No.

In the Supreme Court of the United States

MICHAEL MARTEL, *Petitioner,*

v.

RICHARD RAYMOND TUITE, *Respondent.*

JAMES YATES, *Petitioner,*

v.

MARC CLAYTON MEROLILLO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Section 2254(d) of Title 28 of the United States Code precludes federal habeas corpus relief where the state court's merits adjudication is objectively reasonable, i.e., where "fair-minded jurists could disagree" on the correctness of the decision. *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011). In *Tuite* and *Merolillo*, as in many other cases, a state court held that an error of constitutional dimension occurred during trial, but that it was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18, 21 (1967). The Ninth Circuit granted habeas corpus relief on the basis of its own de novo conclusion that the error either had a "substantial and injurious effect" on the verdict under *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993), or that it was in "virtual equipoise" about whether the error had such an effect under *O'Neal* v. *McAninch*, 513 U.S. 432, 435 (1995).

The question presented is:

May a federal court grant habeas corpus relief to a state prisoner without determining that the state court's "harmless beyond a reasonable doubt" ruling was objectively unreasonable?

LIST OF PARTIES

1. Michael Martel
2. Richard Raymond Tuite
3. James Yates
4. Marc Clayton Merolillo

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PETITION FOR WRIT OF CERTIORARI

Michael Martel, Warden of Mule Creek State Prison, and James Yates, Warden of Pleasant Valley State Prison, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion in *Tuite*, directing the district court to grant a conditional writ of habeas corpus, is unpublished. The district court's judgment denying relief, the magistrate judge's report recommending denial of relief, and the California Court of Appeal's opinion affirming Tuite's criminal conviction, are unpublished. These decisions are reproduced in the Appendix to this petition.

The opinion of the Ninth Circuit Court of Appeals in *Merolillo*, reversing the judgment of the United States District Court and remanding with directions to vacate Merolillo's murder conviction and to issue a writ of habeas corpus, is reported as *Merolillo* v. *Yates*, 663 F.3d 444 (9th Cir. 2011). The district court's judgment denying relief, the magistrate judge's report recommending denial of relief, and the California Court of Appeal's opinion affirming Merolillo's criminal conviction are unpublished. These decisions are also reproduced in the Appendix to this petition.

STATEMENT OF JURISDICTION

In *Tuite*, the Ninth Circuit entered judgment on December 6, 2011. In *Merolillo*, it entered judgment on December 12, 2011. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court's determination that a constitutional violation may be deemed harmless beyond a reasonable doubt is an adjudication on the merits of a constitutional claim: "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967).

STATEMENT OF THE CASE

In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (*per curiam*), this Court addressed for the first time how AEDPA's centerpiece reform of habeas corpus—deferential review of state-court decisions under § 2254(d)—applies when a state court finds a constitutional error to be harmless beyond a reasonable doubt. The Court held that "habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id*. at 18. In *Fry* v. *Pliler*, 551 U.S. 112 (2007), however, this Court stated in dicta that the *Brecht* "substantial and injurious effect" standard "subsumes" the "AEDPA/*Chapman* standard." The Ninth Circuit and several other circuits—but not all—have followed that dicta, and no longer require federal habeas courts to examine whether a state court's harmless-error ruling was objectively unreasonable.

As *Tuite* and *Merolillo* demonstrate, a state court's reasonable application of the *Chapman* standard will often bar habeas relief under 28 U.S.C. § 2254(d)(1) even where a federal court, applying de novo *Brecht* review, might subjectively believe that the error exerted a "harmful and injurious effect," or that there was "grave doubt" about whether it did so.

Because the circuits are now divided on whether to give deference to a state court's harmless-error analysis, and because this issue is recurring, these cases present the important question of how federal habeas courts should conduct harmless-error review under AEDPA.

A. The *Tuite* Case

Tuite involved the 1998 stabbing murder of twelve-year-old Stephanie Crowe by a mentally ill transient, Richard Tuite, who mistook her for a former girlfriend named "Tracy." Tuite had approached several homes in Stephanie's rural neighborhood looking for Tracy or "the girl," resulting in a number of calls to the police. On many of these occasions, Tuite was aggressive towards the residents. Once, he was overheard saying, "Tracy, you whore, I will kill you." App. 107-09.

On the night of the murder, Tuite was seen heading up to Stephanie's house, the only home on that part of a rural drive. App. 109. After the murder, Tuite was found in possession of a wrapper from an uncommon brand of cough drop and a torn wrapper from a Snicker's bar—similar to cough drops and a wrapper later found in Stephanie Crowe's house. App. 115. Tuite possessed a knife on several occasions, before and after Stephanie was killed. App. 116. Tuite was also identified as the killer through DNA evidence showing Stephanie's blood on two shirts he was wearing the night of the murder. App. 114-16.

Nevertheless, the Escondido Police Department arrested Stephanie's fourteen-year-old brother, Michael Crowe, and two of his friends, for the crime. App. 116-18. The police obtained false incriminating statements from them by interrogation described by a Ninth Circuit panel as "shock[ing] the conscience." *Crowe* v. *County of San Diego*, 608 F.3d 406, 417 (9th Cir. 2010). The district attorney dismissed the case against the boys. App. 115, fn. 5. Thereafter, the California Attorney General prosecuted Tuite for the homicide. App. 115, fn. 6.

At Tuite's trial, the defense sought to resurrect the case against the boys and to discount the DNA evidence as contaminated. App. 116-20. The defense called an expert, Mary Ellen O'Toole, who testified that the crime scene appeared "organized." The defense theory was that an "organized" crime scene pointed more to the boys, who could have planned and orchestrated the murder in advance. App. 120. In rebuttal, the prosecutor called an expert, Gregg McCrary, who testified that, in his opinion, the crime scene was "disorganized." App. 121. The defense sought to impeach McCrary with a letter he had written to the International Criminal Investigative Analyst's Fellowship questioning O'Toole's ethics in this case. The letter challenged O'Toole's analysis of the crime scene and opined that her conduct was undermining the successful prosecution of Tuite. App. 138-41. The state trial court excluded the letter under state evidence law as irrelevant. App. 141-42.

A jury found Tuite guilty. However, having heard undisputed evidence of Tuite's mental impairments, the jury found the crime to be voluntary manslaughter rather than murder. App. 104.

On appeal, the California Court of Appeal held that the trial court violated Tuite's Sixth Amendment right to confrontation in precluding cross-examination of McCrary with O'Toole's letter. App. 142-45. However, the appellate court concluded that the error was "harmless beyond a reasonable doubt" using the harmless-error factors established by this Court in *Delaware* v. *Van Arsdall* for assessing the effect of Confrontation Clause error.[1] Applying these

[1] These factors include the importance of the challenged testimony to the prosecution's case; whether the testimony was cumulative; the presence or absence of corroboration or

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factors, the state court explained that the "competing experts' opinions about whether to label the crime scene 'organized' or 'disorganized'" had "almost no significance" to the case, given the videotapes and photographs depicting the scene that were introduced into evidence. Moreover, the state court determined, the letter "had no impact" on the "central evidence" of guilt—that the victim's DNA had been found in bloodstains on Tuite's shirt. Although the excluded cross-examination might have bolstered O'Toole's and weakened McCrary's opinions, the state court concluded it had only a "de minimis effect on the outcome." App. 145-47.

The California Supreme Court denied further review. No petition for writ of certiorari was filed.

Tuite filed a petition for writ of habeas corpus in the federal district court, claiming that he was prejudiced by the state trial court's error in excluding the letter. Applying *Esparza*, both the magistrate judge and the district judge agreed that the state court's harmless-error decision was reasonable, and therefore denied relief under section 2254(d)(1). App. 27-35, 75-83.

In a 2-1 memorandum decision, however, the Ninth Circuit (Judges Noonan and Berzon) reversed and directed the district court to grant Tuite a conditional writ. App. 14. Applying the habeas corpus harmless-error rules of *Brecht* and *O'Neal*, the majority held that the confrontation error required relief because it had "grave doubt" and was in "virtual equipoise" on the question of whether the

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contradiction of the testimony on material points; the extent of cross-examination actually permitted; and the overall strength of the evidence of guilt. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 684 (1986).

error had a "substantial and injurious effect" upon the verdict. App. 13-14. The Ninth Circuit relied on the length of the deliberations, the jury's decision to convict Tuite of a lesser-included offense, and perceived weaknesses in the prosecution's case. App. 8-13. But the majority gave no deference, nor even consideration, to the state court's harmless-error analysis, as required by *Richter*. Judge Callahan dissented, finding the error harmless under *Brecht*. App. 15-18. Although the state had urged the court to apply *Esparza* and determine whether the state court's harmless-error ruling under *Chapman* was reasonable, the majority declined to do so.

The state filed a petition for rehearing en banc, re-asserting its argument that the panel had erred by applying *Brecht* without determining whether the state court's harmless-error analysis under *Chapman* was objectively reasonable. The Ninth Circuit denied rehearing en banc. The panel issued a modified memorandum, concluding that *Esparza* had been impliedly overruled in *Fry* and that it therefore was required to apply only *Brecht*. App. 14. Without discussing the state court's opinion, the Ninth Circuit added that, for the same reasons it found the error prejudicial, it would conclude that the state court's *Chapman* harmless-error analysis was "unreasonable." App. 14.

B. The *Merolillo* Case

In 1997, Merolillo carjacked a vehicle occupied by 84-year-old Elmer Chromy and his 78-year-old wife, Helen Chromy. Merolillo struggled with Mr. Chromy and pushed him out of the car. Mrs. Chromy tried to exit but became entangled in the seat belt. Merolillo drove away, dragging Mrs. Chromy along the street for up to a quarter of a mile as he swerved around the road in an apparent attempt to dislodge her. Mrs. Chromy suffered extensive injuries. She was placed in intensive care and hooked to a breathing machine on life support, where she went in and out of consciousness until she died about thirty days later. Merolillo told the police he had taken the Chromys' car because he needed a ride. App. 251-52.

Merolillo was prosecuted for murder. App. 252. One of the main issues at trial was whether he had proximately caused Mrs. Chromy's death. Pathologists Cohen and Bloor testified for the prosecution; pathologist Hermann testified for the defense. All three agreed that the immediate cause of Mrs. Chromy's death was a dissecting aortic aneurysm. However, they disagreed about whether the aneurysm had been caused by trauma inflicted during the carjacking. App. 253. Dr. Bloor opined that the trauma to Mrs. Chromy's body from the carjacking was a contributing factor. App. 253-54. Dr. Cohen could not state with certainty whether the trauma had caused Mrs. Chromy's aneurysm, but said he thought it could have been a contributing factor because the trauma had occurred close in time to her death. App. 253. Dr. Hermann, for the defense, opined that Mrs. Chromy had died from a spontaneous and naturally occurring aneurysm unrelated to the carjacking. App. 254.

Dr. Darryl Garber, the pathologist who conducted the autopsy, testified at the preliminary hearing but not at trial. Over defense objections on Sixth Amendment grounds at trial, the court permitted the prosecution to elicit testimony from Dr. Hermann that, in Dr. Garber's opinion, head trauma had contributed to Mrs. Chromy's death. App. 254.

A jury convicted Merolillo of first-degree murder with aggravating "special circumstances." App. 252. In his direct appeal from the judgment, Merolillo argued that the trial court had violated his Sixth Amendment right to confront and cross-examine witnesses against him by permitting the prosecution to elicit the testimony from Dr. Hermann about Dr. Garber's opinion that head injuries had contributed to Mrs. Chromy's death. App. 254.

The California Court of Appeal held that the trial court's ruling violated Merolillo's constitutional right to cross-examine about the basis for Dr. Garber's opinion. App. 254-55. The appellate court concluded, however, that the error was harmless under both *Chapman* and the state-law harmless-error standard of *People* v. *Watson*, 46 Cal. 2d 818, 836 (1956). It explained:

> "[T]he reference to Garber's opinion was extremely brief and Garber's opinion was at odds with the three other pathologists, both prosecution and defense, who testified at length in the case. Furthermore, although the prosecutor made oblique references in his closing argument to Garber's opinion, the prosecutor did not argue Garber had identified the cause of death. Instead, the prosecutor persistently argued that the aneurysm was caused by trauma inflicted at the time of the carjacking rather than later, for other reasons, as argued by the defense."

App. 255-56.

The California Supreme Court denied further review. No petition for writ of certiorari was filed.

In later federal habeas corpus proceedings, Merolillo argued that "the trial court's prejudicial error in allowing the prosecutor to elicit inadmissible hearsay evidence that the victim's death was caused by brain trauma violated petitioner's Sixth Amendment right to confrontation and to cross-examine the witnesses against him." App. 237. The district court adopted the magistrate judge's report finding that Merolillo's confrontation rights had been violated. App. 243-45. However, the district court concluded that the error was harmless under *Brecht*. After carefully exploring the reasoning of the state court, the district court agreed that the relatively brief reference to Garber's opinion had been inconsequential. App. 245-47.

In a published opinion, the Ninth Circuit (Judges Schroeder and Gould and District Judge Navarro) reversed and remanded with directions to vacate the murder conviction and issue the writ. The panel disregarded the state court's reasoned decision on the subject of harmless error and instead made an independent evaluation under *Brecht*. The panel asserted that Dr. Garber's opinion had been very important to the prosecution's case because: (1) causation was the issue most argued by both counsel; (2) it appeared that the jury was focused on causation as evidenced by its request for a read-back of expert testimony; (3) Dr. Garber's opinion was likely given more weight than an ordinary witness because he was the pathologist who conducted the autopsy and an apparent peer of the testifying experts; and (4) the prosecution seemed to rely upon Dr. Garber's opinion to break an apparent three-way tie between the testifying experts. *Merolillo*, 663 F.3d at 455-56; App. 193-97.

Moreover, the Ninth Circuit stated, "Dr. Garber's opinion was likely tempting evidence for the jury to consider in support of the prosecution's argument because of its certainty and simplicity." *Merolillo*, 663 F.3d at 457; App. 197. Finally, the Ninth Circuit found the evidence that Merolillo had caused Mrs. Chromy's death to be weak in light of the thirty-day delay between the incident and her death and the "experts' labyrinthine medical testimony." *Merolillo*, 663 F.3d at 457; App. 197. Because the expert testimony was so complicated, the Ninth Circuit ventured, "there is little question that at least some jurors likely resorted to shortcuts in parsing the testimony." *Id.* at 458; App. 199.

At the end of its opinion, the Ninth Circuit added that it had also concluded that the California Court of Appeal's *Chapman* harmless-error analysis was unreasonable. *Merolillo*, 663 F.3d at 458-59; App. 199-200. However, the Ninth Circuit did not discuss the state court's opinion.

With the panel's decision coming directly after the Ninth Circuit's recent nearly unanimous rejection of rehearing in *Tuite*, the state did not file for panel or en banc rehearing.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit failed to defer to the state courts' reasonable conclusion that the asserted errors in these cases were harmless beyond a reasonable doubt. Certiorari should be granted to resolve ambiguity resulting from this Court's language in *Fry*, to resolve an existing split in the circuits, and to resolve an important and recurring question of federal habeas corpus law.

A. The Dicta In *Fry* v. *Pliler* Conflicts With *Mitchell* v. *Esparza a*nd *Harrington* v. *Richter*

1. In *Chapman*, this Court held that courts reviewing constitutional errors must reverse a judgment of conviction unless the error is harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. In *Brecht*, however, this Court held that the *Chapman* standard was inappropriate in federal habeas corpus proceedings challenging state

convictions. Instead, *Brecht* adopted the less onerous standard of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), applicable to ordinary trial errors in federal court, i.e., whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

In 1996, Congress reformed federal habeas corpus in AEDPA. Under 28 U.S.C. § 2254(d), relief from a state criminal conviction shall not be granted with respect to any claim "adjudicated on the merits in State court proceedings," unless the state ruling was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts.

In *Esparza*, 540 U.S. 12, following enactment of AEDPA, this Court held that, when a state appellate court finds a federal constitutional error harmless beyond a reasonable doubt under *Chapman*, a federal court may not grant habeas relief unless the state court's harmless-error determination was objectively unreasonable.

In *Fry*, this Court held that federal habeas courts must apply the *Brecht* "substantial and injurious effect" harmless-error standard before granting relief, where the state court had not conducted harmless-error analysis under *Chapman*. *Fry*, 551 U.S. at 117, 119-21. Dicta in *Fry*, however, has opened the door for federal courts to relitigate under *Brecht* an entire category of claims—those rejected on harmless-error grounds—already resolved by a state court. In that dicta, this Court stated:

> Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, *see*, *e.g.*,

> *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of "'actual prejudice,'" 507 U. S., at 637 (quoting *United States* v. *Lane*, 474 U. S. 438, 449 (1986)), with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. That said, it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former.

Fry, 551 U.S. at 119-20 (emphasis in original).

Post *Fry*, the Ninth Circuit and other circuits have undertaken de novo review of the harmless-error question under the *Brecht* standard, without deferring to the state court's resolution under section 2254(d).

2. The dicta in *Fry* rests on a false assumption—that *Brecht* gives, or inevitably gives, more protection to the state judgment than does AEDPA/*Chapman*. Under *Brecht*, a federal court must grant habeas relief whenever it determines that the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. Indeed, in *O'Neal*, this Court refined the *Brecht* standard in a way that made it petitioner-friendly. Under *O'Neal*, relief must be granted even where a federal court finds itself uncertain, in "virtual equipoise," about whether the error was prejudicial. *O'Neal v. McAninch,* 513 U.S. 432, 435 (1995). Moreover, the *Brecht*/*O'Neal* standard is both subjective and de novo. Under it, the federal judge asks only, "Do *I, the judge,* think that the error substantially influenced the jury's decision?" *Id*. (emphasis added).

Thus, assessing prejudice under *Brecht* turns upon the individual subjective views of the federal judge, without regard to the reasonableness of the prejudice analysis conducted by the state court. *Brecht* is not a rule of deference. See *Lockyer* v. *Andrade*, 538 U.S. 63, 75 (2002) (It is not enough that a federal habeas court, in its "independent review of the legal question," is left with a "'firm conviction'" that the state court was "'erroneous.'"). Under the *Brecht* and *O'Neal* standard applied by the Ninth Circuit in *Tuite* and *Merolillo*, the central habeas corpus reform of AEDPA—deference to reasonable state court decisions on the merits of the prisoner's claim—simply vanishes.

3. Such a non-deferential view of federal habeas corpus review is, further, incompatible with this Court's recent decision in *Harrington v. Richter*. There, this Court held:

> Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Harrington v. Richter, 131 S. Ct. 770, 786 (2011). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.*

Richter further makes clear two points that apply directly to the two cases in this consolidated petition. One, AEDPA establishes a nearly complete bar to the relitigation of claims by the federal courts when those same claims have already been resolved by a state court. *Richter*, 131 S. Ct. at 784; see *Cash* v. *Maxwell*, 132 S. Ct. 611, 613 (2012) (Scalia, J., dissenting from denial of certiorari) (AEDPA "put an end to federal-district-court readjudication of issues already decided, with full due process of law, in state criminal cases . . . .") Two, the focus of the federal court must be on what the state court did—on whether a reasonable argument supports the state court's conclusion—not on the subjective and independent analysis of the record by an individual federal judge. *Richter*, 131 S. Ct. at 786-87 (state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding). As demonstrated by the *Brecht* review conducted in *Tuite* and *Merolillo*, the Ninth Circuit never applied such deference before granting relief.

4. As California emphasized in its briefing in Fry, the applicability of *Brecht* in habeas corpus is a more liberal standard than that of *Chapman*. But, in *Fry*, California also acknowledged that *Esparza* had been correctly decided, and did not seek any modification of the rule of *Esparza* requiring AEDPA deference to state court *Chapman* determinations of harmless error.

The state's position—that federal courts must give deference to a state court's harmless-error analysis before granting relief—does not render *Brecht* a nullity in federal habeas cases arising from state-court convictions and does not conflict with the direct holding in *Fry*. Federal courts would still apply the *Brecht* standard if they find that a state court's harmless-error analysis was contrary to *Chapman* or otherwise unreasonable and therefore not entitled to deference. And it might be that, as in *Fry*, where a state court finds no constitutional error and undertakes no Chapman review, federal habeas courts would apply the *Brecht* "substantial and injurious effect" standard before granting relief. In addition, where a state court has not adjudicated the federal claim on its merits as contemplated by § 2254(d), *Brecht* also would remain applicable. Finally, the *Brecht* test itself might be refined so that, in federal habeas cases arising from state convictions, it incorporates deferential review of the state-court decision.

B. The Circuits Are Divided Over How State-Court Harmless-Error Rulings Are Reviewed Under AEDPA

Certiorari is also warranted because, unsurprisingly, there has arisen in the wake of *Fry* a split of authority in the circuits regarding the role of AEDPA/*Chapman* analysis in federal habeas cases. Several circuits have held that the *Brecht* test subsumes the AEDPA/*Chapman* test in all cases. See *Foxworth* v. *St. Amand*, 570 F.3d 414, 435 (1st Cir. 2009); *Wood* v. *Ercole*, 644 F.3d 83, 93-94 (2d Cir. 2011); *Bond* v. *Beard*, 539 F.3d 256, 275-76 (3rd Cir. 2008); *Burbank* v. *Cain*, 535 F.3d 350, 356-57 (5th Cir. 2008); *Jackson* v. *Norris*, 573 F.3d 856, 858 (8th Cir. 2009); *Welch* v. *Workman*, 639 F.3d 980, 992 (10th Cir. 2011); *Vining* v. *Sec'y, Dep't of Corrections*, 610 F.3d 568, 571 (11th Cir. 2010).

In contrast, the Seventh Circuit has taken the position advocated here: that if a state court has conducted harmless-error analysis, the federal court must decide whether that analysis was objectively unreasonable. It explained:

> If the state court has conducted a harmless-error analysis, the federal court must decide whether that analysis was a reasonable application of the *Chapman* standard. If the answer is yes, then the

> federal case is over and no collateral relief issues. That's the holding of *Esparza*. If the answer is no—either because the state court never conducted a harmless-error analysis, or because it applied *Chapman* unreasonably—then § 2254(d) drops out of the picture and the federal court must make an independent decision, just as if the state court had never addressed the subject at all. And we know from *Fry* that, when this is so, a federal court must apply the *Brecht* standard to determine whether the error was harmless.

Johnson v. *Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009); but see *Jones* v. *Basinger*, 635 F.3d 1030, 1052, n.8 (7th Cir. 2011) (because the error caused "actual prejudice" under *Brecht*, the state court of appeals' application of *Chapman* harmless error analysis was clearly unreasonable as well).

Similarly, in *Ruelas* v. *Wolfenbarger*, 580 F.3d 403 (6th Cir. 2009), the Sixth Circuit stated that "a [federal] habeas court remains free to, before turning to *Brecht*, inquire whether the state court's *Chapman* analysis was reasonable. If it was reasonable, the case is over." *Id*. at 412-13.

C. The Ninth Circuit Erred, and Its Error Is a Recurring One Involving an Important Question of Habeas Corpus Law

1. The Ninth Circuit decisions in these consolidated cases reflect the same type of error this Court in the past several years has deemed important enough to correct in repeated grants of certiorari and reversals—the failure to review state

court decisions deferentially under AEDPA.[2] In addition, other recent grants of certiorari by this Court illustrate the importance of clarifying the harmless-error standard applicable in criminal and habeas corpus cases. E.g., *Vasquez* v. *United States*, 132 S. Ct. 759 (cert. granted Nov. 28, 2011) (No. 11-1999); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (*per curiam*) *Fry*, 551 U.S. 112; *Esparza*, 540 U.S. 12; see also *O'Neal*, 513 U.S. 432. The consolidated cases here demonstrate that the issue of the proper standard of harmless-error review is and will be an important and recurring one.

2. Under the rule proposed by the state here—that relief is foreclosed under § 2254(d) where the state-court acted reasonably in concluding that any constitutional error was "harmless beyond a reasonable doubt" under *Chapman*—the California Court of Appeal's decision in *Tuite* should have been the last word. The state appellate court explicitly applied this Court's *Van Arsdall* factors and reasonably concluded that the error in precluding cross-examination of McCrary with his letter was an insignificant one. App. 147. It found that the

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[2] *E.g.*, *Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (*per curiam*); *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011); *Waddington* v. *Sarausad*, 555 U.S. 179 (2009); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011); *Richter*, 131 S. Ct. 770; *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009); *Carey* v. *Musladin*, 549 U.S. 70 (2006); *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v. *Garcia-Espitia*, 564 U.S. 9 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Lockyer* v. *Andrade*, 538 U.S. 63; *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per curiam*).

experts' testimony pertained only to a dispute, easily resolvable by the jury itself, about whether the crime scene was "organized," as one expert claimed, or "disorganized," as the other expert claimed. Specifically, the state court noted that the jury saw crime scene photographs and a videotape of the crime scene. Jurors also heard testimony about what the crime scene looked like after the homicide. App. 145-46.

Further, the state court reasonably concluded that, in light of DNA evidence showing the victim's blood on Tuite's shirts, the prosecution had a strong case against Tuite independent of any testimony by O'Toole or McCrary. Finally, the state court reasonably relied on the fact that the defense had cross-examined McCrary on other matters suggestive of bias. App. 146-47. In light of such circumstances, and as recognized by the magistrate judge and the district judge, the state court's conclusion that the error was harmless under *Chapman* and *Van Arsdall* was reasonable. Judge Callahan's dissent in Tuite further demonstrates that fair-minded jurists could see the case differently from the view of the panel majority.

It is true that the Ninth Circuit chose to ascribe different weights to the *Van Arsdall* factors. But § 2254(d) forbade its use of "a set of debatable inferences to set aside the conclusion reached by the state court." *Rice* v. *Collins*, 546 U.S. 333, 342 (2006). Nothing compelled all reasonable, "fair-minded jurists," *Richter*, 131 S. Ct. at 778, to accept the belief of the two judges comprising the panel majority that the length of jury deliberations and the fact that the jury convicted Tuite of manslaughter were attributable to the cross-examination error. App. 8-9. It is equally reasonable to conclude that the jury was reluctant to convict Tuite of first-degree murder given evidence he suffered from schizophrenia. And the lengthy jury deliberations are unsurprising in light of the fact that this trial took several weeks to complete.

Similarly, fair-minded jurists were not compelled to adopt the panel majority's view that it was inexplicable or improbable that the killer, if a stranger to the house like Tuite, could commit the crime without any signs of forced entry. App. 9. The evidence showed that Tuite could have easily entered the house through an unlocked laundry room door and fled a number of ways. App. 109-10. Likewise, nothing compelled the majority's view that the opinion testimony about whether the crime scene had been "organized" or not, otherwise of minor importance in a case where the jurors saw the photographs for themselves, somehow would have become crucially damaging just because the experts testified near the end of the trial. App. 10.

The notion that such de novo and subjective re-weighing of the harmless-error issue should trump the state court's different view proves especially untenable in Tuite's case. For, on the question of whether the error had prejudiced Tuite's defense, the Ninth Circuit acknowledged that it itself was not certain. Instead, the majority admitted, it found itself merely in "equipoise" on the question. App. 13-14. Granting habeas corpus relief merely because of "equipoise" on the effect of the error is incompatible with the habeas corpus principle, embodied in § 2254(d), that relief "shall not be granted" unless the petitioner establishes that, in rejecting the claim on harmless-error grounds, the state court's decision is not just wrong but "objectively unreasonable."

3. The Ninth Circuit committed the same failure-to-defer error in *Merolillo*. The California Court of Appeal reasonably concluded that the

admission of hearsay evidence of Dr. Garber's opinion (that head trauma had contributed to Mrs. Chromy's death) was harmless beyond a reasonable doubt because: the references to his opinion were extremely brief; his opinion was completely overshadowed by the opinion of the three other pathologists who testified at trial that Mrs. Chromy died of a dissecting aortic aneurysm; and the prosecutor never argued that Dr. Garber had identified the correct cause of death. App. 255-56. The district court, although applying only *Brecht* analysis, essentially agreed that these were the relevant factors. App. 245-47.

The Ninth Circuit, however, relied on a completely different set of factors to conclude, under its de novo analysis, that the error was prejudicial. But nothing compelled the Ninth Circuit's conclusion that the jury gave more weight to Dr. Garber's opinion than to the opinions of three testifying experts or that the jury used Dr. Garber's opinion to break a three-way tie between the experts. *Merolillo*, 663 F.3d at 458; App. 194-95. Nor would all fair-minded jurists have been compelled to adopt the Ninth Circuit's view that the evidence of causation as weak. *Merolillo*, 663 F.3d at 455-56; App. 197. The record shows that Merolillo dragged Mrs. Chromy, a 78-year-old woman in poor health, on the street alongside the car for up to a quarter of a mile and swerved around on the road in an apparent attempt to dislodge her. As a result of Mrs. Chromy's extensive injuries, she was placed in intensive care and hooked to a breathing machine on life support, where she went in and out of consciousness until she died about thirty days later. App. 251-52. Mrs. Chromy's extensive injuries, clearly caused by Merolillo's criminal conduct, make it difficult to conceive that her death was purely naturally occurring and unrelated to the carjacking. This fact, coupled with Dr. Bloor's testimony that torso trauma contributed to Mrs. Chromy's aortic dissection (App. 253-54), provided strong evidence that Merolillo proximately caused Mrs. Chromy's death.

As stated above, a federal habeas court may not use "a set of debatable inferences to set aside the conclusion reached by the state court." *Rice* v. *Collins*, 546 U.S. at 342. Because fair-minded jurists could disagree on the correctness of the state court's decision, it was entitled to deference. See *Richter*, 131 S. Ct. at 786. The Ninth Circuit's de novo and subjective relitigation of the harmless-error issue should not trump the state court's reasonable finding of harmlessness.

4. It is true that the opinions in both *Tuite* and *Merolillo* purport to have ruled on an alternative basis—that the court would have found the state court's *Chapman* harmless error determinations unreasonable. Examination of the opinions, however, demonstrates that the courts engaged in no real evaluation of reasonableness nor conduct that evaluation properly. Accordingly, the alleged alternative bases do not counsel against a grant of certiorari.

In *Tuite*, the panel majority, after conducting its de novo and subjective *Brecht* analysis, simply stated that, if it were to engage in the AEDPA/*Chapman* analysis urged by the State, it would categorize the state court's decision as unreasonable "for the same reasons." (App. 14.) Similarly, in *Merolillo*, the court stated it would chose to characterize the state decision as unreasonable "for the same reasons" it addressed in its *Brecht* analysis. (App. 200.)

Neither of these analyses actually confronts the decision of the state court. That is, neither analysis seeks to explain how the decision of the state court concluding that the error was harmless was objectively unreasonable. Indeed, since each opinion simply referred back to the de novo *Brecht* analysis, the decisions are defective in the same way as identified in *Harrington v. Richter:* "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 131 S. Ct. at 786. More is required, however, as this Court has instructed. A proper analysis would include an explanation showing "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 786-87. We are left without knowing where the Ninth Circuit believes the state court committed the type of extreme error that warrants federal habeas corpus relief. *Id*. at 786 (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment)).

This lack of faithfulness to the guidance from this Court in AEDPA cases is, unfortunately, not infrequent. But, as in both *Tuite* and *Merolillo*, such a simple labeling of the state court's decision as "unreasonable" is insufficient; a federal court must carefully explore whether the state court decision can be supported by any argument. See *Richter*, 131 S. Ct. at 784 (a petitioner's burden "must be met by showing there was no reasonable basis for the state court to deny relief"); *Felkner* v. *Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam); *Bobby* v. *Dixon*, 132 S. Ct. 26, 27 (2011) ("Because it is not clear [upon reading the decision of the Sixth Circuit] that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision, the Sixth Circuit's judgment must be reversed"). Under AEDPA, it is not sufficient that the federal court is confident in its own view of the issue, *Lockyer* v. *Andrade*, 538 U.S. at 75 (It is not enough that a federal habeas court, in its "independent review of the legal question," is left with a "'firm conviction'" that the state court was 'erroneous.'") Nor may a federal court issue the writ simply because that court concludes in "its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 75-76. Because the decisions in both *Tuite* and *Merolillo* rely only on the Ninth Circuit's independent judgment of the merits of *Brecht* harmless error, no evaluation of the state court's *Chapman* harmless-error determination was made.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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