IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

KEITH UNDRAY FORD, *Petitioner*

vs.

SUZANNE PEERY, WARDEN, Warden, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

BARRY L. MORRIS
Attorney at Law
1407 Oakland Blvd., Suite 200
Walnut Creek, California 94596
(925) 934-1100
Fax: (925) 934-1122
barrymorris@mac.com

Questions Presented

1. When an issue before a state court is resolved by an assumption of fact, as opposed to a factual finding, has the issue before the state court been "adjudicated on the merits" within the meaning of 28 U.S.C. §2254?

2. Is it clearly established by Federal law, as determined by this Court, that the presumption of innocence stays with a defendant in a criminal case throughout the trial process until a guilty verdict is returned?

Volume I

Table of Contents

Volume 2

Appendix

A. Non-published California Court of Appeal Decision

B. California Supreme Court Denial of Review

C. Findings and Recommendation of United States Magistrate

D. Adoption by District Court

E. *Ford v. Perry* (I) 976 F.3d 1031 (9th Cir. 2020)

F. *Ford v. Perry* (2)

Table of Authorities

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

KEITH UNDRAY FORD, *Petitioner*

vs.

SUZANNE PEERY, WARDEN, Warden, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner KEITH UNDRAY FORD respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit rendered on June 8, 2021. A Petition for Rehearing was denied on September 28, 2021.

Judgment Below

On August 28, 2012, petitioner was found guilty of murder. A timely notice of appeal was filed. On September 10, 2014, the California Court of Appeal for the First Appellate District issued a non-published opinion affirming the conviction. (Appendix A) The California Supreme Court denied a Petition for Review on November 19, 2014. (Appendix B)

A habeas petition was filed in the United States District Court for the Eastern District of California on November 25, 2015. On February 9, 2017, Findings and Recommendations were issued by the Magistrate recommending denial of the petition. (Appendix C) The magistrate's recommendation was adopted by the District Court on April 20, 2017. (Appendix D)

On September 28, 2020, the Court of Appeals for the Ninth Circuit issued its opinion in the above-entitled case, reversing the judgement of the state court in *Ford v. Peery,* 976 F.3d 1031 (9th Cir. 2020). (Appendix E) and finding that the trial court erred when it endorsed the prosecutor's argument to the jurors that when they deliberate, petitioner was no longer presumed innocent. A Petition for Rehearing was filed by Respondent. On June 8, 2021, the Ninth Circuit issued an amended opinion, again finding prejudicial error, but deferring to the state court judgment under AEDPA and thus 0affirming the state court decision. (Appendix F)

Petitioner filed a Petition for Rehearing and Rehearing en banc. On August 18, 2021, the petitioner's petition for rehearing *en banc* was denied. There was a dissent from the denial of the rehearing. (Appendix G).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

List of Parties (Rule 28.1)

The parties to the proceedings below were petitioner, KEITH UNDRAY FORD, and SUZANNE PEERY, Warden, respondent.

List of Proceedings (Rule 14(b(iii)

(1) *People v. Ford*, Solano County Superior Court, No. VCR211632; Judgment entered December 20, 2012.

(2) *People v. Ford,* California Court of Appeal, First Appellate District, No. A137496; Judgment entered September 24, 2014.

(3) *People v. Ford,* California Supreme Court, No. S221743; Judgment entered November 19, 2014.

(4) *Ford v. Peery,* United States District Court, Eastern District of California, 2:15-cv-02463-MCE-GGH; Judgment entered April 20, 2017.

(5) *Ford v. Peery,* 976 F.3d 1032 (9th Cir. 2020);

(6) *Ford v. Peery,* 999 F.3d 1214 (9th Cir.2021); Judgment entered August 26, 2021.

Constitutional Provision Involved

United States Constitution, Fifth Amendment:

"No person shall be…deprived of life, liberty, or property, without due process of law…"

United States Constitution, Sixth Amendment:

"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…"

Statement of the Case

On January 3, 2012, the District Attorney of Solano County, California, charged petitioner KEITH UNDRAY FORD with the murder of Ruben Martinez, a violation of California Penal Code §187. It was further alleged that petitioner personally used a firearm, a violation

of Pen. Code §12022.53(b)(c). (CT 34) A jury trial was held on those charges and on August 28, 2012, petitioner was found guilty of murder. Significantly, although the evidence was undisputed that Mr. Martinez died as the result of gunshot wounds, the jury was unable to reach a verdict on the allegation that petitioner used a firearm in connection with the homicide. (CT 207)

Petitioner filed a timely notice of appeal. (CT 271) On September 10, 2014, the Court of Appeal for the First Appellate District affirmed petitioner's conviction. (Appendix D) The California Supreme Court denied a Petition for Review on November 19, 2014. (Appendix E)

On November 15, 2015, petitioner filed a Writ of Habeas Corpus in the United States District Court for the Eastern District of California. (Appendix F) On February 9, 2017, the magistrate issued findings and recommended denying the petition. (Appendix G) The District Court issued an order on April 20, 2017 adopting the magistrate's recommendation. (Appendix H)

Petitioner filed a Notice of Appeal on March 23, 2018. (Appendix I.) On September 28, 2020, the Court of Appeal for the Ninth Circuit issued an opinion reversing petitioner's conviction on the grounds that the prosecutor's rebuttal argument to the jury asserting that petitioner was no longer presumed innocent violated petitioner's Fifth Amendment right to due process of law. (Appendix J.)

Respondent Peery filed a petition for rehearing. (Appendix K.) On June 8, 2021, the Ninth Circuit filed an amended opinion, this time affirming petitioner's conviction. (Appendix L.) The two judges who penned the original opinion maintained that the argument was

improper and prejudicial but held that affirmance was required by ADEPA. Despite the affirmance, the dissent took issue with the majority's finding of error.

Petitioner filed a petition for rehearing and rehearing *en banc.* (Appendix M.) On August 18, 2021, the petition for rehearing was denied. (Appendix N.) Despite the denial of the petition, another judge who was not a part of the original panel, filed a dissent from the denial of the petition for rehearing, contending, in an acid tone, that the majority's refusal to change its view that it was error for the prosecutor to tell the jury that petitioner was not presumed innocent during deliberations was a "bizarre and gratuitous frolic…[¶] [and] is powerful evidence that [the panel majority] wanted to promote an advisory 'rule' that it hoped would nonetheless somehow be deemed binding in the future."

Statement of Facts

A.

The Death of Ruben Martinez

In August of 2010, Ruben Martinez was a 22-year-old who lived with his parents in Napa, working as a car salesman and attending Napa Valley College. He owned a blue Chevrolet Tahoe which he was fanatical about keeping shiny and clean. (1 RT 125-128.) He washed it at work, he washed it at home, and he washed it the day he died. (1 RT 113-120, 4 RT 781-783.)

On the day he died, Martinez had a date with Jessica Blanco whom he had been dating for the past three months. Planning to go to a family party in Rio Vista, Martinez picked up Ms. Blanco at her

home on Beach Street in Vallejo about 8:00 or 8:15 p.m. in his Tahoe. (1 RT 136-137.) However, after stopping at Best Buy, Martinez decided he did not want to go to the party and they returned to Jessica's house at about 10:00 p.m. so that she could get her jacket and go to the bathroom. (1 RT 139-155.)

While at the house, Jessica saw a white car make a U-turn in front of the Tahoe and then make a left turn onto Beach Street; the car was not seen again. (1 RT 155-156, 174-175.) Martinez had parked his Tahoe in front of Jessica's driveway, and stayed in the car when Jessica went into her house. (1 RT 158-159.)

On her way out of the house, while walking down the hallway to her front door, Jessica heard a really loud popping noise followed by a screeching sound and tires peeling on gravel. Upon opening her front door, she saw that Martinez's vehicle had crashed into her neighbor's house with its tires still spinning. (2 RT 166-168.) The Tahoe was pinned between a tree and the garage. Robert Blanco, Jessica's dad, tried to break the passenger window and pull Martinez's leg off the gas pedal but he could not. (2 RT 279-283.)

Susan Hogan, a forensic pathologist, performed an autopsy and concluded that the cause of death was the gunshot wound to the left side of the back of his head. (3 RT 385-390, 394.) Because there was no evidence of soot or stippling in or about the car, she opined that when the gun fired the fatal shot, it was at least three feet away from Martinez. (3 RT 394.)

B.

Observations of Neighbors on Beach Street

Bethel Johnson and her seventeen-year-old daughter, Tenley, lived directly across from the Blancos. Bethel and Tenley, they saw the Tahoe double-parked in front of the Blanco's with the motor running and hazard lights on. From her vantage point directly across the street, Bethel saw a light from a cellphone inside the Tahoe. (2 RT 183-191, 202, 236.) Tenley had her 60-80-pound Rottweiler on a leash and when she got out of the car, the dog barked and charged aggressively toward an Africa-American man who, with two other African-American males, was right behind the Johnson car.

According to Bethel, one the men said something like "Hey, girly" and turned away. Bethel described the man who was closest to her as 5'6" to 5'9," wearing a dark, hooded sweatshirt and having short hair and wore a jacket with stripes on it. One of the others had dreadlocks. She did not remember anybody saying anything. (2 RT 196-208, 212-213, 243-251; 272-273.)

Neither woman saw any of the three men with a weapon, and the men did not say anything threatening. The Johnsons assumed the three men were going to the party at the motorcycle club which had parties almost every Saturday night. (2 RT 209-215, 265.) Two or three minutes after the Johnsons entered their house, Bethel heard a sound like breaking glass. She went outside and checked her car but nothing was broken and no one was in the street. She saw smoke and called 911 because she thought a house was on fire. (2 RT 203-204, 209.)

Most importantly, when shown a photo lineup containing petitioner's photograph, Tenley was unable to identify him. (2 RT 270;

4 RT 870.) Similarly, when shown a jacket with a fine pin stripe found five days later in a car driven by petitioner, she told the police that was not the jacket worn by the man she saw on August 7. (2 RT 272-273; 4 RT 854.)

C.

Fingerprint Evidence

Frankie Franck, a certified latent fingerprint examiner for the San Mateo County Forensic Lab, compared the print from the vehicle with a known left palm and thumb print of petitioner which had been taken in Butte County on October 24, 2009. (3 RT 505, 530, 539.) Franck testified that, although "the latent print was not of the best quality," he concluded that it matched petitioner's. (3 RT 530, 544-550, 576.)

Niki Zamora, an *uncertified* examiner, came to the same conclusion as Franck. It should be noted that she was aware of Franck's identification before she examined the prints. ((3 RT 561, 4 RT 760-769.)

D.

Additional Evidence

On August 12, 2010, petitioner was stopped by Detective Bottomley while driving a white Oldsmobile Aurora. (4 RT 808-809, 817.) Bottomley found seven cell phones in the center console of the car. Petitioner told the officer his nickname was "Dedo," he was 5'8", 165 pounds, and he was 23 years old. (4 RT 817-822.) One of the phones was petitioner's; he said he bought the others stolen off the street. Later he said he did not know if they were stolen or not. (4

RT 826.)

Petitioner told the officer that on the day of the homicide he was at his mother's house at 110 Calhoun Street in Vallejo. He spent weekends at home watching his son who was about two years old. (4 RT 827-829.) Petitioner was in custody between September 26 and December 14, 2010 for having a concealed firearm in his vehicle. It was stipulated that the firearm was in no way related to this case. (4 RT 813.) On December 13, petitioner was again questioned by Det. Bottomley, and said he never went to Napa and did not think he knew Ruben Martinez. He reiterated that, on August 7th, he was at his mother's house watching his son. (4 RT 829-831.) He said he did not know anything about the shooting on Beach Street in Vallejo. (4 RT 859.)

No witness saw an Oldsmobile Aurora at or near Beach Street on August 7th. No determination was made as to whether any of the cell phones found in the Aurora were actually stolen. Petitioner was not prosecuted for possession of those phones. (4 RT 846-847.) On August 12th, petitioner had a short hairstyle; not dreadlocks. (8 RT 847.)

In October of 2010, while petitioner was in custody, he made telephone calls to Antonnia Ward , his then-girlfriend and the mother of his baby. Audiotapes of calls were played to the jury. (4 RT 686-690, 720, 841.) In one call, petitioner said, "Luckily I ain't in here for murder; that's all I keep thinking about." (4 RT 721; ACT, Ex. 6.) Ward testified that petitioner never talked to her about killing anyone; he meant that he was not happy that he was back in jail. He

apologized for having put her in the difficult position of having to work two jobs to support their baby. (4 RT 721-723.) Petitioner never told her that he was involved in a confrontation on Beach Street or that he had killed someone. Petitioner told her that he was disappointed in himself because he knew better than to carry a gun in his car. (4 RT 724-725.)

On July 5, 2011, Det. Bottomley arrested petitioner for the murder of Ruben Martinez. In an interview Det. Bottomley conducted on July 16th, petitioner denied being at the scene and told him that "it wasn't me" who killed Martinez; he told Bottomley "to ask the people that was there." When Bottomley told him his "palm print is on the f---ing door of the car," petitioner responded "that just means I came in contact with that vehicle at one time or another." (4 RT 832-838.) (ACT, Court Ex. 4, pp. 3-4.)

I.

Federal Courts are Not Required by AEDPA to Give Deference to a State Court Decision that Specifically Declines to Adjudicate the Facts before it and Rules Based Instead on an Assumption. Not Adjudicated Facts

1.

ADEPA Applies Only to State Court Decisions that Adjudicated the Facts Before It on their Merits

Title 28 U.S.C. 2254 (d)(2) provides that

> **(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… (emphasis added)

By its very words, §2254(d) only applies to state court decisions that were "*adjudicated on the merits* in State court proceedings." (emphasis added) It is petitioner's contention that in his case, the state court made no such adjudication on the merits of the issue before it -- namely whether or not the prosecutor's admonishment to the jury that the petitioner was no longer presumed innocent -- violated petitioner's

right to due process under the United States Constitution. Instead of deciding the issue, the California court simply noted that the California cases on the issue were divided and *expressly declined to decide the issue*. Instead, the state court assumed that there was error and, based on that assumption, further assumed that any error was harmless.

An *assumption* of fact is not an *adjudication* of that fact. It is simply an assumption An assumption of fact does not adjudicate a fact within the meaning of "adjudication" as used in §2254.

Black's Law Dictionary defines "adjudicate" as meaning to "rule upon judicially." (*Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 686 F.3d 325, 330 n. 2 (5th Cir. 2012); *Applied Energetics, Inc. v. Newoak Capital Mkts., LLC*, 645 F.3d 522, 525 (2nd Cir. 2011); *Thomas v. Horn*, 570 F.3d 105, 114 (3rd. Cir. 2009); *Jones v. City of Franklin*, 677 Fed. Appx. 279, 287 (6th Cir. 2017). By its terms, AEDPA deference does not apply to every pronouncement made by a state court; deference is limited to adjudications on the merits. By parity of reasoning, AEDPA does not apply to a state court's assumption of the facts relevant to the merits of the issue in the absence of an adjudication of that issue. ADEPA does not apply when a state court chooses to speak and, in so doing, indicates that it did not reach the merits of properly presented federal constitutional claim.

The issue before the California Court of Appeal was whether the prosecutor's argument that petitioner was no longer presumed to be innocent -- as amplified by the trial court's overruling of an objection

to the prosecutor's improper argument – violated the Due Process guarantee of the Constitution. Instead of adjudicating "any conflict between the *Goldberg*, *Booker*, and *Panah* cases on the one hand and *Dowdell* on the other," the state court punted, concluding that "any *assumed* error is harmless" (emphasis added) under both state and federal standards. (ER 33)

Assuming that a matter was error is not congruent with deciding that it was error. In an unbroken line of cases stretching back to Chief Justice Marshall in *United States* v. *More*, 3 Cranch 159, 172 (1805), this Court has emphatically rejected the notion that an assumption made in a prior decision was binding precedent. "This Court is not bound by its prior assumptions." (*Lopez v. Monterey County*, 525 U.S. 266, 281 (1999); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), ["Since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits."]; *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478 (2006); *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); A*, Inc. v. Jaco*bsen, 362 U.S. 73, 87-88 (1960); *United States v. Norman,* 935 F.3d 232, 241 (4th Cir. 2019).

Moreover, the state court's discussion of the purported harmless effect of the *assumed* error under federal standards cannot be separately considered from the assumption of error itself. The state court never applied the facts to the law; it assumed, but did not find, that there was error and then further assumed, but did not find, that

the assumed error would be harmless if the court went ahead and actually decided the issue, which it did not. An assumption that there was error, by definition, has no precedential significance because it resolves nothing. (*Verdugo-Urquidez*, *supra*.) An assumption of no prejudice stemming from an assumption of error is still an assumption. Just as adding hearsay on top of hearsay does not make the underlying hearsay any more reliable or admissible, the layering of an assumption of no prejudice on top of an assumption of error does not transform the underlying assumption of error into an adjudication on the merits within the meaning of 28 U.S.C. §2254(d). (*Verdugo-Urquidez*, *supra*.)

B.

AEDPA Does Not Require Deference to State Court Dicta that Would Not Bind State Courts

In *Ford II, supra,* the Ninth Circuit cited *Davis v. Ayala,* 576 U.S. 257 (2015) for the proposition that state court dictum that *assumed*, rather than *decided,* that any error was harmless would suffice to constitute a "decision on the merits" within the meaning of §2254. First, unlike the case at bar, the predicate California decision in *Davis* was not dicta, but a substantive holding, to wit: that the exclusion of the defendant from a hearing was state law error; the assumption made was that the adjudicated error was harmless under both state and federal law. (*Id.* 24 Cal. 4th, at 262.)

In *Davis,* this Court held that a state court's ruling that the error was harmless under federal law was an adjudication subject to review under ADEPA, noting that "this decision undoubtedly constitutes an

adjudication of Ayala's constitutional claim 'on the merits.'" (*Id.* 576 U.S. at 268.) But in *Davis,* there *was* an adjudication of the underlying claim, not just an assumption of error, that formed the basis of the "no prejudice" finding was made.

In contrast, in petitioner's case, the state court studiously and explicitly avoided adjudicating the issue before it "on the merits." Indeed, *it stated that it was not going to adjudicate the issue* in so many words, noting that it "need not resolve any conflict." (ER 33) In contrast to *Davis*, the state court never adjudicated petitioner's underlying claim o prosecutorial misconduct. *Davis* provides no support for the contention that a state court opinion that merely assumes error and further assumes the assumed error to be harmless -- a ruling that has no precedential authority -- is an "adjudication on the merits" within the meaning of that term as used in 28 U.S.C. §2254(d).

C.

AEDPA Deference is Not Due to Dicta in a State Court "decision" that the State Court Would not Consider Binding on its own Courts

Not surprisingly, California treats its own appellate decisions based on "assumptions," such as the one in this case, as dicta. (*Charmac, Inc. v. Aetna Casualty & Sur. Co.*, 233 Cal. App. 3d 660, 667 (1991), ["[W]e cannot attribute any weight to the unstated assumption of Pacific Intermountain Express…the assumption is at best

dictum…"}; *J. T. Thorp v. Workers' Comp. Appeals Bd.,* 153 Cal. App. 3d 327, 343 (1984).)

It would be anomalous indeed for a federal court to be *required* by AEDPA to give *deference to dicta* in a state court decision that does not bind the courts of the state from whence it came. (*State of California v. Superior Court,* 78 Cal. App. 4th 1019, 1029 (2000), ["''we are not bound by dicta'']; *Fireman's Fund Ins. Co. v. Maryland Casualty Co.*, 65 Cal. App. 4th 1279, 1301 (1998).)

4.

As Used in 28 U.S.C. §2254, a "Claim that was Adjudicated on the Merits Does Not Include "Dicta" of No Precedential Value

There is another very important reason why state court dicta does not qualify as a state court "adjudicat[ion] on the merits.' Dicta does not adjudicate anything. (*Hilton v. Guyot*, 159 U.S. 113, 162 (1895); *Desist v. United States*, 394 U.S. 244, 254 (1969); *United States v. United States Gypsum Co.*, 333 U.S. 364, 403 (1948) (Frankfuter, concurring); *Orion Tire Corp. v. Goodyear Tire & Rubber Co.,* 268 F.3d 1133, 1136, (9th Cir. 2001), ["This dictum is not an adjudication on the merits of the forum non conveniens issue…"]; *In re Johns Manville Corp*., 1998 U.S. App. LEXIS 19165, *3 (2nd Cir. 1998), ["The district court's observations constitute only *advisory dicta and should not be considered to have adjudicated any of the issue*s that may arise in an adversary proceeding."]; *Iron v. Knowles*, 234 F. Supp. 327, 331, ["non-adjudicating dictum"]; *United States v. Dominguez-Mestas*, 687 F. Supp.

1429, 1431 (SD Cal. 1988), ["the statement is dictum, lacking the force of an adjudication."]; Black's Law Dictionary 409 (5th ed. 1979) "[D]icta…lack[s] the force of an adjudication."].)

Under 28 U.S.C. §2254(d) it is only the holdings of the United States Supreme Court, not the dicta, that form "clearly established Federal law, as determined by the Supreme Court of the United States." (*Williams v. Taylor,* 529 U.S. 362, 412 (2000); *Brumfield v. Cain*, 576 U.S. 305, 342 (2015); *Carey v. Musladin*, 549 U.S. 70, 74 (2006).)(emphasis added)

Holdings, not dicta, bind lower courts. If "clearly established federal law" refers only to those parts of the decisions that bind lower courts, there is no reason to assume that the drafters of §2254(d) meant anything different when reference was made to "any claim that was *adjudicated on the merits* in State court proceedings…" (emphasis added) As a matter of logic, it strains credulity to posit that the drafters of AEDPA intended to require federal judges to defer to the ruminations of state court dicta when no such deference is required by the courts of that same state.

An "assumption is not an adjudication on the merits." (*Nat'l Union Fire Ins. Co. v. Travelers Indem. Co*., 1998 U.S. Dist. LEXIS 24306, *3.) The state court's assumption that the assumed error was harmless was an integral part of its assumption that there was error in the first place. "[A]ssumptions are not holdings. Nor are they even dicta." *(Benitez v. Charlotte-Mecklenburg Hosp. Auth.*, 992 F.3d 229, 236 (4th Cir. 2021).

As the California court observed in *State of California v. Superior Court, supra,* 78 Cal. App. 4th at 1029, "we are not bound by dicta and such statements by a higher court have 'no force as precedent.'" (*People v. Quiroz,* 244 Cal. App. 4th 1371, 1381 (2016).)

Harrington v. Richter, 562 U.S. 86, 99 (2011) does not require a different result. In *Harrington,* the issue was whether one-sentence denials were adjudicated on the merits. The high court ruled that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication…to the contrary*." (*Ibid.*)(emphasis added)

In the case at bar, there was not just an indication to the contrary: the state court explicitly so stated "to the contrary." The state court did not "adjudicate the claim on the merits." The state court specifically declined to do so. It sidestepped deciding which of a series of conflicting state cases to apply to the facts of this case; it refrained from matching the facts of this case to the applicable law. It did not adjudicate the facts and consequently, AEDPA did not mandate deference.

As a matter of common sense, the declaration by the California court in this case that it "need not resolve any conflict" qualifies as a specific "indication…to the contrary," rebutting any presumption that the court ruled on the merits of the issue before it and precludes treating the state court opinion in this case as an "adjudication on the merits."

II.

The Prosecutor's Argument to Petitioner's Jury That Petitioner was No Longer was Presumed Innocent, as Amplified by the Trial Court's Overruling of a Defense Objection, so Infected the Trial with Unfairness as to Make the Resulting Conviction a Denial of Due Process

A.

Introduction

"The…presumption of innocence in favor of the accused is…axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (*Coffin* v. *United States* (1895) 156 U.S. 432, 453; *Reed v. Ross,* 468 U.S. 1, 4 (1984); *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *In re Winship*, 397 U.S. 358, 363 (1970); *Doe v. Busby*, 661 F.3d 1001, 1016 (9th Cir. 2011.) "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (Citation omitted); *In re Winship*, *supra,* 397 U.S. at 362; *Estelle v. Williams*, *supra.* 425 U.S. at 503; *Taylor v. Kentucky*, 436 U.S. 478, 479 (1978). "The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt." *Delo v. Lashley,* 507 U.S. 272, 278 (1993); *Taylor v. Kentucky, supra,* 436 U.S. at 484, n.12.

In petitioner's case, the prosecutor twice told the jurors, just before they retired to deliberate, that "this idea of this presumption of innocence is over…[the defendant is] not presumed innocent anymore." The trial court overruled a contemporaneous objection by

the defense in the presence of the jury. (ER 48)

B.

Standard of Review

The justiciability of a claim of state prosecutorial misconduct under §2254(d)(1) is not tied to the details of the specific conduct at issue but its effect of that conduct on the fairness of the trial. As with contentions of ineffective assistance of counsel, because there is an infinite range of potentially actionable misconduct, the Supreme Court has set a general standard which measures the validity of the prosecutorial misconduct claim by the effect of the misconduct on the fairness of the trial. A prosecutor's comments in closing argument will be held to violate the Constitution if those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Parker v. Matthews,* 567 U.S. 37, 45 (2012); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)*; Darden v. Wainwright,* 477 U.S. 168, 181 (1986).

C.

This Court has Clearly Established that a Defendant is Presumed Innocent Throughout the Trial Process until a Guilty Verdict is Returned

Decisions of this Court clearly establish that the presumption of innocence does not vanish before the jurors enter the jury room to deliberate on their verdict. *Martinez v. Court of Appeal*, 528 U.S. 152 (2000); *Portuondo v. Agard,* 529 U.S. 61 (2000); *Coffin v. United States*,

supra. "[T]he accused defendant…retains a presumption of innocence *throughout the trial process*." *Martinez v. Court of Appeal, supra,* 528 U.S. at 162 (emphasis added). The "presumption of innocence…survives until a guilty verdict is returned." *Portuondo v. Agard, supra,* 529 U.S. at 76 (Stevens, concurring); *Betterman v. Montana, supra,* 136 S. Ct. at 1613 (2016); *Portuondo v. Agard, supra*. "Once charged, the suspect stands accused but is presumed innocent until conviction upon trial or guilty plea." *Betterman v. Montana, supra,* __U.S.__, 136 S. Ct. at 1613.

"Both the presumption [of innocence] and the burden remain throughout the trial and go with the jury when it deliberates." *United States v. Cummings*, 468 F.2d 274, 280 (9th Cir. 1972). Accord: *State v. Mattson*, 226 P.3d 482, 510 (Haw. 2010); *State v. Daniels*, 861 A.2d 808, 815 (N.J. 2004); *People v. McBride*, 228 P.3d 216, 224 (Colo. 2009); *United States v. Perlaza*, *supra*; *People v. Simpson*, 792 N.E.2d 265, 294 (Ill. 2001); *Muhammad v. State*, 782 So. 2d 343, 370 (Fla. 2001).

> "It is the jury, not the prosecutor, that determines when the presumption of innocence has been rebutted by credible evidence establishing guilt beyond a reasonable doubt." *Watts v. State*, 370 P.3d 104, 107 (Wyo. 2016).

C.

Petitioner was Prejudiced the Prosecutor's Misconduct as Amplified by the Trial Court's Virtual Instruction that the Presumption of Innocence was Over

1.

Petitioner was Prejudiced When the Prosecutor Told the Jury He Was No Longer Presumed Innocent

This was an entirely circumstantial case. While petitioner is not suggesting that an entirely circumstantial case cannot result in proof beyond a reasonable doubt, because there is no direct evidence of guilt in such a case, because the probity of such a case depends upon the inferences to be drawn from the circumstances, the presumption of innocence has an outsized to play. A properly instructed jury starts its deliberations with the presumption of innocence which becomes the lens through which the jury must evaluate the prosecution's case.

By doing away with the presumption of innocence, the constitutionally mandated burden of proof was lowered.

In *Ford I, supra,* the Ninth Circuit succinctly described the prejudicial impact of the *Ford* prosecutor's misconduct in light of the *Darden* factors.

> "The weight of the evidence" against Ford, *Hein*, 601 F.3d at 914, was not great. As recounted above, the evidence was circumstantial, incomplete, and in conflict. While there was some inculpatory evidence (the partial palm print, the stolen cell phones, Ford's conversation with his girlfriend, and Ford's Facebook post), no one saw the shooting. Neither of the two witnesses who had seen three young black men on the street shortly before the shooting could identify Ford. The manner of shooting hypothesized by the prosecutor conflicted with his expert's testimony the gun had been at least three feet away from Martinez when it was fired. The hypothesized manner of shooting

was also inconsistent with Johnson's testimony that she heard the sound of a shot and broken glass, and with the fact that passenger side, rather than driver side, windows were shattered.

The jury clearly had trouble with the evidence. After four days of deliberations, they reported to the court that they were 'hopelessly deadlocked.' The court sent them back to deliberate further. When the jury returned, their answer was internally inconsistent. It was uncontested that Martinez had been killed with a single shot to the head. Ford had been charged with shooting and killing Martinez. The jury found Ford guilty of the murder charge. But the jury was split with a vote of seven to five on whether Ford had used a firearm in killing Martinez.

The 'prominence' of the prosecutor's statements, *id.*, could hardly have been greater. During the course of his closing argument, the prosecutor had repeatedly said that the state had the burden of proof to show guilt beyond a reasonable doubt. But then, at the end of his rebuttal in his closing argument, the prosecutor stated three times that the presumption of innocence no longer applied. The prosecutor's rebuttal was the last thing the jury heard from either of the attorneys. The jury retired to begin deliberations later that same day.

Although the prosecutor did not 'misstate[] the evidence,' *id.*, he misstated the law. He did so three times, in the space of a few moments.

The judge did not 'instruct[] the jury to disregard the comment.' *Id.* Quite the opposite. When Ford's attorney objected to the prosecutor's misstatements, the judge held a sidebar and then overruled the objection. A written instruction told the jury about the existence of the

presumption of innocence: 'A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt.' However, the written instruction did not tell the jury when the presumption applied and when it was 'over.' The judge supplied that instruction. When he overruled the defense's objection to the prosecutor's misstatements, the judge told the jury, in effect, that the presumption of innocence was 'over' before they retired to begin deliberations.

Ford's attorney neither 'invited' the prosecutor's misstatements, nor was she given "an adequate opportunity to rebut" them. *Id.* The prosecutor did not state in his initial closing argument that the presumption of innocence was 'over.' Had he done so, Ford's attorney could have emphatically—and correctly—stated in her responsive closing argument that the presumption of innocence lasts unless and until a defendant is convicted. Instead, the prosecutor made his misstatements in rebuttal. At that point, Ford's attorney could only make an objection, which the judge improperly overruled.

We conclude that there was a reasonable probability of a different outcome in this thin, circumstantial case had the prosecutor not misstated the law. Therefore, we hold under *Darden* that the prosecutor's error violated due process." *Ford v. Peery*, *supra,* 976 F.3d at 1043-1044.

2.

The Trial Court's Overruling of the Objection to the Prosecutor's Misconduct Amplified the Prejudicial Impact of the Misconduct

In this case, not only did the prosecutor commit misconduct by telling the jury that the presumption of innocence vanished once the defendant had a fair trial, the prejudice that ensued was exponentially magnified when the trial court overruled petitioner's objection to the improper argument in the presence of the jury.

In most of the cases dealing with the prejudice that ensues form prosecutorial misconduct, appellate courts focus on whatever curative impact the trial court's instructions may have had. In the case at bar, instead of trying cure the error, the trial court poured gasoline on the fire by telling the jury that the prosecutor's remarks were proper, in effect instructing the jury that petitioner was no longer presumed innocent.

The overruling of the objection was tantamount to an instruction by the court that the presumption of innocence was no more. *Moody v. State*, 140 So. 3d 700, 701 (Fla. 2014); *People v. Tipton*, 584 N.E.2d 310, 313, (Ill. 1991); *Good v. State*, 723 S.W.2d 734, 738 (Tex.Cr.App.1986); *Allison v. How*ell, 317 N.E.2d 379, 383 (Ill. 1974); *Autrey v. State*, 155 Ark. 546, 547 (1922). As the court observed in *Moody, supra*, "[w]e view the trial court's overruling of the defense's objection as the functional equivalent of the jury instruction." (*Moody, supra,* 140 So. 3d at 701.) "[O]verruling an objection to an improper argument, puts 'the stamp of judicial approval' on the improper argument, thus magnifying the possibility for harm." *Good v. State*, *supra,* 723 S.W.2d at 738.

Thus we have the prosecutor's blatantly illegal and unconstitutional exhortation that the presumption of innocence is just

a sometime thing, urging the jury to dispense with the defendant's presumption of innocence because he's had a "fair trial." Moreover, the prosecutor reserved this manifestly improper argument for the last few minutes of his rebuttal argument, both for maximum impact just before the start of deliberations and because, when the contention is made in rebuttal, the defense would not have an opportunity to counter the argument. To seal the deal, the trial court overruled the defense objection to the prosecutor's misconduct in the presence of the jury, thereby giving the misconduct the imprimatur of judicial approval and endorsing the prosecutor's contention that the presumption of innocence was now over.

It doesn't get much worse, it doesn't get more prejudicial than that.

III.

This Court Should Grant Certiorari

The first reason why this Court should grant certiorari in this case is to define the outer limits of what constitutes an "adjudication on the merits" for purposes of the application of 28 U.S.C. §2254(d). There are numerous decisions of this Court that define what comes *within* the definition of a state court "adjudication on the merits" but careful research has disclosed no decision of this Court defining what state court decisions do not constitute an "adjudication on the merits." Surely the drafters of AEDPA did not envision mandating federal deference to every aspect of every state court habeas decision, no

matter how tentative, regardless of whether or not the state court decision is dicta. The very fact that the drafters took the time to specify that only state court decisions what "adjudicated" a criminal matter "on its merits" is a clear indication that the federal obligation to defer to state court resolution of habeas claims is not limitless. Leaving aside the constitutional issues that such a sweeping federal preemption would raise, if that had been the congressional intent, it would have been a simple matter to so state in the provisions of §2254.

Dated: November 3, 2021

Barry L. Morris
Attorney for Petitioner
KEITH UNDRAY FORD

Proof of Service by Mail

Petition for Certiorari and Appendix

I, Barry Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 1407 Oakland Blvd., #200, Walnut Creek, California, 94596; and I am not a party to the within action. On the date shown below, I deposited a true copy of the above entitled document(s) in the mail in the City of Walnut Creek by placing said document(s) in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Ms. Jill Thayer
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Executed on November 16, 2021, at Walnut Creek, CA

I declare under penalty of perjury that the foregoing is true and correct.

———————————

BARRY L. MORRIS