

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RON DAVIS, ACTING WARDEN, :

4 Petitioner : No. 13-1428

5 v. :

6 HECTOR AYALA. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, March 3, 2015

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:10 a.m.

14 APPEARANCES:

15 ROBIN URBANSKI, ESQ., California Deputy Attorney
16 General, San Diego, Cal.; on behalf of Petitioner.

17 ANTHONY J. DAIN, ESQ., San Diego, Cal.; on behalf of
18 Respondent.

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

2 (11:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 13-1428, Davis v. Ayala.

5 Ms. Urbanski.

6 ORAL ARGUMENT OF ROBIN URBANSKI

7 ON BEHALF OF PETITIONER

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

10 The California Supreme Court's harmlessness
11 determination was an adjudication on the merits because
12 it denied relief on the basis of the intrinsic rights
13 and wrongs of Mr. Ayala's claim.

14 A Federal habeas court is authorized to set
15 aside that final State judgment only if Ayala can show
16 two things. First, a legal error as a matter of this
17 Court's clearly established laws; and second, actual
18 prejudice under Brecht.

19 As to the first point, the Ninth Circuit
20 took the view here that there was no adjudication on the
21 merits, and it proceeded to review the entirety of Mr.
22 Ayala's claim under the de novo --

23 JUSTICE SOTOMAYOR: You know, your -- your
24 brief confused me, and it took me a while to pull it
25 apart. All right.

1 I don't know that there's a dispute -- or at
2 least there's a dispute in the application. But really,
3 the deference here was given to the harmless error
4 finding or purported to have been given. So there's
5 no -- there's no dispute that the court below committed
6 an error, meaning that the court below didn't apply the
7 right standards, a factual question. The issue, I
8 think, that you're trying to arrive at is under the
9 circumstances of this case, that the Court also reached
10 the performance prod of Strickland, and that's really
11 where the dispute is, isn't it?

12 MS. URBANSKI: Well, the issue before the
13 court was a Batson issue. It was whether the procedures
14 employed by the trial court had in fact -- were the
15 proper procedures in terms of excluding defense counsel.
16 And the Ninth Circuit in this case took the view that
17 there was no adjudication on the merits with respect to
18 the State court's finding of harmlessness. And it
19 proceeded to review the legal claim de novo.

20 JUSTICE KAGAN: Ms. Urbanski, let's say that
21 they -- that the Ninth Circuit is wrong in that respect.
22 Let's say that there is an adjudication on the merits
23 here. All right? But I think that that doesn't solve
24 the basic problem of this case. There's an adjudication
25 on the merits, but there are these two prongs; there's

1 the harmlessness prong, and then there's the substantive
2 violation prong, whether a Batson violation occurred.
3 And what the court here said was if a Batson violation
4 occurred, it doesn't matter. It would be harmless.

5 So if you -- for whatever reason, right or
6 wrong -- if you take that harmlessness determination out
7 of the picture, if you say that that was an unreasonable
8 application of law, all right, we're left with
9 essentially a vacuum; right?

10 And so what happens? What does the court do
11 where there's been no finding as to a Bat -- Batson
12 violation? And you're saying that it should kind of
13 make up a reason why there might not have been a Batson
14 violation and -- and go with that. And why is that the
15 proper approach?

16 MS. URBANSKI: Your Honor, the reason why
17 that is a proper approach is because on Federal habeas
18 corpus, what the Federal court is doing is deferring to
19 the State -- the final State court judgment of
20 conviction. Even in the case that Your Honor has
21 presented, the State court has ultimately denied relief.
22 It simply did so on harmless error grounds. Had the
23 State court done precisely the same thing as a matter of
24 a silent denial, that decision would have been entitled
25 to deference.

1 JUSTICE SCALIA: Why is -- why is the
2 harmless error thing out of -- out of the picture? I --
3 I don't really understand that. I mean, if in fact the
4 State court found that whatever error there was, if
5 there was any, was harmless and if that's a merits
6 determination, why do we even have to get to the point
7 of whether there was a violation?

8 MS. URBANSKI: The problem, Your Honor --
9 that is correct. But the problem, Your Honor, is it
10 leaves us with what the Ninth Circuit did here, which
11 was to look at the underlying constitutional issue from
12 a de novo perspective. That is not the proper start for
13 --

14 JUSTICE SCALIA: I'm saying you don't have
15 to look at the underlying constitutional issue. Once
16 there's been a determination that it's harmless --
17 whether there was a violation or not. If there was one,
18 it was harmless. Once there's been that determination,
19 why do you have to investigate whether there was one or
20 not?

21 MS. URBANSKI: And that's correct, Your
22 Honor. The harmless determination would resolve the
23 claim.

24 JUSTICE KAGAN: Well, you only do if the
25 harmless determination is an unreasonable

1 application under AEDPA. So if that is an unreasonable
2 application, you face the quandary of what you do with
3 respect to the substantive violation.

4 JUSTICE SCALIA: Right. Right.

5 JUSTICE KAGAN: It obviously doesn't arise
6 if the harmlessness determination is perfectly fine.

7 MS. URBANSKI: Correct, Your Honor.

8 JUSTICE SCALIA: And -- and don't you
9 contend that it was fine?

10 MS. URBANSKI: Yes. Certainly in this case,
11 that --

12 JUSTICE SCALIA: So that ought to be the end
13 of the case as far as you're concerned, right?

14 MS. URBANSKI: In this case that isn't an
15 issue. However, in the case where the State court has
16 left unresolved the issue of the underlying
17 constitutional error, we still do have the problem for
18 future cases of how are we going to review that aspect
19 of the claim. The Ninth Circuit took the approach here
20 that the proper standard --

21 JUSTICE SCALIA: We review judgments. We
22 don't review legal issues. I mean, you'd like us to
23 answer that question even though it's unnecessary to
24 this case, right?

25 MS. URBANSKI: Well -- and I don't disagree

1 with Your Honor that if the finding of harmlessness is
2 a -- is a reasonable application of the Chapman standard
3 in this case, then that certainly is the end of the
4 inquiry.

5 JUSTICE SOTOMAYOR: I -- if we were to find
6 that it wasn't a reasonable finding, then we would have
7 to reach the first issue .

8 MS. URBANSKI: That's correct, Your Honor.

9 JUSTICE SOTOMAYOR: So assume that it was
10 unreasonable. Let's go back to the first issue. Yes,
11 in Williams and Harrington, we have said that if there
12 are multiple claims and the State court just says
13 everything's denied, you assume that means Federal and
14 State. If the State claim is the same as the Federal
15 claim, we say, they -- they -- they -- we assume they
16 meant the Federal claim as well. But this is sort of an
17 interesting case because the -- they said there was
18 constitutional error under State law, but they
19 studiously avoided Federal saying there was one or not
20 under Federal law. And they dismissed the Federal claim
21 just on the harmlessness prong.

22 And what the Ninth Circuit said, as I
23 understand, they didn't reach it. Constitutional
24 avoidance made them decide that it was easier for them
25 to just say there was State error.

1 Why do we reach a different conclusion?

2 MS. URBANSKI: That's correct, Your Honor.

3 The State court here did not resolve the underlying
4 constitutional aspect of the claim. And it proceeded to
5 under -- to resolve the claim based on the harmless
6 error grounds alone. That is an adjudication on the
7 merits. What the Ninth Circuit could not do is
8 precisely what it did in this case, which was out the
9 gate look to the underlying constitutional issue and
10 simply resolve that based on what it would have done on
11 the issue.

12 JUSTICE SOTOMAYOR: I'm sorry. Why not? If
13 the State court didn't reach the Federal constitutional
14 error, you're asking us to assume it did when you've
15 admitted it didn't?

16 MS. URBANSKI: No. I'm not asking the Court
17 to assume that it did. What I'm saying is that on
18 Federal habeas corpus, the deference that is owed is to
19 the final State court judgment. And in this case, the
20 final State court judgment was a denial of relief.

21 JUSTICE KAGAN: Well, suppose -- I mean,
22 that's a very broad kind of rationale. It would apply
23 even if the State court said that there was a violation;
24 right? Then you would -- there's a violation, but no
25 worries, it's harmless. And then you decide that the

1 harmless issue is -- is out because that's an
2 unreasonable application. And then you're going to have
3 a reviewing court say, notwithstanding, that the State
4 court found that there was a violation, we think that
5 there's a credible argument that there wasn't such that
6 we can support the judgment. Is that what you're
7 asking?

8 MS. URBANSKI: And that is correct. That is
9 how the scenario would play out, Your Honor. And I
10 recognize that that is a more --

11 JUSTICE KAGAN: It's a little bit
12 counterintuitive.

13 MS. URBANSKI: A little more challenging
14 case for sure. However, again, what a Federal court is
15 deferring to is the finality of the State court's
16 judgment. And on Federal habeas, the question is
17 whether the habeas can -- petitioner can meet his very
18 high burden of showing both clear error under this
19 Court's precedence and actual prejudice under Brecht.
20 And that does not depend on what the State court may
21 have thought about --

22 JUSTICE SOTOMAYOR: So why do we bother
23 saying in Williams that there are circumstances -- I
24 happen to think this one of them -- where -- and you do,
25 too -- where a State court hasn't reached an issue, that

1 we don't give it deference. Under your judgment, we
2 made a mistake when we said that in Williams.

3 MS. URBANSKI: No, your Honor, because
4 the -- what this Court also said in Richter is that you
5 look to the -- the decision of the claim as a whole.
6 You do not parse it into its components.

7 And here the decision on the claim as a
8 whole was that no relief was warranted because any error
9 did not rise to the level of a constitutional violation
10 such that the Defendant suffered sufficient harm to
11 grant relief.

12 So that is the decision that the -- that
13 resolves the claim, and that's --

14 JUSTICE SOTOMAYOR: Why do we apply AEDPA at
15 all? Meaning -- I think we've said repeatedly that
16 Brecht's actual prejudice standard is higher than the --
17 the AEDPA standard. So why are we applying it at all?

18 MS. URBANSKI: Your Honor, if -- if the
19 Court were to proceed directly to the question of
20 prejudice, then yes, Brecht would be the standard that
21 applies.

22 However, before you even get to that
23 question, the Court should look to what the State court
24 did here first and determine whether that was
25 reasonable. If it was unreasonable or if there was no

1 adjudication on the merits to begin with, then you reach
2 the second question.

3 JUSTICE SOTOMAYOR: Well, you've -- you've
4 already admitted there's sort of an illogic when the
5 State court says there was a Federal violation but no
6 harmlessness and we say, "Yes, there was harm."

7 MS. URBANSKI: No, your Honor. I don't
8 think there's an illogic. I actually think that the
9 rule is all the more logical when you look to the facts,
10 if there is a decision denying relief, and that is the
11 decision that is owed deference under AEDPA standard and
12 that is --

13 JUSTICE SOTOMAYOR: So we don't give it
14 deference that there was a Federal error. We don't say
15 it was a reasonable mistake but they found error and we
16 accept the error.

17 MS. URBANSKI: Correct, Your Honor, because
18 the -- what the State court may have thought about the
19 underlying issue on de novo review is not controlling
20 for purposes of AEDPA. That is a different standard.

21 JUSTICE KAGAN: I mean, would that -- would
22 that also apply -- I'm just sort of trying to figure out
23 the reach of this claim.

24 Just take a case where there was no
25 harmlessness determination. There was just a single

1 decision about a Batson claim, but it was an egregious
2 decision. It was, Hispanics aren't entitled to make
3 Batson claims, something like that, egregiously wrong.

4 But I guess under your theory, we just look
5 to the judgment and then we decide, there is a credible
6 way in which to say that this Batson claim was not a
7 good one and that we should defer to that; is that
8 right?

9 MS. URBANSKI: That's correct, Your Honor.
10 If there is a denial of relief, then that is all the
11 Federal habeas court needs to look to and then look
12 backwards and ask whether there was a reasonable basis
13 to support it, and that follows directly from this
14 Court's decisions in Richter and Williams.

15 There is no principled way to distinguish
16 between where a State court does precisely that in
17 silence and where the State court does it with a
18 reasoned decision.

19 JUSTICE SOTOMAYOR: We didn't do that in
20 Wiggins, Rompilla, or Porter, did we?

21 MS. URBANSKI: No, your Honor. Those are --

22 JUSTICE SOTOMAYOR: So we would have to
23 overturn those cases to accept your proposition.

24 MS. URBANSKI: The results in the cases
25 would not have to be overturned. However, to be sure,

1 this Court did apply a de novo standard of review to one
2 prong of a multiprong claim where the State court --

3 JUSTICE SOTOMAYOR: That the State had not
4 addressed?

5 MS. URBANSKI: Where the State court had
6 left it --

7 JUSTICE SOTOMAYOR: Identical to this case.
8 The State had not addressed one prong, and we said
9 de novo review.

10 MS. URBANSKI: Correct, Your Honor. And
11 those decisions, I would agree, cannot be reconciled
12 with this Court's later decisions in Richter and in Tara
13 Williams, which precisely addressed the issue of, what
14 do we do when the State court says nothing at all?

15 JUSTICE KENNEDY: We added the question,
16 whether or not -- and the Court of Appeals properly
17 applied the standards set forth in -- in Brecht.

18 Do you want to address that briefly? And
19 I -- if we get into the details of this case, it seems
20 to me that the key person is Olanders.

21 MS. URBANSKI: Yes, Your Honor. First of
22 all, with respect to the -- did the Court have a -- a
23 particular question about Olanders D.?

24 JUSTICE KENNEDY: Well, I want you to -- to
25 discuss that -- this argument.

1 MS. URBANSKI: Yes, Your Honor. Well, first
2 of all, with respect to the standard that is to be
3 applied in this case, the -- this Court did make clear
4 that it is the actual prejudice standard of Brecht that
5 is to apply in virtually all 2254 cases, and that is to
6 be the case regardless of whether the State court
7 conducted a Chapman analysis.

8 What the Ninth Circuit did here was take
9 this Court's language and say that it could apply the
10 Brecht standard without regard for the State court's
11 very careful analysis in this case.

12 Fry makes clear, though, that in order to
13 give effect to AEDPA's purpose in limiting the
14 availability of this extraordinary remedy and preserving
15 the finality of State court judgments, the Brecht
16 standard, properly understood and applied, is to be the
17 most protective of final State court judgments . It is
18 more protective than the AEDPA Chapman standard. It
19 subsumes that standard.

20 So what we were ask -- asking this Court to
21 clarify in this case with respect to how a Federal
22 habeas court is to apply the Brecht standard is that in
23 a case such as this one, where the State court has, in
24 fact, conducted a Chapman analysis and found an error to
25 be harmless, then the Federal court has to be able to

1 fairly say that the State court's Chapman analysis was
2 unreasonable.

3 If the Court cannot find the Chapman
4 analysis objectively unreasonable, then the prejudice
5 inquiry is at an end. And in this case, the Ninth
6 Circuit misapplied the Brecht actual prejudice standard.

7 The --

8 JUSTICE SOTOMAYOR: I have a bit of a hard
9 time with the -- this -- assume I accept your
10 proposition that it's actual prejudice.

11 In a process claim, generally, we don't talk
12 about what the outcome was going to be. We talk about
13 what the process was and whether there was an
14 opportunity for you to make arguments you couldn't have
15 made. All right?

16 That's our normal jurisprudence in a due
17 process claim. And we basically say you get a do-over
18 because you weren't permitted to have the process you
19 were entitled to. So you're saying we've got to treat
20 this differently under Brecht; this person wasn't
21 permitted to be there. I think there's some very
22 convincing arguments, potentially, on at least one
23 juror, Olanders. There, the comparison was not
24 speculative. It was based on the answers provided by
25 jurors who had both questionnaires and voir dire that

1 was available.

2 And the briefs point out -- and so does the
3 Ninth Circuit, very convincingly -- all the excuses
4 given by the prosecutor are rebutted by either identical
5 answers by one juror, Ana L. -- Ana or Ana L., or other
6 jurors who did exactly the same thing and were permitted
7 to sit on the jury.

8 So why are we doing anything different with
9 this actual prejudice standard?

10 MS. URBANSKI: Well, first of all, Your
11 Honor, anytime counsel is absented from a portion of the
12 proceedings or anytime a portion of the record winds up
13 missing, it is often going to be the case that you might
14 had a very different record had those things been
15 present. But the question before this Court on Federal
16 habeas is whether the California Supreme Court believed
17 that it had sufficient information before it from which
18 to meaningfully address the issue on appeal.

19 And with respect to Olanders D. in this
20 case, the prosecutor felt that Olanders D.'s answers
21 were not particularly responsive to the question, to the
22 questions being presented. The prosecutor's primary
23 concern was with Olanders D.'s ability to vote for the
24 death penalty, and the trial court conducted a
25 meaningful inquiry with the prosecutor and gave a

1 firsthand credibility determination.

2 JUSTICE SOTOMAYOR: But don't -- don't --
3 don't talk to me generally. Ana L. said more equivocal
4 things about the death penalty than Olanders D., so did
5 another juror, and they still went on.

6 MS. URBANSKI: Ana L. expressed that she had
7 changed her mind about the views on the death penalty,
8 similar to the fact that Olanders D. did. However, what
9 Ana L. said was that she hadn't given it a great deal of
10 thought until being called as a juror. And once she was
11 called as a juror to sit on a -- potentially, on a death
12 penalty case, she now sat down and considered the issue.
13 And after careful thought and consideration, she
14 believed that she, in fact, could make that decision if
15 called upon to do it.

16 JUSTICE SOTOMAYOR: That's what Olanders D.
17 said, essentially.

18 MS. URBANSKI: To the -- I would disagree
19 with that, Your Honor. Olanders D. specifically said on
20 the death -- on the questionnaire that he did not
21 believe in the death penalty.

22 JUSTICE SOTOMAYOR: So did she.

23 MS. URBANSKI: But now called into voir
24 dire, Olanders D. could not provide the prosecutor with
25 a satisfactory explanation for why his views had

1 changed.

2 JUSTICE SOTOMAYOR: He thought -- "I thought
3 about it and realized I -- I could."

4 MS. URBANSKI: The -- the -- Olanders D.'s
5 response at page 178 of the Joint Appendix, when
6 specifically asked what caused the change was, "I mean,
7 examining it more closely, I think -- and becoming more
8 familiar with the laws and the behavior, I mean, the
9 change in people, I think."

10 That is a far -- a significantly different
11 response than somebody coming in and saying, "This case
12 caused me to think about it, and now that I have been
13 forced to think about it, I believe that I can choose
14 this as the penalty. "

15 JUSTICE SOTOMAYOR: That -- you see the two
16 of them substantially different? One said, "I thought.
17 I've listened to what the law is. I've done" -- it's
18 hard for me to imagine how they're substantively
19 different.

20 MS. URBANSKI: I think --

21 JUSTICE SOTOMAYOR: And do you think that
22 defense counsel wouldn't have been able to point that
23 out to the judge?

24 And, you know, there were a lot of people
25 questioned in this.

1 How many days of voir dire was there?

2 MS. URBANSKI: I believe it was three --
3 three weeks of voir dire.

4 JUSTICE SOTOMAYOR: Three weeks of voir
5 dire. Do you suspect that the judge, or think that the
6 judge had clearly in mind every set of questions, and
7 their responses.

8 MS. URBANSKI: Well, the California Supreme
9 Court did credit this judge as being very diligent, very
10 well-respected --

11 JUSTICE SOTOMAYOR: It's clear he was. I'm
12 not doubting that. But my point is simply, do you think
13 that pointing this out to the judge could not have had a
14 substantial influence on his decision? Because all
15 three prongs, he could have pointed to almost identical
16 comments by other jurors.

17 MS. URBANSKI: I would disagree that the
18 comments would have been identical. I think that there
19 are substantial differences between Olanders D.'s
20 unconvincing answers and the very convincing answers of
21 the other jurors.

22 And in any event, what we look to is what
23 the trial court, and then subsequently, the California
24 Supreme Court, had before it at the time that this
25 decision was made. The trial court, as the

1 prosecutor -- while the prosecutor is making these
2 race-neutral proffers, is -- has the benefit of the
3 questionnaire responses right in front of him. The
4 trial court has all of the information in front of it,
5 from which it can make a credibility determination based
6 on this record.

7 There is no reason to believe that the trial
8 court was considering anything less, than all of the
9 information available to it, and there is no reason to
10 believe that defense counsel would have had any
11 substantial impact in pointing things out that the trial
12 court already had before it.

13 The Ninth Circuit here, in its application
14 of Brecht, demonstrating that it was not applying that
15 standard in a manner consistent with this Court's
16 opinions. Brecht speaks to actual prejudice. It does
17 not speak to the kind of prejudice analysis like the
18 Ninth Circuit did in this case, which was marred by
19 speculation and hypothesis, where the court of appeals
20 is hypothesizing about what a prospective juror might
21 have been wearing, or whether he was gathering
22 prospective jurors for a social outing.

23 The Ninth Circuit used a debatable set of
24 inferences in this case, to set aside the conclusion of
25 the State court that a prospective juror's following of

1 a very controversial trial out of San Diego, where the
2 very D.A.'s office and police department that were
3 investigating and trying Mr. Ayala's case, were the
4 subject of serious misconduct allegations and suggesting
5 that somehow a prosecutor basing his reasoning on that,
6 was a pretext for a racial discrimination challenge.

7 The trial -- the Ninth Circuit gave no
8 credit to the trial court's firsthand observations in
9 which the trial court found this prosecutor to be
10 credible, and this was not a trial court that simply
11 accepted the prosecutor's reasons at face value. This
12 was a trial court that was discerning and critical of
13 the prosecutor's reasons, and even disagreed with him at
14 times.

15 And when you look -- compare what the
16 California Supreme Court did here, the California
17 Supreme Court did it right. It credited the trial
18 court's firsthand observations. It looked at the
19 colloquy between the prosecutor and the trial judge and
20 found support for each of those individual's assertions
21 in the record.

22 The court was confident that the prosecutor
23 had not exercised challenges based on race in this case.
24 The State court analyzed the very same --

25 JUSTICE SOTOMAYOR: How can you be

1 confident? I mean, the whole purpose of an adversarial
2 system is so that the other side of an argument is
3 presented to the judge. Was he playing defense attorney
4 too? Is that -- and defense attorney with the same
5 purpose?

6 MS. URBANSKI: Not literally, no, Your
7 Honor. However, certainly the trial court must consider
8 all of the information before it. And so it was looking
9 at the very same things for --

10 JUSTICE SOTOMAYOR: Then I -- why don't we
11 just have a trial ex parte? Presumably that's what
12 you're arguing.

13 MS. URBANSKI: I'm sorry?

14 JUSTICE SOTOMAYOR: We should have the
15 entire trial ex parte, because the judge can do that.

16 MS. URBANSKI: No, Your Honor, certainly we
17 would prefer the counsel --

18 JUSTICE SCALIA: I thought you were arguing
19 the much narrower point that the absence of counsel for
20 this one incident was harmless.

21 MS. URBANSKI: That's correct, Your Honor.

22 JUSTICE SCALIA: You're not arguing
23 for ex parte trials?

24 MS. URBANSKI: No, Your Honor.

25 JUSTICE SCALIA: I didn't think so.

1 MS. URBANSKI: We certainly don't condone
2 that approach here, and there is -- we certainly don't
3 condone that approach here. The --

4 CHIEF JUSTICE ROBERTS: Anywhere -- anywhere
5 else?

6 (Laughter.)

7 MS. URBANSKI: No, no. We would certainly
8 prefer the defense counsel be present, Your Honor.

9 JUSTICE SOTOMAYOR: I guess my question is,
10 the Ninth Circuit, at least with this juror -- I'm not
11 talking about the other things, I'm talking about this
12 juror -- as I pointed out earlier, pointed out two
13 situations that were almost identical to the one that
14 the op -- the prosecutor pointed to with this juror.
15 Anna L. also said something that was totally
16 nonresponsive to a question; it was like, "that's
17 correct," rather than answering the question.

18 So you can say with complete confidence that
19 that would never have made a difference to the judge?
20 If he had had a real adversary able to point all of
21 these things out, you're confident the judge would not
22 have made up his mind. That's what you're saying.

23 MS. URBANSKI: Based on the record in this
24 case and what the trial judge had before him and the
25 fact that this was a critical trial judge, yes. I think

1 the California Supreme Court had an ample record before
2 it from which to conclude that defense counsel's
3 presence would not have made a difference in this case,
4 and I would go back --

5 JUSTICE SOTOMAYOR: No, there -- there's a
6 real problem here, you do understand. We're only
7 pointing to the things for which there is a record.
8 There is another component to this, which is that all
9 the other questionnaires and the entire transcript
10 wasn't available.

11 MS. URBANSKI: That is true, Your Honor.
12 And certainly, anytime counsel is absent or anytime a
13 portion of the record is missing, it will be the case
14 that it is possible that the record might have been
15 different. But what we should look to is what was left
16 in the record, and what was left was a -- was thousands
17 of pages of a voir dire transcript. It was all of the
18 questionnaires of the seated jurors, which are the most
19 important ones for purposes of comparative analysis, and
20 the firsthand observation --

21 JUSTICE SCALIA: Three weeks, is that
22 standard? Three weeks? Is that standard out there?

23 MS. URBANSKI: It's a lengthy voir dire,
24 Your Honor.

25 JUSTICE SCALIA: Good Lord.

1 (Laughter.)

2 MS. URBANSKI: If I may -- can reserve the
3 remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Dain.

6 ORAL ARGUMENT OF ANTHONY J. DAIN

7 ON BEHALF OF THE RESPONDENT

8 MR. DAIN: Mr. Chief Justice, and may it
9 please the Court:

10 Let me start by answering the question that
11 Justice Scalia, Justice Sotomayor and Justice Kagan
12 asked when this first began. And, that is, yes, this
13 was an adjudication on the merits, based on the
14 harmlessness determination. The reason the State wants
15 to address the first prong in the first instance, is
16 because it wants to create the fiction that by treating
17 this holistically, the California Supreme Court actually
18 found no Federal error, and that is what this Court must
19 grant deference to.

20 So let's start with the second question.
21 The second question is the question at heart: Was
22 Brecht applied appropriately? And we only get to that
23 in the -- the general context, if there was an
24 unreasonable determination of Chapman by the State
25 Supreme Court. And the Ninth Circuit said, we grant

1 deference on that point to the California Supreme Court.

2 I'll address Olanders D., but let me even
3 show you why this is case closed in an overarching
4 pretext by the prosecutor, that led to all the harm in
5 this case.

6 When the trial court asked the prosecutor to
7 State his race-neutral reasons, the first words out of
8 the prosecutor's mar -- mouth, were pretext, active
9 pretext, using a shield as a sword.

10 The prosecutor said, and I quote, We can do
11 that but we will do it in chambers, because they have no
12 right -- the defense -- to our strategy. That was
13 pretext.

14 The prosecutor was stating on an overarching
15 level for Olanders D., Galileo S. -- or Galileo,
16 Barbara S., Gerardo O., and the others, that his primary
17 reason for challenge was strategy. And that was
18 pretext. The trial court, which the State says we
19 much -- must give great deference to because it
20 conducted credibility determinations, didn't question
21 that. Defense counsel was primed to question that
22 because defense counsel responded: But we have a right
23 to be present, to hear that statement, in case the
24 prosecution is misstating the facts.

25 JUSTICE ALITO: I don't -- I don't really

1 understand what you're saying. Maybe it was wrong to
2 have this in camera, but why was the statement that we
3 don't want to disclose our strategy a statement that --
4 that challenges that -- that the challenges that I'm
5 going to make are going to be pretextual?

6 MR. DAIN: Because when the prosecution
7 said, I'll give you my reasons, but I don't want my
8 adversary -- I don't want my adversary to be present to
9 test this in the crucible of an adversarial situation,
10 which is what the Constitution requires. When he says,
11 my reasons for challenging these jurors involves
12 strategy, it's a pretext. It did not involve strategy.

13 JUSTICE ALITO: I don't understand that.
14 When you -- when you're trying a case and you're
15 deciding which jurors to exercise peremptory challenges
16 against, do you not take into account what your defense
17 is going to be? What your defense strategy in the case
18 is going to be.

19 MR. DAIN: You might -- you might, but from
20 Georgia v. McCollom to -- in this case, the State court
21 analyzed it under its own State law equivalent.
22 Strategy is not why you would say I don't like this
23 person or I don't trust this person, he doesn't dress
24 right, he doesn't fit in. The courts have said all of
25 those are reasons for which the defense counsel can,

1 should participate and respond.

2 Strategy involves a much more deep analysis
3 that is very rare as this Court has said in prior cases.
4 It's in the rare instance. It's very rare. This isn't
5 a general argument that everything I do is strategy, but
6 the prosecutor was saying it involves strategy which is
7 a very rare situation. And in none of -- as the
8 California Supreme Court recognized, none of his
9 statements involved strategy.

10 So at a minimum, the State says we must
11 credit and give deference to not only the trial court,
12 but the California Supreme Court's credibility
13 determinations. If, as the California Supreme Court
14 found, in determining error that it was not credible,
15 that we -- that strategy was not involved, then a
16 credibility determination was not made. And
17 furthermore, the trial court missed that. Defense
18 counsel said, I don't want to be involved in their
19 strategy, but I want to hear the statement because I
20 want to be present to tell you it's a misstatement.
21 Why have we instruct our --

22 JUSTICE SOTOMAYOR: Give an example of a
23 strategy.

24 MR. DAIN: The trial strategy might be I'm
25 calling -- in near cases of this -- might be calling an

1 informant, and this informant might be living in the
2 same neighborhood as this person. I don't want this
3 person on there. Trial strategy might be that I'm going
4 to be calling a witness who dresses in exactly the same
5 way as that witness and again --

6 JUSTICE SOTOMAYOR: As that juror.

7 MR. DAIN: As a juror. I'm sorry. There
8 could be very deep levels of that. But the California
9 Supreme Court astutely recognized that was not the case.
10 More importantly, it specifically, in opposition to
11 Chief Justice George in dissent, said that the
12 strategy -- that -- that the lack of strategy was error.
13 What it didn't recognize -- and this is why there was an
14 unreasonable application of Chapman.

15 JUSTICE ALITO: Well, let me give you an
16 example. Let's say your defense strategy is going to be
17 that the police officers planted incriminating evidence.
18 All right? And if that's going to be your defense
19 strategy, will you not be particularly diligent in
20 exercising your peremptory challenges to try to get rid
21 of anybody who seems to have sympathy or an
22 identification with the police. That's a strategy.
23 It's not pretextual.

24 MR. DAIN: Two --

25 JUSTICE ALITO: Now, there may not have been

1 that here. The prosecutor may not have had a strategy
2 like that. I -- but I just don't understand this
3 argument that you're making, that merely stating I don't
4 want to disclose to my adversary what my trial strategy
5 will be is a confession that I am going to exercise
6 peremptory challenges pretextually, and I just don't
7 want defense counsel there to call me on it.

8 MR. DAIN: Well, let me take that from the
9 beginning. The answer to your question is, no, that's
10 not a trial strategy in the context of the cases.
11 Everything's a strategy. How -- you could argue
12 strategy is what order I'm going to call the witnesses
13 in.

14 The reason it's not a strategy, and
15 certainly not a reason for an ex parte communication, is
16 defense counsel would already know that. The witness
17 would have been listed; discovery would have been given.
18 That would have been in the police reports. So let --
19 I -- I want to be careful we don't confuse just the
20 general strategy every attorney has in approaching a
21 case with what --

22 JUSTICE SOTOMAYOR: Prosecutor doesn't have
23 to say, it's because of planting of police, the pros --
24 of planting of evidence is going to be at issue. He
25 could just say, I don't like people who distrust the

1 police.

2 MR. DAIN: He absolutely could, and that
3 could be heard by the defendant. It is --

4 JUSTICE SOTOMAYOR: Actually, it's said
5 quite often.

6 MR. DAIN: It is a strategy, but that's not
7 the trial strategy we're talking about that in the rare
8 instance, as this Court has said, would require an ex
9 parte communication.

10 CHIEF JUSTICE ROBERTS: Could you at the
11 other side -- I understand the idea that you're saying
12 that just, you know, basically you'd like jurors who are
13 going to be sympathetic with your case. You say that's
14 not a strategy, but what's the -- what is a strategy?
15 An example of that?

16 MR. DAIN: No. And again, that's why I'm
17 saying trial strategy isn't in the broad sense. Trial
18 strategy is something that really is truly confidential.
19 Like, I have -- you could say in a domestic violence
20 case, I have a witness that is afraid to testify but may
21 have some connection or knowledge that pay -- that
22 person may know the witness. I need to tell the judge
23 that in camera and say, I can't take that risk. It
24 could be a gang case where you have informants. It's a
25 rare situation is what they're talking about.

1 JUSTICE KENNEDY: Well, even -- even if the
2 strategy was an overblown statement by the prosecutor.
3 Suppose that in this case defense counsel is absent, but
4 what the juror says is clearly grounds for the
5 prosecutor to -- excuse me, the juror says I've thought
6 about this. I can't -- I don't believe in the death
7 penalty supposedly. That's the hypothetical. That's
8 not this case.

9 MR. DAIN: Of course.

10 JUSTICE KENNEDY: Then we still look to see
11 whether or not there was harmless error.

12 MR. DAIN: And I'm going to get to that.
13 Absolutely.

14 JUSTICE KENNEDY: And it's true that the
15 harmless error in this case loops back in your -- your
16 concern that there was not full cross-exam. So they
17 come together a bit. But it does -- it does seem to me
18 that this district judge exercised care in listening to
19 the answer. And we are required -- the Federal courts
20 are required under Brecht to give very substantial
21 deference to that finding. So if you could address
22 that.

23 MR. DAIN: And that's what -- what I'm going
24 to say in addressing that. You do start with the
25 premise that, as the California Supreme Court said,

1 there was no strategy. So -- so that's the pretext I'm
2 talking about. If you start with that, that was missed
3 by the trial court and only discussed in terms of error
4 by the California Supreme Court, the California Supreme
5 Court should have said in its harmless error analysis, I
6 start with the reason defense counsel was excluded was
7 pretextual whether -- or was false. Was false.

8 JUSTICE SCALIA: That goes to whether there
9 was a violation --

10 MR. DAIN: No.

11 JUSTICE SCALIA: -- not to whether the
12 violation was harmless or not.

13 MR. DAIN: I disagree. And let me -- and
14 let me state why.

15 The fact that you're assessing, as the State
16 says, the credibility of the prosecution's reasons, if
17 the prosecution starts with the reason that is false,
18 saying, I don't even want my adversary in the room. And
19 he didn't say it like, Your Honor, I have concerns. Can
20 I discuss them? He said, we'll do it, but not in their
21 presence.

22 The State caused the removal of defense
23 counsel, and if we just take Olanders -- Olanders D.
24 Anna L. not only had questions, she responded to
25 virtually identical, she actually said she would be a

1 holdout. She made a statement if the other jurors voted
2 for death, I might not. In fact, I think she said I
3 would not. Olanders D. --

4 CHIEF JUSTICE ROBERTS: But the problem with
5 that -- I mean, you're looking at -- and we have said
6 this often in Batson type cases. You're looking at a
7 cold transcript. You don't know what the difference in
8 intonation was. You don't know if Olanders is saying,
9 yeah, you know, I thought about it, and blah, blah,
10 blah, blah. And the other one is saying, I thought
11 about it -- about this trial, and now -- I mean, you
12 know, we don't know that.

13 MR. DAIN: But that serves our purpose.
14 That serves our purpose because what we didn't have is
15 the adversarial crucible. We didn't have defense
16 counsel saying exactly what you said, well, wait a
17 minute --

18 JUSTICE KENNEDY: Suppose the defense
19 counsel were present and the -- a transcript said
20 exactly what it says here. Defense counsel made no
21 objection. It seems to me that that's how you have to
22 analyze this case because we're -- we're assuming no
23 error.

24 MR. DAIN: The -- what you --

25 JUSTICE KENNEDY: Now, I -- I understand

1 that it would have been a much better record if the
2 counsel were there. That's the reason why there's a
3 likely error here under a matter of law, but we're
4 talking about the harmlessness, the -- the deference that
5 must be given to the State judge.

6 MR. DAIN: Absolutely. And the deference
7 under Brecht, and I would even say under Richter,
8 requires a fair and balanced playing field. At least
9 you have to start every case from Feltner -- every case
10 that has addressed Batson has had a level playing field.
11 All the participants have contributed, and there was a
12 complete record.

13 But the reason I'm saying this is prejudice
14 is it was the State that actively corrupted the record.
15 The State excluded the defendant. So now the State
16 turns around and says, well, you're speculating. It
17 caused the need to speculate. And what I'm saying is if
18 the California Supreme Court had taken into account in
19 its prejudice analysis that it was the State, through a
20 pretext, that excluded the defendant, we wouldn't have
21 to speculate. We wouldn't have what -- what is a
22 corrupt record.

23 JUSTICE SOTOMAYOR: Well, we're speculating
24 the judge would not -- that defense attorney remained
25 silent or that defense attorney --

1 MR. DAIN: No.

2 JUSTICE SOTOMAYOR: Either way. We would be
3 speculating if defense attorney remained silent, or we'd
4 be speculating that the judge would have ruled the same
5 way. The question is on this record.

6 MR. DAIN: Had he ruled the same way -- had
7 defense counsel participated and he ruled the same way,
8 we would have a Batson challenge in substance, not, as
9 Your Honor has recognized, a procedural issue. At that
10 point, all this Court has said, all we can do is say
11 would it have likely changed the outcome, we can't
12 speculate either way. But the problem is it's the State
13 that caused that and that's the prejudice. The State
14 caused the inability to have a complete record,
15 actually, in two ways, it also lost, inadvertently in
16 that instance, it lost the Miller-El v. Dretke
17 opportunity through the questionnaires.

18 But the State actively caused the exclusion
19 of defendant, it caused the inability to have a complete
20 record, and that's different from merely saying that
21 there was an ex parte proceeding but we followed it
22 up --

23 JUSTICE KENNEDY: Well, I'll go back and
24 look at this. I did not think that this was really the
25 basis for the Ninth Circuit's conclusion that Olanders'

1 testimony showed that he was improperly excused, I just
2 don't see --

3 MR. DAIN: Or it's -- I can give you that.

4 JUSTICE KENNEDY: I mean, it's a long
5 opinion but Page 678 talks about Olanders just in the
6 term that we're talking about.

7 MR. DAIN: It said -- the prosecutor had
8 said that he was not responsive -- the Ninth Circuit, to
9 address your question, Justice Kennedy. The Ninth
10 Circuit said that in its review of the existing
11 transcript, he was very responsive.

12 So there -- there was a disagreement there.

13 JUSTICE KENNEDY: He meant --

14 MR. DAIN: The Court disagreed with the
15 statement that he wouldn't fit in. The Court said, I
16 believe he would fit in with the rest of the --

17 JUSTICE SOTOMAYOR: Well, the trial court
18 said that.

19 MR. DAIN: I'm sorry, but the Ninth Circuit
20 pointed out the trial court said that. So the reason
21 Olanders D is so compelling is because the trial court
22 itself questioned some of the prosecutor's reasons, but
23 there were others.

24 For instance, the prosecutor said the
25 questionnaire indicated he opposed the death penalty.

1 We actually don't have the questionnaires because
2 they're gone. We have to take it at its word that it
3 did. Defense counsel again, had the prosecutor not
4 proactively excluded him, might have said, well, the
5 questionnaire said A, B, C. We might have had a
6 complete record --

7 JUSTICE SOTOMAYOR: That's speculation.
8 What the Ninth Circuit did with Olanders B is point to
9 the actual existing record --

10 MR. DAIN: Understood.

11 JUSTICE SOTOMAYOR: -- and show that there
12 were contradictions to -- in the record as it existed.

13 MR. DAIN: And that's what our argument --
14 you can even take the existing record and show the
15 inconsistencies that show Chapman was not appropriately
16 applied.

17 JUSTICE ALITO: Of course it's speculative
18 that defense counsel, had defense counsel been present,
19 would have been able to point to the other juror, Anna.
20 We've had a number of cases where defense counsel was
21 present at the voir dire, which I think should be the
22 rule in almost every situation, and only later, years
23 later on appeal when -- as particularly when you have
24 many, many jurors questioned, as apparently was the case
25 here, does somebody realize, well, this juror who was

1 dismissed, has answers seem to be somewhat similar to
2 this other juror who -- who wasn't challenged.

3 MR. DAIN: And then had that been the facts,
4 we lose, under AEDPA, we lose. Because you do have to
5 give deference under AEDPA to the California Supreme
6 Court. I agree.

7 JUSTICE ALITO: But what reason is there to
8 think that defense counsel would have had better recall
9 of this than the trial judge who was there?

10 MR. DAIN: Defense counsel -- first of all,
11 there were two of them. First of all, they're more
12 focused on each of the jurors that were excused. The
13 judge had -- as the Ninth Circuit noted, there were 70
14 questions for each of these questionnaires, they
15 involved 17 pages. The judge had to take -- and he may
16 have had his own notes that he thought were important,
17 they may have been complete or not incomplete. A judge
18 certainly has many more tasks that don't involve just
19 the direct advocacy, as defense counsel has. But that's
20 when I add, it's the prosecution, the State that caused
21 that. And then uses its sword to say, well, now you're
22 speculating.

23 We can do nothing more. But with Olanders D
24 on the existing record, we can show that was wrong. The
25 reason I'm saying it was unreasonable is because the

1 Court should have taken into account in prejudice that
2 there is a lack of credibility when a prosecutor comes
3 in and causes all these problems and the State Supreme
4 Court says, and that wasn't correct. There was no
5 strategy involved here. By the way, they use -- the
6 Courts use the term "strategy" and "confidential
7 information." Those are generally tied. They're used
8 where you have informants, they're used where you have
9 gang activity, very rare circumstances that occurs.

10 But how -- even if you said under Richter,
11 how can any reasonable judge or justice disagree that if
12 the State, through a false basis, excluded defense
13 counsel, eliminated defense counsel from challenging the
14 questions and assisting the judge where the judge didn't
15 recognize that -- that strategy was not involved,
16 prevented further voir dire which might have corrected
17 the situation, prevented a proper record and then later
18 lost all of the ability to do a comparative analysis,
19 could be harmless, I'm -- and let me even use in the
20 Brecht standard, this Court has eloquently said that --
21 and if you'll give me a moment of unprofessionality
22 while I shuffle my pages -- but this Court has said that
23 it undermines the very integrity of the court system.

24 And in McCollom, it actually described that
25 it -- it may be obvious to the jury, it undermines the

1 parties' understanding and the Court's ability to -- to
2 maintain integrity through the entire trial. So under
3 Brecht, this error caused injury to the jury verdict.
4 And, moreover, the questionnaires are lost, even Brecht
5 can't address that, because they were lost post verdict.

6 But under any standard, there was an
7 unreasonable application of Chapman by the State Supreme
8 Court and it had actual prejudice in this case. Justice
9 George in his dissent was correct. How can anybody
10 credit this record? It wasn't accidental. It wasn't as
11 though defense counsel were arguing defense counsel was
12 in -- ineffective. The State caused this. And it
13 didn't cause it through inadvertence, it actively
14 insisted that it would do this only in chambers, in
15 camera.

16 And going back to Cronin and going back to
17 Wade, this was a critical portion. Forget ex parte,
18 there are many times you can do ex parte proceedings if
19 you make a proper record. They're all rare, but there
20 are times you can do them. But in this instance, in the
21 critical Batson phase, to exclude the defendants -- I
22 use pretext -- it's a false statement that the
23 prosecutor gave that it was strategy. That's
24 prejudicial.

25 It's prejudicial under Brecht, and it's

1 certainly prejudicial under Richter. Thank you, Your
2 Honors.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 JUSTICE KENNEDY: This doesn't relate to the
5 issues you've been arguing. This crime was, what,
6 30 years ago and the trial 26 years ago?

7 MR. DAIN: 1996, yeah, very close.

8 JUSTICE KENNEDY: Has he spent time in
9 solitary confinement, and, if so, how much?

10 MR. DAIN: He has spent his entire time in
11 what's called administrative segregation. When I visit
12 him, I visit him through glass and wire bars.

13 JUSTICE KENNEDY: Is that a single cell?

14 MR. DAIN: It is a single cell. They're all
15 single cells. Well, San Quentin is on the most -- it's
16 on Heaven's land in Marin County. It's a 150-year-old
17 prison and their administrative segregation is single
18 cells, a very old system, very small, and -- and -- you're
19 not allowed

20 JUSTICE KENNEDY: Is it the same thing as
21 solitary confinement?

22 MR. DAIN: No, it's 23 hours out of the day,
23 that probably is the same. They generally --
24 administrative segregation you're not allowed in the
25 general yard anymore. But you are allowed an hour a

1 day --

2 JUSTICE KENNEDY: One hour.

3 MR. DAIN: -- of activity.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. DAIN: Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Four minutes,

7 Ms. Urbanski.

8 REBUTTAL ARGUMENT OF ROBIN URBANSKI

9 ON BEHALF OF PETITIONER

10 MS. URBANSKI: Thank you, Mr. Chief Justice:

11 Just a few brief points. First of all, with
12 respect to the prosecutor stating that he believes he
13 would reveal trial strategy, there is no reason to think
14 that that was any kind of a pretext for then exercising
15 peremptory challenges on the basis of race. The trial
16 court never found this prosecutor to be anything less
17 than credible, and that determination is entitled to
18 great deference in a Federal habeas collateral
19 proceeding.

20 With respect to Olanders --

21 JUSTICE SCALIA: What was the trial strategy
22 that displayed itself in his strikes?

23 MS. URBANSKI: I cannot tell the Court what
24 it was, but I don't think there is any reason to take
25 the trial -- the prosecutor at anything less than his

1 word. We don't have anything in the record to refute
2 it. Certainly that is not what ended up happening, but
3 it is also not a reason to suggest that this was a
4 pretext for race.

5 With respect to Olanders D, this juror gave
6 responses that were not only not responsive, but they
7 were responses that would cause any prosecutor to have
8 doubt about that particular juror serving on a capital
9 case. There were clearly grounds for the prosecutor to
10 have wanted to excuse that juror.

11 But most importantly, the California Supreme
12 Court looked at this record and it found support for the
13 assertions in the record; with respect to Olanders D.,
14 that appears at Petition Appendix page 203a.

15 What we have here is the Ninth Circuit
16 substituting its own view without ever showing how the
17 State court was objectively unreasonable in its
18 analysis. We have a State court here that analyzed the
19 very same harmlessness question under a much higher
20 standard, the Chapman standard, and found no harm. And
21 to proceed without regard for the State court's very
22 careful determination in that regard seems antithetical
23 to the spirit of AEDPA.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 12:00 p.m., the case in the
3 above-entitled matter was submitted.)

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