supp. 3d 812, 819 (E.D. Mich. 2018), A-2, APP_055. After reviewing the record, the district court found that the Michigan courts were presented with an opportunity to consider Mr. Wofford's Sixth-Amendment claim, but never adjudicated it. *Wofford*, 352 F. Supp. 3d at 821–22, A-2, APP_059–60. Consequently, the district court reviewed de novo Mr. Wofford's Sixth Amendment claim, but still deferred to the most of the factual findings of the Michigan Court of Appeals. *Wofford*, 352 F. Supp. 3d at 822, A-2, APP_060–61. The district court concluded there was "clear and convincing" evidence rebutting the conclusion that the juror removed was not the juror who harbored reasonable doubts about Mr. Wofford's guilt. *Wofford*, 352 F. Supp. 3d at 822, A-2, APP_060. In all other

respects, the district court deferred to the Michigan court's factual findings. *Wofford*, 352 F. Supp. 3d at 822, A-2, APP_060–61.

Giving the Michigan courts the greatest benefit of the doubt, the district court held that the trial court denied Mr. Wofford the right to a unanimous verdict by a fair and impartial jury because there was a "reasonable possibility that the impetus for Juror M's dismissal stemmed from her views on the merits of the case." *Wofford*, 352 F. Supp. 3d at 823, A-2, APP_062 (cleaned up) (quoting *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999)).

I. The Sixth Circuit reverses

To figure out whether the state court had adjudicated Mr. Wofford's Sixth Amendment unanimous-jury claim, the Sixth Circuit descended down a rabbit hole of case citations finding eventually a reference to the Sixth Amendment (but not scenarios involving the removal of a suspected holdout juror). To explain these confusing steps, the Sixth Circuit resorted to a diagram:

- **MI Court of Appeals→*Tate*→*Dry Land*→*Phillips*→Sixth Amendment**

See Wofford v. Woods, 969 F.3d 685, 715 (6th Cir. 2020), A-1, APP_041.

The Sixth Circuit started with the Michigan court's citation of *People v. Tate*, 624 N.W.2d 524, 559–60 (Mich. Ct. App. 2001), a case about whether the trial court abused its discretion by removing and replacing a juror with a rash. *Wofford*, 696 F.3d at 705, A-1, APP_027. In *Tate*, the defendant did not allege that the trial court violated his Sixth Amendment right to a unanimous jury because of the juror's views

on the merits of the case. *See id.* at 559–62. To the extent the opinion addressed federal constitutional rights at all, it discussed the Fifth Amendment's protection against double jeopardy. *See id.* at 561.

Because *Tate* did not mention or discuss the Sixth Amendment, the Sixth Circuit turned next to the case the *Tate* court relied on, *People v. Dry Land Marina, Inc.*, 437 N.W.2d 391, 3925–26 (Mich. Ct. App. 1989). *See Wofford*, 969 F.3d at 705–07, A-1, APP_027–29. *Dry Land* involved the removal and replacement of a sick juror, not a holdout juror. The *Dry Land* court did not address when a trial judge violates the Sixth Amendment's unanimous-jury guarantee. *See id.* at 325–26. Instead, the court examined this Court's Fifth Amendment double-jeopardy cases. *See id.* at 392 (citing *United States v. Jorn*, 400 U.S. 470, 479 (1971); *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824)). The district court had determined that the state court overlooked Mr. Wofford's Sixth Amendment claim because "[t]he Fifth Amendment right to avoid prolonged (or double) jeopardy is not the same as the Sixth Amendment right to a unanimous verdict." *Wofford*, 352 F. Supp. 3d at 821. But the Sixth Circuit thought the district court's "analysis rests on a purported division between the Fifth- and Sixth-Amendment precedent that is not supported by Michigan's case law." *Wofford*, 969 F.3d at 714, A-1, APP_040.

To reach that conclusion, the Sixth Circuit had to examine the cases discussed in *Dry Land*. *See Wofford*, 969 F.3d at 705–06, A-1, APP_027–28. The Sixth Circuit noted that, in the section of the *Dry Land* opinion addressing whether recalling the alternate juror violated Michigan Court Rule 6.102(A), the state court discussed

Federal Rule of Criminal Procedure 24(c) and federal cases interpreting it. *See id.* at 706, A-1, APP_028 (discussing *Dry Land*, 437 N.W.2d at 394 (citing *United States v. Hillard*, 701 F.2d 1052, 1056–57 (2d Cir. 1983); *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982); *United States v. Kopituk*, 690 F.2d 1289, 1308–09 (11th Cir. 1982); *United States v. Phillips*, F.2d 971, 991–93 & n.14 (5th Cir. 1981); *Henderson v. Lane*, 613 F.2d 175, 177–79 (7th Cir. 1980)).

Further down the rabbit hole, the Sixth Circuit examined each of these federal cases the *Dry Land* court cited, noting that "[a]ll but one of these cases explicitly discusses the Sixth Amendment." *Wofford*, 969 F.3d at 706 n.24, A-1, APP_028. Although none of these cases involved the removal of a deliberating holdout juror, the Sixth Circuit found them relevant because federal courts mentioned "the Sixth Amendment." *See Wofford*, 969 F.3d at 706; *Phillips*, 696 F.3d at 990 (ill juror); *Hillard*, 701 F.2d at 1055 (ill juror); *Kaminski*, 692 F.2d at 518 (family emergency); *Kopituk*, 690 F.2d at 1306 (mentally ill juror); *Henderson*, 613 F.2d at 176 (heart attack).

The Sixth Circuit next noted that each of these federal decisions discussed *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), and so it turned to that case. *See Wofford*, 969 F.3d at 706, A-1, APP_028. In *Lamb*, the Ninth Circuit considered whether the district court had violated Federal Rule of Criminal Procedure 24(c) by replacing a dismissed juror with an alternate juror who had been "'discharged after the jury retires to consider its verdict.'" *See* 529 F.2d at 1155 (quoting Fed. R. Crim. P. 24(c)). The Ninth Circuit concluded that the rule did not

allow the discharged alternate juror to replace a juror after deliberations had begun and reversed without a showing of prejudice. *Id.* at 1156. The Ninth Circuit expressly declined to address the Fifth Amendment constitutional claim raised. *Id.* at 1156 n.4. The defendant never raised concerns about a violation of the Sixth Amendment. *See id.*

Finally, the Sixth Circuit returned to the federal cases discussed by the *Dry Land* court. Each rejected the Ninth Circuit's automatic-reversal rule and permitted reversal only when the juror's replacement prejudiced the defendant when deciding whether the trial court abused its discretion under the federal court rule. *Dry Land*, 437 N.W.2d at 394 (discussing the holdings in federal cases). The *Dry Land* court held that a violation Michigan Court Rule 6.102(A) "requires reversal of a conviction only when the defendant has been prejudiced by the procedure." 437 N.W.2d at 394. Although *Lamb* was not a case about the Sixth Amendment, the Sixth Circuit believed the *Dry Land* court's review of the federal courts' discussion of *Lamb* resulted in an interpretation of Michigan Court Rule 6.102(A) that "combined both Fifth and Sixth Amendment considerations . . . and required a showing of an actual constitutional violation." *Wofford*, 969 F.3d at 707, A-1, APP_029.

The Sixth Circuit did all this work to conclude that the Michigan court adjudicated Mr. Wofford's Sixth Amendment unanimous-jury claim on the merits of the case, and so the deferential review required by 28 U.S.C. § 2254(d) must be applied. *Wofford*, 969 F.3d at 715, A-1, APP_41. And because this Court has not expressly held whether the removal of a holdout juror violates the Sixth Amendment

and what the constitutional test is, the Sixth Circuit held that Mr. Wofford is not entitled to habeas relief. *Wofford*, 969 F.3d at 717–18, A-1, APP_044.

But the Sixth Circuit issued an alternative holding reaching the merits of the constitutional claim and found "no actual constitutional violation." *Wofford*, 969 F.3d at 717, A-1, APP_043. It characterized federal caselaw from the Second, Ninth, and D.C. Circuits as "craft[ing] a prophylactic rule" to prevent district courts from using their discretion to remove and replace deliberating jurors to achieve unanimity. *Id.* at 708, A-1, APP_030–31 (discussing *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987); *Thomas*, 116 F.3d at 622; *Symington*, 195 F.3d at 1085, 1087). And the Sixth Circuit expressly declined to adopt the Second, Ninth, and D.C. Circuits' test for determining when the removal of a juror violates the Sixth Amendment. *Wofford* 969 F.3d at 716 n.34, A-1, APP_042.

J. The Michigan Court of Appeals holds that a trial court violates the right to a unanimous jury verdict when there is a reasonable possibility the juror was removed because of her views on the merits of the case

In 2020, the Michigan Court of Appeals issued an opinion that directly contradicts the Sixth Circuit's conclusion that it had adjudicated Mr. Wofford's Sixth Amendment unanimous-jury claim on the merits. In *People v. Caddell*, the Michigan Court of Appeals considered whether the removal of a juror for refusing to deliberate violated the state constitutional right to a unanimous jury verdict. The court noted that it was an issue of first impression in Michigan courts. __ N.W.2d ___, No. 343750, 2020 WL 1814307, at *5 (Mich. Ct. App. Apr. 9, 2020), *appeal denied sub nom. People v. William-Salmon*, 951 N.W.2d 683 (Mich. 2020). The defendant argued that the

removal of a juror violated "his constitutional rights to a unanimous jury and due process." *Id.* at *3. After reviewing the same cases the Sixth Circuit exhaustively explored, *Tate*, 624 N.W.2d 524, and *Dry Land*, 437 N.W.2d 391, the court concluded that Michigan "appellate courts have yet to speak on the issue" because "those cases addressed significantly different circumstances from those involved here." *Caddell*, 2020 WL 1814307, at *5.

Consequently, the court reviewed *Brown*, *Thomas*, and *Symington*, and opinions from state courts for guidance. *See id.* at *6–*9. And the Michigan Court of Appeals adopted that same test, holding that the removal of a juror violates the right to a unanimous jury verdict if "the record evidence establishes a reasonable possibility that what led to the multiple notes from the jury, and what put the issue of [the juror's] removal before the judge, was her view on the merits of the case and her status as the holdout juror." *Id.* at *10.

In *Caddell*, eleven of the jurors signed a note accusing the juror of not participating in deliberations, having her mind made up, relying on her emotions, failing to provide rational support for her beliefs, and being disrespectful. *Id.* at *2. After talking to the juror individually, the trial court dismissed her. The court ultimately concluded that the juror's removal violated the unanimous-jury guarantee because notes revealed that the issues other jurors had "stemmed from [the juror's] disagreement with the other jurors regarding the merits of the case." *Id.* at *10. The Michigan Court of Appeals ultimately held that the removal of the juror "deprived [the defendant] of his constitutional right to a unanimous verdict." *Id.* at *11.

REASONS TO GRANT CERTIORARI

The Sixth Amendment promises that "[i]n 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." U.S. Const. amend. VI. This "Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020). That necessarily means that the right to an impartial jury "bear[s] the same content when asserted against States as [it does] when asserted against the federal government." *Id.*

One of the Sixth Amendment's core guarantees of this right is that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395. The right to a jury trial also includes the right to an "uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).

Most courts agree that the removal of a deliberating juror because of her views on the merits of the case violates the Sixth Amendment right to a verdict by a unanimous, uncoerced jury. Decades ago, the D.C. Circuit found this constitutional rule "scarcely debatable." *Brown*, 823 F.2d at 596. Removal of a juror to achieve unanimity renders the right to a unanimous verdict "illusory," and "enable[s] the government to obtain a conviction even though a member of the jury that began deliberations thought that the government had failed to prove its case." *Id.*; *accord Thomas*, 116 F.3d at 624 ("[A] district court may under no circumstances remove a

juror in an effort to break a deadlock."); *Symington*, 195 F.3d at 1085 (the district court's discretion to remove a juror under Fed. R. Crim. P. 23(b) is not "unbounded" because removal of a juror because of her views on the case violates the Sixth Amendment); *State v. Elmore*, 123 P.3d 72, 79 (Wash. 2005) ("Dismissal of a holdout juror also risks violating the Sixth Amendment right to an impartial jury. If it appears that a trial court is reconstituting a jury in order to reach a particular result, then the right to an impartial jury is sacrificed." (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22); *People v. Gallano*, 821 N.E.2d 1214, 1224 (Ill. App. Ct. 2004); *Garcia v. People*, 997 P.2d 1, 8 (Colo. 2000)).

This Court has never expressly held that the removal of a deliberating juror to achieve unanimity violates the Sixth Amendment or explained how courts determine when the removal of a juror violates the Sixth Amendment's unanimous-jury right. The petition for certiorari should be granted to resolve whether and when the removal of a deliberating juror violates the Sixth Amendment's unanimous-jury requirement.

A. Federal and State Courts Are Divided on How to Determine When the Removal of a Deliberating Juror Violates the Sixth Amendment

Without this Court's guidance, federal and state courts will continue to develop and adopt different constitutional tests to decide whether the removal of a juror violates the right to a unanimous jury.

1. Most courts require reversal if there is any reasonable possibility that the juror was removed because of his or her views on the merits of the case

The most often cited cases from the federal courts of appeals provide similar, but slightly different formulations of the constitutional test. The D.C. Circuit requires

reversal on Sixth-Amendment grounds "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence." *Brown*, 823 F.2d at 596. The Second Circuit requires reversal "if the record raises any possibility that the juror's views on the *merits of the case,* rather than a purposeful intent to disregard the court's instructions, underlay the request that he be discharged." *Thomas*, 116 F.3d at 622 n.11. The Ninth Circuit requires reversal "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." *Symington*, 195 F.3d at 1087.

The Eleventh Circuit has chosen a seemingly more stringent test. "[A] juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001). The court clarified that it "mean[t] for this standard to be basically a 'beyond reasonable doubt' standard." *Id.*

The Third Circuit synthesized these various tests and adopted its own formulation: "district courts may discharge a juror for bias, failure to deliberate, failure to follow the district court's instructions, or jury nullification when there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." *United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007). The Third Circuit intended this standard to be high because "[t]he only way to satisfy the defendant's constitutional right to a unanimous verdict in the juror discharge context

is to only permit removal when the District Court finds, beyond a reasonable doubt, that the holdout's reasons were not related to the merits of the case." *Id.* at 304 n.26.

Many state courts use a similar formulation of the constitutional test often relying on these federal authorities. In Ohio, "a juror cannot be removed if there is 'any possibility' that fellow jurors' complaints about him or her are rooted in his or her view of the merits of the case." *State v. Robb*, 723 N.E.2d 1019, 1044 (Ohio 2000). The Illinois Court of Appeals has held that, "where the record shows any reasonable possibility that the impetus for a juror's dismissal during deliberations stems from his views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error." *Gallano*, 821 N.E.2d at 1224. The D.C. Court of Appeals also "adopt[ed] the standard that 'if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror," and must either declare a mistrial or send the juror back to deliberate more. *Shotikare v. United States*, 779 A.2d 335, 345 (D.C. 2001) (quoting *Symington*, 195 F.3d at 1087 (emphasis in the original)).

2. Some courts limit application of the constitutional rule to circumstances when the juror is removed for failing to deliberate

Although most courts have adopted this constitutional rule, not all have. And not all courts apply this rule in every circumstance where a trial court removes and replaces a holdout juror. There is disagreement among state and federal courts about whether the reasonable-possibility rule for determining whether the removal of a deliberating juror violates the Sixth Amendment's unanimity requirement is limited

to circumstances when the dismissed juror allegedly refused to deliberate. In other circumstances where the trial court cites another reason for removal a deliberating juror, these courts apply a different test.

The Fifth Circuit has limited application of this constitutional rule to apply only when the district court investigates a claim that a juror is failing to deliberate. *United States v. Edwards*, 303 F.3d 606, 633 (5th Cir. 2002). Thus, when the discharged juror allegedly engaged in any other type of misconduct, the Fifth Circuit uses the good-cause standard of Federal Rule of Criminal Procedure 23. *United States v. Ramos*, 801 F. App'x 216, 220 (5th Cir. 2020).

The Washington Supreme Court held that "respect for [Sixth Amendment] rights requires that where a trial court concludes that there is a reasonable possibility that the impetus for removal of a deliberating juror is disagreement with the juror's view of the sufficiency of the evidence, the trial court must send the jury back to deliberate with instructions that the jury continue to try to reach a verdict. Otherwise, the defendant is entitled to a mistrial." *Elmore*, 123 P.3d at 79. But the Washington Supreme Court "expressly reserved the 'reasonable possibility' standard for cases involving accusations of nullification and refusing to deliberate or follow the law." *State v. Depaz*, 204 P.3d 217, 222 (Wash. 2009). When a trial court dismisses a juror because of alleged misconduct, the Washington Supreme Court held that a trial court cannot dismiss a known holdout for misconduct alone without determining first whether the misconduct "affected the juror's ability to deliberate." *Id.* at 224. The court believed this test "protects the defendant's right to a unanimous jury by

assuring that the desire for a particular outcome has not influenced the court's decision to remove a juror." *Id.*

Ultimately, the Washington Supreme Court held that the trial court abused its discretion by removing a juror who told her husband about deliberation—and whose husband in turn told her to follow her opinion—because the record did not show that she was unable to deliberate fairly. *See id.* at 224–26. Concurring justices argued that, even when the stated reason for a holdout juror's dismissal was alleged misconduct, the juror could not be dismissed unless there is "no reasonable possibility" the impetus for the removal was the juror's views on the merits of the case. *See id.* at 226–30 (Madsen, J., concurring). The concurrence worried that "the majority's standard fails to adequately protect a defendant's rights to an impartial jury and a unanimous jury verdict." *Id.* at 229.

This confusion about whether the removal of a deliberating juror violates the Sixth Amendment only when the juror is dismissed for failing to deliberate underscores the necessity of this Court's intervention.

3. Some state courts acknowledge the constitutional problem of removing a deliberating holdout juror and have adopted a standard that differs from the majority standard

Some state courts have acknowledged that removing a juror violates the defendant's right to a unanimous verdict and adopted a constitutional test that differs from the majority's test.

After considering the federal courts' guidance in *Brown*, *Thomas*, and *Symington*, the California Supreme Court adopted a different (and perhaps more

protective) test to determine if the removal of a deliberating jury violates the unanimous-jury guarantee. *People v. Cleveland*, 21 P.3d 1225, 1234–36 (Cal. 2001). The California court "agree[d] . . . that a court may not dismiss a juror during deliberations because that juror harbors doubts about the sufficiency of the prosecution's evidence." *Id.* at 1236. But the court did "not adopt the standard . . . that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is 'any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case.'" *Id.* at 1236–37 (quoting *Symington*, 195 F.3d at 1087). Instead, the California Supreme Court allows "a trial court, if put on notice that a juror is not participating in deliberations, to conduct whatever inquiry is reasonably necessary to determine whether such grounds exist and to discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." *Id.* at 1237 (cleaned up). This rule is limited to situations where a juror refuses to deliberate rather than when the juror has different views about the strength of the evidence. *See id.* at 485. And, ultimately, the California Supreme Court reversed the trial court "because the record before us does not establish 'as a demonstrable reality' that Juror No. 1 refused to deliberate." *Id.* at 485.

Concurring in full, one justice wrote separately to emphasize that she believed this rule to be "a stronger evidentiary showing than mere substantial evidence . . . to support a trial court's decision to discharge a sitting juror." *Id.* at 488 (Werderger, J., concurring). She remarked that the abuse of discretion formula in this context is

potentially misleading, for the substitution of a juror after the jury has retired to deliberate 'may trench upon a defendant's right to trial by jury." *Id.* at 487 (cleaned up, citing U.S. Const. amend. VI; Cal. Const., art. I, § 16). She explained that "a trial court would abuse its discretion if it discharged a sitting juror in the absence of evidence showing to a demonstrable reality that the juror failed or was unable to deliberate." *Id.* at 488. This suggests that the California Supreme Court applies a stronger constitutional test, but only when the stated reason for the juror's removal was that she was failing to deliberate.

Finally, the Seventh Circuit has found no Sixth Amendment limitation on a trial court's discretion to remove and replace deliberating jurors under Federal Rule of Criminal Procedure 24(c). *See United States v. Warner*, 498 F.3d 666, 688 (7th Cir. 2007) (noting the defendants argued that the replacement of jurors "deprived them of their right to a fair trial before an impartial jury"). In fact, the Seventh Circuit suggested that only "two explicit conditions of the rule—ensuring that the alternate does not discuss the case prior to replacing an original juror and instructing the jury to restart deliberations"—constrained a district court's discretion. *Id.* at 689. And the court adopted a highly deferential standard for reviewing the removal of a deliberating juror: "if the record shows some legitimate basis for the decision to replace a juror, there is no abuse of discretion." *Id.* The Seventh Circuit noted that the district court had "concluded that there was no concerted effort to remove any juror based on her viewpoint," but the court did not consider whether there was no reasonable possibility the juror was dismissed for that reason. *Id.* at 690. Thus, even

among the federal court of appeals, there is disagreement about whether and when the Sixth Amendment constrains a district court's discretion to remove a juror.

4. Many state courts have not yet addressed this question or issued opinions about the requirements of state constitutions with similar requirements

Many state courts have not yet formulated a standard to determine when the removal of a juror violates the Sixth Amendment's unanimity requirement. This uncertainty leads many state courts to avoid addressing whether the removal of a deliberating juror violates the Sixth Amendment. Instead, they resolve challenges to the dismissal of a deliberating juror under state statutes or state constitutions.

The Texas Criminal Court of Appeals, for example, has never addressed whether the removal of a deliberating juror violates the right to a unanimous jury. Instead, it "assume[d], without deciding," that the court below "erroneously held that the error was a violation of appellant's constitutional right to a unanimous jury." *Scales v. State*, 380 S.W.3d 780, 786 (Tex. Crim. App. 2012).

In *State v. Cheek*, 936 P.2d 749, 761 (Kan. 1997), the Supreme Court of Kansas acknowledged the claim that the removal of a juror because of his views on the merits of the case implicated the Sixth Amendment right to a unanimous verdict. Nonetheless, it relied primarily on §§ 5 and 10 of the Kansas Constitution Bill of Rights and two state statutes to articulate its test for determining when the dismissal of a juror requires reversal. *See id.* The Kansas court held that "[r]easonable cause remains the crucial factor in any inquiry regarding the propriety of dismissing a juror," but it acknowledged that the "inquiry may be influenced by knowledge of

whether the juror in question was a member of the majority, a member of the minority, or the sole remaining vote for either acquittal or conviction." *Id.*

The Supreme Court of Connecticut acknowledged the constitutional test applied by the federal courts and Washington Supreme Court, but declined to address whether that was the appropriate standard for finding a Sixth Amendment violation. *State v. Gonzalez*, 109 A.3d 453, 465 (Conn. 2015). Nonetheless, the court wrote that it believed this standard applied only "when a juror is accused of engaging in misconduct that does not relate to the substance of jury deliberations." *Id.* at 465 n.11.

Similarly, the Vermont Supreme Court acknowledged that the removal of a juror could undermine the Sixth Amendment's jury requirements. *See State v. Villeneuve*, 584 A.2d 1123, 1125 (Vt. 1990). But the court avoided the federal constitutional question, choosing instead to examine the requirements of Chapter I, Article 10 of the Vermont Constitution. *Id.* The Vermont Constitution is similar to the U.S. Constitution in that it guarantees "[t]hat in all prosecutions for criminal offenses, a person hath a right . . . [to] a speedy public trial by an impartial jury of the country; without the unanimous consent of which jury, the person cannot be found guilty." Vt. Const. Ch. I, art. X. Relying on this provision, the Vermont Supreme Court held that this guarantee prohibits the "[d]ischarge of the juror without an adequate inquiry by the court and specific findings supporting the reason for the court's action." *Villeneuve*, 584 A.2d at 1126.

Georgia law permits trial courts "to remove a juror for good cause shown," but the Georgia Court of Appeals requires trial courts to inquire into the basis for the juror's alleged incapacity to serve before removing the juror. *Delgado v. State*, 848 S.E.2d 665, 668–669 (Ga. Ct. App. 2020). This inquiry is necessary because "the erroneous replacement of a juror may under certain circumstances deprive a defendant of his valued right to have his trial completed by a particular tribunal, his sixth amendment right to a fair, impartial and representative jury, and his due process rights grounded in the entitlement to procedures mandated by state law." *Id.* at 669 (citation omitted). But the Georgia Court of Appeals reviews the trial court's decision to see only if there was "[a] sound basis," defined as one that "preserving public respect for the integrity of the judicial process." *Id.* (cleaned up). When the claim involves the removal of a deliberating holdout juror, the Georgia courts keep "in mind" that the removal of a juror from a deadlocked jury is particularly harmful. *Id.*

Federalism encourages experimentation. States through their constitutions and courts are free to offer greater protections than the U.S. Constitution provides. "But the Constitution sets a floor for the protection of individual rights. The constitutional floor is sturdy and often high, but it is a floor." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). State courts should know what the constitutional floor is when it comes to deciding whether and when the removal of a deliberating juror violates the right to a unanimous jury.

Guidance from t\his Court will have ancillary benefits. Clarity will help state courts decide whether their constitutions are more protective than the federal constitution. This Court's articulation of a clear constitutional rule will also assist federal and state courts as they try to figure out when compliance with a statute or rule may nonetheless violate the Constitution. *Cf. Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 870 (2017) (holding that "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."); *Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006) (holding that the Constitution's guarantee of the right of a criminal defendant to present a complete defense constrains the discretion state and federal rulemakers have to craft rules of evidence). This clarity will, in turn, help federal courts figure out whether a habeas petition has rebutted the presumption that a state court adjudicated a federal constitutional claim "on the merits." 28 U.S.C. § 2254(d).

5. This case presents a split between the Sixth Circuit and the Michigan Court of Appeals

The Sixth Circuit's interpretation of other federal and state cases is evidence of a circuit split and the need for this Court's guidance. According to the Sixth Circuit, no court has actually decided articulated when the removal of a juror violates the Sixth Amendment; they merely prescribed rules under their supervisory authority. It is the only court in the country to make that distinction.

The Sixth Circuit also expressly held that the removal of Juror M was not an "actual constitutional violation." *Wofford*, 969 F.3d at 717. But the Sixth Circuit did

not attempt to grapple with what the constitutional rule is. *See id.* at 717. And it did not adopt or reject the test any of the other federal courts use. *Id.* at 716 n.34. That is because the Sixth Circuit characterized the Second, Ninth, and D.C. Circuits' constitutional rules as "prophylactic rules," which require reversal even if there has not been an actual constitutional violation. *See id.* at 688 ("Many of our sister circuits, on direct appeal, and some states have applied a prophylactic rule . . . ."); *id.* at 707 ("[S]everal federal courts have imposed a prophylactic rule to deal with removal situations like that before us."); 716 n.34 ("[T]he choice of whether to [adopt the *Symington* rule] or to adopt a rule requiring an actual constitutional violation (or some other rule above this floor) is one for the individual states to make.").

Since Mr. Wofford's case was decided, the Michigan Court of Appeals issued an opinion contradicting the Sixth Circuit's conclusion that the removal of Juror M did not, in fact, violate the jury unanimity requirement. In *Caddell*, after adopting the Ninth Circuit's articulation of the constitutional rule, 2020 WL 1814307, at *8, the Michigan Court of Appeals turned to the district court's analysis *in this case* for guidance about how to apply the rule because it was "analogous to the case at bar," *id.* at *9. When the Michigan Court of Appeals looked at the record, it found the district court's opinion *in this case* particularly "analogous to the case at bar." *Caddell*, 2020 WL 1814307, at *9–10 (discussing *Wofford*, 352 F. Supp. 3d at 823). This suggests that, had the Michigan Court of Appeals in fact considered whether the removal of Juror M violated Mr. Wofford's right to a unanimous jury verdict, it would agree with the district court that it did.

After reviewing *Wofford*, 352 F. Supp. 3d at 823, and the record, the court held that "although the trial court went to great lengths to follow the appropriate procedure of investigating juror misconduct while protecting the secrecy of jury deliberations, we conclude that the record evidence discloses a reasonable possibility that *the unintended reason* for removing Juror #3 stemmed from her views on the merits of the case." *Caddell*, 2020 WL 1814307, at *10 (emphasis added).

The Michigan Court of Appeals acknowledged that this Court had not yet held that the Fourteenth Amendment incorporates the Sixth Amendment's unanimous-jury requirement to apply in state courts. *Id.* at *3 n.4. Because of that, the Michigan Court limited its holding to the application of Article 1, § 14 of the Michigan Constitution, which provides criminal defendants the right to a unanimous jury. *Id.* But Michigan's constitutional protection is sufficiently coextensive with the federal Constitution to assume that Michigan courts would apply this same test to a similar Sixth Amendment claim. *Cf. Johnson v. Williams*, 568 U.S. 289, 298–99 (2013) ("[T]here are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right.").

* * *

The disagreement between the federal and state courts is longstanding and deep. This Court should grant the petition for certiorari to resolve whether and when the removal of a deliberating juror violates the Sixth Amendment's jury-unanimity requirement.

B. This Case is an Ideal Vehicle to Address the Sixth Amendment Question

At first blush this case may appear to be a problematic vehicle to address the Sixth Amendment question because of the Sixth Circuit's conclusion that the Michigan courts adjudicated his unanimous-jury claim "on the merits." 28 U.S.C. § 2254(d). It is not. Mr. Wofford presented and exhausted his Sixth Amendment claim. The Sixth Circuit provided an alternative holding that squarely answers its view about whether the removal of Juror M violated the Sixth Amendment.

The Sixth Circuit also made a number of pronouncements about Michigan law with which Michigan courts do not agree. For example, the Sixth Circuit stated that "the Michigan jury doctrine combined both Fifth and Sixth Amendment considerations, vested removal authority in the trial judge's discretion, and required a showing of an actual constitutional violation in the event a convicted defendant challenged the replacement of a juror." *Wofford*, 969 F.3d at 707. The Michigan Court of Appeals would be surprised to hear that because it recently held that the cases the Sixth Circuit used to derive that rule "addressed significantly different circumstances" from the removal of a holdout juror. *Caddell*, 2020 WL 1814307, at *5 (discussing *Tate*, 624 N.W.2d 524; *Dry Land*, 437 N.W.2d 391).[1]

[1] The Michigan Court of Appeals further noted that "to establish good cause for the removal of a juror under MCR 6.411, it must be established that one of the reasons in MCR 2.511(D) exist, or that another 'reason recognized by law' exists. The reasons set forth in MCR 2.511(D), except subparts (2) and (3), are, like the issues dealt with in *Tate* and *Dry Land Marina*, essentially unrelated to the jury's deliberative process." *Caddell*, No. 343750, 2020 WL 1814307, at *5.

The Michigan courts would also be surprised to hear that the *Brown*, *Thomas*, and *Symington* courts were not issuing constitutional holdings, but instead prescribing prophylactic rules. *Wofford*, 969 F.3d at 716. When the Michigan Court of Appeals reviewed those cases, it described these cases as resolving federal constitutional questions. *See Caddell*, 2020 WL 1814307, at *8–*9. And the Michigan Court of Appeals adopted the reasonable-possibility test to determine whether the removal of a deliberating juror violated the defendant's right to a unanimous jury, *id.* at *10—the test the Sixth Circuit said that Michigan Courts had already rejected, *see Wofford*, 969 F.3d at 716–17 ("[I]n referencing—and sticking with—the *Tate-Dry Land* line of precedents here, it seems quite plausible that the Michigan court was making a conscious choice" to reject the *Thomas* court's approach to the Sixth Amendment question). By rewriting Michigan's law, the Sixth Circuit's approach to determining whether Mr. Wofford's Sixth Amendment claim had been adjudicated on the merits did not actually show the state courts the dignity and respect 28 U.S.C. § 2254(d) requires.

Granting this petition has the added benefit of reaffirming this Court's instructions to the lower courts about when a habeas petition may rebut the presumption that a constitutional claim has been adjudicated on the merits.

Recognizing the distinction between state-law claims and federal constitutional claims, this Court, in an opinion written by Justice Alito, described a hypothetical but not improbable situation: "Suppose, for example, that a defendant claimed in state court that something that occurred at trial violated both a provision

of the Federal Constitution and a related provision of state law, and suppose further that the state court, in denying relief, made no reference to federal law." *Williams*, 568 U.S. at 301. This Court rejected the argument that the "federal habeas court would be required to proceed on the assumption that the federal claim was adjudicated on the merits." *Id.* In explaining why this argument went "too far," this Court again posed three hypothetical questions: (1) "[W]hat if . . .in at least some circumstances the state standard is *less* protective? (2) "[W]hat if the state standard is quite different from the federal standard, and the defendant's papers made no effort to develop the basis for the federal claim?" (3) "What if a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite?" *Id.* In those circumstances, this Court said the presumption may be rebutted. *Id.*

To figure out whether a state court adjudicated a Sixth Amendment claim, the Sixth Circuit created a method so convoluted it had to draw a picture to explain. According to the Sixth Circuit, a state court's failure to identify the constitutional amendment at issue was not enough to conclude that the court did not adjudicate the claim. Instead, the Sixth Circuit requires a federal court to read not only the cases relied upon to resolve the petitioner's claim, but also to trace citations through a series of state and federal cases—here, stretching back nearly four decades—to see if the controlling case relied on cases discussing the constitutional amendment at issue. And in doing so, the Sixth Circuit ignored important factual differences between the removal of a juror who is sick and the removal of a juror who doubts the strength of

the prosecution's case. This approach is at odds with *Williams* because the reference to "the Sixth Amendment" buried in a string cite at the bottom of a citation rabbit hole.

* * *

As this Court recently affirmed, the Sixth Amendment right to a unanimous jury verdict is and has long been considered "a vital right," *Ramos*, 140 S. Ct. at 1395, that is "fundamental to the American scheme of justice," *id.* at 1390. Federal and state courts recognize that the removal and replacement of a deliberating juror to achieve unanimity undermines the right to a unanimous jury verdict. But they have fractured trying to figure out when exercise of discretion results in a constitutional violation. This case is emblematic of the myriad problems the confusion creates, presents an opportunity to resolve this important question, and offers a chance to reaffirm state courts' authority to determine whether state law is more or less protective than the federal constitution.

CONCLUSION

The petition for certiorari should be granted.

January 11, 2021

Respectfully submitted,

/s/ Colleen P. Fitzharris
FEDERAL COMMUNITY DEFENDER
613 Abbott St., Suite 500
Detroit, Michigan 48226
Telephone No. (313) 967-5542