IN THE SUPREME COURT OF THE UNITED STATES

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JOHN FRANCIS FRY, :

Petitioner :

v. : No. 06-5247

CHERYL K. PLILER, WARDEN. :

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Washington, D.C.

Tuesday, March 20, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

VICTOR S. HALTOM, ESQ., Sacramento, Cal.; on behalf of Petitioner.

ROSS C. MOODY, ESQ., Deputy Attorney General, San Francisco, Cal.; on behalf of Respondent.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-5247, Fry versus Pliler.

Mr. Haltom.

ORAL ARGUMENT OF VICTOR S. HALTOM

ON BEHALF OF PETITIONER

MR. HALTOM: Mr. Chief Justice, and may it please the Court:

The constitutional error that occurred in Mr. Fry's third trial is the type of error that can result in a conviction of an innocent person. Notwithstanding the nature of the error that occurred in Mr. Fry's trial, no court has reviewed the effect of that error or evaluated the effect of that error under the constitutionally mandated Chapman standard.

Mr. Fry's position is simply that he is entitled to one bite at the Chapman apple. In the California Court of Appeals, that State appellate court should have, but did not, rectify the constitutional trial error that occurred in this case. Had that court complied with this Court's precedent, that court would have first identified the constitutional error that occurred at trial, namely the chambers error, and second, reviewed the effect of that error, assessed the

effect of that error under the Chapman test.

The failure of that court to do so, the unreasonable decision-making of that court, relegated Mr. Fry to seeking relief in Federal habeas proceedings.

It scarcely seems reasonable --

JUSTICE KENNEDY: I suppose he could have come here on direct.

MR. HALTOM: He could have, Your Honor, however, he didn't have the right to counsel to come following his appeal to the State appellate court, and then after the denial of his petition, it would be a discretionary review in the California Supreme Court, he no longer had the right to counsel.

And the fact of the matter is if he had filed a petition for writ of certiorari following that, it would have effectively been asking at that stage for a type of error correction.

It scarcely seems logical that the scope of the remedy to which Mr. Fry is entitled for the constitutional violation that he suffered, that that should be curtailed based upon simply the unreasonable decision-making of the State appellate court in the --

JUSTICE SCALIA: Well, if we're talking about what -- where is the logic in the result that I believe you're position produces, which is that a

prisoner who loses in the State court on harmlessness grounds, because the State court finds it's harmless, obtains no habeas relief in Federal court unless the error actually prejudiced him. Whereas if the State court never reached the harmlessness ground, and erred on -- or ruled on whether the violation occurred, whether there was any constitutional violation, then he would obtain relief if there is merely a reasonable probability of harm.

Now, you know, why would there -- what does he care whether -- whether the error below consisted in an erroneous harmlessness determination or an erroneous determination that there was no violation? Why should there be a different standard of review between the two?

MR. HALTOM: Justice Scalia, that's the point raised in the Solicitor General's amicus brief here. And in Mr. Fry's case, what happened was that there was a harmless error analysis conducted, albeit truncated, by the State appellate court. But it was not a Chapman analysis. And that failure of the State appellate court to engage in a Chapman analysis is contrary to this Court's precedent. It ignores Chapman, it also would be an attack on --

JUSTICE SCALIA: Let's assume another violation, the court erroneously determines --

erroneously -- that there was no constitutional violation at all. Its error is not with regard to the harmlessness, but with regard to whether there was a constitutional violation. Why should there be one standard of review for one error and a different standard of review for the other, regardless of whether the State court conducted Chapman or not?

MR. HALTOM: I don't know that necessarily there has to be one standard of review for the other -- for one or the other, Your Honor. Our position in this case is simply following the logic of this Court's decision in Mitchell versus Esparza, that this Court or any Federal habeas court needs to consider what the State appellate court did. You cannot divorce -- there is the underlying constitutional violation that occurred in Mr. Fry's trial. Then that error is compounded when a State appellate court fails to assess the effect of that error under the Chapman standard.

JUSTICE SCALIA: You could say the same thing when the State court has erroneously determined that there was no violation.

In that case, you apply the Kotteakos standard. I just don't understand the rationale of applying a higher standard to the other error.

MR. HALTOM: Well --

JUSTICE GINSBURG: I thought the State court didn't find that there was error. I thought the State court said, this was cumulative, I'm not going to let it in.

MR. HALTOM: That's correct.

JUSTICE GINSBURG: It wasn't until we got into the Federal court that there was an error found. As far as the State was concerned, there was no reason to engage in any kind of harmless error review, Chapman or not, because there was no error.

MR. HALTOM: That's correct. That's in pages 94 to 97 of the joint appendix. The State appellate court concluded there was no error as a matter of State law in this case. The court also concluded that there was no constitutional error.

Then in a footnote, footnote 17 on page 97 of the Joint Appendix, the State appellate court stated in the alternative, effectively, there was no prejudice that Mr. Fry possibly could have suffered in this case. However, in making that alternative holding, the State appellate court, the California court, was applying what's known as the Watson standard, which as this Court has repeatedly recognized, is the functional equivalent of the Kotteakos type standard.

JUSTICE SCALIA: And it is that

determination that you are objecting to here. The harmlessness determination.

MR. HALTOM: I am, Your Honor. Obviously, we are objecting to the State court's finding of no underlying substantive constitutional violation, as well as the State court's determination that there was no --

JUSTICE SCALIA: But for the former, you are perfectly content with our applying Kotteakos. And for the latter, however, you say we have to apply Chapman. I just don't see the logic of that.

MR. HALTOM: Well, first of all, this case, since it has now been determined in the Federal courts that there was an underlying constitutional violation, does not present that question. We do -- and I understand the position that you are raising, Justice Scalia, that there is a potential split in the logic there. I don't think the Court has to resolve that here.

Some of the lower Federal courts have determined that now, in light of AEDPA, the Brecht standard has been completely supplanted. Some courts have construed this Court's decision in Mitchell versus is Esparza to lead to that conclusion. And that may very well be the case. However, I don't think the Court needs to ultimately address that proposition in this

case.

CHIEF JUSTICE ROBERTS: As I read the Court's opinion in Brecht, the Brecht standard on harmlessness is based on the structural consideration that your under collateral review at that point, rather than under direct review. You would apply a different harmlessness standard that doesn't seem to take into account the fact that it's collateral review rather than direct.

MR. HALTOM: Certainly, Mr. Chief Justice, collateral review, as this Court pointed out in Brecht, can result in a more deferential standard of harmless error inquiry. The -- those considerations that led this Court in Brecht to adopt Kotteakos rather than Chapman apply across-the-board in all habeas cases.

However, a central theme of the Brecht decision was that there have been Chapman analysis conducted by the State appellate judiciary --

CHIEF JUSTICE ROBERTS: Well, I guess that's where maybe we -- is the subject of debate, whether the central theme in Brecht was, this is collateral review, and that calls for a different standard, or whether the central theme was Chapman review had been undertaken, and therefore, that calls for a different standard.

I'm not sure I agree with you that the

latter is the case.

MR. HALTOM: I agree that it could be -- it is a debatable point. But the -- to ignore the circumstance that this Court stressed, I think undoubtedly stressed in Brecht that there had been that State appellate review is to basically divorce the holding in Brecht from the factual context in which that case -- or out of which that case arose.

JUSTICE SCALIA: The dissenters certainly thought that that was the consequence, the dissenters in Brecht. They said that Kotteakos would apply even where the State court has found that "no violation has occurred."

MR. HALTOM: That's true, Justice Scalia.

JUSTICE SCALIA: In other words, never approached the harmlessness thing. That's what the dissenters thought.

MR. HALTOM: The dissenters thought that the import of Brecht was that it was going to apply across-the-board in Federal habeas --

JUSTICE BREYER: And I don't think the majority said the contrary. I mean, I wrote it. I mean, I don't know -- what counts is what I wrote, not what I thought. But if you read it, I don't think it decides this question.

What I wonder, though, is why does the -- how does this case present the issue you want to argue? I'm -- Justice Ginsburg made me wonder about that. As I understand it, the trial court said, I'm not going to let this witness testify, it is cumulative. All right. And then the appeals court said, well, that wasn't a mistake. And one reason it wasn't a mistake is that this witness added nothing. There could no possible prejudice, says the trial court, when he excluded that person. That means it was cumulative, that means it did nothing, and that was the appeals court. So the appeals court finds no error.

Now, we get over to the Federal court. And they say, oh, no, this witness added a lot. Well, they couldn't have thought this witness added a lot to the point where the constitution is violated unless they disagreed with that decision of making no possible difference. Very well. We disagree, send it back. End of case.

Now, where does it raise all this stuff about harmless error and -- I mean, when I -- it is hard for me to get my mind around this issue, because it's so complicated. How does this case raise it?

MR. HALTOM: Well, I suppose, Your Honor, because of the fact that the State appellate court

didn't simply state, we find no error, and leave it at that, but rather, the State appellate court also raised the point that, in a footnote, in a truncated manner, that there is no possible --

JUSTICE BREYER: Was that as a reason for there not being error? Or was it in the context of saying, well, even if there was a mistake, there was no possible prejudice. What does the footnote mean, in your opinion? The second?

MR. HALTOM: Yes.

JUSTICE BREYER: What is the footnote number?

MR. HALTOM: It's footnote 17.

JUSTICE BREYER: Okay. I'll read it.

CHIEF JUSTICE ROBERTS: Page what?

MR. HALTOM: It's 97 in the Joint Appendix, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you.

JUSTICE BREYER: Thank you. Very helpful. The other thing which I brought up, so I might as well get both my questions out, is that years ago I read a decision by Judge Leventhal that made a big impression on me. And he was a very good judge. It's in a different context, it's the same problem.

He said, I originally thought this was the

case dreamed of by law professors, a case where I could conscientiously say, although I consider the findings clearly erroneous, so I'd reverse if it were a judge's decision, nonetheless, there is support and substantial evidence. And therefore, I affirm it, because it comes from an agency.

But when I think about it, I don't think there's substantial evidence either. Okay. In other words, has there ever been a case in the history of mankind where you think a judge has actually thought to himself, after reviewing the record, oh, I think that this is harmless, so I'll affirm. But I don't think it's harmless beyond a reasonable doubt, so I'll reverse.

I mean, I find it very difficult to get myself in that state of mind, where I think such a thing is possible.

MR. HALTOM: I agree with you, Your Honor. It's angels on the pin of a needle, I guess is the phrase here, and this case may be a case where the difference between Chapman and Brecht could be of consequence. If you'd look at the district court's treatment of this case, at the district court level the court stated: "Mr. Fry comes close to demonstrating actionable error," and that court is applying the Brecht

standard. The district court states: "I cannot rule out prejudice in this case." So seemingly had that court applied Chapman, Mr. Fry would have prevailed in the district court.

Likewise, in the Ninth Circuit we have the dissenting justice concluding that there is prejudice even under the Brecht standard, and then we have the panel majority in ruling against Mr. Fry on the prejudice issue stating that had Pamela Maples' testimony been admitted that would have substantially bolstered Mr. Fry's claim of independence. That statement seems inconsistent with the finding that it is harmless error under Brecht; and even if it's not inconsistent it seems that had that court been applying the Chapman standard, that court would have ruled in Mr. Fry's --

JUSTICE STEVENS: If I could come back to, may I ask this question: Is part of your argument that even under the Brecht standard it was not harmless?

MR. HALTOM: Yes, Your Honor.

JUSTICE STEVENS: This is a case, am I correct, where there were two, two hung juries and then a five-week deliberation in this case? And there was a harmless -- and the testimony of Maples was she had seen a guy who didn't fit the description do the killing?

MR. HALTOM: Correct, Your Honor.

CHIEF JUSTICE ROBERTS: Where is that in the question presented?

JUSTICE KENNEDY: It says that if the Brecht standard applies, does the Petitioner or the State bear the burden? I guess that's the narrower question, who has the burden.

MR. HALTOM: Well, the Respondent has essentially conceded that under O'Neal that they bear the risk of non-persuasion.

JUSTICE BREYER: But O'Neal, I thought O'Neal just says that this word "burden of proof" is out of place when you talk about an appellate judge reading the record.

MR. HALTOM: I think that that was what the holding in the majority opinion was, but I think, as Justice Thomas pointed out in his dissenting opinion, the effect of that is to allocate the risk of non-persuasion to the State. And so I think that that's -- I could be wrong, but it seems to me a semantic point.

And to Justice Stevens' question, as you pointed out in your concurrence in Brecht, the Kotteakos standard which this court adopted in Brecht is an exacting standard. And in applying that standard, if

you'd look at this case, the Court's decisions, Sullivan, Kotteakos, say that the focus has to be on the jury. Here we have a jury in the third trial that deliberated for 23 court days after 29 court days --

CHIEF JUSTICE ROBERTS: You're now arguing that under Brecht this should not have been harmless; is that the point you're making?

MR. HALTOM: Yes, Your Honor.

THE COURT: Okay. Now, I didn't hear the answer to my question. I'm not sure that is in the question that you presented and on which we granted cert. It says which standard applies, who bears the burden. I don't see anything saying is this -- was it erroneous to conclude that this was harmless under Brecht.

MR. HALTOM: Well, I believe, number one, does it matter which standard applies as part of the question presented? Does it matter which harmless error standard is implied? My answer to that is no, because Mr. Fry prevails under either Brecht or Chapman.

And this Court could in this case simply decide this case on that very narrow question, like many court do where this issue is raised, this intellectually challenging issue of what should a habeas court apply, Brecht or Chapman, when there has been no Chapman

analysis in the State court or when there has been an objectively unreasonable Chapman analysis in the State court. Most courts confronted with that issue say, we don't need to decide the question here because either the error was plainly harmless under both of those standards or plainly not harmless under both of these standards. And I simply recounted the history of the litigation below in the Federal courts to point out that this could be a case where that make a difference. It seems like --

JUSTICE SCALIA: The trouble with reading that second question that way is that, you know, it follows from your first question, which speaks in the generality of cases. It's not speaking to this case. Your first question presented is, if constitutional error in a State trial is not recognized by the judiciary until the case ends up in Federal court, is the prejudicial impact assessed under the standard set forth in Chapman or in Brecht? That's the first question. Very generalized.

Second question: Does it matter which harmless-error standard is employed? I didn't take that to mean does it matter in this case which of the two. I thought it meant, you know, is there any difference between the two standards? Don't you think that's fair

reading of it.

MR. HALTOM: No, Your Honor.

JUSTICE SCALIA: You think it means, does it matter in this case which harmless -- you think that second sentence means would, would the defendant be entitled to reversal of the conviction no matter which harmless error standard is employed? You think that's what it means?

MR. HALTOM: I think that that is the import of that portion of the question.

JUSTICE GINSBURG: Is that a question on which we would be likely to grant cert?

MR. HALTOM: Perhaps not if that was the only question in and of itself, but perhaps so because, as I indicated before, as Justice Stevens stressed in his concurring opinion in Brecht, the Kotteakos standard is a demanding standard. And look at this case. If the error in this case can be deemed harmless under any standard, then what cannot? What is prejudice when you're looking at the jury and when you have a jury where nine days into the deliberations at least five of them voted that Mr. Fry was not guilty. They told the judge that they were at an impasse. This jury struggled mightily with this evidence.

JUSTICE STEVENS: Would you help me with one

thing I'm not terribly clear about, though. Is it clear which -- what side the magistrate thought had the burden of persuasion?

MR. HALTOM: It is not, and it seems as though, looking at the language that the magistrate judge utilized in his findings and recommendations, that he was looking to me, to Mr. Fry, to meet that burden. And I quoted his language in my brief and to the Ninth Circuit and I argued to the Ninth Circuit that the burden of persuasion had been improperly allocated to Mr. Fry. However, that issue was simply not addressed in the Ninth Circuit's opinion.

JUSTICE STEVENS: Does your opponent now concede that the State has the burden?

MR. HALTOM: Yes, Respondent concedes that their burden -- that it's their burden --

JUSTICE BREYER: How do they say that after I thought I wrote an opinion for the majority of the Court which said this concept is not applicable in -- when you're reviewing a record for harmless error. It's not a question of presenting evidence. What I think it said is that it's not a question of presentation of evidence. In such a case, we think it's conceptually clear for the judge to ask directly, do I the judge think that the error substantially influenced the

judge's -- the jury's decision? Now, maybe I was wrong, but I think there was a majority of the Court that agreed with it.

MR. HALTOM: Yes, Your Honor. And I think your point, as I understood it, in O'Neal was that it analytically does not make sense --

JUSTICE BREYER: To talk about burdens of proof?

MR. HALTOM: -- when the appellate court is --

JUSTICE BREYER: Yes. But that's my basic question in this case and it's a serious question. Suppose I think, which I do think, that I as a judge can conscientiously review a record and decide for myself whether I think this error of the judge was harmless, and if I really try I can bring myself to understand this question. Regardless of what I think, could another judge, say a State judge, reasonably have thought the opposite? I can do that mentally.

You try to get me to make more fine distinctions than that, I cannot do it. I can't. I'm sorry. I admit it.

Now, if that's the state of mind that I can get myself into -- and I believe that's true of many judges -- how do I write words that are realistic in

this area?

MR. HALTOM: I think that that's a question, Your Honor, that this court has struggled with. As Justice Scalia pointed out in his concurring opinion in Dominguez Benitez, that we're talking about with these harmless error standards ineffable gradations of probability that are beyond even the judicial mind to grasp. But I think if we just tie it to the facts of this case, I think that in the explanation you just gave that there is no reasonable judge who could look at this case and conclude --

JUSTICE ALITO: There are many situations in which an appellate court has to apply a legal standard to facts in criminal cases and civil cases. In a criminal case, an issue on appeal could be whether there's sufficient evidence to support the verdict. Do you think there's a burden of persuasion on appeal on all of those issues?

MR. HALTOM: With respect to a standard sufficiency analysis, no, Justice Alito. It's just a question for the appellate judge to discern, was there sufficient evidence in the record reviewing the evidence in the light most favorable to the prosecution.

JUSTICE ALITO: What's the difference between that and applying any harmless error standard?

It's exactly the same kind of analysis. It's a different legal test, but you're applying, you're applying the law to facts.

MR. HALTOM: I agree. And I don't quarrel at all with the way that the court described -- said that looking at the prejudice inquiry or a harmless error inquiry in the O'Neal case, that it doesn't fit to look at it in terms of the allocation of burden. I don't think that this case ultimately turns on that, except to the extent that the magistrate judge when he wrote his finding and recommendations that were adopted by the district court judge did state that he was looking to Mr. Fry to make the sufficient showing --

JUSTICE GINSBURG: Are you talking about what's on the bottom of page 181 of the joint appendix? That was the only place that I found where the magistrate expressed a view on this. It reads: "The court does not find that there has been" -- "the court does find that there has been an insufficient showing. So that "insufficient showing" means showing by the Petitioner." Is that what you're relying on?

MR. HALTOM: Yes. That's exactly what I'm relying on, Your Honor.

So, going back to specifically the facts of this case, this Court could, as I indicated earlier,

without regard to the thorny Chapman versus Brecht question, decide this case solely in terms of, under Brecht, does Mr. Fry prevail; and we look at the nature of the constitutional violation that occurred.

CHIEF JUSTICE ROBERTS: That wouldn't help us resolve the conflict in the circuits between which standard is applicable, though, right?

MR. HALTOM: No, it certainly would not, Your Honor. And this Court may very well deem that to be necessary. But I think also that this Court fashioning a decision which is faithful to the requirement that -- or the principle that Kotteakos is an exacting standard, would also be an important constitutional principle. In a case like this, where there has been no Chapman review and where the Chapman court stated that we need a rigorous harmless error standard in order to safeguard convictions, safeguard against erroneous convictions where there is a close question of guilt or innocence, that hasn't happened in this case and it would be appropriate for this Court to fashion a rule or holding in this case that would ensure that that happens.

JUSTICE GINSBURG: And that would put 2254 out of sync with 2255, where I understand if it's a Federal conviction then it's always Brecht on

post-conviction relief?

MR. HALTOM: As I understand that question, the Solicitor General pointed out in the introduction of its amicus brief that there are some 2255 cases where there's been an intervening change in the law which could involve this question of Brecht versus Chapman. And I've cited in my brief a district court case, United States versus Monsanto, where the court concluded, in accordance with the position that I'm advocating, that it makes no sense for a reviewing court in a habeas proceeding to apply the Brecht standard blindly without regard to what was done in prior proceedings, but rather there's no need for deference, where the -- the big issue in Brecht, as I understand it, was this Court was concerned about simply repeating a harmless error analysis that the State court had already done; and we're not asking this Court to do that in this case.

The same concern, Justice Ginsburg, holds over in certain limited 2255 cases.

If I may save the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Haltom.

Mr. Moody.

ORAL ARGUMENT OF ROSS C. MOODY

ON BEHALF OF THE RESPONDENT

MR. MOODY: Mr. Chief Justice, and may it please the Court:

Federal habeas is limited in scope and purpose. It is not a continuation of the appellate process. Rather, it is an extraordinary remedy limited by fundamental concepts of federalism, comity, and State sovereignty. In Brecht, this court held that the stringent Chapman standard was inappropriate for use on collateral review. Instead, in order to strike a proper balance between State and Federal interests, the actual prejudice standard of substantial and injurious effect on the verdict should be used in collateral cases.

Petitioner is asking for an exception to this rule. He claims that if he did not receive Chapman review in State court, he should receive it on Federal habeas. That was not the rule in Brecht and it should not be adopted by this Court here. The Brecht decision did not state an exception based on the State standard used. The key in Brecht was that appropriate balance between the Federal Government and the State. This Court has never treated cases where there was not a state Chapman finding differently from other cases. It applies Brecht throughout. In the Penry case and in the O'Neal case there was no Chapman finding in state court, yet this Court applied Brecht and made no comment about

that.

JUSTICE GINSBURG: You said in your brief that the remedy, if the Petitioner wants to assure he's going to get Chapman review someplace, then he should have sought cert -- direct review from the State court's conviction. Did you say that?

MR. MOODY: Yes, Your Honor.

JUSTICE GINSBURG: But realistically, the likelihood that such a petition would be successful, passing the problem that the Petitioner is not likely to have a lawyer, does the likelihood that this Court would grant cert on such a question is very slim.

MR. MOODY: I agree, the likelihood of the cert grant in that circumstance is slim but it does not change the fact that once you come to court under 2254, you are asking for collateral review. And in collateral review, it's inappropriate to apply the Chapman standard.

JUSTICE SCALIA: I suppose you could say that of all the questions that go into habeas under 2254, that they could have brought up directly but the chances are their being taken here are negligible?

MR. MOODY: I, I agree with that, Your Honor.

CHIEF JUSTICE ROBERTS: Counsel, if the

State court had conducted a Chapman review, erroneously, how would that be reviewed under Federal habeas? You would ask under AEDPA whether it was an unreasonable application of Chapman?

MR. MOODY: Yes, Your Honor. First you would ask if it was an unreasonable application of Chapman. If you found that it was not, then the case is over, there's no need to grant the writ. If you found that it was, you would proceed and do a Brecht analysis. And that's what we learned from --

CHIEF JUSTICE ROBERTS: That seems awfully refined, doesn't it, to do two different analyses? Is this an -- is this an unreasonable application of Chapman? And then apply the Brecht standard after determining that it was an unreasonable application of Chapman?

MR. MOODY: I don't disagree. I'm merely trying to make sense of the various decisions in this, in this arena. There's some tension between the Esparza decision and other decisions of the Court; and one has to find a place for AEDPA standard. So we would not object to simply an application of Brecht which is what this Court has always done. But as far as it seems to suggest there may be an interim step.

JUSTICE BREYER: Suppose we apply Brecht.

This is what I'm having to little trouble with but I'd appreciate your commenting or straightening this out. The Ninth Circuit holds two things according to the SG in the briefs. He states them very well. The first is let's look at this witness. The testimony was excluded. Now the Ninth Circuit says that exclusion was unreasonable of -- an unreasonable application of clearly established Federal law, because that testimony of the witness that was excluded was not only material, it would have substantially bolstered the claim of innocence. So that's their finding on the merits.

Then they go on to say, but the exclusion was harmless.

How could both those things be true? How could it be true that the reason that there was error in excluding it was that the evidence is so important that it substantially bolsters the claim of innocence? That's one thing they say.

But the exclusion was harmless. I just fail to understand how anyone could think both those things. But maybe in the context of the case it was possible, but that's what I'd appreciate your explaining.

MR. MOODY: I think that the explanation is as follows. When you're analyzing the denial of a defense type of evidence, a Chambers claim, you first

look to see how it fit into the defense. And that is what they were doing. You're not looking at the entire case. You're looking only at the defense.

And so in the sense that something is better than nothing, adding a twelfth witness instead of eleven may improve the defense case.

And yet nonetheless, when you move to the next question, which is, was there a substantial and injurious effect on the verdict in the case, and now you're not just looking at the defense, you're looking at everything that was available to the jury -- it may be that there was still so much other evidence that it could overcome whatever increase you received on the defense.

JUSTICE ALITO: Why is it necessary for us to try to reconcile those two statements? The Ninth Circuit may well have been wrong in finding that there was a violation at all, but we have to assume that, for purposes of the question that's presented to us. So why shouldn't we just analyze the harmless error question independently of what they said about whether there was a Chambers violation?

MR. MOODY: We would not object to that. I'm trying to -- I'm trying to assist Justice Breyer in that perceived imbalance between a finding of a

substance above and then a finding of harmless error before.

JUSTICE ALITO: Well, every time evidence is excluded on the grounds that it is cumulative, or is the equivalent of a 403 balancing in Federal Court, there's not a constitutional error under Chambers and related cases, is there?

MR. MOODY: Yes. We agree. That's certainly the law of this Court. And in this, in -- well, let me move on. I'd like to make a couple of other points.

JUSTICE SOUTER: May I go just back to Justice Breyer's question for a second?

MR. MOODY: Sure.

JUSTICE SOUTER: And I mean, I think your answer to Justice Breyer was a very good answer as a, as sort of a general statement. But in -- would you agree that in this case, if we -- if we do proceed, number one, to agree with you that Brecht is the standard, and we then do proceed to apply Brecht here or to determine whether Brecht was properly applied here, that in this particular case, the, the record indicates that the case was so close that there would have to be a finding of harmful error, or at least it would be impossible to find harmless error. Even applying Brecht clear.

And you know what I'm getting at. I mean, five weeks of deliberation. The question after, whatever it was, two weeks, and four ballots, and so on. Obviously this -- this case was just to tottering on the edge. So even if we, if we do get to the point of applying Brecht, wouldn't it be impossible to say that he's -- he gets no relief under Brecht?

MR. MOODY: No, I would disagree with that. You've the sixth court to hear this case. The prior five have all rejected his claim. And while --

JUSTICE STEVENS: But two or three of those did it on an improper ground, that you agree with now, don't you?

MR. MOODY: No, I don't agree with that.

JUSTICE STEVENS: For purposes of argument.

MR. MOODY: For purposes of argument I do. The district court and the Ninth Circuit both applied Brecht and found that this was not an error which --

JUSTICE GINSBURG: It was two to one in the Ninth Circuit.

MR. MOODY: This is true.

JUSTICE GINSBURG: Judge Rawlinson I think said that using the Brecht standard, that there was actual prejudice.

MR. MOODY: Yes, she did. There was a

dissent in the Ninth Circuit.

JUSTICE STEVENS: Isn't this the -- I may have it wrong -- but isn't this the case in which the witness was unique not cumulative because she was the only one who was completely disinterested.

MR. MOODY: No. I would disagree with that. She's been characterized that way. But, and I want to point out that, I would like to clarify the record in response to your question, Justice Stevens. You asked whether or not she saw another man commit the murder. And counsel appeared to agree with you. That was not her testimony. Her testimony was that she overheard someone else confessing to murders that may or may not have been these murders.

And the -- and this was a very long case. This case lasted eleven weeks, it involved a hundred witnesses. You can look at the opinions it produced in state court and in the district court. They're each 100 pages long. It's not unreasonable to expect the jury to take a long time to decide that case.

Now there are 25 court days of deliberations --

JUSTICE SOUTER: Five, five weeks?

MR. MOODY: Five weeks, 25 court days, 24 of which were taken up with read back. Several -- several

holidays. I mean if you want to go through and look at it, now --

JUSTICE SOUTER: Do you know of any other case in which the jury deliberated for five weeks?

MR. MOODY: I haven't attempted to find one. It is a long deliberation.

JUSTICE SOUTER: I'm sure there's an example somewhere, but I -- I practiced law for over 40 years, and I never heard of it.

JUSTICE GINSBURG: At what point, how many weeks had gone by when they said they were hung?

MR. MOODY: I believe that was -- I keep, I've been switching back and forth between calendar days and court days. So forgive me. I believe that was on the eighth court day. And at that point, when they announced they were hung, they selected a new foreperson and then rolled up their sleeves and went back in and deliberated the case.

JUSTICE BREYER: So --

MR. MOODY: And after --

JUSTICE BREYER: Go ahead.

MR. MOODY: After they selected the new foreperson, they asked for 15 read backs, including the crucial evidence in the case. The ballistics experts. They asked for that. They asked for the testimony of

the in-custody witness who heard the confession of Mr. Fry. They asked for Mr. Fry's testimony.

JUSTICE STEVENS: Did they ask for a read back of Mrs. Maples' testimony?

MR. MOODY: Well, Mrs. Maples' testimony was not admitted. It was excluded.

JUSTICE STEVENS: Oh, that's right. Of course.

MR. MOODY: But they did not -- significantly they did not ask for read back of the witnesses who testified similarly to, to Ms. Maples. The third party culpability case was basically not credited by the jury. They did not a read back of those witnesses.

JUSTICE KENNEDY: Well, maybe, maybe you'd end up --

JUSTICE STEVENS: Well, maybe a critical witness was left out. That argues the other way, I think.

MR. MOODY: I would encourage the Court to carefully look at what Ms. Maples was going to say. If you look in her own words, and I'm quoting: I was just in and out of the room. I just listened to bits and pieces of it. And that's at joint appendix 10. This, this witness may have been Mr. Hurtz's cousin, and not

his ex-girlfriend, or his ex-girlfriend's mother, but she did not have very much to say about this. She said she didn't hear the beginning of the statement. She could not tell you whether it was a serious discussion. She was in and out of the room. She heard only bits and pieces.

JUSTICE BREYER: But what she heard was that they were going to kill, this other person was going to kill a man and a woman, and it turned out that that was the crime at issue.

MR. MOODY: With respect, that's not what she heard.

JUSTICE BREYER: What did she hear?

MR. MOODY: What she heard was a statement that he had killed a man and a woman. And this was not immediately after the offense. This is 18 months after the offense, this is not next day.

JUSTICE BREYER: Do you think -- do you think, do you think I should do this? I'm still looking, I'm worried about on the one hand, as you are, having this Court announce too many six-part tests, and having a lot of words and it becomes easy to make a mistake for a judge and then you never finish a proceeding. I'm worried about that, as are you.

MR. MOODY: Yes.

JUSTICE BREYER: At the same time, I think what counts is what the judge does, the reviewing judge. Not what -- quite what the test says.

So there has to be a conscientious effort to decide, was there -- was it harmless? Could a reasonable jurist in California have concluded the opposite? Okay.

So maybe we should do it in this case. We simply try ourselves to go through this record, make that determination to show by example, rather than by trying to find a form of words.

MR. MOODY: Well, you don't do it very often. I understand that that's something you could do if you wanted to. I think that this is just a classic case where two courts applied the Brecht standard and reached their conclusions and there's nothing really remarkable about it.

JUSTICE KENNEDY: The third party perpetrator that Maples was going to talk about according to the prosecution's theory, was Hurtz or Hearst?

MR. MOODY: Hurtz. Yes.

JUSTICE KENNEDY: And there -- there was a link between Hurtz, there was an acquaintanceship between Hurtz and the victim?

MR. MOODY: That's right.
JUSTICE KENNEDY: Was that established in other testimony or would that all have come out just only through Maples?
MR. MOODY: Actually, I'm thinking about my answer because I was thinking about Borelli. There were three third party culpability, potential targets in this case. And I believe that Hurtz, the testimony of several of the witness who were admitted did testify of a link between Cindy Bell and Hurtz.
JUSTICE SOUTER: Otherwise, I mean, they couldn't have found it was cumulative if -- if that had not been the case.
MR. MOODY: In order to -- I need to correct the record on that as well. The trial judge did not find that this was cumulative. He found a lack of foundation. What happened was, was Ms. Maples was offered as a witness --
JUSTICE SOUTER: But -- on appellate review in California, they found it cumulative, didn't they?
MR. MOODY: The alternative prejudice holding, the footnote 17, they said it would have been cumulative.
JUSTICE KENNEDY: Right. Okay.
MR. MOODY: Yes.

JUSTICE SOUTER: And they -- they couldn't have found that if there hadn't been some evidence on Hurtz, apart from Maples?

MR. MOODY: Oh, that's right. Yes. There was, and that's really my point. My point is that 11 third party culpability witnesses were allowed to testify in this trial. And one was excluded.

JUSTICE KENNEDY: How did Hurtz's name enter into the trial?

MR. MOODY: Well --

JUSTICE KENNEDY: Why did anybody mention him?

MR. MOODY: Well, for one thing, he was called to testify and asked if he killed these people. Mr. Hurtz testified at this trial. The jury got to see him, they got to look him in the eye, they got to hear him on direct, they got to hear him on cross. And they did not ask for a read back of that testimony.

JUSTICE SOUTER: And if Maples' testimony had come in, I presume they could have cross-examined him on the basis of Maples' testimony?

MR. MOODY: Well, he stated he never said he killed these people. And he, he stated he'd never said he killed a man and a woman in a car. So it -- it went to what Maples would have said, and also --

JUSTICE KENNEDY: Did he say he'd killed peoples otherwise, or at other times?

(Laughter.)

MR. MOODY: He also denied doing that.

JUSTICE KENNEDY: Well, but then at that point in time, Maples, Maples' conviction -- Maples' testimony becomes, assuming there's a foundation, becomes more relevant.

MR. MOODY: I would disagree, simply because she says she didn't hear the conversation well enough to really give her testimony any true probative value in the case because she was in and out of the room. She didn't hear the beginning. She didn't hear the end. And when she's asked, was it a serious discussion, she says, I don't know. So this could be -- this could be something very different --

JUSTICE STEVENS: That's classic going to the weight of the evidence. That goes to the weight, not the admissibility.

MR. MOODY: Ordinarily I would agree with that. And if we knew, Your Honor, that he was speaking about these killings, then certainly it would go to the weight. But since he was speaking about killings that she said she didn't know if they were in California, New Jersey, she didn't know when they occurred, and

therefore -- in California we ask that before you present third party culpability evidence you tie it to this crime.

JUSTICE STEVENS: So we don't assume that he's committed a whole lot of killings, I don't suppose?

MR. MOODY: Well, it's -- he may have committed other killings, but if did not confess to committing these killings then there's no probative value to her testimony.

CHIEF JUSTICE ROBERTS: Do you think the question of the application of Brecht is included within the questions presented?

MR. MOODY: No. I briefed it because I was concerned that the Court might reach it, but I don't think it is fairly presented.

The only other point that I wanted to make is that if one accepts Petitioner's rule it will basically swallow up the Brecht standard and return to a near wholesale application of Chapman on collateral review. As Tyson and Trigg pointed out, many, many times Petitioners come to court and they have a case where there was no finding of constitutional error in State court and therefore no Chapman application, but they're going to assert that in Federal court. And so if in every one of those cases you apply Chapman, then

you really have reduced application of Brecht.

JUSTICE GINSBURG: But on the other side, State courts say, we don't have, we don't have to bother in any case with Chapman because when it goes over into the Federal court they're going to apply Brecht.

MR. MOODY: I don't think we should assume that the State courts are going to do that. I think that what -- it's sort of like what we said earlier in the argument, Your Honor, where not every evidentiary ruling is a constitutional violation. I would say most of them are not. And this Court has not drawn a bright line of exactly where that is. So in many cases, this is just an erroneous exclusion of evidence at best. And so, therefore, the State court would not be going to a Chapman standard because it would not be finding error.

And with that, I'm prepared to submit.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Millett?

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING RESPONDENT

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

The distinction between collateral review and direct review is deeply rooted in the law, and what

Petitioner is asking is to have the standard of review for harmlessness in collateral review become the same standard as direct review whenever the courts on direct review got Chapman wrong or unreasonably applied it. That is the exact same argument Mr. Brecht made in this Court. He got Chapman review. They cited Chapman. They didn't cite it here. That's the only difference.

Mr. Brecht came to this Court and said they unreasonably applied Chapman review and I should get it again on habeas, and this Court said that there is a deep difference, a deep distinction, between collateral review and direct review and that distinction turns upon the fundamental rule of habeas corpus, and that is not to sit here as the sixth court on direct review of a long record where difficult calls were made. It is to correct fundamental miscarriages of justice, grievous wrongs that have caused custody in violation of constitutional --

JUSTICE STEVENS: May I ask two questions and then you can proceed. One, do you take a position on who has the burden of persuasion? That's the first question. And do you have an opinion on proper application of Brecht in this case?

MS. MILLETT: If I can adopt Justice Breyer's language from O'Neal and say that this

Court eschewed couching this discussion in terms of burden of persuasion. We accept O'Neal's holding what then there is equipoise, which did not what happened in this case, the tie goes to --

JUSTICE STEVENS: But you do agree if it were in equipoise the State would have the burden?

MS. MILLETT: The tie would go to the prisoner, yes. Were it in equipoise, because the State would have the burden the State would lose. I don't think that's what happened in this case. I think what Justice Breyer, what this Court said O'Neal said is, the way you articulated it, instead of burden of proof is that it's a level of conviction on the part of the court and what the judge will say in, what the court said in O'Neal, is, do I think the error substantially contributed to the jury's verdict? And that is essentially what the court said here on 181 at the very bottom when it said "The court doesn't find that there's an insufficient showing" -- that's the same way of saying I haven't been persuaded -- that the error contributed to the verdict. So I don't think that this case in any sense could turn upon, whether we call it the burden of persuasion or the proper level of conviction on the part of the court. This court was not persuaded and that is all that matters. When the court

is not persuaded and not left in equipoise, the prisoner loses.

The second question you asked was whether we have a position on application of Brecht, and we do. We've laid it out in our brief. We think that in no sense does this record support the notion, support the argument, that there was a substantial and injurious effect when the twelfth out of eleven witnesses was excluded, talking about third party culpability. And that requires not just looking at what, in isolation, what evidence was in there about Mr. Hurtz. There was I think six or seven witnesses who said they heard him either say he did it or he was there or he was involved.

But it requires looking at the whole record. And there were -- the defense here was not a Hurtz versus Fry. This was a case where the defense did an excellent job. It was a well defended case, and threw up a buffet of options for the jury, none of which it bought on.

In the third trial you had what you didn't had in the prior trials. You had ballistics evidence that linked his gun to the crime. You have his own admission, his own testimony, that he left the house that night with the gun, with the bullets, and went out in the truck that was seen at -- a truck of the same

type, that was seen at the crime scene.

JUSTICE STEVENS: I have the same problem Justice Souter does, in all candor. The jury takes five weeks to decide the case and there's a fairly interesting bit of testimony that doesn't get in. And to say to be totally satisfied it didn't have an injurious effect on the deliberations is a close question, I think.

MS. MILLETT: Well, two answers. If it's a close question, if AEDPA and if Kotteakos and Brecht mean anything, it's that the close calls go to the State and are not overturned by the sixth court on review.

JUSTICE STEVENS: No, but an equally divided call goes the other way.

MS. MILLETT: I'm sorry?

JUSTICE STEVENS: If it's not just a close call, but if it's equal, it goes the other way.

MS. MILLETT: It is, and no one has thought this was equal. The two courts -- the three courts, the California Court of Appeals also said in any event there's no possible prejudice.

Now, how they could say no possible prejudice under a State standard and still say, ah, but it would have affected the verdict under Chapman, is not something I'm able to understand. So I think you have

--

JUSTICE SOUTER: Neither am I. But I draw a different conclusion from it from the one you're drawing.

MS. MILLETT: I guess I misunderstand your point, because I think when the court said there's no possible prejudice --

JUSTICE SOUTER: I mean, I cannot accept the State -- the conclusion that there was no possible prejudice, on the premises that Justice Stevens a moment ago and I a moment before sort of put out. I just do not find that a reasonable conclusion.

MS. MILLETT: Well, again, even if the Court thinks there may have been some chance, may have been -- you know -- relevant testimony -- this Court can well disagree and can conclude that this was abuse of discretion. If it were Federal Rule of Evidence 403, you could decide this was a an abuse of discretion. Whether it was unconstitutional, so clearly unconstitutional as to merit under AEDPA and under Brecht reversal of the conviction 12 years after the fact --

JUSTICE GINSBURG: I thought the AEDPA question was out of it because that hasn't been -- there was no cross-appeal on that question. I thought it was

a given, a given in this case, that the California courts did not apply or unreasonably applied clearly established Federal law.

I didn't think that was an issue in the case. I think we took it on the assumption that it was such an error.

MS. MILLETT: Again, the Respondents in this case have not conceded constitutional error, and in their brief they repeat that. And I think there's a question whether a court should --

JUSTICE GINSBURG: It's not raised here. There was no cross-appeal from that.

MS. MILLETT: Well, a Respondent is entitled to defend on any ground supported by the record. But even assuming that, we'll assume the error, assumes that there was an error and one assumes that it was -- which is hard for me to get to, but one assumes it was clearly unconstitutional in this close call, the type of call that's made hundreds of times in every trial, balancing this, and the combination of lack of foundation and cumulativeness. It's hard for me to understand when that rises to the level of unconstitutionality.

But if we assume that it did, you have the two courts that applied the Brecht standard here. And the district court decision here is nearly 100 pages

long. It's a very careful, methodical analysis.

JUSTICE GINSBURG: That's because there were many, many issues raised.

MS. MILLETT: There's many issues, but also it was being careful and it was being very methodical. And it went through this and it went through this record. That court went through true this record, more than 5,000 transcript pages, 11 week of trial, more than 100 witnesses. And it was on that --

CHIEF JUSTICE ROBERTS: I suppose if we're going to apply the Brecht standard ourselves, we would have to do the same thing.

MS. MILLETT: I think that's what this Court has said.

The other thing I want to get back to is the question about the length of jury deliberations. Sure, this was really wrong. Now, they changed forepersons in midstream and got a reasonable doubt instruction repeated. Who knows what happened. But what I will not concede -- I will concede it's long, but I will not concede that the mere fact of length of deliberations says anything about if this one particular error in applying a balancing test substantially affected the verdict. I think the length of deliberations is so incredibly speculative.

JUSTICE STEVENS: You will concede it was a close case, won't you?

MS. MILLETT: I will concede it was, I will concede it was a difficult case.

JUSTICE STEVENS: If you take five weeks it's pretty clearly a close case.

MS. MILLETT: That's right. But you know, the whole the point of federal habeas corpus is that this is not filling in the gaps in direct review. We're not going to give you --

CHIEF JUSTICE ROBERTS: There's no evidence or inference that it was close on the alternative murderer theory, which is the only thing that Maples' testimony goes to.

MS. MILLETT: That's exactly right. In fact, if you look at the closing arguments, Mr. Hurtz has a couple of references in a two-day closing argument. That was not the centerpiece of his case.

JUSTICE STEVENS: It has to be close on an alternative murderer. It wasn't suicide. Obviously, if he didn't do it, somebody else did. So if it's a close case from the first, it's obviously a close case for the second.

MS. MILLETT: No, but as to who did it and whether Hurtz did it or whether -- remember, what the

defense is trying to show is not who did it; it's that this person didn't do it, and whether it was them or someone else is what we don't know.

Again, this is Federal habeas corpus before this Court, and I don't think that the misapplication of a valid rule of evidence, which is not what this Court has in Chambers, Holmes, or any of the cases that were involved, was so -- that simply disallowed the twelfth out of eleven witnesses on third party culpability is so clearly erroneous, it was so clearly impacting the verdict in this case, as to warrant a retrial 15 years after the crime.

And yes, the jury -- it was close in the sense that they worked a long hard time. But at the end of the day, they were unanimous. There's nothing close about unanimous. And I think it would be the wrong message to say that a jury that works as hard as this one did, did the readbacks, culled through this record --

JUSTICE STEVENS: Yes, but we don't know what they would have done if they had this evidence that was excluded. That's the problem.

MS. MILLETT: One never knows that in habeas corpus. But what you do when you look at what they were focusing on, they were focusing on the two ballistics

experts. They had them read back right next each other. They made that call. It's their job to do it.

JUSTICE SOUTER: But the reason they may have been doing that is that they may very well have thought that the evidence indicating third party guilt was close and perhaps persuasive and what they wanted to know was whether the evidence going specifically to this defendant was strong enough to overcome it.

MS. MILLETT: May I answer? One would have expected at least one readback on third party culpability instead of three readbacks of Mr. Fry's testimony which put himself that night with the gun in the truck, and which he said -- you know -- and beforehand he agreed he might have said he wanted to blow them away.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Haltom, you have three minutes remaining.

REBUTTAL ARGUMENT OF VICTOR S. HALTOM

ON BEHALF OF PETITIONER

MR. HALTOM: Thank you. The trial counsel --

JUSTICE KENNEDY: Mr. Haltom, before you go drifting, counsel, into the evidentiary questions in the

case, I have one question. Two cases. A, Hurtz did not testify at all. B, he did. Is the foundation ruling any different in the two cases insofar as Maples' testimony or is it the same? I.e., is there a lesser showing for foundation if Hurtz did testify?

MR. HALTOM: I think that possibly the foundation with Hurtz there could be increased. The jury sought Mr. Hurtz.

JUSTICE KENNEDY: Oh, you mean, oh, you mean more? You have to be more strict for foundation after Hurtz testified? I was suggesting the opposite.

MR. HALTOM: Well, I was just thinking that his presence there would be relevant. The jury actually saw him. They heard a truck driver describing, a neutral truck driver, describing the actual killer, who in no way fit the description of Mr. Fry. Unfortunately, the record doesn't indicate what Mr. Hurtz looked like, but the jury saw it. And if the jury saw that that truck driver was describing a man that looked like Mr. Hurtz, then that --

JUSTICE GINSBURG: But there were all kinds of infirmities in that truck driver's testimony, including the time, the timing of the murder.

MR. HALTOM: There were infirmities in his testimony, Your Honor. However, he came from Missouri,

so maybe he was looking at a Missouri clock. We don't know. But why would that man make up a story? He has no axe to grind in this case. And then his testimony is corroborated by a gentleman who sees him immediately after it and says: He looked like he had just seen a ghost, and described seeing a double execution-style murder. Now --

JUSTICE STEVENS: That was all presented to the jury, right?

MR. HALTOM: That was all presented to the jury. However, Ms. Maples' testimony was not, and counsel did not argue that heavily focused on Mr. Hurtz' guilt. She certainly did argue it, but the reason that she didn't is because, as the Court of Appeals, the California Court of Appeals, said, the other seven witnesses who said Mr. Hurtz said he had killed the Bells were all described as having been flimsy witness who gave contradictory unbelievable testimony.

CHIEF JUSTICE ROBERTS: Well, how strong is this witness, who didn't even know if it was a serious conversation, didn't hear the beginning of it, and didn't -- couldn't tell whether he was talking about something that happened 10 years before or 2 days before?

MR. HALTOM: Mr. Chief Justice, she was

extremely strong. Page JA-78 in the joint appendix, Respondent concedes she was the only unbiased witness concerning Mr. Hurtz's -- concerning Mr. Hurtz. She heard this, her cousin, saying he shot a man and a woman in a parked car, first shooting the woman in the head, then shooting the man, getting blood all over himself. That linked up with all the other confessions in this case. Interlinking confessions just like in Chambers were deemed to provide adequate assurance of reliability.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:06 a.m. the case in the above entitled matter was submitted.)