1   IN THE SUPREME COURT OF THE UNITED STATES

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3 RON DAVIS, ACTING WARDEN,   :

4   Petitioner   :   No. 13-1428

5   v.   :

6 HECTOR AYALA.   :

7 - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, March 3, 2015

10

11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:10 a.m.

14 APPEARANCES:

15 ROBIN URBANSKI, ESQ., California Deputy Attorney

16   General, San Diego, Cal.; on behalf of Petitioner.

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

18   Respondent.

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

2   (11:10 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next this morning in Case 13-1428, Davis v. Ayala.

5   Ms. Urbanski.

6   ORAL ARGUMENT OF ROBIN URBANSKI

7   ON BEHALF OF PETITIONER

8   MS. URBANSKI: Mr. Chief Justice and may it

9   please the Court:

10   The California Supreme Court's harmlessness

11   determination was an adjudication on the merits because

12   it denied relief on the basis of the intrinsic rights

13   and wrongs of Mr. Ayala's claim.

14   A Federal habeas court is authorized to set

15   aside that final State judgment only if Ayala can show

16   two things. First, a legal error as a matter of this

17   Court's clearly established laws; and second, actual

18   prejudice under Brecht.

19   As to the first point, the Ninth Circuit

20   took the view here that there was no adjudication on the

21   merits, and it proceeded to review the entirety of Mr.

22   Ayala's claim under the de novo --

23   JUSTICE SOTOMAYOR: You know, your -- your

24   brief confused me, and it took me a while to pull it

25   apart. All right.

1   I don't know that there's a dispute -- or at

2   least there's a dispute in the application. But really,

3   the deference here was given to the harmless error

4   finding or purported to have been given. So there's

5   no -- there's no dispute that the court below committed

6   an error, meaning that the court below didn't apply the

7   right standards, a factual question. The issue, I

8   think, that you're trying to arrive at is under the

9   circumstances of this case, that the Court also reached

10   the performance prod of Strickland, and that's really

11   where the dispute is, isn't it?

12   MS. URBANSKI: Well, the issue before the

13   court was a Batson issue. It was whether the procedures

14   employed by the trial court had in fact -- were the

15   proper procedures in terms of excluding defense counsel.

16   And the Ninth Circuit in this case took the view that

17   there was no adjudication on the merits with respect to

18   the State court's finding of harmlessness. And it

19   proceeded to review the legal claim de novo.

20   JUSTICE KAGAN: Ms. Urbanski, let's say that

21   they -- that the Ninth Circuit is wrong in that respect.

22   Let's say that there is an adjudication on the merits

23   here. All right? But I think that that doesn't solve

24   the basic problem of this case. There's an adjudication

25   on the merits, but there are these two prongs; there's

1   the harmlessness prong, and then there's the substantive

2   violation prong, whether a Batson violation occurred.

3   And what the court here said was if a Batson violation

4   occurred, it doesn't matter. It would be harmless.

5   So if you -- for whatever reason, right or

6   wrong -- if you take that harmlessness determination out

7   of the picture, if you say that that was an unreasonable

8   application of law, all right, we're left with

9   essentially a vacuum; right?

10   And so what happens?   What does the court do

11   where there's been no finding as to a Bat -- Batson

12   violation? And you're saying that it should kind of

13   make up a reason why there might not have been a Batson

14   violation and -- and go with that. And why is that the

15   proper approach?

16   MS. URBANSKI: Your Honor, the reason why

17   that is a proper approach is because on Federal habeas

18   corpus, what the Federal court is doing is deferring to

19   the State -- the final State court judgment of

20   conviction. Even in the case that Your Honor has

21   presented, the State court has ultimately denied relief.

22   It simply did so on harmless error grounds. Had the

23   State court done precisely the same thing as a matter of

24   a silent denial, that decision would have been entitled

25   to deference.

1   JUSTICE SCALIA: Why is -- why is the

2   harmless error thing out of -- out of the picture? I --

3   I don't really understand that. I mean, if in fact the

4   State court found that whatever error there was, if

5   there was any, was harmless and if that's a merits

6   determination, why do we even have to get to the point

7   of whether there was a violation?

8   MS. URBANSKI: The problem, Your Honor --

9   that is correct. But the problem, Your Honor, is it

10   leaves us with what the Ninth Circuit did here, which

11   was to look at the underlying constitutional issue from

12   a de novo perspective. That is not the proper start for

13   --

14   JUSTICE SCALIA: I'm saying you don't have

15   to look at the underlying constitutional issue. Once

16   there's been a determination that it's harmless --

17   whether there was a violation or not. If there was one,

18   it was harmless. Once there's been that determination,

19   why do you have to investigate whether there was one or

20   not?

21   MS. URBANSKI: And that's correct, Your

22   Honor. The harmlessness determination would resolve the

23   claim.

24   JUSTICE KAGAN: Well, you only do if the

25   harmlessness determination is an unreasonable

1   application under AEDPA. So if that is an unreasonable

2   application, you face the quandary of what you do with

3   respect to the substantive violation.

4   JUSTICE SCALIA: Right. Right.

5   JUSTICE KAGAN: It obviously doesn't arise

6   if the harmlessness determination is perfectly fine.

7   MS. URBANSKI: Correct, Your Honor.

8   JUSTICE SCALIA: And -- and don't you

9   contend that it was fine?

10   MS. URBANSKI: Yes. Certainly in this case,

11   that --

12   JUSTICE SCALIA: So that ought to be the end

13   of the case as far as you're concerned, right?

14   MS. URBANSKI: In this case that isn't an

15   issue. However, in the case where the State court has

16   left unresolved the issue of the underlying

17   constitutional error, we still do have the problem for

18   future cases of how are we going to review that aspect

19   of the claim. The Ninth Circuit took the approach here

20   that the proper standard --

21   JUSTICE SCALIA: We review judgments. We

22   don't review legal issues. I mean, you'd like us to

23   answer that question even though it's unnecessary to

24   this case, right?

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

1   with Your Honor that if the finding of harmlessness is

2   a -- is a reasonable application of the Chapman standard

3   in this case, then that certainly is the end of the

4   inquiry.

5   JUSTICE SOTOMAYOR: I -- if we were to find

6   that it wasn't a reasonable finding, then we would have

7   to reach the first issue .

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

9   JUSTICE SOTOMAYOR: So assume that it was

10   unreasonable. Let's go back to the first issue. Yes,

11   in Williams and Harrington, we have said that if there

12   are multiple claims and the State court just says

13   everything's denied, you assume that means Federal and

14   State. If the State claim is the same as the Federal

15   claim, we say, they -- they -- they -- we assume they

16   meant the Federal claim as well. But this is sort of an

17   interesting case because the -- they said there was

18   constitutional error under State law, but they

19   studiously avoided Federal saying there was one or not

20   under Federal law. And they dismissed the Federal claim

21   just on the harmlessness prong.

22   And what the Ninth Circuit said, as I

23   understand, they didn't reach it. Constitutional

24   avoidance made them decide that it was easier for them

25   to just say there was State error.

1   Why do we reach a different conclusion?

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

3   The State court here did not resolve the underlying

4   constitutional aspect of the claim. And it proceeded to

5   under -- to resolve the claim based on the harmless

6   error grounds alone. That is an adjudication on the

7   merits. What the Ninth Circuit could not do is

8   precisely what it did in this case, which was out the

9   gate look to the underlying constitutional issue and

10   simply resolve that based on what it would have done on

11   the issue.

12   JUSTICE SOTOMAYOR: I'm sorry. Why not? If

13   the State court didn't reach the Federal constitutional

14   error, you're asking us to assume it did when you've

15   admitted it didn't?

16   MS. URBANSKI: No. I'm not asking the Court

17   to assume that it did. What I'm saying is that on

18   Federal habeas corpus, the deference that is owed is to

19   the final State court judgment. And in this case, the

20   final State court judgment was a denial of relief.

21   JUSTICE KAGAN: Well, suppose -- I mean,

22   that's a very broad kind of rationale. It would apply

23   even if the State court said that there was a violation;

24   right? Then you would -- there's a violation, but no

25   worries, it's harmless. And then you decide that the

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1   harmlessness issue is -- is out because that's an

2   unreasonable application.  And then you're going to have

3   a reviewing court say, notwithstanding, that the State

4   court found that there was a violation, we think that

5   there's a credible argument that there wasn't such that

6   we can support the judgment.  Is that what you're

7   asking?

8        MS. URBANSKI:        And that is correct.  That is

9   how the scenario would play out, Your Honor.  And I

10  recognize that that is a more --

11       JUSTICE KAGAN:        It's a little bit

12  counterintuitive.

13       MS. URBANSKI:        A little more challenging

14  case for sure.  However, again, what a Federal court is

15  deferring to is the finality of the State court's

16  judgment.  And on Federal habeas, the question is

17  whether the habeas can -- petitioner can meet his very

18  high burden of showing both clear error under this

19  Court's precedence and actual prejudice under Brecht.

20  And that does not depend on what the State court may

21  have thought about --

22       JUSTICE SOTOMAYOR:        So why do we bother

23  saying in Williams that there are circumstances -- I

24  happen to think this one of them -- where -- and you do,

25  too -- where a State court hasn't reached an issue, that
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1   we don't give it deference. Under your judgment, we

2   made a mistake when we said that in Williams.

3   MS. URBANSKI: No, your Honor, because

4   the -- what this Court also said in Richter is that you

5   look to the -- the decision of the claim as a whole.

6   You do not parse it into its components.

7   And here the decision on the claim as a

8   whole was that no relief was warranted because any error

9   did not rise to the level of a constitutional violation

10   such that the Defendant suffered sufficient harm to

11   grant relief.

12   So that is the decision that the -- that

13   resolves the claim, and that's --

14   JUSTICE SOTOMAYOR: Why do we apply AEDPA at

15   all? Meaning -- I think we've said repeatedly that

16   Brecht's actual prejudice standard is higher than the --

17   the AEDPA standard. So why are we applying it at all?

18   MS. URBANSKI: Your Honor, if -- if the

19   Court were to proceed directly to the question of

20   prejudice, then yes, Brecht would be the standard that

21   applies.

22   However, before you even get to that

23   question, the Court should look to what the State court

24   did here first and determine whether that was

25   reasonable. If it was unreasonable or if there was no

1   adjudication on the merits to begin with, then you reach

2   the second question.

3   JUSTICE SOTOMAYOR: Well, you've -- you've

4   already admitted there's sort of an illogic when the

5   State court says there was a Federal violation but no

6   harmlessness and we say, "Yes, there was harm."

7   MS. URBANSKI: No, your Honor. I don't

8   think there's an illogic. I actually think that the

9   rule is all the more logical when you look to the facts,

10 if there is a decision denying relief, and that is the

11 decision that is owed deference under AEDPA standard and

12 that is --

13   JUSTICE SOTOMAYOR: So we don't give it

14 deference that there was a Federal error. We don't say

15 it was a reasonable mistake but they found error and we

16 accept the error.

17   MS. URBANSKI: Correct, Your Honor, because

18 the -- what the State court may have thought about the

19 underlying issue on de novo review is not controlling

20 for purposes of AEDPA. That is a different standard.

21   JUSTICE KAGAN: I mean, would that -- would

22 that also apply -- I'm just sort of trying to figure out

23 the reach of this claim.

24   Just take a case where there was no

25 harmlessness determination. There was just a single

1   decision about a Batson claim, but it was an egregious

2   decision. It was, Hispanics aren't entitled to make

3   Batson claims, something like that, egregiously wrong.

4   But I guess under your theory, we just look

5   to the judgment and then we decide, there is a credible

6   way in which to say that this Batson claim was not a

7   good one and that we should defer to that; is that

8   right?

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

10   If there is a denial of relief, then that is all the

11   Federal habeas court needs to look to and then look

12   backwards and ask whether there was a reasonable basis

13   to support it, and that follows directly from this

14   Court's decisions in Richter and Williams.

15   There is no principled way to distinguish

16   between where a State court does precisely that in

17   silence and where the State court does it with a

18   reasoned decision.

19   JUSTICE SOTOMAYOR: We didn't do that in

20   Wiggins, Rompilla, or Porter, did we?

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

22   JUSTICE SOTOMAYOR: So we would have to

23   overturn those cases to accept your proposition.

24   MS. URBANSKI: The results in the cases

25   would not have to be overturned. However, to be sure,

1   this Court did apply a de novo standard of review to one

2   prong of a multiprong claim where the State court --

3   JUSTICE SOTOMAYOR: That the State had not

4   addressed?

5   MS. URBANSKI: Where the State court had

6   left it --

7   JUSTICE SOTOMAYOR: Identical to this case.

8   The State had not addressed one prong, and we said

9   de novo review.

10   MS. URBANSKI: Correct, Your Honor. And

11   those decisions, I would agree, cannot be reconciled

12   with this Court's later decisions in Richter and in Tara

13   Williams, which precisely addressed the issue of, what

14   do we do when the State court says nothing at all?

15   JUSTICE KENNEDY: We added the question,

16   whether or not -- and the Court of Appeals properly

17   applied the standards set forth in -- in Brecht.

18   Do you want to address that briefly?   And

19   I -- if we get into the details of this case, it seems

20   to me that the key person is Olanders.

21   MS. URBANSKI: Yes, Your Honor. First of

22   all, with respect to the -- did the Court have a -- a

23   particular question about Olanders D.?

24   JUSTICE KENNEDY: Well, I want you to -- to

25   discuss that -- this argument.

1   MS. URBANSKI: Yes, Your Honor. Well, first

2   of all, with respect to the standard that is to be

3   applied in this case, the -- this Court did make clear

4   that it is the actual prejudice standard of Brecht that

5   is to apply in virtually all 2254 cases, and that is to

6   be the case regardless of whether the State court

7   conducted a Chapman analysis.

8   What the Ninth Circuit did here was take

9   this Court's language and say that it could apply the

10   Brecht standard without regard for the State court's

11   very careful analysis in this case.

12   Fry makes clear, though, that in order to

13   give effect to AEDPA's purpose in limiting the

14   availability of this extraordinary remedy and preserving

15   the finality of State court judgments, the Brecht

16   standard, properly understood and applied, is to be the

17   most protective of final State court judgments . It is

18   more protective than the AEDPA Chapman standard. It

19   subsumes that standard.

20   So what we were ask -- asking this Court to

21   clarify in this case with respect to how a Federal

22   habeas court is to apply the Brecht standard is that in

23   a case such as this one, where the State court has, in

24   fact, conducted a Chapman analysis and found an error to

25   be harmless, then the Federal court has to be able to

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

2   unreasonable.

3   If the Court cannot find the Chapman

4   analysis objectively unreasonable, then the prejudice

5   inquiry is at an end. And in this case, the Ninth

6   Circuit misapplied the Brecht actual prejudice standard.

7   The --

8   JUSTICE SOTOMAYOR: I have a bit of a hard

9   time with the -- this -- assume I accept your

10   proposition that it's actual prejudice.

11   In a process claim, generally, we don't talk

12   about what the outcome was going to be. We talk about

13   what the process was and whether there was an

14   opportunity for you to make arguments you couldn't have

15   made. All right?

16   That's our normal jurisprudence in a due

17   process claim. And we basically say you get a do-over

18   because you weren't permitted to have the process you

19   were entitled to. So you're saying we've got to treat

20   this differently under Brecht; this person wasn't

21   permitted to be there. I think there's some very

22   convincing arguments, potentially, on at least one

23   juror, Olanders. There, the comparison was not

24   speculative. It was based on the answers provided by

25   jurors who had both questionnaires and voir dire that

1   was available.

2   And the briefs point out -- and so does the

3   Ninth Circuit, very convincingly -- all the excuses

4   given by the prosecutor are rebutted by either identical

5   answers by one juror, Ana L. -- Ana or Ana L., or other

6   jurors who did exactly the same thing and were permitted

7   to sit on the jury.

8   So why are we doing anything different with

9   this actual prejudice standard?

10   MS. URBANSKI: Well, first of all, Your

11 Honor, anytime counsel is absented from a portion of the

12 proceedings or anytime a portion of the record winds up

13 missing, it is often going to be the case that you might

14 had a very different record had those things been

15 present. But the question before this Court on Federal

16 habeas is whether the California Supreme Court believed

17 that it had sufficient information before it from which

18 to meaningfully address the issue on appeal.

19   And with respect to Olanders D. in this

20 case, the prosecutor felt that Olanders D.'s answers

21 were not particularly responsive to the question, to the

22 questions being presented. The prosecutor's primary

23 concern was with Olanders D.'s ability to vote for the

24 death penalty, and the trial court conducted a

25 meaningful inquiry with the prosecutor and gave a

1   firsthand credibility determination.

2   JUSTICE SOTOMAYOR: But don't -- don't --

3   don't talk to me generally. Ana L. said more equivocal

4   things about the death penalty than Olanders D., so did

5   another juror, and they still went on.

6   MS. URBANSKI: Ana L. expressed that she had

7   changed her mind about the views on the death penalty,

8   similar to the fact that Olanders D. did. However, what

9   Ana L. said was that she hadn't given it a great deal of

10 thought until being called as a juror. And once she was

11 called as a juror to sit on a -- potentially, on a death

12 penalty case, she now sat down and considered the issue.

13 And after careful thought and consideration, she

14 believed that she, in fact, could make that decision if

15 called upon to do it.

16   JUSTICE SOTOMAYOR: That's what Olanders D.

17 said, essentially.

18   MS. URBANSKI: To the -- I would disagree

19 with that, Your Honor. Olanders D. specifically said on

20 the death -- on the questionnaire that he did not

21 believe in the death penalty.

22   JUSTICE SOTOMAYOR: So did she.

23   MS. URBANSKI: But now called into voir

24 dire, Olanders D. could not provide the prosecutor with

25 a satisfactory explanation for why his views had

1   changed.

2   JUSTICE SOTOMAYOR: He thought -- "I thought

3   about it and realized I -- I could."

4   MS. URBANSKI: The -- the -- Olanders D.'s

5   response at page 178 of the Joint Appendix, when

6   specifically asked what caused the change was, "I mean,

7   examining it more closely, I think -- and becoming more

8   familiar with the laws and the behavior, I mean, the

9   change in people, I think."

10   That is a far -- a significantly different

11   response than somebody coming in and saying, "This case

12   caused me to think about it, and now that I have been

13   forced to think about it, I believe that I can choose

14   this as the penalty. "

15   JUSTICE SOTOMAYOR: That -- you see the two

16   of them substantially different? One said, "I thought.

17   I've listened to what the law is. I've done" -- it's

18   hard for me to imagine how they're substantively

19   different.

20   MS. URBANSKI: I think --

21   JUSTICE SOTOMAYOR: And do you think that

22   defense counsel wouldn't have been able to point that

23   out to the judge?

24   And, you know, there were a lot of people

25   questioned in this.

1   How many days of voir dire was there?

2   MS. URBANSKI: I believe it was three --

3 three weeks of voir dire.

4   JUSTICE SOTOMAYOR: Three weeks of voir

5 dire. Do you suspect that the judge, or think that the

6 judge had clearly in mind every set of questions, and

7 their responses.

8   MS. URBANSKI: Well, the California Supreme

9 Court did credit this judge as being very diligent, very

10 well-respected --

11   JUSTICE SOTOMAYOR: It's clear he was. I'm

12 not doubting that. But my point is simply, do you think

13 that pointing this out to the judge could not have had a

14 substantial influence on his decision? Because all

15 three prongs, he could have pointed to almost identical

16 comments by other jurors.

17   MS. URBANSKI: I would disagree that the

18 comments would have been identical. I think that there

19 are substantial differences between Olanders D.'s

20 unconvincing answers and the very convincing answers of

21 the other jurors.

22   And in any event, what we look to is what

23 the trial court, and then subsequently, the California

24 Supreme Court, had before it at the time that this

25 decision was made. The trial court, as the

1   prosecutor -- while the prosecutor is making these

2   race-neutral proffers, is -- has the benefit of the

3   questionnaire responses right in front of him. The

4   trial court has all of the information in front of it,

5   from which it can make a credibility determination based

6   on this record.

7   There is no reason to believe that the trial

8   court was considering anything less, than all of the

9   information available to it, and there is no reason to

10   believe that defense counsel would have had any

11   substantial impact in pointing things out that the trial

12   court already had before it.

13   The Ninth Circuit here, in its application

14   of Brecht, demonstrating that it was not applying that

15   standard in a manner consistent with this Court's

16   opinions. Brecht speaks to actual prejudice. It does

17   not speak to the kind of prejudice analysis like the

18   Ninth Circuit did in this case, which was marred by

19   speculation and hypothesis, where the court of appeals

20   is hypothesizing about what a prospective juror might

21   have been wearing, or whether he was gathering

22   prospective jurors for a social outing.

23   The Ninth Circuit used a debatable set of

24   inferences in this case, to set aside the conclusion of

25   the State court that a prospective juror's following of

1   a very controversial trial out of San Diego, where the

2   very D.A.'s office and police department that were

3   investigating and trying Mr. Ayala's case, were the

4   subject of serious misconduct allegations and suggesting

5   that somehow a prosecutor basing his reasoning on that,

6   was a pretext for a racial discrimination challenge.

7   The trial -- the Ninth Circuit gave no

8   credit to the trial court's firsthand observations in

9   which the trial court found this prosecutor to be

10   credible, and this was not a trial court that simply

11   accepted the prosecutor's reasons at face value. This

12   was a trial court that was discerning and critical of

13   the prosecutor's reasons, and even disagreed with him at

14   times.

15   And when you look -- compare what the

16   California Supreme Court did here, the California

17   Supreme Court did it right. It credited the trial

18   court's firsthand observations. It looked at the

19   colloquy between the prosecutor and the trial judge and

20   found support for each of those individual's assertions

21   in the record.

22   The court was confident that the prosecutor

23   had not exercised challenges based on race in this case.

24   The State court analyzed the very same --

25   JUSTICE SOTOMAYOR: How can you be

1 confident? I mean, the whole purpose of an adversarial

2 system is so that the other side of an argument is

3 presented to the judge. Was he playing defense attorney

4 too? Is that -- and defense attorney with the same

5 purpose?

6   MS. URBANSKI: Not literally, no, Your

7 Honor. However, certainly the trial court must consider

8 all of the information before it. And so it was looking

9 at the very same things for --

10   JUSTICE SOTOMAYOR: Then I -- why don't we

11 just have a trial ex parte? Presumably that's what

12 you're arguing.

13   MS. URBANSKI: I'm sorry?

14   JUSTICE SOTOMAYOR: We should have the

15 entire trial ex parte, because the judge can do that.

16   MS. URBANSKI: No, Your Honor, certainly we

17 would prefer the counsel --

18   JUSTICE SCALIA: I thought you were arguing

19 the much narrower point that the absence of counsel for

20 this one incident was harmless.

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

22   JUSTICE SCALIA: You're not arguing

23 for ex parte trials?

24   MS. URBANSKI: No, Your Honor.

25   JUSTICE SCALIA: I didn't think so.

1   MS. URBANSKI: We certainly don't condone

2   that approach here, and there is -- we certainly don't

3   condone that approach here. The --

4   CHIEF JUSTICE ROBERTS: Anywhere -- anywhere

5   else?

6   (Laughter.)

7   MS. URBANSKI: No, no. We would certainly

8   prefer the defense counsel be present, Your Honor.

9   JUSTICE SOTOMAYOR: I guess my question is,

10   the Ninth Circuit, at least with this juror -- I'm not

11   talking about the other things, I'm talking about this

12   juror -- as I pointed out earlier, pointed out two

13   situations that were almost identical to the one that

14   the op -- the prosecutor pointed to with this juror.

15   Anna L. also said something that was totally

16   nonresponsive to a question; it was like, "that's

17   correct," rather than answering the question.

18   So you can say with complete confidence that

19   that would never have made a difference to the judge?

20   If he had had a real adversary able to point all of

21   these things out, you're confident the judge would not

22   have made up his mind. That's what you're saying.

23   MS. URBANSKI: Based on the record in this

24   case and what the trial judge had before him and the

25   fact that this was a critical trial judge, yes. I think

1   the California Supreme Court had an ample record before

2   it from which to conclude that defense counsel's

3   presence would not have made a difference in this case,

4   and I would go back --

5   JUSTICE SOTOMAYOR: No, there -- there's a

6   real problem here, you do understand. We're only

7   pointing to the things for which there is a record.

8   There is another component to this, which is that all

9   the other questionnaires and the entire transcript

10   wasn't available.

11   MS. URBANSKI: That is true, Your Honor.

12   And certainly, anytime counsel is absent or anytime a

13   portion of the record is missing, it will be the case

14   that it is possible that the record might have been

15   different. But what we should look to is what was left

16   in the record, and what was left was a -- was thousands

17   of pages of a voir dire transcript. It was all of the

18   questionnaires of the seated jurors, which are the most

19   important ones for purposes of comparative analysis, and

20   the firsthand observation --

21   JUSTICE SCALIA: Three weeks, is that

22   standard? Three weeks? Is that standard out there?

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

24   Your Honor.

25   JUSTICE SCALIA: Good Lord.

1   (Laughter.)

2   MS. URBANSKI: If I may -- can reserve the

3   remainder of my time.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   Mr. Dain.

6   ORAL ARGUMENT OF ANTHONY J. DAIN

7   ON BEHALF OF THE RESPONDENT

8   MR. DAIN: Mr. Chief Justice, and may it

9   please the Court:

10   Let me start by answering the question that

11   Justice Scalia, Justice Sotomayor and Justice Kagan

12   asked when this first began. And, that is, yes, this

13   was an adjudication on the merits, based on the

14   harmlessness determination. The reason the State wants

15   to address the first prong in the first instance, is

16   because it wants to create the fiction that by treating

17   this holistically, the California Supreme Court actually

18   found no Federal error, and that is what this Court must

19   grant deference to.

20   So let's start with the second question.

21   The second question is the question at heart: Was

22   Brecht applied appropriately? And we only get to that

23   in the -- the general context, if there was an

24   unreasonable determination of Chapman by the State

25   Supreme Court. And the Ninth Circuit said, we grant

1   deference on that point to the California Supreme Court.

2   I'll address Olanders D., but let me even

3   show you why this is case closed in an overarching

4   pretext by the prosecutor, that led to all the harm in

5   this case.

6   When the trial court asked the prosecutor to

7   State his race-neutral reasons, the first words out of

8   the prosecutor's mar -- mouth, were pretext, active

9   pretext, using a shield as a sword.

10   The prosecutor said, and I quote, We can do

11   that but we will do it in chambers, because they have no

12   right -- the defense -- to our strategy. That was

13   pretext.

14   The prosecutor was stating on an overarching

15   level for Olanders D., Galileo S. -- or Galileo,

16   Barbara S., Gerardo O., and the others, that his primary

17   reason for challenge was strategy. And that was

18   pretext. The trial court, which the State says we

19   much -- must give great deference to because it

20   conducted credibility determinations, didn't question

21   that. Defense counsel was primed to question that

22   because defense counsel responded: But we have a right

23   to be present, to hear that statement, in case the

24   prosecution is misstating the facts.

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

1 understand what you're saying. Maybe it was wrong to

2 have this in camera, but why was the statement that we

3 don't want to disclose our strategy a statement that --

4 that challenges that -- that the challenges that I'm

5 going to make are going to be pretextual?

6   MR. DAIN: Because when the prosecution

7 said, I'll give you my reasons, but I don't want my

8 adversary -- I don't want my adversary to be present to

9 test this in the crucible of an adversarial situation,

10 which is what the Constitution requires. When he says,

11 my reasons for challenging these jurors involves

12 strategy, it's a pretext. It did not involve strategy.

13   JUSTICE ALITO: I don't understand that.

14 When you -- when you're trying a case and you're

15 deciding which jurors to exercise peremptory challenges

16 against, do you not take into account what your defense

17 is going to be? What your defense strategy in the case

18 is going to be.

19   MR. DAIN: You might -- you might, but from

20 Georgia v. McCollom to -- in this case, the State court

21 analyzed it under its own State law equivalent.

22 Strategy is not why you would say I don't like this

23 person or I don't trust this person, he doesn't dress

24 right, he doesn't fit in. The courts have said all of

25 those are reasons for which the defense counsel can,

1   should participate and respond.

2   Strategy involves a much more deep analysis

3   that is very rare as this Court has said in prior cases.

4   It's in the rare instance. It's very rare. This isn't

5   a general argument that everything I do is strategy, but

6   the prosecutor was saying it involves strategy which is

7   a very rare situation. And in none of -- as the

8   California Supreme Court recognized, none of his

9   statements involved strategy.

10   So at a minimum, the State says we must

11   credit and give deference to not only the trial court,

12   but the California Supreme Court's credibility

13   determinations. If, as the California Supreme Court

14   found, in determining error that it was not credible,

15   that we -- that strategy was not involved, then a

16   credibility determination was not made. And

17   furthermore, the trial court missed that. Defense

18   counsel said, I don't want to be involved in their

19   strategy, but I want to hear the statement because I

20   want to be present to tell you it's a misstatement.

21   Why have we instruct our --

22   JUSTICE SOTOMAYOR: Give an example of a

23   strategy.

24   MR. DAIN: The trial strategy might be I'm

25   calling -- in near cases of this -- might be calling an

1   informant, and this informant might be living in the

2   same neighborhood as this person. I don't want this

3   person on there. Trial strategy might be that I'm going

4   to be calling a witness who dresses in exactly the same

5   way as that witness and again --

6   JUSTICE SOTOMAYOR: As that juror.

7   MR. DAIN: As a juror. I'm sorry. There

8   could be very deep levels of that. But the California

9   Supreme Court astutely recognized that was not the case.

10   More importantly, it specifically, in opposition to

11   Chief Justice George in dissent, said that the

12   strategy -- that -- that the lack of strategy was error.

13   What it didn't recognize -- and this is why there was an

14   unreasonable application of Chapman.

15   JUSTICE ALITO: Well, let me give you an

16   example. Let's say your defense strategy is going to be

17   that the police officers planted incriminating evidence.

18   All right? And if that's going to be your defense

19   strategy, will you not be particularly diligent in

20   exercising your peremptory challenges to try to get rid

21   of anybody who seems to have sympathy or an

22   identification with the police. That's a strategy.

23   It's not pretextual.

24   MR. DAIN: Two --

25   JUSTICE ALITO: Now, there may not have been

1   that here. The prosecutor may not have had a strategy

2   like that. I -- but I just don't understand this

3   argument that you're making, that merely stating I don't

4   want to disclose to my adversary what my trial strategy

5   will be is a confession that I am going to exercise

6   peremptory challenges pretextually, and I just don't

7   want defense counsel there to call me on it.

8   MR. DAIN: Well, let me take that from the

9   beginning. The answer to your question is, no, that's

10   not a trial strategy in the context of the cases.

11   Everything's a strategy. How -- you could argue

12   strategy is what order I'm going to call the witnesses

13   in.

14   The reason it's not a strategy, and

15   certainly not a reason for an ex parte communication, is

16   defense counsel would already know that. The witness

17   would have been listed; discovery would have been given.

18   That would have been in the police reports. So let --

19   I -- I want to be careful we don't confuse just the

20   general strategy every attorney has in approaching a

21   case with what --

22   JUSTICE SOTOMAYOR: Prosecutor doesn't have

23   to say, it's because of planting of police, the pros --

24   of planting of evidence is going to be at issue. He

25   could just say, I don't like people who distrust the

1   police.

2   MR. DAIN: He absolutely could, and that

3   could be heard by the defendant. It is --

4   JUSTICE SOTOMAYOR: Actually, it's said

5   quite often.

6   MR. DAIN: It is a strategy, but that's not

7   the trial strategy we're talking about that in the rare

8   instance, as this Court has said, would require an ex

9   parte communication.

10   CHIEF JUSTICE ROBERTS: Could you at the

11 other side -- I understand the idea that you're saying

12 that just, you know, basically you'd like jurors who are

13 going to be sympathetic with your case. You say that's

14 not a strategy, but what's the -- what is a strategy?

15 An example of that?

16   MR. DAIN: No. And again, that's why I'm

17 saying trial strategy isn't in the broad sense. Trial

18 strategy is something that really is truly confidential.

19 Like, I have -- you could say in a domestic violence

20 case, I have a witness that is afraid to testify but may

21 have some connection or knowledge that pay -- that

22 person may know the witness. I need to tell the judge

23 that in camera and say, I can't take that risk. It

24 could be a gang case where you have informants. It's a

25 rare situation is what they're talking about.

1   JUSTICE KENNEDY: Well, even -- even if the

2   strategy was an overblown statement by the prosecutor.

3   Suppose that in this case defense counsel is absent, but

4   what the juror says is clearly grounds for the

5   prosecutor to -- excuse me, the juror says I've thought

6   about this. I can't -- I don't believe in the death

7   penalty supposedly. That's the hypothetical. That's

8   not this case.

9   MR. DAIN: Of course.

10   JUSTICE KENNEDY: Then we still look to see

11   whether or not there was harmless error.

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

13   Absolutely.

14   JUSTICE KENNEDY: And it's true that the

15   harmless error in this case loops back in your -- your

16   concern that there was not full cross-exam. So they

17   come together a bit. But it does -- it does seem to me

18   that this district judge exercised care in listening to

19   the answer. And we are required -- the Federal courts

20   are required under Brecht to give very substantial

21   deference to that finding. So if you could address

22   that.

23   MR. DAIN: And that's what -- what I'm going

24   to say in addressing that. You do start with the

25   premise that, as the California Supreme Court said,

1 there was no strategy. So -- so that's the pretext I'm

2 talking about. If you start with that, that was missed

3 by the trial court and only discussed in terms of error

4 by the California Supreme Court, the California Supreme

5 Court should have said in its harmless error analysis, I

6 start with the reason defense counsel was excluded was

7 pretextual whether -- or was false. Was false.

8   JUSTICE SCALIA: That goes to whether there

9 was a violation --

10   MR. DAIN: No.

11   JUSTICE SCALIA: -- not to whether the

12 violation was harmless or not.

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

14 let me state why.

15   The fact that you're assessing, as the State

16 says, the credibility of the prosecution's reasons, if

17 the prosecution starts with the reason that is false,

18 saying, I don't even want my adversary in the room. And

19 he didn't say it like, Your Honor, I have concerns. Can

20 I discuss them? He said, we'll do it, but not in their

21 presence.

22   The State caused the removal of defense

23 counsel, and if we just take Olanders -- Olanders D.

24 Anna L. not only had questions, she responded to

25 virtually identical, she actually said she would be a

1   holdout. She made a statement if the other jurors voted

2   for death, I might not. In fact, I think she said I

3   would not. Olanders D. --

4   CHIEF JUSTICE ROBERTS: But the problem with

5   that -- I mean, you're looking at -- and we have said

6   this often in Batson type cases. You're looking at a

7   cold transcript. You don't know what the difference in

8   intonation was. You don't know if Olanders is saying,

9   yeah, you know, I thought about it, and blah, blah,

10   blah, blah. And the other one is saying, I thought

11   about it -- about this trial, and now -- I mean, you

12   know, we don't know that.

13   MR. DAIN: But that serves our purpose.

14   That serves our purpose because what we didn't have is

15   the adversarial crucible. We didn't have defense

16   counsel saying exactly what you said, well, wait a

17   minute --

18   JUSTICE KENNEDY: Suppose the defense

19   counsel were present and the -- a transcript said

20   exactly what it says here. Defense counsel made no

21   objection. It seems to me that that's how you have to

22   analyze this case because we're -- we're assuming no

23   error.

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

25   JUSTICE KENNEDY: Now, I -- I understand

1   that it would have been a much better record if the

2   counsel were there. That's the reason why there's a

3   likely error here under a matter of law, but we're

4   talking about the harmlessness, the -- the deference that

5   must be given to the State judge.

6   MR. DAIN: Absolutely. And the deference

7   under Brecht, and I would even say under Richter,

8   requires a fair and balanced playing field. At least

9   you have to start every case from Feltner -- every case

10   that has addressed Batson has had a level playing field.

11   All the participants have contributed, and there was a

12   complete record.

13   But the reason I'm saying this is prejudice

14   is it was the State that actively corrupted the record.

15   The State excluded the defendant. So now the State

16   turns around and says, well, you're speculating. It

17   caused the need to speculate. And what I'm saying is if

18   the California Supreme Court had taken into account in

19   its prejudice analysis that it was the State, through a

20   pretext, that excluded the defendant, we wouldn't have

21   to speculate. We wouldn't have what -- what is a

22   corrupt record.

23   JUSTICE SOTOMAYOR: Well, we're speculating

24   the judge would not -- that defense attorney remained

25   silent or that defense attorney --

1   MR. DAIN: No.

2   JUSTICE SOTOMAYOR: Either way. We would be

3   speculating if defense attorney remained silent, or we'd

4   be speculating that the judge would have ruled the same

5   way. The question is on this record.

6   MR. DAIN: Had he ruled the same way -- had

7   defense counsel participated and he ruled the same way,

8   we would have a Batson challenge in substance, not, as

9   Your Honor has recognized, a procedural issue. At that

10   point, all this Court has said, all we can do is say

11   would it have likely changed the outcome, we can't

12   speculate either way. But the problem is it's the State

13   that caused that and that's the prejudice. The State

14   caused the inability to have a complete record,

15   actually, in two ways, it also lost, inadvertently in

16   that instance, it lost the Miller-El v. Dretke

17   opportunity through the questionnaires.

18   But the State actively caused the exclusion

19   of defendant, it caused the inability to have a complete

20   record, and that's different from merely saying that

21   there was an ex parte proceeding but we followed it

22   up --

23   JUSTICE KENNEDY: Well, I'll go back and

24   look at this. I did not think that this was really the

25   basis for the Ninth Circuit's conclusion that Olanders'

1   testimony showed that he was improperly excused, I just

2   don't see --

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

4   JUSTICE KENNEDY: I mean, it's a long

5   opinion but Page 678 talks about Olanders just in the

6   term that we're talking about.

7   MR. DAIN: It said -- the prosecutor had

8   said that he was not responsive -- the Ninth Circuit, to

9   address your question, Justice Kennedy. The Ninth

10   Circuit said that in its review of the existing

11   transcript, he was very responsive.

12   So there -- there was a disagreement there.

13   JUSTICE KENNEDY: He meant --

14   MR. DAIN: The Court disagreed with the

15   statement that he wouldn't fit in. The Court said, I

16   believe he would fit in with the rest of the --

17   JUSTICE SOTOMAYOR: Well, the trial court

18   said that.

19   MR. DAIN: I'm sorry, but the Ninth Circuit

20   pointed out the trial court said that. So the reason

21   Olanders D is so compelling is because the trial court

22   itself questioned some of the prosecutor's reasons, but

23   there were others.

24   For instance, the prosecutor said the

25   questionnaire indicated he opposed the death penalty.

     1   We actually don't have the questionnaires because

     2   they're gone. We have to take it at its word that it

     3   did. Defense counsel again, had the prosecutor not

     4   proactively excluded him, might have said, well, the

     5   questionnaire said A, B, C. We might have had a

     6   complete record --

     7   JUSTICE SOTOMAYOR: That's speculation.

     8   What the Ninth Circuit did with Olanders B is point to

     9   the actual existing record --

    10   MR. DAIN: Understood.

    11   JUSTICE SOTOMAYOR: -- and show that there

    12   were contradictions to -- in the record as it existed.

    13   MR. DAIN: And that's what our argument --

    14   you can even take the existing record and show the

    15   inconsistencies that show Chapman was not appropriately

    16   applied.

    17   JUSTICE ALITO: Of course it's speculative

    18   that defense counsel, had defense counsel been present,

    19   would have been able to point to the other juror, Anna.

    20   We've had a number of cases where defense counsel was

    21   present at the voir dire, which I think should be the

    22   rule in almost every situation, and only later, years

    23   later on appeal when -- as particularly when you have

    24   many, many jurors questioned, as apparently was the case

    25   here, does somebody realize, well, this juror who was

1   dismissed, has answers seem to be somewhat similar to

2   this other juror who -- who wasn't challenged.

3   MR. DAIN: And then had that been the facts,

4   we lose, under AEDPA, we lose. Because you do have to

5   give deference under AEDPA to the California Supreme

6   Court. I agree.

7   JUSTICE ALITO: But what reason is there to

8   think that defense counsel would have had better recall

9   of this than the trial judge who was there?

10   MR. DAIN: Defense counsel -- first of all,

11   there were two of them. First of all, they're more

12   focused on each of the jurors that were excused. The

13   judge had -- as the Ninth Circuit noted, there were 70

14   questions for each of these questionnaires, they

15   involved 17 pages. The judge had to take -- and he may

16   have had his own notes that he thought were important,

17   they may have been complete or not incomplete. A judge

18   certainly has many more tasks that don't involve just

19   the direct advocacy, as defense counsel has. But that's

20   when I add, it's the prosecution, the State that caused

21   that. And then uses its sword to say, well, now you're

22   speculating.

23   We can do nothing more.   But with Olanders D

24   on the existing record, we can show that was wrong. The

25   reason I'm saying it was unreasonable is because the

1   Court should have taken into account in prejudice that

2   there is a lack of credibility when a prosecutor comes

3   in and causes all these problems and the State Supreme

4   Court says, and that wasn't correct. There was no

5   strategy involved here. By the way, they use -- the

6   Courts use the term "strategy" and "confidential

7   information." Those are generally tied. They're used

8   where you have informants, they're used where you have

9   gang activity, very rare circumstances that occurs.

10   But how -- even if you said under Richter,

11   how can any reasonable judge or justice disagree that if

12   the State, through a false basis, excluded defense

13   counsel, eliminated defense counsel from challenging the

14   questions and assisting the judge where the judge didn't

15   recognize that -- that strategy was not involved,

16   prevented further voir dire which might have corrected

17   the situation, prevented a proper record and then later

18   lost all of the ability to do a comparative analysis,

19   could be harmless, I'm -- and let me even use in the

20   Brecht standard, this Court has eloquently said that --

21   and if you'll give me a moment of unprofessionality

22   while I shuffle my pages -- but this Court has said that

23   it undermines the very integrity of the court system.

24   And in McCollom, it actually described that

25   it -- it may be obvious to the jury, it undermines the

1   parties' understanding and the Court's ability to -- to

2   maintain integrity through the entire trial. So under

3   Brecht, this error caused injury to the jury verdict.

4   And, moreover, the questionnaires are lost, even Brecht

5   can't address that, because they were lost post verdict.

6   But under any standard, there was an

7   unreasonable application of Chapman by the State Supreme

8   Court and it had actual prejudice in this case. Justice

9   George in his dissent was correct. How can anybody

10   credit this record? It wasn't accidental. It wasn't as

11   though defense counsel were arguing defense counsel was

12   in -- ineffective. The State caused this. And it

13   didn't cause it through inadvertence, it actively

14   insisted that it would do this only in chambers, in

15   camera.

16   And going back to Cronic and going back to

17   Wade, this was a critical portion. Forget ex parte,

18   there are many times you can do ex parte proceedings if

19   you make a proper record. They're all rare, but there

20   are times you can do them. But in this instance, in the

21   critical Batson phase, to exclude the defendants -- I

22   use pretext -- it's a false statement that the

23   prosecutor gave that it was strategy. That's

24   prejudicial.

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

1 certainly prejudicial under Richter. Thank you, Your

2 Honors.

3   CHIEF JUSTICE ROBERTS: Thank you.

4   JUSTICE KENNEDY: This doesn't relate to the

5 issues you've been arguing. This crime was, what,

6 30 years ago and the trial 26 years ago?

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

8   JUSTICE KENNEDY: Has he spent time in

9 solitary confinement, and, if so, how much?

10   MR. DAIN: He has spent his entire time in

11 what's called administrative segregation. When I visit

12 him, I visit him through glass and wire bars.

13   JUSTICE KENNEDY: Is that a single cell?

14   MR. DAIN: It is a single cell. They're all

15 single cells. Well, San Quentin is on the most -- it's

16 on Heaven's land in Marin County. It's a 150-year-old

17 prison and their administrative segregation is single

18 cells, a very old system, very small, and -- and – you're

19 not allowed

20   JUSTICE KENNEDY: Is it the same thing as

21 solitary confinement?

22   MR. DAIN: No, it's 23 hours out of the day,

23 that probably is the same. They generally --

24 administrative segregation you're not allowed in the

25 general yard anymore. But you are allowed an hour a

1   day --

2   JUSTICE KENNEDY: One hour.

3   MR. DAIN: -- of activity.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   MR. DAIN: Thank you, Your Honor.

6   CHIEF JUSTICE ROBERTS: Four minutes,

7   Ms. Urbanski.

8   REBUTTAL ARGUMENT OF ROBIN URBANSKI

9   ON BEHALF OF PETITIONER

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

11   Just a few brief points.   First of all, with

12   respect to the prosecutor stating that he believes he

13   would reveal trial strategy, there is no reason to think

14   that that was any kind of a pretext for then exercising

15   peremptory challenges on the basis of race. The trial

16   court never found this prosecutor to be anything less

17   than credible, and that determination is entitled to

18   great deference in a Federal habeas collateral

19   proceeding.

20   With respect to Olanders --

21   JUSTICE SCALIA: What was the trial strategy

22   that displayed itself in his strikes?

23   MS. URBANSKI: I cannot tell the Court what

24   it was, but I don't think there is any reason to take

25   the trial -- the prosecutor at anything less than his

1   word. We don't have anything in the record to refute

2   it. Certainly that is not what ended up happening, but

3   it is also not a reason to suggest that this was a

4   pretext for race.

5   With respect to Olanders D, this juror gave

6   responses that were not only not responsive, but they

7   were responses that would cause any prosecutor to have

8   doubt about that particular juror serving on a capital

9   case. There were clearly grounds for the prosecutor to

10 have wanted to excuse that juror.

11   But most importantly, the California Supreme

12 Court looked at this record and it found support for the

13 assertions in the record; with respect to Olanders D.,

14 that appears at Petition Appendix page 203a.

15   What we have here is the Ninth Circuit

16 substituting its own view without ever showing how the

17 State court was objectively unreasonable in its

18 analysis. We have a State court here that analyzed the

19 very same harmlessness question under a much higher

20 standard, the Chapman standard, and found no harm. And

21 to proceed without regard for the State court's very

22 careful determination in that regard seems antithetical

23 to the spirit of AEDPA.

24   Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you, counsel.

1   The case is submitted.

2   (Whereupon, at 12:00 p.m., the case in the

3   above-entitled matter was submitted.)

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