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IN THE SUPREME COURT OF THE UNITED STATES

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BERTRAM RICE, WARDEN, ET AL., :

Petitioners :

v. : No. 04-52

STEVEN MARTELL COLLINS. :

- - - - -X

Washington, D.C.

Monday, December 5, 2005

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(11:04 a.m.)

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

General Lockyer.

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

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

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

Although --

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

MR. LOCKYER: Yes.

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

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

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

5 JUSTICE KENNEDY: I -- I take it --

6 MR. LOCKYER: -- appendix 2 --

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

10 MR. LOCKYER: That's correct.

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

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

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

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

19 JUSTICE KENNEDY: Thank you.

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Well, it is -- it is
16 a little unusual to have under your view two different
17 sections, both addressed to the question of the
18 appropriate standard of review in a particular type of
19 proceeding. They seem either redundant or overlapping.

20 The theory on the other side at least distinguishes
21 them and argues that they apply in different
22 circumstances.

23 MR. LOCKYER: That's true, Mr. Chief Justice.

24 Our view is that the (e)(1) test really focuses on
25 specific facts that have been found in State court.

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

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

20 The --

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

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

15 JUSTICE SOUTER: Well, I thought youthfulness
16 --

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

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

25 JUSTICE KENNEDY: What -- what is the

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

7 MR. LOCKYER: Well --

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

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

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

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

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

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

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

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

21 MR. LOCKYER: Yes.

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

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

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

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

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

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

4 What -- what is your response to that?

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

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

16 MR. LOCKYER: Right.

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

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

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

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

11 MR. LOCKYER: Right.

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

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

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

24 MR. LOCKYER: Justice Scalia, your direct --

25 JUSTICE STEVENS: May I ask this question,

1 General?

2 MR. LOCKYER: Yes.

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

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

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

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

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

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

6 MR. LOCKYER: Yes.

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

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

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

16 JUSTICE STEVENS: Right.

17 MR. LOCKYER: In good faith?

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

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

24 JUSTICE STEVENS: And if the trial judge
25 determined --

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

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

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

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

12 MR. LOCKYER: Yes.

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

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

22 MR. LOCKYER: Justice Scalia --

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

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

1 brief that one some day, but --

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

3 --

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. LOCKYER: And --

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

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

13 JUSTICE BREYER: Which question?

14 MR. LOCKYER: It's unclear.

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

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

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

22 MR. LOCKYER: It -- it seems to be where the
23 juror said yes in response to the voir dire, and then
24 --

25 JUSTICE BREYER: Which was a question you

1 said --

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

4 JUSTICE BREYER: I see.

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

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

23

24 Here, we have a very brief, quick proceeding.

25 The judge is asking the questions and really resisting

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

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

15 MR. LOCKYER: Yes.

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

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

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

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

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

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

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

25 JUSTICE BREYER: You have 30 seconds. You

1 want to say how irresponsible that is, right?

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

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

5 CHIEF JUSTICE ROBERTS: Thank you, General.

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

7 ORAL ARGUMENT OF MARK R. DROZDOWSKI

8 ON BEHALF OF THE RESPONDENT

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

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

16 The circuit also rightly held that the --

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

19 MR. DROZDOWSKI: Well, here the rolling of
20 the eyes, first, is uncorroborated by the trial judge.

21 He says, quite frankly, I did not see it. And in his
22 ruling, he does not credit that rationale.

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: So you're --

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

19 MR. DROZDOWSKI: As the Court has previously
20 mentioned, what we also have here is there's no --
21 there's no corroboration in the transcript that juror
22 --

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

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

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

13 JUSTICE GINSBURG: Why?

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

17 MR. DROZDOWSKI: Well --

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

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

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

6 JUSTICE BREYER: So tell me.

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

15 And there was some discussion earlier about
16 this. Miller-El makes clear that the district attorney
17 must give the real reason for the strike, not just any
18 rational basis the prosecutor can think up. And when
19 we look at the transcript of the Batson hearing here,
20 we see a prosecutor scrambling to think of anything she
21 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. DROZDOWSKI: That's correct.

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

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

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

25 JUSTICE BREYER: So what is the remedy -- the

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

14 MR. DROZDOWSKI: Well, I -- I think -- I
15 think the record here reinforces Your Honor's view on
16 --

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

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

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

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

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

1 probably pretty hard to figure out.

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

5 Another point is --

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

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

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

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

25 MR. DROZDOWSKI: I understand, but what's

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

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

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

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

1 -- and that suggests a certain looseness of
2 responsibility.

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

8 What would your position be?

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

12 JUSTICE SOUTER: Right.

13 MR. DROZDOWSKI: -- of what actually
14 happened.

15 JUSTICE SOUTER: What would your position be?

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

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

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

1 prosecutor.

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

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

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

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

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

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

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

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

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

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

15 MR. DROZDOWSKI: Correct.

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

19 JUSTICE SOUTER: And this one rolled her
20 eyes.

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

25 CHIEF JUSTICE ROBERTS: Juror 19 -- you just

1 said earlier the fact that the one juror's uncle had an
2 alcohol problem was -- was a legitimate factor. Juror
3 19's daughter had a -- a cocaine problem and this was a
4 cocaine case. Isn't that a perfectly legitimate reason
5 for exercising a peremptory with respect to a juror?

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

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

25 MR. DROZDOWSKI: I respectfully disagree that

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

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

13 JUSTICE KENNEDY: Would you say the same
14 thing about the defense counsel confusing jurors 16 and
15 19 on page 9? The bottom of page 9, it seems to me Ms.
16 -- Ms. Nachman is confusing juror 19 with 16. They're
17 talking about 16 and 6, and then Ms. Nachman ends by
18 talking about juror 19. That seems to me clearly to
19 mean number 16.

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

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

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

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

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

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

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

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

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

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

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

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

15 And here, the district attorney did not ask
16 questions on grounds later used to justify the strike.

17 Now, clearly here, it's a judge-conducted voir dire,
18 but the attorneys were allowed to ask the judge to ask
19 different questions -- to ask that the judge ask
20 additional questions. And here, at the conclusion of
21 the voir dire of jurors 1 through 17, the -- the
22 prosecutor asked the judge to ask four additional
23 questions. Three of them were to the panel generally
24 and one specifically about juror 8. But the prosecutor
25 never asked that any additional questions be asked of

1 juror 16 before she struck her.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. DROZDOWSKI: No, we don't.

8 JUSTICE KENNEDY: Thank you.

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

14 Here, the district attorney struck two of
15 three African American jurors, including both black
16 women, where a black defendant was facing a sentence of
17 25 years to life in a three-strikes case for possessing
18 .1 grams of cocaine.

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

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

1 reason for sustaining a Batson type challenge?

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

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

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

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

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

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

21 MR. DROZDOWSKI: There is not besides her
22 name.

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

1 MR. DROZDOWSKI: No.

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

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

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 General Lockyer, you have 4 minutes
8 remaining.

9 REBUTTAL ARGUMENT OF WILLIAM W. LOCKYER

10 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

24 If there are no questions, thank you very
25 much.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.
3 (Whereupon, at 12:02 p.m., the case in the
4 above-entitled matter was submitted.)

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