
In the Supreme Court of the United States

MICHAEL MARTEL, *Petitioner*,

v.

RICHARD RAYMOND TUIITE, *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

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Pursuant to Supreme Court Rule 15.8, the State brings to this Court's attention the August 29, 2012, published opinion of the Ninth Circuit in *Ayala v. Wong*, No. 09-99005, 2012 U.S. App. LEXIS 18321, 2012 WL 3711689 (9th Cir. Cal. Aug. 29, 2012). In that case, a divided court disagreed about the standard of review to be applied to a state court's finding of harmless error in a habeas corpus case following *Fry v. Pliler*, 551 U.S. 112 (2007), and *Harrington v. Richter*, 131 S. Ct. 770 (2011).

Judge Reinhardt's majority opinion in *Ayala* held that, when evaluating whether a trial error prejudiced a state habeas corpus petitioner, federal courts must apply the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and grant relief whenever the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Ayala*, 2012 U.S. App. LEXIS 18321 at 41. The *Brecht* test, the *Ayala* majority asserted, applies "without regard for the state court's harmlessness determination." *Id.* at 41. As in the *Tuite* and *Merolillo* cases before this Court, the Ninth Circuit majority's statement of the test in *Ayala* reflected its subjective nature: "Where the record is so evenly balanced that a judge 'feels himself in virtual equipoise as to the harmlessness of the error' and has 'grave doubt about whether an error affected a jury [substantially and injuriously], the judge must treat the error as if it did so.'" *Id.* at 42-43.

In dissenting in *Ayala*, Judge Callahan endorsed the position advocated by California in this case: habeas corpus relief requires a showing that the state court's harmless-error ruling was objectively unreasonable. Judge Callahan correctly recognized that:

In reiterating that a writ may issue only where there is no possibility that fairminded jurists could agree with the state court's decision, the Supreme Court [in *Richter*] refined the “grave doubt” standard set forth in *Brecht*. A federal court cannot have “grave doubt” as to harmlessness if a fairminded jurist could agree on the correctness of the state court's decision.

Id. at 101.

Applying that standard, rather than the one applied by the majority, Judge Callahan concluded that, despite the majority's *Brecht* analysis, the California Supreme Court's decision was objectively reasonable so as to bar habeas corpus relief.

The split opinion in *Ayala* reflects the conflict among the circuits on the correct habeas corpus standard, and illustrates why it is crucial that habeas corpus deference to state-court harmless-error decisions be re-affirmed.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 6, 2012

Respectfully submitted

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