No. 11-1094

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

REPLY TO BRIEF IN OPPOSITION

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNNE G. MCGINNIS
Deputy Attorney General

TERESA TORREBLANCA
Deputy Attorney General
KEVIN VIENNA
Supervising Deputy Attorney General
Counsel of Record
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2198
E-mail: Kevin.Vienna@doj.ca.gov
Counsel for Petitioner

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INTRODUCTION

In both *Tuite* and *Merolillo*, 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). In each case, however, the Ninth Circuit granted habeas corpus relief based on its own 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 the court was in "virtual equipoise" about whether the error had such an effect under *O'Neal* v. *McAninch*, 513 U.S. 432, 435 (1995). The issue before this Court is whether a federal court may grant habeas corpus relief to a state prisoner without first determining that the state court's "harmless beyond a reasonable doubt" ruling was objectively unreasonable. Certiorari is warranted to resolve ambiguity resulting from this Court's dicta in *Fry* v. *Pliler*, 551 U.S. 112 (2007), to resolve an existing split in the circuits, and to resolve an important and recurring question of federal habeas corpus law.

Tuite and Merolillo make parallel arguments in opposition to granting a writ of certiorari, but their arguments fall short, as shown below. Contrary to their contentions, the dicta in *Fry* directly conflicts in an important way with other precedent from this Court and with the statutory limits applicable to federal habeas review; there is an actual and active circuit split in the lower federal courts; and these two cases properly raise the issue before this Court.

ARGUMENT

A. The Dicta In *Fry v. Pliler* Conflicts With the Holding In *Mitchell v. Esparza*.

Merolillo argues there is no conflict between *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) and *Fry*. Merolillo Opp. 19-20. He is wrong; there is a conflict and it matters.

In *Esparza*, 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. *Esparza*, 540 U.S. at 17-18. In *Fry*, this Court held that a federal habeas court need apply only the *Brecht* "substantial and injurious effect" harmless-error standard before granting relief, not the more demanding *Chapman* test, where the state court has not conducted harmless-error analysis under *Chapman*. *Fry*, 551 U.S. at 117, 119-21. Thus, Merolillo is partly correct; there is no direct inconsistency between the *holdings* in *Fry* and *Esparza*, because *Fry* addressed a circumstance different from the one in *Esparza*.

However, in dicta, this Court in *Fry* went on to suggest that the *Brecht* standard applies in all cases, even where the state court conducted harmless error analysis under *Chapman*. *Fry*, 551 U.S. at 119-20. This directly conflicts with the holding in *Esparza,* which requires federal courts to evaluate a state court's *Chapman* analysis for reasonableness.

Fry's dicta not only conflicts with *Esparza*, it is incompatible with this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), which provided:

> 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.

Richter, 131 S. Ct. at 786. No such analysis occurs if a federal habeas court proceeds directly to the de novo and subjective analysis of harm under *Brecht*.

Tuite and Merolillo argue that *Richter* does not control this case because it arose in the context of a claim of ineffective assistance of counsel. Tuite Opp. 14; Merolillo Opp. 20-21. But their argument lacks merit because *Richter* is not as limited as Tuite and Merolillo suggest. This rule announced in *Richter* is a broad one, which applies to all federal habeas cases under 28 U.S.C. § 2254(d) (AEDPA).

The choice of harmless-error standard matters significantly. The *Brecht*-only approach in the *Tuite* and *Merolillo* opinions is susceptible to the "readiness to attribute error" against which the AEDPA protects.[1] *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (a federal court's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.") The Ninth Circuit, by proceeding directly to de novo review of harmfulness, reverses the roles of the state and federal courts. The state courts cease being the "principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787. Rather, a state court's "good faith attempts"

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[1] Examples of this "readiness" are numerous and recent. *E.g., Cavasos* 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).

at resolution of the constitutional claim, *id.*, no longer matter. The federal court is free to reject—in toto— the state court's evaluation of harmful error, including its assessments of the strength of the evidence and the significance of an error in the overall context of the case.

B. The Dicta In *Fry* Should Be Re-Examined.

Tuite and Merolillo argue that there is no need for this Court to grant certiorari in this matter because the question presented was already addressed in *Fry*. Tuite Opp. 12-14; Merolillo Opp. 17-19. As argued above, *Fry's* dicta not only conflicts with *Esparza*, it is incompatible with this Court's decision in *Richter*. Accordingly, the language at issue should be re-examined and the question resolved.

Federal courts perform a limited role in habeas corpus review of state criminal judgments. This limitation flows from this Court's recognition of the potential harmful effects of federal intervention in the state processes. *Calderon* v. *Thompson*, 523 U.S. 538, 555-56 (1998). Based on this principle, when choosing among standards of review that might apply to habeas cases, this Court has selected the standard most conducive to preserving state judgments. *E.g., Brecht*, 507 U.S. at 631 (pre-AEDPA, a federal court on collateral review of state judgment applies a standard less demanding than *Chapman* in examining harmfulness of constitutional trial error); *Fry*, 551 U.S. at 117 (holding, post-AEDPA, that when no state *Chapman* analysis has been conducted, federal courts need evaluate error only under lesser *Brecht* standard).

The dicta in *Fry* contradicts this principle by failing to give deference to a state court's determination under *Chapman* that an error was harmless beyond a reasonable doubt. Under the rule of *Tuite* and *Merolillo*, the decision of the state court is not evaluated through the lens of "objective unreasonableness." Instead, the federal court proceeds to its own de novo and subjective analysis of the state record under *Brecht*.

C. These Cases Present An Appropriate Vehicle to Resolve the Question Presented.

Tuite and Merolillo contend that these cases are not an appropriate vehicle to resolve the question presented because the Ninth Circuit, in addition to its *Brecht* analysis, conducted AEDPA/*Chapman* review and found that the state court's *Chapman* determinations were unreasonable. Tuite Opp. 10-12; Merolillo Opp. 23-27. Examination of the Ninth Circuit's opinions, however, demonstrates that the courts engaged in no real evaluation of the reasonableness of the state court's decisions as required under AEDPA.[2]

The Ninth Circuit in *Tuite* ordered the district court to grant the conditional writ, explaining:

> Given the lack of evidence tying Tuite to the crime, the problems with the DNA

[2] This result, of course, is not surprising. It may be, rather, an illustration of the problem of confirmation bias. See *Marmi E. Graniti D'Italia Sicilmarmi S.p.A.* v. *Universal Granite and Marble,* 757 F. Supp. 2d 773, 781 (N.D. Ill. 2010) (confirmation bias is "the well-documented tendency, once one has made up one's mind, to search harder for evidence that confirms rather than contradicts one's initial judgment") (citing R. Posner, *How Judges Think*, 111 (2008)).

> evidence, the jury's deadlock and compromise verdict, and the weight and strategic position of McCrary's testimony, this case is one of those "unusual" circumstances in which we find ourselves "in virtual equipose as to the harmlessness of the error." *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). We must treat the error as affecting the verdict, and are compelled to grant the writ. *Id*.

App. 13-14.

In responding to the State's request to analyze the California Court of Appeal's decision for reasonableness, the Ninth Circuit stated only, "were we to apply the AEDPA/*Chapman* standard, we would conclude, for the same reasons stated in the text with regard to the *Brecht* standard, that the state court *Chapman* harmless error ruling was unreasonable." App. 14. The mere labeling of the state court's decision as "unreasonable," however, was insufficient. The Ninth Circuit should have carefully explored whether the state court decision could be supported by a reasonable argument. See *Richter*, 131 S. Ct. at 784; *Lockyer* v. *Andrade*, 538 U.S. 63, 75 (2003). As explained in *Richter*, when evaluating a state court's decision under the AEDPA, a federal court errs when it "overlooks arguments that would otherwise justify the state court's result . . . ." *Richter*, 131 S. Ct. at 786.

The Ninth Circuit did not address, much less give deference to, the California Court of Appeal's findings that: (1) the "competing experts' opinions about whether to label the crime scene 'organized' or 'disorganized'" had "almost no significance" to the case, given the fact that the jury saw videotapes and photographs of the scene and could make that determination on its own; (2) McCrary's letter, which

was excluded at trial, "had no impact" on the "central evidence" of guilt—that the victim's blood/DNA was found on Tuite's shirts in two different places; and (3) regardless of O'Toole and McCrary's conflicting opinions about the appropriate label to describe the crime scene, the defense was able to argue, based on the facts of the crime, that only the victim's brother or some other insider could have killed Stephanie. App. 145-46. Thus, the Ninth Circuit engaged in no real evaluation of the reasonableness of the state court's decision, as required under AEDPA.

The Ninth Circuit also failed to conduct a proper AEDPA analysis in *Merolillo*. It reversed and remanded to the district court with directions to vacate the murder conviction and issue the writ based on its own independent and debatable conclusions that: (1) Dr. Garber's opinion was very important to the prosecution's case; (2) "[His opinion] was likely tempting evidence for the jury to consider in support of the prosecution's argument because of its certainty and simplicity;" (3) evidence that Merolillo's actions caused Mrs. Chromy's death was weak; and (4) because the expert testimony was so complicated, "there is little question that at least some jurors likely resorted to shortcuts in parsing the testimony." App. 197-99.

Instead of evaluating the reasonableness of the state court's decision as required under AEDPA, the Ninth Circuit stated only, "For the same reasons discussed above, we cannot say that the admission of Dr. Garber's opinion was harmless beyond a reasonable doubt. In fact, as discussed above, we have 'grave doubt' that the error was harmless." App. 200.

The Ninth Circuit gave no regard to the California Court of Appeal's conclusion that the error in admitting Dr. Garber's opinion was harmless

beyond a reasonable doubt. The state court was so persuaded because: (1) the references to his opinion were extremely brief; (2) his opinion was completely overshadowed by the opinion of the three other pathologists who testified at trial that Chromy died of a dissecting aortic aneurysm; and (3) the prosecutor never argued that Dr. Garber had identified the correct cause of death. App. 255-56.

A proper AEDPA analysis would have included an explanation showing why "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." *Richter,* 131 S. Ct. at 786-87. The Ninth Circuit conducted no such analysis; it certainly failed to show the sort of obvious and indisputable error that, according to *Richter*, is required before a state decision may be labeled "unreasonable."

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

Tuite and Merolillo contend that certiorari should be denied because there is no conflict in the circuits on how state-court harmless-error rulings are reviewed under AEDPA. They argue that all circuits agree the *Brecht* test always subsumes the AEDPA/*Chapman* test. Tuite Opp. 18; Merolillo Opp. 21-23. Tuite additionally argues that the Seventh Circuit "has since backed off of *Johnson* [v. *Acevedo*, 572 F.3d 398 (7th Cir. 2009)] bringing itself in line with all of the other circuits." Tuite Opp. 18. Tuite and Merolillo are mistaken. The circuit conflict persists.

Several circuits have held that the *Brecht* test always subsumes the AEDPA/*Chapman* test. However, the Seventh Circuit in *Johnson* took the position advocated here: that if a state court has conducted harmless-error analysis, the federal court must first decide whether that analysis was objectively unreasonable; only if it finds the analysis unreasonable must it make an independent decision under *Brecht* to determine whether the error was harmless. *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009).

As Tuite notes, in *Jones* v. *Basinger*, 635 F.3d 1030, 1052 n.8 (7th Cir. 2011), the Seventh Circuit stated in a footnote that if an error is prejudicial under *Brecht,* a state court's *Chapman* analysis is necessarily unreasonable as well. Tuite Opp. 18. However, shortly after *Jones* was decided, another panel of the Seventh Circuit reaffirmed the holding in *Johnson* that if the state court has conducted harmless-error analysis, the federal court must first decide whether that analysis was a reasonable application of the *Chapman* standard before proceeding to an analysis under *Brecht*. *Brown* v. *Rednour*, 637 F.3d 761, 766 (7th Cir. 2011).[3] Notably, after *Jones*, district courts in the Seventh Circuit have continued to apply the test set forth in *Johnson*. E.g., *U.S. ex rel. Owens* v. *Acevedo*, 2012 WL 1416432 at * 9 (N.D. Ill. 2012); *Harris* v. *Thompson*, 2011 WL 6257143 at * 12 (N.D. Ill. 2011); *Kamlager* v. *Thurmer*, 2011 WL 4528500 at * 2 (E.D. Wis. 2011). The split in the circuits therefore continues.

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[3] The Seventh Circuit permits a panel to overrule a prior decision of another panel provided certain conditions are met. 7th Cir. R. 40(e).

E. Tuite's Opposition Relies on Significant Factual Inaccuracies.

Tuite's Opposition seeks to relitigate the facts in support of the defense argument that the victim's brother and his friends committed the homicide, not Tuite. Tuite Opp. at 21-25. Generally, those factual disputes were resolved by the jury and the state courts. To the extent his factual arguments are relevant to the decision to grant certiorari, however, it is worth reiterating that this was not a close case, as well as pointing out several significant factual inaccuracies in Tuite's argument. Many of these same inaccuracies are also reflected in the Ninth Circuit's majority opinion.

The state court viewed the evidence of the victim's blood on Tuite's clothing as "central." App. 145-47. The only reasonable explanation for Stephanie's blood on Tuite's shirts was that he was the person who killed her. Tuite mistakenly suggests that a *prosecution expert* supported the unlikely defense theory of accidental and multiple transfers of the victim's blood to Tuite's clothing, but he means a *defense* expert.

Tuite mistakenly contends that the evidence pointed away from Tuite because there was no way for him to have departed from the crime scene after the killing. Tuite Opp. 21. To the contrary, this was litigated, and the prosecution offered three separate possibilities: through the glass door in the master bedroom; through the front doors; or through the point of entry at the laundry room (if Stephanie's father was simply mistaken about that door being locked the next morning).

Tuite suggests the defense refuted the evidence of cough drop wrappers connecting Tuite to the crime scene. Tuite Opp. 21-22, n.1. Not so. The evidence

that Tuite possessed the wrapper from an uncommon cough drop, also found in the Crowe's house, provided strong circumstantial evidence of his involvement.

This case was not close, contrary to Tuite's suggestion. Tuite Opp. 5, 21, 23. While the jury may have deliberated at length over the degree of the crime, significant circumstantial evidence pointed to Tuite as the killer and only to Tuite.

Tuite repeats that Stephanie's brother and his two friends confessed to the murder, and that a knife believed to be the murder weapon was linked to the boys. Tuite Opp. 2. To the contrary, not only was there a finding that the boys' statements were coerced, the knife connected to them was eliminated as a possible murder weapon. The boys did not commit the crime. There was a finding by the Ninth Circuit in a related civil case that, when questioning the boys, the police used interrogation tactics that shocked the conscience. *Crowe* v. *County of San Diego*, 608 F.3d 406, 417 (9th Cir. 2010). The cities of Escondido and Oceanside ultimately agreed to pay the Crowe family $7.25 million to settle the civil suit. In a related settlement, Aaron Houser received about $4 million. http://www.kpbs.org/news/2011/oct/21/7-million-settlement-reached-stephanie-crowe-murde/. On May 22, 2012, a San Diego County Superior Court judge found Michael Crowe and Joshua Treadway factually innocent in the killing of Stephanie Crowe. http://www.10news.com/news/31097398/detail.html.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
JULIE L. GARLAND
Senior Assistant Attorney General
LYNNE G. MCGINNIS
Deputy Attorney General
TERESA TORREBLANCA
Deputy Attorney General
Senior Assistant Attorney General
KEVIN VIENNA
Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioner

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