

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY UTTECHT, SUPERINTENDENT, :

4 WASHINGTON STATE PENITENTIARY, :

5 Petitioner :

6 v. : No. 06-413

7 CAL COBURN BROWN. :

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9 Washington, D.C.

10 Tuesday, April 17, 2007

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:00 p.m.

15 APPEARANCES:

16 JOHN J. SAMSON, ESQ., Assistant Attorney General,
17 Olympia, Wash; on behalf of Petitioner.

18 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting Petitioner.

22 SUZANNE LEE ELLIOTT, ESQ., Hartford, Conn; on behalf of
23 Respondent.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument next
4 in 06-413, Uttecht versus Brown.

5 Mr. Samson.

6 ORAL ARGUMENT OF JOHN L. SAMSON,

7 ON BEHALF OF PETITIONER

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

10 The Ninth Circuit's conclusion that
11 Mr. Brown is entitled to habeas corpus relief should be
12 reversed for three reasons. First, under Section
13 2254(3)(16) of the Anti-Terrorism and Effective Death
14 Penalty Act the trial judge's dismissal of Mr. Deal from
15 the jury is a finding of fact of substantial impairment
16 that is presumed correct unless it is rebutted by clear
17 and convincing evidence. Mr. Brown has not presented
18 such evidence because the record before the State court
19 supports the decision to remove Mr. Deal, especially
20 since the trial judge had the opportunity to observe
21 Mr. Deal and the defense had no objection to his
22 removal.

23 Second, under 2254(d)(2) the State court
24 decision was based on a reasonable determination of the
25 facts. Since the finding of fact was correct it is

1 necessarily reasonable.

2 And third, under 2254(d)(2), the State court
3 decision was not contrary to Supreme Court precedent.
4 Since the trial court applied the correct standard under
5 Witt and found as fact that Mr. Deal was substantially
6 impaired and this case is immaterially indistinguishable
7 from Witt, the State court's decision was a reasonable
8 application of clearly established Federal law.

9 Mr. Deal did indicate in the voir dire that
10 he could impose the death penalty and consider it, but
11 his other statements created an ambiguity which the
12 trial judge was in the best position to resolve.

13 JUSTICE SOUTER: Counsel, may I ask you one
14 thing, which I have assumed, and I think it is correct,
15 but I'd like to be sure of it. Is it the case, is it
16 correct, that prior to the voir dire questions, no one
17 had given a statement to the venire people of what the
18 law was with respect to the imposition of the death
19 penalty; is that correct?

20 MR. SAMSON: Not exactly, Your Honor. Prior
21 to the individual voir dire, they were -- there was
22 instructions given to the jurors. Prior to the filling
23 out of the questionnaire.

24 JUSTICE SOUTER: Were they told what the --
25 I forget how many factors are enumerated under the

1 Washington law? Were they told what they were?

2 MR. SAMSON: No, Your Honor, it was more a
3 general instruction regarding how the system operates.

4 JUSTICE SOUTER: Okay.

5 MR. SAMSON: In the individual voir dire of
6 Mr. Deal --

7 JUSTICE GINSBURG: But one piece of
8 evidence that -- one piece of information that wasn't
9 given apparently to those jurors, they didn't know about
10 it, was that life meant life without parole. Because
11 when he was questioned, he was surprised, he didn't know
12 that that was the law.

13 MR. SAMSON: Your Honor, he learned an hour
14 before his questioning that that was the law. He was
15 not informed of that -- of tht law when he filled out
16 his questionnaire. But approximately an hour before the
17 individual questioning, he was informed of that, and he
18 indicated that in his questioning that he had just
19 learned an hour ago.

20 CHIEF JUSTICE ROBERTS: And how did he learn
21 that?

22 MR. SAMSON: He learned that from the
23 instructions given by the trial judge as well as through
24 the statements by defense counsel and by the prosecutor.

25 And the defense counsel reminded Mr. Deal of

1 the fact that there was life without parole. She asked
2 him if he can consider both options, death and life
3 without parole. He said he could. And then defense
4 counsel asked why do you think the death penalty is
5 appropriate? And he stated again, as he stated in his
6 questionnaire, it would be a case where the person was
7 incorrigible and would reviolates if rereleased.

8 JUSTICE GINSBURG: He gave that as an
9 example. He didn't say and that's the only circumstance
10 in which I be willing to vote for the death penalty.

11 MR. SAMSON: That is correct, Your Honor,
12 but the prosecutor in viewing Mr. Deal's responses
13 through the course of the voir dire, the prosecutor
14 viewed Mr. Deal as saying the only time, or I would have
15 great difficulty in imposing the death penalty, unless
16 the person would be released and would be in a position
17 to -- to reoffend or kill again.

18 JUSTICE SCALIA: Did he say, "for example,"
19 with regard to the quotation that Justice Ginsburg
20 mentioned? I didn't recall that he said for example.

21 JUSTICE GINSBURG: He was asked to give an
22 example. He didn't say for example. But he didn't say
23 this would be the only situation in which I would vote
24 for the death penalty.

25 MR. SAMSON: That is, that is correct. Both

1 -- both are correct, Your Honors. At Joint Appendix 62,
2 he was asked for an example of why he believed the death
3 penalty was appropriate, and he says, "I think if a
4 person is or would be incorrigible and would reviolates
5 if released, then it would be appropriate."

6 And, in fact, the only two examples he ever
7 gave of when he believed it would be appropriate is when
8 a defendant wants to die or a defendant would be
9 released on parole and could kill again. And the
10 prosecutor specifically asked Mr. Deal, can you think of
11 an example, or a situation of when you would be able to
12 impose a death penalty now knowing there is life without
13 parole, and Mr. Deal at Joint Appendix 71 to 72 said I
14 would have to give that some thought. Like I said up
15 until an hour ago I did not realize that life without
16 parole was --

17 JUSTICE KENNEDY: Would you agree that if we
18 grant your position and grant you relief, that it would
19 be something of an extension over Witt and Darden, in
20 that the jurors in Witt and Darden had fixed views, that
21 they were as a matter of conscience opposed to the
22 penalty?

23 MR. SAMSON: Your Honor, I would agree that
24 the statements given by the jurors in Witt and Darden
25 were not exactly what Mr. Deal said. But I think the

1 general rule that the deference given to the trial judge
2 would be the same rule. And we are only asking this
3 court to apply the rule.

4 JUSTICE KENNEDY: I understand that. But I
5 do think that the views of this juror, Deal, were
6 somewhat more equivocal than in the cases I've
7 mentioned.

8 MR. SAMSON: They were, Your Honor. There
9 was not a statement as in Witt and Darden where the
10 jurors said that they had an opposition to the death
11 penalty and would have difficulty applying it. That is
12 correct. The statements were -- were different.

13 And certainly if the judge viewing a juror
14 of this type determined that the juror was not impaired,
15 then that decision would also be entitled to deference.
16 In fact, an example occurred in this case, Juror Obeso,
17 the judge -- there was a challenge by the prosecutor.
18 There was actually an objection by the defense. And the
19 judge said Mr. Obeso says that he can follow the law and
20 impose the death penalty and I think he can.

21 CHIEF JUSTICE ROBERTS: One thing I couldn't
22 clearly discern from your brief is the significance you
23 attached to the defendant's, defense failure to object.
24 How does that enter into our analysis?

25 MR. SAMSON: Your Honor, there's two points

1 made from the failure to object. The first is it
2 explains why there's no evidence, expressed evidence
3 regarding demeanor or credibility or even an express
4 statement regarding demeanor or credibility or even an
5 express statement as to substantial impairment.

6 The second is that as the Court stated in
7 Witt, it is a significant factor the court may consider
8 in its evidence that show the judge acted appropriately.

9 JUSTICE KENNEDY: It seems to me on that
10 point that the State is somewhat surprised and
11 whipsawed. And I understand that the Washington court
12 reached the issue. It is not independent State ground.
13 I take it the prosecutor had some peremptories left?

14 MR. SAMSON: Yes, Your Honor. The
15 prosecutor had two.

16 JUSTICE KENNEDY: How late in the process
17 was -- was Deal considered? Was he one of the early
18 jurors or one of the late jurors?

19 MR. SAMSON: He was one of the -- the early
20 jurors. He was on November 3, which was about five to
21 six days into the individual voir dire on the death
22 qualification.

23 JUSTICE KENNEDY: This was about a 17 day
24 voir dire?

25 MR. SAMSON: That is correct, Your Honor.

1 And --

2 JUSTICE KENNEDY: Well, that cuts a little
3 bit against the peremptory. I mean, if it was early in
4 the game the prosecutor might not have exercised the
5 peremptory.

6 MR. SAMSON: Well the peremptories were not
7 exercised until the death qualification and the other
8 for-cause checks are were done.

9 JUSTICE KENNEDY: Oh, I see. So the whole
10 jury is -- I see.

11 MR. SAMSON: Yes, Your Honor. So they, they
12 completed all the death qualification. And then those
13 jurors that that remained they had further individual
14 voir dire, and the defense and the prosecutor then used
15 their peremptories interchangeably to remove jurors.

16 JUSTICE STEVENS: May I go back to the
17 Chief's question about the failure to object? I think I
18 got the impression from Judge Kozinski's opinion that he
19 thought that the Washington Supreme Court found that
20 with respect to two out of the three jurors at issue
21 that there had been a finding that they were
22 substantially impaired, but with respect to this juror,
23 that the Washington Supreme Court seemed to rely on the
24 failure to object as the principal explanation for their
25 decision.

1 MR. SAMSON: I would -- I would disagree
2 with that, Your Honor.

3 The -- the State Supreme Court on page 171a
4 of the Petitioner's appendix specifically was citing to
5 Witt and the rules from Witt. And that includes the
6 rule that the trial judge's exclusion of a juror
7 constitutes a finding of fact.

8 CHIEF JUSTICE ROBERTS: I thought
9 Justice Stevens's articulation of Judge Kozinski's
10 opinion was exactly right but I thought you would in
11 response cite us to page 208a where the Washington
12 Supreme Court said that those jurors' views, including
13 Mr. Deal, would have prevented or substantially impaired
14 their ability to follow the court's instructions and
15 abide by their oaths as jurors.

16 It seems the court of appeals judge
17 overlooked that.

18 MR. SAMSON: They did, Your Honor. They
19 did. And that is a specific finding of fact by the
20 State Supreme Court.

21 JUSTICE GINSBURG: Is it a finding? It's
22 listed under "Summary and conclusions." Under
23 "Findings," I thought under "Findings" the -- the
24 findings were that he misunderstood the standard. He
25 said beyond a shadow of a doubt, rather than beyond a

1 reasonable doubt. And what other finding of fact was
2 there? Because this one is listed under conclusions.
3 "From the facts, I conclude that he would be impaired."
4 But the impairment is the conclusion from what facts?

5 MR. SAMSON: It is from all the facts that
6 the State Supreme Court had before it. It's
7 one-paragraph analysis of Mr. Deal did not lay out all
8 the facts that were before the court. And the statement
9 208-A, although it's listed as a conclusion, essentially
10 constitute a finding of fact. And even if this Court
11 were to say that is not a finding of fact, it contains
12 with it the implicit finding of fact.

13 JUSTICE SCALIA: Well, aren't we obliged
14 under AEDPA to give deference to any reasonable
15 conclusion from the facts?

16 MR. SAMSON: Yes, Your Honor.

17 JUSTICE SCALIA: So even if it is just a
18 conclusion, AEDPA still applies to it unless it's a
19 totally unreasonable conclusion, right?

20 MR. SAMSON: That's exactly right, Your
21 Honor.

22 JUSTICE KENNEDY: But the point stands that
23 the court of appeals was just incorrect in, in, in not
24 noting what's there too late. It's just not a fair
25 summary of what the Washington Supreme Court did.

1 MR. SAMSON: Yes, Your Honor. The Ninth
2 Circuit found that the State courts made no Finding of
3 fact and, as Mr. Brown has essentially admitted in his
4 response brief, there are two State court findings of
5 fact, one by the Washington Supreme Court and one by the
6 trial judge.

7 CHIEF JUSTICE ROBERTS: Is this something
8 particular under Washington procedure, this summary and
9 conclusions section at the end of the opinion?

10 MR. SAMSON: No, Your Honor. I think this
11 is more just the style of the justice who wrote the
12 opinion and how he writes his opinions.

13 CHIEF JUSTICE ROBERTS: All right.

14 JUSTICE SOUTER: I take it your position is
15 that if the State courts had made or had expressed no
16 conclusion other than the final conclusion that he is
17 impaired, that that conclusion itself would be entitled
18 to AEDPA deference if the record could be read to
19 support it; is that correct?

20 MR. SAMSON: Yes, Your Honor. Yes, Your
21 Honor. The AEDPA --

22 JUSTICE SOUTER: If that's the case, then
23 AEDPA deference is more than deference, isn't it? AEDPA
24 deference has reached on your view the conclusion that
25 if there is any factual support in a record, the

1 ultimate conclusion of the court will be upheld, whereas
2 I thought AEDPA deference went to factfinding and to
3 express conclusions that the court drew.

4 MR. SAMSON: Your Honor, we're not saying
5 that there will never be a case where the deference
6 given to a trial judge and the deference given to a
7 State court in factual determinations can be overcome.
8 Certainly, it's hard to think of one, but there can be a
9 case where that deference could be overcome.

10 JUSTICE STEVENS: Isn't this perhaps just
11 such a case? Because this finding by the Supreme Court
12 of the State is based only on the written record, so it
13 does not get any benefit of observing the demeanor of
14 the witness -- I mean, the demeanor of the prospective
15 juror; isn't that correct.

16 MR. SAMSON: It is correct the State Supreme
17 Court --

18 JUSTICE STEVENS: So if we disagreed and
19 thought there was not evidence in the written record
20 that would support that conclusion, we should not give
21 deference to that appellate court finding.

22 MR. SAMSON: Your Honor, but the appellate
23 court finding also was based on the trial court finding
24 of fact, and the State Supreme Court recognized, as this
25 Court did in Witt, that deference must be given to the

1 trial judge, who did have the opportunity to observe the
2 juror.

3 JUSTICE SOUTER: But the trial judge made no
4 conclusion about demeanor. He didn't say anything about
5 demeanor, did he?

6 MR. SAMSON: No, Your Honor, and neither did
7 the --

8 JUSTICE SOUTER: If we're going to get --
9 that takes -- it seems to me it takes deference yet one
10 further step. We're saying that even if there is
11 nothing on the record about demeanor, we are supposed to
12 assume that a trial judge drew a conclusion based on
13 demeanor. I mean, that is not deference. I mean,
14 that's simply imputing fiction.

15 MR. SAMSON: Your Honor, there's no evidence
16 on demeanor because the defense counsel did not object.

17 JUSTICE SOUTER: Why is it the defense
18 counsel's obligation to object? It seems to me that if
19 the State is objecting, saying I want this juror
20 removed, and the trial judge is saying, okay, I will
21 remove him, that there is an obligation to make a
22 record.

23 MR. SAMSON: Your Honor --

24 JUSTICE SOUTER: Wouldn't there be? I guess
25 my point is if there isn't, then in effect you are

1 making the defendant responsible for creating a record
2 to support what the other side asks for.

3 MR. SAMSON: Your Honor, as this Court
4 explained in Witt, when there is no objection or no
5 dispute as to the factual issue in the trial court, the
6 judge has to reason to elaborate on his finding and
7 therefore he has no obligation to do so.

8 JUSTICE SOUTER: But that means that the,
9 that the argument for sustaining the trial judge's
10 action on the ground that the trial judge could observe
11 demeanor in effect is the elimination of judicial review
12 on that subject, because we know that if the venire
13 person was present in the courtroom and the judge was
14 present in the courtroom, the judge probably looked at
15 him, and if that is enough to sustain judicial action on
16 the grounds that we defer to demeanor then there's no
17 judicial review at all. I think that's what Judge
18 Kozinski said.

19 MR. SAMSON: Your Honor, if there is
20 absolutely no evidence to support the trial judge's
21 conclusion in the record --

22 JUSTICE SOUTER: I'm talking about demeanor.
23 I'm talking about demeanor. And there's nothing as I
24 understand it on the record about demeanor.

25 MR. SAMSON: Yes, Your Honor. In Marshall

1 versus Lonberger the Court said there is no requirement
2 for explicit finding as to credibility.

3 JUSTICE SOUTER: And if there is no
4 requirement that there be anything on the record about
5 demeanor, then there is no judicial review on that point
6 at all, is there?

7 MR. SAMSON: Not on demeanor, but there can
8 be judicial review on the other facts that are presented
9 in the record.

10 JUSTICE SCALIA: Of course there is on
11 demeanor. I mean, I suppose, to begin with, is it not
12 the case that the burden is on the habeas applicant to
13 show that demeanor did not make the difference? It's
14 the burden on him to show that it was an unreasonable
15 determination.

16 MR. SAMSON: It is the burden on him to
17 present clear and convincing evidence.

18 JUSTICE SOUTER: And the question --

19 JUSTICE SCALIA: And secondly, he could
20 present such evidence if he showed that there was
21 absolutely no ambiguity in what the person's statements
22 said, so that demeanor could not have made a difference.
23 But in a case where the statements are seemingly
24 contradictory or arguably contradictory, demeanor is
25 very relevant and it's the burden, it seems to me, of

1 the Petitioner to show that demeanor wasn't what made
2 the difference.

3 And besides which, wasn't there some part of
4 the record that you referred to where he said "and I
5 believe him"?

6 MR. SAMSON: Yes, Your Honor. That's as to
7 a different juror when there was an objection, and
8 because there was no objection there was no obligation.

9 If I may --

10 JUSTICE SOUTER: Is there any way that he
11 can show that demeanor didn't make a difference when the
12 record is absolutely silent on demeanor? Is there any
13 way he can show that?

14 MR. SAMSON: Your Honor, he could attempt to
15 bring evidence in a State court collateral -- he
16 actually filed a motion for reconsideration as to
17 another juror. He did not do that in this case.

18 JUSTICE STEVENS: May I ask to be sure I
19 understand the record, because I did miss something
20 before. Did the trial judge say in so many words that
21 Deal's views would have prevented or substantially
22 impaired his ability to follow the court's instructions
23 and abide by the rules of the jurors?

24 MR. SAMSON: The trial judge made no such
25 express finding because there was no objection raised.

1 And if I may reserve --

2 JUSTICE STEVENS: So that's the point of the
3 absence of objection. That's why he didn't make the
4 critical finding.

5 MR. SAMSON: Yes, Your Honor.

6 JUSTICE STEVENS: Because the judge didn't
7 make the critical finding.

8 MR. SAMSON: He would have made a finding if
9 there was an objection.

10 If I may reserve --

11 CHIEF JUSTICE ROBERTS: You may reserve the
12 remainder of your time for rebuttal.

13 MR. SAMSON: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

15 ORAL ARGUMENT OF MICHAEL R. DREEBEN

16 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

17 SUPPORTING THE PETITIONER

18 MR. DREEBEN: Thank you, Mr. Chief Justice,
19 and may it please --

20 JUSTICE STEVENS: Please finish up the
21 thought because you're equally well prepared. How do we
22 know the trial judge would have made that a finding if
23 there had been an objection?

24 MR. DREEBEN: Justice Stevens, this is a
25 record in which the trial judge showed that he was

1 meticulously careful in applying the standard from
2 Wainwright versus Witt. In the joint appendix, I
3 believe at pages 7 through 9, there's an extensive
4 discussion of how the judge is going to apply the Witt
5 standard evenhandedly. He's going to eliminate those
6 jurors who are like-biased. He's going to eliminate
7 those jurors who --

8 JUSTICE STEVENS: Does that respond to the
9 possible suggestion that Judge Kozinski made that what
10 he really did was act on the basis of no objection,
11 rather than on the basis of a finding that he failed to
12 make?

13 MR. DREEBEN: I don't think so,
14 Justice Stevens, because it's very clear that he told
15 the parties, if you have any question, if you have any
16 problem with any of the objections that are made, speak
17 up and I will intervene and question the juror myself
18 and clarify it.

19 And this is a judge who, against the
20 background of the entire voir dire, clearly was making a
21 good faith effort to apply the Witt standard. There
22 were 12 objections by the prosecution to various jurors
23 that they should be excused for cause because of
24 inability to apply the law as Washington gives it. The
25 defense objected, I believe, to seven of those; and the

1 prosecution lost on five of those occasions.

2 So the judge basically went with the defense
3 when the defense spoke up and objected. There were two
4 jurors that were excused over the defense objection.
5 The transcript is also in the voir dire on those and it
6 shows that the defense objected and said these jurors
7 can apply the standard under the law, and the judge
8 found that they could not and excused them.

9 In the case of Juror Deal there is no
10 absolutely reason to believe that the judge wouldn't
11 have done exactly the same thing if the defense had
12 objected.

13 JUSTICE KENNEDY: Well, what is -- I know,
14 Justice Breyer; just on this point. The defense
15 actually volunteered "no objection."

16 MR. DREEBEN: Said "We have no objection."
17 And I think that this is one of the three significant
18 legal errors that the Ninth Circuit made in disposing of
19 this challenge. This Court made clear in Wainwright
20 versus Witt that the absence of a defense objection is
21 very critical in assessing whether a judge's implied
22 finding of bias is to be upheld on appeal. And it's for
23 the reason that my colleague mentioned in part: If the
24 judge is not asked to give a fuller explanation, there
25 is no reason --

1 JUSTICE BREYER: What has this to do with
2 the -- aside from the explanation, when I read through
3 the transcript, as I have, it seemed to me in the
4 transcript he didn't say a word that suggested he's
5 against giving the death penalty. He kept saying yeah,
6 in special circumstances, not always. Then they get
7 into this thing where he's been thinking of a person who
8 will in fact commit a crime again. And then it's put to
9 him directly: Have you thought about that he won't be
10 committing a crime again if he's in jail the rest of his
11 life. He says: You're right; I hadn't really thought
12 it through.

13 I want to know, thinking it through, could
14 you consider the death penalty? Do you think under the
15 conditions where the man would never get out again you
16 could impose it? Yes, sir.

17 So you don't think that if parole was an
18 option, etcetera, repeating it. Death penalty? I could
19 consider it. Then could you impose it? I could if I
20 was convinced that was the appropriate measure.

21 And it's absolutely clear he's not thinking
22 of the repetition. It is clear he is thinking that it's
23 some kind of a mean. And I compare that with Witt,
24 where the person just says no, I can't, and I compared
25 it with this other case, Gray, and they say it's illegal

1 to push him off a jury, a woman who is confused, and
2 finally she says: I think I could.

3 MR. DREEBEN: Justice Breyer, I think your
4 question goes to the heart of the case.

5 JUSTICE BREYER: Well, that's probably
6 right.

7 MR. DREEBEN: But the reason it goes to the
8 heart of the case, Justice Breyer, is that you and I and
9 every other appellate lawyer and judge who have looked
10 at this is dealing with a cold record, but the only
11 person who actually saw and heard this juror give the
12 responses was the trial judge.

13 JUSTICE BREYER: So what is it that he could
14 have done? Was he shaking, making faces? Was he
15 shaking his head to indicate he believed the opposite?

16 MR. DREEBEN: Well, Justice Breyer --

17 JUSTICE BREYER: If something like that
18 happened, isn't a prosecutor of any sense going to say,
19 I want it noted for the record that the witness while he
20 said these words was chortling inwardly or something
21 like that?

22 MR. DREEBEN: Well, Justice Breyer, there
23 were five separate occasions during Juror Deal's voir
24 dire in which he expressed either uncertainty or a
25 misconception about what the death penalty should be

1 exposed for when measured against Washington law.

2 And the overarching point that I make before
3 I talk about those five instances is that this is a
4 record in which there is confusion and uncertainty about
5 whether Juror Deal really can adhere to the law. And in
6 those circumstances, the only judge who can truly
7 resolve that and determine whether he should be credited
8 is the trial judge. And this Court has made that point
9 over and over again in describing its voir dire.

10 JUSTICE KENNEDY: If there is confusion, is
11 that grounds for excluding him?

12 MR. DREEBEN: Confusion alone is not. If
13 it's confusion it must rise to a level of preventing or
14 impairing the juror's ability to follow the law.

15 JUSTICE GINSBURG: But even at this point,
16 this juror, he doesn't know anything about aggravating
17 circumstances. He doesn't know about mitigating
18 circumstances. He hasn't been told what the standards
19 of -- that it was beyond a reasonable doubt.

20 And to say that he should be criticized
21 because when he was asked to give an example he said one
22 thing and not another, it seems if you just read the
23 transcript, that there's nothing disqualifying. So as
24 you said, everything is the weight falls on the
25 demeanor, which an appellate court can't review.

1 MR. DREEBEN: I think that that's right,
2 Justice Ginsburg. It doesn't mean that there is no
3 judicial review at all, in response to Justice Souter's
4 question and I think the concern underlying your own.
5 There has to be fair support in the record for the
6 conclusion that the trial judge could have resolved the
7 question of a juror's competence to sit in the way that
8 he did.

9 And if you had a record in which everything
10 that juror said was consistent with complying with State
11 law, which I don't think this record is, and the
12 prosecutor objected, and the judge says granted, and
13 there's no explanation, I think that would be difficult
14 to uphold, even if it is possible that everyone in the
15 courtroom knew that the judge was relying on demeanor.

16 JUSTICE SOUTER: Is there anything in this
17 record to indicate that the judge did rely on demeanor?

18 MR. DREEBEN: What is -- no. There's
19 nothing explicit. But this Court has said over and over
20 again that there does not have to be because in this
21 case, in particular, since there was no objection, the
22 judge did not elaborate on his reasons at all. But the
23 Court has gone further in Witt and in Darden and
24 building on cases like Patton versus Yount, and made
25 clear that it is implicit in a judge's action in

1 response to an objection that he has relied on the
2 totality of the law and his observations.

3 And here there were two instances during the
4 defense colloquy in which the juror specifically said
5 that his example of when the death penalty is
6 appropriate is a circumstance when somebody is
7 incorrigible and will reoffend if released. And then
8 three times during the prosecution's voir dire, he
9 volunteered, first of all, that it would have to be in
10 my mind very obvious that the person would reoffend.
11 And this was a particularly significant answer because
12 it wasn't given in response to a death penalty question,
13 it was given in response to whether he could apply the
14 reasonable doubt standard to the crime.

15 He again comes back to the reoffend notion
16 after having State law explained to him again, and said,
17 could you consider imposing the death penalty, he said I
18 have to give that some thought.

19 JUSTICE SOUTER: But he had not been given,
20 as I understand it, the explanation of what the -- I
21 keep saying nine factors. Whatever the enumerated State
22 factors were. He had not been told that at any point,
23 had he?

24 MR. DREEBEN: No, but I think the important
25 point, Justice Souter, is that under Washington law

1 there were really two alternatives, life without parole
2 or death.

3 JUSTICE SOUTER: Yeah, but the -- the
4 questioning was what grounds are you going to look to
5 make that decision; and he had not been instructed on
6 Washington law on that at all.

7 MR. DREEBEN: The concern that I think the
8 prosecutor had and that the judge accepted is that this
9 juror's vision of when capital punishment is appropriate
10 is when somebody will get out and kill again. And under
11 that analysis, you would never impose capital punishment
12 under Washington law, because the defendant is never
13 going to get --

14 JUSTICE STEVENS: But doesn't it follow that
15 his limited cases, the views about when the death
16 penalty is appropriate would translate into views of
17 whether he could or could not impose the death penalty
18 if instructed properly by the court?

19 MR. DREEBEN: Not -- not automatically,
20 Justice Stevens. I mean, this is an juror --

21 JUSTICE STEVENS: Doesn't it have to be
22 automatic in order to justify the result in this case?

23 MR. DREEBEN: No. What has to be the case,
24 and this Court in Witt made clear it is not going to
25 apply an unmistakable certainty requirement, is that the

1 judge has to conclude that juror's views would prevent
2 or substantially impair juror in applying the law. And
3 the judge had to make a call based on what he saw and
4 what none of us did, of whether this juror's views --

5 JUSTICE STEVENS: Isn't there a world of
6 difference, at least it has been my experience in trials
7 like this of what a juror will do on his own and what he
8 thinks the law might be, and what is fair, and so forth,
9 as opposed to what a, the juror will do in response to
10 proper instructions?

11 MR. DREEBEN: Yeah.

12 JUSTICE STEVENS: The jurors mostly are
13 pretty conscientious.

14 MR. DREEBEN: Yes, they there are. And --

15 JUSTICE STEVENS: Is there any reason to
16 believe this guy wasn't?

17 MR. DREEBEN: Well the judge found one. By
18 excusing him after having --

19 JUSTICE STEVENS: Well -- without -- because
20 there was no objection.

21 MR. DREEBEN: Well he made clear, if I may
22 conclude, he made clear at the outset as I think I did
23 when I started my presentation, that this record shows a
24 judge who was conscientiously applying the Witt
25 standard.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Dreeben.

3 Ms. Elliott.

4 ORAL ARGUMENT OF MS. SUZANNE LEE ELLIOTT,
5 ON BEHALF OF RESPONDENT

6 MS. ELLIOTT: Mr. Chief Justice, and may it
7 please the Court.

8 There were in our view two findings by the
9 Washington courts here. The first by the trial court is
10 objectively, an objectively unreasonable determination
11 of the facts in light of the evidence presented, and
12 thus the writ should be granted under 50 -- 28 --
13 2254(d)(2)? And the supreme court's decision -- and
14 I'll get to a moment to where I think their decision is,
15 in the record, which conflicts with the State's view of
16 where that is -- was an unreasonable application of this
17 Court's controlling precedent in Witt versus
18 Witherspoon.

19 And I would direct the Court to, in terms of
20 the State Supreme Court's finding, to page 173a of the
21 appendix of the Petition for certiorari. But I would,
22 of course, first like to start with the actual record in
23 this case.

24 In this case, the Washington State trial
25 court's decision to excuse juror Deal for cause was be

1 objectively unreasonable based upon the record, because
2 juror Deal said many times on the record, when presented
3 with the question of whether or not he could impose the
4 death penalty under the sketchy view he had of
5 Washington State's statutory capital punishment scheme,
6 that he could do so.

7 CHIEF JUSTICE ROBERTS: But that's the
8 beginning of the questioning, isn't it? It is not the
9 end of it. It is surely not the law that just, whenever
10 a juror says sure, I'll follow the instructions, that
11 he's automatically -- has to be seated?

12 MS. ELLIOTT: No, Your Honor. But it went
13 beyond that. And at page 73 of the joint appendix, the
14 very question was put to him by the prosecutor. "Now
15 that you know that in Washington, if you find the
16 defendant guilty, you're only going to have two choices,
17 the death penalty or life in prison without the
18 possibility of parole, could you still consider under
19 the appropriate evidence imposing the death penalty?"
20 And Mr. Deal said, "I could consider it. Yes."

21 CHIEF JUSTICE ROBERTS: After several times
22 saying the only time he would consider it is if the
23 person is going to reoffend. I mean, if he just gets
24 the right answer once out of six times and it's the last
25 time, is the judge required to ignore the prior

1 colloquy?

2 MS. ELLIOTT: No, Your Honor, but I don't
3 think he only said it once out of those times. Judge
4 Kozinski identified in his opinion six times, and those
5 are found on the record of proceedings at page 62, at
6 page 72, and again at page 73. And he was repeatedly
7 asked, and one time he was asked first I'm going to ask
8 you if you could consider it -- this is on page 72 and
9 then I'm going to ask you if you could impose it? Even
10 if he would never get out.

11 CHIEF JUSTICE ROBERTS: But look at page --
12 look at page 262. He says, you know, could -- could
13 you -- when do you think the death penalty is
14 appropriate? If the person would reviolates if released.

15 MS. ELLIOTT: But that is one of, under --

16 CHIEF JUSTICE ROBERTS: There are others.

17 MS. ELLIOTT: -- Washington law it's an
18 appropriate consideration. And that's the -- and then
19 that was the example he gave, but he didn't say but I'm
20 never going to do it, if he -- if my only choice is
21 death or life in prison.

22 And I think that the State's reading of the
23 voir dire here actually expands both the objection made
24 by the prosecutor and the -- the substance of the
25 colloquy with juror Deal.

1 JUSTICE ALITO: What do you make of the fact
2 that twice just before his final statement he's given
3 exactly the question whether he could -- whether he
4 impose the death penalty in any situation other than
5 when the person might get out and kill again, and he --
6 his answers are at best equivocal. The first time he
7 says I would have to give that some thought. That's on
8 72. And then he says I do feel that way if parole is an
9 option. Without parole as an option I believe in the
10 death penalty. Which is totally ambiguous. What do you
11 make of those answers?

12 MS. ELLIOTT: I make of those answers as
13 being entirely appropriate under the questions given and
14 also demonstrating that he's clearly not a juror who is
15 substantially impaired or whose views would prevent him
16 from considering the instructions that would be given to
17 him at the end of this case. If fact include him as a
18 --

19 CHIEF JUSTICE ROBERTS: What if the -- what
20 if the voir dire -- what if the juror said just what he
21 said on a few occasions, that I would consider it if the
22 person would reviolates? And that was all. That would
23 be a basis for excusing him?

24 MS. ELLIOTT: Under your hypothetical, no.
25 If, however, he said I will never impose the death

1 penalty if the only choice is life without and the death
2 penalty, I think that would be problematic under
3 Washington law.

4 But he never said that. That's the reading
5 the State gives his voir dire but it's not there.
6 Because that would prevent him from making the decision
7 that Washington requires.

8 JUSTICE SCALIA: Well, you -- you -- you
9 insist that he come out and say in so many words, I am
10 going to be an unreliable juror. That's -- that's not
11 the way it happens. And somebody has to evaluate
12 whether indeed he's shading the truth a little bit and
13 whether, in fact, he will be impaired in his service.
14 And some of these -- some of these answers suggest that.
15 And it, it is not an easy call to simply say well, you
16 know, unless he comes out and admits yes, I'm going to
17 be a lousy juror, nobody is going to say that.

18 MS. ELLIOTT: Well, Your Honor, I agree that
19 nobody is going to say that, although in other cases, in
20 other records and other cases cited by the State here,
21 in fact, trial judges have made records of those kinds
22 of situations, which are not present here. And in fact,
23 for example, I believe it was Gray versus Mississippi,
24 the judge got the feeling that jurors were giving
25 answers that would get them off the panel.

1 JUSTICE SCALIA: Why -- why was there no
2 objection if this was so clear? If this fellow had
3 answered all the questions the way you expect a, a good
4 juror to answer, why was there no objection when the
5 State moved to dismiss him?

6 MS. ELLIOTT: It is not required under
7 Washington law. And, in fact --

8 JUSTICE KENNEDY: It may well be objected,
9 there were 12 instances --

10 MS. ELLIOTT: That is corrected.

11 JUSTICE KENNEDY: -- in which the prosecutor
12 wanted to excuse; in seven of those, there was an
13 objection.

14 MS. ELLIOTT: That's correct.

15 JUSTICE KENNEDY: So he certainly knew how
16 to object. And you absolutely trap the trial judge here
17 by not indicating to him that he should make some
18 further finding. In fact, the -- the -- the lawyer
19 doesn't just remain silent. He's standing and says I
20 have no objection.

21 MS. ELLIOTT: Well the question --

22 JUSTICE GINSBURG: Judge Kozinski thought
23 the reason there was no objection was that this juror
24 came across as being pro-death penalty. Isn't that what
25 he said?

1 MS. ELLIOTT: That's what he said. I --

2 CHIEF JUSTICE ROBERTS: You don't go as far
3 as Judge Kozinski?

4 (Laughter.)

5 MS. ELLIOTT: On two points I don't go as
6 far as Judge Kozinski. One, I believe that actually
7 there has to be some deference to implicit findings; let
8 me clarify that, and I know the State has pointed that
9 out. I think Judge Kozinski's language was a little
10 loose there. I think he probably agrees with me.

11 As to the -- the failure to object, first of
12 all, if the court says, first of all, are there any
13 objections; now again we have admitted that what he said
14 was I have no objection. But the -- under Washington
15 law, the prosecutor, the judge, and the defense attorney
16 all knew that this issue could be raised for the first
17 time on appeal.

18 The prosecutor -- and I'm not saying on
19 habeas review, but in the trial court, a challenge for
20 cause, the burden falls on the prosecutor to articulate
21 a basis.

22 JUSTICE SCALIA: Well, that's fine. But,
23 but competent counsel knows that getting something
24 overturned on appeal is a lot harder than getting it
25 done right the first time. And he also knows that if

1 you raise an objection, you're more likely get it done
2 right.

3 I can't imagine why if he thought this
4 person was not properly strikeable he would have sat --
5 indeed not just sat silent but said I have no objection.
6 It just doesn't make any sense.

7 MS. ELLIOTT: Well I think he made a
8 mistake, then.

9 JUSTICE SCALIA: Well, he made the same
10 mistake the judge did. I wonder who else was there that
11 made the same mistake. I mean, you know, it makes you
12 think maybe, maybe the judge was right.

13 MS. ELLIOTT: Well, Your Honor, the only
14 basis we have for the trial judge's ruling is the
15 objection made by the prosecutor. And the -- assuming
16 he incorporated that as the basis for his ruling. What
17 prosecutor said was that -- he had two rulings. First,
18 he said I think he's overcome his problem with the
19 explanation about reasonable doubt. And so that's not
20 an issue in this case. And he said, and I don't think
21 he has said anything that overcame this idea that, of he
22 must kill again before he imposed the death penalty or
23 be in a position to kill again.

24 That, it's our position is incorrect,
25 under -- an incorrect summation of what happened in the

1 voir dire and, in fact --

2 JUSTICE SCALIA: Where -- where are you
3 quoting from?

4 MS. ELLIOTT: I'm quoting from page 675.
5 Which is Mr. Matthews --

6 JUSTICE SCALIA: 75 of the --

7 MS. ELLIOTT: Of the joint appendix. Which
8 is Mr. Matthews' objection. And the court makes
9 basically an unadorned grant of objection that for
10 cause.

11 JUSTICE KENNEDY: And incidentally the court
12 did not say are there any objections? The court did not
13 say that.

14 MS. ELLIOTT: I'm sorry, Your Honor. The
15 court says -- uh -- the bailiff will excuse you.
16 Counsel, any challenge to this particular juror? That's
17 at the bottom of page 64. And then what Mr. Mulligan
18 says is we have no objection.

19 JUSTICE KENNEDY: Well, but the court didn't
20 say is there an objection? So you're incorrect.

21 MS. ELLIOTT: I'm sorry. So --

22 CHIEF JUSTICE ROBERTS: Now on the that,
23 just the language you just focused on, on page 75, if
24 that was correct, you disagree with it, but if the
25 court concluded that the juror had not overcome the idea

1 that he must kill again before imposing the death
2 penalty, that would be a sufficient basis for excusing
3 him?

4 MS. ELLIOTT: Under Washington law, I think
5 there would be a sufficient basis for excusing juror
6 Deal if he said I now know what the statutory scheme is,
7 and only if there's some possibility for release of
8 Mr. Brown and the opportunity for him to kill again,
9 would I impose the death penalty.

10 We know that would prevent him from imposing
11 Washington's statutory scheme because once finding him
12 guilty, the juror will never be released again. So the
13 possibility of release would not be there. And so he
14 would reject the notion that you must consider
15 mitigating factors if there's no possibility of release.

16 We argue in our brief that that's not what
17 he said. And in fact, Juror Deal was a thinking juror,
18 a juror who could, in fact, consider all of the options.
19 We disagree, of course, with the prosecutor's summary
20 that this concern about recidivism was somehow central
21 or pivotal to Juror Deal.

22 JUSTICE KENNEDY: You think he could have
23 imposed the death penalty in this case?

24 MS. ELLIOTT: Yes.

25 JUSTICE KENNEDY: What's the harm then in

1 replacing him, from your standpoint?

2 MS. ELLIOTT: The harm?

3 JUSTICE KENNEDY: You're complaining about
4 the excusal of a juror who by your own submission would
5 impose the death penalty. So why am I here?

6 JUSTICE GINSBURG: Because you don't know
7 him.

8 JUSTICE KENNEDY: I would like to hear the
9 answer.

10 MS. ELLIOTT: My answer is because it's a
11 constitutional issue and this juror could also have
12 considered the mitigating circumstances that would have
13 been proposed by the -- at that stage that were clearly
14 on the table for argument in front of the jury at the
15 penalty phase.

16 JUSTICE GINSBURG: You, according to this
17 structural error, so you have a death case, and so you
18 have this kind of error you don't have to prove.

19 MS. ELLIOTT: Under Gray versus Mississippi,
20 I don't have to -- Mr. Brown does not have to prove that
21 it's harmless.

22 JUSTICE GINSBURG: And then you're zeroing
23 in on this particular juror and the colloquy, but
24 shouldn't we look at the entire proceeding of the
25 jurors, including that there were -- what was it --

1 seven attempts by the prosecutor to have a for cause
2 excusal?

3 JUSTICE KENNEDY: There were actually 12, I
4 think. Weren't there 12 objections by the prosecution?
5 I was going to ask, we've already destroyed the rebuttal
6 time of your colleagues, but it seems to me that this is
7 a large number of challenges by the prosecutor. Can you
8 comment on that? 12? I mean, the defense objected to
9 seven, and five objections were sustained.

10 MS. ELLIOTT: I can't say in the vast
11 universe of capital cases in Washington whether that's
12 extraordinary or not.

13 JUSTICE KENNEDY: Thank you.

14 JUSTICE SCALIA: How many days did this
15 take?

16 MS. ELLIOTT: 17, I believe.

17 JUSTICE SCALIA: 17 days? Less than one a
18 day. That's pretty good.

19 CHIEF JUSTICE ROBERTS: Yeah. How many
20 paraded by? I mean, do we know?

21 MS. ELLIOTT: I didn't count on a daily
22 basis, Your Honor. In a quality case in Washington, 17
23 days is probably pretty average, maybe a little short.

24 JUSTICE GINSBURG: But it does seem that
25 this trial judge was doing a conscientious job. He

1 granted five of the -- rejected five of the
2 prosecutor's, and how many of those had been where
3 defense counsel had objected?

4 MS. ELLIOTT: I think seven.

5 JUSTICE GINSBURG: He objected in seven and
6 in five of those --

7 MS. ELLIOTT: No. He objected to 12, and
8 seven of those were granted, that's my understanding.

9 JUSTICE GINSBURG: Well, I'm not --

10 JUSTICE KENNEDY: No. I think the
11 prosecution challenged 12 times. There were seven
12 objections. Five were sustained.

13 MS. ELLIOTT: Excuse me. I'm sorry, Your
14 Honor. I misunderstood your question.

15 So yeah, I don't disagree that this Court
16 should look at the entire record of voir dire, and I
17 don't disagree that Judge Martinez is a conscientious
18 trial judge. The problem in this case is that when he
19 granted the challenge for cause to this juror, he did
20 not and he could not find that this juror was
21 substantially impaired. He could not -- he was not
22 prevented from following Washington law.

23 The --

24 CHIEF JUSTICE ROBERTS: In your view, do we
25 look at this any differently through AEDPA than if we

1 were looking at this on direct review?

2 MS. ELLIOTT: Well, yes. I mean, you have
3 to view it through the lens of the statute.

4 CHIEF JUSTICE ROBERTS: So that makes a
5 difference in the standard of review that we apply in
6 this case?

7 MS. ELLIOTT: Well, there is -- prior to the
8 enactment of AEDPA, there was -- this Court said you
9 give deference to the trial court's findings. AEDPA
10 has, of course, codified that deference by saying that
11 the trial judge has to be objectively unreasonable based
12 upon the facts developed at the trial court level.

13 CHIEF JUSTICE ROBERTS: So, does that mean
14 we give a greater degree of deference?

15 MS. ELLIOTT: I don't think this Court has
16 said what, on balance, what the difference between the
17 kind of deference that was required under Witherspoon
18 is, as laid against the kind of deference now. It's
19 clear Congress wanted to provide a substantial amount of
20 deference to the trial court and limited habeas review
21 of State court decisions. But as Judge Kozinski pointed
22 out in his opinion in this case, that didn't mean that
23 they were going to completely eliminate Federal habeas
24 review.

25 CHIEF JUSTICE ROBERTS: I'm just trying to

1 get a handle on your view as to whether the standard of
2 review with respect to deference to the State court is
3 different in this respect than it would be on direct
4 review?

5 MS. ELLIOTT: Yes. I think under habeas
6 review, it's a more substantial review, because we have
7 to show not only that the findings were unreasonable but
8 they were objectively unreasonable, which I think is a
9 different standard than saying you give deference to the
10 trial court.

11 JUSTICE STEVENS: May I ask, one of the most
12 troubling parts about this case is the failure to
13 object. As I understand, under Washington law, that
14 doesn't making any difference, the review is exactly the
15 same as it would have been if there had been an
16 objection. But under our review as a matter of
17 constitutional law, should it make a difference?

18 MS. ELLIOTT: I don't think so. I think
19 it's one of those peculiarities of Washington law that
20 you should give respect to, but it is essentially
21 meaningless in the context of this case, because all the
22 parties knew this case was going to be reviewed and
23 reviewed. I mean, there's automatic appellate review.

24 JUSTICE STEVENS: Do you have any response
25 to Justice Kennedy's concern that this really allows for

1 a mouse trapping of the trial judge who very likely
2 would have paid less attention to the issue as long as
3 any counsel doesn't object, just as a realistic way that
4 this kind of thing is handled?

5 MS. ELLIOTT: Well, I respect his concerns
6 about bushwhacking or mouse trapping, but the fact of
7 the matter is that that's Washington law and the judge
8 was well aware of it, as were the parties.

9 JUSTICE KENNEDY: Well, let me put it to you
10 this way: There's no demeanor finding here. Suppose
11 the judge had made a demeanor finding. That would be
12 different, the case would be a different case, wouldn't
13 it?

14 MS. ELLIOTT: Yes.

15 JUSTICE KENNEDY: And if the objection is
16 what prevents the demeanor finding, then maybe we should
17 be able to consider the fact there was no objection,
18 even though Washington law doesn't require it before we
19 consider the issue.

20 MS. ELLIOTT: But there's nothing in the
21 record that says that the reason that the judge didn't
22 mention the demeanor, or the prosecutor who made the
23 objection didn't mention demeanor. Certainly, it seems
24 to me that if demeanor had been a concern based upon the
25 answers given by the juror here, and because the

1 prosecutor had the laboring oar at the trial court to
2 provide a basis for the challenge for cause, he would
3 mention it.

4 CHIEF JUSTICE ROBERTS: I thought your
5 brother made the point that there was a more elaborate
6 explanation of the trial judge's determinations when
7 there had been an objection.

8 MS. ELLIOTT: I do believe that he had a
9 more lengthy explanation where there were objections.
10 But whether or not that would have -- there was
11 something in the demeanor of this particular judge here
12 that he simply didn't mention, it can't be found here.

13 JUSTICE SCALIA: Well, but he said for one
14 of the other witnesses, I just don't -- I don't believe
15 him. And if that had been his problem here, he
16 presumably would have said the same thing.

17 MS. ELLIOTT: Well, presumably then, he
18 would have said that in response to the prosecutor's
19 objections, which was not that we don't believe that
20 Juror Deal could be credible.

21 JUSTICE SCALIA: Not if there's no opposing
22 objection by defense counsel. When there was, and when
23 part of his reason for granting the motion to strike the
24 juror was demeanor, he mentioned demeanor.

25 MS. ELLIOTT: That's correct, and here he

1 didn't. So I think the assumption was, he was granting
2 the objection on the basis provided by Mr. Matthews,
3 which was incorrect both under Washington law and under
4 the facts developed in the voir dire.

5 JUSTICE BREYER: The law on this, and you've
6 read the cases more recent probably -- I've skimmed
7 through some but not read them all, as I'm sure you
8 have. And the statement of the law that I want to know,
9 is it still valid law, is in Witherspoon on 522, Justice
10 Stewart in the footnote. And what he says in that
11 footnote is, "the most that can be demanded of a venire
12 man in this regard is that he be willing to consider,"
13 and those are his italics, "to consider all of the
14 penalties provided by State law, and that he not be
15 irrevocably committed before the trial has begun to vote
16 against the penalty of death, regardless of the facts
17 and circumstances that might emerge. If the voir dire
18 testimony in a given case indicates that venire men were
19 excluded on any broader basis than this, the defendant's
20 sentence cannot be carried out." Is that still a valid
21 statement of the law or has it changed?

22 MS. ELLIOTT: That is still a valid
23 statement of the law.

24 JUSTICE SCALIA: Of what law?

25 JUSTICE BREYER: Of Washington law. No,

1 this is Justice Stewart of the Supreme Court.

2 MS. ELLIOTT: This Court, which has been
3 shortened into a --

4 CHIEF JUSTICE ROBERTS: Substantially
5 impaired.

6 MS. ELLIOTT: -- substantially impaired
7 test.

8 CHIEF JUSTICE ROBERTS: Which is a lot
9 different than irrevocably committed.

10 MS. ELLIOTT: Well, it's substantially
11 impaired to prevent or substantially impaired, the
12 ability. And this juror never --

13 CHIEF JUSTICE ROBERTS: You would agree that
14 substantially impaired is not the same as irrevocably
15 committed?

16 MS. ELLIOTT: Yes, I would agree, because
17 you could say I favor the death penalty, as this juror
18 did, and still sit on the jury.

19 JUSTICE BREYER: This doesn't say -- that's
20 one of the things it says. But the other is, "the most
21 that can be demanded of a venire man is that he be
22 willing to consider" -- that's the word that's
23 italicized -- now, is there any -- "and if you exclude
24 him on a broader ground than that, the death sentence
25 cannot be carried out". Now, is there anything in any

1 later case that suggests a change in that respect?

2 MS. ELLIOTT: No, Your Honor. In fact, the
3 cases affirm that. And in fact, this juror was
4 precisely the kind of juror that I think was appropriate
5 to sit. What he said was, I can consider.

6 JUSTICE SCALIA: Well, he said that, but
7 elsewhere he sort of indicated that he couldn't consider
8 it unless it were a situation in which this person would
9 be able to commit the crime again.

10 MS. ELLIOTT: But none of those statements
11 indicated he would be prevented from voting for the
12 death penalty, or that he was substantially impaired
13 from doing that.

14 JUSTICE SCALIA: They did indicate that
15 unless that was the situation, he wouldn't consider
16 imposing the death penalty. I think that's precisely
17 what they indicated.

18 MS. ELLIOTT: Well, if it means only that he
19 would consider the issue of future dangerousness, it
20 wouldn't prevent him under Washington law. Because
21 under Washington law, first of all, the presumption is
22 for life. And second of all, the consideration of
23 whether or not a person would recidivate is both an
24 aggravating and a mitigating factor. So the fact that
25 he's concerned about reoffense is perfectly appropriate.

1 Where I think he could be prevented is if he
2 said, if this -- unless this guy is going to be released
3 in the future, and I don't think that's what he said
4 here, Your Honor. What he said was, recidivism is
5 important.

6 JUSTICE SCALIA: I like recidivate by the
7 way. I'm going to use it in the opinion. It's a very
8 useful verb.

9 JUSTICE STEVENS: If I can get back to my
10 concern about the failure to object again. Supposing
11 this defense counsel instead of just saying no
12 objection, said no objection, I think he's a hanging
13 juror?

14 MS. ELLIOTT: I think he's a hanging juror?

15 JUSTICE STEVENS: In other words, he thought
16 contrary to the prosecutor, his appraisal of this man
17 was that he's going to be pro-death penalty, and he let
18 that be known. Would that make a difference?

19 MS. ELLIOTT: Well, I think that --

20 JUSTICE STEVENS: I don't think it would
21 under Washington law. I don't suppose it would.

22 MS. ELLIOTT: Well, if the juror said -- it
23 would make a difference under Morgan if the juror said
24 I'm not going to consider any mitigating factor.

25 JUSTICE STEVENS: No, no. The juror just

1 did what he did, but everybody was evaluating his
2 demeanor in the courtroom, and defense counsel's
3 evaluation was to mean I don't want that juror, he's
4 going to hang my client, and that's what he thought and
5 he let it come out when he told the judge no objection.

6 MS. ELLIOTT: Oh.

7 JUSTICE STEVENS: Would that make a
8 difference?

9 MS. ELLIOTT: It wouldn't make a difference
10 under Washington law because it could be raised for the
11 first time on appeal, yes, if that wasn't what the
12 record demonstrated.

13 Did I understand your question?

14 JUSTICE STEVENS: You did. Do you think it
15 should make a difference to us if we think that he
16 didn't really want this guy on the jury?

17 MS. ELLIOTT: I don't think there's anything
18 in the record to suggest that, but for lack of his
19 objection. Because there's no harmless error analysis,
20 I don't think it can make a difference to this Court,
21 and because in Washington we have this peculiar rule
22 which says you don't have to object.

23 JUSTICE KENNEDY: Does the fact that this is
24 structural error, that there's no harmless error
25 analysis, mean that we should be very careful to give

1 substance to the rule that there's deference to the
2 trial judge? And in fact, in the Witt case, we said
3 that the determination to excuse a juror is based on
4 determinations of demeanor and credibility that are
5 within the trial judge's province. We said that.

6 MS. ELLIOTT: Absolutely. And if there had
7 been a mention of demeanor on this record, I think this
8 Court's decision would be easy.

9 JUSTICE KENNEDY: What presumes that there
10 is that judgment made by the district judge, whether or
11 not it's mentioned? It was not mentioned in Witt.

12 MS. ELLIOTT: Well, what Judge Kozinski says
13 about that is if on the record -- you have a cold record
14 here which demonstrates in our view that the juror is
15 completely qualified to serve, and nothing about him
16 would prevent him from serving. And you have no mention
17 of demeanor by the trial judge, but speculation on the
18 part of the prosecution, then all substantive evidence
19 review of juror challenges in capital cases is dead and
20 --

21 JUSTICE KENNEDY: Should defer to Judge
22 Kozinski's observation or to the Supreme Court in Witt?

23 MS. ELLIOTT: You should defer to the
24 Supreme Court's observation in Witt, but only I think if
25 there's some indication on the record that there is

1 demeanor. And --

2 CHIEF JUSTICE ROBERTS: Well, there's a
3 third choice which under AEDPA is the Washington State
4 court decision to which we should defer.

5 MS. ELLIOTT: The Washington State Supreme
6 Court decision?

7 CHIEF JUSTICE ROBERTS: Yes.

8 MS. ELLIOTT: The Washington State Supreme
9 Court decision suffers a different problem, I think,
10 Your Honor, which is that what the Washington State
11 Supreme Court said on page 173 was that on voir dire he
12 indicated he would impose the death penalty where the
13 defendant, quote, "would reviolates if released," which
14 is not a correct statement of the law. And in fact,
15 that is -- the considerations about whether or not
16 Mr. Brown would reviolates whether in prison or not are
17 considerations under Washington law in a death penalty
18 case.

19 CHIEF JUSTICE ROBERTS: On page 208, though,
20 the Washington Supreme Court also stated the standard,
21 as I understand it from Witt, that Mr. Deal's views
22 would have prevented or substantially impaired his
23 ability to follow the court's instructions.

24 MS. ELLIOTT: But -- I agree that there is a
25 summary that says that. But the substantive basis for

1 the trial court' decision I think is back at page, as I
2 said, 173a, where he --

3 JUSTICE GINSBURG: Isn't the number of the
4 page that you gave telling this is an appeal from a
5 capital sentence, and there are umpteen challenges made.
6 So the judge is dealing with Richard Deal in one
7 paragraph. The defendant raised a host of challenges,
8 and so there's not perfect consistency with what these
9 two passages in the opinion. But mustn't we take into
10 account what this was? It was the defense brought out
11 every objection they probably could conceive of and they
12 didn't put particular emphasis on this, so it comes out
13 this way.

14 MS. ELLIOTT: Well, if you're -- you mean in
15 terms of the -- in the trial court? Or in the State
16 Supreme Court decision?

17 JUSTICE GINSBURG: In the Supreme Court.
18 Now we're talking about the Washington Supreme Court.
19 You said they got it wrong because they said in this
20 paragraph that he got the law you wrong, he made an
21 incorrect statement of the law because he said he would
22 impose the death penalty where the defendant would
23 reviolates if released, which is not a correct statement
24 of the law.

25 We don't know exactly what that court meant

1 by that paragraph, but we do know that the Washington
2 Supreme Court was basing -- I don't know how many
3 objections they were dealing with in this opinion, but a
4 great many.

5 MS. ELLIOTT: Yes, and so if you then turn
6 to the end of the opinion, if that's what you're asking,
7 at 208, there's kind of a summary of their basis for all
8 of the challenges made by Mr. Brown to all sorts of
9 things in the case.

10 There were also challenges to other jurors
11 as well. And there are separate paragraphs where the
12 court -- those jurors that are mentioned in the summary
13 paragraph, where the court then explains the various
14 reasons why it's upholding the trial judge as to those
15 jurors as well.

16 JUSTICE GINSBURG: Well, my point is simply
17 that where the court is faced with so many challenges,
18 this particular one, there had been no objection at the
19 trial. So an appellate court might think we don't want
20 to spend too much time on that one.

21 MS. ELLIOTT: That is true. It appears as
22 though what they did was to, because this is not what
23 the trial judge said, this is the basis for the
24 objection by the prosecutor, that they assumed the trial
25 judge adopted the prosecutor's objection.

1 In sum, there's nothing in the record that
2 supports a conclusion here that Juror Deal could not
3 subordinate his personal views about the death penalty
4 or that he would frustrate the State's legitimate
5 purpose in carrying out the State's legitimate interest
6 in a constitutional capital death penalty scheme. So we
7 would ask this Court to affirm the opinion of Judge
8 Kozinski in the Ninth Circuit and grant the writ of
9 habeas corpus in this case. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Ms. Elliott.

12 Mr. Samson, you have one minute remaining.

13 REBUTTAL ARGUMENT OF JOHN J. SAMSON

14 ON BEHALF OF THE PETITIONER

15 MR. SAMSON: Thank you, Mr. Chief Justice.

16 In response to the questions regarding the
17 Witherspoon language and whether it's still good law,
18 the Court in Witt essentially said that is no longer the
19 standard. The standard instead is the substantial
20 impairment standard, and it is not required to show that
21 the juror would never impose the death penalty or
22 automatically vote against it by unmistakable clarity.

23 And the fact that there were -- in response
24 to Justice Ginsburg's question, the fact that there were
25 so many claims presented to the State Supreme Court may

1 explain in part the summary opinion regarding this
2 particular issue. AEDPA does not require a perfect
3 opinion by the State court to survive review. It only
4 requires reasonableness and an objective standard.

5 In addition, the arguments presented by
6 Mr. Brown are essentially: We disagree and the Federal
7 courts should disagree with the factfinding process done
8 by the State courts. But the fact that a reviewing
9 court reviewing the same transcript may reach a
10 different factual determination is not sufficient. If
11 the view reached by the State court is supported by
12 evidence and is -- thank you, Your Honor.

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

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