ORIGINAL

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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2064

TITLE JAMES GREER, WARDEN, Petitioner V. CHARLES "CHUCK" MILLER

PLACE Washington, D. C.

DATE April 27, 1987

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES GREER, WARDEN, :

Petitioner, :

v. : No. 85-2064

CHARLES "CHUCK" MILLER :

- -x

Washington, D.C.

Monday, April 27, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

MARK. L. ROTERT, ESQ., Chief, Criminal Appeals Division, Illinois Attorney General's Office, Chicago, Illinois; on behalf of the Petitioner.

GARY R. PETERSON, ESQ., Springfield, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-2064, Greer against Miller.

Mr. Rotert, you may proceed whenever you are ready.

ORAL ARGUMENTS MARK L. ROTERT, ESQ.,

ON BEHALF OF THE PETITIONER

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

Your Honors, the petitioners have raised three issues for consideration by the Court in their briefs, but today I'm only going to discuss the first and the second issue, and I'd like to divide my time roughly equally between the two issues.

First, today, I'd like to discuss the first issue in the brief, and that question is whether or not it is always inappropriate to attempt to apply the standards of Chapman v. California to an asserted violation of due process of law that arose under the rule of Doyle v. Ohio.

And the petitioner's position in this regard may be very succinctly stated. We believe that it is an oxymoron, and an inherently contradictory statement, to say on the one end that error occurred which was so serious that it rose to the level of a deprivation of

due process of law, that is, it rendered the trial fundamentally unfair, but then on the other hand to say, we're now going to analyze that error and determine whether it was harmless beyond a reasonable doubt.

It would appear that the use of terminology that an error rose to the level of creating fundamental unfairness answers the question of whether or not the conviction may stand.

The conviction may not stand in the face of such fundamental unfairness.

Now, there are, in light of that conclusion, two possible results that can obtain when there's been a violation of the rule in Doyle v. Ohio.

I think the first potential result was that apparently accepted by the Seventh Circuit Court of Appeals, the majority of the en banc, and also appears to have been accepted by the respondents in this case.

That theory seems to operate on the premise that once a prosecutor utters the language that is condemned under Doyle, that is in this case, once the prosecutor said, why didn't you tell anyone this story when you got arrested, the deprivation of due process is complete.

The violation of fundamental fairness is apparent, and there's no more analysis to be had in the

case.

Well, if that were in fact the rule, it would be an unusually harsh rule. It would read more facts into Doyle than Doyle itself contains. It would create a rule that was disproportionate to the harm suffered by the defendant. And it would violate this Court's tradition that due process clause cases are not designed to deter prosecutorial misconduct.

Therefore, we submit that the more appropriate analysis in this case is to examine a violation of the Doyle rule, and to treat that examination in what we might refer to as the traditional due process model.

This would require that a defendant would bear the burden of showing that when the Doyle violation is assessed in the context of the entirety of the trial, that but for the Doyle error, the results of that proceeding would probably have been different.

If a defendant makes such a showing under Doyle v. Ohio --

QUESTION: Why is that any less logically absurd?

MR. ROTERT: Well, it's very similar to --

QUESTION: I mean isn't -- isn't -- you've just told us, once you find a Doyle violation, that's the end of it. And once you find that there has been a

lack of fundamental unfairness, there's been a lack of fundamental unfairness.

It seems to me the logic of your position is that you don't make any kind of a harmless error inquiry.

MR. ROTERT: Well, I don't equate the violation of Doyle rules with a violation of due process such as creates a fundamental unfairness.

I believe if Doyle is read as a case that was decided on the basis of its own unique facts, Doyle makes some implicit assumptions.

One of the implicit assumptions in Doyle is that post-Miranda warning silence were used by the jury to draw negative inferences about defendant Doyle's credibility; that resulted in a breach of the implicit promise of Miranda, and rendered the trial fundamentally unfair.

But by describing Doyle in that fashion, Justice Scalia, I hope I have demonstrated that there are more elements to Doyle than merely looking to see whether the prosecutor commented, in the presence of the jury, on post-Miranda warning silence.

QUESTION: Oh, well no, I didn't understand that. So every Doyle violation is not a Doyle violation.

MR. ROTERT: Every Doyle --

QUESTION: I mean, every time you make that

kind of a statement you haven't violated Doyle?

MR. ROTERT: You may violate the rule of the Doyle case, but that does not end the inquiry of whether or not you have violated due process of law by creating a fundamentally unfair proceeding.

QUESTION: So every Doyle case involves a harmless error inquiry before you even find a Doyle violation?

MR. ROTERT: No, it's not precisely a harmless error inquiry. I would analogize it to the Strickland v. Washington inquiry. Before you determine whether there is a violation, you must assess prejudice.

Prejudice is a necessary component of declaring that there has been a violation of due process of law.

Now I think that this -- this proposition that I proffered to the Court this afternoon is reflected by a comparison of the facts of Doyle with the facts of this case.

QUESTION: May I just interrupt with one question? Does this argument that you're now making apply equally whether the challenge is made on direct review or on collateral attack?

MR. ROTERT: It does, Justice Stevens, and I appreciate that. My first argument says that Doyle

violations have a prejudice requirement no matter what the context in which they're raised.

My second argument talks about the specific application of Chapman v. California, in the context of habeas review.

It's an assuming arguendo. If the Court doesn't believe me when I say that there's a prejudice component to Doyle, if the Court agrees with the majority, in fact, the unanimous weight of the Federal circuits, that Chapman applies to Doyle, then I think we have to take a look at whether or not Chapman serves a utilitarian function in habeas corpus, and we'd like to --

QUESTION: Mr. Rotert, I didn't see that this was the question presented for review, what you're telling us this afternoon.

I think I'm understanding you to say, we shouldn't treat a Doyle error as a determination in and of itself that there has been any error of a constitutional nature.

You are asking us to reexamine Doyle in a sense.

MR. ROTERT: I'm asking --

QUESTION: And I thought the questions presented asked us to reexamine the remedy for a Doyle

error, to wit, whether we apply the Chapman standard upon this error.

MR. ROTERT: Well, I think that it -- the question presented for review in the cert petition, if I may, was, whether, when considering violations of Doyle in Federal habeas corpus proceedings, which takes me to the second point, the standard of review should be whether the error substantially affected the course of the trial, rather than whether the error was harmless beyond a reasonable doubt.

My position this afternoon, Justice O'Connor, is that the question should be answered that the error must substantially affect the course of the trial.

Please understand, I'm not requiring or even requesting that the Court reexamine Doyle in its rationale.

QUESTION: Well, it strikes me that might be a better idea than to set up some new standard, other than Chapman, if you find there has been a violation of due process.

I'm just trying to understand what it is you're arguing.

MR. ROTERT: I don't believe we're looking for a new standard. I believe we're looking for -- at faithful adherence to Doyle, but I don't believe that

Doyle was a case in which this Court had an opportunity to discuss both what elements constitute a violation and what remedial steps are required if there's been a violation.

I think that the case is one that was decided on its own facts, and including in those facts, I would remind the Court, the State of Ohio expressly declined to ask the Court for a remedial determination, a determination of what remedy should obtain if there is a deprivation of constitutional rights.

So in that sense, we're not asking for a reanalysis of Doyle. We're not asking -- or attacking the fundamental premise of Doyle.

We're saying that Doyle is subject to misconstruction because of the facts and circumstances it raised. Those facts and circumstances made a complete deprivation of due process.

What happened in Doyle was that the defendant was cross-examined at some length about his post warning silence. And as Justice Stevens once noted, he gave a jumble of answers. He got hurt on cross-examination because of his post warning silence.

In the context of that case, it should also be noted, that the prosecutor argued that issue frequently on closing arguments. He directed to the jury the

inference that they should draw, he said, was that there was a concocted or fabricated story.

I think that the Court in Doyle had no occasion to stop and consider when, if at all --

QUESTION: Well, is your argument that in this case there was no violation of due process at all?

MR. ROTERT: It is that, Justice O'Connor.

QUESTION: And it doesn't make any difference whether it's on Federal habeas or on direct review.

MR. ROTERT: That is correct, Justice O'Connor. Yes, my argument is that there is -- there is an attempt by the prosecutor to violate the rule of Doyle. Undisputed.

But there was not a deprivation of due process, because Mr. Respondent's trial was not fundamentally unfair.

QUESTION: Mr. Rotert, just before Justice O'Connor asked her first question, do I understand you are not going along with Judge Easterbrook's isolated position below?

MR. ROTERT: Not all of Judge Easterbrook's interesting dissent found its way into our brief, Justice Blackmun, that's fair to say.

QUESTION: Well, you're not supporting his thesis, that's what I want to know.

MR. ROTERT: Not on this particular regard. On the second regard, when Judge Easterbrook questions the applicability of Chapman to habeas corpus cases, we do adopt substantially much of his rationale.

We take a different approach to the essential Doyle question itself.

Now, I think that --

QUESTION: Well, any Doyle violation, I mean, has to be based on some constitutional shortcoming, doesn't it?

MR. ROTERT: Yes, it does, Justice.

QUESTION: And are you saying that here there was no constitutional shortcoming?

MR. ROTERT: That's correct, because there wasn't an error that deprived the trial of its fundamental fairness.

QUESTION: So then -- concomitantly, that means there was no, "Doyle" violation?

MR. ROTERT: There was a Doyle violation. But is -- the question I would present is, is a violation of the rule in Doyle necessarily and always a violation of due process of law in that it deprives fundamental fairness.

QUESTION: You're saying sometimes it isn't?

MR. ROTERT: Precisely. And I think this case

is --

QUESTION: And you say obviously, it was in Doyle, because of the facts.

MR. ROTERT: That's correct.

QUESTION: And the Court had no occasion to say whether prejudice was essential.

MR. ROTERT: That's exactly right, Justice White. That's exactly what I'm saying. And here's one of the best ways to illustrate the dichotomy between the two cases.

Doyle talks about the offensive constitutional problems that come up when there is a breach of a promise. That's very suggestive language used by the Court that almost calls us back to contract principles.

I would submit to the Court that there is no breach of the promise possible merely by virtue of the unilateral conduct of the prosecutor.

QUESTION: Well, what does the Constitution say about breach of promise?

MR. ROTERT: Well, there is a position that can be taken that Doyle is not directly rooted in any specific constitutional principle. It's rooted in what Judge Easterbrook called the bushwhack theory. You shouldn't tell a guy that he should be able to remain silent, and then hurt him with his silence later.

That kind of fundamental unfairness is perceived as undermining our confidence in the accuracy of the verdict.

But the point that I'm drawing is that unless this Court has reason to conclude that the jury actually inferred negative things about this respondent's post warning silence, there is no reason on which you could conclude that there was a breach of the promise implicit in Miranda.

Here what happened was, the question was asked, and an objection was immediately sustained. Now, admittedly, the judge didn't use iron clad language. He said, ladies and gentlemen of the jury, you are to ignore that last question for the time being.

But the record also demonstrates that later that very same day, in a written set of instructions, of which this instruction was on the first page, the jury was told, ladies and gentlemen, you are to ignore questions or comments or evidence as to which I sustained objections.

This jury was told directly twice in the same day, once orally and once in written form, don't pay any attention to the prosecutor's attempt to talk about post warning silence.

There is no basis on which this Court should

conclude that the jury drew a negative inference from his post warning silence. There's been no breach of the --

QUESTION: There's no conclusion to the contrary. He said, until I tell you, and then he never told them.

MR. ROTERT: No, he did tell them in a written instruction later.

QUESTION: No, he didn't tell them on that particular question.

MR. ROTERT: Not on that particular point.

QUESTION: So he says, that I will tell you about later. And he didn't.

MR. ROTERT: Well, Justice Marshall, that point might be well taken if the judge had said, I don't know what to do about this objection, I'll tell you later.

QUESTION: I'm not talking about whether or not, I'm talking about what he said.

MR. ROTERT: What he said was the objection is sustained.

QUESTION: He said he was going to explain it later and he didn't.

MR. ROTERT: Well, I dispute that reading of the record. I think that he did indicate to the jury

that they shouldn't consider the question.

QUESTION: That's how you understand everything else to juries.

MR. ROTERT: But I think we have to indulge in the natural assumption the jurors in this case, as in every other case, followed the instructions given them by the judge.

QUESTION: And the instruction was to wait.

MR. ROTERT: I beg your pardon?

QUESTION: And the instruction was to wait.

MR. ROTERT: Your Honors, the second issue that the petitioners have briefed, and that I would like to discuss this afternoon is whether, assuming, as we are willing to assume for the second argument, that a Doyle violation gets Chapman analysis, we submit that there are significant policy reasons why the Chapman v. California stringent standards, to demonstrate that error is harmless beyond a reasonable doubt, do not provide adequate utility in collateral review to justify their application.

Now, Your Honors, it's fair to say that over the last three or four decades, two general theories have obtained in this Court concerning the essential focus of the purpose of habeas corpus.

On the one hand there has been the theory

expressed that habeas corpus is necessary to keep the state courts in line, to make sure that they honor the principles and precedents that are issued by this Court on the Federal Constitution.

A second theory that's been noted by the Court in various cases more recently says that, no, the essential purpose of habeas corpus is to see to it that there are no fundamentally unjust convictions obtained in the state courts in individual cases.

We believe we are demonstrating a proposition to the Court this afternoon that materially advances both of those interests.

Now, Your Honors, we state it as follows: There should be a rule from this Court, based upon the facts of this case, that states, where a state court identifies correctly the underlying constitutional principle that's at issue in a criminal trial, where it applies the governing precedent that's on point as issued by this Court, and if it determines the constitutional error arose, it then determines that the error was harmless beyond a reasonable doubt under Chapman v. California, then when that same case comes to the Federal habeas corpus court and the Federal judge agrees about the underlying principle having been correctly identified, agrees that the governing

principle or precedent was applied by the state court, the only question then remaining for the Federal District Court Judge is whether or not the petitioner in that habeas corpus case can demonstrate, on his burden, that absent the error the results of the proceeding would probably have been different.

And even if it were a violation of Griffin v. California, the kind of case that initially gave rise to Chapman v. California, if the state court had afforded a Chapman analysis on direct review, no useful purpose is served by permitting or requiring a Federal court to indulge in that analysis on collateral review.

QUESTION: You say in effect that if the state courts have concluded there's a constitutional violation but it was harmless under Chapman, and the Federal court agrees as to what the constitutional violation was, it may not then reexamine the Chapman question?

MR. ROTERT: I believe that it should not then reexamine the question, and I believe that this Court should fashion a rule to that effect.

QUESTION: Well, I said it may not; you say it should not. Is there any difference between those two?

MR. ROTERT: Yes, because this Court has reaffirmed only last week that the scope of habeas corpus jurisdiction, as a matter of potential power, is

extraordinarily broad.

But that power being as broad as it is does not mean that this Court will give the habeas corpus jurisdiction its widest possible scope.

This Court in any number of contexts has said, even though we have the jurisdictional power to act, we will act according to our assessment of what it means under the interests of finality and under the interests of comity.

So while you would have the power to require Federal courts to give us a Chapman analysis on habeas, you also have the power to say we shall not exercise that jurisdiction.

Now I want to emphasize that there's a misconception on the part of the opponents in the briefs. We do not assert, by the argument we raise to the Court today, that any change should be made in those constitutional cases which would now result in a per se reversal.

For example, if someone had no attorney under the Gideon case, that's a per se reversal case. And if under some unfortunate circumstance, that escaped the notice of the state court, on Federal court per se reversal rules would remain viable for application.

But what we're talking about are the

applications of Chapman v. California to habeas corpus cases where the state court has already made that subjective, fact-rooted factual determination.

Now the reason --

QUESTION: You're saying it's a question of fact under the section of the habeas statute that says you have to defer -- the Federal court has to defer to state court factual determinations?

MR. ROTERT: Well, no, I recognize that the Chapman analysis is essentially a Federal question. And I recognize that what is involved springs from an alleged or proven violation of constitutional principles.

But I do assert that the reason in this case that this conviction has been vacated and a new trial has been ordered is not because the State of Illinois differs in its view of the Constitution from the Federal judiciary.

The difference in the two opinions, the Illinois Supreme Court saying it was no problem, or at least not reversible error, and the opinion of the en banc Seventh Circuit saying you've got to give Mr. Miller a new trial, is not born of any friction between the Courts on the Constitution.

QUESTION: Well, but even a fact question can

be reviewed by the Federal Court, given unusual circumstances. You're putting the harmless error determination even further from review than a fact question.

MR. ROTERT: No, I don't believe I am. Because what I'm doing is saying that that Federal question, although it is fact based, having been analyzed once in the state court, that has met the needs that are found, that are supposed to be balanced under Chapman itself.

And the duplication of that effort is not materially advancing the development of constitutional law. It doesn't provide significantly greater constitutional protections.

But it does create the kind of situation we see here. There are no 2254(d) problems with the Seventh Circuit's opinion. They did not misstate historical facts, and they did not accuse the Illinois court of misstating historical facts.

QUESTION: But there is duplication of constitutional inquiry in almost every area of constitutional law and habeas corpus.

MR. ROTERT: But the duplication of effort relates to the meaning and the extent of constitutional rights and principles. When a state court says, we

don't think this was an indirect comment on his right to silence, and so Griffin doesn't apply, and a Federal court comes to precisely the opposite conclusion, that is a distinction or a dispute between the courts on the meaning of Federal constitutional principles.

The dispute and the distinction that arose in this case has to do with the meaning of facts. Do you think that Randy Williams was or was not believable? Do you think that Mr. Miller was or was not believable?

I believe that Chapman v. California expressly says, we are setting up a balance. On one side we're going to balance the interest in fundamental fairness in the trial and society's interest in seeing to it that fundamentally fair convictions are upheld, and against that we're going to balance the surpassing importance of the constitutional principles we see in the Fourth and Fifth Amendment.

By definition, if Chapman were only concerned with the accuracy of the trial's result, they wouldn't have balanced that accuracy factor against those surpassing importance interests.

Chapman serves a broad societal spectrum. It is intended on direct review as a judicial remedy, and it was a case that came through on direct review, but it is intended to strike a balance that is appropriate on

direct review.

That balance must be recalibrated when we get to collateral review. And the interests that Chapman serves in the societal function are not the same interests that the habeas corpus statute serves under either of the schools of thought that I've identified to this Court.

QUESTION: Which one of your two arguments would you rather have us adopt?

MR. ROTERT: Oh, a win is a win, Justice White. I'll be happy to see --

QUESTION: I know, but on your Chapman on habeas argument, you'd never get to your first question. Because I suppose you would argue that even under your standard, which would involve a prejudice component before there's a due process violation, once a state court has determined that there -- that there isn't any prejudice and no violation, that wouldn't be reviewable under Federal habeas?

MR. ROTERT: That's correct. Mr. Justice White, of the two arguments, I think that the problems associated with application of Chapman on habeas corpus are more significant to the various 50 states than the problems associated with a rather inaccurate reading of what Doyle v. Ohio purports to say about the due process

clause.

Now, one of the things that's noteworthy about the Chapman standard is, according to this Court and according to the lower courts, is, that if a state in this case wants to show that error was harmless beyond a reasonable doubt, we have to show Mr. Miller's guilt by virtue of overwhelming evidence, a quotation taken directly from any number of decisions by this Court.

If we're going to apply that overwhelming evidence standard on collateral review, it should be because the need to enforce Chapman on collateral review outweighs the costs that are associated with that enforcement of Chapman.

But in point of fact, that's not true. The benefits of applying Chapman on collateral review are illusory.

There is no dispute here between the Illinois appellate court, the Illinois trial court, and the Illinois Supreme Court, all three of which said Doyle error occurred, and the Seventh Circuit, either en banc or in panel.

Nobody has ever disputed the presence of a Doyle error. All we've ever done is quibble back and forth about the facts of this case and the meaning to be drawn from those facts.

If it is true, as this Court has noted, that some tension arises under our notion of a Federal system, by virtue of a fact -- by virtue of a Federal court vacating a conviction because it disagrees with a state court on the Constitution, how much more pronounced is that friction between the two jurisdictions when the vacation of the conviction arises because fair-minded judges in the Federal judiciary read facts and draw different conclusions than the fair-minded judges of the state judiciary.

QUESTION: Well, what do you do about Jackson.

MR. ROTERT: Versus Virginia?

QUESTION: Yes.

MR. ROTERT: Well, I don't know that there is any Chapman --

QUESTION: Well, there is Federal judges saying that no reasonable jury could have found -- could have returned a verdict of guilty in this case, and disagreeing flatly with the state courts.

That's what Jackson authorizes Federal courts to do.

MR. ROTERT: Yes, sir. But unfortunately, Jackson v. Virginia as a due process case would never result in application of Chapman on collateral review anyway, so it doesn't fit into the analysis I'm talking

about.

QUESTION: Well, I know, but you say Federal judges shouldn't upset -- differ with the factual conclusions of state court judges.

MR. ROTERT: Well, to the extent that any case can't exist in a vacuum, every case that creates a constitutional error for review by any jurisdictional court has to be decided on the basis of its facts.

But when we don't dispute what the constitutional rules are, or ought to be, and we merely dispute what the meaning of the facts are under those rules, then I think it's not that I'm saying that Chapman has absolutely no place. I'm saying that the costs of the application of Chapman are pretty significantly higher than the incremental benefits we get from applying Chapman on collateral review.

And that in light of that disbalance, this Court, as it did in other contexts, most specifically, Stone v. Powell, should reconsider whether or not that application is warranted in the future.

I will reserve the rest of my comments this afternoon for my rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rotert.

We will hear now from you, Mr. Peterson.

ORAL ARGUMENT OF GARY R. PETERSON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The state has suggested that this Court adopt a broad presumption in favor of harmless error in Doyle cases.

In so doing, the state has not mentioned what occurred at trial in this case. I believe an examination of what occurred at trial will reveal why such a broad presumption should not be imposed.

At trial in this case the prosecutor characterized the evidence as a credibility contest between the state's accomplice witness, Randy Williams, and the defendant, Charles Miller.

During his closing argument to the jury, the prosecutor stated, what it really boils down to here is, who told you the story and who told you the truth. You either believe Randy Williams or you believe Charles Miller. It's as simple as that.

Recognizing that the outcome of this case was dependent upon the jury's assessment of the defendant's credibility, the prosecutor commenced his cross-examination by asking, why didn't you tell that story to the police at the time you were arrested?

The prosecutor's comment was in blatant violation of this Court's decision in Doyle v. Ohio, and it was extremely prejudicial.

QUESTION: He was -- but the witness was not allowed to answer, was he?

MR. PETERSON: That's correct, Your Honor. But the Doyle violation is complete when the prosecutor comments on the fact that the defendant remained silent at the time of his arrest.

Such comments suggest --

QUESTION: Even if the comment is only in the form of a question to the witness?

MR. PETERSON: That is correct, because such comment --

QUESTION: What case says that?

MR. PETERSON: Doyle itself says that. In fact --

QUESTION: Well, wasn't there argument in Doyle to the jury?

MR. PETERSON: Yes, there was. But I think the Court indicated in Doyle that the attempt of impeachment with post arrest silence -- impeachment doesn't have to be completed.

We have one Doyle violation here. And of course, if the prosecutor reiterated that comment to the

jury, we'd have more than one violation; we'd have more than one comment on post Miranda warning silence.

In this case, the suggestion of the fact, or the comment that the defendant did not tell his story at the time of his arrest, suggested to the jury that if the defendant were innocent, and if his story were true, he would have told it at the time of his arrest.

And since this case was a credibility contest, that comment was extremely prejudicial.

With respect to the Doyle issue presented by the state, and with respect to the harmless error application to that Doyle violation, I think it's clear that the due process clause recognizes not only fundamental fairness in the trial as a whole, but fundamental fairness in the prosecutor's relations and actions within the criminal justice system.

Doyle held it is fundamentally unfair for the police to implicitly promise the defendant, at the time he is given Miranda warnings, that his silence will not be used against him, and then for the prosecutor to come back at trial and in fact use that silence against him to impeach his testimony.

QUESTION: Are you saying there is no sort of harmless error analysis in Doyle, then, under no standard at all?

MR. PETERSON: No, we are willing to concede, Your Honor, that Doyle is the type of trial violation which in terms of looking at its effect on a trial as a whole may sometimes be harmless.

QUESTION: That's not consistent with what you just said.

MR. PETERSON: No, fundamental --

QUESTION: I mean, it's either in and of itself fundamental, or it's in and of itself not fundamental; now, which is it?

MR. PETERSON: I disagree. It violates the Constitution, because it's fundamentally unfair. But this Court has recognized that constitutional errors may be subject to harmless error analysis.

In this case --

QUESTION: Not where the harmless error goes to showing that it hasn't been fundamentally unfair. Because that just undoes the very constitutional violation you begin with.

MR. PETERSON: The harmless error analysis goes to show if a trial as a whole is fundamentally unfair. The Doyle violation goes to the question of whether the prosecutor's conduct, in relation to the defendant, is fundamentally unfair.

Certainly, if the defendant's conduct in

relation to the defendant, is fundamentally unfair, in this case as in Doyle, and there's a reasonable possibility that that error contributed to the conviction, then the trial as a whole is fundamentally unfair.

But I'm willing to concede that where the State's case is overwhelming or the defendant's story is implausible, that under those circumstances, the Doyle error would not contribute to the conviction.

QUESTION: And so, not be fundamentally unfair?

MR. PETERSON: Would not be fundamentally unfair.

QUESTION: Even though it was fundamentally unfair?

MR. PETERSON: It would not be fundamentally unfair in terms of the trial as a whole. It would still be fundamentally unfair, the fact that the prosecutor tricked and deceived this witness.

QUESTION: The constitutional violation, which kind of fundamental unfairness?

MR. PETERSON: Fundamental unfairness in this case --

QUESTION: But I mean, you just described two different kinds of fundamental unfairness. Which is the constitutional kind?

MR. PETERSON: They're both constitutional, Your Honor. Due process clause established fundamental unfairness. And I would cite this Court the cases that deal with coerced confessions, the Santobello cases, that fundamental fairness is no different in this case.

In coerced confessions, the prosecutor tricks or the state and the authorities trick or deceive defendant into giving a confession. That's a violation of due process, because trickery and deception are fundamentally unfair.

In the Santobello v. New York situation, where the prosecutor enters into a plea bargain with the defendant, and he promises him he'll recommend a specific sentence, and when the defendant is then induced into giving a certain plea, the prosecutor comes back and recommends a greater sentence to the judge. That is fundamentally unfair.

And I would submit in that case the error could also be harmless. Because the defendant comes back, let's say you have a situation where the prosecutor agrees to recommend the minimum two-year sentence in exchange for the defendant's guilty plea.

The defendant pleads guilty. The prosecutor then recommends a six year sentence, but the judge gives him a two-year sentence. In that case the fundamental

unfairness would be harmless; but it would still be a constitutional violation.

The question is whether that constitutional violation was harmless --

QUESTION: Mr. Peterson, I suppose your best example would be if there was fundamental unfairness by asking the question and the jury acquitted him; there'd be no prejudice there, but you'd have your fundamental unfairness.

MR. PETERSON: That's true, Your Honor. In that case, there would be harmless error.

QUESTION: Well, why shouldn't we ask in a case like this the initial question of whether it's fundamentally unfair, what happened here? And why should we have to presume it in every case?

MR. PETERSON: Well, that question in itself suggests to the jury that if the defendant's story were true --

QUESTION: Well, shouldn't we at least ask the question? You can argue that asking the question was somehow prejudicial to the defendant, but shouldn't we at least ask that in every instance?

MR. PETERSON: I think that's why harmless error analysis is appropriate, Your Honor. If the -- if the prosecutor asked that, it's certainly a

constitutional violation --

QUESTION: Not every Doyle error, then, you concede, is a constitutional violation?

MR. PETERSON: No, I disagree. Every Doyle error is a constitutional violation, but that error may not be prejudicial in terms of its effect on the trial as a whole. In that case, it would be harmless error.

That's not the case in this case where the trial is a credibility contest between the defendant and the state's accomplice witness.

QUESTION: Well, if I understood the state's attorney, he's taking quite a different view and saying that not every Doyle error is a constitutional error?

MR. ROTERT: I say that view is inconsistent with this Court's ruling last term in Wainwright v. Greenfield, where it reestablished the constitutional importance of Doyle, and reestablished that due process is violated, that fundamental fairness is violated, where the prosecutor asks the defendant -- or when the prosecutor attempts to impeach the defendant with his post Miranda warning silence.

QUESTION: What -- what do you -- what do you think the difference is between you and your opponent with respect to the standard? You say a harmless error would save the conviction.

Your opponent says, well, there has to be a prejudice component before there's even a constitutional error.

You think the latter would just save many more convictions that your standard?

MR. PETERSON: I think the latter standard, the standard suggested by the state, is virtually impossible to show in terms of harmless error analysis.

The standard suggested by the state, that the error probably would affect the outcome, and it's more likely than not that the error would affect the outcome of the trial.

QUESTION: Well, we have standards like that with respect to some constitutional violations, don't we?

MR. PETERSON: Certainly, judge -- Justice White.

QUESTION: Well, why wouldn't it be appropriate in this context?

MR. PETERSON: With respect to cases such as Strickland v. Washington --

QUESTION: Pretty fundamental right at stake there.

MR. PETERSON: It certainly is, and United States v. Bagley is another situation. In those cases, there is no constitutional violation until the prejudice

has been established.

In this case, it's clear from this Court's decision that a constitutional violation has occurred. Now --

QUESTION: But it doesn't take a whole lot of reworking of those cases to say that perhaps there isn't a constitutional violation until there's prejudice.

QUESTION: Especially when prejudice was so obvious in Doyle.

MR. PETERSON: I'm not sure I understand the question.

QUESTION: Well, I mean, it doesn't take a whole lot of revisionist approach to Doyle to say that not every so-called "Doyle" quote violation is constitutional?

MR. PETERSON: Well, perhaps not. But I -- such a revision would violate the Constitution. Because every Doyle violation violates fundamental unfairness in terms of --

QUESTION: What is the deprivation, if it has not effect? What is the deprivation of life, liberty or property? I mean, that's what we're talking about, right? Without due process of law?

MR. PETERSON: The deprivation here is the deprivation of the defendant's right to have a fair

trial.

QUESTION: Not if it's had no effect. He's been deprived of -- he's deprived -- you mean you can be deprived of a due -- of a trial without being deprived of any life, liberty or property?

If he's acquitted, you acknowledge there's no constitutional violation, right? Even if he's acquitted after an unfair trial, there's no constitutional violation, is there?

MR. PETERSON: There's a denial of -- if he's -- if he's found guilty based upon a fundamentally unfair conduct of the prosecutor, and there's a reasonable possibility that that conduct contributed to his conviction.

QUESTION: Well, but if there's a reasonable possibility that it contributed to the conviction, then there's a reasonable possibility there was a constitutional violation.

MR. PETERSON: I'm sure that can be said with regard to all constitutional errors, if it's --

QUESTION: Only those which hang on the due process clause, which in and of itself requires a deprivation, to deprive somebody of due process, of life, liberty or property, you have to show that whatever happened affected a deprivation, which puts in

a causality element, it seems to me.

Other constitutional violations don't have any causality element; they just say, you're entitled to an attorney. You're entitled to confront the witnesses against you. No causality required.

But every due process violation has causality built in, doesn't it? So it's really the burden of the defendant to show that there was some effect of the Doyle violation.

MR. PETERSON: Well, in every Doyle case, there is going to be an effect. Because there is the suggestion that the defendant, if he was innocent and if his story were true, that he would have told that story.

There is going to be a prejudicial effect in every case. However, I have conceded that that effect may be harmless in some situations.

QUESTION: Well, if that's true, you wouldn't -- I don't know why you would be so worried if we said there was a prejudice component to a constitutional violation, because you say it would always be there.

MR. PETERSON: Prejudicial effect will always be there, that's correct. But the state is arguing that a different standard should be applied, and that makes a substantial difference.

I don't think it makes a difference in this

case, because we have pointed out that even if the state's standard is adopted in this case, the defendant would still prevail.

In this case we have the benefit of the trial judge's comments upon the evidence. The trial judge stated at the close, or following the trial in this case, that this case was a swearing match between Mr. Williams and Mr. Miller.

The trial judge stated, fortunately for the state, they believe Mr. Williams; unfortunately for the defendant, they believe Mr. Williams. The trial judge also stated that it could have gone just the other way. And he was commenting on the weight of the evidence when he said that.

Under those circumstances, where the trial could have gone either way, it's the word of one man against another.

The Doyle violation, and the prejudicial effect of that violation, shifts the weight of that evidence. So it's more likely than not that the defendant -- that it did affect the outcome of the trial.

And I point out that not only -- well, let me say this. The state has argued that to establish the standard, it would probably would have been different.

You have to look at the credibility of the witnesses, and the defendant has to show that the jury probably would have believed him rather than the state's witness.

This standard is simply impossible to administer. Because this court has recognized that it's not the duty nor the function of the Federal habeas court to examine the credibility and weigh the credibility of witnesses.

That's the function of the trial court. He's the only person in a position to observe the demeanor of witnesses.

Fortunately, in this case, you have the benefit of the trial judge --

QUESTION: But Mr. Peterson, could I interrupt there? If you agree that harmless error analysis, even under a Chapman standard, is appropriate for a Federal judge, necessarily doesn't that entail some inquiry into credibility of witnesses?

MR. PETERSON: No. As in a case like this, as the state indicates, in order to establish harmless error, they must show the evidence is overwhelming.

Here we say it's a credibility contest. But for us to prevail in this type of situation, the state says we have to show the jury probably would have believed one witness rather than another.

We're not resolving credibility in the harmless error case. Under the state's standard, you have to resolve credibility to show that the defendant probably would have been acquitted.

QUESTION: But I think in -- I think in most harmless error cases, I think of the Hastings case which came up from the Seventh Circuit too, there were a lot of witnesses who testified to the guilt of the defendants, but in finding the error harmless, the court must have decided their testimony was worthy of belief.

Generally, you know, there weren't photographs taken of what happened. They were oral descriptions.

MR. PETERSON: Certainly, and I think --

QUESTION: Whenever there's overwhelming evidence, a lot of the overwhelming evidence is oral testimony. And I suppose if you believe the prosecution's witness here, you could find the evidence overwhelming.

MR. PETERSON: Well, it's one thing to say that, when you have a presumption of constitutional error, the error occurred in this, you can show that the error was harmless beyond a reasonable doubt.

There if the evidence is close, if the evidence is conflicting, then it's not harmless.

And that's the case we have here. The

evidence is conflicting, and under the State's theory, you have to resolve that conflicting evidence. It requires the Federal district judge to go into the record and attempt to resolve the conflicts in the evidence, assess the credibility of witnesses; and he's not able to do that, because he hasn't observed the demeanor of those witnesses.

Now, although I've indicated it's almost impossible to meet this standard, I would say the standard has been met in this case, because not only was this one man's word against another, but there were substantial reasons for disbelieving Randy Williams.

As the trial court stated during defendant's motion on a directed verdict, the trial court stated that Mr. Williams' testimony is not necessarily credible; and in fact, Williams was an accomplice witness. And as this Court has indicated, accomplice witness testimony is suspect, because of a motive to shift the blame to someone else.

And the jury in this case was instructed accordingly. They were instructed that Williams' testimony should be subject to suspicion, and should be scrutinized with care.

It would also indicate that Mr. Williams' testimony with regard to the defendant's involvement in

this crime, was implausible.

Williams testified that he, his brother Rick, and Butch Armstrong left a Jacksonville, Illinois tavern at 1:30 one February morning in the company of the victim.

Williams and his cohorts had been drinking for 12 hours prior to this, and they had recently ingested a narcotic substance known as MDA.

According to Williams, they all got into the car, they drove over to his brother Rick's house and left Rick off. He continued to drive around until Armstrong and Gorsuch, the victim, were in the back seat.

During that time, Armstrong administered a severe beating to the victim. And they put Randy Williams' stocking hat over the victim's head so the victim could not see where they were taking him.

They took him to Randy Williams' residence. There, they obtained Randy Williams shotgun. They loaded that shotgun. They obtained his .32 caliber revolver, which was also loaded, and while at the residence, according to Williams, Armstrong struck the victim over the head with the butt of the shotgun.

There was so much blood, Williams was unable to clean it up with the towel. He went back, the victim

still hooded, they went back in the car, drove around some more, and according to Williams, they finally came to the defendant's residence.

Doesn't know what time this is, and the testimony is very vague, but it's still dark out.

According to Williams, Armstrong went in. He awoke Mr. Miller up from a sound sleep, and Miller comes out to the car. According to Williams, they then drive off to a bridge and take turns shooting the victim in the head with the shotgun.

I submit that it is difficult to believe that an individual who has absolutely no motive to kill the victim would be awakened from a sound sleep in the middle of a cold February night and that within a few minutes be out on a bridge shooting someone.

On the other hand, Mr. Miller's story was not implausible. He stated that they came to his residence after they killed Gorsuch, and there was really no reason to disbelieve him, except for the state's suggestion that if he were innocent and if his story were true, he would have told that story when he was arrested.

In addition, as the opinions of the lower courts indicate, Williams testimony was impeached in substantial respects. For instance, he stated in a post

arrest statement that while they were riding around, prior to -- actually he stated in a post arrest statement that after they picked up -- that Armstrong had fired a revolver into the backseat of the car.

In the post arrest statement, he said that this had occurred after they had picked up Miller. But if that was true, according to Gorsuch, the gun would either hit Miller or it would hit the victim.

He changed his testimony at trial to say the revolver was fired before they picked up the defendant.

Williams' testimony was also contradicted. He testified that the evidence indicated that the victim might not have been shot at the bridge; that he might have been killed by a pair of nunchakus.

There were nunchakus hanging on the wall at Williams' residence. And although he denied using them to beat the victim, the evidence established that the cause of death -- or indicated that the cause of death could have resulted from a blow to the head from those nunchakus.

For these reasons, even if the state's standard is accepted, I would urge this Court to affirm the Court of Appeals.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Peterson.

Mr. Rotert, you have five minutes remaining.

REBUTTAL ARGUMENT OF MARK L. ROTERT, ESQ.,

ON BEHALF OF THE PETITIONER

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

Your Honors, if I might say with all due respect, I doubt seriously if the Court is interested in determining whether or not the verdict in this particular case is one that any of the nine members of this Court would have voted for if they had been jurors in this trial.

I think that it's sufficient for me to say here that there are significant problems with a determination that Randy Williams' credibility was not good enough to support this conviction.

Under the circumstances of this case, for Randy Williams to implicate Chuck Miller in this murder would have been suicidal if in fact Chuck Miller were innocent, because all that Randy Williams could hope to do by that is create an enemy to whom he had recently confessed that he was a murderer.

So I think without belaboring the point to the Court, a fair analysis of the facts suggests that this is what Judge Easterbrook called it, a close case. I'm not going to dispute the respondent's assertion that

this is a credibility contest.

Many criminal trials are. But I doubt very seriously that the Court wants to look at this case for its credibility aspects.

Your Honors, I think that one point that might help understanding the petitioner's position is that there is a difference in law between unfairness and fundamental unfairness.

It was unfair for this prosecutor to get up and say what he said before that objection was sustained, just like it was unfair for the prosecutor in Darden to call the defendant an animal; just like it would be unfair for a prosecutor to have exculpatory material in his file and not turn it over; just like any number of instances involving unfairness by the prosecutor which are assessed under a due process model to see if prejudice resulted.

Fundamental unfairness is a constitutionally significant term, and it does not apply to the circumstances present here.

And I think to the extent that fundamental unfairness was found in Doyle v. Ohio, much of the problem that lower courts have had is in mixing or confusing unfairness with fundamental unfairness.

QUESTION: You mean, by fundamental

unfairness, I take it you mean something that has -- makes a difference about the outcome?

MR. ROTERT: That's precisely correct.

Now I would like to point out briefly. Doyle is a case which has had a tremendous impact on the trial courts in the states. But for one of those types of constitutional criminal procedure cases, it hasn't received extensive treatment on its facts from this Court.

There's Doyle, and in essence, the only other case that's directly in the same realm as Doyle is Wainwright. But I want the Court to be very cautious, because Wainwright is a case involving substantive use of post warning silence, a situation which creates unfairness potential that is significantly different from what is seen here.

Finally, to the extent that the respondent describes our standard as being one that is virtually impossible and unworkable for that reason, that must be distressing news to this Court, because we got that standard from this Court's majority opinion in Strickland v. Washington; we incorporated it wholesale.

So to the extent that it's attacked for not being feasible or realistic, we would assert to the Court that the circumstances of Sixth Amendment

litigation in this country don't bear that claim out.

For all of the reasons advanced by the petitioners this afternoon, we urge that the Court reverse the decision of the en banc Seventh Circuit ordering a new trial for this respondent.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rotert. The case is submitted.

(Whereupon, at 1:50 p.m., the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)