IN THE SUPREME COURT OF THE UNITED STATES

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BERTRAM RICE, WARDEN, ET AL., :

Petitioners :

v. : No. 04-52

STEVEN MARTELL COLLINS. :

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Washington, D.C.

Monday, December 5, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

WILLIAM W. LOCKYER, ESQ., Attorney General, Sacramento, California; on behalf of the Petitioners.

MARK R. DROZDOWSKI, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Rice v. Collins.

General Lockyer.

ORAL ARGUMENT OF WILLIAM W. LOCKYER

ON BEHALF OF THE PETITIONERS

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

This Court has repeatedly communicated an understanding of the appropriate deference owed to State court fact finding in habeas review under 28 U.S.C., section 2254. Here, we don't have a simple case of the Ninth Circuit applying the proper standard of deference, but getting the wrong result. The problem is the Ninth Circuit doesn't get the standard. Although --

JUSTICE KENNEDY: Just at the -- at the outset -- and I'm -- I'm not sure you're prepared for this, but the joint appendix, volume 2, is under seal, right?

MR. LOCKYER: Yes.

JUSTICE KENNEDY: In the course of the argument, I think we'd be very interested in knowing about the colloquy that the trial judge had with the attorneys, and if it's under seal, it's a little bit

awkward to do that. Is there any reason that it has to be kept under seal?

MR. LOCKYER: None -- none at all, Justice Kennedy. I believe we provided the --

JUSTICE KENNEDY: I -- I take it --

MR. LOCKYER: -- appendix 2 --

JUSTICE KENNEDY: -- I take it that the -- the names of the jurors we don't know because they're given numbers.

MR. LOCKYER: That's correct.

JUSTICE KENNEDY: So far as you know, the counsel for the respondent would also have no objection?

MR. LOCKYER: Neither of us have any objection, and it's been quoted extensively --

JUSTICE KENNEDY: Yes, it was then quoted extensively in the Ninth Circuit I thought.

MR. LOCKYER: In -- in the briefs as well.

JUSTICE KENNEDY: Thank you.

MR. LOCKYER: Thank you, Mr. Kennedy -- Justice Kennedy.

In this instance, the Ninth Circuit professes fealty to AEDPA deference, but it seems simply too easy, having sensed a constitutional injury, to become willing to attribute error to the State court and to

substitute its own factual inferences for those of the trial judge.

The way the Court decides this case can provide further instruction to habeas courts to help them avoid the Ninth Circuit error. I'd suggest at least four instructions that might be considered.

First, confirming that the objective reasonableness test, that inquiry under (d)(2), is like that currently under (d)(1). That is, the factual inquiry, like that under the legal inquiry, more deferential than review for clear error.

Second, since it seems logical that State fact finding should be entitled to equal, if not greater, respect than that now accorded State court resolution of legal issues under (d)(1), we've argued for adoption of the Jackson v. Virginia kind of standard as consistent with the letter and spirit of AEDPA, meaning that witness credibility determinations rarely may be overturned, and that all of the evidence must be reviewed in the light most favorable to the factfinder.

Third, although Miller-El v. Dretke represented an extraordinarily egregious and I personally think undeniable violation of Batson, some might react to a whiff of a little smoke as a Miller-El

fire. Proper resolution of this case can make it clear that Miller-El v. Dretke dealt with a outlier and that the traditional line of this Court's habeas cases, restricting Federal courts from second-guessing a State judge's credibility calls, retain their vitality.

Finally and specifically responding to Mr. Collins' argument that this case, it seems, is an opportunity to confirm the well-established presumption of correctness for State court fact finding under section 2254(e)(1), that it remains available in all habeas cases. Collins' view that the traditional presumption now applies only in the rare case of Federal evidentiary hearings would eviscerate the traditional presumption. In my office --

CHIEF JUSTICE ROBERTS: Well, it is -- it is a little unusual to have under your view two different sections, both addressed to the question of the appropriate standard of review in a particular type of proceeding. They seem either redundant or overlapping. The theory on the other side at least distinguishes them and argues that they apply in different circumstances.

MR. LOCKYER: That's true, Mr. Chief Justice. Our view is that the (e)(1) test really focuses on specific facts that have been found in State court.

The (d)(2) focus is on the decision, which presumably would be a bundle of multiple facts, the decision of the court and whether it was objectively unreasonable.

And to limit the (e)(1) presumption not only, I think, being contrary to congressional intention when AEDPA reforms were adopted, and your cases that have applied both (e)(1) and (d)(2) as separate, independent tests -- in my office, there are 320 attorneys that do Federal habeas work, 120,000 hours of lawyering. If you take out the capital cases, the non-capital Federal habeas claims, only 2 or 3 percent ever go to a Federal evidentiary hearing. So the result of reading that (e)(1) without the presumption in the cold record case means basically the State loses the presumption for almost every habeas claim that we look at. So it would seem to not be also supported by the statute's clear terms. There's no limitation written into (e)(1) that it -- it's -- doesn't apply across the board to all habeas claims.

The --

CHIEF JUSTICE ROBERTS: What about the contention in the particular proceeding that the district court -- or the State fact finder did not, in fact, make a determination, but simply gave the benefit of the doubt to the prosecutor?

MR. LOCKYER: Mr. Chief Justice, I -- I think that reading the transcript will show that the judge, hearing the Batson motion, asking counsel to explain the reasons for her strikes, allowing defense counsel to comment and explain, and then the ruling of the judge seems to be a general one, both contemplating both demeanor and youthfulness, and benefit of the doubt may refer back to the fact that there's a dispute about the challenged juror and whether she turned aside, rolled her eyes in a dismissive and disrespectful way. And the judge says, well, I didn't see that behavior, but I'll give you the benefit of the doubt. But I think the ruling is a general one that subsumes both claims, youthfulness and demeanor.

JUSTICE SOUTER: Well, I thought youthfulness --

JUSTICE KENNEDY: And I -- I noticed the defense attorney, respondent here, did not comment in any way on the -- the demeanor of the -- of witness 16, which means either the -- he -- he saw it and said nothing or he -- he didn't see it at all. We don't know.

MR. LOCKYER: Justice Kennedy, that's correct. There was no comment.

JUSTICE KENNEDY: What -- what is the

obligation that we impose on the prosecution in this case to give a coherent explanation of why there -- the juror was excused? That step has proceeded. We're at that step in Batson where an explanation has to be given. What -- what have we said about how coherent and complete that explanation has to be?

MR. LOCKYER: Well --

JUSTICE KENNEDY: Here, it seems that the prosecutor was somewhat caught off guard or -- or certainly was not extremely clear.

MR. LOCKYER: Well, we are in the middle of a -- a trial, of course, and it happens quickly and, as the Court has suggested, often peremptory --

JUSTICE KENNEDY: Well, I'm not so sure quickly. They gave notice that there'd be a Batson hearing. She should have known what's going on.

MR. LOCKYER: Yes, sir. However, it was just a short time later in the day, Justice Kennedy. There was a break to dismiss the jury and then come back to the Batson claim.

But the peremptories, as the Court has frequently said, are intuitive, often inarticulable. In this case, I think the --

JUSTICE KENNEDY: But the point is once there's a Batson challenge, it has to be articulated.

MR. LOCKYER: Well, I think that happens. That is, as soon as the prosecutor is asked to defend her challenge, she does, and she talks about youthfulness. She says the young person doesn't have ties in the community, doesn't have a stake in the community, is unmarried, perhaps has a greater tolerance for drug crime with a small amount. This is a three-strikes case. It would be a natural worry, I think, for a district attorney to think that a third strike, even though one and two were armed robbery and rape -- that a third strike that's a possession of a small amount of drugs, you might need to worry about a juror's tolerance or worrying about that severity of sentence.

JUSTICE SOUTER: But -- but isn't -- isn't the difficulty with your analysis there, General, that, yes, she started out by -- by talking about youthfulness. As I understand it, she started out talking about youthfulness and the -- and the demeanor, the rolling of the eyes.

MR. LOCKYER: Yes.

JUSTICE SOUTER: Sort of at the second stage, again she spoke of youthfulness. Then at a third stage, she said, well, it's a combination of -- of age, gender, and inexperience. Then she realized she was in

trouble, and she said, well, I really didn't mean gender because I -- I'd be in constitutional hot water there. Then she said, well, I really don't mean age because there are other young people on the jury, and I'm -- I'm not challenging them. So that the only thing that was left was possibly that element of age which refers to ties to the community.

And at the end of this long colloquy, in which she has gone back and forth and back and forth and -- and jettisoned some of her reasons, the trial judge says, well, I didn't see the eye-rolling, and I guess I'll give the benefit of the doubt to counsel. I don't know whether the judge is talking about the benefit of the doubt on eye-rolling or the benefit of the doubt on -- on ties to the community.

Assuming it's ties to the community, that has nothing to do, I suppose, with -- with the -- the fear that a young person is going to be too sympathetic to a defendant who's up for the third time with a small amount of drugs.

And at the end of the day, it seems to me we have what Justice Kennedy's question in the first place suggested. We simply have an incoherent colloquy and a response to the judge which simply does not tell you what the judge is ruling on or the basis for the

ruling. All we know is that ultimately he's saying I'm rejecting the Batson challenge. That's the problem with -- with deference in this case.

What -- what is your response to that?

MR. LOCKYER: Well, thank you, Justice Souter. First, I'd point to the language that the judge provided, which was in regard to juror 16, the only one that is at issue, the court did not observe the demeanor. However, 16 was a youthful person, as was 6, and then prepared to give the district attorney the benefit of the doubt.

JUSTICE SOUTER: Yes, but the district attorney has -- I mean, the -- the point here is we're judging the district attorney's responses, not the judge's responses.

MR. LOCKYER: Right.

JUSTICE SOUTER: What we want to know is what the judge found and ruled upon. The district attorney, as I understand it, has withdrawn the general claim that youthfulness is a problem, and the only claim that might have been -- might -- probably was comprehended under youth that -- that remains is the claim of no community ties. And I find it very difficult to tell from the judge's ruling whether the judge is saying, yes, I think there's a fair showing that there are no

community ties and that's certainly a race-neutral reason. I don't know what the judge was -- was --

MR. LOCKYER: If I may, Justice Souter. The DA never withdrew the youthful claim.

JUSTICE SOUTER: Well, didn't the DA say, look, youth alone doesn't -- doesn't explain my reasons because there are other young people on the jury that -- that we're not challenging, and -- and I don't want to suggest that all young people should be disqualified?

MR. LOCKYER: Right.

JUSTICE SCALIA: General, does -- does the judge have to find what the reason for the strike was, or does the judge have to find what the reason for the strike wasn't?

MR. LOCKYER: The judge has to find that it was not a racially discriminatory strike.

JUSTICE SCALIA: And if there are several allegations and -- and each of them is somewhat doubtful but, on balance, he says, I give the benefit of the -- of the doubt to the -- to the district attorney, it's his indication that, as a matter of fact, he finds that the reason wasn't race.

MR. LOCKYER: Justice Scalia, your direct --

JUSTICE STEVENS: May I ask this question,

General?

MR. LOCKYER: Yes.

JUSTICE STEVENS: There are really two kinds of Batson problems as I see it. There are some cases where the prosecutor is -- just is deliberately keeping African Americans off the jury, and there -- there's no question there's a violation there.

But I'm wondering if there isn't another category where persons are unconscious of their own subconscious bias and not realizing that they themselves have an unconscious fear that perhaps an African American might not be a sympathetic juror. Would that kind of failure to really identify the problem within the prosecutor's own conception of the case -- would that be a Batson violation in your view?

MR. LOCKYER: Well, probably not, because the requirement is that the strike be intentionally done. That is, there's an intentionality. If it's unconscious, as you suggest, Justice Stevens, I -- I would think that wouldn't qualify.

JUSTICE STEVENS: If, for example, the judge saw that over a period of time, a particular prosecutor had hunches about jurors over and over again and they just happened to be black most of the time. That would not justify a -- a Batson challenge.

MR. LOCKYER: Well, there might be a pattern over time.

JUSTICE STEVENS: But -- but she's totally convinced of the good faith of the prosecutor. And I'm not suggesting bad faith.

MR. LOCKYER: Yes.

JUSTICE STEVENS: But just realizes this person has an unconscious bias that shows up in the -- in the pattern of challenges. Would that be a justified challenge?

MR. LOCKYER: You might be able to deduce intent from -- infer it from a variety of challenges.

JUSTICE SCALIA: No. You have to accept his hypothetical as he gave it. Assuming that the attorney, the district attorney, was in good faith.

JUSTICE STEVENS: Right.

MR. LOCKYER: In good faith?

JUSTICE SCALIA: Yes. Assuming that the -- the attorney did not think that he or she was striking the juror because of the juror's race.

MR. LOCKYER: Justice Stevens and Scalia, I would rely on the trial judge to make a determination of the intention of the district attorney --

JUSTICE STEVENS: And if the trial judge determined --

JUSTICE KENNEDY: Well, the question is would he --

JUSTICE STEVENS: -- based -- based on the history of several trials and so forth, that this prosecutor unconsciously had this hunch with respect to black jurors but not others, that would be a sufficient basis for a challenge.

MR. LOCKYER: I'd be inclined to say yes.

JUSTICE GINSBURG: But there is no such -- that -- that's very far from this case, General Lockyer.

MR. LOCKYER: Yes.

JUSTICE GINSBURG: I did -- I did have one --

JUSTICE SCALIA: That -- that gives a lot of power to district -- to -- to the district judge, doesn't it? I mean, you know, this -- he says this -- this U.S. attorney really doesn't honestly believe that he's biased, but I think, being the great psychologist that I am, that this United States attorney, or whoever, is -- is really biased and -- and he's -- I -- you really --

MR. LOCKYER: Justice Scalia --

JUSTICE SCALIA: -- you really want the system to run that way?

MR. LOCKYER: Well, Justice Scalia, I hope to

brief that one some day, but --

JUSTICE GINSBURG: Can we -- can we go back --

MR. LOCKYER: -- but -- but it's a good -- it's a good question even though I -- I don't think it's what's happening in this instance. And I mostly would say we rely on the trial judge who's there --

JUSTICE STEVENS: Except in this very case, one gets the impression that the prosecutor was pretty confused, but maybe she was acting in good faith.

MR. LOCKYER: I -- I believe that's correct from the record.

JUSTICE GINSBURG: She was certainly -- she was certainly wrong on the law. When she -- when the gender question came up, she said, well, that's not a suspect category, and she seemed to be -- her notion was that it was okay to aim for a jury that had an equal number of men and women. And it was -- she seemed to be thinking the same thing with regard to age too. I agree with you she didn't withdraw it, but was -- the reasonable explanation was we don't want too many young people here. So I'm going to allow some, but I want older people to dominate. But the gender -- she had to be told by the judge Batson applies to gender. That -- that seemed -- that seemed strange to

me that -- that 2 years after, she would not know.

MR. LOCKYER: Justice Ginsburg, I think that perhaps an explanation -- and, again, if the trial judge thought it was reasonable -- is there some compelling reason to read it a different way years later on appeal after the California Court of Appeal, a Federal magistrate, and a Federal district judge have agreed with the trial judge's perspectives.

But it could be that she is quoting, as you'll see in the transcript, California law that had talked about jury balances. It's good to have young and old. It's good to have different races.

I agree. You're absolutely right. J.E.B. v. Alabama had occurred a couple of years before, and the judge does say, I don't see, Ms. Satriano, that you are seeking to justify excusing people of one ethnicity based on gender. So he seemed to at least be saying, you started with youth. Everything you said about youth, ties in the community, tolerance for drug use, unmarried, which might be distinctions with other young people -- those -- do you have anything else to say? And I -- I suspect she felt like compelled to come up with some further explanation.

JUSTICE BREYER: What -- what is the -- where -- where is the place in what the judge -- when did

this eye-rolling take place? I can't figure it out.

MR. LOCKYER: Okay. Yes. During the judicial voir dire.

JUSTICE BREYER: Yes, I have that in front of me.

MR. LOCKYER: And --

JUSTICE BREYER: What was the statement that the judge made in respect to which the juror is supposed to have rolled her eyes?

MR. LOCKYER: The district attorney simply says with one of the questions to which you -- the prospective --

JUSTICE BREYER: Which question?

MR. LOCKYER: It's unclear.

JUSTICE BREYER: So the reason I can't find it out is none of us know.

MR. LOCKYER: No, you're right. I mean, it's one where -- it doesn't say in the record eye-rolling.

JUSTICE BREYER: And it actually says it wasn't a question. It was a statement, and that's why I can't figure it out.

MR. LOCKYER: It -- it seems to be where the juror said yes in response to the voir dire, and then --

JUSTICE BREYER: Which was a question you

said --

MR. LOCKYER: -- turned aside. All we know is yes was said. We don't know what the question was.

JUSTICE BREYER: I see.

MR. LOCKYER: The -- a point I guess to be made about this confusing transcript -- and of course, I don't know what the file looked like with respect to Miller-El, but this is it. Obviously, there's not a lot to go on, and I think it suggests how vital it is to rely on the trial court judge to make some credibility determination. He's there and sees the district attorney and tries to, after making appropriate inquiries, say that he accepts her non-racial reasons.

Counsel for respondent does a lot to compare to Miller-El and so perhaps it's worth just distinguishing briefly. There we have 10 of 11 African American jurors struck. We have the lawyers doing the questioning, trick questions, loaded questions, complicated questions. We have the external evidence of the Dallas manual recommending discriminatory strikes. We have the cards with race written on them.

Here, we have a very brief, quick proceeding. The judge is asking the questions and really resisting

lawyers' attempts to add to that, to get more information so you can make a valid assessment of the juror that's before you. And so in this instance, obviously, relying on intuition, trial experience, she exercises the two peremptory challenges, one of which was withdrawn on appeal and not pursued, the other with respect to the young person, the demeanor, and youthfulness are the grounds given.

JUSTICE STEVENS: May I ask just a -- kind of a background question? I noticed the judge pointed out after ruling that he was under -- he -- I can't remember if it was a he or a she, but was under an obligation to report its reasons for granting Wheeler motion to the State bar.

MR. LOCKYER: Yes.

JUSTICE STEVENS: Does that -- did that requirement apply after the Ninth Circuit decision? Is there a requirement that the -- the lawyer be investigated for possible discipline?

MR. LOCKYER: We tried to research it, Justice Stevens, and we believe that it was a -- a State court rule adopted subsequent to Wheeler. And that -- of course, unlike the way in which it is characterized in respondent's briefs, it wasn't a warning to her, the district attorney, that is. It was

a general statement. If there's a Batson claim, I'm obligated to report.

JUSTICE KENNEDY: Well, I -- I read it as saying, and therefore I'm going to be careful about finding that there's been a Batson violation. And I wonder if that's consistent with what we want trial judges to do when they're hearing Batson challenges.

MR. LOCKYEAR: Justice Kennedy, I frankly didn't read it that way. It just seemed to be he was stating the fact, that it would be an obligation to report. Clearly, it has some impact on how people feel about the judicial system and the particular lawyer's reputation if the judge were to affirm the motion. But I -- I would expect the judge was doing his job and performing his duties correctly.

JUSTICE BREYER: If you have a minute, you might -- I don't know if you -- if this is very useful. But I've taken this point of view that -- that there's no way to get to the bottom of the use of stereotypes in cases like this, a perfect example. And therefore, the only thing to do, consistent with the Constitution, is no peremptories.

MR. LOCKYER: Well, I know that's your view, Justice Breyer.

JUSTICE BREYER: You have 30 seconds. You

want to say how irresponsible that is, right?

MR. LOCKYER: I prefer to keep the tradition and allow the peremptory challenges.

Thank you. I'll reserve time, if I may.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Drozdowski, we'll hear now from you.

ORAL ARGUMENT OF MARK R. DROZDOWSKI

ON BEHALF OF THE RESPONDENT

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

The Ninth Circuit properly held that the State appellate court decision represented an unreasonable determination of facts because the prosecutor did not give a single persuasive reason for striking juror 16.

The circuit also rightly held that the --

CHIEF JUSTICE ROBERTS: Why isn't the rolling of the eyes a persuasive reason?

MR. DROZDOWSKI: Well, here the rolling of the eyes, first, is uncorroborated by the trial judge. He says, quite frankly, I did not see it. And in his ruling, he does not credit that rationale.

JUSTICE KENNEDY: Well, what -- what should happen if the trial judge doesn't see it and a counsel, who's observant, said, judge, I've got a problem with

this juror? I don't know that the trial judge has to -- has to see it, if he believes the counsel.

MR. DROZDOWSKI: That could be, but here the trial court's --

JUSTICE KENNEDY: We've -- we've all been -- been in court and -- and noticed that sometimes witnesses or jurors or parties or even attorneys will make faces and so forth that's not consistent with -- with proper demeanor in a courtroom.

MR. DROZDOWSKI: That's correct. But what's significant here is that this was a judge-conducted voir dire where juror 16 would have been facing the judge when giving her answer. So the judge would have been in the best position to see the --

CHIEF JUSTICE ROBERTS: So you're --

JUSTICE KENNEDY: Maybe the judge is reading. A judge doesn't watch -- watch the witness 100 percent of the time. That's not credible.

MR. DROZDOWSKI: As the Court has previously mentioned, what we also have here is there's no -- there's no corroboration in the transcript that juror --

JUSTICE BREYER: So what is the point? The judge says, I'll give the prosecution the benefit of the doubt. Well, he -- he knows the prosecutor and he

believes the prosecutor. I didn't see it, but I'll give him the benefit of the doubt. He told me that's what she did. What's -- I mean, I really don't see why that isn't, given the present law, sufficient.

MR. DROZDOWSKI: Well, here, the trial court's ruling -- he says, I did not see the demeanor complained of. However, juror 16 is youthful, as are other jurors. I'm prepared to give the district attorney the benefit of the doubt. So I think the ruling here, if there is, indeed, a finding of no discrimination, would be limited to the youth rationale clearly by --

JUSTICE GINSBURG: Why?

JUSTICE BREYER: You mean benefit of the doubt just refers to youth. I -- I read that as referring to the whole story.

MR. DROZDOWSKI: Well --

JUSTICE BREYER: I mean, I -- it's pretty hard to read that as saying, I'll give him the benefit of the doubt in respect to the youth. It sounds as if I'll give him the benefit of the doubt in respect to the reasons he gave for challenging her. There are two other African American jurors on the jury. She is useful -- youthful. He -- she saw him -- he saw her rolling her eyes when -- what do you think about the

drugs or some other relevant question. And he says, I'll give him the benefit of the doubt. I mean, I don't see how to read that in a way that -- that comes out the way you want it to come out.

MR. DROZDOWSKI: Well -- well, even --

JUSTICE BREYER: So tell me.

MR. DROZDOWSKI: Okay. Even if the Court concludes that the trial judge did credit the demeanor rationale, it's still a wholly unpersuasive reason to give in light of everything else the prosecutor did here. The demeanor rationale wasn't the sole reason given. It comes as part of a litany of reasons that are all either unconstitutional, the gender rationale, or contradicted or unsupported by the record.

And there was some discussion earlier about this. Miller-El makes clear that the district attorney must give the real reason for the strike, not just any rational basis the prosecutor can think up. And when we look at the transcript of the Batson hearing here, we see a prosecutor scrambling to think of anything she --

CHIEF JUSTICE ROBERTS: Well, isn't this just another way of saying you don't believe the proffered justification? In other words, the -- the trial judge made a credibility determination that that was the

reason, the person rolled her eyes, and you're saying, in light of the other explanations, you think the prosecutor is just making that up.

MR. DROZDOWSKI: I -- I think two things. I think, one, the reasonable conclusion is the prosecutor is making it up, but even if the Court -- the Court doesn't need to accept that to still come to the conclusion and say the demeanor rationale is still not the reason for the strike. She can't say the reason here. She comes up with six different reasons, but they're all either --

CHIEF JUSTICE ROBERTS: So you're saying you don't believe it. You think there's a different reason, and the rolling the eyes is not the real reason. And we have a factual determination that the judge believes that that's the reason or a reason. And under the -- the statute, at least that -- that's -- that either has to be shown to be unreasonable or, under the State's reason, that's presumed to be correct, and you have to show it by clear and convincing evidence.

MR. DROZDOWSKI: And the Ninth Circuit properly found that the conclusion was both unreasonable and rebutted by clear and convincing evidence, and it's because none of these reasons, when

we look at the totality -- what I'm trying to say is --

JUSTICE GINSBURG: What was the -- on the -- on the eye-roll, which I thought also the -- the prosecutor said that she turned her head. So it may be that she was out of the vision of the -- the judge even if he had been looking. I don't see that you have any evidence to rebut it. You said, well, it was rebutted by clear and convincing evidence. There was no evidence. There was no evidentiary hearing.

MR. DROZDOWSKI: Well, we cited a case on page 24 in our brief, a Third Circuit case, Riley, that says a reviewing court's suspicion may be raised by a series of very weak explanations given for the strike.

JUSTICE SCALIA: There -- there's no doubt that the court -- or at least in my mind, that -- that the trial court could have come out the other way. I -- I -- you know, all of the things you say are quite true. The question is whether the trial court had to come out the other way, whether it was just utterly unreasonable for the trial court to come out the way it did. And that -- you know, that's a -- that's a heavy burden. And -- and it is a messy transcript and all of that, but I -- I find it difficult to see how -- how you can establish that -- not only that -- that the trial court could have come out the other way or,

indeed, maybe in your judgment, maybe in my judgment, should have come out the other way. But you have to establish that it's unreasonable not to come out the other way. And -- and I find it hard to -- to see how you can do that when you have a transcript that relies, in part, upon the -- you know, the rolling of the eyes and the -- and the trial court says, I'm -- I'm willing to give her the benefit of the doubt that that's the reason she did it.

MR. DROZDOWSKI: Well, Miller-El emphasizes that we need to view the prosecutor's behavior cumulatively. And again, when we look at here the -- the prosecutor coming out with one reason after another to try to justify her strikes, consecutive strikes, of the only two black women on this jury, there's just simply no credibility left to give to the demeanor rationale even if one views that it's --

JUSTICE GINSBURG: I thought there was another -- another. Wasn't there another minority woman on the -- in the jury panel?

MR. DROZDOWSKI: Juror 20 Collins explains -- Mr. -- trial counsel -- defense counsel, explained at the hearing was a person of color but not African American. So the record shows, I believe, we have one African American on the jury and one other minority.

JUSTICE KENNEDY: Now -- now, number 19 was excused and was a black person.

MR. DROZDOWSKI: That's correct.

JUSTICE KENNEDY: And -- and a woman. And if that too had been suspicious and challenged, then you might have had a pattern, a pattern of two people, which could have overcome the demeanor testimony -- demeanor claim.

But I -- I think on this record that we have to assume that there is nothing wrongful about excusing juror 19 merely because respondent's counsel here -- you did not pursue that. I -- I read the record as -- as telling us that so far as juror 19 is concerned, there was an adequate reason for excusing that juror. At least respondent's counsel -- you have not said that there wasn't.

MR. DROZDOWSKI: Well, on the State appeal, it's true that Collins' attorney dropped the claim specifically as to juror 19. But the reason the prosecutor's strike of juror 19 is relevant is at step three of Batson, this Court has emphasized that the duty of the trial judge to determine purposeful discrimination requires an examination of all the relevant circumstances.

JUSTICE BREYER: So what is the remedy -- the

remedy if we say and hold with you that prosecutors can't give reasons like they gave here? How is a -- what's a prosecutor supposed to do? I mean, the prosecutor might be moved by stereotype. Young African American women -- of course, she tolerates drugs. Well, not quite of course. Well -- well -- well, she rolled her eyes. Well, at least she looked in this direction. Well, I sort of -- maybe I'm seeing eye-rolling here. I mean, we all understand that. But that's why I guess I am where I am. I -- I don't see what the -- I don't see what we're telling prosecutors if we hold in your favor, and I don't see how we deal with the problem if we hold against you.

MR. DROZDOWSKI: Well, I -- I think -- I think the record here reinforces Your Honor's view on --

JUSTICE BREYER: But I'm asking for your experience. You have a lot of experience as a defense lawyer. How is this thing supposed to work?

MR. DROZDOWSKI: Well, I -- I think if -- if the Court allows to happen what -- what happened here, then I think the message it could be saying to prosecutors, is as long as you can just rifle off a series of -- of reasons for your strike and then the trial court latches onto one of them, taking it out of

the context of the plausibility of all the other strikes, then we're going to allow this type of behavior to continue.

JUSTICE SCALIA: This prosecutor presumably appears before this judge on other occasions, and -- and don't you think we -- we can give some weight to the fact that the judge is there, sees the woman, sees what she's saying, and -- and can judge better than we can whether she's making this up or just -- just is -- is somewhat confused, especially since, as -- as I think the General pointed out, we're dealing with a kind of determination that is usually instinctive on the part of trial counsel. There's just something about this, you know, and you move to strike. I'm not sure it springs into your mind, at the time you -- you move to strike, the precise reason. Then somebody asks you later, why was it? Why was it? There was just something about that person I didn't like. I know it wasn't the race. That had nothing to do with it. Now, what was it? And then -- then you have to recreate a -- a rational process that, in fact, never occurred. It was an instinctive process more than a rational one.

So I'm -- I'm not particularly upset by -- by seeing counsel flounder about in -- in trying to come up with what the right reason was. I think it's

probably pretty hard to figure out.

MR. DROZDOWSKI: First of all, there's nothing in the record to indicate that this prosecutor had appeared many times before this trial judge.

Another point is --

JUSTICE GINSBURG: Well, she might in the future, if she's got a job as a prosecutor in this court. So she's certainly going to be concerned with her reputation, her integrity before the court.

MR. DROZDOWSKI: That's right, but I guess what I'm trying to say is it's not that the judge said, you know, Ms. Prosecutor, you've appeared before me many times and I'm willing to give you the benefit of the doubt because I know the way you are. We have nothing like that here.

Also, as far as it being instinctive, Batson and Miller-El require the prosecutor to give the reasons and stand and fall on the plausibility of those reasons. And -- and here --

JUSTICE SCALIA: I'm saying that it's hard. That's all. And -- and that you can understand why somebody would flop around because, at the time the strike is made, I'm -- I'm not sure it's always an entirely rational rather than instinctive action.

MR. DROZDOWSKI: I understand, but what's

significant here is when she is flopping around, the reason she comes up with -- she says gender. It's patently unconstitutional and discriminatory. We have youth, and then she says, well, it's not that they're younger. Other young people on the jury. It's not that I don't want young people. And she doesn't strike juror 15.

JUSTICE SOUTER: All right. Let me -- let me ask you as a -- as a response to -- to the kind of the incoherent flopping around argument, let me ask you what your position would be if the record were different in the following respect.

Let's assume the record is just what it is up until that final paragraph or so in which the judge rules. And instead of doing what he did in this case, the judge says the following two things. He says, number one, I didn't see the eye-rolling, but I accept counsel's representation of fact that the eye-rolling went on and I certainly understand the -- the significance of that. So I'm going to take that as a fact.

Number two, even though counsel has withdrawn the -- the sort of the general claim of youth and so on, I understand counsel still to be saying this is a person without any manifest ties to the community and

-- and that suggests a certain looseness of responsibility.

And based upon the eye-rolling and based upon the lack of ties to the community, I think counsel had a race-neutral basis for the -- for the strike that was made, and for that reason, I'm going to overrule the Batson challenge with respect to number 16.

What would your position be?

MR. DROZDOWSKI: Well, that -- that would be a -- a tougher case for us because we would have an explicit ruling --

JUSTICE SOUTER: Right.

MR. DROZDOWSKI: -- of what actually happened.

JUSTICE SOUTER: What would your position be?

MR. DROZDOWSKI: I still think that in this case, given the entire context and all the other reasons given, including the gender reason, that it would still -- that those demeanor and youth reasons would still not be persuasive looking at the context --

JUSTICE SOUTER: So you would say that those two conclusions on the part of the court were unreasonable?

MR. DROZDOWSKI: On -- on this record, yes, given all the other reasons we have given by the

prosecutor.

CHIEF JUSTICE ROBERTS: And you would say you've established that by clear and convincing evidence?

MR. DROZDOWSKI: I would because when we go through the comparative juror analysis and look at the record of the whole, we see that the reasons given, for example, on youth are not used for similarly situated white jurors.

JUSTICE KENNEDY: Well, but number 6 was a young white -- young white male, I believe, and he was excused on the ground of youth. So it's consistent.

MR. DROZDOWSKI: 6 was different in that he was unemployed, in fact, had never been employed, and also he had an uncle who was a recovered alcoholic, and that made him quite different from juror 16.

JUSTICE GINSBURG: What's wrong with the explanation, as far as youth is concerned, is that she didn't want to across-the-board strike young people, but she just wanted to come up with a jury that had dominantly older people. So that wouldn't mean that she's withdrawing youth. It's just that she's saying it isn't an absolute with me.

MR. DROZDOWSKI: Well, I think she's also admitting that youth wasn't a reason because she's

saying there are other young people on the jury, and the significant question here --

JUSTICE GINSBURG: Well, what's -- one -- one point could be I don't want too many young people, so I'm going to exercise some peremptories to make sure that the jury is dominantly older people. What's wrong with that?

MR. DROZDOWSKI: What's wrong with that here is the question is why is she using that rationale against the young black juror and not the -- the young white jurors on the panel? How come she's seeking to achieve the balance by striking juror 16?

JUSTICE GINSBURG: Well, she did. Number 6 was white. Right?

MR. DROZDOWSKI: Correct.

JUSTICE GINSBURG: And youth was a factor there. There may have been other factors, but youth was certainly a factor in that case.

JUSTICE SOUTER: And this one rolled her eyes.

MR. DROZDOWSKI: Right, but when we look at the totality of the reasons, which include looking at the way she treated juror 19, we have the lack of ties in the community --

CHIEF JUSTICE ROBERTS: Juror 19 -- you just

said earlier the fact that the one juror's uncle had an alcohol problem was -- was a legitimate factor. Juror 19's daughter had a -- a cocaine problem and this was a cocaine case. Isn't that a perfectly legitimate reason for exercising a peremptory with respect to a juror?

MR. DROZDOWSKI: The significance of the treatment of juror 19 is, right out of the box, the prosecutor is coming up with reasons that she says apply to both 16 and 19, the only two black women on the jury. And these are very disparate women, and they're different in age and occupation status, the number of children they have, and people they -- who are close to them who have substance abuse problems. And right out of the box, the prosecutor is saying that both of them are disqualified from jury service because they're both young, when juror 19, in fact, was a retired grandmother.

JUSTICE GINSBURG: But that -- that was so obviously a slip, and Judge Hall pointed that out in her dissent. Defense counsel too confused -- was confused on the numbers. Obviously, it -- the -- the prosecutor wasn't trying to say a grandmother is going to be excused -- is going to be struck because she's young.

MR. DROZDOWSKI: I respectfully disagree that

it was a mistake. Her answer -- her response that juror 16 and 19 are both young came immediately in response to the court's request that the prosecutor justify her peremptory strikes of judge 16 -- jurors 16 and 19.

And then later on, when the judge said that gender was not going to cut it, the prosecutor said, well, it's not really gender. She backtracked to youth, and she said what is important, their youth is important. And she could only have been referring to 16 and 19 at that point because there was no claim that juror 6 was being excluded because of his gender.

JUSTICE KENNEDY: Would you say the same thing about the defense counsel confusing jurors 16 and 19 on page 9? The bottom of page 9, it seems to me Ms. -- Ms. Nachman is confusing juror 19 with 16. They're talking about 16 and 6, and then Ms. Nachman ends by talking about juror 19. That seems to me clearly to mean number 16.

MR. DROZDOWSKI: Well, I'm -- I -- I don't think so because on the next page she continues discussing juror 19 at the top of page 10.

JUSTICE KENNEDY: Well, I -- I don't think it's a necessary reading.

CHIEF JUSTICE ROBERTS: Maybe I'm -- what --

what is the inference you try to draw from the treatment of juror 19? That the prosecutor wants to -- was striking people on the basis of their race or that she had better reasons for 19 than 16?

MR. DROZDOWSKI: No, no. The conclusion is that she was striking jurors on the basis of the race, that she is using --

CHIEF JUSTICE ROBERTS: And then what do you do with the fact that juror 19's daughter had a cocaine problem and this was a cocaine case? That doesn't seem to be -- that's not a race-based reason. That's seems to me to be a good reason.

MR. DROZDOWSKI: Right. We're not challenging the strike of 19 per se. What we're saying is that the prosecutor's reasons she gave for 19 are important in trying to determine whether she is intentionally discriminating in striking juror 16. And the fact that she is lumping the two jurors together, not treating them as individuals, but treating them, in fact, stereotypically by saying that all -- that three of these reasons apply to both of them, when the record clearly shows that they don't apply to juror 19, it shows -- it shows the discriminatory behavior.

The -- the Attorney General said that this case is unlike Miller-El, but I'd just like to

emphasize certainly here we have a petitioner who was representing himself pro se and he did not present extra-record evidence of a -- of a history of discrimination.

But the case-specific evidence is similar to Miller-El in important respects, and Miller-El requires relief in this case.

First -- first of all, three of the reasons given here for the strikes pertain just as well to non-black jurors as to the black jurors, and that's youth, tolerance, and single.

Here, as in Miller-El, we have the district attorney scrambling from rationale to rationale and, when called on, one of the reasons shifting to another.

And here, the district attorney did not ask questions on grounds later used to justify the strike. Now, clearly here, it's a judge-conducted voir dire, but the attorneys were allowed to ask the judge to ask different questions -- to ask that the judge ask additional questions. And here, at the conclusion of the voir dire of jurors 1 through 17, the -- the prosecutor asked the judge to ask four additional questions. Three of them were to the panel generally and one specifically about juror 8. But the prosecutor never asked that any additional questions be asked of

juror 16 before she struck her.

If I could turn briefly to the State's Jackson v. Virginia argument, unless there's any additional questions on the Batson claim. The State's claim that (d)(2) and (e)(1) incorporate the Jackson sufficiency of the evidence test is contrary to the plain terms of (d)(2) and (e)(1) and this Court's cases construing those provisions. And the State still hasn't cited a single case prescribing a Jackson type of review, and courts have been construing AEDPA for over 9 years now. That should be the end of the line for the State's argument.

CHIEF JUSTICE ROBERTS: What do you do with the argument that your reading of the two sections means that (e)(1) would only apply in a very small number of cases, and it's obvious that Congress was trying to tighten the habeas review procedures?

MR. DROZDOWSKI: Our argument is based on the -- the structure and text of the statute and -- and the fact that the clear and convincing requirement is tied to the presumption of correctness.

I'd like to emphasize that the Ninth Circuit in this case did apply both (d)(2) and (e)(1), as this Court did in Miller-El, and found that Collins has satisfied both standards. So I just want to emphasize

for the Court, even if it does not agree with us on our construction of (e)(1), that relief is still appropriate in this case.

JUSTICE KENNEDY: In -- in a sense, the standards perhaps ought to be reversed. When you hear the evidence, which is what you do under (e)(1), that is when you've determined -- should determine whether it's unreasonable. You should presume that it's correct before you decide whether you're going to hear. So you could argue that they should be --

MR. DROZDOWSKI: Right. I -- I think our argument is based on the fact that we have the presumption of correctness as part of (e), which is the fact development procedure in Federal court.

The State's Jackson argument, I'd just like to highlight, is irreconcilable with what this Court said in Miller-El I, and what it did in Miller-El II. In Miller-El I, this Court stated that Federal courts can disagree with State court credibility determinations and, when guided by AEDPA, determine that the conclusion is unreasonable or its factual premise rebutted by clear and convincing evidence.

In Miller-El II, this Court disagreed with the State court credibility determination and granted habeas relief even though the significance of some of

the habeas petitioner's evidence was open to judgment calls.

By contrast, this Court stated in Schlup v. Delo, that the assessment of credibility is generally beyond the scope of review in Jackson.

And in the Crenshaw case cited by the State, the Court explained that under Jackson, the test for rejecting evidence as incredible is extraordinarily stringent and is met, for example, only when the testimony given is describing facts that are physically impossible.

This Court couldn't have granted relief in Miller-El if it construed (d)(2) or (e)(1) as containing the Jackson test, and the State's approach would effectively bar habeas relief whenever a habeas petitioner challenged a credibility determination.

JUSTICE SCALIA: Do you think that (d)(2) or (e)(1) is the -- is the stricter requirement? I'm really not sure which of the two. Don't you think it -- it might be possible to show, by clear and convincing evidence, that the State court decision was -- factual decision was wrong, but you, nonetheless, do not show that it was unreasonable? In other words, it may well be that (d)(2) is -- is the more severe one.

MR. DROZDOWSKI: I -- I think they're

different standards. (e)(1) is a -- a standard of proof, and (d)(2) is a standard of assessing a prior court's assessment of the facts.

JUSTICE KENNEDY: If -- if I might ask. You have no objection to our unsealing the joint appendix, volume 2.

MR. DROZDOWSKI: No, we don't.

JUSTICE KENNEDY: Thank you.

MR. DROZDOWSKI: If I could briefly sum up. In Powers v. Ohio, this Court said that the Fourteenth Amendment mandate, that racial discrimination be eliminated from all acts and proceedings of the State, is most compelling in the judicial system.

Here, the district attorney struck two of three African American jurors, including both black women, where a black defendant was facing a sentence of 25 years to life in a three-strikes case for possessing .1 grams of cocaine.

One of the reasons given by the district attorney is patently unconstitutional: gender. And all the other reasons are either contradicted or unsupported by the record.

JUSTICE STEVENS: Do you, by any means -- you don't contend, though, the fact that she did rely, in part, on an unconstitutional reason is a sufficient

reason for sustaining a Batson type challenge?

MR. DROZDOWSKI: In this case, it's very significant that she relied on the unconstitutional reason.

JUSTICE STEVENS: But you have not argued that that would be a sufficient reason for setting aside the verdict.

MR. DROZDOWSKI: This claim was not raised in State court as a gender challenge as opposed to race, if I'm answering the Court's question.

JUSTICE STEVENS: Do you think it would have had merit if you had made that argument?

MR. DROZDOWSKI: Absolutely, and I think it has merit here because it's -- it's a reason the district attorney admitted that was motivating her strike. It's -- it's patently unconstitutional and it taints every other reason she gave.

JUSTICE THOMAS: Counsel, is there anything in the record to alert us to the race of the prosecutor?

MR. DROZDOWSKI: There is not besides her name.

JUSTICE THOMAS: Would it make any difference? There seemed to be some suggestion that there are stereotypes at play in these Batson cases.

MR. DROZDOWSKI: No.

Equal protection mandates relief in this case, and AEDPA does not prevent it.

I respectfully request that the Court affirm the judgment of the Ninth Circuit. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Lockyer, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM W. LOCKYER
ON BEHALF OF THE PETITIONERS

MR. LOCKYER: Thank you, Mr. Chief Justice.

First, with respect to juror 19, I think it's the best clear way to see what the Ninth Circuit did and what Collins continues to do, which is to substitute their reading, their inferences, and then conclude that anyone that disagrees is unreasonable.

Juror 19 -- if you read page 5, it's clearly a slip of the tongue where she accidentally is comparing the two young people, 6, and says 19. Immediately afterward, she says 6. And the defense counsel says, well, who is 6? She says, it's the other young person, the young white person that I struck.

That slip of the tongue is the heart of the Ninth Circuit effort and analysis to do, as the dissenters said in the en banc denial, nitpick the

record to find some circumstantial evidence to support your view of inferences and conclusions about reasonableness. I think that partly makes the case and especially with a statute where deference is so owed.

The gender claim is ambiguous, but it was not a challenge based solely on race and the circuits are split on the mixed motive question, as Justice Stevens indicated. Second, Third, Fourth, Eighth, and Eleventh, and in one opinion in the Ninth, they've addressed mixed motives generally saying your clearly established Federal law says that it has to be solely based on race. That's the current test in the standard.

We raised Jackson and -- Jackson v. Virginia just because of the Lockyer v. Andrade case in which the Court indicates that clear error, when we talk about objective reasonableness in understanding (d)(2) and (d)(1) in the case of Andrade, that it's more than clear error. So we're trying to figure out, well, what's more than clear error. We don't know what it might be other than seeing the evidence in the light most favorable to the trier of fact.

And finally, with respect to youth, clearly it's reasonable for a judge to look at the demeanor of the DA who's saying again and again and again it's a

young person, unmarried, no ties in the community. One of the things we didn't talk about is the DA who's from Los Angeles knows that that juror lives in Inglewood. Now, there are different kind of neighborhoods in Inglewood, but a lot of them are neighborhoods with lots of drug dealing, and he might think or she might think, in this instance, it shows naivete to answer the question that there's never drug dealing in my neighborhood.

Well, for all those concerns, they're not implausible, they're not fantastic, as you know from the decisions that the reasons can be superstitious. They can be silly.

JUSTICE STEVENS: But, you're coming up with still more reasons than the prosecutor came up with.

MR. LOCKYER: Well, they're just the ones in the record, Your Honor. So I wanted to make sure the Court was aware of them.

But that's basically our contention, that deference was owed and the Ninth Circuit didn't respect that deference to trial judge that we rely on for credibility determinations.

If there are no questions, thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)