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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-465, Johnson v. Williams.

5 Ms. Brennan.

6 ORAL ARGUMENT OF STEPHANIE BRENAN

7 ON BEHALF OF THE PETITIONER

8 MS. BRENAN: Mr. Chief Justice, and may it
9 please the Court:

10 A fairly presented claim has been
11 adjudicated on the merits when a state court issues a
12 decision denying relief unless it has made a plain
13 statement to the contrary. And this is especially true
14 where the state court has grappled with the substance of
15 the alleged error.

16 And this rule is correct for three reasons:

17 First, state courts discharge their duties.
18 They are sworn to uphold the Constitution. Therefore,
19 they must adjudicate claims that can -- that allege
20 constitutional violations. So when a state court issues
21 a decision denying relief, it must necessarily have
22 considered and rejected all of the claims.

23 JUSTICE SOTOMAYOR: What happens when there
24 is a challenge to the admission of evidence on a state
25 law ground on -- on a Confrontation Clause ground, and

1 all the state court does is grapple with the evidentiary
2 rule, but it's self evident that the Confrontation
3 Clause is based on a different theory?

4 Are we to assume, in the light of that kind
5 of decision, that the court actually grappled with the
6 Confrontation Clause?

7 MS. BRENAN: Your Honor, we would assume
8 that there the state court, through its denial of
9 relief, did adjudicate the presented Confrontation
10 Clause -- claim. And that would be because --
11 for a number of reasons.

12 First, the presumption of regularity that
13 judicial officers do do their job, and it can only be
14 rebutted by clear evidence.

15 JUSTICE SOTOMAYOR: Am I to make that
16 assumption when, before our line of cases in this area,
17 state courts generally had held that if hearsay was
18 admissible under their evidentiary rules, that that was
19 the end of their Confrontation Clause challenge?

20 Is a Federal court supposed to continue with
21 that presumption in light of an undisputed state's
22 statement that their rules are consonant with the
23 Confrontation Clause.

24 MS. BRENAN: In that situation, if the state
25 court rule is consonant with the Confrontation Clause,

1 we would have certainly an adjudication of the
2 Confrontation Clause.

3 JUSTICE SOTOMAYOR: Well, let's assume it's
4 not after our -- we render our decision.

5 MS. BRENNAN: And if it were -- if it were
6 different, we would still hold that in that situation,
7 as this Court -- in relying on Richter, in that
8 situation it would be more of a summary denial on the
9 confrontation analysis.

10 JUSTICE SOTOMAYOR: If one --

11 JUSTICE KENNEDY: Well, we can continue and
12 probably should talk about this broad theory that you
13 want us to adopt.

14 Really, in this case, the court of appeals
15 in -- in the state system cited Nesler, and Nesler in
16 turn cited, at page 104 of the petition appendix, a
17 Supreme Court case you don't even -- you say citation,
18 you don't even give -- but it -- it's -- it's the
19 Supreme Court case, United States v. Wood, written by
20 Chief Justice Charles Evans Hughes. And it seems to me
21 it's very clearly ties its state analysis to the Federal
22 Constitution and a Sixth Amendment discussion in Wood.

23 So it seems to me that you're -- you have a
24 very strong argument that they did adjudicate the
25 Federal claim anyway. I know you want us to maybe reach

1 the bigger issue, but -- and your brief almost downplays
2 it -- but it seems to me pretty clear that you have the
3 argument, that you don't strongly make, although you
4 don't, by any means, abandon it, that -- that here the
5 state law was tied to the Federal standard, and the
6 Federal standard was the basis for the entire
7 jurisprudence.

8 MS. BRENNAN: Yes, Your Honor, we agree that
9 in our situation it just so happened to be that the
10 state standard also encompassed this Court's Sixth
11 Amendment jurisprudence because it -- it was citing U.S.
12 v. Wood, and it was citing Smith v. Phillips among the
13 -- the Sixth Amendment cases. In our case, it just so
14 happens that it does.

15 But we posit also that our case shows why
16 this is illustrative as to why this Court should adopt
17 the broader rule that, in situations where a state court
18 has denied relief or a claim has been fairly presented,
19 that this Court and all Federal courts should assume
20 that the state courts did their job by adjudicating
21 claims --

22 JUSTICE SOTOMAYOR: Irrebuttably?

23 MS. BRENNAN: Your Honor, in -- we have
24 suggested that -- that it can be rebutted by a plain
25 statement, if the state court says that it is not

1 reaching it or, more particularly, if a state court
2 imposes a procedural bar.

3 JUSTICE SOTOMAYOR: I see exceptions to that
4 already. There are cases where the state court reaches
5 one prong of the Strickland standard, has no need to go
6 to the second.

7 MS. BRENNAN: Yes --

8 JUSTICE SOTOMAYOR: So you really can't say
9 in that situation that you can assume they reached the
10 second, can you?

11 MS. BRENNAN: Well, Your Honor, I posit that
12 those Strickland cases are different. And they are
13 different because in all of those cases of Wiggins v.
14 Smith and Rompilla, that there the courts -- what the
15 State court did was follow exactly what this Court has
16 said of how a Strickland claim may be answered entirely
17 by only addressing the one prong of Strickland.

18 And so there they're doing exactly
19 adjudicating everything through the analysis of one.

20 Additionally, in those cases, by doing so,
21 the courts are not in any way suggesting that the State
22 courts failed to do something.

23 JUSTICE KENNEDY: Well, suppose that the --

24 JUSTICE GINSBURG: Ms. Brennan, we are
25 straying pretty far from this case. And correct me if

1 I'm wrong, but, as I understand it, the argument was
2 made under State law, and then Williams said there was
3 an abuse of discretion under State law and therefore the
4 Sixth Amendment was violated.

5 So there really isn't any
6 independent -- Williams hasn't stated any independent
7 Sixth Amendment right. It's State law was violated and
8 therefore the Constitution was violated.

9 So it seems to me if we just look at the
10 position that Williams was taking, that these two, the
11 State and the Federal claim, are tied -- tied together.
12 And we don't -- to go beyond this case and imagine some
13 other case that might come before us some day would not
14 be wise.

15 MS. BRENAN: Yes, Your Honor, I completely
16 agree with the view that here Williams did present a
17 completely dependent Federal claim; and, therefore, the
18 State's analysis -- the State court's analysis would
19 have fully adjudicated that.

20 However, we suggest that this case does
21 illustrate why that broader rule is important. And it's
22 important because, otherwise, other Federal courts may
23 not view it as this Court did, of seeing it as a dependent
24 claim --

25 CHIEF JUSTICE ROBERTS: The -- the court of

1 appeals, whose decision we're reviewing, understood the
2 Respondent to present a separate State claim and a
3 separate Federal claim, correct?

4 MS. BRENNAN: Exactly.

5 CHIEF JUSTICE ROBERTS: That's the predicate
6 to the whole question we have before us, right?

7 MS. BRENNAN: Exactly, Your Honor.

8 So --

9 JUSTICE ALITO: Let me give you this
10 hypothetical. The brief filed with an intermediate
11 State court of appeals contains 25 pages of argument on
12 a Federal constitutional claim. Let's say it's a Brady
13 claim. And then it also has two other claims, two other
14 arguments. They are State law claims, and each one is
15 dealt with in two pages. And then the State court,
16 intermediate court of appeals, issues an opinion that
17 addresses only the two State law claims and says nothing
18 about the Federal constitutional claim.

19 You would say there that -- that it's
20 conclusively presumed that they adjudicated the Federal
21 constitutional claim?

22 MS. BRENNAN: Yes, Your Honor, in that
23 situation we would. One, because of the presumption of
24 regularity; two, because of what this Court has said in
25 Richter, where we could view it as a summary denial;

1 and, third, what underlies that is - is the view that
2 if it's not written in the opinion, that it has been ignored.

3 But that's not what this Court said in
4 Castillo, where it said, if a court chooses to ignore in
5 its opinion, which should be read as in its opinion
6 writing, means that that claim has been impliedly
7 rejected.

8 So, therefore, just because a State court
9 chooses not to write about it in its opinion does not
10 mean that it didn't consider and reject that claim.

11 JUSTICE ALITO: Why is it necessary to go so
12 far as to require a plain statement? Why wouldn't you
13 protect the same interests if you had a rule that said
14 that there is a presumption that they have adjudicated
15 the claim on the merits, but that it can be rebutted if
16 there is a strong inference that they overlooked it or a
17 very strong inference that they overlooked it.

18 Then you wouldn't have situations like the
19 one that Justice Sotomayor posed in her hypothetical or
20 the one that I just mentioned to you.

21 MS. BRENNAN: Sure, Your Honor, but the
22 reason why there should be a plain statement is because
23 it's long been held that in order to rebut that
24 presumption of regularity, you need clear evidence.
25 And, really, the only clear evidence that one could have

1 would be a plain statement.

2 And this Court reinforced that when it said
3 in Richter, it talked about an indication or other State
4 procedural bars, and it cited Harris v. Reed. And
5 Harris v. Reed is a case that talked about plain
6 statements.

7 JUSTICE SCALIA: Well, I assume that in --
8 in many cases, especially capital cases, one could argue
9 for years over whether -- whether, in fact, there was
10 enough indication that the court did not consider it or
11 not, right? And every year is a reduction of sentence,
12 so to speak.

13 MS. BRENNAN: Exactly, Your Honor. And
14 that's -- that's why having a broader rule with this
15 presumption --

16 JUSTICE KENNEDY: Well, I suppose -- I
17 suppose the broader rule, if you took \$28.52 out of the
18 State's judicial budget and bought them all a stamp
19 which just says, we have considered and rejected all
20 constitutional claims, then there would be no problem?

21 MS. BRENNAN: Your Honor, they really do that
22 when they say "affirmed" at the end of the decision. It
23 really adds nothing.

24 If it were a stamp, it would be merely
25 reflexive, and therefore would in the end give you no

1 indication whether an argument had been considered or
2 not.

3 CHIEF JUSTICE ROBERTS: Any idea based on
4 your experience how many separate claims are typically
5 raised in a capital case of this sort?

6 MS. BRENNAN: If -- this was not a capital
7 case --

8 CHIEF JUSTICE ROBERTS: I'm sorry.

9 MS. BRENNAN: -- but an LWOP case. However,
10 in a capital case there can be hundreds. And we -- or
11 hundreds of pages of documents -- or hundreds of pages
12 in an appellant's opening brief, and, therefore, if one
13 were to slip in, in a phrase an apparent claim, and that
14 the State court happens not to --

15 JUSTICE SCALIA: There would be a lot of
16 good debate over whether it was presented clearly
17 enough, is presenting it in two sentences enough to
18 require the court to answer it. I can see a whole --
19 you know, a whole train of litigation on this wonderful
20 subject, a whole new area of law. Has the -- has the
21 State supreme court overlooked something that was
22 clearly enough presented, and is there enough indication
23 that the State court has overlooked it? I mean --
24 that's the problem.

25 JUSTICE SOTOMAYOR: All of the circuit

1 courts basically have a rule close to the one announced
2 by Justice Alito, don't they?

3 MS. BRENNAN: Your Honor, if they happen not
4 to mention one particular claim?

5 JUSTICE SOTOMAYOR: All of them have
6 essentially a presumption that's rebutted by some form
7 of evidence, except for perhaps the Eleventh and this
8 circuit that have a clear, almost irrebuttable
9 presumption.

10 I'm sorry. Not the Ninth, but the Eleventh.

11 MS. BRENNAN: Well, Your Honor -- the
12 Eleventh Circuit and, I believe that, the Sixth Circuit as
13 well.

14 JUSTICE SOTOMAYOR: But it's not as absolute
15 as the Eleventh.

16 MS. BRENNAN: True that the Eleventh Circuit
17 has a broader rule. And we believe --

18 JUSTICE SOTOMAYOR: I have a -- you know, I
19 mean, for every rule you're going to find an exception
20 that abuses it. It's the nature of human nature.

21 Do you know what the total number of habeas
22 petitions there are and what the percentage that are
23 actually granted?

24 MS. BRENNAN: I don't have that figure off
25 the top of my head, Your Honor.

1 JUSTICE SOTOMAYOR: Would you be willing to
2 accept that it's -- in relationship to the total
3 granted, it's very, very small?

4 MS. BRENNAN: Yes, I believe that is true,
5 that there is a small number of granting of petitions,
6 yes.

7 JUSTICE SOTOMAYOR: So whatever the abuse of
8 the system is, it hasn't halted justice.

9 MS. BRENNAN: Well, Your Honor, the thing is
10 that -- and I think that Justice Scalia has adverted to
11 this -- is that if we were to -- to require only an
12 indication, it would create a situation where there
13 would be all this litigation. And that's why this
14 Court, when it does -- has accepted conclusive
15 presumptions in other cases, for example in Coleman v.
16 Thompson, talked about we will accept these conclusive
17 presumptions because they work in almost all of the
18 cases, and we will accept the small number of errors in
19 exchange for the reduction workload. So --

20 JUSTICE BREYER: Well, why can't they just
21 do what we used to do? Many district judges do this
22 and -- because there sometimes thousands of
23 petitions of different kinds. A lot go to the staff
24 attorneys that look them over and flag the arguments,
25 and you put at the end, just to be on the safe side:

1 Any other arguments that are made are rejected. All
2 right.

3 Now, that serves one purpose. A human being
4 has a hard time writing that unless he's thinking: I've
5 looked this over pretty carefully. And if it's a staff
6 attorney preparing a draft, the staff attorney doesn't
7 want to -- doesn't want to write those words unless he
8 or she has really looked with some care.

9 And so it serves a purpose. It means they
10 don't do it just as a form. They could turn it into a
11 form, but they shouldn't. And so if -- let them write
12 that, and therefore if we get nothing then you put into
13 play these presumptions, et cetera.

14 MS. BRENAN: Justice Breyer, I would
15 disagree with -- with that proposal because it is in the
16 end just -- could become reflexive --

17 JUSTICE BREYER: Well, anything. Judges can
18 not do their job. But -- but when you write something
19 like the word "denied," which is all most district
20 judges write in respect to many motions, they read the
21 motion, they think about it, that's their job.

22 So -- so, similarly, a staff attorney or a
23 judge who is going to have to write certain words will
24 want to do his job or her job, and they will do it.

25 So I'm just suggesting that it won't -- that

1 isn't a big deal.

2 Now, this case, they didn't write that for
3 some reason. Many do.

4 JUSTICE SCALIA: Doesn't the -- doesn't the
5 word denied at the end of the order say the same thing?
6 We've considered --

7 JUSTICE BREYER: No.

8 JUSTICE SCALIA: -- all of the points made,
9 and we have denied them.

10 And wouldn't it be the case that if you
11 require such a statement, but you have a situation where
12 a Federal question occupies 90 percent of the brief, and
13 the court only addresses explicitly the state things,
14 the state claims, and then at the very end says, we have
15 considered all the other claims, presumably including
16 the 90 percent Federal claims that are not addressed,
17 would we be out of the woods, or would you be here again
18 arguing the same problem?

19 MS. BRENNAN: I think we could be arguing the
20 same problem. I think, as Your Honor's noted, that the
21 inclusion of the word denied, or, if you're affirming a
22 conviction in a direct appeal, the word affirmed covers
23 that. It says exactly, we have considered all those
24 other claims.

25 JUSTICE KAGAN: Ms. Brennan, can I ask you

1 what you mean by a plain statement? Because you've said
2 a couple of times a plain statement to the contrary.

3 Justice Sotomayor and Justice Alito have
4 given you hypotheticals, very different from this case,
5 but hypotheticals, where there is, I think, a strong
6 inference that there was no adjudication of the
7 particular Federal claim alleged.

8 You said that's not a plain statement, even
9 though it seems as though there is a strong inference.
10 So what would be a plain statement?

11 MS. BRENNAN: A plain statement would be a
12 procedural bar, or if there were -- a court were to say,
13 we're not, for some reason, going the reach the
14 constitutional claim, that they really need to say it
15 out loud. I don't know why they would say that, but
16 that's what would be required.

17 JUSTICE KAGAN: Yes, I don't know why they
18 would say that either. Well, by the way, we're not
19 adjudicating this, you know. So if that's your test,
20 your test is an irrebuttable presumption.

21 MS. BRENNAN: No, Your Honor, I would
22 disagree, because there is the possibility of having --
23 having the procedural bar.

24 JUSTICE ALITO: What if -- what if the
25 brief raises five arguments, and the opinion says the

1 appellant has raised four arguments, is that a plain
2 statement that the fifth -- the fifth argument was
3 overlooked?

4 MS. BRENNAN: I would say that it possibly
5 could be if it were in that situation. However, I
6 would -- I would still go back to -- to really, the
7 Richter presumption of saying that that word at the end,
8 denied, denied is denied is denied, and it covers every
9 fairly presented claim.

10 JUSTICE ALITO: That's not a plain
11 statement? What if there is one Federal claim -- one
12 Federal argument and five state arguments, and the
13 opinion says, this appeal raises only issues of state
14 law, is that a plain statement?

15 MS. BRENNAN: Possibly it could be,
16 Your Honor, but here we don't -- we don't have that
17 situation.

18 JUSTICE GINSBURG: May I ask you about the
19 underlying claim here? It is quite troublesome. I
20 think this is a state that doesn't allow an Allen
21 charge; is that right?

22 MS. BRENNAN: Correct. Correct, Your Honor.

23 JUSTICE GINSBURG: And the possibility of
24 getting rid of the juror, the hold-out juror, in this
25 way is -- is really troublesome.

1 The judge can't give an Allen charge to urge
2 the jury to deliberate further, but can say -- now, the
3 judge knows who the hold-out is, and to just dismiss
4 that juror, it is -- it is very troublesome.

5 MS. BRENAN: Well, Your Honor, the thing is
6 that here we have a trial court who is looking at this
7 juror and makes the determination that the juror is
8 biased. And, therefore, if there was to be anything of
9 any sort of constitutional violation, it would be to
10 keeping that juror, a biased juror, on the jury. That
11 would be a violation of the Sixth Amendment.

12 JUSTICE KENNEDY: Well, I have to -- I mean,
13 this takes us into the merits, which is really
14 interesting, but I -- we probably shouldn't go there,
15 but, as long as we're there for a minute, I agree with
16 Justice Ginsburg. I've never seen a procedure like
17 this.

18 And I looked -- I looked at this -- the
19 Federal cases, Brown and Thomas, that the Cleveland
20 court cited. Those -- and Wood was voir dire, was not
21 mid-jury.

22 I just hope this doesn't happen with much
23 regularity. And the fact that the trial judge is upset,
24 that's the reason that you should leave the jury alone,
25 it seems to me. I think it's very troublesome.

1 MS. BRENAN: Well, Justice Kennedy, it's a
2 situation where, through the voir dire, what comes out
3 is not that we're trying to get -- that the trial judge
4 is feeling to get rid of this juror because he's the
5 hold-out juror, but it's because through the voir dire
6 he determines that this juror is biased, and that is the
7 bias, and that's what makes it different.

8 JUSTICE SOTOMAYOR: That the person is not
9 guilty is a bias?

10 MS. BRENAN: No, Your Honor, that's
11 certainly not it. It's the bias comes from what he was
12 saying of his disagreement or -- that he just really did
13 not believe with the felony murder rule. Therefore,
14 it's that -- that under any evidence, whatever evidence
15 was presented, that he would not be able to convict
16 because he disagreed with the very basis of the law.

17 JUSTICE SOTOMAYOR: That -- that's -- that
18 may be your strongest point, but most of what he said
19 was basically this is a murder case, and the evidence
20 has to be beyond a reasonable doubt, and I think it has
21 to be clear enough for me to be convinced. Is that a
22 biased juror?

23 MS. BRENAN: That is not a biased juror, but
24 that's what he said to the court.

25 But what comes out through the voir dire of

1 the other jurors is not that he was using a reasonable
2 doubt standard, but that he was using a no doubt
3 standard, an absolute doubt standard.

4 And that's where he's not following the law,
5 and that's where he's biased. And that's where he
6 becomes a biased juror who has no right to be on that
7 jury.

8 JUSTICE SOTOMAYOR: I must say that, like
9 Justice Kennedy, I'm deeply troubled when trial judges
10 intrude in the deliberative processes of juries.

11 Most of the time when we're assessing bias,
12 we're assessing it on the grounds of extraneous
13 evidence, a juror who has said one thing in voir dire
14 and is now either a convicted felon or introduced
15 extraneous circumstance.

16 But the degree of being convinced is the
17 very essence of jury deliberations. This case is
18 troublesome.

19 MS. BRENNAN: Well, Your Honor, I believe in
20 this situation it's one where the judge was presented
21 with possible misconduct, and therefore had to do
22 something. Had the judge done nothing, we could have
23 possibly been in the same situation.

24 And under -- under California law, it's
25 where this -- this examination cannot be so intrusive.

1 So we maintain that it was not. It was only
2 to the degree in which we are finding that there was a
3 biased juror. At that point in time, the Sixth
4 Amendment required that that juror be removed.

5 JUSTICE KAGAN: Could I go back, Ms. Brennan,
6 to your basic theory, because I guess I'm not sure I
7 understand what you're arguing now.

8 In your brief, you talked about focusing on
9 the error. So if evidence was admitted, you would say
10 it doesn't matter that there were three different
11 theories for why the admission of evidence was wrong;
12 you should just look at the fact that we're talking
13 about the admission of evidence. Now, is -- is that
14 what you're arguing, or are you also saying what the
15 states say in their amicus brief, that even if, you
16 know, one claim is about the admission of evidence, and
17 one claim is about ineffective assistance of counsel,
18 you would still apply the same rule?

19 MS. BRENNAN: What we're saying is that, at
20 the very least, in our type of situation where -- where
21 the court discusses the alleged error, there is an
22 adjudication on the merits, but that plays into the
23 larger and broader rule.

24 JUSTICE KAGAN: Well, why does your theory
25 make any sense? I mean, we're supposed to be

1 interpreting a statute here that says whether the claim
2 was adjudicated on the merits. Usually when we speak of
3 claims, we speak of legal grounds for relief. We don't
4 look at a claim and say, we'll just check, you know,
5 what -- we don't use an operative facts test, and you
6 seem to be suggesting that that's the kind of test we
7 should use.

8 MS. BRENNAN: Yes, in -- especially if you're
9 going to look at the state courts, which are -- must
10 decide both the Federal and state questions. So their
11 interpretation of what a claim is does not necessarily
12 mean what it eventually becomes when it's in Federal
13 habeas.

14 And the Federal habeas courts are limited by
15 their jurisdiction to only be Federal law theories, and
16 a Federal petitioner can only bring such claims.

17 So, for that reason, it's -- it's not the
18 good fit for the state courts to limit them in that way.
19 And that's why we're saying, at least in a situation
20 where a state court has grappled with the substance of
21 the error, that it has adjudicated the claim, which it
22 could have viewed, as was here, sort of a single claim
23 independent, or it could have state law theories and
24 Federal law theories that it puts together.

25 And I would like to reserve the remainder of

1 my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.
3 Mr. Hermansen.

4 ORAL ARGUMENT OF KURT D. HERMANSEN
5 ON BEHALF OF THE RESPONDENT

6 MR. HERMANSEN: Mr. Chief Justice, and may
7 it please the Court:

8 The rule this Court should adopt is the same
9 rule that the consensus -- the consensus rule of the
10 courts of appeals. When they look at an opinion, a
11 reasoned opinion, they look at what the opinion says,
12 the text of the opinion. And if the opinion grapples
13 with the bulk of the claims that are in the prisoner's
14 appellate brief but omits to address one of the claims,
15 then there is an inference that the claim has not been
16 adjudicated on the merits.

17 CHIEF JUSTICE ROBERTS: Well, just the way
18 you phrased it, if it addresses the bulk of the claims,
19 under your theory it has to address every claim,
20 correct?

21 MR. HERMANSEN: If -- under my theory, if
22 there is a Federal claim that's overlooked or omitted,
23 then the inference --

24 CHIEF JUSTICE ROBERTS: No, no. Not
25 overlooked or omitted. Not discussed.

1 MR. HERMANSEN: Correct.

2 CHIEF JUSTICE ROBERTS: Not analyzed in the
3 opinion.

4 MR. HERMANSEN: Correct. Here it's Sixth
5 Amendment, so the Sixth Amendment was not mentioned.
6 The Sixth Amendment was not -- there is no indication
7 from the opinion itself that the Sixth Amendment claim
8 was adjudicated.

9 CHIEF JUSTICE ROBERTS: You agree that if --
10 if this was raised when your friend was at the
11 lectern -- if the court at the end said, not only
12 denied, but said, I considered all other arguments not
13 addressed, denied, then you have no case, correct?

14 MR. HERMANSEN: Correct. And that's the
15 recommendation of the NACDL brief. Is that, and we do see
16 that a lot. There is -- where there are opinions that say:
17 We've reviewed and considered all claims raised and
18 reject them.

19 JUSTICE GINSBURG: That would mean that if
20 you prevail it would just become routine. Justice
21 Kennedy mentioned the stamp that says: We considered
22 all of the questions raised, those not discussed on the
23 merits --

24 MR. HERMANSEN: Well, Justice Ginsburg, as
25 Justice Breyer was saying, we, and as my friend was

1 arguing, you know, there is regularity and we do -- it's
2 fair to assume that a judge who is looking at an
3 appellate court brief is going to do their job and look
4 at the briefs. So that --

5 CHIEF JUSTICE ROBERTS: Well, you're not
6 willing to assume that when the judge says "denied."
7 You're willing to assume that when the judge says: I've
8 looked at everything, denied.

9 MR. HERMANSEN: Right --

10 CHIEF JUSTICE ROBERTS: It seems to me if
11 you give them the presumption of regularity in the one
12 case you ought to give it to them in the other.

13 MR. HERMANSEN: And I don't think the
14 presumption of regularity should apply here, just as
15 this Court in *Smith v. Digmon* looked at the opinion and
16 looked at what was argued and said: All the courts
17 below made a mistake; it was fairly exhausted.

18 And I would like to address Justice Scalia's
19 concern about the whole area of litigation that might
20 occur. That won't happen for one reason: In the habeas
21 context the claim must be fairly presented, period. If
22 the Federal constitutional claim is not fairly
23 presented, you're not in Federal court. And so there is
24 already a whole body of law talking about what a claim
25 is.

1 And my friend tries to avoid the word
2 "claim" because it's inconvenient.

3 JUSTICE GINSBURG: Was it fairly presented
4 here?

5 MR. HERMANSEN: It was fairly --

6 JUSTICE GINSBURG: Given that the argument
7 was abuse of discretion?

8 MR. HERMANSEN: It was -- yes, Justice
9 Ginsburg, it was fairly presented. And in the red brief
10 at page 39 I talk about that, and also at page 43 of the
11 red brief I indicate that the attorney general conceded
12 that the claim was exhausted.

13 JUSTICE KENNEDY: Of course, again this is
14 fact-specific to the case. It doesn't address the rule
15 that we want to address and was the reason for us taking
16 the case, but 104a, the State court, State appellate
17 court, cites the United States v. Wood, and -- and it
18 also cites Cleveland, and Cleveland had three circuit
19 court cases, all of which involved the Sixth Amendment.

20 It seems to me that the Federal
21 constitutional claim was intertwined with and -- and
22 controlling of the procedural matters that the court
23 discussed. I just don't see the case is here even on
24 your theory.

25 MR. HERMANSEN: Justice Kennedy, I'm glad

1 you brought that up because I do want to address your
2 concern on that, and it's Dye -- this Court's opinion in
3 Dye takes care of the intertwined argument. In Dye this
4 Court said that as long as the claim, the Federal nature
5 of the claim is presented, even if it's presented under
6 the same heading, it's fairly presented on a habeas
7 claim.

8 JUSTICE ALITO: Yes, but that's the state
9 court. Here didn't -- would you disagree that the
10 California Supreme Court in Cleveland correctly or
11 incorrectly adopted a rule that it believed was
12 consistent with the Federal Constitution?

13 MR. HERMANSEN: If that were the case, then
14 we would have a different case. But in Cleveland, the
15 California Supreme Court explicitly rejected or declined
16 to adopt the Brown, Symington, Thomas --

17 JUSTICE ALITO: And were they under any
18 obligation to agree with Federal courts of appeal as to
19 the interpretation of the Sixth Amendment?

20 MR. HERMANSEN: They were not.

21 JUSTICE ALITO: Well, they -- isn't the --
22 isn't the reasonable reading of Cleveland that we're
23 adopting this rule, this is our State rule, it's based
24 on a very broadly worded State statute, it is informed
25 by our understanding of the Sixth Amendment, and we

1 disagree. We mention the Federal courts of appeals
2 decisions on this issue and we respectfully disagree
3 with their interpretation of the Sixth Amendment.

4 MR. HERMANSEN: Correct. So if the -- if
5 Cleveland were to come before this Court, then there
6 would be a clear indication from the opinion that they
7 had considered the Federal standard, but didn't adopt
8 it.

9 JUSTICE ALITO: Didn't the -- I'm sorry.

10 MR. HERMANSEN: But this case isn't
11 Cleveland. In this case what happened was --

12 JUSTICE SOTOMAYOR: I'm not sure how you can
13 say that. I mean, I think the simplest statement of the
14 State rule is that the State believes that if you remove
15 a juror for actual bias, that that is okay under the
16 Sixth Amendment. They said it in Cleveland. They were
17 presented with the argument in this case by the briefing
18 that the juror was not biased and hence the Sixth
19 Amendment was violated. And they ruled to say he was
20 biased, and I see as a natural, clear inference that
21 they were saying the Sixth Amendment wasn't violated
22 because he was biased.

23 MR. HERMANSEN: There -- the problem with
24 that determination is that there's the Federal standard
25 on what is -- what the Sixth Amendment standard is. So

1 under Thomas, Symington and Brown --

2 JUSTICE SOTOMAYOR: That's a different
3 question. That question is whether the California
4 Supreme Court's Cleveland decision, its assumption that
5 a biased juror violates -- doesn't violate -- the
6 removal of a biased juror doesn't violate the Sixth
7 Amendment, is that an unreasonable application of
8 Supreme Court precedent, not circuit court precedent?

9 MR. HERMANSEN: This gets to the -- my
10 friend's argument about how their argument is upside
11 down. They are saying that we're trying to incorporate
12 into 2254(d)(1) what is contrary to and what is the
13 United States Supreme Court law, but we never get to
14 (d)(1)'s United States Supreme Court law limitation
15 because, looking at the text of 2254(d), you start with
16 was the claim adjudicated on the merits? That's the
17 threshold question.

18 So if the claim was not adjudicated on the
19 merits you don't get to the United States Supreme Court
20 law limitation. Instead --

21 CHIEF JUSTICE ROBERTS: Well -- I'm sorry.
22 Go ahead.

23 MR. HERMANSEN: Instead you look at Brown,
24 Thomas, and Symington, and they say that if the juror's
25 views on the merits of the case have been expressed and

1 the juror might be kicked off because of -- which is
2 exactly what happened here -- kicked off because of his
3 views on the case, then the Sixth Amendment has been
4 violated.

5 JUSTICE SOTOMAYOR: What Supreme Court
6 precedent commands that result?

7 MR. HERMANSEN: Supreme Court precedent
8 doesn't command it, but because it's de novo review and
9 because -- because it's a quid pro quo. 2254(d),
10 Congress said States are going to get deference and they
11 are going to get a limitation on the law that the
12 Federal courts can look at, the United States Supreme
13 Court law. But for that quid pro quo to happen, for the
14 States to get that deference and limitation on the law,
15 they have to have adjudicated the claim. Because
16 that's --

17 CHIEF JUSTICE ROBERTS: No, the --

18 MR. HERMANSEN: -- the main event is
19 supposed to be in State court. That is where the bite
20 of the apple is supposed to be, in State court.

21 CHIEF JUSTICE ROBERTS: The discussion
22 you've been having with Justice Sotomayor and Justice
23 Alito highlights another problem with your approach, is
24 that the court is going to have to decide in every case
25 whether or not State law is coterminous with Federal

1 law. And there was -- I don't know that the Ninth
2 Circuit got that question right in this case or they got
3 it wrong, but in every case, or many of the cases, the
4 claim will be made on the part of the State, well, yes,
5 they just said State law, but it's the same as Federal
6 law. And the Ninth Circuit recognized that as an
7 exception to their rule. Isn't that really going to
8 cause all sorts of collateral litigation?

9 MR. HERMANSEN: And it's not because this is
10 the rare case --

11 CHIEF JUSTICE ROBERTS: I'm sorry?

12 MR. HERMANSEN: I'm sorry. It's not, Your
13 Honor.

14 CHIEF JUSTICE ROBERTS: Oh, it's not.

15 MR. HERMANSEN: Mr. Chief Justice, this case
16 is a rare case where, looking at the opinion, we can't
17 tell if they adjudicated the claim on the merits. And
18 it appears, every appearance and inference is that they
19 overlooked it or didn't adjudicate it. So that's a rare
20 case. Normally, just looking at the opinion you can
21 tell if they adjudicated the Federal claim.

22 CHIEF JUSTICE ROBERTS: Except in a case
23 like Harrington v. Richter.

24 MR. HERMANSEN: Harrington v. Richter
25 created a very simple, straightforward, and appropriate

1 presumption, because when you have a unexplained order
2 it makes sense that, in that context, that they have
3 adjudicated everything on the merits. And to give the
4 greatest respect to the State courts in comity and
5 federalism is to look at what the order says, and if
6 it's a reasoned opinion to take it at face value. It
7 says what it says; it doesn't say what it doesn't say.

8 JUSTICE KAGAN: Well, I may be just
9 repeating some of my colleagues here, but I think if you
10 take this opinion at face value, it cuts against you. I
11 mean, it's a -- they're applying Cleveland. Cleveland
12 is a constitutional decision. It's a Federal
13 constitutional decision.

14 The concurrence makes that completely clear.
15 California has made it completely clear in other cases
16 post Cleveland that it thinks it's applying the Sixth
17 Amendment.

18 Whether it's applying a correct
19 interpretation of the Sixth Amendment is unclear, but
20 it's also completely irrelevant. It thinks it's
21 applying the Sixth Amendment, and it's reaching a
22 Constitutional judgment, isn't it?

23 MR. HERMANSEN: No, Your Honor.
24 Cleveland -- a careful reading of Cleveland shows that
25 the majority does not adopt the Federal standard. So

1 the consensus standard in the -- in the Federal circuit
2 courts is that if the merits of --

3 JUSTICE KAGAN: You're quite right, it does
4 not adopt the consensus standard. It specifically
5 rejects the consensus standard, but it's entitled to do
6 that. As a state court, with no Supreme Court decision
7 that it has to follow, it can say, we have a different
8 view of the Sixth Amendment. I'm just repeating what
9 Justice Alito here said.

10 And that's what it's doing. It's saying,
11 we're applying the Sixth Amendment, we're applying it
12 differently from the way these other courts have done so
13 because we think they're wrong.

14 MR. HERMANSEN: And so two points on that.
15 First, is the concurrent chides the majority for not
16 being concerned about the Sixth Amendment.

17 The second is the -- my friend cites *People*
18 *v. Allen* with an ellipse and doesn't give the full
19 context of *Allen*. So when they cite more recent law,
20 2006, that talks about how the demonstrable reality
21 test, which is just a notch up above substantial
22 evidence, is designed to protect constitutional rights
23 of due process and Sixth Amendment, what they don't say
24 is in *People v. Allen*, they only reached the statutory
25 issue, they never reached the constitutional issue. So,

1 at most, it's dicta.

2 And the California Supreme Court has never
3 held -- has never addressed the issue of when is the
4 Sixth Amendment violated when a juror is kicked off in
5 this fashion? And instead, they -- their role is we
6 allow free intrusion into the deliberative process. We
7 don't adopt Symington and Brown and Thomas when they say
8 that -- when a juror's views on the merits of the case,
9 questioning should stop. Instead, we think
10 that questioning should -- should be free to continue.

11 JUSTICE ALITO: The -- section 1089 is very
12 broadly worded; isn't that right? The section that was
13 being interpreted in Cleveland?

14 MR. HERMANSEN: Section 1089 -- I don't --

15 JUSTICE ALITO: All right. You think that
16 the California Supreme Court said, we're announcing a
17 rule of state law, and, you know, we've been told that
18 this rule is inconsistent with the Sixth Amendment, but
19 we don't care, and we're not even -- we're not going to
20 worry about what the Sixth Amendment requires, we're
21 just going to adopt this rule as state law; do you think
22 that's what they did?

23 MR. HERMANSEN: In People v. Collins, the
24 California Supreme Court said that 1089 is a rule of
25 efficiency so that courts can efficiently deal with

1 possible juror bias. And that -- that's still good law.
2 That hasn't changed.

3 So that's why Justice Werdegarr, in her
4 concurrence, was saying, we need to be worried about the
5 Sixth Amendment. And the only reason she joined in the
6 opinion was it used to be, well, if there's just
7 substantial evidence that the juror is not deliberating
8 as a juror should, she wasn't satisfied that that was
9 sufficient; but, because there had to be a demonstrable
10 reality from the record that the juror wasn't
11 deliberating, she signed on in Cleveland.

12 And in Cleveland, they reversed under 1089.
13 And this case should have been reversed under 1089.

14 JUSTICE BREYER: -- Can we go back a minute,
15 please, to
16 Justice Kennedy's question about page 104(a).

17 I read the court of appeals' opinion. Most
18 of it, about six or eight pages, recites the facts.
19 Then they discuss the law. The legal discussion is on
20 page 104(a). It's approximately 30 lines long. More
21 than half of it concerns Federal law.

22 I mean, they don't just cite that Federal
23 case. They say, "In assessing whether a juror is
24 impartial for Federal constitutional purposes -- Federal
25 constitutional purposes -- the United States Supreme
26 Court has said," da, da, da, then they quote it all.

1 Now, since your argument, the argument in
2 the -- in this brief here is entirely Sixth Amendment,
3 as far as I can tell, they say, look, look what happened
4 here, they took this man off the jury. That violates my
5 rights to Sixth Amendment right. It says it over and
6 over and over. I have no doubt you raised it.

7 And now they give an answer. And the answer
8 that they give consists of 30 lines, and 16 of the lines
9 consist of Federal law.

10 So -- so what's the problem?

11 MR. HERMANSEN: The problem --

12 JUSTICE BREYER: The remaining 14 lines do
13 consist of state law too; but, I mean, how can we say
14 they didn't consider the Federal issue?

15 MR. HERMANSEN: Because Nesler doesn't talk
16 one iota about kicking off the holdout juror.

17 JUSTICE BREYER: No, they didn't quote --
18 Nesler doesn't. What they did in Nesler is quote a
19 Federal case. And what they do here is not just say
20 Nesler, they quote the Federal case.

21 MR. HERMANSEN: And that Federal case has
22 nothing to do with kicking off a holdout juror.

23 JUSTICE BREYER: Well, maybe it doesn't.
24 Maybe they didn't properly -- maybe they didn't properly
25 state what Federal law is. Everybody has some concerns

1 about that one.

2 But what I don't see is how when they spend
3 14 out of 27 lines quoting a Federal case which they
4 believe sets the standard for impartiality and
5 partiality you can say that they didn't discuss the
6 Federal issue.

7 MR. HERMANSEN: You hit the nail right on
8 the head, Justice Breyer, because they are talking about
9 impartiality. That's all they're talking about.
10 They're looking at a Federal case to see what the
11 definition of impartiality is.

12 JUSTICE BREYER: For Constitutional
13 purposes. And this guy was kicked off the jury because
14 they thought he was not impartial.

15 MR. HERMANSEN: The bottom line is they did
16 not apply the Federal rule. And the Federal rule is
17 that if the juror's views on the merits of the case have
18 been revealed, then the juror should not be kicked off.

19 JUSTICE BREYER: Well, then your claim over
20 in the Ninth Circuit is not that they didn't consider
21 it, but that, rather, they considered it, but no
22 reasonable juror could reach -- no reasonable jurist
23 could reach the conclusion that they reached on the
24 issue.

25 That argument is open to you. The only

1 thing I don't understand is how you're saying -- or
2 everybody -- I must be wrong, because everybody seems to
3 be saying it -- that they didn't reach the Federal issue
4 when they spent 14 lines discussing it, rightly or
5 wrongly.

6 MR. HERMANSEN: Respectfully,
7 Justice Breyer, they don't -- they're just talking about
8 a definition of one word, of what actual bias is.

9 JUSTICE BREYER: Which happens to be the
10 issue in this case.

11 MR. HERMANSEN: The issue in this case is
12 can you kick off a juror who has expressed 10 or 15
13 times -- and this came out right out of the hat -- the
14 foreperson was called out, asked about some notes and
15 said, Juror No. 6, 10 or 15 times has said, I don't
16 think there's sufficient evidence. So that's different
17 from whether we look at Federal law to -- for the
18 definition of actual bias.

19 My -- I think it's a reasonable position to
20 say that you can't infer from this discussion of Nesler,
21 only talking about what the definition of actual bias
22 is, that the actual Sixth Amendment claim -- and even
23 the trial attorney was arguing in Symington, Your Honor,
24 please don't question these jurors. The foreperson,
25 right out of the box said that Juror No. 6, 10 or 15

1 times, has already said that he thinks there isn't
2 sufficient evidence.

3 JUSTICE BREYER: No. Now, what the court
4 says about that argument, what the court of appeals
5 says, is that the argument of your client not only
6 misstates the evidence -- that's their -- not you, but
7 they're criticizing -- and then he says, "It ignores the
8 trial court's explanation that it was discharging Juror
9 No. 6 because he had shown himself to be biased."

10 So this court of appeals thinks the issue is
11 whether he had shown sufficient bias. You think the
12 answer to that is clearly no. The Government thinks
13 it's yes. And I can understand the differences of
14 opinion, but I'm back to my question.

15 It seems to me in 14 lines they do address
16 the Federal constitutional question of bias. And
17 that's -- that's -- maybe it wasn't the right issue,
18 et cetera, but -- or maybe they didn't decide it
19 correctly.

20 But you see what's bothering me. And so
21 I've listened to the answer. Do you want to add
22 anything?

23 MR. HERMANSEN: I would respectfully request
24 that, read -- that reading this whole thing in context,
25 it's clear that the California Court of Appeals is

1 dealing with 1089. They are not dealing with the
2 Federal standard that we're grappling with here, which
3 is if a juror's views on the merits of a case have been
4 expressed, can you then interrogate all the jurors --

5 JUSTICE SOTOMAYOR: Is this -- is this a
6 holding that the Sixth Amendment requires you to keep a
7 biased juror as long as the juror says, I have doubts
8 about the sufficiency of the evidence?

9 MR. HERMANSEN: No. If there is good
10 cause --

11 JUSTICE SOTOMAYOR: Now, answer my question.
12 Does the Sixth Amendment require you to keep a biased
13 juror?

14 MR. HERMANSEN: No.

15 JUSTICE SOTOMAYOR: All right. So, if the
16 Sixth Amendment doesn't require you to keep a biased
17 juror, then why is it that the state court's finding
18 that this juror was biased a Sixth Amendment holding,
19 that it wasn't violated because the juror was biased?
20 The logic is almost inescapable to me.

21 MR. HERMANSEN: Yeah, right. So for a
22 minute we'll get into the issue that wasn't certified,
23 but what happened in this case was the judge -- the
24 Ninth Circuit found that the finding of bias wasn't good
25 cause under the Federal standard because the --

1 JUSTICE SOTOMAYOR: Did the California court
2 find the juror was biased?

3 MR. HERMANSEN: Yes. Because he was
4 applying too high of a standard because he said very
5 convinced beyond a reasonable doubt, and there was a
6 quibble about what does the word very add to beyond a
7 reasonable doubt. And the jury very eloquently
8 responded that very convinced beyond a reasonable doubt
9 is the same as convinced beyond a reasonable doubt.

10 And so that doesn't show bias when
11 someone --

12 JUSTICE BREYER: That was one of the things.
13 Then they go through in those four pages about six
14 other -- they called -- he gave one story to the judge,
15 Juror No. 6.

16 Then the prosecution calls about eight other
17 jurors, and they come up with quite a different story
18 about what he was telling them in the jury room and --
19 that I'm not going to convict him. Well, he didn't
20 quite say that; he was talking about Vietnam and talking
21 about the slaves, and you don't want to convict a person
22 for -- make him return the slave.

23 I mean, they talked about a lot of things.
24 And he went through all that, and then concludes he was
25 biased. And your point was he wasn't biased. He was

1 going to decide it fairly.

2 Okay, I'm listening.

3 MR. HERMANSEN: But the threshold issue is
4 when the foreperson, at the very, very, very beginning,
5 says, Juror No. 6, 10 or 15 times has said he doesn't
6 think there is sufficient evidence, all questioning
7 should have stopped at that point, because there was no
8 indication of bias.

9 But -- and how do we know that there --
10 there's a possibility that he's being kicked off because
11 of his views on the merits of the case? We know that
12 because the prosecutor filed a motion saying, let's
13 reopen questioning. And that -- then the judge said,
14 okay, yeah, let's reopen questioning.

15 But the foreman had already said, I think
16 your response to the jury note has satisfied that; I
17 think it will be fine. Yet, the prosecutor filed a
18 motion to reopen because the prosecutor knew that this
19 juror had reasonable doubts.

20 And so that's why there's clear evidence in
21 this case that the motion to dismiss the juror was based
22 on the juror's views on the merits of the case.

23 And -- and, also, this is not a capital
24 case, it's just a -- an LWOP case.

25 And if there are no further questions, thank

1 you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Brennan, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF STEPHANIE BRENNAN

5 ON BEHALF OF THE PETITIONER

6 MS. BRENNAN: Thank you.

7 I would just like to make about four points.

8 First, my friend discussed the case of Smith
9 v. Digmon. And I think I would like to point this Court
10 to the words that were used in Smith v. Digmon, which is
11 where the state court chooses to ignore in its opinion.
12 And as this Court later said in Castille talking about
13 that, that's an implicit rejection.

14 So, really, the way it should be interpreted
15 is, if a state court fails to mention in its opinion
16 writing, it's implicitly rejected, not that it's been
17 ignored.

18 Secondly, I'd just like to agree that, yes,
19 California believes that 1089 is Constitutional under
20 the Sixth Amendment. And, in fact, the Ninth Circuit in
21 Miller v. Stagner said that it was facially
22 constitutional.

23 Third, I would just like to agree with
24 Justice Sotomayor that here, where the trial court made
25 the finding of bias, that answered the Sixth Amendment

1 question.

2 The entire argument below and throughout was
3 a disagreement as to whether the juror was biased, or
4 was he just having -- harboring doubts about the
5 sufficiency of the evidence. Those were the
6 counter-arguments.

7 The trial court, by making the determination
8 that there was bias, necessarily answered that question.

9 Secondly, as to that point, I would just
10 like to also point this Court to the language in People
11 v. Cleveland that talks about agreeing with Thomas, and
12 Brown, and Symington that you cannot dismiss a juror
13 based on his views of the evidence. And that's at 21
14 P.3d at page -- 1236.

15 So it couldn't have -- in order to have good
16 cause in California, you couldn't have gotten rid of him
17 for his views of the evidence.

18 Finally, I'd just like to say that
19 Mr. Chief Justice is correct that this would increase
20 the litigation. We would have courts, Federal habeas
21 courts all the time trying to decide whether there was a
22 sufficient indication or not by deciding whether state
23 law is coterminous with Federal law.

24 As we've already seen in California,
25 following the issuance of this decision that's exactly

1 the type of arguments that we're getting all the time
2 now. And for that reason, this Court should adopt the
3 rule that where a fairly presented claim has been
4 rejected by a state court, it has denied that claim,
5 adjudicated that claim on the merits.

6 If there is anything else?

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 10:53 a.m., the case in the
10 above-entitled matter was submitted.)

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