

No.

In the Supreme Court of the United States

KEVIN CHAPPELL, WARDEN, *Petitioner*,

v.

HECTOR AYALA, *Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE**QUESTION PRESENTED**

Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Warden Kevin Chappell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.¹

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-121a) is not yet officially reported, but may be found at 2014 U.S. App. LEXIS 3699 and 2014 WL 707162. An earlier version of the court's opinion, before amendment on denial of rehearing en banc, was reported at 730 F.3d 831. The opinion of the district court (App. 122a-171a) is unpublished. The opinion of the California Supreme Court on direct appeal of the underlying state case (App. 189a-261a) is reported at 24 Cal. 4th 243.

JURISDICTION

The judgment of the court of appeals was originally entered on September 13, 2013. The court amended its opinion and reentered judgment on February 25, 2014, in conjunction with the entry of an order denying rehearing or rehearing en banc. App. 1a, 172a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

¹ Kevin Chappell has succeeded Robert Wong as warden of the state prison in which respondent is incarcerated. Warden Chappell is substituted as the named petitioner in this case in compliance with this Court's Rule 35.3.

STATUTORY PROVISION INVOLVED

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.

STATEMENT

1. In 1989, respondent Hector Ayala was tried for the execution-style murders of three men during an attempted robbery in 1985. *See* App. 2a, 189a-196a. Jury selection took more than three months. *Id.* at 3a.

In three motions pursuant to *People v. Wheeler*, 22 Cal. 3d 258 (1978)—California’s equivalent to *Batson v. Kentucky*, 476 U.S. 79 (1986)—defense counsel objected to the prosecutor’s use of seven peremptory challenges to exclude minority jurors. App. 3a-4a & n.1. When the court asked the prosecutor to explain his reasons for the challenges, the prosecutor said he would prefer to provide them *ex parte*, so as not to divulge matters of trial strategy. *Id.* at 196a-197a. Over a defense objection to being excluded from any

discussion that did not actually involve such matters, the trial court permitted the *ex parte* proffer of the prosecution's explanations. *Id.* at 197a. Based on those proceedings, the court ultimately concluded that the prosecutor had not made his challenges on the basis of race. *Id.*

The jury convicted respondent of three counts of first degree murder, one count of attempted murder, one count of robbery, and three counts of attempted robbery. It also found two special circumstances—multiple murder and murder in the attempted commission of robbery—and returned a verdict of death as to each count of murder. The trial court entered judgment consistent with that verdict on November 30, 1989. App. 190a.

2. The California Supreme Court affirmed. App. 189a-261a. Among other things, respondent challenged the trial court's use of *ex parte* hearings to receive the prosecutor's explanations for his peremptory challenges. *See id.* at 196a-212a. In describing the legal framework applicable to that claim, the court cited both *Batson* and *Wheeler*. *E.g., id.* at 197a-198a. It observed that, apart from the general framework established by *Batson*, “no particular procedures are constitutionally required,” and specifically noted this Court's statement that it “remain[ed] for the trial courts to develop rules” for the appropriate handling of *Batson* challenges “without unnecessary disruption of the jury selection process.” *Id.* at 198a (quoting *Powers v. Ohio*, 499 U.S. 400, 416 (1991)). It then held that, “as a matter of state law,” the trial court erred by excluding the defense from *Wheeler/Batson* hearings where, in fact, “no matters of trial strategy were revealed.” *Id.* at 200a; *see id.* at 199a-203a.

The court then conducted an extensive, independent review of the record to determine

whether the error it had identified was prejudicial. App. 203a-212a. In the end it concluded “that the error was harmless under state law (*People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956)), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California*, 386 U.S. 18, 24 (1967)) as a matter of federal law.” *Id.* at 203a.

In its review, the court carefully considered the record as to each prospective juror struck by the prosecution. As to venire member Olanders D., the prosecutor had noted that D.’s jury questionnaire said that he opposed capital punishment. App. 203a. Although D. indicated his views had changed over the years, the prosecutor believed he was not being entirely responsive to the questions posed by either party, and that he would not “fit in” on the jury. The Supreme Court noted that the trial court had disagreed on the last point, believing Olanders D. might well get along with other jurors, but found the other proffered reasons accurate and supported by the record. *Id.* at 203a-204a.

As to Galileo S., the court noted the prosecutor’s explanation that S.’s answers during voir dire on attitudes toward the death penalty revealed that he was “a nonconformist person who has had numerous run-in’s with the law.” App. 204a. Also, government records indicated three or four arrests beyond those that S. had admitted. The prosecutor summarized: “[H]is attitude is such that I think it would create alienation and hostility on the part of the other jurors.” The trial court agreed with the prosecutor, observing that Galileo S. exhibited a “paranoia ... concerning the justice system.” The Supreme Court’s independent review of the record “tend[ed] to confirm some of these observations,” including “a somewhat flippant attitude in responding to various questions during general voir dire.” *Id.* & n.1.

As to prospective juror Barbara S., the court discussed the prosecutor's observations that he believed her responses to questions were extremely slow, causing the prosecutor to suspect she was under the influence of drugs. App. 204a. She had "an empty look in her eyes, slow responses, a lack of really being totally in tune with what was going on." The prosecutor believed S.'s answers did not make sense and that she lacked the ability to communicate effectively during the questioning process. He also believed that she appeared angry. The Supreme Court noted that the trial court disagreed on the last point, interpreting her demeanor as reflecting nervousness rather than hostility. Otherwise, however, the trial court "certainly [could not] quarrel" with the prosecutor's impressions or with his decision to challenge S. *Id.* at 204a-205a.

As to Geraldo O., the court noted the prosecutor's explanation that O. had difficulty in reading, writing, and understanding English, that his dress and behavior were not like the other prospective jurors, and that he appeared to be "aloof" from other prospective jurors. App. 205a. The prosecutor also expressed concern about O.'s inability to express any opinion about the death penalty. The trial court had agreed that the record supported the prosecutor's assessment, and the Supreme Court's own review likewise tended to confirm it. *Id.* & n.2.

Regarding prospective juror George S., the Supreme Court discussed the prosecutor's initial belief that the prospective juror was Greek and not Hispanic. App. 176a. Additionally, the prosecutor felt "extremely uneasy" about the fact that George S. was the sole "holdout" on a prior jury as well as with his voir dire responses concerning the death penalty. Also causing the prosecutor concern was the fact that the George S. had applied to be a police officer and

was rejected, which the prosecutor feared might have been for psychological reasons. App. 205a-206a. The trial court confirmed that each of these observations was accurate. *Id.* at 206.

As to Luis M., the court noted the prosecutor's concerns that he was hesitant about the death penalty and had admitted asking about the defendant in his neighborhood and otherwise personally investigating the case. The trial court had agreed that the prosecutor properly exercised a peremptory challenge on these grounds. App. 206a.

Finally, as to prospective juror Robert M., the court observed that the prosecutor had initially passed on challenges, leaving Robert M. on the panel. Ultimately, the prosecutor decided to challenge M. because he doubted M. could actually impose the death penalty. The trial court agreed that although M.'s questionnaire indicated he was supportive of the death penalty, his answers were equivocal as to whether he could actually impose it. The trial court found this to be a permissible basis upon which to exercise a peremptory challenge. App. 206a-207a.

In light of its thorough review of the record, the Supreme Court summarized the evidence supporting a conclusion that the prosecutor had not exercised his strikes for discriminatory reasons. App. 207a. It further noted that the trial court's rulings following each *ex parte* hearing "indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications." *Id.* at 207a-208a. To the extent the trial court endorsed the prosecutor's characterizations of prospective jurors and their responses, that provided support for the court's "implicit conclusion that the prosecutor did not fabricate his justifications and that they were grounded in fact." *Id.* at 208a. On

balance, the state reviewing court was left “confident that the prosecutor was not violating *Wheeler*, and that defense counsel’s presence could not have affected the outcome of the *Wheeler* hearings.” *Id.* at 207a. And while it recognized that there was a possibility, “in the abstract,” that the record might have been different if defense counsel had been present, it refused to “reverse the judgment on the basis of speculation regarding theoretical possibilities of th[at] type[.]” *Id.* at 209a.

3. In 2002, respondent filed a federal petition for habeas corpus, raising (among other issues) the same claim that the trial court’s exclusion of him and his counsel from the hearings during which the prosecutor explained his reasons for challenging the seven prospective jurors violated his federal constitutional rights. App. 124a, 130a-133a.

The district court first held that it was not clearly established at the time respondent’s conviction became final whether a defendant had a federal constitutional right to have counsel participate in a *Batson* hearing. *See* App. 132a. The court thus concluded that relief based on some of respondent’s arguments would require applying a new rule of federal criminal procedure, which would be barred by *Teague v. Lane*, 489 U.S. 288 (1989). App. 127a-132a.

Alternatively, the district court held that respondent could not satisfy an exception to the relitigation bar imposed by AEDPA, 28 U.S.C. 2254(d). App. 133a-148a. As particularly relevant here, the court noted that, in *Batson*, this Court specifically left it to the lower courts to “formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” App. 143a (quoting *Batson*, 476 U.S. at 99 & fn. 24). It looked to decisions from the Sixth and Seventh Circuit Courts of Appeals, holding that a trial

court does not err in excluding the defense from a prosecutor's explanation for exercising peremptory challenges. *Id.* (citing *United States v. Tucker*, 836 F.2d 334, 337-340 (7th Cir. 1988), and *United States v. Davis*, 809 F.2d 1194, 1201-1202 (6th Cir. 1987)). The court also noted this Court's decision in *Georgia v. McCollum*, 505 U.S. 42, 58 (1992), which stated that "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Id.* at 143a-144a.

In light of these authorities, the district court "doubt[ed] whether the trial court's procedure was constitutionally defective as a matter of clearly established federal law." *Id.* at 145a. In any event, the court concluded that respondent could not establish a right to relief under § 2254(d), because the state Supreme Court's decision that any federal error was harmless was neither contrary to, nor an unreasonable application of, clearly established federal law. App. 145a; *see id.* at 145a-148a.

4. A divided panel of the Ninth Circuit reversed and remanded, with instructions to the district court to grant federal habeas relief. App. 1a-121a.

a. At the outset of its analysis, the court acknowledged that respondent's habeas petition is subject to AEDPA (App. 9a), which requires deference to a state court's adjudication of the merits of a claim unless the state court decision "was contrary to, or an unreasonable application of, clearly established Federal law" as determined by this Court, or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The court recognized this Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011) (*Richter*), holding "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court

adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” App. 13a (quoting *Richter*, 131 S. Ct. at 784). It likewise acknowledged this Court’s decision in *Johnson v. Williams*, 133 S. Ct. 1088 (2013) (*Williams*), holding “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some circumstances be limited.” App. 14a (quoting *Williams*, 133 S. Ct. at 1096).

The court concluded, however, that the *Williams* presumption did not apply to respondent’s *Batson*-related claim; and that, even if it did, it had been rebutted by the state court’s opinion. App. 14a-15a. It reasoned that the California Supreme Court’s opinion could support only two interpretations. One was that the court must have silently found federal constitutional error, because it held there was state error and its decision included discussion of cases concluding that there had been federal error. *Id.* at 14a-17a. Alternatively, the state court might have decided that there was nothing to be gained from reaching the federal constitutional issue, because it had already decided that any error was harmless under both the state and federal standards. In either situation, the Ninth Circuit concluded, the presumption that the state court had adjudicated respondent’s federal claim “on the merits” would be rebutted. *Id.* at 17a-18a.

b. Proceeding to review respondent’s claim *de novo*, the court of appeals held that excluding the defense from the prosecutor’s *Batson* proffer was both unconstitutional and prejudicial. App. 23a-55a.

As to error, the court held that the question was controlled by its own prior precedent dealing with

federal proceedings. *Id.* at 24a (citing *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987)). As to prejudice, the court undertook its own juror-by-juror review of the record (*see* App. 34a-45a), and ultimately concluded that “constitutional error on the part of the state likely prevented Ayala from showing that the prosecution utilized its peremptory challenges in a racially discriminatory manner” (*id.* at 70a-71a). Perceiving “substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges” (*id.* at 33a), the court concluded it was “probable that the state’s errors precluded Ayala from turning what is a very plausible *Batson* claim—the challenge to the prosecution’s strikes of all minority jurors—into a winning one” by preventing defense counsel from identifying where the prosecutor’s reasons might have been pretextual and from making a better record of related facts or arguments to support respondent’s claim (*id.* at 35a).

c. Judge Callahan dissented. App. 71a-121a. She first agreed with the district court that respondent’s *Batson* claim was not an available basis for relief on federal habeas under *Teague v. Lane*, because this Court “specifically declined ‘to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges’” and the federal courts of appeals had adopted divergent views on the question of *ex parte* proceedings, so that a rule requiring the presence of the defendant and his counsel at a *Batson* hearing was not “dictated by precedent” when respondent’s conviction became final. *Id.* at 72a-80a (citing *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)).

Judge Callahan further reasoned that by holding that if federal error occurred it was harmless beyond a reasonable doubt the state Supreme Court had implicitly rejected respondent’s claim of federal

constitutional error. App. 80a. Alternatively, the state court had “clearly addressed Ayala’s federal claim in determining that whatever federal error occurred, it was harmless as a matter of federal law.” *Id.* at 70a. Accordingly, Judge Callahan concluded, the state court’s judgment must be accorded full deference under § 2254(d). *Id.* at 80a-81a (citing *Williams*, 133 S. Ct. at 1094).

Judge Callahan reasoned that, even if it were debatable whether the state court implicitly rejected respondent’s underlying claim, the court’s analysis made clear that it was aware of the federal claim, and *Richter* and *Williams* thus required federal habeas courts to accept that the state court had adjudicated the claim on the merits. App. 86a-89a. Observing that the “majority’s dislike for AEDPA drives it to try to avoid its provisions” (*id.* at 81a), Judge Callahan identified two flaws in the majority’s analysis: (1) it was “contrary to [this Court’s] opinions directing that any question as to whether a state court considered a constitutional issue is to be resolved in favor of finding that it did” (*id.*, citing *Johnson*, 133 S. Ct. at 1094-1096, and *Richter*, 131 S. Ct. at 784-785), and (2) “by separating the California Supreme Court’s determination of *Batson/Wheeler* error from its adjudication of the federal claim, the majority evade[d] giving the opinion the deference demanded by AEDPA and [this] Court” (*id.* at 81a-82a (footnote omitted)).

Judge Callahan also explained that, because fairminded jurists could disagree on the matter of harmlessness, by definition there could be no “grave doubt” as to the harmlessness of any federal constitutional error in this case. App. 97a. She observed that, primarily relying on a Ninth Circuit decision, the majority improperly used the *Brecht* standard in order to justify *de novo* review of the

prejudice question. *Id.* at 90a-97a. Conversely, Judge Callahan relied on this Court's decisions in *Richter*, 131 S. Ct. at 785-786, and *Felkner v. Jackson*, 131 S. Ct. 1305 (2011), for the proposition that when a state court denies a federal claim on harmless error grounds, that too is a decision entitled to deference, unless the petitioner can establish one of the exceptions to the relitigation bar in §2254(d). App. 91a-93a, 97a-99a.

d. The Ninth Circuit denied the State's petition for rehearing en banc. App. 172a. Eight judges dissented from that decision, with a written opinion by Judge Ikuta. App. 172a-188a. The dissenters read the California Supreme Court's opinion to have resolved Ayala's federal constitutional claim against him by discussing this Court's decisions in *Batson* and *Powers v. Ohio*, 499 U.S. 400, and noting that this Court has never required any particular procedures in conducting a *Batson* inquiry, expressly leaving the development of such procedures to trial courts. App. 174a-175a. Judge Ikuta reasoned that the state court only reinforced the rejection of Ayala's *Batson* claim by holding any potential federal error to be harmless. App. 177a, 178a.

In any event, Judge Ikuta explained that it did not matter whether one could read the state court's opinion to have declined to reach the underlying constitutional issue, because this Court has never intimated that a state court's denial of a federal claim on harmless-error grounds is not a merits denial, thus authorizing a federal habeas court to review the underlying claim *de novo*. App. 181a. She criticized the panel majority for creating another path to *de novo* review because this Court "has not yet *directly* told us that we must defer to a state court decision holding that any potential federal constitutional error was harmless." App. 173a, original emphasis.

Because a harmless-error denial is a denial of relief on substantive grounds, rather than procedural ones, the dissenters maintained that a state court's decision that any federal error was harmless is an adjudication on the merits entitled to full respect under AEDPA. App. 182a. Indeed, the panel's decision to the contrary created a circuit conflict. App. 182a-183a.

Finally, Judge Ikuta disagreed with the panel majority's application of the *Brecht* prejudice standard, arguing that it contradicted this Court's decision in *Fry v. Pliler*, 551 U.S. 112 (2007). App. 184a-185a. She observed that if a state court's harmless error determination under *Chapman* is not unreasonable, then there can be no prejudice under *Brecht*, given *Fry*'s reasoning that "*Brecht* 'obviously subsumes' AEDPA/*Chapman* review." *Id.* at 185a-186a. In the dissenters' view, the California Supreme Court's determination that any *Batson* error in this case was harmless beyond a reasonable doubt was not an unreasonable application of *Chapman*. *Id.* at 186a.

REASONS FOR GRANTING CERTIORARI

On the direct appeal of respondent's murder conviction, the California Supreme Court held that the trial court committed state-law error by permitting the prosecutor to articulate race-neutral justifications for his peremptory strikes of minority jurors outside the presence of respondent and his lawyer. App. 200a. After carefully reviewing the record, the court concluded that the error was harmless on the facts of this particular case. App. 203a-212a. As to respondent's parallel federal claim, the court noted that this Court had expressly declined to prescribe specific procedures for implementing the requirements of *Batson v. Kentucky*, 476 U.S. 79, and that lower courts had reached different conclusions concerning whether it was federal constitutional error

to receive a prosecutor's explanations for peremptory strikes *ex parte*. App. 198a, 201a-203a. Based on the same evaluation of the record that it conducted for state-law purposes, the court resolved the claim by holding that any federal error that might have occurred was likewise harmless beyond a reasonable doubt. App. 203a, 210a, 211a. Having concluded that neither the state nor the federal claim provided a basis for relief, the court entered a judgment affirming respondent's conviction. App. 245a.

Fourteen years later, a sharply divided panel of the Ninth Circuit undertook to evaluate respondent's federal *Batson* claim *de novo*. App. 22a, 23a-24a. It justified that approach by holding that the California Supreme Court's determination that any federal error was clearly harmless was not an "adjudicat[ion]" of respondent's federal claim "on the merits" for purposes of triggering the restrictions on federal habeas review of state criminal judgments imposed by 28 U.S.C. § 2254(d). *See, e.g.*, App. 9a & n.3, 11a, 12a & n.4, 16a-17a, 22a-23a. That holding departs from this Court's teachings concerning the proper application of § 2254(d), and creates a conflict in the circuits on an issue that will arise in many cases. Moreover, after improperly addressing respondent's legal arguments *de novo*, the court also proceeded to conduct a *de novo* harmless-error analysis, in which it simply disagreed with the state trial and appellate courts' assessment of the record. This Court should grant review to resolve the conflict and to ensure that the Ninth Circuit's approach does not fundamentally undercut Congress's direction that federal courts may set aside state criminal judgments on collateral review only when they can be shown to be "contrary to, or [based on] an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

1. Section 2254(d)’s restrictions on federal habeas review apply to any federal “claim” that was “adjudicated on the merits in State court proceedings.” 28 U.S.C. § 2254(d). This Court has held that “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state law procedural principles to the contrary.” *Richter*, 131 S. Ct. at 784-785. The same is true when a defendant raises a federal claim and the state court denies relief with an opinion that expressly addresses some claims, but not the one later presented for federal habeas review. *Williams*, 133 S. Ct. at 1094-1096. “When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits” (*id.* at 1096)—subject to rebuttal of the presumption in some “unusual circumstances” (*id.*), such as where “the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked” (*id.* at 1097). The principal question in this case is whether a federal claim has been “adjudicated on the merits” for purposes of AEDPA where the state court adverts to and addresses the claim, but its only clear holding is that “*if* federal error occurred, it ... was harmless beyond a reasonable doubt as a matter of federal law.” App. 203a (emphasis added; citation omitted); *see also id.* at 211a, 213a.

The answer to that question follows from this Court’s decisions. To begin with, it is clear that the California Supreme Court actually “adjudicated” respondent’s federal claim. That court expressly noted the existence of a claim under *Batson*, along

with the largely parallel state claim under *People v. Wheeler*, 22 Cal. 3d 258 (see App. 196a); discussed the state and federal claims together (App. 196a-212a); noted that this Court had specifically left it to trial courts to develop related procedures, resulting in “a rather wide spectrum” of responses (including “those that permit the prosecutor’s explanation to be received in camera and ex parte”) (App. 198a-199a); held that the procedure followed in respondent’s case was error as a matter of *state* law (App. 200a); repeatedly held that “if federal error occurred, it, too, was harmless beyond a reasonable doubt” (App. 203a; *id.* at 211a, 213a); and entered a judgment denying any relief. There is no possibility that respondent’s federal claim was “inadvertently overlooked.” See *Williams*, 133 S. Ct. at 1097.

The state court’s adjudication was also “on the merits.” In *Williams*, this Court explained that “as used in this context, the word ‘merits’ is defined as ‘[t]he intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form.’” 133 S. Ct. at 1097 (emphasis omitted). A non-merits adjudication would be one based on matters “extraneous” to the particular claim, “such as the competence of the tribunal or the like,” or on “procedural details” or “technicalities.” *Id.* (internal quotation marks omitted). In this framework, a determination that a particular claim of error, even if otherwise well-founded, would not warrant relief, because any error would not have affected the substantive outcome of the proceeding, is an evaluation “based on the intrinsic right and wrong of the matter.” *Id.* It is not a matter of threshold jurisdiction, procedural bar, or other “technicalit[y]” separate from the intrinsic merits of the defendant’s claim. *Cf. Gonzalez v. Crosby*, 545 U.S. 524, 532 & n.4 (2005) (distinguishing, in a related context, between a

determination “that there exist or do not exist grounds entitling a petitioner to habeas corpus relief” and “a denial for such reasons as failure to exhaust, procedural default, or statute of limitations bar”); *see also Williams*, 133 S. Ct. at 1100 (Scalia, J., concurring in the judgment).

That conclusion comports with the Court’s other AEDPA decisions. As the Ninth Circuit observed in this case, rejecting a claim on harmless-error grounds “is not an unusual practice.” App. 18a; *see also id.* at 183a (Ikuta, J., dissenting from denial of rehearing en banc) (state courts “routinely” resolve federal claims on harmless-error grounds). Decisions in which a state court denies relief without stating its reasons, or without expressly addressing a particular federal claim, will thus commonly involve claims denied on that basis. This Court has made clear that, in those situations, there is a “strong ... presumption” that any federal claim properly presented to the state court was “adjudicated on the merits” within the meaning of Section 2254(d). *Williams*, 133 S. Ct. at 1096; *Richter*, 131 S. Ct. at 784-785. In discussing how that presumption might be overcome, the Court has noted that it might be clear in a particular case a state court treated a claim as procedurally barred, or simply overlooked it. It has never suggested that, as the Ninth Circuit held here (*see* App. 17a-18a), a state court’s rejection of a federal claim could be treated as not “on the merits” for AEDPA purposes because it was based on a determination that any error was clearly harmless. Nor would such a broad exception to the general rule be consistent with this Court’s many cases construing and applying AEDPA, which have consistently emphasized that a state court judgment may not be set aside unless it reaches a result that is demonstrably inconsistent with some square holding of this Court. *See, e.g., White v. Woodall*, 134 S. Ct.

1697, 1702 (2014); *Early v. Packer*, 537 U.S. 3, 8 (2002) (validity of state judgment “does not even require *awareness* of our cases [by the state court], so long as neither the reasoning nor the result of the state-court decision contradicts them”).

The California Supreme Court’s determination that any federal error “was harmless beyond a reasonable doubt ... as a matter of federal law” (App. 203a) thus rejected respondent’s federal claims “on the merits” for purposes of Section 2254(d). Federal habeas review should accordingly have been limited to determining whether respondent could show that the ultimate denial of relief “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” (28 U.S.C. § 2254(d)(1)). That burden was not reduced by the fact that the state court did not state any definitive conclusion about whether there was federal error—any more than it would have been if the court had said nothing about the federal claim at all. *See Richter*, 131 S. Ct. at 784 (“§ 2254 applies when a ‘claim,’ not a component of one, has been adjudicated”). Rather, respondent was required to show that, taking his federal claim as a whole, and without regard for what the state court might have said or thought about any particular aspect of the claim, there was “no reasonable basis for the state court to deny relief.” *Id.* That is, AEDPA did not permit the Ninth Circuit to set aside the California Supreme Court’s judgment unless respondent could demonstrate that there was “no possibility fairminded jurists could disagree that the state court’s decision conflict[ed] with this Court’s precedents.” *Id.* at 786.

If the Ninth Circuit had applied that standard in this case, it could not have granted relief. As the California Supreme Court explained in its opinion,

this Court expressly left it to trial courts to develop particular procedures for implementing *Batson*'s constitutional requirements; and the lower courts adopted a "wide spectrum" of approaches, including permitting prosecutors to present explanations for their strikes *ex parte*, as was done here. App. 198a (citing *Powers v. Ohio*, 499 U.S. 400, 416, and quoting *Gray v. State*, 317 Md. 250, 257 (1989)); *id.* at 201a (citing cases from the Sixth and Seventh Circuits for the proposition that "some decisions have tolerated an *ex parte Batson* hearing procedure on the ground that the United States Constitution permits it"). Although the state Supreme Court concluded that the better practice was to permit *ex parte* proceedings only for compelling reasons not present here, and adopted that rule as a matter of state law, it clearly was not *compelled* to reach that result by any decision of this Court. Cf. App. 54a-67a (concluding for purposes of *Teague v. Lane*, 489 U.S. 288, only that rule was "established" as a matter of *Ninth Circuit* law, *id.* at 54a-59a, or based on a "confluence of *Batson* and th[is] Court's Sixth Amendment jurisprudence," *id.* at 64); *id.* at 76a-80a (Callahan, J., dissenting) (agreeing with district court that rule was not "dictated by precedent" for purposes of *Teague*).² And without

² Under Section 2254(d), "clearly established ... as determined by" this Court "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *see also, e.g., Carey v. Musladin*, 549 U.S. 70, 74 (2006). A "specific" legal rule may not be inferred from this Court's decisions; rather, the Court must have "squarely" established the rule. *Richter*, 131 S. Ct. at 786; *Knowles v. Mirzayance*, 556 U.S. 111 (2009). Where the Court's "cases give no clear answer to the question presented, let alone one in [the accused's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" by rejecting a federal claim. (continued...)

such compulsion, the state court’s judgment denying relief on respondent’s federal claim could not be set aside later by a federal habeas court as “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 786-787.

2. The Ninth Circuit reached a contrary result only by refusing to honor the state court’s judgment as an “adjudicat[ion] on the merits” for purposes of AEDPA (App. 10a-23a); reviewing respondent’s federal claim *de novo*, and holding that his trial was marred by federal constitutional error (*id.* at 23a-27a); and then conducting its own review of the record and deciding, again *de novo*, that the error was prejudicial (*id.* at 27a-53a). These departures from proper federal habeas review under AEDPA warrant review and correction by this Court.

a. First, the Ninth Circuit’s decision that rejection of a federal claim solely on harmless-error grounds is not an adjudication “on the merits,” and thus permits a federal habeas court to review the claim *de novo*, conflicts squarely with the Tenth Circuit’s decision in *Littlejohn v. Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). *See also* App. 182a-183a (Ikuta, J., dissenting from denial of rehearing en banc). In *Littlejohn*, the state court on direct appeal had noted the opposing arguments regarding one of the defendant’s federal claims. In the end, however, it did not rule one way or the other on whether there was

(...continued)

Wright v. Van Patten, 552 U.S. 120, 126 (2008) (*per curiam*). Here, as the California Supreme Court recognized, no decision of this Court established any specific rule forbidding trial courts from receiving *ex parte* explanations for a prosecutor’s peremptory challenges.

error, but rejected the claim only on the ground that “even assuming, *arguendo*, that Littlejohn’s prior trial testimony should have been suppressed, any error stemming from its admission was harmless beyond a reasonable doubt[.]” *Littlejohn v. State*, 85 P.3d 287, 298 (Ok. Ct. Crim. App. 2004); *see Littlejohn*, 704 F.3d at 848. In his federal habeas proceeding, Littlejohn argued that, because the state court assumed there was federal error, AEDPA did not require the federal court to consider whether his claim was based on “clearly established federal law.” 704 F.3d at 850 n.17; *compare* App. 21a-33a (holding that because the California Supreme Court either accepted respondent’s argument that there was federal error or did not decide that question, the federal court had “no reason to give § 2254(d) deference to such a holding in evaluating Ayala’s claim”). The Tenth Circuit rejected that argument:

Where a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning. *Cf. Brown v. Luebbers*, 371 F.3d 458, 462-463 (8th Cir. 2004) (holding that AEDPA deference applied to a state court’s alternative holding where it assumed a trial error and applied harmless error review under *Chapman*). That is, it renders a decision that is on the merits for purposes of AEDPA, *see Richter*, 131 S. Ct. at 784; therefore, our inquiry must adhere to the analytical framework of AEDPA, which includes an assay into whether there is clearly established federal law.

704 F.3d at 850 n.17. Undertaking that inquiry, the court held that no decision of this Court “furnished

the [state court] with clearly established federal law to resolve Mr. Littlejohn’s argument,” and that there was therefore no basis for federal habeas relief. *Id.* at 850-851.

The result and reasoning in *Littlejohn* cannot be reconciled with those of the Ninth Circuit panel majority in this case. Indeed, Judge Ikuta pointed out this conflict in her 8-judge dissent from the denial of rehearing en banc. App. 182a-183a. Tellingly, the panel’s 67-page opinion, although amended in other respects on the denial of rehearing, offers no response.

b. Second, as Judge Ikuta’s dissent also points out (App. 183a), the Ninth Circuit’s holding that federal habeas courts may (indeed, must) review *de novo* any federal claim that a state court resolved on harmless-error grounds “is not a case-specific error that will be confined to the facts of this opinion.” State courts in the Ninth Circuit, as elsewhere, “routinely resolve claims of federal error on the basis that any potential error was harmless.” *Id.* Under the Ninth Circuit’s approach, *de novo* federal review under AEDPA will no longer be limited to “those rare cases when a state court decides a federal claim in a way that is ‘contrary to’ clearly established Supreme Court precedent,” or the perhaps even rarer cases where some evidence “leads very clearly to the conclusion that a federal claim was inadvertently overlooked.” *Williams*, 133 S. Ct. at 1097; *see also, e.g., Richter*, 131 S. Ct. at 786 (“If this standard is difficult to meet, that is because it was meant to be.”). Rather, federal courts, at least in the Ninth Circuit, will now have frequent occasion to consider for themselves, on the basis of cold state records, whether a state trial involved federal constitutional error—and then, if they find error, to try to assess whether it was harmless, “‘without regard for the state court’s harmlessness determination.’” App. 31a-32a (quoting *Pulido v.*

Chrones, 629 F.3d 1007, 1012 (9th Cir. 2010)); *see also* *Dixon v. Williams*, No. 10-17145, slip op. 15, 2014 WL 1687819 (9th Cir. Apr. 30, 2014) (quoting this language from *Ayala* and granting habeas relief, reversing district court’s determination that state Supreme Court’s denial of relief should be respected under AEDPA).

The only way for state courts to avoid this result would be to take care to address questions of federal error expressly in every case—even where it would otherwise be possible and efficient to reject a particular defendant’s claim on harmless-error grounds. But any such rule would complicate the processing of routine cases by state courts that must sensibly allocate finite judicial resources. It would run directly counter to the usual principle that courts should *not* unnecessarily reach often-complex constitutional questions. *See, e.g.*, App. 18a-19a (acknowledging that avoiding unnecessary resolution of constitutional questions is a “good reason” for state courts to resolve federal claims on harmless-error grounds). And it would improperly turn AEDPA into a prescription for how state courts should frame their opinions and judgments. *See Richter*, 131 S. Ct. at 757.

None of this is an appropriate way of construing or implementing AEDPA. On the contrary, if allowed to proceed, the Ninth Circuit’s new regime will permit a broad and rapid undermining of “AEDPA’s deferential architecture,” which was intended to “leav[e] ‘primary responsibility’ for adjudicating federal claims to the States.” *Williams*, 133 S. Ct. at 1097 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (*per curiam*)).

c. Finally, even if there had been any warrant under AEDPA for the Ninth Circuit to reach its own conclusion that there was federal error at

respondent's trial and then proceed to consider whether that error was harmless, the way in which the court conducted its harmless-error inquiry cannot be reconciled with the basic principles of deference to state court judgments that Congress sought to impose through AEDPA.

In *Mitchell v. Esparza*, 540 U.S. 12 (2003), this Court held that, when a state appellate court finds federal constitutional error harmless beyond a reasonable doubt under *Chapman*, a federal court may not set aside the resulting judgment unless the state court's determination was objectively unreasonable. In *Fry v. Pliler*, 551 U.S. at 119-121, the Court held that that deferential standard of collateral review is "obviously subsume[d]" by the "actual prejudice" standard of *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), which the Court viewed as allowing federal habeas courts *less* scope for setting aside state judgments. *See id.* at 119 (emphasizing the Court's "frequent recognition that AEDPA limited rather than expanded the availability of [federal] habeas relief"). Reiterating concerns raised in *Brecht* itself regarding the finality of state court judgments and the difficulty of retrying defendants many years after their crimes were committed, the Court again stressed that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effects on the trial process," and indeed "often occupy a superior vantage point from which to evaluate the effect of trial error." *Id.* at 118 (quoting *Brecht*, 507 U.S. at 636.)

Since *Fry*, the courts of appeals have struggled to arrive at an appropriate understanding of how to apply *Brecht* review to harmless-error questions under AEDPA. Compare, e.g., *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (no deference to state court determination), *cert. denied*, 133 S. Ct. 102 (2012),

and *Jones v. Basinger*, 635 F.3d 1030, 1052, n.8 (7th Cir. 2011) (where error caused “actual prejudice” under *Brecht*, state court’s application of *Chapman* was clearly unreasonable), with, e.g., *Cudjo v. Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (federal habeas court must apply AEDPA deference to state court *Chapman* determination), and *Kamlager v. Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013) (if state court has conducted harmless-error analysis, federal habeas court must decide whether that analysis was objectively unreasonable); *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (same). And the Ninth Circuit’s decision in this case is a good example of how this Court’s decision in *Fry* is often applied, in practice, to set aside state judgments without any regard for the reasonableness of the state court’s analysis of the harmless-error question. See, e.g., App. 31a-32a (“We apply the *Brecht* test without regard for the state court’s harmlessness determination.” (internal quotation marks omitted; citing *Fry*)).

On direct appeal in respondent’s case, the California Supreme Court conducted its own thorough review of the reasons proffered by the prosecutor for challenging the prospective jurors at issue and the underlying record materials, taking account as well of the trial court’s demonstrated careful engagement in the process and critical evaluation of the prosecutor’s explanations as they were offered. See App. 203a-212a. Whatever conclusion a different group of judges might come to based on their own analysis, the state court’s assessment was not unreasonable—even as an application of *Chapman*’s standard of harmlessness beyond a reasonable doubt, and *a fortiori* as a question of whether there was more likely than not any “actual prejudice” to the defendant. Yet, rather than giving any regard to the careful evaluation and

conclusion of their state colleagues, the Ninth Circuit panel majority in this case engaged in a putative *Brecht* analysis that “piles speculation upon speculation” to reach a contrary result. App. 186a (Ikuta, J., dissenting from denial of rehearing en banc); see *id.* at 184a-188a & n.5; see also App. 106a-119a (Callahan, J., dissenting) (reviewing evidence concerning individual jurors and concluding (at 119a) that “[t]he California Supreme Court may not have been compelled to conclude that ‘the challenged jurors were excluded for proper, race-neutral reasons,’ ... [b]ut its conclusion was objectively reasonable”).

Such wholly non-deferential second-guessing of reasonable determinations by state courts, particularly on the record-, fact-, and context-intensive question of evaluating the potential for prejudice from possible errors in state court trial proceedings, cannot be what this Court intended in *Fry*—or what Congress intended when it enacted AEDPA. A state criminal conviction may not properly be set aside simply because two federal appellate judges would, on *de novo* consideration, reach a different conclusion from their state court counterparts concerning whether a particular alleged error was potentially prejudicial. Indeed, the fundamental flaw in the Ninth Circuit’s approach is aptly highlighted by the renewed applicability of an observation that this Court made in *Richter*: “Here, it is not apparent how the Court of Appeals’ analysis would have been any different without AEDPA.” 131 S. Ct. at 786.

In order for appropriate AEDPA deference to be in fact “subsume[d]” by use of the *Brecht* standard, as *Fry* envisioned, application of that standard must involve something other than the wholly *de novo*, avowedly *non-deferential* harmlessness review engaged in by the panel majority in this case.

Otherwise, rather than being *subsumed*, AEDPA's critical limitations on the mere relitigation of claims in federal court will have been effectively *supplanted*. Accordingly, the Court should also grant review to make clear that, if the court of appeals properly reached the question of harmlessness at all, its "lengthy opinion ... discloses an improper understanding of § 2254(d)'s unreasonableness standard and of its operation in the context of" assessing a state court's considered conclusion that any federal error that may have occurred was clearly harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed September 13, 2013

Amended February 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HECTOR JUAN AYALA, Petitioner-Appellant,

v.

ROBERT K. WONG, Warden, Respondent-Appellee.

No. 09-99005

D.C. No. 3:01-CV-01322-IEG-PLC

Appeal from the United States District Court
for the Southern District of California

AMENDED OPINION

REINHARDT, Circuit Judge:

State prisoner Hector Juan Ayala (“Ayala”) appeals the denial of his petition for a writ of habeas corpus. During the selection of the jury that convicted Ayala and sentenced him to death, the prosecution used its peremptory challenges to strike all of the black and Hispanic jurors available for challenge. The trial judge concluded that Ayala had established a *prima facie* case of racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), but permitted the prosecution to give its justifications for the challenges of these jurors in an *in camera* hearing from which Ayala and his counsel were excluded. The trial judge then accepted the prosecution’s justifications for its strikes without disclosing them to the defense or permitting it to respond. The California Supreme Court held that the trial court erred as a matter of state law, relying on a number of federal cases, but found that any error—

state or federal—was “harmless.”

We conduct our review of Ayala’s appeal under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In reviewing Ayala’s federal claim, the state court faced two questions: first, whether the exclusion of Ayala and his counsel from the ex parte *Batson* proceedings was federal constitutional error, and, second, whether any such error was harmless. We conclude that the state court either resolved the first question in Ayala’s favor or did not reach it. We therefore apply de novo review, and conclude that there was federal constitutional error. Turning to the second question, harmlessness, we conclude that the state court found that any federal constitutional error was harmless. We review that determination under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and conclude that the violation of Ayala’s *Batson* rights was prejudicial. We therefore remand with instructions to grant the writ.

I.

On April 26, 1985, Jose Luis Rositas, Marcos Antonio Zamora, and Ernesto Dominguez Mendez were shot and killed in the garage of an automobile repair shop in San Diego, California. A fourth victim, Pedro Castillo, was shot in the back but managed to escape alive. Castillo identified Ayala, his brother Ronaldo Ayala, and Jose Moreno as the shooters. He claimed that these men had intended to rob the deceased, who ran a heroin distribution business out of the repair shop.

Ayala was subsequently charged with three counts of murder, one count of attempted murder, one count of robbery and three counts of attempted robbery. The information further alleged that the

special circumstances of multiple murder and murder in the attempted commission of robberies were applicable in his case. A finding that one of these special circumstances was true was required in order for Ayala to be eligible for the death penalty.

Jury selection began in San Diego in January 1989. Each of the more than 200 potential jurors who responded to the summons and survived hardship screening was directed to fill out a 77-question, 17-page questionnaire. Over the next three months, the court and the parties interviewed each of the prospective jurors regarding his or her ability to follow the law, utilizing the questionnaires as starting points for their inquiry. Those jurors who had not been dismissed for cause were called back for general voir dire, at which smaller groups of jurors were questioned by both the prosecution and the defense. The parties winnowed the remaining group down to twelve seated jurors and six alternates through the use of peremptory challenges. Each side was allotted twenty peremptory challenges which could be used upon any of the twelve jurors then positioned to serve on the jury. After twelve seated jurors were finally selected, both parties were allotted an additional six peremptory challenges to be used in the selection of alternates.

The prosecution employed seven of the 18 peremptory challenges it used in the selection of the seated jurors to dismiss each black or Hispanic prospective juror who was available for challenge, resulting in a jury that was devoid of any members of these ethnic groups. In response, Ayala, who is Hispanic, brought three separate motions pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming that the prosecution was systematically excluding

minority jurors on the basis of race.¹

The defense made its first *Batson* motion after the prosecution challenged two black jurors. The trial court found that the defense had not yet established a *prima facie* case of racial discrimination, but nevertheless determined that it would require the prosecution to state its reasons for challenging the jurors in question. At the prosecutor's insistence, and despite the defense's objections, the court refused to let the defendant or his counsel be present at the hearing in which the prosecution set forth these reasons and the court determined whether they were legitimate.

The trial judge continued to employ this *ex parte*, in camera procedure to hear and consider the prosecutor's purported reasons for challenging minority jurors following the defense's second and third *Batson* motions. He did so despite his determination, by the third motion, that the defense had established a *prima facie* showing of racial discrimination.

Ultimately, the trial judge concluded that the prosecutor had proffered plausible race-neutral reasons for the exclusion of each of the seven minority jurors, and denied the defense's *Batson* motions. Although the *ex parte Batson* proceedings were transcribed, this transcript—and thus, the prosecution's proffered race-neutral reasons for

¹ The motions were technically made under *People v. Wheeler*, 22 Cal.3d 258 (1978), the California analogue to *Batson*. Because “a *Wheeler* motion serves as an implicit *Batson* objection,” we characterize Ayala's motions, and the proceedings that followed, as being pursuant to *Batson*. *Crittenden v. Ayers*, 624 F.3d 943, 951 (9th Cir. 2010).

striking the seven black and Hispanic jurors — were not made available to Ayala and his counsel until after the conclusion of the trial.

The jury convicted Ayala of all counts save a single attempted robbery count, and found true the special circumstance allegations. At the penalty phase, it returned a verdict of death.

Early in the process of jury selection, the trial judge had instructed the parties to return to the court all the questionnaires the prospective jurors had completed, and advised them that he would be “keeping the originals.” At some point during or following the trial, however, all questionnaires, save those of the twelve sitting jurors and five alternates, were lost. The questionnaires of four additional jurors — including the sixth alternate — were located in the defense counsel’s files, but the remaining 193 questionnaires have never been located.

On direct appeal from his conviction, Ayala challenged the trial court’s use of ex parte *Batson* proceedings. He also claimed that the loss of the jury questionnaires deprived him of his right to a meaningful appeal of the denial of his *Batson* motion. A divided California Supreme Court upheld his conviction on the basis of harmless error and also upheld the sentence. *People v. Ayala*, 24 Cal. 4th 243 (Cal. 2000). The court unanimously held that under state law the trial judge had erred in conducting the *Batson* proceedings ex parte. *Id.* at 204 (majority opinion); *id.* at 291 (George, C.J., dissenting). A majority went on to hold, however, that any error was harmless beyond a reasonable doubt. *Id.* at 204. It also concluded that the loss of the questionnaires was harmless beyond a reasonable doubt. *Id.* at 208.

In dissent, Chief Justice George, joined by Justice Kennard, expressed his disagreement with the majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless." *Id.* at 221 (George, C.J., dissenting). Ayala's petition for certiorari was denied by the United States Supreme Court on May 14, 2001. *Ayala v. California*, 532 U.S. 1029 (2001).

Ayala timely filed his federal habeas petition. The district court denied relief, but issued a Certificate of Appealability as to Ayala's *Batson*-related claims and his claim that the state had violated his Vienna Convention right to consular notification.² Ayala now appeals.

II.

In order for this court to grant Ayala habeas relief, we must find that he suffered a violation of his federal constitutional rights. To do so, Ayala must demonstrate both that (1) the state court committed federal constitutional error and (2) that he was prejudiced as a result. We discuss the issue of error in Part III and the issue of prejudice in Part IV.

Here, Ayala alleges two federal constitutional violations, the first of which is the principal focus of this opinion. Ayala's primary claim relates to his exclusion and his counsel's from the *Batson* proceedings. Ayala's secondary claim, which exacerbates the overall error in this case, relates to the state court's loss of the juror questionnaires prior

² Because we conclude that Ayala is entitled to relief on his *Batson*-related claims, we need not decide whether the district court erred in rejecting his Vienna Convention claim.

to Ayala’s appeal. We discuss these errors separately, in Sections III.A and III.B respectively, devoting much greater attention to the first, although the second would strongly bolster the first.

The state, in defending against the grant of habeas relief to Ayala, makes two principal arguments. First, it contends that Ayala was not prejudiced by his exclusion or his counsel’s from the *Batson* proceedings, or by the loss of the juror questionnaires. This was the state court’s basis for denying Ayala relief.

Second, the state raises a procedural objection that Ayala’s claim regarding his exclusion during the *Batson* proceedings is barred by *Teague v. Lane*, 489 U.S. 288 (1989). “[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.” *Horn v. Banks*, 536 U.S. 266, 272 (2002). We conduct the requisite *Teague* analysis in Part V of this opinion.

In Part VI of this opinion, we respond to arguments made by the dissent, and in Part VII we set forth our conclusion and remand to the district court with instructions to grant Ayala the writ of habeas corpus.

III.

As stated above, Ayala alleges that the state court committed two distinct federal constitutional errors. The first alleged error relates to the state court’s exclusion of Ayala and his counsel from the *Batson* proceedings (referred to sometimes in this opinion as the “ex parte *Batson* proceedings”). The second error relates to the state court’s loss of the juror

questionnaires. We address each error in turn, concluding that Ayala is correct and that the state court committed both federal constitutional errors, although we hold that the first error is sufficient in itself to warrant the issuance of the writ, and the second simply bolsters the first.

A.

“For more than a century, [the Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State injury selection offends the Equal Protection Clause.” *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). *Batson* established the three-step inquiry used to determine whether this basic constitutional guarantee has been violated. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges in a racially discriminatory manner. *Batson*, 476 U.S. at 96. Such a showing may be made, as the trial judge concluded it was in Ayala’s case, where the prosecution has engaged in a pattern of strikes against jurors of a particular race. *Id.* at 97. Second, once the defendant has made a prima facie showing, “the burden shifts to the State to come forward with a neutral explanation for challenging” the jurors. *Id.* Third, the trial court must then determine whether, taking into consideration the prosecutor’s explanations for his conduct, “the defendant has established purposeful discrimination.” *Id.* at 98.

Ayala contends that the exclusion of the defense from the proceedings in which the prosecution justified its strikes of the seven black and Hispanic jurors, and the trial court accepted those justifications, violated his right to the assistance of counsel and his right to be personally present and to

assist in his defense. He further contends that these errors prevented him from ensuring that the prosecution did not violate his fundamental right to a jury chosen free from racial discrimination.

Before we may evaluate the merits of Ayala's contention, we must first determine the appropriate standard of review to apply. Specifically, because Ayala's habeas petition is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), *see Kennedy v. Lockyer*, 379 F.3d 1041, 1046 (9th Cir. 2004), we must determine whether Ayala's claim of federal constitutional error was adjudicated on the merits, and if so what the nature of that adjudication was.³ We do so in Section III.A.1, concluding that the California Supreme Court did not find against Ayala on the merits of his claim of federal constitutional error, and therefore § 2254(d) does not require deference to such a

³ “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011). Accordingly, if the California Supreme Court made an “adjudication on the merits” that the exclusion of Ayala and his counsel from his *Batson* proceedings was not erroneous under federal constitutional law, then Ayala would not be entitled to relief on his claim unless that state court adjudication

(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.

28 U.S.C. § 2254(d).

determination. We then conclude in Section III.A.2 that, under de novo review, Ayala's constitutional rights were violated when he and his counsel were excluded from stages two and three of the *Batson* proceedings.

1.

The first question is whether the state court made an adjudication on the merits as to whether the exclusion of Ayala and his counsel from the *Batson* proceedings was federal constitutional error. Answering that question is significantly more difficult in this case than in most federal habeas appeals. We are confronted with an especially unclear state court decision that requires us to delve more deeply than is typical into the question of what the state court did or did not “adjudicate on the merits” the question of constitutional error. The California Supreme Court, when confronted with Ayala's claim, concluded that the exclusion of the defense from these proceedings was, in fact, erroneous as a matter of state law. The state court began its analysis by stating the legal framework for Ayala's challenge. It identified the three-step process for a *Batson* challenge and noted that, under *Batson*, no particular procedures were required. *Ayala*, 6 P.3d at 202. It then made three distinct legal determinations. First, it found that “no matters of trial strategy were revealed” during the *Batson* proceedings in Ayala's case. *Id.* at 202-03. Second, it held “as a matter of state law” that it was “error to exclude defendant from participating in the hearings on his [Batson] motions.” *Id.* at 203. The California Supreme Court observed that “it seems to be almost universally recognized that ex parte proceedings following a [*Batson*] motion ... should not be

conducted unless compelling reasons justify them.” *Id.* at 203. Because no matters of trial strategy were revealed here and thus no such “compelling reasons” existed, the state court “concluded that error occurred under state law.” *Id.* at 204. Third, turning to the question of prejudice (a subject we discuss in Part IV), the state court

conclude[d] that the error was harmless under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705) as a matter of federal law.

Id.; see also *id.* at 204-08 (analyzing prejudice further). Having found error but having also deemed it harmless, the state court denied Ayala relief.

There is no doubt that the California Supreme Court found that the exclusion of Ayala and his counsel from the *Batson* proceedings was erroneous under state law. The state court made no express finding with respect to whether the exclusion of Ayala and his counsel from the *Batson* proceedings was also error under federal constitutional law. Although it is not easy to interpret a state court’s silence, there are only three possible determinations it could have made in this case. The California Supreme Court either

- (1) held that there was error under federal constitutional law;
- (2) did not decide whether there was error under federal constitutional law; or

(3) held that there was no error under federal constitutional law.

[hereinafter discussed as Options 1, 2, and 3 respectively]

Of these three possibilities, only under Option 3 — in which the state court made an unfavorable determination on the merits of Ayala’s claim of federal constitutional error—would § 2254(d) require deference to a determination against Ayala.⁴ Thus,

⁴ Under Option 1, i.e., if the California Supreme Court found error under federal constitutional law, as well as under state law, an argument can be made that we would be required to accord AEDPA deference to that determination. That is, we could be required to give AEDPA deference *in favor of* the petitioner. An argument can also be made that § 2254(d), by its text and purpose, is inapplicable to a claim on which the petitioner prevailed in state court, and therefore the claim should be reviewed de novo. Finally, because habeas review is intended to provide relief to a prisoner and not to the state, an argument can be made that a state court’s determination in favor of petitioner cannot be relitigated on habeas review. The question whether to accord AEDPA deference to a state court determination favorable to a petitioner, review that determination de novo or not review it at all is a question of first impression that we need not decide in this case. In all three situations—de novo review, AEDPA deference in favor of the petitioner, or no review—we would conclude that there was federal constitutional error in Ayala’s trial. See discussion *infra* Part III(A)(2).

Under Option 2, i.e., if the California Supreme Court found error with respect to the *Batson* issue as a matter of state law only and did not decide the question of federal constitutional error on the merits, our review would be de novo. See *Cone v. Bell*, 556 U.S. 449, 472 (2009) (reviewing de novo because the “[state] courts did not reach the merits of [the petitioner’s constitutional] claim”); *Lott v. Trammell*, 705 F.3d 1167, 1218 (10th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012). A decision “as a matter of state law only” perforce does not constitute an “adjudication on the merits” of a
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we need determine only whether the California Supreme Court’s silence is best interpreted as Option 3—i.e., as holding that the exclusion of Ayala and his counsel from the *Batson* proceedings was *not* erroneous under federal constitutional law.

In determining how to interpret state court silence on the question of federal constitutional error, we consider, *inter alia*, two recent Supreme Court decisions: *Richter*, 131 S. Ct. 770, and *Johnson v. Williams*, 133 S. Ct. 1088 (2013). In both *Richter* and *Williams*, the Supreme Court applied a rebuttable presumption that, even though the state court was silent with respect to a fairly presented federal claim, the claim was adjudicated on the merits. The Court’s rationale was that, because the state court denied relief overall, it necessarily adjudicated (and rejected) the federal claim. For example, in the context of a summary denial, as in *Richter*, the state court could not have denied relief overall without having rejected, and thus adjudicated, every fairly presented federal claim. Accordingly, the Supreme Court held, “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Richter*, 131 S. Ct. at 784. The same was true when, in *Williams*, the state court rejected a state law claim, was silent with respect to a fairly presented federal claim, and denied relief overall. *See Williams*, 133 S. Ct. at 1091. There too, the state court could not have denied relief overall without having

(...continued)

federal claim, and therefore § 2254(d) would not apply.

rejected, and thus adjudicated, the federal claim presented by the petitioner. Thus, the Supreme Court held, “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.” *Id.* at 1096 (discussing *Richter*). Here, the presumption is inapplicable for several reasons. We need mention only a couple. First, it was not necessary for the state court to reject the claim of federal constitutional error on the merits in order for it to deny relief to the petitioner. To the contrary, the state court denied Ayala relief on his federal constitutional claim only because it concluded that the error (if any) was harmless. Second, the facts of this case dictate the conclusion that the California Supreme Court believed that the error under state law also constituted federal constitutional error.

We believe that there are only two plausible interpretations of the California Supreme Court’s decision—either Option 1 or Option 2. The most likely interpretation is Option 1, i.e., that the California Supreme Court held implicitly that there was error under state law *and* under federal constitutional law alike. Notably, the California Supreme Court based its determination that the trial court’s exclusion of Ayala and his counsel was impermissible “as a matter of state law,” *Ayala*, 6 P.3d at 203, on the fact that it was “almost universally recognized” that *ex parte Batson* proceedings are erroneous absent a compelling reason, expressly relying for this conclusion on multiple federal cases that themselves relied on federal constitutional law. *Id.* (citing *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989); *United*

States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987)). The court then quoted extensively from *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), in which we held that the ex parte proceedings in that case violated federal constitutional law. *Ayala*, 6 P.3d at 203-04. In summarizing its discussion of error (before moving to prejudice), the California Supreme Court stated: “We have concluded that error occurred under state law, and we have noted *Thompson*’s suggestion that excluding the defense from a [*Batson*]-type hearing may amount to a denial of due process.” *Id.* at 204. The obvious message here is that the California Supreme Court believed that the federal constitutional issue should be decided the same way as the state law issue. This is consistent with the fact that California courts interpret a violation of *Wheeler* — California’s state equivalent of *Batson* — as proof of a violation of *Batson*. See *People v. Yeoman*, 72 P.3d 1166, 1187 (Cal. 2003); see also *Johnson v. California*, 545 U.S. 162 (2005) (holding that *Wheeler* is more demanding than *Batson*). Thus, if we were required to determine whether the California Supreme Court adjudicated *Ayala*’s claim of federal constitutional error on its merits in favor of the petitioner or the state, we would hold without question that the California Supreme Court found error in petitioner’s favor under both state law *and* federal constitutional law—i.e., Option 1.

In support of this conclusion, we find instructive—and likely dispositive—the Supreme Court’s discussion in Part III of *Williams*. In that case, the petitioner challenged the dismissal of a holdout juror under both California state law and under the Sixth Amendment right to a fair jury. The

California Court of Appeal found that there was no error under state law. It did not expressly decide petitioner's federal constitutional claim but, in the course of deciding the state law claim, cited a California Supreme Court case, *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001). *Cleveland* in turn discussed three federal appellate cases in depth, each of which was based on the Sixth Amendment. In *Williams*, the Supreme Court explained *Cleveland* as follows:

Cleveland did not expressly purport to decide a federal constitutional question, but its discussion of [the federal cases] shows that the California Supreme Court understood itself to be deciding a question with federal constitutional dimensions. See 25 Cal.4th, at 487, 106 Cal. Rptr. 2d 313, 21 P.3d, at 1239 (Werdegar, J., concurring) (emphasizing importance of careful appellate review in juror discharge cases in light of the "constitutional dimension to the problem").

Williams, 133 S. Ct. at 1098. A unanimous Supreme Court then concluded that because the state court found no error under state law on the basis in part of federal cases relying on federal constitutional law, it likewise found no error using that same analysis to decide the question under federal constitutional law. *Id.* at 1098-99. The obverse is necessarily true with respect to the state court's analysis in this case. The California Supreme Court, in finding that the exclusion of Ayala and his counsel from the *Batson* proceedings was erroneous under state law, cited to multiple federal cases relying on federal law. It did not expressly purport to decide the federal constitutional question, but it too must have

understood itself to be deciding a question with federal constitutional dimensions and to be deciding it in petitioner's favor by its reliance on cases that held analogous conduct to be erroneous under the federal Constitution. Thus, if we were compelled to determine whether the California Supreme Court adjudicated Ayala's claim of federal constitutional error on its merits in favor of the petitioner or the state, we would hold without the slightest hesitation that it found that the error occurred under federal constitutional law—i.e., Option 1. Accordingly, if we apply § 2254(d) at all, we defer to a holding that there *was* federal constitutional error, deference that favors Ayala. *See* discussion *supra* at 31 n. 4.

Alternatively, we are willing to assume another, albeit weaker, interpretation of the California Supreme Court's decision that leads to the same result. Under that interpretation, the state court did not, deliberately or otherwise, decide whether there was error under federal law, i.e., Option 2 above. In short, it failed to decide the merits of the question of federal constitutional error because it thought there was nothing to be gained by doing so. It had already decided that the state court had erred on state law grounds and nothing further was to be gained by holding that it was also a federal constitutional error. *Richter* and *Williams* instruct us to afford a rebuttable presumption that a fairly presented claim was “adjudicated on the merits” for purposes of § 2254(d), but this presumption is rebuttable if there is “any indication or state-law procedural principles” supporting the conclusion that the state court did not adjudicate the federal claim on the merits. *Richter*, 131 S. Ct. at 784-85. Here, the California Supreme Court denied Ayala relief overall but did so by (1) finding that the trial court committed error on state

law grounds, (2) failing to make any express determination of error on federal constitutional grounds, and (3) finding any error harmless under *both* the state and federal standards for harmless error. In the context of these holdings, the rebuttable presumption that *Richter* and *Williams* instruct us to afford is, in fact, rebutted. The California Supreme Court, by finding any alleged error harmless under both the state and federal standards for harmless error, had no reason to reach the question of whether federal constitutional error occurred. This is not an unusual practice; courts often choose not to decide the question whether an error occurred by deciding that any error was harmless. Indeed, we have found no published opinion in which, after a state court has denied relief based on harmless error, a federal court has presumed that the state court adjudicated the merits of the question of error.

In fact, the California Supreme Court would have had good reason not to decide the merits of the issue of federal constitutional error here. “If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.” *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)). Moreover, where the intersection of state law and federal constitutional law is complex, a state court may very well prefer to decide only the state law claim and not reach a federal constitutional question. The California Supreme Court, by finding error under state law, determined the question of error conclusively. This served the purpose of providing guidance to the lower state courts. Finding that the

state law error also constituted federal constitutional error (or did not) would, however, have served no purpose, once the state court determined that any error was harmless. (The state court was free to decide the issues presented in whatever order it chose.) Indeed, respect for state judges requires recognizing that a state court's silence with respect to a fairly presented federal claim may be intentional and prudent.

Our reasoning finds support in a different line of Supreme Court cases, in which the Court has interpreted state court silence with regard to a particular issue as not constituting an “adjudication on the merits.” Many of these cases involved claims of ineffective assistance of counsel brought under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims have two prongs, deficiency of counsel's performance and prejudice to the defendant; failure on either prong is dispositive. *Id.* at 680. Accordingly, state courts frequently decide *Strickland* claims by rejecting either deficiency or prejudice and remain silent with respect to the other prong. When these claims are raised in federal habeas proceedings, the Supreme Court has repeatedly interpreted that silence as a failure to reach the other prong and therefore *not* an “adjudication on the merits” of it. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (“Our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.” (emphasis added)); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (“Because the state courts found the representation adequate, *they never reached the issue* of prejudice, and so we examine this element of the *Strickland* claim de novo.” (emphasis added))

(internal citations omitted)); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (“Because the state court *did not decide* whether Porter’s counsel was deficient, we review this element of Porter’s *Strickland* claim de novo.” (emphasis added)). Nor has the Supreme Court limited this reasoning to *Strickland* claims. In *Cone v. Bell*, 556 U.S. 449 (2009), the petitioner raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in his federal habeas petition. The state habeas court dismissed the claim based on a factual determination that the Supreme Court held was erroneous. *Id.* at 466-69. Turning to the merits of the claim, the Supreme Court stated:

Because the Tennessee courts *did not reach* the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to “any claim that was adjudicated on the merits in State court proceedings.” 28 U.S.C. § 2254(d). Instead, the claim is reviewed de novo. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005) (de novo review where state courts did not reach prejudice prong under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (same).

Id. at 472 (emphasis added). Again, even though the state court was silent with respect to the merits of Cone’s *Brady* claim, the Supreme Court did not presume that the claim was adjudicated on the merits. Thus, as *Wiggins*, *Rompilla*, *Porter*, and *Cone* demonstrate, and as both *Richter* and *Williams* have

recognized, in some instances, a state court's silence with respect to a part of a claim should not be interpreted as an "adjudication on the merits" on that part for purposes of § 2254(d).

We summarize the law as set forth by the Supreme Court as follows. There are circumstances in which, even if a state court has denied relief overall, a state court's silence with respect to a fairly presented federal issue cannot be interpreted as an "adjudication on the merits" of that issue for purposes of § 2254(d), because the rebuttable presumption cited in *Richter* and *Williams* is rebutted by the legal principles involved (including the principle of constitutional avoidance) and factual context applicable to a particular case. *See Wiggins v. Smith*, 539 U.S. at 534; *Rompilla v. Beard*, 545 U.S. at 390; *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009); *Cone v. Bell*, 556 U.S. at 472.

This is such a case. As explained earlier, the California Supreme Court had no reason to reach Ayala's federal constitutional claim once it had decided that (1) the alleged error occurred as a matter of state law, (2) the error was harmless under the state and federal standards for harmless error, and (3) whether or not that occurrence also violated federal constitutional law was of no consequence. Furthermore, under long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law. Thus, we find merit in Option 2, i.e., that the California Supreme Court did not decide whether there was error under federal constitutional law.

We recognize that it remains unclear whether the California Supreme Court decision is better read as

Option 1 or Option 2.⁵ What is clear is that Option 3—i.e., that the California Supreme Court held that, although there was error under state law, there was none under federal constitutional law—is *not* the best, or even a plausible reading of the state court opinion.⁶ In this case, because the California Supreme Court found error under state law by citing to federal cases relying on federal law *and* because it “noted” that there might have been a violation of federal law, *Ayala*, 6 P.3d at 202-04, Option 3 is a wholly implausible reading of the California Supreme Court decision.⁷ Accordingly, we have no reason to

⁵ The dissent therefore misstates our holding when it claims we have “decide[d] that the California Supreme Court did not determine whether there was error under federal law.” Dissent at 98. That is only one of two holdings we find possible; the other is that the Supreme Court decided that there was federal constitutional error for the same reasons that there was state constitutional error. It follows that it is also not true that we have concluded, as the dissent claims, that there is “no reason” to give the California Supreme Court decision § 2254(d) deference. As explained *supra* at 31 n. 4, if the California Supreme Court held that there *was* federal constitutional error — Option 1 — we might give this holding § 2254(d) deference, although the question of what level of deference to afford a finding *in favor* of petitioner is a question of first impression that we need not decide here.

⁶ In other words, because *Wheeler* is *Batson*-plus, and because its *Wheeler* holding relied on *Batson* case law, it is impossible that the California Supreme Court found no *Batson* error on the merits while finding *Wheeler* error on the merits. It either found *Batson* error or did not reach the federal claim. Therefore, there is either no merits decision demanding deference or a merits decision *favoring Ayala*. The latter possibility is uncharted territory, but, regardless, we review under a standard no less favorable to *Ayala* than *de novo*.

⁷ Even the dissent struggles to argue that Option 3 is the best reading. First, it states that the California Supreme Court “rejected” *Ayala*’s federal claim. Dissent at 97. Then,
(continued...)

give § 2254(d) deference to such a holding in evaluating Ayala’s claim. (As noted *supra* in Part II, we will discuss in Part IV the question whether the California Supreme Court’s determination that any error was harmless was erroneous.)

2.

Having determined that only Options 1 and 2 are plausible readings of the California Supreme Court

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suddenly less confident, the dissent argues only that “[t]here may be some question as to whether the California Supreme Court actually found that there was federal error.” *Id.* Finally, backing away from its original claim even more, the dissent seems to endorse Option 1, suggesting that the Supreme Court found that there *was* federal constitutional error: “The California Supreme Court’s evaluation of the *Batson/Wheeler* issue was clear and concise. It held that ‘it was error to exclude defendant from participating in the hearings on the *Wheeler* motions.’” Dissent at 99 (citing *Ayala*, 6 P.3d at 203). The dissent accuses us of “admitting” that the California Supreme Court cited both *Batson* and *Thompson* in making this “clear” finding of *Wheeler* error. *Id.* (citing *Ayala*, P.3d at 203). Of course we admit this; our argument is that *because* the California Supreme Court cited *Batson* and *Thompson* in finding state constitutional error, the court likely found federal constitutional error as well. It is the dissent’s position that is perplexing: while acknowledging that the California Supreme Court cited federal cases in holding for Ayala on his claim of state constitutional error, it concludes that the court “implicitly reject[ed]” Ayala’s federal constitutional error claim. Dissent at 99-100. Given *Williams*’s instruction that a state court’s citation to federal cases in deciding a state claim “shows that [it] underst[ands] itself to be deciding a question with federal constitutional dimensions,” and given that the federal cases the California Supreme Court cited deemed analogous conduct to constitute federal constitutional error, the dissent’s reading that these same cases compel the conclusion that the conduct here is *not* federal constitutional error makes little sense. *See Williams*, 133 S. Ct. at 1098.

decision, we proceed to review de novo Ayala’s claim that his exclusion from stages two and three of the *Batson* proceedings violated the federal constitution.⁸

Under de novo review, it is clear that it was federal constitutional error to exclude both Ayala and his counsel from stages two and three of the *Batson* proceedings. As the California Supreme Court recognized, our circuit had already held in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987) that, in the absence of a “compelling justification” (e.g., the disclosure of trial strategy) for conducting ex parte *Batson* proceedings, such exclusions violate federal constitutional law. *Id.* at 1258-59. Here, the California Supreme Court concluded — and neither party to this appeal disputes — that there was no such compelling justification for conducting ex parte *Batson* proceedings, as “no matters of trial strategy were revealed” by the prosecutor. *Ayala*, 6 P.3d 193 at 261-62. As such, Ayala’s claim is controlled by *Thompson*, and we conclude that federal constitutional error occurred when Ayala and his lawyer were excluded from stages two and three of the *Batson* proceedings.⁹

⁸ As discussed *supra* at 31 fn. 4, there are three possible standards of review that could apply to the California Supreme Court’s decision on federal constitutional error. Because, under the circumstances of this case, de novo review is the most searching of the three, we need not review the decision under the other two standards.

⁹ Part of our reason for brevity in our analysis of Ayala’s claim under de novo review is that his case is clearly controlled by *Thompson*. Another reason is that our analysis in Part V, in which we reject the state’s *Teague* argument, explains further why Ayala suffered a constitutional violation in this case.

B.

Ayala also claims that the state's loss of an overwhelming majority of the jury questionnaires deprived him of a record adequate for appeal and thus violated his federal due process rights. Although less clear than with Ayala's first federal constitutional claim, the California Supreme Court also decided this claim on the basis of harmless error only. *Ayala*, 6 P.3d 193, 24 Cal. 4th at 270 ("Thus, even if there was federal error, it was harmless beyond a reasonable doubt."). Accordingly, for the reasons explained *supra* Section III.A.1, we proceed with de novo review.

As the California Supreme Court recognized, Ayala has a due process right to a record sufficient to allow him a fair and full appeal of his conviction. *Id.* at 208 (citing *People v. Alvarez*, 14 Cal. 4th 155, 196 n.8 (1996)). If a state provides for a direct appeal as of right from a criminal conviction, it must also provide "certain minimum safeguards necessary to make that appeal 'adequate and effective.'" *Evitts v. Lucey*, 469 U.S. 387, 392 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)); *see also* *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990) ("Where a state guarantees the right to a direct appeal, as California does, the state is required to make that appeal satisfy the Due Process Clause.").

In *Boyd v. Newland*, we applied these principles in granting the habeas petition of an indigent defendant who had been denied a copy of his voir dire transcript because the state court had, in violation of clearly established federal law, determined that the transcript was not necessary to his *Batson* appeal. 467 F.3d 1139 (9th Cir. 2006). We held that "all defendants ... have a right to have access to the tools

which would enable them to develop their plausible *Batson* claims through comparative juror analysis.” *Id.* at 1150. It follows that if the state’s loss of the questionnaires deprived Ayala of the ability to meaningfully appeal the denial of his *Batson* claim, he was deprived of due process.¹⁰

This conclusion is not called into question by *Briggs v. Grounds*, 682 F.3d 1165 (9th Cir. 2012), cited in the dissent. Dissent at 119. In *Briggs*, the petitioner had complete access to the juror questionnaires during the course of his state appeal. In fact, he relied heavily on them in presenting a comparative juror analysis to support his *Batson* claim. 682 F.3d at 1171. Thus Briggs’s due process rights were not implicated. The language cited by the dissent is lifted from a section of the opinion discussing whether, because those questionnaires were not included in the federal court record, we should credit the petitioner’s characterization of those questionnaires over the state court’s characterization. *Briggs* is irrelevant for our purposes, i.e., whether Ayala’s due process rights were implicated when California lost the juror questionnaires, thus rendering them unavailable for his *state court* appeal.

¹⁰ The dissent ignores the holding of *Boyd* and instead plucks the words “voir dire transcript” out of the opinion to argue that *only* a voir dire transcript is necessary for comparative juror analysis. Dissent at 117-19. If our dissenting colleague believes that jury questionnaires are not tools for comparative juror analysis, we point her to *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 256-57 (2005) and *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc), both of which utilized juror questionnaires in comparative juror analysis.

Ayala is entitled to relief on this claim only if the loss of the questionnaires was prejudicial *in se* or if it in conjunction with the *Batson* error discussed *supra* served to deprive him of a meaningful appeal. *Id.*; see also *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). “[I]n analyzing prejudice ..., this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” *Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir. 2005) (quoting *Thomas v. Hubbard*, 273 F.3d 1164, 1178 (9th Cir. 2001)). Here, the loss of the questionnaires increased the prejudice that Ayala suffered as a result of the exclusion of defense counsel from *Batson* steps two and three, as it further undermined his ability to show that *Batson* had been violated. Accordingly, in determining whether Ayala is entitled to relief, we evaluate the prejudice caused by the loss of the questionnaires in conjunction with the harm caused by excluding defense counsel from the *Batson* proceedings. As we will explain immediately below, the analysis under *Brecht* regarding the *Batson* error demonstrates that the exclusion of Ayala and his counsel from the second and third stages of the *Batson* inquiry is sufficiently prejudicial to require reversal for that reason alone.¹¹

IV.

The California Supreme Court held that Ayala

¹¹ Ayala also asserts that there is an Eighth Amendment right to appeal — and to a record adequate for appeal — in a capital case. See *Whitmore v. Arkansas*, 495 U.S. 149, 168 (1990) (Marshall, J., dissenting). We need not decide this question here.

was not prejudiced by the trial court’s exclusion of the defense from stages two and three of the *Batson* proceedings, by the state’s loss of the vast majority of the jury questionnaires, or by the two errors considered together. The Court declared itself “confident that the challenged jurors were excluded for proper, race-neutral reasons,” *Ayala*, 6 P.3d at 204, concluded that the exclusion of defense counsel was “harmless beyond a reasonable doubt,” *id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)), and held that despite the loss of the questionnaires the record was “sufficiently complete for [it] to be able to conclude that [the struck jurors] were not challenged and excused on the basis of forbidden group bias.” *Id.* at 208.

We now address these same questions., and hold that *Brecht v. Abrahamson*, 507 U.S. 619 (1993), requires us to reach a different conclusion.

A.

Ayala claims, first, that exclusion of defense counsel from the *Batson* proceedings necessarily represented structural error, and that he is entitled to relief without further inquiry into whether he was prejudiced. The state court’s conclusion that the error here was not structural — a conclusion implicit in its application of the *Chapman* harmless error standard to evaluate whether *Ayala* had suffered prejudice — is subject to review under the deferential standard of § 2254(d). *See Byrd v. Lewis*, 566 F.3d 855, 862 (9th Cir. 2009).

The Supreme Court has defined as “structural” an error that affects “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Arizona v. Fulminante*, 499 U.S.

279, 310 (1991). Where this line is drawn is not always clear. Compare, e.g., *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (violation of the right to public trial requires automatic reversal), with, e.g., *Rushen v. Spain*, 464 U.S. 114, 117-18 & n.2 (1983) (denial of a defendant's right to be present at trial is subject to harmless error review). While a violation of *Batson* is itself structural error, there is no Supreme Court decision addressing whether the exclusion of defense counsel from *Batson* proceedings constitutes structural error.

Ayala contends that the state court's decision represents an unreasonable application of the Supreme Court's clearly established rule that "no showing of prejudice need be made 'where assistance of counsel has been denied entirely or during a critical stage of the proceedings.'" Brief of Appellant at 22 (quoting *Mickens v. Taylor*, 535 U.S. 162, 166 (2002)); see also *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984).¹² The use of the phrase "critical stage" in this excerpt can be somewhat deceptive: although the *Batson* proceedings represented a "critical stage" in the sense that Ayala had the right to counsel during those proceedings, they were not necessarily the sort of "critical stage" at which the deprivation of that right constituted structural error. See *United States v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005). As the Fourth Circuit has explained, the statements in *Mickens* and *Cronin*

rely on the Supreme Court's earlier usage
of the phrase "critical stage," in cases such

¹² As the state observes, although *Mickens* postdates the California Supreme Court's decision, the opinion simply restates the rule set forth 18 years earlier in *Cronin*.

as *Hamilton v. [Alabama]*, 368 U.S. 52 (1961)] and *White [v. Maryland]*, 373 U.S. 59 (1963) (per curiam)] to refer narrowly to those proceedings both at which the Sixth Amendment right to counsel attaches and at which denial of counsel necessarily undermines the reliability of the entire criminal proceeding.... [T]he Supreme Court has subsequently used the phrase “critical stage,” in cases such as [*United States v. Wade*], 388 U.S. 218 (1967)] and *Coleman [v. Alabama]*, 399 U.S. 1 (1970)], in a broader sense, to refer to all proceedings at which the Sixth Amendment right to counsel attaches — including those at which the denial of such is admittedly subject to harmless-error analysis.

Id. at 228 (emphasis omitted).

In *Musladin v. Lamarque*, we held that the “clearly established” rule of *Cronic* is that a “critical stage” where the deprivation of counsel constitutes structural error is one that holds “significant consequences for the accused.” 555 F.3d 830, 839 (9th Cir. 2009) (quoting *Bell v. Cone*, 535 U.S. 685, 695-96 (2002)). We identified as providing guidance in this inquiry Supreme Court decisions holding an overnight trial recess and closing arguments to be two such critical stages. *Id.* at 839-40 (citing *Geders v. United States*, 425 U.S. 80 (1976) and *Herring v. New York*, 422 U.S. 853 (1975)).

Given this fairly ambiguous standard, it was not an unreasonable application of clearly established federal law for the California Supreme Court to conclude that the exclusion of the defense from

Batson steps two and three does not amount to a deprivation of the right to counsel such that the likelihood that the jury was chosen by unconstitutional means is “so high that a case-by-case inquiry is unnecessary.” *Mickens*, 535 U.S. at 166. As the state points out, it would be somewhat incongruous to conclude that the exclusion of counsel during *Batson* proceedings is a defect in the very structure of the trial if the same exclusion would be permissible were there some reason to keep the prosecution’s justifications confidential. Thus, a “fairminded jurist[],” *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), might conclude that *Batson* steps two and three are not a *Cronic*-type “critical stage.” Even if we would hold the error to be structural were we to consider the issue de novo, we cannot say that as the Supreme Court has construed AEDPA the state court’s contrary conclusion was unreasonable. *See Musladin*, 555 F.3d at 842-43.

B.

Ayala claims next that, even if the trial court’s exclusion of the defense was not the sort of constitutional error *in se* that requires that we presume that in every exclusion case prejudice ensues, it was prejudicial in *his* case, both in solo and when considered in conjunction with the loss of the questionnaires. In evaluating whether a trial error prejudiced a state habeas petitioner, we must apply the standard set forth in *Brecht v. Abrahamson*, determining whether the error had a “substantial and injurious effect or influence in determining the jury’s verdict.” 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). We “apply the *Brecht* test without regard for the

state court's harmlessness determination." *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010) (citing *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007)).¹³

The *Brecht* standard has been described as follows:

[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.

¹³ If this appeal had come before us prior to the Supreme Court's decision in *Fry*, we would have instead asked whether the state court's determination that any error was harmless under *Chapman* was contrary to, or an unreasonable application, of federal law. See *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005). *Fry* clarified, however, that *Brecht* is the harmless error standard to be applied in such circumstances because the *Brecht* standard "subsumes" the "more liberal" § 2254(d)/*Chapman* standard. See *Fry*, 551 U.S. at 120; *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011). In other words, if a federal habeas court determines that the *Brecht* standard has been met, it also necessarily determines to be an unreasonable application of *Chapman* a state court's conclusion that the error was harmless beyond a reasonable doubt. In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court's conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires. See *Merolillo*, 663 F.3d at 458-59.

Merolillo v. Yates, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos*, 328 U.S. at 765). “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.* (quoting *O’Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995)) (alteration in original) (internal quotations omitted).¹⁴

¹⁴ The dissent contends that *Brecht* no longer provides the proper standard of review for assessing prejudice, arguing instead that a writ may issue only if we determine that “no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim.” Dissent at 115-16. The dissent’s only authority for its conclusion is *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), which the dissent suggests refined the *Brecht* test. Dissent at 115-16.

The dissent clearly errs in applying *Richter* to prejudice analysis under AEDPA. In *Fry*, 551 U.S. 112, the Supreme Court held that *Brecht* is the proper test for prejudice analysis under AEDPA. In *Richter*, handed down just four years later, the Supreme Court did not once mention *Fry* or *Brecht*. Furthermore, the Court’s reference to “fairminded jurist” was *not* in the context of reviewing a state court’s prejudice determination but rather in the context of whether a state court’s determination regarding constitutional error was unreasonable. 131 S. Ct. at 785. (Here, as explained *supra*, the state court was silent on the question of error, and thus only prejudice is at issue.) The dissent thus seems willing to conclude that the Supreme Court radically changed *Brecht*, a nearly two-decade old precedent — a case with central import in virtually all federal habeas adjudication, reaffirmed just five years ago in *Fry* — without even a mention of that oft-cited case. There is no legal basis for the dissent’s conclusion that a case cited almost 10,000 times to determine prejudice in habeas cases was sub silentio drastically overhauled in a discussion unrelated to prejudice. The dissent’s reference to *Pinholster* is equally

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We conclude that Ayala has met the *Brecht* standard. The prejudice he suffered was the deprivation of the opportunity to develop, present, and likely prevail on his *Batson* claim. Had he prevailed on that claim, and shown that the prosecution acted upon impermissible considerations of race in striking even one of the seven black or

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unpersuasive. In that case, as in *Richter*, the Court did not use the language “fairminded jurist” in reviewing a state court’s prejudice determination. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011).

Furthermore, because *Richter* and *Pinholster* were ineffective assistance of counsel cases, the Court had no reason to apply *Brecht*. *Strickland*, not *Brecht*, provides the proper prejudice standard for ineffective assistance of counsel claims. See *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009) (“[W]here a habeas petition governed by AEDPA alleges ineffective assistance of counsel under [*Strickland*], we apply *Strickland*’s prejudice standard and do not engage in a separate analysis applying the *Brecht* standard.”).

Additionally, in the thirty months since *Richter* was handed down, we have repeatedly applied the traditional *Brecht* test to assess prejudice in habeas cases. *E.g.*, *Merolillo*, 663 F.3d at 454; *Ybarra v. McDaniel*, 656 F.3d 984, 995 (9th Cir. 2011); *United States v. Rodrigues*, 678 F.3d 693, 695 (9th Cir. 2012). In some cases, we have cited *Richter* in analyzing constitutional error but then, properly, applied the traditional *Brecht* test when determining prejudice. *E.g.*, *Ocampo v. Vail*, 649 F.3d 1098, 1106 (9th Cir. 2011); *Schneider v. McDaniel*, 674 F.3d 1144, 1149-50 (9th Cir. 2012). Thus, even if we believed that the dissent were correct that *Richter* rewrote the test for prejudice (a conclusion that is wholly without support and that we unequivocally reject), this three-judge court, like all others, is nevertheless required to apply *Brecht* as it was (and is), because such is the law of the circuit. Lacking support in both Supreme Court and Ninth Circuit case law, the dissent’s pronouncement simply amounts to a preference that the prejudice standard under AEDPA should be far more onerous than current law provides.

Hispanic jurors it struck, then, as the state acknowledged in oral argument before this court, we would be compelled to reverse Ayala's conviction because his entire trial would have been infected by this violation of the Constitution. *See Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Boyd*, 467 F.3d at 1150. The question, then, is whether Ayala could have made this showing but for the state's constitutional errors. If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ.

Here, it is probable that the state's errors precluded Ayala from turning what is a very plausible *Batson* claim — the challenge to the prosecution's strikes of all minority jurors — into a winning one by preventing defense counsel from performing the two "crucial functions" we identified in *Thompson*. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. Although the trial judge may have been able to "detect some of these deficiencies by himself, . . . there might be arguments [he] would overlook" because he was "unassisted by an advocate." *Thompson*, 827 F.2d at 1260-61. The jury selection process took over three months and comprises more than six thousand pages of the record. The trial judge, attempting to evaluate the prosecution's reasons for striking the jurors in light of this massive amount of information, was almost certain to forget or overlook key facts, but could have been substantially aided by the presence of participants in the process adverse to the prosecution. In particular, Ayala's lawyers could have pointed out when the prosecutor's proffered reason

for striking a black or Hispanic juror applied “just as well to an otherwise-similar nonblack [or non-Hispanic] who [was] permitted to serve.” *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Supreme Court has emphasized the importance of this sort of “comparative juror analysis” to determining whether a prosecutor’s reasons for challenging a minority juror were pretextual. *Id.*; see also *Snyder v. Louisiana*, 552 U.S. 472, 483-85 (2008). Although Ayala can — and does — still raise some of these arguments on appeal, he was deprived of the crucial opportunity to present them to the institutional actor best positioned to evaluate them. As the Supreme Court has observed, appellate courts must accord deference to “trial court findings on the issue of discriminatory intent” because “the finding largely will turn on evaluation of credibility.” *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality opinion)) (internal quotation marks and citations omitted). Because, after finding a prima facie case of a *Batson* violation, the trial court was not made aware of key facts that could have influenced its credibility determination, there is substantial reason to doubt that Ayala’s *Batson* challenge was properly denied.

Second, Ayala’s counsel could have “preserve[d] for the record, and possible appeal, crucial facts bearing on the judge’s decision.” *Thompson*, 827 F.2d at 1261. We cannot know many of the facts material to whether the prosecution’s stated reasons were false, discriminatory, or pretextual because defense counsel was not able to preserve relevant facts regarding prospective jurors’ physical appearances, behavior, or other characteristics. Although the trial judge could have been aware of these facts, an

appellate court “can only serve [its] function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor’s reasons.” *Id.*; see also *United States v. Alcantar*, 897 F.2d 436, 438 (9th Cir. 1990) (reversing a defendant’s conviction where the *Batson* proceedings conducted below left the defense unable “to adequately challenge the prosecution’s reasons as pretextual” and left the reviewing court uncertain as to whether the prosecution had, in fact, violated *Batson*).

This second deficiency is greatly augmented by the loss of the jury questionnaires. The only questionnaires that have been preserved are those of the seated and alternate jurors.¹⁵ We are unable to evaluate the legitimacy of some of the prosecution’s proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost. The loss of the questionnaires also leaves us lacking potentially crucial information about certain individuals who were neither the subject of Ayala’s *Batson* challenge nor ultimately served as jurors.¹⁶ Thus, we cannot perform a fair

¹⁵ There are also three other questionnaires out of more than 200 which were somehow located, but have no particular significance with respect to a comparative juror analysis.

¹⁶ The state and the dissent both appear to presume that the only relevant comparisons in a comparative juror analysis are between the struck jurors and the jurors who are ultimately seated, but *Miller-El* made clear that the otherwise-similar jurors to whom the struck jurors can be compared include those “permitted to serve” by the prosecution but ultimately struck by the defense. See, e.g., *Miller-El v. Dretke*, 545 U.S. at 244-45 (comparing a struck juror to a juror not challenged by the prosecution who was later challenged by the defense). This, of course, makes perfect sense: some of these jurors were not
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comparative juror analysis as required by *Batson*. See *Miller-El v. Dretke*, 545 U.S. at 241.

Even so, we have substantial reason to question the motivation of the prosecution in engaging in its peremptory challenges of the black and Hispanic jurors. In conducting our inquiry, we must keep in mind the strength of Ayala's prima facie case. "[T]he statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El v. Cockrell*, 537 U.S. at 342. That the prosecution struck each of the seven black or Hispanic jurors available for challenge establishes a basis for significant doubt of its motives: "[h]appenstance is unlikely to produce this disparity." *Id.*

Perhaps more important, the analysis of the prosecution's motives that is possible on the partial record before us demonstrates that many of its stated reasons for striking the seven black and Hispanic jurors were or may have been false, discriminatory, or pretextual. There are good reasons to think that race motivated the prosecution's strikes of at least three, if not more, jurors: Olanders D., Gerardo O. and Robert M.¹⁷ We "cannot say, with fair assurance,

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struck by the defense until after the prosecution had passed them for several rounds, and the "underlying question is not what the defense thought about these jurors," but what the prosecution did. *Id.* at 245 n.4.

¹⁷ Although the record provides somewhat less reason to conclude that the prosecution's justifications for the strikes of the four other black and Hispanic jurors were pretextual, race may also have played a substantial role in these challenges. For example, Ayala might have been able to show that the prosecution violated *Batson* when it struck Hispanic juror George S. in the final round of peremptory challenges. The

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after pondering all that happened without stripping the erroneous action from the whole,” *Kotteakos*, 328 U.S. at 765, that Ayala was not prevented from showing that the prosecution struck at least one of these jurors because of his race.

1. *Olanders D.*

Olanders D. was one of two black jurors whom the prosecution struck in the first round of peremptory challenges. During the in camera hearing that followed the defense’s *Batson* motion, the prosecutor explained that he struck Olanders D. because: (1) he might not be able to vote for the death penalty, as he had written in his questionnaire that he did not believe in it, and he had indicated in questioning that his view had recently changed; (2) his answers to voir

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prosecution gave five reasons for striking George S. The first reason — that his application to be a police officer some twenty years earlier had been rejected — applied equally to seated white juror Charles C. The second reason — that he had indicated some discomfort with the death penalty — did not significantly distinguish him from a number of seated white jurors. *See infra* Section V.B.2. The third reason — that he had been a “holdout” on a prior jury — could have been called into question had defense counsel been able to point out that the jury on which George S. had been a “holdout” was a civil one, that the issue in dispute had been the assessment of damages, and that unanimity was not required. The fourth reason — that he had written in his questionnaire that the parties probably would not want him to serve as a juror — overlapped entirely with the third reason, as George S. had explained that he wrote that the parties might not want him as a juror because he had been a civil jury “holdout.” The fifth and final reason — that he placed excessive emphasis on the Bible in his questionnaire — cannot be evaluated at all because the questionnaire has been lost, along with those of others whom the prosecutor might have passed.

dire questions often were not fully responsive; (3) his questionnaire responses had been “poor”; and (4) he might lack the “ability to fit in with a cohesive group of 12 people.” The trial judge rejected one of the four proffered reasons — his purported inability “to fit in with a cohesive group of 12 people.” The presence of defense counsel, and the preservation of the questionnaires, could have permitted Ayala to call into question all three of the reasons that the court accepted as legitimate.

First, in response to the prosecution’s claim that it was concerned that Olanders D. would hesitate to impose the death penalty, defense counsel could have pointed to seated white jurors who had expressed similar or greater hesitancy. One seated juror in particular was indistinguishable from Olanders D. in this regard. Olanders D. had (apparently) written in his questionnaire that he did not believe in the death penalty. Ana L., a seated white juror, made almost precisely the same statement in her questionnaire, writing that she “probably would not be able to vote for the death penalty.” Also, Olanders D. later said during voir dire that he had reconsidered his views, and affirmed that he could be “personally responsible for being on a jury and actually voting for the death penalty.” Once again, Ana L. said almost precisely the same thing: she stated that she had since rethought her position, and affirmed that she could “actually vote” for the death penalty.¹⁸

¹⁸ Other seated white jurors to whom defense counsel could have pointed in order to show to be pretextual the prosecution’s stated concern that Olanders D. would not be willing to impose the death penalty include Dorothy C., Dorothea L., Dorothy H. and Leona B. *See infra* Section V.B.2.

Second, in answer to the prosecution's purported concern that Olanders D.'s answers on voir dire were not always fully responsive, defense counsel could have questioned the validity of this assessment, suggested that his answers were in fact fully responsive, and pointed to seated white jurors whose answers were less responsive than Olanders D.'s. Our review of the voir dire transcript reveals nothing that supports the prosecution's claim: Olanders D.'s answers were responsive and complete. In order to make this fact clear to the trial judge, defense counsel could once again have compared Olanders D. to seated juror Ana L. Ana L. had, for example, responded "That is correct" to a question asking "why" she would prefer not to sit as a juror, stared blankly at defense counsel in response to a question on the presumption of innocence, and failed, at various points, to respond directly to yes or no questions.

Third, we cannot know exactly what arguments defense counsel could have made to undermine the prosecution's final reason for striking Olanders D. — that his questionnaire responses were "poor," and demonstrated his inability to express himself. Because Olanders D.'s questionnaire has been lost, we may only speculate as to its contents. If the reason his answers were "poor" was that they were not particularly detailed, the defense could have compared his questionnaire to that of Ana L., whose answers were brief and often incomplete, or to that of Charles G., a seated white juror whose responses to the 77 questions were rarely longer than two or three words apiece. If the reason his answers were poor was that they reflected an inability to think clearly or express complex thoughts, the defense could have compared his questionnaire to that of Thomas B., a

seated white juror who, for example, opined of street gangs, “I feel the only media coverage they get is bad, however, those whom do constructive events usually seek out positive media coverage.” Further, this is an obvious instance in which the defense is prejudiced by being unable to compare Olanders D.’s answers to those of prospective white jurors who were accepted by the prosecution but struck by the defense, and whose questionnaires have been lost.¹⁹ It is also, of course, possible that Olanders D.’s answers were not poor at all. We have no way of knowing.

Thus, one of the four reasons given by the prosecution for striking this prospective juror was determined to be without merit by the trial judge; two failed to distinguish the juror whatsoever from at

¹⁹ For example, Elizabeth S., who was in all likelihood white, was seated as an alternate on a panel accepted by the prosecution — which never used its sixth and final peremptory challenge in the selection of the alternate jurors — but was later struck by the defense. Her questionnaire, which was lost, might have been particularly valuable to Ayala for comparative juror analysis if her written responses were anything like those she delivered during voir dire. Consider the following exchange between the trial court and Elizabeth S.:

Q: Did you have an opportunity to review the summary of legal issues and preliminary questions? This was a packet of material in the juror’s lounge.

A: No.

Q: You didn’t read it?

A: Not today. I read the papers that they gave me in the office.

Q. Today?

A. Yeah.

Q. Okay. That was the summary of legal issues and preliminary questions?

A. Yeah, Yeah.

Perhaps because of this and similar exchanges, she was later asked if she had a hearing problem, which she did not.

least one seated white juror; and the fourth and final reason the prosecution gave for striking the juror cannot be evaluated because his questionnaire was lost, as were those of the prospective white jurors struck by the defense. Given the objective reasons that we have even on this record to question the validity of the prosecution's explanations for striking Olanders D., we simply cannot conclude that it is likely that, if the defense had been present during the *Batson* proceedings and if the lost questionnaires had been preserved, Ayala would not have been able to show that the prosecution's stated reasons for striking Olanders D. were pretextual, and that the actual reasons were racial.

2. Gerardo O.

Gerardo O. was one of two Hispanic jurors the prosecution challenged during the second round of peremptories. He was struck, the prosecutor explained in the subsequent ex parte proceeding, because: (1) he was "illiterate," and had needed the questionnaire to be translated for him; (2) he "appeared not to fit in with anyone else," was "standoffish," with "dress and mannerisms ... not in keeping with the other jurors," and "did not appear to be socializing or mixing with any of the other jurors"; and (3) his voir dire responses suggested that he was not sure "if he could take someone's life," and that he "felt a little shaky as far as his responsibilities in this case." The trial judge concluded that the "record document[ed] the factors that were indicated" by the prosecutor and accepted his explanation.

Once again, had the defense not been excluded from the *Batson* proceedings, it likely could have called into question all of the prosecution's stated reasons for striking Gerardo O. Defense counsel

could have first argued that one reason given — that Gerardo O. was illiterate — was itself indicative of the prosecution’s discriminatory intent. Although Gerardo O. did need someone to fill out the questionnaire for him, the record reveals that he was not, in fact, illiterate, but simply had difficulty writing in English. Gerardo O. had been born in Mexico and was not a native English speaker, but he had graduated from high school and attended college in the United States, and was perfectly capable of reading the summary of legal issues that was given to prospective jurors before voir dire questioning. As he explained at voir dire, he did not fill out the questionnaire himself because he was concerned about his English spelling. The prosecution’s purported reason for striking Gerardo O., then, was directly related to his status as someone who spoke Spanish as his first language. Thus, as the Supreme Court observed in a similar circumstance, “the prosecutor’s frank admission that his ground for excusing th[is] juror[] related to [his] ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact [was a] race-based peremptory challenge[.]” *Hernandez*, 500 U.S. at 363 (plurality opinion). Defense counsel’s presence was necessary to point out the potential inferences to the trial judge and urge the judge to adopt the one most appropriate here.

An inference of racial bias might also have been drawn from the prosecutor’s claim that Gerardo O. was challenged because he did not dress or act like other jurors, and did not mix or socialize with them. It is likely that Gerardo O.’s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980s Hispanic males in San Diego County were more

likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt (and for this reason did not “fit in,” in the prosecutor’s mind, with the other jurors). If so, and if defense counsel were able to bring this fact to the trial court’s attention, the prosecution’s explanation that it struck Gerardo O. because of his dress and mannerisms would provide compelling support for Ayala’s claim that the strike was actually racially-motivated. *See id.* (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another.”) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). If present at the hearing, defense counsel could have made a record that would have strongly supported these claims.

Even if Gerardo O.’s clothes and behavior were in no way correlated with his race, defense counsel might have been able to show the prosecution’s explanation to be pretextual. Defense counsel might have pointed to other jurors the prosecution had not struck who had similar characteristics — perhaps, for example, a seated white juror had actually worn an outfit identical to Gerardo O.’s. Defense counsel might also have been able to challenge the factual basis for the prosecution’s claim — perhaps, unbeknownst to the trial judge, Gerardo O. did “socializ[e] or mix[]” with a number of other jurors, and had even organized a dinner for some of them at his favorite Mexican restaurant.

We can only speculate as to whether or how Ayala could have shown this explanation for striking Gerardo O. to be facially discriminatory, false or

pretextual because we know nothing about his dress or mannerisms, or that of the other prospective jurors. These are exactly the sort of physical and behavioral observations that the defense could have preserved for the record had it been permitted to hear and respond to the prosecution's explanations for challenging Gerardo O. Although we might hope that the trial judge would have noticed if Gerardo O. had been wearing a shirt worn only by members of the Hispanic community, or had been dressed identically to other prospective jurors whom the prosecution had not challenged, or had in fact been socializing with other jurors, "we cannot affirm simply because we are confident he must have known what he was doing." *Thompson*, 827 F.2d at 1261.

Finally, in response to the prosecution's third reason for the strike — that Gerardo O. seemed reluctant to impose the death penalty — defense counsel could have demonstrated this reason to be pretextual through comparisons to jurors the prosecution did not strike. Gerardo O. had stated during voir dire that "I'm not sure if I can take someone's life in my hand and say ... you know, 'death,' or something," but he soon thereafter affirmed that he "could vote for the death penalty." This statement was indistinguishable from those made by a number of seated white jurors. Dorothy C. said in voir dire that serving as a juror in a capital case would cause her to "worry a lot" because it was "a lot of responsibility," gasped when defense counsel told her that as a juror she would "decide the sentence," and stated, "I've never had to vote on a death penalty. That might be a little bit difficult when it came right down to it, but I'd say I'm for it." Likewise, Dorothy H., when asked in voir dire if she could return a verdict of death, stated, "I don't think

it would be an easy thing for anyone, but I don't — I think I could do it if I felt it was the thing to do." Dorothea L. was even more hesitant, saying, when asked the same question, "I think so, but I don't know until I have to do it." Finally, Leona B., when asked by the prosecutor if having the responsibility for imposing the death penalty would "bother" her, responded, "Yes, I think so. I think — I think one should be affected ... by that. I don't think it's anything to be taken lightly." Certainly, Gerardo O. expressed less hesitancy than Ana L., who had flatly stated on her questionnaire that she "probably would not be able to vote for the death penalty" before subsequently changing her mind. Further, prospective white jurors accepted by the prosecution but struck by the defense might have expressed similar sentiments in their jury questionnaires. We cannot tell, because these questionnaires have been lost.

Thus, one of the reasons given by the prosecution for striking this prospective juror could have itself given rise to an inference of discriminatory intent. A second reason cannot be evaluated because defense counsel was excluded from the *Batson* proceedings and could not preserve for the record certain crucial facts. The third reason given failed to distinguish Gerardo O. from seated white jurors the prosecutor chose not to strike, as well as, possibly, from other prospective white jurors struck not by the prosecution but by the defense. Given the cause we have to question the validity of the prosecution's reasons that can be evaluated on this record, we cannot say that Ayala would not have shown that the trial court would or should have determined that the prosecution's strike of Gerardo O. violated *Batson*.

3. *Robert M.*

The prosecution struck Hispanic juror Robert M. in the final round of peremptory challenges. In camera, the prosecutor explained that he had been concerned, given Robert M.'s response to voir dire questioning, that he might not be willing to impose the death penalty. This concern had been heightened by Robert M.'s mentioning the Sagon Penn case — a case in which the defendant was found not guilty in a second trial and the police and the district attorney's office were accused of misconduct. The trial judge accepted the prosecution's explanation, stating that, although Martinez's "questionnaire would tend to indicate a person that is certainly pro the death penalty[,] ... his answers varied somewhat to the extent that individually, there may well be a legitimate concern as to whether or not he could impose it."

Defense counsel's presence in the *Batson* proceedings was necessary to call into question the prosecution's claim that it struck Robert M. because of his reluctance to impose the death penalty. Even without comparing Robert M. to other jurors permitted to serve, this explanation is highly suspect: Robert M. repeatedly stated during voir dire that he believed in the death penalty and could personally vote to impose it, and his questionnaire (which has, of course, been lost) manifested a similar enthusiasm according to the trial judge. Defense counsel could have brought to the trial court's attention that the only statement potentially raising any question whatsoever — that voting for a death sentence might "weigh on his conscience," and would be a "heavy" decision — was indistinguishable from a practical standpoint from statements by Dorothy C., who said

that serving as juror in a capital case was “a lot of responsibility” and would cause her to “worry a lot,” Dorothy H., who stated that imposing the death penalty would not “be an easy thing for anyone,” Dorothea L., who said she would not know if she could impose the death penalty until she had to do it, and Leona B., who affirmed that this responsibility would “bother” her. Other prospective jurors who were struck by the defense, but had been accepted by the prosecution, may have made comparable statements in their questionnaires (which, again, have been lost). Counsel could have argued that most jurors who believed in imposing the death penalty would consider a decision to do so a “heavy” decision that would weigh on one’s conscience. Following counsel’s argument, the judge might well have recognized that there is indeed rarely a “heavier” decision a citizen is ever asked to undertake. Certainly, like Gerardo O., Robert M. was no more hesitant than Ana L., who had actually at one point stated that she would be unable to impose the death penalty.

To the extent that the prosecution gave Robert M.’s reference to the Sagon Penn case as a separate reason for its challenge, defense counsel could likely have demonstrated that this reason was pretextual. First, the entirety of the Sagon Penn exchange was as follows:

Prosecutor: Have you followed any kind of — any court cases in the news or come downtown to watch any trials?

Robert M.: Well, I followed the Saigon [sic] Penn case.

Prosecutor: All right.

Robert M. briefly mentioned the case in response to the prosecution's question, and he said nothing about any accusations of police or prosecutorial misconduct.

Second, although none of the seated jurors had been asked a similar question, one seated white juror had on his own initiative referred to a far more controversial capital case. When asked to describe his feelings about the death penalty, Douglas S. mentioned the "Harris" case, saying: "The Harris case, which goes back I believe he's on death row ... I can't even recall the exact crimes, but I remember them to be quite bizarre, and — and here he was, facing execution, and I don't know." Douglas S. was presumably referring to Robert Alton Harris, who at the time of Ayala's trial was on California's death row, and had, in a case that was extensively covered by the press, been tried, convicted and sentenced to death in San Diego. *People v. Harris*, 623 P.2d 240, 246 (Cal. 1981). As Harris's case wound its way through the state and federal courts, it generated substantial controversy, some of which, as in the Sagon Penn case, was related to allegations of official misconduct. *See, e.g., id.* at 267 (Bird, C.J., dissenting) (arguing that Harris had been denied his right to a fair trial due to extensive and prejudicial pretrial publicity, partially the product of the "sorry spectacle of prosecutorial offices publicly vying with each other to have 'first crack' at convicting the accused"); *see also* Stephen R. Reinhardt, *The Supreme Court, The Death Penalty, and The Harris Case*, 102 Yale L.J. 205, 205 & n.1 (1992) (for further description of controversy generated by case). Douglas S.'s statement about the case — "here he was, facing execution, and I don't know" — suggests that this controversy had created some doubt in his mind as to the propriety of Harris's conviction and

sentence. Certainly, Douglas S.'s unelicited discussion of the Harris case should have troubled the prosecutor far more than Robert M.'s brief direct response regarding the Sagon Penn case.

Finally, if there was any inference to draw from Robert M.'s fleeting reference to the Sagon Penn case, it was that Robert M. would not return a guilty verdict based on a blind trust of the police and the prosecution who had arrested and charged the defendant with the crime. Numerous seated white jurors expressed similar sentiments. Douglas S., for example, stated that the last person who had lied to his face was a California policeman. Similarly, Charles C. said, "You don't change your stripes ... when you put on a badge; and you have to judge everybody's testimony in a court case on its face."

Even if the trial judge had not been willing to completely reject the prosecution's implausible explanation that it struck Robert M. because he mentioned the Sagon Penn case, there is a strong likelihood that, had defense counsel been present and been able to persuade the court that the prosecution's principal reason for challenging this juror — his reluctance to impose the death penalty — was pretextual, the court would have concluded that the strike violated *Batson*. We thus cannot conclude that the exclusion of defense counsel from the *Batson* proceedings did not prevent Ayala from showing that the prosecution's strike of Robert M. was based on its impermissible consideration of race.

* * *

Although each of the reasons offered by the prosecution for challenging the black and Hispanic jurors discussed above could have been shown to be

pretextual had defense counsel been allowed to participate at steps two and three of the *Batson* proceedings, it is not necessary that all of the reasons advanced by the prosecution be pretextual or be shown to be pretextual. Notwithstanding the existence of some apparently appropriate reasons, “if a review of the record undermines ... *many* of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.” *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (en banc) (quoting *Lewis v. Lewis*, 321 F.3d 824, 830 (9th Cir. 2003)) (emphasis added). In short, “[a] court need not find all nonracial reasons pretextual in order to find racial discrimination” with respect to any particular juror, and the exclusion of any one juror in violation of *Batson* requires reversal of the verdict. *Id.*

C.

Because the defense was excluded from the *Batson* proceedings, it could not bring necessary facts and arguments to the attention of the trial judge, the institutional actor best positioned to evaluate the prosecution’s credibility and to determine if its proffered reasons for striking the minority jurors were its actual and legitimate reasons. Furthermore, because the defense was excluded from the *Batson* proceedings, the appellate courts reviewing this case cannot engage in a proper comparative juror analysis, or know what other facts and arguments might be employed to demonstrate that the proffered reasons were false, facially discriminatory, and pretextual. The latter form of prejudice was exacerbated when the vast majority of the juror questionnaires were lost.

Even on this deficient record, Ayala’s *Batson* claim is compelling: the prosecution struck all seven

of the black and Hispanic jurors in a position to serve on the jury, and many of its proffered race-neutral reasons are highly implausible. Given the strength of Ayala’s *prima facie* case, the evidence that the prosecution’s proffered reasons were false or discriminatory, and the inferences that can be drawn from the available comparative juror analysis, it is “impossible to conclude that [Ayala’s] substantial rights were not affected” by the exclusion of defense counsel from the *Batson* proceedings. *Kotteakos*, 328 U.S. at 765. Ayala has suffered prejudice under *Brecht*, and is entitled to relief. When that demonstration of prejudice is supplemented by the state’s loss of the juror questionnaires, the case for prejudice under *Brecht* is even more clear.

V.

Although our conclusions in Parts III and IV — that the state court committed federal constitutional error that prejudiced Ayala under the *Brecht* standard — would dictate that he be granted habeas relief, we may not grant such relief if, as the state asserts, and the district court agreed, Ayala’s claim (specifically his exclusion from stages two and three of the *Batson* proceedings) is barred by *Teague v. Lane*, 489 U.S. 288 (1989). “[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.” *Horn v. Banks*, 536 U.S. 266, 272 (2002).

Under *Teague*, a “new constitutional rule[] of criminal procedure” cannot be applied retroactively to cases on collateral review. 489 U.S. at 310 (plurality opinion). Thus, “[b]efore a state prisoner may upset his state conviction or sentence on federal

collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit is not ‘new,’” but had been established at the time his conviction became final. *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997). “A holding constitutes a ‘new rule’ within the meaning of *Teague* if it ‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.” *Graham v. Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301).²⁰

We hold that Ayala’s claim does not require the retroactive application of a new constitutional rule of criminal procedure, and thus is not *Teague*-barred. At the time Ayala’s conviction became final on May 14, 2001, it was established that defense counsel must be permitted to be present and offer argument during *Batson* steps two and three when, as in Ayala’s case, the proceedings do not require the prosecution to reveal confidential information or trial strategy.

A.

In this Circuit, this rule was unequivocally “dictated by precedent,” *Teague*, 489 U.S. at 301 (emphasis omitted), long before Ayala’s conviction

²⁰ *Teague* is subject to two exceptions. See *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990) (a “new rule” can be applied retroactively on collateral review if “the rule places a class of private conduct beyond the power of the State to proscribe,” or if it constitutes a “‘watershed rule[] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding”) (quoting *Teague*, 489 U.S. at 311). Neither party contends that either exception is applicable in this case.

became final, having been established in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). In *Thompson*, we held that a district court had made a constitutional error when, after the defendant had established a *prima facie* case under *Batson*, the court permitted the prosecution to state the reasons for its peremptory strikes *ex parte*. Observing that *Batson* step two might sometimes require the prosecutor to “reveal confidential matters of tactics and strategy,” we recognized that in some circumstances there might be “compelling” reasons to conduct the proceedings *ex parte*. *Id.* at 1258-59. We therefore declined to adopt an absolute rule holding that the defense must *always* be permitted to participate at *Batson* steps two and three. We held, however, that defense counsel must be permitted to be present and offer argument during *Batson* steps two and three if the prosecution’s proffered race-neutral reasons do not involve confidential or strategic information. *Id.* at 1258-59.²¹

Our decision in *Thompson* represented the straightforward application of two lines of Supreme Court precedent. The first line of precedent finds its source in the Sixth Amendment’s guarantee of the right to counsel. Because “the plain wording of” the Amendment “encompasses counsel’s assistance

²¹ The dissent suggests that, because *Thompson* recognized the need for “occasional departures” from the rule regarding the exclusion of defense counsel from *Batson* steps two and three, *Thompson*, 827 F.2d at 1258, its conclusion was “not [] a clear rule of constitutional law.” Dissent at 94-95. We are puzzled by this, as many constitutional rules recognize exceptions — e.g., the exigency exception to the Fourth Amendment prohibition on warrantless searches, and the public safety exception to *Miranda* — but that does not make the rules any less clear.

whenever necessary to assure a meaningful ‘defence,’” the Court has long held that the right applies at all “critical” stages of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 224-25 (1967); *see also, e.g., White v. Maryland*, 373 U.S. 59, 60 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Ultimately, the right to counsel “has been accorded ... ‘not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.’” *Mickens*, 535 U.S. at 166 (quoting *Cronic*, 466 U.S. at 658). Foremost among the attributes of a fair trial is the requirement that it be adversarial in nature: “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” *Herring v. New York*, 422 U.S. 853, 862 (1975). “The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Cronic*, 466 U.S. at 656. As we observed in *Thompson*, “[t]he right of a criminal defendant to an adversary proceeding is fundamental to our system of justice,” and thus ex parte proceedings are justifiable only as “uneasy compromises with some overriding necessity.” 827 F.2d at 1258.

Batson is the seminal case in the second line of precedent. After setting out the three-stage framework used to determine whether the prosecution has engaged in purposeful racial discrimination in the selection of a jury, the *Batson* Court declined “to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” 476 U.S. at 99. *Batson* made clear, however, that the defendant bears the ultimate

burden of persuasion. *Id.* at 98. *Batson* also made clear that a court must consider “all relevant circumstances” in deciding whether a defendant has met his burden of persuasion — an inquiry that requires determining whether a prosecutor’s stated reasons for striking a particular juror are race-neutral, and, if race-neutral, whether they are his actual reasons. *Id.* at 96-99; see *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

In *Thompson*, we recognized that the *Batson* framework leaves defense counsel with “two crucial functions” that it must be permitted to perform. 827 F.2d at 1260. The first function is “to point out to the district judge where the government’s stated reason may indicate bad faith.” *Id.* As we explained:

For example, government counsel here excluded one of the jurors because he lived in defendant’s neighborhood and wore jeans to court. This seems like a legitimate reason, unless a nonexcluded juror also wore jeans or other casual dress, or lived in the same neighborhood as the defendant.... [D]efense counsel might have been able to point out that the stated reasons were pretextual because others similarly situated were allowed to serve. In addition, defense counsel might have been able to argue that the reasons advanced by the prosecution were legally improper.... Of course, the district judge might be able to detect some of these deficiencies by himself, but that is not his normal role under our system of justice.

Id. The second function is to “preserve for the record, and possible appeal, crucial facts bearing on the

judge's decision." *Id.* at 1261. As we reasoned in *Thompson*:

All we have before us concerning this issue is the prosecutor's explanation of her reasons and the district judge's ruling.... [I]f we are to review the district judge's decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the prosecutor's reasons.... Here, the record's silence cannot be reassuring.

Id. Thus, we held, only with the presence and assistance of defense counsel can the trial judge and subsequent appellate judges properly evaluate whether the defense has met its burden of persuasion under *Batson*. Excluding the defense from the *Batson* proceedings without some compelling justification therefore violates the Constitution. *Id.* at 1259-61.²²

²² The state and the dissent, in arguing that Ayala's claim is barred by *Teague*, cite *Lewis v. Lewis*, 321 F.3d 824 (9th Cir. 2003), a case in which we granted a habeas petitioner's *Batson* claim. In the course of some extended musings regarding the "ideal procedures under *Batson*," *id.* at 830, the *Lewis* panel observed, in a footnote, that the argument that "a court must allow defense counsel to argue" at *Batson* step three was not "clearly established law," as it "appears not to have been addressed by courts." *Id.* at 831 n.27. This passage is dicta, as the question of whether defense counsel must be permitted to argue at *Batson* step three was not "presented for review" in *Lewis*. *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam). Indeed, this passage could not represent anything but dicta, as the *Lewis* panel could not

(continued...)

Thompson compels us to conclude that the rule Ayala seeks is not, under *Teague*, a “new” one. “[C]ircuit court holdings suffice to create a ‘clearly established’ rule of law under *Teague*.” *Belmontes v. Woodford*, 350 F.3d 861, 884 (9th Cir. 2003) (reversed on other grounds by *Brown v. Belmontes*, 544 U.S. 945 (2005)); see *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O’Connor, J., for the Court) (“With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute ‘clearly established Federal law, as determined by the Supreme Court of the United States’ under § 2254(d)(1) The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court’s jurisprudence.”). We have held that, as long as a rule derived from Supreme Court precedent was established in *this* Circuit when a petitioner’s conviction became final, it is not a “new rule” under *Teague*. See *Belmontes*, 350 F.3d at 884; *Bell v. Hill*, 190 F.3d 1089, 1092-93 (9th Cir. 1999). “This is true even [if] other federal courts and state courts have rejected our holding.” *Bell*, 190 F.3d at 1093. Because *Thompson* itself relied on the Supreme Court’s right to counsel and equal protection jurisprudence, “we cannot now say that a state court would not have felt compelled by the Constitution and Supreme Court precedent” to conclude that the rule Ayala contends

(...continued)

overrule our prior decision in *Thompson*, of which it was apparently unaware. See *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc) (holding that a prior panel’s decision may only be overruled by a subsequent panel if the decision is “clearly irreconcilable” with a higher court’s intervening ruling). *Thompson*’s holding thus unquestionably remains binding Circuit law.

must be applied was not established at the time his conviction became final. *Id.*

B.

We would hold that Ayala's claim is not *Teague*-barred even if we were free to conclude that, contrary to *Bell* and *Belmontes*, *Thompson* did not in and of itself establish that the rule Ayala seeks is not "new." Nearly every court to consider the question by the time Ayala's conviction became final had adopted the rule that we set forth in *Thompson*, concluding that defense counsel must be allowed to participate at *Batson* steps two and three except when confidential or strategic reasons justify the challenge. The Fourth, Eighth and Eleventh Circuits had all so held. *See United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988) ("We ... agree with the Ninth Circuit that the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown."); *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir. 1989) ("[O]nce the prosecutor has advanced his racially neutral explanation, the defendant should have the opportunity to rebut with his own interpretation."); *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987) (remanding for an evidentiary hearing where the district court had denied the defendant's request for a hearing to rebut the government's proffered race-neutral reasons). The state courts that confronted the issue had all reached similar conclusions. *See Ayala*, 6 P.3d at 203; *Goode v. Shoukfeh*, 943 S.W.2d 441, 452 (Tex. 1997); *People v. Hameed*, 88 N.Y.2d 232, 238 (1996), 666 N.E.2d 1339, 644 N.Y.S.2d 466; *State v. Hood*, 245 Kan. 367, 378 (1989); *Gray v. State*, 317 Md. 250, 257-58 (1989); *Commonwealth v. Jackson*, 386 Pa.

Super. 29, 51 (1989); *Commonwealth v. Futch*, 38 Mass. App. Ct. 174, 178 (1995); *see also Caspari v. Bohlen*, 510 U.S. 383, 395 (1994) (“[I]n the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts.”).

These courts adopted the *Thompson* rule with good reason. The Sixth Amendment provides that the defendant must be permitted to have the assistance of a trained advocate at all critical stages of the proceedings in order to test and challenge all aspects of the prosecution’s case. *See Cronin*, 466 U.S. at 656. *Batson* did not suggest that there should be an *exception* to this overarching rule when a defendant has established a *prima facie* case that the prosecutor has struck jurors on the basis of race. To the contrary, it makes no sense to put the burden of persuasion on the defense, as *Batson* does, and then refuse defense counsel the opportunity to hear and respond to the prosecution’s explanations. The rule Ayala seeks is not in any sense new, but rather one which, as almost all courts to have considered the question have concluded, follows directly from the more general rule that the defendant has the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Id.*; *see also Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment) (“Where the beginning point is a rule of ... general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”).

The state and the dissent call our attention to two decisions that reached a contrary conclusion, both of

which were decided soon after the Court issued *Batson*. In *United States v. Davis*, the Sixth Circuit rejected a defendant's argument that his right to be present had been violated when the trial court allowed the prosecution to explain its peremptory strikes in camera, holding that "the district court was entitled to hear from the Government under whatever circumstances the district court felt appropriate." 809 F.2d 1194, 1202 (6th Cir. 1987). Similarly, in *United States v. Tucker*, the Seventh Circuit held that the Sixth Circuit was correct to conclude that "*Batson* neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing." 836 F.2d 334, 340 (7th Cir. 1988).²³

These decisions do not render Ayala's claim *Teague*-barred. "[T]he standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new." *Williams*, 529 U.S. at 410 (quoting *Wright*, 505 U.S. at 304 (1992)

²³ The state and the dissent also cite a third decision that they contend demonstrates that there is a Circuit split that precludes our finding that the rule Ayala seeks was "dictated by precedent." In *Majid v. Portuondo*, where the issue was whether the defense had the right to cross-examine witnesses at a *Batson* hearing, the Second Circuit remarked gratuitously that "[i]t remains at least arguable that courts holding *Batson* hearings may ... hear the [prosecution's] explanations in camera and outside the presence of the defendants." 428 F.3d 112, 128 (2d. Cir. 2005). The question of whether a challenge to the type of in camera hearing conducted in Ayala's case is *Teague*-barred was not, however, before the court. Moreover, this passage in *Majid* can be understood as observing only that there is no *absolute* right to an adversarial proceeding, which is consistent with the rule that Ayala seeks here.

(O'Connor, J., concurring in the judgment)). To the extent that these decisions deny that there is any right to participate in *Batson* proceedings, they simply cannot be reconciled with the basic Sixth Amendment requirement that, at all critical stages of criminal proceedings, the defendant must have the assistance of counsel in order to subject the prosecution's case to adversarial testing. That the courts in *Davis* and *Tucker* failed to fully appreciate the relevance of this principle is understandable, as in neither case did the defendants invoke the right to counsel to support their claim: in *Davis*, the defendants asserted that the in camera hearings had violated *their* right to be present at trial, a right derived principally from the Sixth Amendment's Confrontation Clause, *see Davis*, 809 F.2d at 1200; in *Tucker*, the defendant claimed that the ex parte proceedings violated his rights to due process and to an impartial jury, *see Tucker*, 836 F.2d at 338, 340. Perhaps for this reason, the *Davis* court failed to recognize the important functions counsel serves during *Batson* steps two and three, instead concluding that once the defense had established a prima facie case of racial discrimination, its "participation was no longer necessary for the district court to make its determination." 809 F.2d at 1202. As we explained in *Thompson*, this statement is simply not true: defense counsel continues to serve the two crucial functions of bringing facts and arguments to the attention of the trial court and preserving them for the record. *Thompson*, 827 F.2d at 1260-61. Likewise, the court in *Tucker* rejected the rule we adopted in *Thompson* because it concluded that *Batson* itself did not require the defense to be present during *Batson* steps two and three, and because our exception permitting ex parte

proceedings in some circumstances threatened to “swallow the rule.” See *Tucker*, 836 F.2d at 338, 340. Our rule is not, however, derived directly from *Batson*, but rather from the confluence of *Batson* and the Court’s Sixth Amendment jurisprudence. Moreover, the fact that a rule is subject to an exception — perhaps even a relatively broad exception — is not a justification for rejecting the rule altogether when the result, in those cases in which the exception does not apply, is to deprive a defendant of his constitutional rights.²⁴

Even assuming some doubt may have existed as to whether the rule Ayala seeks was “dictated by precedent” in the immediate aftermath of the Sixth and Seventh Circuits’ decisions in 1987 and 1988, by the time Ayala’s conviction became final in 2001, 13 years later, every court to have considered the issue in the interim — state and federal — had rejected, either explicitly or implicitly, the Sixth and Seventh Circuits’ view, and had adopted the *Thompson* rule. See *Garrison*, 849 F.2d at 106; *Roan Eagle*, 867 F.2d at 441; *Ayala*, 6 P.3d at 203; *Goode*, 943 S.W.2d at 452; *Hameed*, 88 N.Y.2d at 238; *Hood*, 245 Kan. at 378; *Gray*, 317 Md. at 257-58; *Jackson*, 386 Pa. Super. at 51; *Futch*, 38 Mass. App. Ct. at 178. The Supreme Court had also, in the interim,

²⁴ *Tucker* itself may be read to recognize this point, as it did not explicitly reject our conclusion that an adversarial hearing at *Batson* steps two and three was sometimes constitutionally compelled. *Id.* at 340. It observed that, in general, “adversarial hearings are the most appropriate method for handling most *Batson*-type challenges.” *Id.* Thus, although the *Tucker* court purported to reject *Thompson* in favor of *Davis*, the decision did not necessarily foreclose defendants from claiming that their rights had been violated by the trial court’s employment of a nonadversarial *Batson* proceeding.

acknowledged a version of our rule when it observed (in dicta) that, when a prosecutor challenges a defendant's use of peremptory challenges, "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Thus, the California Supreme Court characterized the rule Ayala sought — the *Thompson* rule — as one that had been "almost universally recognized." *Ayala*, 6 P.3d at 203. Given that the California Supreme Court's description is correct, the rule that Ayala would have us apply is not *Teague*-barred.²⁵

²⁵ We also note that where, as here, the state court applied the rule in question on direct appeal, and determined it to be "almost universally recognized," the application of *Teague* to bar the petitioner's claims would do little to further the doctrine's purpose. *Teague* is motivated by considerations of comity and finality. *See Teague*, 489 U.S. at 308. Its purpose is to afford repose to the states by ensuring that criminal convictions that were valid at the time they became final will not be upset by subsequently discovered constitutional rules. As Justice O'Connor explained, applying new rules on collateral review

continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." [456 U.S. 107, 128 n.33 (1982).]

Id. at 310. Although *Teague* may still bar the application in federal habeas proceedings of rules that the state courts have themselves recognized, *cf. Beard v. Banks*, 542 U.S. 406, 413 (continued...)

Accordingly, we conclude that, at the time Ayala's conviction became final, it was established for purposes of *Teague* that defense counsel cannot be excluded from *Batson* steps two and three absent some "compelling justification" for doing so. *Thompson*, 827 F.2d at 1259-60. The California Supreme Court held that this rule was violated in Ayala's case. It found, and the state does not dispute, that "no matters of trial strategy were revealed" in the hearings at which the prosecution explained its reasons for its peremptory challenges of all the potential black and Hispanic jurors. *Ayala*, 6 P.3d at 203.²⁶ Thus, the exclusion of defense counsel was in

(...continued)

(2004), *Horn*, 536 U.S. at 272, the interests of comity and finality are obviously far less weighty when a state court has accepted a rule than when it has rejected or ignored a rule. Here, the state is not being forced to marshal resources to defend against a new and novel claim that was not recognized at the time the conviction became final; nor did it faithfully apply existing constitutional law only to have a federal court subsequently apply new constitutional commands. To the contrary, the state is challenging a rule that the California Supreme Court found to be well established and controlling at the time it affirmed Ayala's conviction on direct appeal, as well as at the time the trial court conducted its proceedings. Certainly the state court could not be "frustrated" to find that a federal court determined that it was error to exclude the defense from the *Batson* proceedings when the state court itself had held that this very same rule was "almost universally recognized" and reached the same determination itself.

²⁶ The dissent attempts to reframe the *Teague* analysis as follows: *Thompson* merely articulated the rule that defense counsel could not be excluded without "compelling" justification; it was not until after Ayala's conviction became final that courts recognized that the prosecutor's explanation in this case (i.e., not revealing his strategy to the defense) was "not a valid reason not to follow the norm of an adversarial proceeding."

(continued...)

violation of the Constitution, and the only remaining question as to that aspect of the case is whether the constitutional error was prejudicial.

VI.

Our dissenting colleague makes three assertions that are fundamental to her disagreement with our opinion. All are plainly erroneous and illustrate her misunderstanding of the nature of our holding. First, the dissent suggests that, because the trial court accepted the prosecutor's rationale for striking these jurors, deference to its ruling is required under AEDPA, citing *Rice v. Collins*, 546 U.S. 333, 338-39 (2006). Dissent at 125-27. Second, and along similar lines, the dissent accuses us of failing to give the state court decision the "benefit of the doubt," citing *Felkner v. Jackson*, ___ U.S. ___, 131 S.Ct. 1305, 1307 (2011). Dissent at 135. Third, the dissent assumes that Ayala must demonstrate that the individual jurors were struck for racial reasons by "clear and

(...continued)

Dissent at 96.

To the contrary, *Thompson* directly addressed the government's argument that "an adversary hearing is inappropriate because the government lawyer is required to reveal confidential matters of tactics and strategy." *Thompson*, 827 F.2d at 1259. In that case, we rejected this claim as a general proposition and held that the determination of whether revealing case strategy could be a compelling justification in a particular case must be determined by examining whether the facts in that case warranted an exception to the general rule. *Id.* Rules applied on a case-by-case basis do not raise *Teague* issues. See *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring) ("If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.").

convincing evidence,” citing 28 U.S.C. § 2254(e)(1). Dissent at 122, 126.

Each of these assertions assumes, incorrectly, that we are confronting an ordinary *Batson* challenge on habeas review — a challenge to the holding in a case in which defense counsel was able to present arguments to the trial court regarding racial bias, appeal that claim to the state appellate court, and subsequently seek reversal in federal court of the judgment that none of the jurors was struck by the prosecution for impermissible racially motivated reasons. *Rice* and *Felkner* are precisely such cases. The Supreme Court has emphasized, in such cases, that deference is required, that the petitioner must demonstrate his factual claims of prosecutorial bias by clear and convincing evidence, and that we may not give the petitioner the benefit-of-the-doubt with regard to the existence of racial prejudice. However, this case is not an ordinary *Batson* challenge, and for the reasons we have explained *supra* the dissent’s approach is both inapplicable and wholly inappropriate. This, as the dissent consistently ignores, is a case in which the challenge is to the procedure employed by the trial court in conducting the *Batson* inquiry — a procedure that resulted in the denial of a fair *Batson* hearing to the defendant. Thus, it is not our task here to show that Ayala should have prevailed on his *Batson* claim, but only that he was prejudiced in his ability to prevail on that claim by the fact that his counsel was not present at the *Batson* hearing.

We cannot defer to the trial court where procedural error (such as the state supreme court found here and that the state concedes) has rendered the trial court’s determination unreliable. Ayala’s

counsel was excluded from *Batson* stages two and three, thus depriving him of the opportunity to persuade the trial judge that the prosecutor was motivated by racial bias. Even a very capable trial judge may overlook or fail to understand the arguments supporting racial motivation “if unassisted by an advocate.” *Thompson*, 827 F.2d at 1261. Because the procedures designed to ensure a fair hearing to the defendant were not followed, we cannot afford deference to the trial court’s determination of the merits of the *Batson* claim. As we concluded in *Thompson*, we “cannot rely on ... such fundamentally flawed procedures to show that that defendant suffered no prejudice.” *Id.* at 1261.

Next, for similar reasons, the “clear and convincing evidence” standard has no role with regard to Ayala’s challenge. The dissent’s position is inherently at odds with the statutory authority on which it relies. That AEDPA provision reads as follows:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). We have previously held, in interpreting § 2254(e)(1), that “the presumption of correctness and the clear-and-convincing standard of proof *only* come into play once the state court’s fact-findings survive any intrinsic challenge.” *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004)

(emphasis added) (cited by but expressly not overruled in *Wood v. Allen*, 558 U.S. 290, 299-301 & n.1 (2010)). In *Taylor*, we explained that a state court factual finding is intrinsically flawed if “the process employed by the state court is defective,” *Id.* at 999 (citing *Nunes v. Mueller*, 350 F.3d 1045, 1055-56 (9th Cir. 2003)). Here, the state court admitted that precluding Ayala’s counsel from establishing a *Batson* violation at stages two and three of the state’s trial court proceeding constituted procedural error. Under *Taylor*, because the state court proceeding was flawed, it is not entitled to a presumption of correctness, and Ayala is not required to demonstrate his *Batson* claim by clear and convincing evidence. The dissent’s assertion is contrary to AEDPA and to *Taylor* and would simply erect an insurmountable barrier that would protect the conceded error against any effective federal review.²⁷

VII.

We hold that the exclusion of Ayala and his counsel during *Batson* steps two and three constitutes prejudicial error. In the language of *Brecht*: we cannot say that had counsel been permitted to participate in the *Batson* proceedings, Ayala would have been unable to show that the prosecution violated *Batson*. To the contrary, constitutional error on the part of the state likely prevented Ayala from showing that the prosecution

²⁷ There is one additional error our dissenting colleague makes that is not limited to the *Batson* context but would rewrite the law of prejudice in all habeas cases. For that reason, it deserves mention here. As we have explained *supra*, the well-established *Brecht* standard governing prejudice has not been revised or modified, and the dissent’s suggestion to the contrary is without merit. See discussion *supra* at 46-50 & nn.12-13.

utilized its peremptory challenges in a racially discriminatory manner, and thus permitted him to be tried, convicted, and sentenced to death by a jury selected in a manner repugnant to the Constitution. Accordingly, we reverse the judgment of the district court, and remand with instructions to grant the writ and order that Ayala be released from custody unless the state elects to retry him within a reasonable amount of time to be determined by the district court.

REVERSED and REMANDED.

CALLAHAN, Circuit Judge, dissenting:

In 1985, Hector Juan Ayala shot and killed three men. In 1989, he was convicted of three counts of murder, and the jury returned a death sentence. On direct appeal his conviction and sentence were affirmed by the California Supreme Court in 2000. *People v. Ayala*, 6 P.3d 193 (Cal. 2000). The Supreme Court of the United States denied his petition for certiorari in 2001. *Ayala v. California*, 532 U.S. 908 (2001). Ayala filed his initial petition for a writ of habeas corpus in the United States District Court for the Southern District of California in 2002. This appeal is from the district court's February 17, 2009, final order denying the petition.¹

The majority holds, based primarily on law developed after Ayala's trial, that Ayala must be released or retried because it suspects the prosecutor might have had a racial motive in recusing seven jurors. It does so by inappropriately deconstructing

¹ There does not appear to be any question that there was sufficient evidence to convict Ayala of murder. *See Ayala*, 6 P.3d at 199-201.

the California Supreme Court’s opinion to justify its evasion of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) so that it may review the state trial court’s 1989 decisions *de novo*. Because Ayala’s federal claim is *Teague*-barred, and because the majority’s approach and conclusion are contrary to AEDPA and recent Supreme Court opinions, I dissent.

I

I agree with the district court and the State that Ayala’s claim that he was deprived of his constitutional rights when his attorney was not present when the prosecutor offered his reasons for the challenged recusals, is barred under *Teague v. Lane*, 489 U.S. 288 (1989).²

A. The standard for determining whether a claim is barred under *Teague*.

In *Caspari v. Bohlen*, 510 U.S. 383 (1994), the Supreme Court set forth the test for determining whether a state prisoner’s claim was *Teague*-barred:

“[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague v. Lane*, *supra*, 489 U.S. at 301. In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First,

² Because it is clear that Ayala’s claims would be *Teague*-barred if reviewed *de novo*, the majority should have begun and ended with this *Teague* analysis, rather than reach the more difficult questions regarding the standard of review under 28 U.S.C. § 2254(d).

the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," *Graham v. Collins, supra*, 506 U.S., at 468, and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution," *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle. See *Gilmore v. Taylor*, 508 U.S. 333, 345 (1993).

Id. at 390 (emphasis as quoted in *Caspari*).³

There is no dispute that Ayala's conviction became final in May 2001, when the Supreme Court denied certiorari, and Ayala does not assert that he comes within either of the two narrow exceptions. The remaining question is whether, in May 2001, the unconstitutionality of ex parte procedure used by the trial court in 1986 was "dictated" by precedent.

B. The evolution of *Batson* as of May 2001.

In *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), the

³ In all quotations, the parallel citations have been omitted.

Supreme Court held that “a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor’s exercise of peremptory challenges at the defendant’s trial.” *See also Georgia v. McCollum*, 505 U.S. 42, 47 (1992). *Batson* established a three-step inquiry. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges in a racially discriminatory manner. *Batson*, 476 U.S. at 96. The Supreme Court stated that it had “confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination against black jurors.” *Id.* at 97. Second, “[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.” *Id.* Third, the trial court must then “determine if the defendant has established purposeful discrimination.” *Id.* at 98.

In setting forth this three-step standard, the Supreme Court specifically declined “to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Id.* at 99. The Court reiterated that “[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.” *Id.* at 99 n.24. As a result, during the quarter of a century that has passed since *Batson*, courts have considered numerous ways of applying *Batson*’s three-step standard.

Ayala's primary argument is that the trial court's exclusion of him and his counsel from the proceedings in which the prosecution justified its recusal of seven jurors violated his constitutional rights to assistance of counsel at critical stages of the proceedings, to be personally present, and to assist his counsel in his defense. In response, the State argued and the district court held that in 2001, when Ayala's conviction became final, the exclusion of Ayala and his counsel from the proceedings was not a constitutional violation, and hence, Ayala's claim was barred by *Teague*, 489 U.S. 288.

The California Supreme Court, in reviewing Ayala's direct appeal, concluded that it was "almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them." *Ayala*, 6 P.3d at 203.

The majority claims that in May 2001 this rule had been "unequivocally 'dictated by precedent'" as a result of our opinion in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987). Majority at p. 72. *Thompson* concerned a 1985 criminal trial in a federal district court. The judge alone conducted voir dire and "the government used four of its peremptory challenges to exclude all four blacks in the venire." *Id.* at 1256. When Thompson's lawyer moved for a mistrial, the district court "allowed the government to put its reasons for the disputed peremptory challenges on the record, albeit in camera and out of the presence of the defendant and his lawyer." *Id.* Thompson appealed, arguing that this procedure violated his Fifth Amendment right to due process

and his Sixth Amendment right to a fair and impartial jury. *Id.* A divided panel concluded that the “district court erred in refusing to allow defense counsel in this case to hear the government’s reasons for excluding the black potential jurors and to present argument thereon.” *Id.* at 1261. We explained that “situations where the court acts with the benefit of only one side’s presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process.”⁴ *Id.* at 1258-59.

C. Ayala’s Sixth Amendment claim was not dictated by precedent in 2001.

In *Horn v. Banks*, 536 U.S. 266, 272 (2002), the Supreme Court held that “a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state,” even if the state supreme court did not consider the issue. Thus, we are required to determine as a threshold matter whether Ayala’s claim is *Teague*-barred. I would hold that Ayala’s claim is *Teague*-barred because it was not “dictated” by Supreme Court case law, and the case Ayala relies upon, *Thompson*, did not announce a clear constitutional rule. The majority confuses the

⁴ The dissent argued that the majority’s choice of an adversarial proceeding over an in camera proceeding was contrary to the Supreme Court’s decision in *Batson* not to formulate particular procedures. *Id.* at 1262 (Sneed, J., dissenting).

wisdom of *Thompson* with whether that wisdom had been embraced by 2001.

Thompson is not a Supreme Court opinion and concerned a federal court trial, not a state court trial. Accordingly, it could not dictate the result in Ayala's case when his conviction became final. In *Massachusetts Delivery Ass'n v. Coakley*, 671 F.3d 33, 47 (1st Cir. 2012), the First Circuit reiterated that "[s]tate courts are not bound by the dictates of the lower federal courts, although they are free to rely on the opinions of such courts when adjudicating federal claims." (internal citations omitted.). Similarly, in *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir. 1977), the Tenth Circuit noted that "the Oklahoma Courts may express their differing views on the retroactivity problem or similar federal questions until we are all guided by a binding decision of the Supreme Court." Also, in *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970), the Seventh Circuit agreed that "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts." Consistent with our sister circuits' decisions, our prior opinion in *Thompson*, which was an appeal from a federal criminal action, was not binding on the California Supreme Court.

Furthermore, even though the logic behind the opinion in *Thompson* may be compelling, the opinion does not set forth a clear rule of constitutional law. The opinion recognized that there were "occasional departures from" the norm of holding adversarial proceedings, noted a number of instances in which in camera proceedings were appropriate, and concluded that departure from the norm "may amount to a denial of due process." *Id.* at 1258-59 (emphasis

added). The language in *Thompson* is vague compared, for example, to our statement in *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989), that “we hold that the right to counsel attaches to the motion for a new trial stage.”

The fact that *Thompson* did not lay down a clear rule of constitutional law is confirmed by a review of other Ninth Circuit cases as well as decisions by our sister circuits. In *Lewis v. Lewis*, 321 F.3d 824, 831 n.27 (9th Cir. 2003), we observed that “[c]ertainly, requiring a court to allow defense counsel to argue [during the three-step *Batson* process] is not clearly established law.” Thus, fifteen years after *Thompson* issued, we did not think that *Thompson* established a clear rule of constitutional law. In *Majid v. Portuondo*, 428 F.3d 112 (2d Cir. 2005), the Second Circuit commented that “[i]t remains at least arguable that courts holding *Batson* hearings may, to the contrary, hear the explanations in camera and outside the presence of the defendants.” *Id.* at 128 (citations omitted). In *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), the Seventh Circuit noted that the Supreme Court in *Batson* expressly declined to formulate procedures and disagreed with the Ninth Circuit’s opinion in *Thompson* insofar as it required “adversarial hearings once a defendant establishes a prima facie case of purposeful discrimination.” Similarly, in *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987), the Sixth Circuit commented that *Batson* does not “require the participation of defense counsel while the Government’s explanations are being proffered.”

The majority strives mightily to distinguish these cases on the grounds that they are not well-reasoned, in some instances are dicta, and have been rejected

by other circuits and most state courts. But the standard established by the Supreme Court for determining whether an issue is *Teague*-barred is not the merits of the old rule, or even recognition of the wisdom of the new rule, but whether the new rule was “dictated by precedent.” *Caspari*, 510 U.S. at 390. These conflicting cases confirm that *Thompson* did not dictate the result in Ayala’s case.

Moreover, as noted, the rule that the majority claims was established in *Thompson* is not a bright-line rule. Rather, at most, *Thompson* states that defense counsel could not be excluded absent some “compelling justification.” See Majority at p. 76. Here, the prosecutor offered an explanation for seeking to present his reasons in camera: he did not want to reveal his strategy to the defense. Following *Thompson* and the other cases cited by the majority, it is now clear that this is not a valid reason not to follow the norm of an adversarial proceeding.⁵ However, this was not firmly established in 2001 when Ayala’s conviction became final.

In sum, I agree with the district court that the right to be present and have counsel present when the prosecution presented its reasons for its

⁵ The California Supreme Court carefully considered the prosecutor’s claim that his reasons for the recusals would disclose matters of strategy. It concluded that the prosecutor had “simply [given] the reasons for his challenges, reasons that defendant was entitled to hear and that disclosed no secrets of trial strategy.” *Ayala*, 6 P.3d at 202-03. Accordingly, it concluded that “[i]t was unreasonable to exclude defendant from the hearings.” *Id.* at 203. The California Supreme Court was right. However, for purposes of the application of *Teague*, the point is that this conclusion was neither dictated nor compelled when Ayala’s conviction became final.

challenged recusals was not “dictated by precedent” when Ayala’s conviction became final, and therefore the issue is *Teague*-barred.

II

Assuming the issue is not *Teague*-barred, we must next turn to the question of what exactly the California Supreme Court held and what deference it is owed. The court first acknowledged that “no particular procedures are constitutionally required” to conduct a *Batson* hearing, thereby rejecting Ayala’s federal claim. *Ayala*, 6 P.3d at 202. “The next question,” it said, was “whether it was error to exclude defendant from participating in the hearings on his *Wheeler* motions.” It concluded that “*as a matter of state law*, it was.” *Id.* at 203 (emphasis added). After conducting a thorough review of relevant state and federal precedents, it reiterated that it had “concluded that error had occurred under state law” and “noted” *Thompson*’s suggestion that the error may amount to a denial of due process. *Id.* at 204. Nonetheless, it concluded that the error was “harmless under state law, and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt as a matter of federal law.” *Id.* (internal citations omitted). Thus, although there may be some question as to whether the California Supreme Court actually found that there was federal error, it clearly addressed Ayala’s federal claim in determining that whatever federal error occurred, it was harmless as a matter of federal law.

The majority and I part ways as to how to review this holding. Because the state court adjudicated Ayala’s federal claim on the merits and rejected it, we must accord that decision deference under AEDPA. *See Johnson v. Williams*, 133 S. Ct. 1088,

1094 (2013) (“[W]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”) (internal citations omitted).

However, the majority’s dislike for AEDPA drives it to try to avoid its provisions. In its initial opinion, the majority interpreted the Supreme Court’s opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in such a manner as to allow it to grant relief without deferring to the California Supreme Court. *See Ayala v. Wong*, 693 F.3d 945, 961-63 (9th Cir. 2012). The majority now takes a different tack in an effort to circumnavigate AEDPA and review Ayala’s 1989 state court conviction *de novo*. Contrary to the Supreme Court’s recent opinions, the majority deconstructs the California Supreme Court’s opinion. In doing so, the majority: (1) separates the California Supreme Court’s finding of error under state law from its adjudication of the federal claim; (2) decides that the California Supreme Court did not determine whether there was error under federal law; and then (3) concludes that it has “no reason to give § 2254(d) deference” to the California Supreme Court’s decision. Majority at pp. 40-41.

The majority’s approach is fundamentally flawed for at least two reasons. First, it is contrary to the Supreme Court’s opinions directing that any question as to whether a state court considered a constitutional issue is to be resolved in favor of finding that it did. *Richter v. Harrington*, 131 S. Ct. 770, 784-85 (2011); *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013). Second, by separating the California Supreme Court’s determination of

*Batson/Wheeler*⁶ error from its adjudication of the federal claim, the majority evades giving the opinion the deference demanded by AEDPA and the United States Supreme Court.

A. Supreme Court precedent compels the conclusion that the California Supreme Court decided Ayala’s federal claims on their merits.

1. The California Supreme Court’s opinion.

The California Supreme Court’s evaluation of the *Batson/Wheeler* issue was clear and concise. It held that “it was error to exclude defendant from participating in the hearings on the *Wheeler* motions.” *Ayala*, 6 P.3d at 203. Indeed, the California Supreme Court recognized that the error enhanced “the risk that defendant’s inability to rebut the prosecution’s stated reasons will leave the record incomplete.” *Id.* at 204. As the majority admits, the California Supreme Court cited both *Batson* and our opinion in *Thompson* in concluding that “it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them.” *Ayala*, 6 P.3d at 203.

The California Supreme Court then turned to the question of prejudice and held:

⁶ As the majority notes, *People v. Wheeler*, 22 Cal.3d 258 (1978), is the California analogue to *Batson*. See Majority at p. 22 n.1. Accordingly, in cases arising out of California, claims that minority jurors were improperly excluded are sometimes referred to as *Batson/Wheeler* claims.

We have concluded that error occurred under state law, and we have noted *Thompson's* suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) as a matter of federal law.

6 P.3d at 204. There can be no doubt that the California Supreme Court adjudicated the federal claim, first by implicitly rejecting it, and then, as an alternative holding, finding that any error was harmless.

2. *The majority's deconstruction of the California Supreme Court's opinion.*

The majority acknowledges this portion of the California Supreme Court's opinion. Majority at p. 30. However, it then proceeds to mull over whether the state court (a) held there was error under federal constitutional law, (b) held there was no error under federal constitutional law, or (3) did not decide whether there was error under federal constitutional law. *Id.* These are idle musings, for the "only question that matters under § 2254(d)(1)" is whether the petitioner's claim was adjudicated on the merits, and whether that adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Whether one agrees with the California Supreme Court's decision or not, the

federal claim was clearly adjudicated.

The majority, although purporting to accept that the California Supreme Court found constitutional error, proceeds to argue that “alternatively” the exception to deference set forth in *Richter* applies.⁷ Majority at pp. 35-36. Exactly how the majority reaches this conclusion is not clear. Here is its explanation:

Richter and *Williams* instruct us to afford a rebuttable presumption that a fairly presented claim was “adjudicated on the merits” for purposes of § 2254(d), but this presumption is rebuttable if there is “any indication or state-law procedural principles” supporting the conclusion that the state court did not adjudicate the federal claim on the merits. *Richter*, 131 S. Ct. at 784-85. Here, the California Supreme Court denied Ayala relief overall

⁷ This “alternate” approach, in addition to being incorrect, serves to obscure the majority’s separation of the California Supreme Court’s determination that there was federal constitutional error from that court’s determination that any error “was harmless beyond a reasonable doubt *as a matter of federal law*.” *Ayala*, 6 P.3d at 204 (internal citation omitted, emphasis added). Without its alternate approach, the majority would be hard pressed not to give the California Supreme Court’s determination of harmless error the deference it is entitled to under AEDPA. This, obviously, is our primary area of disagreement. I would, applying AEDPA, defer to the California Supreme Court’s opinion. The majority, instead, concocts an approach that circumvents AEDPA in order that it may review Ayala’s 1989 conviction *de novo*. See Majority at p. 53 (“If we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ.”).

but did so by (1) finding that the trial court committed error on state law grounds, (2) failing to make any express determination of error on federal constitutional grounds, and (3) finding any error harmless under *both* the state and federal standards for harmless error. In the context of these holdings, the rebuttable presumption that *Richter* and *Williams* instruct us to afford is, in fact, rebutted. The California Supreme Court, by finding any alleged error harmless under both the state and federal standards for harmless error, had no reason to reach the question of whether federal constitutional error occurred.

Majority at p. 36.

The majority then argues that the California Supreme Court “would have had good reason not to decide the merits of the federal constitutional issue” because courts generally do not pass on questions of constitutionality unless adjudication is unavoidable. Majority at p. 36-37. Also, by analogy it draws on cases involving claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), where the Supreme Court has interpreted a state court’s silence as a failure to reach an issue and thus not an adjudication on the merits. Majority at p. 37-38.

The majority then proffers its vision of the law: “There are circumstances in which, even if a state court has denied relief overall, a state court’s silence with respect to a fairly presented federal issue cannot be interpreted as an ‘adjudication on the merits’ of that issue for purposes of § 2254(d), because the

rebuttable presumption cited in *Richter* and *Williams* is rebutted by the legal principles involved (including the principle of constitutional avoidance) and factual context applicable to a particular case.” Majority at p. 39. This novel approach allows the majority to assert that the “California Supreme Court had no reason to reach Ayala’s federal constitutional claim,” and to conclude that it has “no reason to give § 2254 deference” to the California Supreme Court’s decision. Majority at pp. 39-40.

3. *The majority’s approach is contrary to recent Supreme Court opinions.*

The majority’s deconstruction of the California Supreme Court’s opinion, besides being unnecessary dicta and unpersuasive, is contrary to recent Supreme Court opinions that were directed at the Ninth Circuit. In both *Richter*, 131 S. Ct. 770, and *Johnson*, 133 S. Ct. 1088, the Supreme Court reversed us for failing to give proper deference to the state courts’ opinions.⁸ Moreover, the Supreme Court set forth a clear standard that leaves no doubt that here the California Supreme Court considered Ayala’s federal claims on their merits.

In *Richter*, the Court stressed that AEDPA “bars relitigation of any claim ‘adjudicated on the merits in state court,’ subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” 131 S. Ct. at 784 (internal quotation marks omitted). The Court noted that there does not need to be “an opinion from the state court explaining the state court’s reasoning,” and the state court need not say it was adjudicating the

⁸ See *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009); *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011).

federal claim on its merits. *Id.* It further held that, “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Id.* at 784-85.

Two years later, in *Williams*, a unanimous Supreme Court found it necessary to remind us of this standard. Williams challenged his conviction for first degree murder on the ground that the trial court improperly dismissed a juror. 133 S. Ct. at 1093. The California state courts denied him relief and the district court denied Williams’ habeas petition. Judge Reinhardt, writing for a three-judge panel of the Ninth Circuit, held that despite the *Richter* presumption, the state courts had not adjudicated Williams’ federal claim,⁹ applied a *de novo* standard

⁹ The panel had reasoned:

It is obvious, not “theoretical” or “speculat[ive],” that Williams’s constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. *Id.* at 785. Specifically, the portion of the court’s opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams’s statutory claim, but made no mention whatsoever of her more fundamental constitutional claim, is a compelling “indication” that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision.

Williams v. Cavazos, 646 F.3d 626, 639 (9th Cir. 2011).
(continued...)

of review, and granted relief. *Williams*, 646 F.3d at 641, 653.

The Supreme Court firmly rejected our opinion. It first noted that the assumption that a federal claim was overlooked by the state court is wrong for a number of reasons, including: (1) “there are circumstances in which a line of state precedent is viewed as fully incorporating a related federal constitutional right,”¹⁰ *Williams*, 133 S. Ct. at 1094; (2) “a state court may not regard a fleeting reference to a provision of the Federal Constitution or federal precedent as sufficient to raise a separate federal claim,” *id.* at 1095; and (3) “there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion.” *Id.* The Supreme Court concluded that, “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits.” *Id.* at 1096.

If federal courts are to presume that a state court considers a federal claim even when the court does not expressly address the claim, it follows that where, as here, the California Supreme Court’s opinion clearly reflects that the court was aware of the federal claims, we must accept that the federal claims were “adjudicated on the merits,” and limit

(...continued)

The majority appears to follow a similar course in the case at bar.

¹⁰ The Supreme Court specifically noted that “[i]n California, for example, the state constitutional right to be present at trial is generally coextensive with the protections of the Federal Constitution.” 133 S. Ct. at 1094-95 (internal quotation marks omitted).

any relief according to § 2254(d). *See Richter*, 131 S. Ct. at 784.

The majority, however, seizes on the Supreme Court's statement that the presumption "can in some limited circumstances be rebutted," *Williams*, 133 S. Ct. at 1096, and adopts a definition of the exception that swallows the presumption. The majority asserts that the presumption does not apply because "it was not necessary for the state court to reject the claim of federal constitutional error on the merits in order for it to deny relief to the petitioner," and because "the facts of this case dictate the conclusion that the California Supreme Court believed that the error under state law also constituted federal constitutional error." Majority at p. 32-33. The first reason is contrary to *Williams* because the Supreme Court held that the presumption applies even where the state court regards a federal claim "as too insubstantial to merit discussion." 133 S. Ct. at 1095. The second proffered reason is also contrary to *Williams* because the Court held that the presumption applies where "state precedent is viewed as fully incorporating a related federal constitutional right." *Id.* at 1094.

Furthermore, in order to rebut the *Richter* presumption there must be "reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785. But here, there can be no doubt that the California Supreme Court did consider Ayala's federal claims, first by stating that "no particular procedures are constitutionally required" to hold a *Batson* hearing, and then, in the alternative, holding that any federal error was harmless. *Ayala*, 6 P.3d at 202-04. Thus, the California Supreme Court's opinion is not *best*

read as addressing Ayala's federal claims, as the majority admits,¹¹ but can *only* be so read.

In sum, a review of the California Supreme Court's opinion allows for only one conclusion: that the court considered Ayala's federal claims. Moreover, even if this conclusion was not mandated, and the presumption set forth by the Supreme Court in *Richter* and *Williams* came into play, the presumption would be controlling. Because the California Supreme Court considered Ayala's federal claims (and, in any event, must be presumed to have done so), the AEDPA standard of review applies.

B. The majority applies a *de novo* standard of review and fails to give proper deference to the California Supreme Court's opinion.

The majority's treatment of the California Supreme Court's ruling on the *Batson/Wheeler* violation is a smoke screen designed to obscure the fact that the majority reviews prejudice *de novo* rather than under the AEDPA deference standard. This approach cannot be squared with the Supreme Court's recent opinions, which require that we ask whether the California Supreme Court's determination that the error was harmless beyond a reasonable doubt was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility

¹¹ The majority states: " if we were compelled to determine whether the California Supreme Court adjudicated Ayala's federal claim on its merits in favor of the petitioner or the state, we would hold without the slightest hesitation that it found that error occurred under federal constitutional law." Majority at p. 35.

of fair minded disagreement.” *Richter*, 131 S. Ct. at 786-87.

1. *Deference is mandated by the statute and Supreme Court precedent.*

The applicable provisions of AEDPA are codified in 28 U.S.C. § 2254.¹² The Supreme Court’s opinions hold that the AEDPA standard applies to the California Supreme Court’s finding of harmless error. In *Richter*, the Supreme Court reiterated that federal habeas relief is not available “unless it is shown that the earlier state court’s decision ‘was contrary to’ federal law then clearly established in the holdings of

¹² Section 2254(d) reads in relevant 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

this Court,” or “‘was based on an unreasonable determination of the facts’ in light of the record before the state court.” 131 S. Ct. at 785 (internal citations omitted). Thus, it does not matter whether the California Supreme Court’s determination of harmless error is a question of fact, or law, or mixed; it is entitled to deference under AEDPA.

The Supreme Court further elaborated on the applicable standard. In *Richter*, it held that a “state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” 131 S. Ct. at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In addressing prejudice in a claim of ineffective assistance of counsel under *Strickland*, the Supreme Court held:

[A] challenger must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” [*Strickland v. Washington*, 466 U.S. 668] at 694 [(1984)]. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

131 S. Ct. at 787-88. The Supreme Court again emphasized this deference when it reversed us in

Felkner v. Jackson, 131 S. Ct. 1305 (2011).¹³

2. *The majority's alternate standard of review is contrary to Supreme Court precedent.*

The majority, however, invokes *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in order to justify what is, in essence, a *de novo* standard of review. Majority at pp. 49-53. The majority asserts that relief may be granted if we find that the error had a “substantial and injurious effect or influence in determining the jury’s verdict,” Majority at p. 49 (quoting *Brecht*, 507 U.S. at 623), or “if one cannot

¹³ Although the majority here engages in considerably more analysis than we did in *Felkner*, the Supreme Court’s admonition remains instructive. The Court held:

The *Batson* issue before us turns largely on an “evaluation of credibility.” 476 U.S., at 98, n .21. The trial court’s determination is entitled to “great deference,” *ibid.*, and “must be sustained unless it is clearly erroneous,” *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). “

That is the standard on direct review. On federal habeas review, AEDPA “imposes a highly deferential standard for evaluating state-court rulings” and “demands that state-court decisions be given the benefit of the doubt.” *Renico v. Lett*, 130 S. Ct. 1855, 1862 (2010) (internal quotation marks omitted). Here the trial court credited the prosecutor’s race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court’s findings. The state appellate court’s decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner.

131 S. Ct. at 1307.

say, with fair assurance, after pondering all that happened without stripping the erroneous action for the whole, that the judgment was not substantially swayed by the error,” Majority at p. 50 (quoting *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011)), or even where a “judge feels himself in virtual equipoise as to the harmlessness of the error.” Majority at p. 51 (quoting *Merolillo*, 663 F.3d at 454). That the majority essentially conceives of this as *de novo* review is obvious from its declaration that “[i]f we cannot say that the exclusion of defense counsel with or without the loss of the questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim, then we must grant the writ.” Majority at p. 53.

Brecht was decided before the passage of AEDPA. In *Fry v. Pliler*, 551 U.S. 112, 121 (2007), the Supreme Court held that “in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the ‘substantial and injurious effect’ standard set forth in *Brecht*.” However, in doing so, the Supreme Court construed the *Brecht* standard as including the AEDPA standard:

Three years after we decided *Brecht*, Congress passed, and the President signed, the [AEDPA], under which a habeas petition may not be granted unless the state court’s adjudication “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” 28 U.S.C. § 2254(d)(1). In *Mitchell v. Esparza*, 540 U.S. 12 (2003)

(per curiam), we held that, when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination* itself was unreasonable. Petitioner contends that § 2254(d)(1), as interpreted in *Esparza*, eliminates the requirement that a petitioner also satisfy *Brecht's* standard. We think not. That conclusion is not suggested by *Esparza*, which had no reason to decide the point. Nor is it suggested by the text of AEDPA, which sets forth a precondition to the grant of habeas relief (“a writ of habeas corpus ... shall not be granted” unless the conditions of § 2254(d) are met), not an entitlement to it. 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.

551 U.S. at 119-20.

Three aspects of the Supreme Court’s explanation are particularly important. First, the Court endorsed its prior opinion in *Esparza*, 540 U.S. 12, that habeas relief was available only if the state court’s determination of harmlessness was unreasonable. *Fry*, 551 U.S. at 119. Second, the Court reiterated that AEDPA “limited rather than expanded the availability of habeas relief.” *Id.* Third, the Court held that the *Brecht* “actual prejudice” standard requires a greater showing than the “the more liberal AEDVA/*Chapman* standard which requires only that the state court’s harmless-beyond-a-reasonable-doubt determination be unreasonable.” *Id.* at 119-20. *See also Brecht*, 507 U.S. at 637 (holding that habeas petitioners “are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice’”); *Pulido v. Chrones*, 629 F.3d 1007, 1020 (9th Cir. 2010) (holding that because the petitioner “did not suffer any actual prejudice, he is not entitled to habeas relief”).

The majority attempts to evade the deference inherent in the AEDPA/*Brecht* standard by quoting language from *Merolillo*, 663 F.3d at 454. The majority asserts that when a judge is “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.” Majority at p. 51 (citations omitted).

The majority takes this standard out of context. *Merolillo* does not suggest that the state court’s opinion is not entitled to deference. Our opinion first recognized that we continue to look to the last reasoned decision of the state court, and that the state court’s findings “are entitled to a presumption

of correctness unless the petitioner rebuts the presumption with clear and convincing evidence.” 663 F.3d at 453 (citing 28 U.S.C. § 2254(e)(1)). Although the opinion refers to the Supreme Court’s prior elucidations on harmless error, we concluded that *Brecht*’s “substantial and injurious effect” standard governs our harmless error review. *Merolillo*, 663 F.3d at 455. Our opinion also determined that applying the AEDPA/*Chapman* standard, the state court’s determination of harmless error was objectively unreasonable. *Id.*

3. *Deference to the state court opinion reconciles Brecht and the Supreme Court’s recent opinions.*

The majority fails to appreciate that even when focusing on harmless error, a state court’s factual findings are entitled to deference, *see, e.g., Mansfield v. Sec’y, Dep’t of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012), and that this deference informs the definition of “grave doubt.” In order to grant relief, a federal court must have “grave doubt” as to the harmless error of the error. Critically, the Supreme Court’s opinions mandate that this “grave doubt” be objective rather than subjective. Our personal perspectives as to harmless error are not controlling. Rather, we are directed to consider whether “there is no possibility fairminded jurists could disagree” with the state court’s decision, and whether there “was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 131 S. Ct. at 786-87. Thus, by definition, where fairminded jurists can disagree, there is no “grave doubt” as to the harmless error of the error. In other words, in state habeas petitions subject to AEDPA, any objective “grave doubt” as to the

harmlessness of an error is dispelled by a determination that “fairminded jurists” could disagree.

The reach of this mandate from *Richter* can be illustrated by considering the majority’s statement in a footnote. The majority opines that the California Supreme Court’s conclusion that Ayala was not prejudiced was “an unreasonable application of *Chapman*.¹⁴ *Chapman*, decided some 30 years before the passage of AEDPA, held “that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Id.* at 24. AEDPA does not change the constitutional standard, but it does alter the standard applied by federal courts when reviewing a state prisoner’s habeas petition. AEDPA limits relief to instances where the state court adjudication was “an unreasonable application of, clearly established Federal law,” or “an unreasonable determination of the facts in light of the evidence.” 28 U.S.C. § 2254(d). The Supreme Court’s opinions in cases such as *Richter* and *Williams* provide an objective measure for what is unreasonable under AEDPA: a state court’s determination of a federal claim is unreasonable only if no fairminded jurist could agree with it.

¹⁴ The majority states:

In holding that Ayala has demonstrated his entitlement to relief under *Brecht*, we therefore also hold to be an unreasonable application of *Chapman* the California Supreme Court’s conclusion that Ayala was not prejudiced by the exclusion of the defense during *Batson* steps two and three or by the loss of the questionnaires.

Majority at p. 50 n.13.

In this case, consistent with the Supreme Court's opinions, a writ may not issue just because "we cannot say that the exclusion of defense counsel and the loss of questionnaires likely did not prevent Ayala from prevailing on his *Batson* claim." Majority at p. 53. Rather, a writ may issue only if we determine (using the majority's language) that there is a "grave doubt as to the harmlessness of the error," meaning that no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim.¹⁵ See, e.g., *Richter*, 131 S. Ct. at 786-87. As set forth in the next section, fairminded jurists can concur in the California Supreme Court's determination of harmless error.

III

A review of the record shows that although the loss of the questionnaires and the exclusion of defense counsel constitute error, fairminded jurists

¹⁵ This approach is also consistent with the Supreme Court's opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). There the Court held that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petition must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 1400. The federal court must look at the record that was before the state court and determine whether fairminded jurists could disagree with the state court's decision. Furthermore, the Court in reviewing the habeas petition in *Pinholster* applied a deferential standard of review. It held that "Pinholster has not shown that the California Supreme Court's decision that he could not demonstrate deficient performance by his trial counsel necessarily involved an unreasonable application of federal law," and that "Pinholster also has failed to show that the California Supreme Court must have unreasonably concluded that Pinholster was not prejudiced." *Id.* at 1403-04, 1408.

can agree with the California Supreme Court that those facts did not prevent Ayala from prevailing on his *Batson* claim.

A. The loss of certain prospective jurors' questionnaires.

The majority states that it is “unable to evaluate the legitimacy of some of the prosecution’s proffered reasons for striking the black and Hispanic jurors because they referred to questionnaires that are now lost.” Majority at p. 55. Of course, this statement misses the mark because the real question is whether the record was sufficient to allow the California Supreme Court to review Ayala’s claims as he presented them to that court. A review of the California Supreme Court’s opinion and Ayala’s filings shows that the state court fully and fairly considered his claims. Furthermore, Ayala has not shown that the loss of certain prospective jurors’ questionnaires violated his constitutional rights or that the loss prejudiced him.

First, it is critical to note what was in the record before the California Supreme Court. The record contained the voir dire transcript for all prospective jurors, the transcript of the in camera hearings on the prosecutor’s reasons for the recusals, the questionnaires of all the seated jurors, and the questionnaires of the alternate jurors. What was missing were the 77-question, 17-page questionnaires the 200 or so other potential jurors had filled out.

In *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), we recognized that the Supreme Court’s opinion in *Miller-El v. Dretke*, 545 U.S. 231 (2005), holds that “comparative juror analysis is an important tool that courts should utilize in assessing

Batson claims.”¹⁶ *Boyd*, 467 F.3d at 1145. We commented that “comparative juror analysis” referred “to an examination of a prosecutor’s questions to prospective jurors and the jurors’ responses, to see whether the prosecutor treated otherwise similar jurors differently because of their membership in a particular group.” *Id.* *Boyd* concluded:

A reviewing court cannot examine the “totality of the relevant facts” and “all relevant circumstances,” *Batson*, 476 U.S. at 94, surrounding a prosecutor’s peremptory strike of a minority potential juror without an entire voir dire transcript. A transcript of the complete voir dire, as distinct from a partial transcript up to the time of the *Batson* motion, is proper because comparative juror analysis is appropriate both at the time of the *Batson* motion and in light of all subsequent voir dire testimony.

467 F.3d at 1151. Here, we have the entire voir dire transcript. Moreover, there is nothing in *Boyd* to suggest that in addition to the voir dire transcript, juror questionnaires from jurors who are not selected are essential to a determination of the totality of the relevant facts.

Indeed, the opposite conclusion can be drawn from our treatment in *Boyd* of a California rule requiring

¹⁶ We further held that the right to a comparative juror analysis explicitly set forth in *Miller-El* was not *Teague*-barred as it “simply illustrates the means by which a petitioner can establish, and should be allowed to establish, a *Batson* error.” *Boyd*, 467 F.3d at 1146 (internal citation omitted).

an indigent defendant to show some cause in order to receive a free transcript of voir dire. We held, citing *United States v. MacCollum*, 426 U.S. 317, 322-23 (1976), that the California rule did not violate the Constitution, but that the state court erred in failing to recognize that the defendant had raised a plausible *Batson* claim entitling him to a transcript of voir dire. *Boyd*, 467 F.3d at 1151. If a defendant can be required to show some cause in order to receive a transcript of voir dire, it follows that a defendant has no *per se* right to the preservation of all questionnaires filled out by prospective jurors who were not seated.

To be fair, there is language in our en banc opinion in *Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006) (en banc), that could be read to infer a right to juror questionnaires. We concluded that: “In this case, an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor’s nonracial grounds, compelling the conclusion that his actual and only reason for striking [a juror] was her race.” *Id.* at 360. But this statement shows only that where juror questionnaires are available, we will consider them, not that the questionnaires are necessary. Instead, we commented that a comparative juror analysis was appropriate because “[w]e too have a transcript of voir dire and a *Batson* claim fairly presented, and that is all *Miller-El* requires.” *Id.* at 361.

In addition, we recently commented on the lack of questionnaires of excused jurors in *Briggs v. Grounds*, 682 F.3d 1165 (9th Cir. 2012). *Briggs* concerned a *Batson* challenge to a state court conviction where the federal record did not contain the questionnaires of excused jurors. *Id.* at 1170. In

affirming the district court's denial of relief, the majority noted:

The dissent seems to conclude that because we cannot independently verify the answers from the questionnaires as they are not in the record, the defense's characterization is equally, if not more, plausible despite the state court determinations to the contrary. However, "AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt," *Felkner v. Jackson*, [sic] 131 S. Ct. 1305, 1307 (2011) (per curiam) (internal quotation marks omitted) (overturning the Ninth Circuit). The dissent's readiness to doubt the state court determination based on the defendant's characterization of the record does not apply the appropriate level of deference Congress and the United States Supreme Court have required of us.

Id. at 1170-71. The majority in *Briggs* further noted that "it is widely acknowledged that the trial judge is in the best position to evaluate the credibility of the prosecutor's proffered justifications." *Id.* at 1171 (internal citations omitted). Citing the Supreme Court's statements in *Rice v. Collins*, 546 U.S. 333, 338-39 (2006), that a "federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge," we stated in *Briggs* that:

it would be anathema to AEDPA if we were to assume that the petitioner's contentions about the questionnaires are

true simply because the record before us does not contain the excused jurors' questionnaires. The burden to disprove the factual findings rests with Briggs. 28 U.S.C. § 2254(e)(1) (requiring "clear and convincing evidence" to rebut "a determination of a factual issue made by a State court").

Id.

It follows that the lack of prospective jurors' questionnaires does not relieve Ayala of his burden to show by clear and convincing evidence that the California Supreme Court was wrong in determining that the prosecutor was not biased. Accordingly, we must determine whether Ayala has shown that the lack of these questionnaires in his case renders the record insufficient for a determination of his federal claim. He fails in this task for several reasons.

First, the California Supreme Court reasonably rejected Ayala's claim that his constitutional rights were infringed by the loss of the bulk of prospective juror questionnaires. It explained:

The deficiency of which he complains is the absence of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk's office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States

Constitution — under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. (*People v. Alvarez*, 14 Cal.4th 155,] at p. 196, fn.8 [1996]).

Ayala, 6 P.3d at 208. The California Supreme Court concluded that if the loss of the questionnaires was error under either federal or state law, "it was harmless beyond a reasonable doubt." *Id.* This determination is reasonable and entitled to deference. *Rice*, 546 U.S. at 338-39.

Second, the determination is reasonable because the missing juror questionnaires are not critical to *Ayala*'s federal claims. The questionnaires of the 70 or so jurors who were never called are not relevant because *Ayala* does not allege, let alone show, that the potential jurors were excused due to constitutionally forbidden reasons.

Third, none of the prosecutor's stated reasons for recusing the questioned jurors relied solely, or even primarily, on the jurors' questionnaires. Rather, in each instance the prosecutor mentioned the juror's specific answers to questions posed on voir dire. In a couple of instances the prosecutor referenced a person's questionnaire, but this was primarily to explain why the prosecutor found the individual's oral responses troubling.

Finally, *Ayala* has ably presented his specific *Batson* challenges based on the voir dire transcript

and the extant questionnaires of the seated jurors and alternates. Although Ayala argues that the lost questionnaires might support his arguments, such a contention can be made about any lost document. If such speculation constituted prejudice, the standard would be reduced to a *per se* rule.

B. Challenges to the Individual Jurors

The remaining issue is whether Ayala has shown by clear and convincing evidence that no reasonable jurist could have credited the prosecutor's non-discriminatory reasons for excusing the seven jurors in issue. In other words, whether at least one fairminded jurist could agree with the California Supreme Court's opinion. The majority discusses only three of the jurors in its opinion, but a review of the prosecutor's reasons for excusing each of the seven jurors shows that the California Supreme Court's determination that "the challenged jurors were excluded for proper, race-neutral reasons" was reasonable. *See Ayala*, 6 P.3d at 204.

1. Olanders D.

Olanders D. was one of the first jurors challenged by Ayala. The trial court held that Ayala had not met the first prong of the *Batson* test (a *prima facie* showing that the challenge was based on race, *see Kesser*, 465 F.3d at 359), but nonetheless indicated that it would hear the prosecutor's reasons for the recusal in order to have a complete record. The prosecutor stated in the *ex parte* proceeding:

My primary concern with regard to [Olanders D.] is his ability to vote for the death [sentence] during the penalty phrase. On his questionnaire he indicated that he does not believe in the death

penalty. He did indicate that his view had changed over the last several years. He told us that he did want to serve. During the time that he was questioned, I felt that his responses were not totally responsive to the questions of either counsel for the defense or myself.

My observations in reading his questionnaire and before even making note of his racial orientation was that his responses on the questionnaire were poor. They were not thought out. He demonstrated a lack of ability to express himself well. And his answers did not make a lot of sense. As a result, I felt that he is not a person who could actively participate in a meaningful way in deliberations with other jurors, and his ability to fit in with a cohesive group of 12 people I sincerely question, and it was for that reason plus his stand on the death penalty that led me to believe that I did not want him on this jury.

The trial judge responded:

Okay. Certainly with reference to whether or not he would get along with 12 people, it may well be that he would get along very well with 12 people. I think the other observations of counsel are accurate and borne out by the record.

The California Supreme Court held that the record showed that the challenged jurors were excluded for proper, race-neutral causes. *Ayala*, 6 P.3d at 204. Addressing *Olanders D.*, the court

commented:

[T]he prosecutor stated he had exercised the challenge in part because his questionnaire indicated he opposed the death penalty. The prosecutor acknowledged Olanders D.'s oral statements that his views had changed, but commented that his answers were "not totally responsive to the questions of either counsel for the defense or myself." He further stated, in essence, that Olanders D.'s difficulties in communicating led him to question whether he would "fit in" on the jury. The court disagreed with the latter point, noting, "it may well be that he would get along very well with 12 people," but added: "I think the other observations of counsel are accurate and borne out by the record."

Id. The California Supreme Court further noted that the trial court "credited the prosecutor's opinion[] that Olanders D. opposed the death penalty." *Id.* at 206.

The majority claims that the prosecutor's motives for excusing Olanders D. is suspect for several reasons. First, Ayala "could have pointed to seated white jurors" who similarly expressed hesitancy to impose the death penalty. Majority at p. 57. Second, the majority asserts that its review of the voir dire transcript shows that "Olanders D.'s answers were responsive and complete." Majority at p. 58. Third, it claims that the responses of a seated white juror were just as unresponsive. Majority at p. 59. The majority concludes that none of the reasons proffered

by the prosecutor should be sustained because one was rejected by the trial judge, “two failed to distinguish the juror whatsoever from at least one seated white juror,” and the fourth cannot be evaluated because his questionnaire was lost. Majority at p. 60.

Were we reviewing the trial judge’s decision *de novo*, the majority’s approach might be persuasive. But the applicable standard is whether no fairminded judge could agree with the California Supreme Court’s determination that the juror was excluded for proper, race-neutral reasons. See *Richter*, 131 S. Ct. at 786. Ayala does not come close to meeting this standard.

There is no suggestion that any seated juror raised a similar set of concerns as Olanders D. The trial judge, who had the opportunity to observe Olanders D., agreed with the prosecutor that Olanders D. was ambivalent about the death penalty, had not been responsive on his questionnaire, and lacked the ability to express himself clearly. Moreover, the trial judge did not necessarily reject the prosecutor’s concern that Olanders D. could not participate in a meaningful way in jury deliberations, but rather only commented that it “may well be that he would get along very well with 12 people [on the jury].” The trial court’s determinations as affirmed by the California Supreme Court are presumed correct. *Rice*, 546 U.S. at 338-39 (“State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’ § 2254(e)(1).”).

The majority’s expressed concerns about Olanders D.’s recusal are far from compelling. It is hardly

surprising that a number of potential jurors expressed ambivalence about the death penalty. The fact that a prosecutor is more concerned with one potential juror's ambivalence than another is not necessarily a sign of racial prejudice. Similarly, the fact that the majority in reviewing the voir dire transcripts thinks that a seated juror's responses were no more responsive than Olanders D.'s is really of little moment. As noted, the trial judge — who heard Olanders D.'s voir dire — agreed with the prosecutor that he “demonstrated a lack of ability to express himself well.” The majority's supposition that Olanders D.'s questionnaire responses may not have been “poor” is not clear or convincing evidence of anything. At most, the majority's arguments and assumptions may suggest that the prosecutor's evaluation of Olanders D. was not compelled, but none of them really question the sincerity of the prosecutor's reasons or suggest a likelihood of some unstated improper motive. The majority fails to show that a fairminded jurist could not have agreed with the California Supreme Court.

The only indicia of possible racial bias was the fact that seven of the eighteen peremptory challenges exercised by the prosecutor excused African-American and Hispanic jurors. If this were enough to compel a finding of racial bias, there would be no reason for the second and third steps in the *Batson* standard or for deference to the trial court's determinations. The lack of any compelling evidence of racial bias is clear when the record in this case is compared to the prosecutor's statements in *Kesser*, 465 F.3d 351. There, in overcoming the deference due to the state court's determinations, we commented: “The racial animus behind the prosecutor's strike is clear. When he was asked to explain why he used a

peremptory challenge to eliminate [a juror], he answered using blatant racial and cultural stereotypes.” *Id.* at 357. Here, in contrast, all the majority can do is suggest that other jurors, like Olanders D., were uncomfortable with the death penalty, failed to offer thoughtful answers, and did not communicate well. But even if the prosecutor’s perceptions about Olanders D. were incorrect or not unique, that fact would not be such compelling evidence of pretext as to justify a failure to defer to the California Supreme Court’s reasoned determination that the jurors were excused for proper, race-neutral reasons.

2. *Gerardo O.*

Gerardo O. was one of the recusals that Ayala challenged in his second objection. The prosecutor explained his challenge to Gerardo O. as follows:

I made an observation of [Gerardo] when he first entered the courtroom on the first day that the jurors were called into the area.

At that time, he appeared to not fit in with anyone else. He was a standoffish type of individual. His dress and his mannerisms I felt were not in keeping with the other jurors.

He indicated to us at the beginning that he was illiterate. Actually, his words were that he was illiterate, and that he therefore had the questionnaire translated to him, so that he could make responses.

I observed him on subsequent occasions when he came to the court, and observed

that he did not appear to be socializing or mixing with any of the other jurors, and I also take into account his responses on the questionnaire and in the *Hovey* questioning process, at which time he expressed that he had no feeling with regard to the death penalty in writing.

When being questioned, he said that he was not sure if he could take someone's life, or if he could take someone's life into his hands.

He further responded in the *Hovey* process that there would be eleven other people, that he felt a little shaky as far as his responsibilities in this case.

For those reasons, I felt that he would be an inappropriate juror, and for that reason, I exercised the peremptory challenge.

The trial court accepted the prosecutor's reasons. It noted that the record supported the prosecutor's observations and commented that the recusal was based on Gerardo O.'s individual traits. The California Supreme Court in rejecting Ayala's *Wheeler/Batson* claim noted that "Gerardo O. struggled with English and did not understand the proceedings." *Ayala*, 6 P.3d at 206.

The majority does not deny that Gerardo O. stated that he was illiterate, or that he needed someone to fill out his questionnaire, or that he dressed differently, or that he did not mix with the other jurors. *See* Majority at pp. 61-65. Instead, the majority speculates that Ayala's lawyer might have shown that despite his own comments, Gerardo O.

was not illiterate, and that Geraldo O.'s "dress and mannerisms were distinctly Hispanic."¹⁷ Majority at p. 62. It further muses that the prosecutor's comments concerning Gerardo O.'s manner and aloofness and his ambivalence toward the death penalty could have been pretexts for an underlying racial bias.¹⁸ Majority at pp. 64-65. Of course, it is impossible to negate such possibilities, but there is

¹⁷ The majority's cited quote from *Hernandez v. New York*, 500 U.S. 352 (1991), demonstrates that *Hernandez* is not applicable to this case. The Supreme Court noted "the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges." *Id.* at 363. Here, the prosecutor did not mention any concern with Gerardo O.'s ability to speak Spanish and there does not appear to be any indication that any juror's ability to speak Spanish was an issue. Instead, the majority, having poured over the record to determine that Gerardo O., despite his own admission of illiteracy, had "attended college in the United States," opines that he "was perfectly capable of reading the summary of legal issues that was given to prospective jurors." Majority at p.6 1-62. It then leaps to the unsupported conclusion that the prosecutor's purported reason for striking Gerardo O. was directly related to his status as someone who spoke Spanish as his first language. Majority at p. 62. The majority's speculation may not be illogical, but it is far from compelling.

¹⁸ The majority also suggests that Gerardo O.'s ambivalence to the death penalty was no more pronounced than some seated white jurors. Majority at pp. 64-65. As previously noted, the potential jurors' attitudes toward the death penalty was an important consideration for both the defense and the prosecution. The fact that the prosecutor distinguished between levels of ambivalence that the majority over twenty years later argues are indistinguishable is hardly a sign of pretext. Moreover, there is no doubt that Gerardo O.'s qualifications — professed illiteracy, distinctive dress and aloofness, and ambivalence to the death penalty — were unique.

nothing but the majority's imagination to fuel its assertions.¹⁹ Here, the trial judge agreed with the prosecutor's observations of Gerardo O. and the California Supreme Court affirmed. The majority has not presented the type of clear evidence that the United States Supreme Court has held is necessary to overcome our deference to state court findings. *See Rice*, 546 U.S. at 338-39.

3. *Robert M.*

Robert M. was one of the last persons whose recusal was challenged. The prosecutor explained his reasons as follows:

As far as [Robert M.] is concerned, Miss Michaels and I had discussions during the selection process here in court, even as late as immediately before the exercise of the last challenge.

The court would note that I had passed at one point, leaving [Robert M.] on.

I have always felt some degree of reluctance with regard to [Robert M.], and my concern primarily is in the area of whether, after conviction, [Robert M.] would actually vote for the death penalty, and it was my view that taking all of his responses in *Hovey* into account, and the — some of his responses even as late as yesterday — for example, the following of the Sagon Penn case. It was Miss Michaels

¹⁹ The majority goes so far as to fantasize that “perhaps” unbeknownst to the trial judge, Gerardo O. “had even organized a dinner for some of them at his favorite Mexican restaurant.” Majority at p. 63.

doing the questioning at that time, and I did not actually — it would have been possibly a disadvantage or a disservice to inquire further as to his impressions about the Sagon Penn case.

I'm concerned about that case because the fact that Mr. Penn, in a very notorious trial here, was found not guilty in a second trial, and allegations of misconduct with regard to the District Attorney's office and the police were certainly rampant in that case.

There's really no way for me to inquire as to where [Robert M.] actually stood.

As far as [Robert M.] is concerned, our scores, a combination of all the factors — Mr. Cameron graded [Robert M.] as a four, Miss Michaels had rated [Robert M.] as a five, and my score on him was four to a five, somewhere in that area.

I had before doing any of the selection process, resolved that at the very best, we would not wish to have any jurors on this case whose combined score was five or less.

In spite of that, I passed once on him, but it is my view, basically, that because of his attitudes with regard to the death penalty, such as in his first response to whether he would always vote for — well, in the question number one about whether he would always vote for guilt, he indicated that it was a difficult question.

He said that he believed in the death penalty, but it was hard for him to be involved in the death penalty.

With regard to questions about whether he would vote for death, he said no, it would be hard to say, no, I don't know what the evidence is, and Miss Michael's reasons, which she expressed to me, and I have to agree with, is a great degree of concern about whether if we get to that point he could actually vote for death, and having that kind of a question in my mind as I'm trying this case would be distracting and worrisome to me during the process of the trial.

The trial judge accepted the prosecutor's reasons, noting that although Robert M. "is certainly pro the death penalty," his answers varied and "there may well be a legitimate concern as to whether or not he could impose it." The court further noted that "an appropriate use of a peremptory would be for a person that any party feels either could not vote for death or could not vote for life." In affirming Ayala's conviction the California Supreme Court observed "that Robert M. was less than desirable from the prosecution's point of view." *Ayala*, 6 P.3d at 206.

Again, the majority does not really question the prosecutor's reasons, but speculates that had Ayala's counsel been present he might have argued that Robert M.'s reluctance to impose the death penalty was not different from other jurors' reluctance. Majority at pp. 66-67. In addition, the majority does not deny that Robert M. had stated that he had

followed the Sagon Penn case, but argues that he only mentioned this briefly.²⁰ Majority at p. 68. Nonetheless, Robert M.'s interest in a recent notorious criminal case that involved misconduct by the prosecutor and resulted in a not guilty verdict is a legitimate non-discriminatory reason for recusal by the prosecutor.

4. *The Other Jurors*

The only other recused juror that the majority mentions is George S. See Majority at p. 56-57 n.16. The prosecutor explained that he had recused George S. because he (a) stated that he had sat on a prior jury and “was the one hold-out with regard to whatever issue was being presented at that time”; (b) was equivocal on the death penalty, (c) had been rejected as a police officer candidate, and (d) placed undue emphasis on the Bible. The trial judge commented that the prosecutor's observations were accurate. The majority does not deny that the prosecution offered these individualized grounds for the recusal. Instead, the majority dismisses the fact that George S. had been a holdout juror with the comment that it was a civil action and speculates

²⁰ The extent of the majority's speculation is illustrated by its argument that because another juror who was seated mentioned that he was aware of the capital case *People v. Harris*, 623 P.2d 240 (Cal. 1981), the prosecutor's concern with Robert M.'s interest in the Sagon Penn case may have been pretextual. Majority at pp. 67-68. This argument assumes that somehow the *Harris* case was similar to the Sagon Penn case. This seems unlikely as the crime in *Harris* took place in 1978, some eleven years before the jury selection process in this case. Moreover, unlike the alleged verdict in the Sagon Penn case, Harris was found guilty and the California Supreme Court's opinion, which issued in 1981, did not find any serious misconduct by the district attorney.

that George S.'s alleged emphasis on the Bible "cannot be evaluated at all" because of the loss of the questionnaires. *See* Majority at p. 56 n.17. Again, perhaps the majority's assertions suggest that the prosecutor's views were not compelled, but they do not really undermine their reasonableness or sincerity.

There were valid nondiscriminatory grounds for recusing the remaining three minority jurors. Galileo S. was recused because he (a) displayed a non-conformist attitude to the justice system, (b) had more run-ins with the law than he admitted, and (c) had an attitude that might create alienation and hostility on the part of other jurors. Luis M. was challenged because he (a) expressed ambivalence on the death penalty, (b) had investigated the case on his own, and (c) left the military with a low rank suggesting some sort of misconduct or inability to perform. Barbara S. was challenged because (a) her responses to oral questions were slow, (b) she had an empty look in her eyes and seemed out of tune with what was going on, and (c) her written and oral answers were incomplete and non-responsive.

As with the other recused jurors, the prosecution team offered individualized reasons for each of these recusals. There is no blatant racism, no reference to stereotypes (veiled or otherwise), and no discernable pattern of discrimination in the reasons advanced by the prosecution. Nonetheless, these recusals are susceptible to the type of speculative challenges that the majority hurls at the recusals of Olanders D., Gerardo O., and Robert M. In all likelihood, other jurors expressed ambivalence and equivalence about the death penalty, other jurors offered slow or incomplete responses, and other jurors probably had

been denied employment or performed poorly in a job. These might be appropriate avenues to explore at the time that a recusal is made. But we are reviewing a 1989 state trial pursuant to AEDPA, and the Supreme Court in its recent opinions has reiterated that (a) *Batson* issues turn largely on evaluations of credibility, (b) the trial court's determination is entitled to great deference, (c) the determination must be sustained unless it is clearly erroneous, and (d) AEDPA demands that state-court decisions be given the benefit of the doubt. *See Felkner*, 131 S. Ct. at 1307.

The California Supreme Court may not have been compelled to conclude that “the challenged jurors were excluded for proper, race-neutral reasons.” *Ayala*, 6 P.3d at 204. But its conclusion was objectively reasonable. That is, *Ayala* has not shown that the California Supreme Court's ailing “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. As in *Richter*, the majority's opinion “illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system.” *Id.* at 787.

IV

The Supreme Court decided *Batson v. Kentucky* in 1986, a year after *Ayala* killed three men and three years before his murder conviction. In *Batson*, the Supreme Court declined “to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.” 476 U.S. at 99.

I would hold that Ayala's claim that he had a constitutional right to have counsel present when the prosecutor offered its reasons for the challenged recusals was not dictated by precedent when Ayala's conviction became final, and thus is *Teague*-barred.

Ultimately, however, this case turns on the reasonableness of the California Supreme Court's 2000 opinion that the absence of defense counsel and the loss of jury questionnaires were harmless error beyond a reasonable doubt as a matter of federal law. *Ayala*, 6 P.3d at 204. Following the Supreme Court's pointed guidance in *Richter*, 131 S. Ct. 770, and *Williams*, 133 S. Ct. 1088, we must conclude that the California Supreme Court adjudicated Ayala's federal claims on their merits and thus apply AEDPA's deferential standard of review.²¹

This standard of review mandates that we determine whether fairminded jurists could agree with the California Supreme Court. In other words, we can grant relief only if no fairminded jurist could find that the exclusion of defense counsel and the loss of questionnaires did not prevent Ayala from prevailing on his *Batson* claim. Here, the evidence of valid non-pretextual reasons for the prosecutor's recusals renders the state court's decision objectively reasonable.

²¹ I do not agree with some of the majority's characterizations of my dissent. I have set forth my reasons in this dissent and trust the reader will be able to discern the respective merits of the majority and dissent without further assistance. To the extent the majority accuses me of relying heavily on recent Supreme Court opinions such as *Richter*, 131 S. Ct. 770, *see* Majority at p. 51-52, n. 14, the accusation is accurate.

Because the majority fails to appreciate that Ayala's federal claim is *Teague*-barred, and applies a *de novo* standard of review, despite the Supreme Court's contrary directions, I dissent.

Filed October 23, 2006

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

HECTOR JUAN AYALA, Petitioner,

vs.

ROBERT L. AYERS, JR., Acting Warden of the
California State Prison at San Quentin, Respondent.¹

Case No. 01cv1322-IEG(PCL)

ORDER DENYING PETITIONER'S MOTION
FOR SUMMARY JUDGMENT ON GROUP 2
CLAIMS AND DENYING REQUEST FOR
EVIDENTIARY HEARING; GRANTING
RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT ON GROUP 2 CLAIMS

Petitioner Hector Juan Ayala and Respondent Steven Ornoski have moved for summary judgment on Petitioner's Group 2 claims which include Grounds 1, 2, 4, 5, and of his Third Amended Petition. The parties have filed opposition and reply briefs.

A hearing was held before Chief Judge Irma E. Gonzalez on August 15, 2006. Anthony Dain and Tiffany Salayer appeared on behalf of Petitioner. Steven Oetting of the California Attorney General's Office appeared on behalf of Respondent. Following the hearing, upon the Court's request, the parties also filed supplemental briefs on the possible implications of two recent Ninth Circuit decisions on

¹ Robert L. Ayers, Jr. is the is the current Acting Warden at San Quentin, and the Court directs the Clerk to reflect this in the case caption.

the Group 2 claims.

Upon consideration, the Court DENIES Petitioner's motion for summary judgment and GRANTS Respondent's motion for summary judgment on the Group 2 claims.

OVERVIEW

By an amended information filed on January 20, 1987, Petitioner Hector Juan Ayala ("Petitioner") and his brother Ronaldo Medrano Ayala were charged with the murders of Jose Luis Rositas, Marcos Antonio Zamora and Ernesto Dominguez Mendez. The information alleged that the murders were committed on or about April 26, 1985, during a robbery attempt where the brothers held four men captive in an automobile repair shop. Both men were also charged with the attempted murder of Pedro Castillo, who was shot during the drug-related robbery attempt, but who escaped and survived. At trial, the prosecution also presented evidence that a third man, Jose Moreno, helped in the commission of these crimes. Castillo provided the information to police that led to the arrests and was the key prosecutors witness at trial.

Petitioner was convicted on August 1, 1989, of three counts of first-degree murder in violation of California Penal Code ("CPC") § 187, one count of attempted murder in violation of CPC §§ 664 and 187, and one count of robbery and three counts of attempted robbery in violation of CPC §§ 664 and 211 — each count with findings that Petitioner used a firearm in the commission of the crimes in violation of CPC § 12022.5. Petitioner was also found guilty of the two special circumstance allegations, multiple murder under CPC § 190.2(a)(3), and murder in the

attempted commission of a robbery under CPC § 190.2(a)(17)(1). The jury returned a verdict of death for each of the three murders on August 31, 1989, and the court entered judgment in accordance with the verdict on November 30, 1989.

Petitioner filed his opening brief on automatic appeal to the California Supreme Court on April 23, 1998, raising nineteen (19) separate issues. The California Supreme Court denied the appeal on August 28, 2000. *People v. Ayala*, 24 Cal. 4th 243 (2000). On November 15, 2000, the state court denied the petition for rehearing.

On August 9, 1999, Petitioner filed a habeas petition with the California Supreme Court, raising three (3) grounds for relief. Petitioner was not granted an evidentially hearing on those claims and his petition was summarily denied on the merits on August 30, 2000. On March 15, 2001, Petitioner filed a Writ of Certiorari with the United States Supreme Court, which was denied on May 14, 2001. On May 14, 2001, his judgment became final.

On July 20, 2001, Petitioner filed a request for appointment of counsel to handle his federal habeas petition. Petitioner filed an initial petition in this court on May 14, 2002. After later filing a Second Amended Petition in this court on December 13, 2002, Petitioner filed a second state habeas petition in the California Supreme Court on March 17, 2003. The state petition was filed in order to exhaust several unexhausted claims.

Petitioner filed his Third Amended Petition with this court on December 9, 2004. On April 11, 2006, the Court denied Petitioner's request for an evidentially hearing regarding Petitioner's Group 1

Claims (Claims 12 and 13) and granted Respondent's motion for summary adjudication of those claims.

STANDARD OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody *in violation of the Constitution or laws or treaties of the United States*.

28 U.S.C. § 2254(a) (West 1994) (emphasis added).

In *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), the United States Supreme Court held that the new provisions of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") "generally apply only to cases filed after the Act [AEDPA] became effective." In capital habeas actions, cases are typically commenced by the filing of requests for appointment of counsel and stays of execution of the petitioners' death sentences. Petitioner filed his request for appointment of counsel and stay of execution on April 27, 2001 and filed his petition with this Court on May 6, 2002. The AEDPA became effective on April 24, 1996, when the President signed it into law. *See id.* Accordingly, the AEDPA applies to this case.

Relevant to this case are the changes AEDPA rendered to 28 U.S.C. § 2254(d), which now reads:

(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.

28 U.S.C.A. § 2254(d)(1)-(2) (West Supp. 2005). “A state-court decision is ‘contrary to’... clearly established precedents if it ‘applies a rule that contradicts the governing law set forth in our cases’ or if it ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent.’” *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court decision involves an “unreasonable application” of clearly established federal law “if the state court identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case” or “if the state court either unreasonably extends a legal principle from [the Supreme Court’s] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Williams*, 529 U.S. at 407.

Even when the federal court undertakes an independent review of the record in the absence of a reasoned state court decision, the federal court must “still defer to the state court’s ultimate decision.” *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). If the state court decision does not furnish any analytical foundation, the review must focus on Supreme Court cases to determine “whether the state court’s resolution of the case constituted an unreasonable application of clearly established federal law.” *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2001). Federal courts also look to Ninth Circuit law for persuasive authority in applying Supreme Court law and to determine whether a particular state court decision is an “unreasonable application” of Supreme Court precedent. *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

TEAGUE v. LANE

The United States Supreme Court, addressing perceived inconsistencies in its prior rulings regarding retroactive application of its decisions, held that “new” constitutional rules of criminal procedure will not be applied retroactively to cases on collateral review unless they fall within two narrow exceptions. *Teague v. Lane*, 489 U.S. 288 (1989). A new rule is one that “breaks new ground or imposes a new obligation on the States or the Federal Government” or one whose “result was not dictated by precedent existing at the time defendant’s conviction became final.” *Id.* at 301. The two exceptions to the *Teague* rule are: (1) rules placing certain kinds of private individual conduct beyond the power of the criminal law to prohibit, and (2) procedures implicit in the concept of ordered liberty without which the likelihood of an accurate conviction is seriously

diminished. *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989); *Graham v. Collins*, 506 U.S. 461, 478 (1993).

When the state properly argues that a “defendant seeks the benefit of a new rule of constitutional law, the court must apply *Teague* v. Lane before considering the merits of the claim.” *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Under *Teague*, habeas relief is generally unavailable if it is based “on a rule announced after [a petitioner’s] conviction and sentence became final.” *Id.* Therefore, the court must first ascertain the date on which a petitioner’s conviction became final. *Id.* The second step in a *Teague* analysis is to determine whether a state court considering the contested claim would have felt compelled by existing precedent to conclude that the rule petitioner seeks was required by the Constitution at the time his or her conviction became final. *Id.* at 389-90. Third, if the court determines that a petitioner is seeking relief under a new rule, the court must then decide if that rule falls under one of the two exceptions to *Teague*. *Id.* at 390.

The Court must determine whether the decision Petitioner relies upon announces a new rule. If it does, and if neither *Teague* exception applies, Petitioner may not rely upon that case. Even if Petitioner does not seek to apply a decision creating a new rule, “it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.” *Stringer v. Black*, 503 U.S. 222, 228 (1992), referencing *Butler v. McKellar*, 494 U.S. 407, 414-415 (1990).

Respondent asserts that this Court is barred from deciding the merits of Claims 1, 2 and 5, as those three claims propose the creation of new rules of

criminal procedure which are barred under *Teague*. (Answer to Third Amended Petition [“Ans.”] at 22, 27, 31.) Petitioner disputes Respondent’s position, maintaining that these claims are not *Teague*-barred, and arguing that “[w]hether a rule of law is ‘new’ is dictated by what the controlling law was at the time Petitioner’s state court judgment became final.” (Petitioner’s Motion for Summary Adjudication [“Pet. MSA”] at 7.) Petitioner argues that this Court is bound by Ninth Circuit precedent in applying Supreme Court law, and that Ninth Circuit holdings can create a ‘clearly established’ rule of law under *Teague*.

Regarding Claims 1 and 2, Petitioner points to the Ninth Circuit holding in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), as evidence that those claims do not involve a new rule of law under *Teague*. (Pet. MSA at 8-9.) Petitioner does not make any argument regarding the inapplicability of *Teague* to Claim 5, instead arguing against the application of *Teague* to Claim 4. (*Id.* at 16.) Respondent does not assert a *Teague*-bar on Claim 4.

The California Supreme Court denied Petitioner’s direct appeal on August 28, 2000, and denied rehearing on November 15, 2000. The United States Supreme Court denied certiorari on May 14, 2001, at which time Petitioner’s conviction became final.² Under *Teague*, Petitioner may not avail himself of a decision announced after his conviction was finalized, or advocate a decision by this court, which creates a

² Respondent erroneously states the standard, as a “new rule” for *Teague* purposes is one that was established after a petitioner’s conviction became final and not at the time of his trial. *Teague*, 489 U.S. at 301.

new rule of criminal procedure.

1. Claims 1 and 2

In Claim 1, Respondent maintains that “at the time of his (Petitioner’s) trial, there were no clearly established rules of criminal procedure requiring counsel for the defense to be present when a prosecutor sets forth his reasons for peremptorily challenging jurors under *Batson v. Kentucky*.” (Respondent’s Motion to Dismiss [“Resp. MTD”] at 2.) In Claim 2, Respondent asserts that “at the time of his trial there was no established rule of criminal procedure that a defendant had a right to be personally present when the prosecution provided its reasons for peremptorily challenging a juror under *Batson*.” (*Id.* at 19.) Respondent then aptly asserts that requiring a prosecutor to state these reasons in the presence of defense counsel and the defendant, with the failure to do so constituting structural trial error, creates a new rule of criminal procedure that was not clearly established at the time Petitioner’s conviction became final. (*Id.* at 12-13, 19-20.)

Petitioner submits that in 1987, well before Petitioner’s judgment became final, the Ninth Circuit held that a “district court erred in refusing to allow defense counsel in this case to hear the government’s reasons for excluding the black potential jurors and to present argument thereon.” (Pet. MSA at 7-9.), citing *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987). More recently, however, the Ninth Circuit has noted that it is not “clearly established” whether defense counsel must be permitted to make any argument to rebut the prosecutor’s proffered race-neutral reasoning for excluding prospective jurors:

One can argue that a court must allow defense counsel to present argument during the three-step inquiry, unless the record clearly shows that a decision in the defendant's favor is warranted. After all, the defendant bears the ultimate burden of persuasion, *see Batson*, 476 U.S. at 98, 106 S.Ct. at 1712, and has only been allowed to establish a *prima facie* case before step three. However, this argument appears not to have been addressed by courts. *Certainly, requiring a court to allow defense counsel to argue is not clearly established law.* Nonetheless, it seems wise for courts to allow counsel to argue, if only to remove some of the burden of record evaluation from the court.

Lewis v. Lewis, 321 F.3d 824, 831 fn.27 (9th Cir. 2003) (emphasis added). If a defendant does not have a clearly established right to offer a rebuttal to a prosecutor's proffered reasons for exercising a peremptory challenge, it cannot be said that it is clearly established that the defendant and his counsel must be present while the prosecution's proffer is made.

Respondent concedes that under Ninth Circuit precedent, circuit authority can suffice to create a clearly-established rule of law under *Teague*. (Resp. MTD at 16); *Leavitt v. Arave*, 383 F.3d 809, 819 (9th Cir. 2004); *Bell v. Hill*, 190 F.3d 1089, 1093 (9th Cir. 1999). Respondent also notes that other circuit courts disagree with the Ninth Circuit on whether circuit authority can create a clearly established rule of law under *Teague*. *See Soffar v. Cockrell*, 300 F.3d 588,

598 (5th Cir. 2002) (en banc). Petitioner cites no *Supreme Court* authority in existence as of the date his conviction became final which would have compelled reasonable state jurists to conclude that trial counsel and Petitioner were constitutionally entitled to be present at the *Batson* inquiry. In addition, as the Ninth Circuit held in *Lewis*, the rules Petitioner seeks to apply to the instant case are not clearly established rules of law under *Teague*. The proposed rules do not concern private individual conduct nor do they concern procedures implicit in the concept of ordered liberty, and therefore do not fall within either exception to *Teague*. Thus, Claims 1 and 2 propose the application of new rules of criminal procedure, and are barred under *Teague v. Lane*.

2. Claim 5

Respondent argues that, [a]ny requirement that the state court was required for the first time on appeal to allow comparison of the responses of jurors who were allegedly excused on the basis of race with those who were not would amount to a new rule of criminal procedure,” and is thus barred under *Teague v. Lane*. (Resp. MTD at 24.) Respondent also argues that “the Ninth Circuit has concluded, at the time of Petitioner’s direct appeal, there was no clearly established law *requiring* a comparative juror analysis on appeal.” (*Id.*); *Boyd v. Newland*, 393 F.3d 1008, 1014-15 (9th Cir. 2004); *Kesser v. Cambra*, 392 F.3d 327, 342-44 (9th Cir. 2004) (emphasis added). Petitioner did not initially offer any *Teague* argument on Claim 5.

The Ninth Circuit has held that comparative juror analysis, as outlined in *Miller-El v. Dretke*, 545 U.S. 231 (2005), merely clarifies the Supreme Court’s holding in *Batson* by offering another potential tool

for the courts to utilize in analyzing such claims, and does not establish a new rule of criminal procedure. *Boyd v. Newland*, 455 F.3d 897, 904-06 (9th Cir. 2006). The Ninth Circuit in *Boyd* rejected the contention that the claims regarding comparative analysis were *Teague*-barred, and ruled on the merits of the claim. *Id.* at 904. Respondent acknowledged this point in the supplemental briefings ordered by the Court. (Respondent's Supplemental Briefing "Resp. SB" at 4.) Thus, Petitioner's Claim 5 argument does not propose the application of a new rule of criminal procedure, and is not barred under *Teague v. Lane*.

DISCUSSION OF MERITS OF PETITIONER'S CLAIMS

1. Claims 1 and 2 — the Exclusion of Petitioner and his Counsel from the Wheeler/Batson hearings

Notwithstanding the Court's finding that Petitioner's Claims 1 and 2 are *Teague*-barred, the Court will also discuss the merits of those claims. Petitioner alleges that the trial court's exclusion of defense counsel from the hearing during which the prosecutor proffered its reasons for exercising peremptory challenges resulted in a "violation of his constitutional rights to an adversarial hearing, to assistance of counsel during a critical stage of the proceedings against him, to a reliable determination of his death penalty, and to due process." (Third Amended Petition ["Pet."] at 14.) Petitioner further alleges that the trial court's exclusion of him personally resulted in a "violation of his constitutional rights to be personally present...." (Pet. at 21.)

A. Factual Background

Jury selection began in Petitioner's case on January 17, 1989. [2 RT 41] The selection process was divided into three phases: screening for hardship, individual sequestered voir dire pursuant to *Hovey v. Superior Court*, 28 Cal.3d 1 (1998), and general voir dire. This process took three-and-a-half months. During the group voir dire, the defense brought three motions pursuant to *People v. Wheeler*, 22 Cal.3d at 258, California's equivalent to *Batson v. Kentucky*, 476 U.S. at 79, claiming the prosecution was improperly exercising its peremptory challenges against minority prospective jurors on the basis of their race or ethnic background. [50 RT 6094-97; 6217-18; 51 RT 6344-50.]

The trial court asked the prosecution to explain its reasons for the challenges. [50 RT 6094-95; 50 RT 6217-18; 51 RT 6344.] The prosecutor stated he did not wish to reveal his strategy and requested that the court hold an ex parte hearing from which defendant and his counsel would be excluded. [50-1 RT 6184-86.] Defense counsel stated that he had no objection to being excluded from discussions of strategy, but that "I think I am entitled to be present" otherwise, in case the prosecution's "statement is a misstatement of the facts" and to "make sure the record is clear as to what the statement of facts is." [50 RT 6096.] The court overruled defense counsel's objection and held three ex parte hearings. Following each hearing, the trial court ruled that the prosecutor was not challenging jury panelists because of race or ethnicity. [50-1RT 6186; 51-1 RT 6307; 51-1 RT 6358.]

B. The California Supreme Court's Ruling

The California Supreme Court denied Petitioner's claim that the trial court erred in excluding him and his counsel from the three ex parte hearings. The California Supreme Court first laid out the legal standard to be applied in ruling upon a defendant's challenge under *Wheeler* and *Batson*. *Ayala*, 24 Cal. 4th 243, 259-269.

“Under *Wheeler*, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. [Citation.] The defendant bears the burden to show; prima facie, the presence of purposeful discrimination. [Citation.] If he succeeds, the burden shifts to the prosecutor to show its absence.” (*People v. Alvarez* (1996) 14 Cal. 4th 155, 193 [58 Cal. Rptr. 2d 385, 926 P.2d 365].)

The details of the procedure for conducting an inquiry on a claim of improper group bias against prospective jurors are well known. In the first step of the three-part *Wheeler* inquiry, “[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First,... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the

circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association...” (*People v. Box* (2000) 23 Cal. 4th 1153, 1187-1188 [99 Cal. Rptr. 2d 69, 5 P.3d 130].) Next, the burden shifts to the challenged party to provide a race-neutral explanation for the exercise of peremptory challenges. (*People v. Hayes* (1999) 21 Cal. 4th 1211, 1284 [91 Cal. Rptr. 2d 211, 989 P.2d 645].) At the third step of the *Wheeler* challenge process—the determination by the trial court whether the opponent of the peremptory challenge has proved purposeful racial discrimination—the trial court must consider at least two possibilities. If the prosecutor acknowledges that he challenged a prospective juror for an impermissible reason (*see U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256, fn. 1), then, of course, the *Wheeler* motion must be granted. If the prosecutor does not so state, but instead offers the court race-neutral reasons, it must still determine whether those stated reasons are untrue and pretextual. (*People v. Alvarez, supra*, 14 Cal. 4th 155, 196.)

Id. at 260-61. The California Supreme Court noted that the United States Supreme Court has established no particular procedures which are constitutionally required:

Provided that the inquiry proceeds within the general framework just

articulated, no particular procedures are constitutionally required. As the United States Supreme Court said of *Batson* hearings, “It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.” (*Powers v. Ohio* (1991) 499 U.S. 400, 416 [111 S.Ct. 1364, 1374, 113 L.Ed.2d 411].) “The response of courts across the country has created a rather wide spectrum, ranging from those that recommend an adversary proceeding of some type to those that permit the prosecutor’s explanation to be received in camera and ex parte.” (*Gray v. State* (1989) 317 Md. 250, 257 [562 A.2d 1278, 1281].)

Id. at 261.

The California Supreme Court initially rejected the trial court’s implicit ruling that the prosecution’s reasons for exercising the peremptory challenges were matters of trial strategy justifying an *ex parte* hearing. *Id.* at 262. The Court further concluded that because no matters of trial strategy were revealed, it was error “as a matter of state law” to exclude defendant from participating in the hearings. *Id.* In finding that the procedure was erroneous under state law, the California Supreme Court relied heavily upon the Ninth Circuit’s decision in *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987):

The question whether ex parte communications are proper in ruling on a *Wheeler* motion has not arisen in

California decisional law. But the same or closely related issues have arisen in federal and other state cases discussing analogous motions brought under *Batson v. Kentucky*, *supra*, 476 U.S. 79. While some decisions have tolerated an ex parte Batson hearing procedure on the ground that the United States Constitution permits it (*U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340; *U.S. v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1202), it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them. (*People v. Hameed* (1996) 88 N.Y.2d 232, 237-238 [644 N.Y.S.2d 466, 469, 666 N.E.2d 1339, 1342]; *U.S. v. Roan Eagle* (8th Cir. 1989) 867 F.2d 436, 441; *Gray v. State*, *supra*, 317 Md. 250, 257-258 [562 A.2d 1278, 1282]; *U.S. v. Tindle* (4th Cir. 1988) 860 F.2d 125, 132-133 (conc. & dis. opn. of Murnaghan, J.); *U.S. v. Garrison* (4th Cir. 1988) 849 F.2d 103, 106; *U.S. v. Tucker*, *supra*, 836 F.2d at p. 340; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452, 40 Tex. Sup. Ct. J. 487 [civil case].) We agree.

U.S. v. Thompson, *supra*, 827 F.2d 1254, presented the issue and the countervailing values involved: “The question presented to us is... whether the district judge erred by permitting the

[prosecutor] to state her reasons to him ex parte and then ruling on the objection without divulging the reasons to defense counsel. In resolving this issue we must consider and reconcile two fundamental principles of our criminal justice system. The first is that the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him. [Citations.] The second principle is that adversary proceedings are the norm in our system of criminal justice, [citation], and ex parte proceedings the disfavored exception.” (*Id.* at p. 1257.)

U.S. v. Thompson, supra, 827 F.2d 1254, further explained: “The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decisionmaker-judge or jury-has the benefit of forceful argument by both sides....

“There are, to be sure, occasional departures from this norm. The district judge makes an ex parte review of the prosecution’s evidence to determine whether it falls within the rule of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). [Citations.]

Also, the district judge normally considers on an ex parte basis whether to reveal to the defense the identity of a government informant. [Citation.] But, as these examples illustrate, situations where the court acts with the benefit of only one side's presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and... may amount to a denial of due process." (*U.S. v. Thompson, supra*, 827 F.2d 1254, 1258-1259, fn. omitted.)

In addition to the foregoing general considerations, it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete.

Ayala, 24 Cal. 4th at 262-264.

The California Supreme Court found, however, that the state law error, and any federal error that may have occurred, was harmless. *Id.* at 268-69. In concluding that the error was harmless, the Court closely examined the record of the voir dire. Based upon that review the Court concluded as follows:

In summary, the record reveals the following facts in support of the view that the prosecutor was not engaged in racial or ethnic discrimination. The court

credited the prosecutor's opinions that Olanders D. opposed the death penalty, that Barbara S. was in a dazed state, that George S. had been a holdout juror and had been rejected for a law enforcement position, and that Robert M. was less than desirable from the prosecution's point of view. Galileo S., among other deficiencies, had (unless the prosecutor was misleading the court) not been honest regarding his criminal past. Luis M. admitted that he had investigated the case. Gerardo O. struggled with English and did not understand the proceedings. A prosecution committee, including a psychologist, gave Barbara S., George S., and Robert M. poor or mediocre suitability ratings. George S.'s surname is not obviously Spanish, and the prosecutor stated that he was unaware of his Hispanic heritage.

On these facts, we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings. [FN3 omitted] Moreover, the trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications. To the extent the rulings expressed agreement with the prosecutor's characterizations of the prospective jurors and their responses, they also support the court's implicit conclusion that the prosecutor did not

fabricate his justifications and they were grounded in fact.

Id. at 266-67. The Court recognized the theoretical possibility that exclusion of a defendant from an ex parte *Wheeler* hearing may result in an incomplete record. *Id.* at 267. The Court found, however, “[o]n this well-developed record... we are confident that defense counsel could not have argued anything substantial that would have changed the court’s rulings. Accordingly, the error was harmless.” *Id.* at 268.

Finally, the California Supreme Court rejected the contention that the error violated Petitioner’s right to be present and to be represented by counsel, finding any federal constitutional error also to be harmless. *Id.* at 269.

C. Discussion

Assuming that Claims 1 and 2 are not *Teague*-barred, those claims fail on their merits. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court first held that the United States Constitution prohibits a prosecutor from exercising a peremptory challenge solely on the basis of race. Evaluating whether a peremptory challenge was race-based under *Batson* is a three-step process, requiring that (1) the defendant must demonstrate a prima facie case that the prosecutor challenged the contested jurors due to their race, (2) if the defense made a prima facie showing of discrimination, the burden shifts to the prosecution to articulate racially-neutral explanations for those challenges, then (3) the trial court must determine if the defendant met his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96-98. At the final step, the trial court

must “evaluat[e] ‘the persuasiveness of the justification’ proffered by the prosecutor, but ‘the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.’” *Rice v. Collins*, ___ U.S. ___, 126 S. Ct. 969, 974 (2006) (quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*)).

The Supreme Court has never suggested the exact manner in which trial courts must gather evidence necessary to make its determination that the exercise of a peremptory challenge was (or was not) motivated by racial animus. In *Batson*, the Court specifically left it to the lower courts to “formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Id.*, 476 U.S. at 99 & fn.24 . Seizing upon this language, both the Sixth and Seventh Circuit Courts of Appeals have concluded that a trial court does not err in allowing a prosecutor to explain his or her reasons for exercising a peremptory challenge in an ex parte proceeding outside the presence of the defense. *United States v. Tucker*, 836 F.2d 334, 337-40 (7th Cir. 1988); *United States v. Davis*, 809 F.2d 1194, 1201-02 (6th Cir. 1987). In *Tucker*, the Seventh Circuit noted that *Batson* itself “does not require rebuttal of the Government’s explanation by defense counsel” nor does it “require the participation of defense counsel...” 836 F.2d at 339; *see also Davis*, 809 F.2d at 1202 (“Once the defendants had established a prima facie case of racial motivation sufficient for the district court to make an inquiry of the Government, there was nothing more defendants were required to do. Their participation was no longer necessary for the district court to make its determination.”)

Subsequent to the Sixth and Seventh Circuits

decisions, the Supreme Court acknowledged, albeit in dictum, that “[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in camera* discussion can be arranged.” *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Just last year, the Second Circuit again noted that “there also remains doubt whether the defense enjoys the even more rudimentary right to be allowed access to the prosecution’s race-neutral explanations in the first place.” *Majid v. Portuondo*, 428 F.3d 112, 128 (2d Cir. 2005).

In the face of this authority tending to demonstrate that there is no clearly established federal law prohibiting the trial court from holding *ex parte Batson* proceedings, Petitioner relies upon *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), as well as the general right of a defendant to be present during critical stages of a felony trial in arguing that he is entitled to relief. In *Thompson*, the Ninth Circuit noted that “[a]bsent ... compelling justification, *ex parte* proceedings are anathema in our system of justice and, in the context of a criminal trial, may amount to a denial of due process.” *Id.* at 1258-59. The court held that because the prosecutor’s proffered reasons for exercising a peremptory challenge were not strategy-related, the trial court erred in excluding defendant and his counsel from those proceedings. *Id.* at 1259. Petitioner in this case also relies upon general authority establishing that voir dire is a critical stage of the felony criminal proceeding, during which the defendant has a right, derived from the Confrontation Clause of the Sixth Amendment, to be present. *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citing *Lewis v. United States*, 146 U.S. 370,

374 (1892)).

The California Supreme Court concluded that the trial court abused its discretion in finding that the reasons proffered by the prosecutor for exercising the peremptory challenge involved trial strategy. *Ayala*, 24 Cal. 4th at 262. The California Supreme Court also concluded that it was an error of *state law* for the trial court to hold those proceedings *ex parte*. *Id.* The California Supreme Court did not, however, express an opinion as to whether the exclusion of Petitioner and his counsel was error of constitutional magnitude. In light of the express holdings of the Sixth and Seventh Circuits in *Tucker*, 836 F.2d at 337-40 and *Davis*, 809 F.2d at 1201-02, the *ex parte* proceedings were not constitutional error, as well as the Supreme Court's acknowledgment in *McCollum*, 505 U.S. at 58 that *in camera* discussions are sometimes appropriate, the Court doubts whether the trial court's procedure was constitutionally defective as a matter of clearly established Federal law.

Even assuming that the trial court erred in hearing the prosecutor's reasons for exercising his peremptory challenges outside of the presence of Petitioner and his counsel, however, the state court's determination that such error was harmless was neither "contrary to [n]or an unreasonable application of clearly established Federal law." *Williams*, 529 U.S. at 412-13. Petitioner argues that exclusion of he and his counsel was structural error, requiring automatic reversal. Petitioner argues that "where assistance of counsel has been denied entirely or during a critical stage of the proceeding," prejudice is presumed and reversal is required. *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *United States v.*

Cronic, 466 U.S. 648, 659 fn.25 (1984). Petitioner also relies upon the Ninth Circuit's analysis in *Thompson*, finding the exclusion of defendant and his counsel from the *Batson* hearing to be *per se* reversible because "[t]he government cannot rely on a transcript reflecting such fundamentally flawed procedures to show that the defendant suffered no prejudice." *Thompson*, 827 F.2d at 1261.

As an initial matter, the Ninth Circuit's decision in *Thompson* is materially distinguishable from this case. The prosecutor in *Thompson* relied in part upon the juror's race as the basis for exercising the peremptory challenge. *Id.*, 827 F.2d at 1256, fn.1. In addition, the trial judge in *Thompson* made no explicit findings on the record regarding the strength or weakness of the prosecutor's proffered reasons. In this case, the reasons offered by the prosecutor did not contain a hint of racial bias. The trial judge who had presided over the entire voir dire process was well aware of the standards and made explicit findings on the record evaluating the credibility of the prosecutor's proffered reasons. Finally, *Thompson* was a direct appeal of a federal criminal judgment, not a collateral attack on a state court judgment under 28 U.S.C. § 2254, such that different standards of review applied. For these reasons, the Court finds the Ninth Circuit's decision in *Thompson*, that exclusion of a defendant or his attorney from an *ex parte Batson* hearing is *per se* reversible, to be inapplicable to this case.

In general, the error alleged by Petitioner here does not fall within the circumstance where *per se* reversal is required. The Supreme Court has never held that the exclusion of a defendant from a critical stage of his criminal proceedings constitutes a

structural error. *Campbell v. Rice*, 408 F.3d 1166, 1172 (9th Cir. 2005). “To the contrary, in *Rushen v. Spain*, 464 U.S. 114, 117 (1983) (per curiam), the Court determined that the fact that the defendant was denied the right to be present during an *ex parte* communication between the judge and a juror was trial error subject to harmless error analysis.” *Campbell*, 408 F.3d at 1172. Furthermore, as Petitioner acknowledges, *Mickens* holds only that prejudice is presumed where counsel “has been denied entirely or during a critical stage.” *Id.*, 535 U.S. at 166. Petitioner was not completely deprived of counsel during the voir dire in this case. Therefore, the California Supreme Court’s decision that any federal constitutional error in excluding Petitioner and his counsel from the *ex parte Batson* proceedings was subject to harmless error analysis was not contrary to or an unreasonable application of clearly established Federal law. *Williams*, 529 U.S. at 412-13.

Finally, Petitioner has not shown that the California Supreme Court’s decision finding the purported error to be harmless was objectively unreasonable within the meaning of AEDPA. *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003) (before habeas relief may be granted under AEDPA, federal court must determine that the state court applied the harmless-error review in an “objectively unreasonable” manner). The California Supreme Court went to great lengths to review the reasons proffered by the prosecution, and the trial court’s evaluation of those reasons. *Ayala*, 24 Cal. 4th at 264-266. Upon such review, the California Supreme Court concluded that the trial court’s exclusion of Petitioner and his counsel from the proceedings “could not have affected the outcome of the [*Batson*]

hearings.” *Id.* at 267. The California Supreme Court also discussed and distinguished the Ninth Circuit’s opinion in *Thompson*, noting there was nothing in the record to suggest any impropriety in the prosecutor’s exercise of his peremptory challenges. *Id.* at 267-68.

The Court has reviewed the record of the voir dire. As discussed in detail below with regard to Petitioner’s Claim 4, the Court finds the prosecutor’s proffered non-discriminatory reasons for exercising each of the peremptory challenges was amply supported by the record. This is not a case where the prosecutor offered patently inappropriate or even marginal reasons for striking the jurors. The Court finds that the state court’s harmless error analysis was not objectively unreasonable. Petitioner is not entitled to relief on Claims 1 and 2.

2. Claim 4 — Equal Protection rights of prospective jurors

Petitioner alleges that the “ex parte, in camera *Batson* proceedings violated the equal protection rights of the seven minority prospective jurors who were the subjects of those proceedings,” resulting in a violation of Petitioner’s due process rights. (Pet. at 23.) Respondent argues that this claim was rejected on the merits by the, California Supreme Court. (Ans. at 29.)

A. California Supreme Court’s Opinion

In the direct appeal opinion, the state supreme court concluded:

In tandem with his *Wheeler* claim, defendant also maintains that the ex parte proceedings make it impossible to

determine whether race-based exclusion may have occurred, to the detriment of prospective jurors who enjoy a right under the equal protection clause not to be discriminated against in jury selection on the basis of race. (*Powers v. Ohio, supra*, 499 U.S. 400, 409, [111 S.Ct. 1364, 1369-1370].) Again, on the record before us, we are confident that no such exclusion occurred. The prosecutor articulated, at a minimum, plausible criteria for his excusals, the trial court agreed that the excusals were proper, and to the extent the written record before us touches on the prosecutor's stated reasons, it confirms that they were not pretextual.

Ayala, 24 Cal. 4th at 269.

B. Discussion

As set forth above, the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), first held that the United States Constitution prohibits a prosecutor from peremptorily challenging potential jurors solely on the basis of race. Evaluating whether a peremptory challenge was race-based under *Batson* is a three-step process, requiring that (1) the defendant must demonstrate a prima facie case that the prosecutor challenged the contested jurors due to their race, (2) if the defense made a prima facie showing of discrimination, the burden shifts to the prosecution to articulate racially-neutral explanations for those challenges, then (3) the trial court must determine if the defendant met his burden of proving purposeful discrimination. *Id.*, 476 U.S. at 96-98.

The Supreme Court has also held that a prosecutor's race-based exclusion of jurors can constitute a violation of the Equal Protection rights of those jurors, which a petitioner does have standing to challenge even when the prospective jurors in question do not share racial identity with him or her. *Powers v. Ohio*, 499 U.S. 400 (1991). State law allows for significant trial court discretion and acknowledges that a peremptory challenge may be based on a broad range of evidence intimating juror partiality. *People v. Wheeler*, 22 Cal.3d 258, 275 (1978).

Petitioner argues that while the California Supreme Court rejected this claim on direct appeal, the state court's review of the record was "illusory" because it "failed to include participation, and a record made, by the defense." (Pet. MSA at 16.) Petitioner concludes that, as the state supreme court failed to properly apply clearly established federal law, habeas relief should be granted on this claim. (*Id.*)

Respondent maintains that the California Supreme Court "correctly identified and applied *Batson*," and the state court's decision was not contrary to or an unreasonable application of controlling precedent. (Resp. MTD at 21-22.) Respondent further argues that the trial prosecutor offered specific reasons for challenging each prospective juror in question and the California Supreme Court found those reasons to be race-neutral. (*Id.* at 22.)

State supreme court factual findings are presumed to be correct absent clear and convincing evidence to the contrary. *Rice v. Collins*, ___ U.S. ___, 126 S.Ct. 969, 974 (2006); *Mitleider v. Hall*, 391 F.3d

1039, 1046-48 (9th Cir. 2004). At trial, defense counsel argued that of the seven minority prospective jurors who were the subject of the prosecution's peremptory challenges, that it is "clear that these jurors are not significantly different from the white jurors that the prosecution has chosen to leave on the jury both in terms of their attitudes on the death penalty, their attitudes on the criminal justice system, and their attitudes on the presumption of innocence and burden of proof, that I'm more concerned with generally." [51 RT 6347.] The trial court then stated that this showing "will make a prima facie case of discrimination based on group, and will request a further clarification from the people." [*Id.*] Then, in an ex parte hearing, the prosecution disclosed to the trial court their reasons for a number of their peremptory challenges.

The prosecution stated that their challenge of prospective juror Galileo S. was because they found him to be a "nonconformist person who has had numerous run-in's with the law," who had "three or four more arrests than those that he has told us about," with arrests for drunk driving and drugs among the list. [50 RT 6184-85.] The trial court noted for the record that the information about the additional arrests was "shared with defense counsel prior to group questioning." and also agreed with the prosecution that Galileo S. had "a healthy paranoia, if you will, concerning the justice system." [*Id.* at 6185.]

The prosecution opined that their primary concern with Olanders D. was "his ability to vote for death during the penalty phase." [*Id.*] The prosecution added that "[o]n his questionnaire he indicated that he does not believe in the death

penalty. He did indicate that his view had changed over the years.” [*Id.*] The prosecution was also concerned by his “lack of ability to express himself well” and said that his answers “did not make a lot of sense.” [*Id.*] The court concluded that counsel’s observations were “accurate and borne out by the record.” [*Id.* at 6186.]

When the next set of prospective jurors were challenged or accepted, the defense objected, stating that two individuals challenged by the prosecution consisted of “one hundred percent of the jurors of Hispanic extraction that have gotten in the jury box.” [50 RT 6217.] The trial court replied: “Again, I don’t think the record at this point is sufficient for a prima facie showing. However, again I’m going to request an independent statement for the record with reference to the people’s challenge of both Hispanic jurors.” [*Id.* at 6218.]

The prosecution stated, again during an ex parte hearing, that the challenge of Luis M. was partly due to the fact that “he has had second, or perhaps third thoughts with regards to the death penalty.” [51 RT 6305.] In addition, the prosecution was uncomfortable with the jury including “a person who went out and investigated the case” and “left the military at the rank of E-2, suggesting some sort of misconduct or inability.” [*Id.*] The prosecution felt that Gerardo O. was a “standoffish type of individual” and had concerns about the fact that he “indicated to us at the beginning that he was illiterate ... and that he therefore had the questionnaire translated to him, so that he could make responses.” [*Id.* at 6306.] The prosecution also noted that Gerardo O. said he was not sure if he could “take someone’s life into his hands” and felt “a

little shaky” about his responsibilities as a juror in this case. [*Id.* at 6306-07.]

The prosecution stated that they used a peremptory challenge on George S. [51 RT 6351] for multiple reasons, including the fact that “he was one hold-out” in his prior jury service, that he placed “undue emphasis on the Bible” and opined that “God would punish” those who did wrong and that he “applied and was rejected back in 1969 to be a police officer,” which caused them to speculate on the “psychological aspects” of his rejection. [*Id.* at 6351-52.] The prosecutor also stated that he was “not aware that he was Hispanic” until the defense protested the peremptory challenge, as he thought the prospective juror was maybe of “Greek” ancestry. [*Id.* at 6352-53.]

The prosecutor stated that the challenge of Barbara S. was due to the fact that he “thought there was something wrong” with her, as “her responses were extremely slow,” “her answers did not make sense” given the questions asked, and the prosecution suspected she was “possibly under the influence of drugs.” [*Id.* at 6354-55.] The prosecutor added that he believed Barbara S. appeared “somewhat angry” upon her initial entrance into court, and displayed “a great deal of nervousness.” [*Id.* at 6355.] The trial court did not agree with the prosecution’s characterization of her demeanor, opined that many prospective jurors were nervous, and stated that Barbara S. did not appear to be hostile. [*Id.* at 6356.] However, the court did concur with prosecution’s notice of the “incomplete, if you will, answers, non sequiturs.” [*Id.*]

The prosecution stated that they felt reluctance regarding whether Robert M. would actually vote for

the death penalty, and were concerned with his interest in “following of the Saigon Penn case.” [*Id.* at 6356-57.] The prosecution noted that Robert M. said while he believed in the death penalty it would be “hard for him to be involved in the death penalty.” [*Id.* at 6357-58.] The trial court noted Robert M.’s agreement with the idea of the death penalty, and conceded that the prosecution could have a legitimate concern whether this prospective juror would actually impose it in a case. [*Id.* at 6358.]

The prosecutor offered credible reasons for challenging the jurors in question, and the trial court concluded that those reasons were sufficient and race-neutral. The California Supreme Court found no evidence of a due process violation under *Powers v. Ohio*, based its findings on the record before it, and properly applied controlling federal law.

This Court cannot say the state court’s denial of this claim was contrary to or an unreasonable application of clearly established federal law, nor was it based upon an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13. As a result, this claim does not entitle Petitioner to habeas relief.

3. Claim 5 — Loss of juror questionnaires

Petitioner alleges that the loss of the majority of the juror questionnaires in his case resulted in a violation of his rights to meaningful appellate review, to a reliable penalty determination, and to due process. (Pet. at 24.) Respondent argues that the California Supreme Court considered this claim and rejected it on the merits, and further asserts that the claim is “procedurally barred.” (Ans. at 30.) Respondent initially argued that “Petitioner has not shown that the claim does not rest upon a new rule

barred under *Teague v. Lane*.” (*Id.*)

A. Procedural arguments

Respondent’s *Teague* claim was discussed and rejected above on page 8. Respondent also asserts Petitioner’s claim 5 is “procedurally barred,” because the state supreme court ruled it would not have engaged in comparative juror analysis between seated and non-seated jurors, and thus, Petitioner could not have suffered prejudice from the loss of the questionnaires. (Ans. at 29-30.)

This Court may decline to render an opinion on the adequacy of procedural default rules and decide this claim on the merits. Established precedent in the Ninth Circuit dictates that a court’s decision with respect to evaluating procedural default is to be informed by furthering “the interests of comity, federalism, and judicial efficiency.” *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). Thus, if deciding the merits of a claim proves to be less complicated and less time-consuming than adjudicating the issue of procedural default, a court may exercise discretion to take this course of action in its management of the case. *Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982), quoted by *Boyd*, 147 F.3d at 1127. This is the case here.

B. California Supreme Court’s opinion

The state supreme court denied this claim on direct appeal, concluding:

Defendant claims that his constitutional right to a meaningful review of his conviction and sentence has been infringed by the loss of the bulk of prospective juror questionnaires. The

questionnaires of the seated jurors and alternates were preserved, but almost all others have been lost.

As a general matter, we disagree. We addressed, and rejected, a similar claim in *People v. Alvarez*, *supra*, 14 Cal. 4th 155, where we said: “[D]efendant maintains that his *Wheeler*[-]*Batson* claim must be resolved in his favor on the ground that the record on appeal is not adequate to permit meaningful review. The deficiency of which he complains is the absence of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk’s office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States Constitution—under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant’s ability to prosecute his appeal.” (*Id.* at p.196, fn.8.)

With regard to the prospective jurors whose questionnaires were lost but who are not identified by the defendant as the subject of the *Wheeler* challenges: this

court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis. (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1197 [56 Cal. Rptr. 2d 49, 920 P.2d 1254]; cf. *id* at pp. 1249 (conc. opn. of Mosk, J.) [urging a contrary approach].) Under this court's precedent, therefore, the loss of the questionnaires could not have prejudiced him. With regard to the prospective jurors whose questionnaires were lost and who were the subject of *Wheeler* challenges, we have already explained that the record is sufficiently complete for us to be able to conclude that they were not challenged and excused on the basis of forbidden group bias. Thus, even if there was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California, supra*, 386 U.S. 18, 24, [87 S.Ct. 824, 828]), and under state law any error also was harmless (*People v. Watson, supra*, 46 Cal.2d 818, 836).

Ayala, 24 Cal. 4th at 269-70.

Petitioner points out that Chief Justice George dissented from the California Supreme Court's conclusions in *Ayala*, finding the harmless error analysis used by the majority to examine Petitioner's claims to be "suspect." *Id.* at 295. Chief Justice George further opined that the court's exclusion of defense counsel and the defendant from the hearings where the prosecutor disclosed his reasons for the peremptory challenges, coupled with the loss of the juror questionnaires, warranted relief. In the dissent,

he wrote:

Further, a remand also would be impracticable and inadequate in this case because the extensive written juror questionnaires of the vast majority of panelists who participated in the general voir dire have been lost and apparently destroyed. Thus, as a result of the trial court's error, we are left with a record that is inadequate for our review and that cannot be reconstructed at this time. Accordingly, a reversal of the conviction and a remand for a new trial is the only appropriate remedy.

Id. at 297.

C. Discussion

Due process requires that the record of proceedings must be sufficient to permit adequate and effective appellate review. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). A criminal defendant has the right to a record on appeal which includes a complete transcript of the proceedings at trial. *Hardy v. United States*, 375 U.S. 277, 279-82 (1964). Where part of the record is missing, a petitioner must demonstrate prejudice to his or her appeal before relief may be granted. *United States v. Carrillo*, 902 F.2d 1405, 1410 (9th Cir. 1990). Petitioner maintains that the loss of the juror questionnaires violated his right to a meaningful appellate review consisting of “comparing the responses on the questionnaires of the challenged minority prospective jurors with the responses to those same questions by non minority prospective jurors who were not the subject of peremptory challenges by the prosecution.” (Pet. MSA at 17.)

Petitioner relies on the Ninth Circuit holdings in *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987), and the Ninth Circuit’s review of that case on appeal of the remand, *United States v. Alcantar*, 897 F.2d 436 (9th Cir. 1990), to meld the arguments from Claims 1 and 2 with the argument in Claim 5. In *Alcantar*, a federal district judge held an *ex parte* hearing to hear the prosecution’s reasons for their peremptory challenges, and the Ninth Circuit remanded the matter for the district court to conduct a new hearing, concluding that defense counsel should have been afforded an opportunity to argue that the reasons given by the prosecution for challenging the minority jurors were merely pretextual. *Alcantar*, 832 F.2d at 1180. On remand, the district court found no improper use of peremptory challenges and reaffirmed the conviction. *Alcantar*, 897 F.2d at 438. The Ninth Circuit again reversed, ordering a new trial, finding the “passage of time has rendered such a hearing meaningless,” and had not served the purposes of allowing the defense an opportunity to challenge the prosecution’s reasons and to “preserve a full record on appeal.” *Alcantar*, 832 F.2d at 1180; *Alcantar*, 897 F.2d at 438. Petitioner asserts that the same interests were thwarted in this case, as the loss of the jury questionnaires deprived Petitioner of a full record on appeal which would have allowed him to conduct a comparative juror analysis.

California courts do not entertain comparative juror analysis for the first time on appeal. *People v. Montiel*, 5 Cal. 4th 877, 909 (1993) (“an appellate court will not reassess good faith by conducting its own comparative juror analysis.”) Federal courts do consider comparative juror analysis a useful tool for analyzing peremptory strikes under federal law, and

the Ninth Circuit strongly suggested that the California courts “should” use this tool on appeal. *Boyd*, 455 F.3d at 906; *see also Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997). The Ninth Circuit believes that “Supreme Court precedent requires a comparative juror analysis even when the trial court has concluded that the defendant failed to make a prima facie case.” *Boyd*, 455 F.3d at 907. In this case, the trial court did find that defendant had made a prima facie case, heard the reasons of the prosecutor for challenging the prospective jurors, and concluded that the challenges were not made on an impermissible basis. In addition, in *Boyd*, the Ninth Circuit based its reasoning on the fact that the reviewing courts denied the petitioner access to a full voir dire transcript. *Id.* at 900. The circumstances between *Boyd* and the instant case are distinguishable, as this Petitioner has access to the full voir dire transcript and questionnaires from all seated jurors and alternates from his trial.

In the recently decided *Kesser v. Cambra*, ___ F.3d ___, 2006 WL 2589425 (9th Cir. Sept. 11, 2006) (en banc), the Ninth Circuit held that a state prosecutor improperly struck a prospective juror on the basis of race, reversing an earlier decision denying habeas relief. The Court’s majority concluded that while the prosecutor’s motive for the peremptory challenge was plausible when considered out of context, once it was considered in comparison with “the background and responses of the jurors who were seated, reveal[ed] the prosecutor’s purposeful and plainly racial motives in excusing” the contested prospective jurors. *Kesser*, 2006 at *9. The Ninth Circuit concluded that the state court, in refusing to consider comparative evidence in the record before them, made an unreasonable determination of facts in violation of 28

U.S.C. § 2254(d)(2), which warranted reversal of the judgment and a grant of the writ. *Id.* at *6.

Respondent accurately points out that Claim 5 is not a direct *Batson* claim, but “involves the sufficiency of the record” after a number of juror questionnaires were lost or destroyed. (Resp. SB at 4.) The questionnaires of the seated jurors and alternate jurors were preserved, and the state court’s ruling was limited to the impact of the lost questionnaires of challenged and otherwise non-selected jurors. As such, the nature of Petitioner’s comparative analysis claim is strikingly different than the one advocated by the Ninth Circuit in *Kesser*. Petitioner alleges prejudice from the loss of the questionnaires of non-serving jurors in his case, as he is unable to make comparisons between the written answers provided in those materials with the prosecutor’s stated reasons for striking certain minority jurors from the panel.

However, comparative analysis is intended to draw parallels between challenged jurors and those allowed to serve. Petitioner has access to those materials in the record, in the form of the voir dire transcript, the prosecution’s stated reasons for challenging certain jurors, and the questionnaires of the empaneled jurors and alternates. Comparing the questionnaire answers of non-challenged and non-seated jurors with the jurors who were the subject of the prosecution’s peremptory challenges would serve little purpose. The California Supreme Court held that they “will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis” and concluded that the loss of the contested questionnaires did not result in prejudice to

Petitioner. *Ayala*, 24 Cal. 4th at 270.

Here, the record on appeal provides a meaningful and effective presentation of Petitioner's claims, and appears sufficient to resolve the contentions presented in his federal habeas petition. The reporter's transcript of jury selection proceedings, available to Petitioner, is 6461 pages in 51 volumes and thoroughly recounts the voir dire. Objections to peremptory challenges, challenges for cause and motions regarding prospective jurors are all contained in the available record. The trial judge and counsel specifically questioned potential jurors regarding their responses in the questionnaires, thoroughly exploring their ability to serve as a juror in Petitioner's trial. In addition, the questionnaires of the seated jurors and alternates were preserved for review on appeal. The record in this case does allow a reviewing court to examine whether the prosecution exercised its peremptory challenges in an appropriate manner.

It is true that, due to the loss of certain questionnaires, comparisons between challenged juror's answers and non-challenged and non-seated juror's responses cannot be made. However, the California Supreme Court concluded that the record on appeal was sufficiently complete to conclude that the challenged jurors were not excused due to any constitutionally forbidden reasons. *Ayala*, 24 Cal. 4th at 269-70. The state supreme court found that if there was an error in the jury selection proceedings, it was harmless. *Id.*

It is not mandatory for a state court to engage in comparative analysis of challenged jurors to non-challenged and non-seated jurors, and the failure to do so is not an unreasonable application of, or

contrary to, clearly established federal law under 28 U.S.C. § 2254(d)(1). As a result, Petitioner is unable to demonstrate that the loss of those jury questionnaires violated his rights to meaningful appellate review, to a reliable penalty determination, or to due process, and is not entitled to habeas relief.

4. Claim 9 — Prospective Juror Linda J.

Petitioner alleges that “the trial court excluded prospective juror Linda J. [sic] for cause on the ground that her views on the death penalty would substantially impair her ability to perform her duties as a juror,” which violated Petitioner’s rights to a fair and impartial jury and to due process. (Pet. at 33.) Respondent argues that the California Supreme Court considered this claim on direct appeal and rejected it on the merits. (Ans. at 41.)

A. California Supreme Court’s opinion

The state supreme court did consider this claim on direct appeal, concluding:

Defendant claims that the Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court granted the prosecution’s motion to excuse a prospective juror for substantially impaired ability to follow the law regarding capital punishment. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841].)

“As we [have] explained..., ‘[w]hen a prospective juror’s views about the death penalty “would ‘prevent or substantially impair the performance of his [or her] duties as a juror” [citation], the juror is

not impartial and may be challenged “for cause”⁴⁴ (*People v. Earp* (1999) 20 Cal. 4th 826, 853 [85 Cal. Rptr. 2d 857, 978 P.2d 15].) This test applies equally to defense and prosecution challenges. (*Ibid.*) As stated, “if the juror’s statements are equivocal or conflicting, the trial court’s determination of the juror’s state of mind is binding. If there is no inconsistency, we will uphold the court’s ruling if it is supported by substantial evidence. [Citations.] [Citation.] A juror’s bias need not ‘be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.” (*People v. Carpenter, supra*, 21 Cal. 4th 1016, 1035.)

Linda J’s answers were inconsistent. Initially she testified that she would “find it difficult” to return a verdict of death. She stated that she went beyond being unsure about imposing the death penalty; rather, “I don’t think I’m capable of that.” But she also testified that she favored the death penalty in the abstract, and she hypothesized that the trial might enable her to summon the will to impose it.

After initially denying the prosecution’s challenge for cause on the grounds that Linda J. was “impaired, but not substantially,” the trial court later reversed itself, finding that her ability to

serve as a juror was substantially impaired.

Because Linda J.'s answers were inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror. There was no violation of any constitutional right.

Ayala, 24 Cal. 4th at 274-75.

B. Discussion

The United States Supreme Court has held that a sentence of death cannot be upheld if the jury that imposed or recommended it excluded prospective venirepersons who expressed opinions against the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968). In 1980, the Supreme Court further held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45 (1980). The Court later affirmed that the *Adams* standard was the proper standard by which to evaluate allegations of improper exclusion of prospective jurors. *Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

Appellate review of a trial court's decision regarding issues arising from juror voir dire is obligatorily deferential, as a "reviewing court, which analyzes only the transcripts from voir dire, is not as well-positioned as the trial court to make credibility

determinations.” *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). In the instant case, the trial court initially denied the state’s challenge for cause and later reversed its own decision, ultimately striking Linda J. for cause based on her views regarding capital punishment. This reversal, on its own, does not allow this court to conclude that the trial court erred. Rather, Petitioner must demonstrate that the state supreme court made an unreasonable determination of facts or applied the law in an unreasonable manner in rejecting this claim on appeal.

Upon initial questioning by the trial court, Linda J. said that she would “find it difficult” to vote for the death penalty. [43 RT 4969.] During questioning by defense counsel, she maintained that she would have no difficulty deciding the guilt or innocence of the defendant [*Id.* at 4970], but “to say whether a person is going to die, I don’t think I’m capable of that.” [*Id.* at 4975.] She conceded that it was “possible” that she could vote for the death penalty if she was placed on the jury, if she was “totally convinced” that it was the right decision. [*Id.* at 4976, 4979.]

When the prosecutor began inquiring into her views on capital punishment, she stated that “When I just think about it, without listening to— having to go through the steps getting to it, I would have to say I couldn’t do it.” [*Id.* at 4991.] She expanded on this, explaining that if she took it “step by step, probably I could listen and come up with a choice,” but that when she considered the death penalty issue as a whole, she did not think she could impose it. [*Id.* at 4991-92.] Linda J. repeated her discomfort with the death penalty throughout her juror interview, and only expressed the hope that she could “possibly”

develop an ability to impose the death penalty after sitting through the trial as a juror. [*Id.* at 4994-95.]

The trial court initially rejected the prosecutor's challenge for cause, stating that "I think Linda J. [sic] is impaired, but not substantially." [*Id.* at 4998.] The court opined that, regarding a decision on the death penalty, that "she [Linda J.] probably can do it." [*Id.* at 4999.] The trial court later reconsidered the state's motion in support of a challenge for cause of Linda J. on the basis of briefs submitted by both the prosecutor and defense counsel. [48 RT 5748.] Both parties declined further oral argument on the subject, and the trial court ultimately decided that Linda J. was in fact "substantially impaired" on the penalty issue and granted the challenge for cause. [*Id.* at 5784-85.]

The Supreme Court has stated that in conducting juror interviews,

[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra*, this is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 425-26, footnote omitted.

The Supreme Court has opined that a trial judge’s “power of observation often proves the most accurate means of ascertaining the truth.” *Witt*, 469 U.S. at 434. Contrary to Petitioner’s assertions, the Court finds substantial support for the conclusions reached by both the trial court and the state supreme court in determining that Linda J. was “substantially impaired” in her ability to perform as juror due to her views on the death penalty. *Witt*, 469 U.S. at 433.

The California Supreme Court’s determination that the trial judge did not commit error in excusing Linda J. was not contrary to or an unreasonable application of federal law, nor was it based on an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13. Petitioner is not entitled to habeas relief on this claim.

EVIDENTIARY HEARING STANDARD

In his Reply, Petitioner argues that if the Court does not grant his Motion for Summary Adjudication, then in the alternative an evidentiary hearing should be granted. (Pet. Reply at 8.) Respondent notes that, in Petitioner’s Group Two Motion for Summary Adjudication, Petitioner himself asserted that there were no genuine issues of material fact, and he was thus entitled to summary adjudication on the Group Two claims. (*Id.*, citing Pet. MSA at 1.) Respondent maintains that the instant case is therefore controlled by 28 U.S.C. § 2254(d)(2), not 28 U.S.C. § 2254(e). At oral arguments on the Group Two claims, Petitioner explained to the Court that he exercised an abundance of caution in requesting an evidentiary hearing but did not himself believe that any further facts could be discovered on the Group

Two claims.

Generally, the standard for granting an evidentiary hearing requires Petitioner to make a showing he is entitled to habeas relief.

A habeas petitioner is entitled to an evidentiary hearing as a matter of right on a claim where the facts are disputed if two conditions are met: (1) where the petitioner's allegations would, if proved, entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts.

Rich v. Calderon, 187 F.3d 1064, 1067-68 (9th Cir. 1999); *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). The first prong is typically referred to as the requirement of asserting a "colorable claim." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994). To properly assert a "colorable claim," a petitioner is "required to allege specific facts which, if true, would entitle him to relief." *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998).

A petitioner is entitled to an evidentiary hearing if the second prong is met through a showing that:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court

hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). When a petitioner is able to establish a colorable claim for relief, did not fail to develop the facts surrounding his claim, and was never given a state hearing on the claim, the district court must conduct an evidentiary hearing. *Insyxiengmay v. Morgan*, 403 F.3d 657, 670 (9th Cir. 2005), quoting *Baja v. Ducharme*, 187 F.3d 1075, 1078 (9th Cir. 1999).

In addition to being entitled an evidentiary hearing as of right when the petitioner presents colorable allegations and the state court has not reliably found the relevant facts through no fault of the petitioner, a federal court retains discretionary authority to conduct an evidentiary hearing. *Id.* at 318; *Seidel v. Merkle*, 146 F.3d 750, 753 (9th Cir. 1998).

The AEDPA further limits a district court's decision to conduct evidentiary hearings in § 2254 proceedings. *See* 28 U.S.C. § 2254 (e)(2); *see Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003). Section 2254(e) provides as follows:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that:

(A) the claim relies on:

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C.A. § 2254(e) (West. Supp. 2005).

As stated above, the standard for granting an evidentiary hearing requires Petitioner to make a showing he is entitled to relief if the facts alleged can be proven. Petitioner has failed to do so. Petitioner has not shown that any of these claims rely on either a new rule of constitutional law or a factual predicate that could not have been previously discovered through due diligence. *See* 28 U.S.C. § 2254(e)(2).

Accordingly, Petitioner is not entitled to an evidentiary hearing.

IT IS SO ORDERED.

DATED: October 23, 2006

IRMA E. GONZALEZ, Chief Judge

United States District Court

Filed February 25, 2014

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HECTOR JUAN AYALA, Petitioner-Appellant,

v.

ROBERT K. WONG, Warden, Respondent-Appellee.

No. 09-99005

ORDER

The opinion and dissenting opinion, filed on September 13, 2013, and published at 730 F.3d 831, are replaced by the amended opinion and amended dissenting opinion filed concurrently with this Order.

Judges Reinhardt and Wardlaw voted to deny the petition for rehearing en banc. Judge Callahan voted to grant the petition. A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The request for rehearing en banc is **DENIED**. No further petitions will be entertained.

Judge Ikuta's dissent from denial of rehearing en banc is filed concurrently with this Order.

DISSENT

IKUTA, Circuit Judge, joined by O'SCANNLAIN, TALLMAN, BYBEE, CALLAHAN, BEA, M. SMITH, and N.R. SMITH, Circuit Judges, dissenting from the denial of rehearing en banc:

The Supreme Court has twice before rejected the approach to habeas review that the panel majority adopts here. In two prior habeas opinions, *Richter v.*

Hickman, 578 F.3d 944 (9th Cir. 2009) (en banc), and *Williams v. Cavazos*, 646 F.3d 626 (9th Cir. 2011), we brushed aside the deference we owe a state court’s adjudication of a petitioner’s claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), and reviewed a petitioner’s claim de novo. The Supreme Court unanimously reversed both of these opinions. It held that we must defer to a state court denial of a federal claim even if the state court issued only a summary denial, *Harrington v. Richter*, 131 S. Ct. 770, 784-85, 178 L. Ed. 2d 624 (2011), and even if the state court issued a reasoned opinion that did not expressly reject the federal claim, *Johnson v. Williams*, 133 S. Ct. 1088, 1094-96 (2013).

Undeterred, the panel majority now tries yet another route to de novo review. It reasons that the Supreme Court has not yet *directly* told us that we must defer to a state court decision holding that any potential federal constitutional error was harmless. Therefore, the panel majority concludes, we can review such a claim de novo, free of AEDPA deference. In reaching this conclusion, the panel majority ignores the clear command of AEDPA and the Supreme Court, and creates a circuit split. Because we should interpret AEDPA in accordance with the statutory language and the direction provided by the Supreme Court, I respectfully dissent from the court’s failure to rehear this case en banc.

I

The length and complexity of the panel majority’s opinion cannot disguise the fact that it circumvents the Supreme Court’s ruling in *Richter* and *Williams* that “a federal habeas court must presume that the federal claim was adjudicated on the merits.”

Williams, 133 S. Ct. at 1096. Here, Juan Ayala presented his claim—that the Constitution required defense counsel to be present when the prosecutor presented his reasons for striking certain jurors—to the California Supreme Court, and the court rejected that claim. Twice.

The facts underlying Ayala’s claim are straightforward. Ayala was charged with multiple murders. During jury selection, he argued that the prosecutor was striking jury panelists on the basis of their race or ethnicity in violation of *People v. Wheeler*, 22 Cal. 3d 258 (1978),¹ and its federal analogue, *Batson v. Kentucky*, 476 U.S. 79 (1986). See *People v. Ayala (Ayala I)*, 24 Cal. 4th 243, 259-60 (2000). The trial court asked the prosecutor to explain his reasons for those challenges, but the prosecutor expressed concern about doing so in open court for fear of revealing his trial strategy. *Id.* at 260. To alleviate this concern, the trial court held three ex parte hearings to consider the prosecutor’s reasons for his challenges, and each time found that the prosecutor was not challenging jury panelists because of race or ethnicity. *Id.*

On direct appeal to the California Supreme Court,

¹ *Wheeler* presaged *Batson* by interpreting the California Constitution to prohibit race-based peremptory challenges. See *Wade v. Terhune*, 202 F.3d 1190, 1192 (9th Cir. 2000). The California Supreme Court has stated that “[s]ubstantially the same principles apply under *Batson*” as under *Wheeler*. *People v. Alvarez*, 14 Cal. 4th 155, 193 (1996). Although there are some differences between the *Wheeler* and *Batson* standards, see *Wade*, 202 F.3d at 1196-97, those differences are not applicable here. Accordingly, “because we are reviewing [Ayala’s] petition for a writ of habeas corpus under 28 U.S.C. § 2254, we generally refer to *Batson* in analyzing his claims.” *Mitleider v. Hall*, 391 F.3d 1039, 1042 n.2 (9th Cir. 2004).

Ayala challenged his exclusion from the *ex parte Batson* hearings. The court addressed the issue at length. *See id.* at 259-69. It began by reciting the *Batson/Wheeler* procedure for determining whether a prosecutor's peremptory challenges were discriminatory. *Id.* at 260-61. First, the defendant must make a *prima facie* case that the prosecutor used his peremptory challenges to exclude "members of a cognizable group" because of their group association. *Id.* at 260. Second, the burden shifts to the prosecutor "to provide a race-neutral explanation for the exercise of peremptory challenges." *Id.* Third, the trial court must determine "whether those stated reasons are untrue and pretextual." *Id.* at 261.

After explaining the necessary steps in a court's adjudication of a *Batson/Wheeler* claim, the California Supreme Court held that, so long as "the inquiry proceeds within the general framework just articulated, no particular procedures are constitutionally required." *Id.* The court's conclusion rested on *Powers v. Ohio*, 499 U.S. 400 (1991), which stated, with respect to *Batson* hearings, that "[i]t remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice." *Ayala I*, 24 Cal. 4th at 261 (quoting *Powers*, 499 U.S. at 416). This conclusion resolved Ayala's federal constitutional claim that *Batson* required the trial court to include the defendant or defense counsel in the hearings on the prosecutor's reasons for striking jury panelists.

While rejecting Ayala's constitutional claim, the court went on to consider "whether it was error to exclude defendant from participating in the hearings

on his *Wheeler* motions” as a matter of California law. *Id.* at 262. Because “[t]he question whether ex parte communications are proper in ruling on a *Wheeler* motion ha[d] not arisen in California decisional law,” the court surveyed the legal landscape, citing cases from the Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, as well as cases from New York, Maryland, and Texas that had considered analogous procedural issues. *Id.* It noted that “[w]hile some decisions have tolerated an ex parte Batson hearing procedure on the ground that the United States Constitution permits it,” *id.* (citing *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988), and *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987)), most courts to have considered the issue determined that ex parte proceedings were “poor procedure and should not be conducted unless compelling reasons justify them,” *id.* at 262-63. Aligning itself with the majority, the court held that, as a matter of state procedure, trial courts should not hold ex parte *Batson/Wheeler* hearings, and therefore “that error occurred under state law” in Ayala’s case. *Id.* at 263-64. Nevertheless, after a careful review of the record pertaining to the seven challenged jurors, including the transcripts of the exchanges between the prosecutor and the judge, the court concluded that the prosecutor’s peremptory challenges did not exclude a cognizable group from the jury on a discriminatory basis. *Id.* at 264-68. Consequently, although the trial court erred in light of the newly adopted state procedure, “the error was harmless.” *Id.* at 268. And any potential federal error “was harmless beyond a reasonable doubt,” according to the California Supreme Court. *Id.* at 269 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

In short, the California Supreme Court considered Ayala's *Batson* claim, rejected it on the merits, and followed that up by holding that any potential error was harmless. Given that *Richter*, 131 S. Ct. at 784-85, and *Williams*, 133 S. Ct. at 1094-96, require us to presume that the state court adjudicated a claim on the merits when the claim was presented to the state court and the state court denied relief, there is no doubt the court adjudicated Ayala's claim on the merits here. Therefore, the only question is whether the state court's adjudication of Ayala's *Batson* claim was an unreasonable application of Supreme Court precedent.

As the California Supreme Court pointed out, "no particular procedures are constitutionally required." *Ayala I*, 24 Cal. 4th at 261. *Batson* itself "decline[d] ... to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," 476 U.S. at 99, and the Supreme Court has left it to the lower courts to "develop [the] rules," *Powers*, 499 U.S. at 416. No subsequent Supreme Court case has given further instruction on *Batson* procedures, and certainly no Supreme Court case has foreclosed the use of ex parte proceedings. Therefore, the California Supreme Court's rejection of Ayala's *Batson* claim in this case was not contrary to, or an unreasonable application of, clearly established Supreme Court caselaw, and we should have affirmed the district court.

II

Contrary to Supreme Court precedent, the plain language of AEDPA, and the decisions of our sister circuits, the panel majority here reasons that no AEDPA deference is owed to the state court's opinion. Am. Maj. Op. at 21, 27-28. Notwithstanding the

presumption established by *Richter* and *Williams*, the panel majority concludes that the state court did not adjudicate Ayala's claim on the merits because the state court never analyzed the merits of Ayala's *Batson* claim and held only that any federal error would have been harmless. As a threshold matter, this misreads the state court's opinion. The California Supreme Court addressed and rejected Ayala's *Batson* claim on the ground that no particular procedures are constitutionally required, and only later reinforced its rejection of the *Batson* claim by holding that any potential error was harmless. But even if the state court had limited itself to holding that any federal error was harmless, the panel majority's analysis of whether the state court adjudicated Ayala's claim on the merits is wrong.

Williams held that we must presume that a state court adjudicated a federal claim on the merits, and that this presumption is rebutted only "[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." 133 S. Ct. at 1097.² Here, "the evidence leads

² As *Williams* demonstrated, this presumption is quite robust. In *Williams*, the California Court of Appeal had rejected a petitioner's claim regarding the dismissal of a juror, citing only a California Supreme Court opinion, *People v. Cleveland*, 25 Cal. 4th 466 (2001), and other principles of state law. *People v. Taylor*, No. B137365, 2002 WL 66140, at *8 (Cal. Ct. App. Jan. 18, 2002). *Cleveland*, in turn, had discussed but rejected two federal circuit court opinions that themselves addressed the Sixth Amendment. 25 Cal. 4th at 480-84. *Williams* concluded that the state court's mere mention of *Cleveland* was enough to show that the state court understood it was resolving a question of federal constitutional law. 133 S. Ct. at 1098-99. Accordingly, *Williams* held that the state court had adjudicated the
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very clearly to the conclusion” that the California Supreme Court did not inadvertently overlook Ayala’s *Batson* claim: it discussed the claim, found no error, ruled that any potential error would be harmless, and denied relief overall. Under *Williams*, therefore, we must presume that the state court adjudicated Ayala’s claim on the merits, and the only question left is whether that adjudication was an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d).

The panel majority attempts to evade this conclusion by insisting that the rebuttable presumption discussed in *Richter* and *Williams* is rebutted in this case by the “principle of constitutional avoidance.” Am. Maj. Op. at 35-36, 39. The panel majority reasons that “the California Supreme Court had no reason to reach Ayala’s federal constitutional claim” because it could resolve the claim as a matter of state law, and “under long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law.” *Id.* at 39-40. Because there was no compelling reason for the California Supreme Court to have evaluated the claim of constitutional error, the panel majority concludes that the California Supreme Court did not

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petitioner’s Sixth Amendment claim on the merits, and rejected the Ninth Circuit’s conclusion to the contrary. *Id.* at 1099. Given the Supreme Court’s determination that the state court adjudicated a petitioner’s federal claim because it referenced an earlier state opinion that itself mentioned federal circuit court opinions, the California Supreme Court’s direct discussion and rejection of Ayala’s *Batson* claim in this case was a clear adjudication of that claim on the merits.

adjudicate Ayala's *Batson* claim on the merits. *Id.* at 39-41.³ It is obvious that this conclusion directly reverses the presumption in *Williams*. Where *Williams* would hold that we presume a state court reached the federal issue, the panel majority holds that we presume the state court did everything in its power to *avoid* reaching that federal issue.

The panel majority supports its reverse presumption by reference to Supreme Court cases granting relief to habeas petitioners raising ineffective assistance of counsel claims. *Id.* at 37-38 (citing *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003)). But these cases offer no support for the panel majority's novel theory. In

³ A confusing aspect of the panel majority's opinion is its observation that "if we were required to determine whether the California Supreme Court adjudicated Ayala's claim of federal constitutional error on its merits in favor of the petitioner or the state, we *would* hold without question that the California Supreme Court found error in petitioner's favor under both state law and federal constitutional law." Am. Maj. Op. at 34 (emphases altered). The panel majority refers to this scenario as "Option 1." *Id.* at 30. "Option 1" would present a very different case: Had the California Supreme Court held that the trial court committed a *Batson* error, and had Ayala challenged only the court's determination under *Chapman* that such error was harmless, we would have to decide the open question of how AEDPA would apply to that type of adjudication on the merits. But the panel majority does not resolve this question, and instead makes the fatal error of holding that the California Supreme Court did not adjudicate Ayala's federal claim on the merits, whether in favor of Ayala, *see id.* at 28 n.3, 31 n.4, or against him. Thus, while the panel majority discusses the "Option 1" scenario at great length, it elects instead to presume (contrary to *Richter* and *Williams*) that the state court avoided an "Option 1" scenario by deciding Ayala's claims on state law grounds.

those cases, a state court rejected a petitioner's ineffective assistance claim on either the deficiency or prejudice prong, and did not reach the other prong. Applying § 2254(d), the Supreme Court concluded in each case that the state court's adjudication of one of the *Strickland* prongs was contrary to, or an unreasonable application of, *Strickland*. Because the state court did not reach the other prong, the Supreme Court addressed it de novo. *Porter*, 558 U.S. at 39; *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534. These cases are consistent with *Williams*, because the state court's express refusal to reach one of the *Strickland* prongs rebuts the presumption that the state court adjudicated that prong on the merits. Moreover, because the Supreme Court determined that the state court's analysis of one prong was an unreasonable application of *Strickland*, it was freed from AEDPA deference, and could review the other prong of the *Strickland* claim de novo. *Porter*, 558 U.S. at 39; *Rompilla*, 545 U.S. at 390; *Wiggins*, 539 U.S. at 534.⁴

Moreover, the Supreme Court has never suggested that when a state court rejects a petitioner's claim because any potential error was harmless, we can review the claim de novo because that claim was not fully adjudicated on the merits. Such a conclusion contravenes *Richter* and *Williams*, which instruct us to presume that a state court has

⁴ Another case cited by the panel majority, *Cone v. Bell*, 556 U.S. 449 (2009), is equally inapplicable. Am. Maj. Op. at 38-39. In *Cone*, the Supreme Court held that when a state court erroneously finds a procedural default and therefore has not reached the merits of a claim, a federal court can do so. 556 U.S. at 469-72. No one suggests that Ayala procedurally defaulted his *Batson* claim.

adjudicated a claim on the merits and to apply AEDPA deference when a state court has denied relief overall, regardless of the grounds for denying relief. The panel majority's interpretation also contradicts the commonsense interpretation of "adjudicated on merits." We have held that the term "adjudicated on the merits" as used in § 2254(d) means that "the petition ... was either granted or denied, [and] ... that the grant or denial rest[s] on substantive, rather than procedural, grounds." *Lambert v. Blodgett*, 393 F.3d 943, 966 (9th Cir. 2004); *see also Barker v. Fleming*, 423 F.3d 1085, 1092 (9th Cir. 2005). A determination that any error was harmless is a denial of relief on "substantive ... grounds." Accordingly, a decision that any error was harmless is an adjudication on the merits, and we should apply § 2254(d) to that adjudication. The majority's failure to do so is contrary to the command of § 2254(d) and our precedents interpreting it.

Not only does the panel majority's approach contradict AEDPA and our precedent, it also conflicts with the conclusion reached by our sister circuits. As the Tenth Circuit recently explained, "[w]here a state court assumes a constitutional violation in order to address whether the defendant was actually harmed by the violation, as here, the state court takes the claim on the merits; it just disposes of it on alternative *merits*-based reasoning." *Littlejohn v. Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). The Tenth Circuit concluded that because the state court rejected petitioner's constitutional claim on the ground that any error was harmless, it "render[ed] a decision that is on the merits for purposes of AEDPA." *Id.* at 850 n.17. Accordingly, the Tenth Circuit proceeded to consider whether the adjudication of the constitutional claim was an

unreasonable application of Supreme Court precedent. *Id.* The Seventh and Eighth Circuits have adopted a similar interpretation of “adjudicated on the merits.” See *Anderson v. Cowan*, 227 F.3d 893, 898 (7th Cir. 2000) (considering a state court’s rejection of a *Bruton* error on the ground that any such error was harmless beyond a reasonable doubt, and concluding that this rejection of the *Bruton* claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent); *Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) (“[W]here the state court [] has conducted a *Chapman* harmless error analysis, ... the claim has been ‘adjudicated on the merits’ in state court.”). The panel majority’s conclusion that claims rejected on harmless error grounds are not “adjudicated on the merits” thus conflicts with all other circuits to have considered the question.

This is not a case-specific error that will be confined to the facts of this opinion. The panel majority’s approach sets the groundwork for authorizing federal courts to review a habeas petition de novo whenever a state appellate court rejects a petitioner’s federal claim on harmlessness grounds, contrary to the Supreme Court’s admonition to defer to the state court’s decisions, and the general rule that § 2254(d) barely “stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings,” *Richter*, 131 S. Ct. at 786. The consequences of the panel majority’s approach will reverberate throughout this circuit. The state courts within our circuit routinely resolve claims of federal error on the basis that any potential error was harmless. See, e.g., *People v. Thomas*, 54 Cal. 4th 908, 936-37 (2012); *People v. Loy*, 52 Cal. 4th 46, 69-71 (2011); *Smith v. State*, 111 Nev. 499, 505-06

(1995); *State v. Walton*, 311 Or. 223, 229-31 (1991); *State v. Whelchel*, 115 Wash. 2d 708, 728-30 (1990); *Braham v. State*, 571 P.2d 631, 645-48 (Alaska 1977). Under the panel majority's rationale, we would give AEDPA deference to none of these determinations.

III

Not only does the panel majority commit serious errors in its AEDPA analysis, it lands yet another blow to our AEDPA jurisprudence by concluding that we review a state court's harmless error analysis under an exceptionally non-deferential standard. After erroneously concluding that the California Supreme Court did not adjudicate Ayala's *Batson* claim on the merits, Am. Maj. Op. at 39-40, and determining under de novo review that the state trial court committed a *Batson* error in holding an ex parte hearing with the prosecutor, *id.* at 42, the panel majority purports to apply the prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to review the California Supreme Court's conclusion that any federal error was harmless, Am. Maj. Op. at 49-70.

But the panel majority's application of the *Brecht* prejudice standard contradicts the Supreme Court's direction in *Fry v. Pliler*, 551 U.S. 112 (2007). Under *Brecht*, a federal habeas court that determines there is constitutional error cannot grant relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 638 (internal quotation marks omitted). Before *Pliler*, a federal court faced a conundrum in considering a state court's decision that a constitutional error was harmless beyond a reasonable doubt under *Chapman*. The federal habeas court had to determine whether to: (1) apply

§ 2254(d), and ask whether the state court's rejection of the petitioner's claim on harmlessness grounds was based on an unreasonable application of *Chapman*, (2) apply the general harmless error standard for habeas cases in *Brecht*, or (3) do both.

In *Pliler*, the Supreme Court sought to simplify the harmlessness assessment for federal courts and ensure that state courts received proper deference. It held that federal courts should apply the *Brecht* standard in every case because it is more deferential to state courts. 551 U.S. at 119-20. *Pliler* explained that before AEDPA, the Supreme Court applied the *Brecht* standard of review to consider habeas claims of state trial errors, because *Brecht* provided a "more forgiving standard of review" than *Chapman*. *Id.* at 116. The Court then rejected the argument that the passage of AEDPA replaced *Brecht* with a more petitioner-friendly standard: "Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of actual prejudice [] with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." *Id.* at 119-20 (internal quotation marks and citations omitted). Thus, it made sense to use the stricter *Brecht* standard in all habeas cases.

Nevertheless, given *Pliler*'s determination that the *Brecht* standard is more deferential to state courts than an AEDPA/*Chapman* analysis, it logically follows that if the state court's determination that an error is harmless beyond a reasonable doubt is not an unreasonable application of *Chapman*, then there is no prejudice under *Brecht*.

See *Pliler*, 551 U.S. at 120 (*Brecht* “obviously subsumes” AEDPA/*Chapman* review). Anything else would be inconsistent with *Pliler*’s reasoning. It would also be contrary to § 2254(d), which provides that a federal court *cannot* grant the writ unless the state court’s adjudication of a claim resulted in a decision that was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. See *Cudjo v. Ayers*, 698 F.3d 752, 768 (9th Cir. 2012) (stating that “if the California Supreme Court had appropriately applied the *Chapman* analysis in analyzing this Constitutional error, this court would be required to defer to that analysis under AEDPA unless it was unreasonable”).

Applying this reasoning here, the California Supreme Court’s determination that the procedure adopted by the trial court in holding an ex parte hearing was harmless beyond a reasonable doubt was not an unreasonable application of *Chapman*. The California Supreme Court devoted several pages to a meticulous review of the trial court’s decision regarding the seven jurors who were excluded and gave well-reasoned and supported explanations for why “the challenged jurors were excluded for proper, race-neutral reasons.” *Ayala I*, 24 Cal. 4th at 264.

Because we would be compelled to defer to the state court under an AEDPA/*Chapman* framework, we necessarily should find no *Brecht* prejudice. See *Pliler*, 551 U.S. at 120. In contrast, the panel majority engages in not just de novo legal analysis, but de novo review of the record that piles speculation upon speculation instead of giving due deference to the finder of fact.⁵ See *Batson*, 476 U.S.

⁵ One particularly striking example of the panel
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at 98 n.21. The panel majority's erroneous application of *Brecht* contradicts *Pliler* and dangerously muddles our caselaw.

IV

In sum, the panel majority's path to de novo review is contrary to the plain language of AEDPA, which precludes granting the writ unless the state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable

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majority's highly speculative approach is worth mentioning here. The panel majority offers the following hypothesis regarding how Ayala's input might have changed the trial court's conclusion that the prosecutor's reason for challenging one of the potential jurors was a legitimate nondiscriminatory reason (the panel majority discusses only three of the seven):

An inference of racial bias might [] have been drawn from the prosecutor's claim that Gerardo O. was challenged because he did not dress or act like other jurors, and did not mix or socialize with them. It is likely that Gerardo O.'s dress and mannerisms were distinctly Hispanic. Perhaps in the late 1980s Hispanic males in San Diego County were more likely than members of other racial or ethnic groups in the area to wear a particular style or color of shirt, and Gerardo O. was wearing such a shirt (and for this reason did not 'fit in,' in the prosecutor's mind, with the other jurors). If so, and if defense counsel were able to bring this fact to the trial court's attention, the prosecution's explanation that it struck Gerardo O. because of his dress and mannerisms would provide compelling support for Ayala's claim that the strike was actually racially-motivated.

Am. Maj. Op. at 62. This sort of conjecture in the face of a contrary determination by the trier of fact has no place in analyzing prejudice.

application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The panel majority hops over AEDPA’s “bar on federal court relitigation of claims already rejected in state proceedings,” *Richter*, 131 S. Ct. at 786, with a novel theory that ignores recent Supreme Court jurisprudence and conflicts with our sister circuits. In fact, the panel majority’s opinion raises every red flag that should have prompted us to rehear a case en banc. The approach to AEDPA embodied in the panel majority’s opinion has already struck out twice at the Supreme Court. I fear that with this case, we are looking at a hat trick. Because we should have corrected these errors ourselves, rather than asking the Supreme Court to weigh in a third time, I respectfully dissent from the denial of rehearing en banc.

Filed August 28, 2000

SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent,

v.

HECTOR JUAN AYALA, Defendant and Appellant.

No. S013188

OPINION

The San Diego County District Attorney filed an amended information on January 20, 1987, charging defendant with three murders and other offenses. The information alleged that the crimes all occurred on or about April 26, 1985.

Count 1 charged defendant with murder in the death of Jose Luis Rositas (Pen. Code, § 187; all unlabeled statutory references are to this code). Counts 2 and 3 contained the same charge in the deaths of Marcos Antonio Zamora and Ernesto Dominguez Mendez respectively. Count 4 charged him with the attempted murder of Pedro Castillo (§§ 187, 664), and count 5 with robbing him (§ 211). Count 6, which the superior court later dismissed and which the jury did not consider, charged him with robbing Zamora. Counts 7, 8, and 9 charged him with the attempted robbery of Dominguez, Rositas, and Zamora respectively (§§ 211, 664). The first six counts were accompanied by allegations that defendant personally used a firearm (§ 12022.5).

The amended information alleged that defendant committed the special circumstances of multiple murder (§ 190.2, subd. (a)(3)) and murder in the attempted commission of robberies (§ 190.2, former subd. (a)(17)(i), now subd. (a)(17)(A)).

The amended information further alleged that defendant had been convicted of other offenses: of robbery in 1972, of burglary in 1975, and of possessing controlled narcotic substances for sale in 1982.

The case was called for trial on January 17, 1989. William Woodward and Gloria Michaels represented the People, and Barton C. Sheela III and Glorene Franco represented defendant. (Woodward would later withdraw to join the bench. See *post*, at p. 287.) On August 1, 1989, the jury convicted defendant of all the offenses charged but one: the attempted robbery of Rositas. (None of the determinate terms is at issue here.) The jury also found, with respect to counts 1 through 5 and count 8 (the latter having been renumbered from count 9 following dismissal of count 6 as described in the previous paragraph), that defendant had personally used a firearm within the meaning of section 12022.5. It further found the special circumstance allegations true. Defendant waived his right to have the prior offense allegations tried before a jury, and the court found them true. The parties stipulated before the jury that he had suffered the convictions.

The penalty phase began August 14, 1989. On August 31, the jury returned a verdict of death on counts 1, 2, and 3, and the court entered judgment in accordance with it. The appeal to this court is automatic.

THE GUILT PHASE

FACTS

The prosecution theorized that defendant herein, Hector Juan Ayala, his brother Ronaldo Medrano Ayala, and Jose Moreno murdered Dominguez,

Rositas, and Zamora, after holding them captive in an automobile repair shop. (Moreno, tried under the name Joseph Juarez Moreno, was acquitted in a separate trial.) They would also have killed Castillo, but he improvised an escape plan and, though shot, survived to testify. Castillo provided the information that led to defendant's arrest and served as the prosecution's key witness at trial.

Opening statements and presentation of evidence began on May 30, 1989. San Diego Police Detective Richard Carey testified that on April 26, 1985, his homicide team was summoned to an automobile body repair shop located at 999 South Forty-third Street, between Logan and National Avenues in southeast San Diego. He found Dominguez's, Zamora's and Rositas's bodies in the shop office. All had been shot. A forensic pathologist, Dr. David Masamichi Katsuyama, testified that each had died from two gunshots to the head.

Prosecution Case

The prosecution theorized that the murders resulted from a robbery attempt that failed because it was based on the perpetrators' incorrect speculation that Dominguez had just returned from Mexico with a quantity of narcotics or cash.

Juan Manuel Meza testified that about a month before the killings Ronaldo Ayala, in the presence of Meza and defendant, proposed to rob the automobile body shop. Thereafter, Meza attended a meeting that defendant had called at his house. Defendant emerged from the bedroom displaying a .38-caliber Smith & Wesson revolver in poor condition. He or Ronaldo Ayala asked Meza if they could use some of Meza's guns, which were of better quality, for the

impending robbery of “a large quantity of drugs” that defendant said Dominguez was then obtaining “from the other side of the border.” (Meza testified that he owned a variety of firearms: a .45-caliber, .357-caliber and .380-caliber, all presumably pistols; a 30-30, a 30-06, and an AR-15 rifle; and an Uzi.) The three discussed a plan for the crime, in which they would tie up the victims and wait for Dominguez’s wife to arrive in an orange van with the drugs during that evening. The victims were all to be killed.

Castillo was Dominguez’s employee. He testified that Dominguez and Zamora, who was Dominguez’s brother-in-law, ran a heroin distribution business at the shop. Castillo helped to prepare, package, and deliver heroin. Defendant was also a heroin user.

Castillo testified that a week before the killings he spoke with defendant about Dominguez’s whereabouts. Dominguez was in jail, apparently for minor offenses. But Dominguez told Castillo to tell anybody asking that he was in Mexico, and Castillo so told defendant. Defendant did not believe Castillo, so Castillo told the truth. But defendant appeared skeptical of that information also, so Castillo reverted to his story that Dominguez was traveling south of the border.

About noon on the day of the killings, Castillo injected a dose of heroin off the premises and returned to work at the shop. The drug had a stabilizing effect on Castillo, who also testified that using it that day did not impair his ability to work.

About 5:00 p.m. Castillo, defendant, Ronaldo Ayala, Moreno, and Dominguez were all present on the premises. Later, around dusk, Castillo looked up and saw defendant pointing a pistol at him. He

escorted him to the office at gunpoint, where Ronaldo Ayala, also armed with a gun, was holding Dominguez, Zamora, and Rositas captive. They had all been bound with duct tape.

Defendant said to Dominguez something like, “Didn’t you know you had to go through us?”

Moreno then bound Castillo’s hands behind his back with duct tape. When Moreno was taping him he tried to shift his hands so as to keep them as free as possible.

Ronaldo Ayala announced that he “[w]anted \$ 10,000 or someone was going to die,” Castillo further testified. Dominguez responded, “Hey, homeboy, nunca te h[e] hecho nada [I’ve never done anything to you].” Apparently nobody had \$ 10,000, but Castillo volunteered that he had hidden some money under the driver’s seat of a tow truck parked outside—a ruse, as he had money only in his pocket. At that time, defendant extracted the pocket money, accused Castillo of lying, and stabbed him in the upper left leg.

Moreno left to inspect the tow truck. On his return, he informed his accomplices that the truck contained no money. Ronaldo Ayala urged that Castillo be taken out to get the money, but defendant, speaking to Castillo, said he preferred to “blow you away.” Castillo responded, “Gosh, it’s there, homeboy. ... It’s in the truck. I just put it there.”

Ronaldo Ayala shoved defendant and quieted him. Then, with a gun in one hand, he began to escort Castillo outside, holding him by his jacket with the other hand and warning him that if he tried to run when the garage door opened—precisely Castillo’s

plan—he would kill him.

Ronaldo Ayala told Moreno to open the garage door slowly, and Castillo feigned that he was trying to squeeze under it, but could not do so. In fact his feint was disguising the fact that he was propping the door up with his body. Unknown to the assailants, the door was defective, and would slam down unless supported. Once Moreno had raised it far enough for Castillo to escape, and also had relaxed his own hold on the door (which Castillo could sense by the door's weight on him), Castillo bolted underneath, and the door slammed down, surprising Ronaldo Ayala and Moreno.

Still bound at the hands, Castillo ran toward the street. Ronaldo Ayala and Moreno managed to open the garage door, and a shot was fired at Castillo, wounding him in the back. He fell onto South Forty-third Street. As he lay in the street he heard more shots. Then he saw a police car come into view, and the police took control of the scene.

Castillo acknowledged that he had testified falsely on prior occasions with respect to heroin-related activity at the body shop, denying any knowledge that Dominguez or Zamora sold the drug. He testified at trial that he did this for the sake of the murder victims' families: he did not want to taint their memories of the dead. He also testified that he never returned to using heroin or methadone after the killings. "I didn't need it no more" because "I accepted the Lord as my savior" some eight months later.

There was testimony that defendant's fingerprints had been found on items recovered from the body shop office. (See *post*, at p. 278.)

A police officer, Tony D. McElroy, testified that he

found Castillo in the street and discovered bodies inside the automobile body shop. He questioned Castillo, who told him that the perpetrators were three Mexicans. One, he told Officer McElroy, was wearing a red Pendleton-type jacket. Before describing anyone else he said he only wanted to answer further questions with a lawyer present.

Defense Case

Defendant did not testify at the guilt phase. But the defense theory was that third parties were responsible for the murders: either two young Latino men, one of whom was wearing a Pendleton-style shirt or jacket, or men who lived behind the body shop and who were also merchandising drugs. And Castillo was in league with them, and testified against defendant to turn suspicion away from the real killers, who might otherwise exact revenge against him.

Regarding the first theory: Traci Lynn Pittman testified that on the night of the murders she was at a liquor store across South Forty-third Street. She saw two Hispanic men walk from that liquor store to the complex containing the automobile body shop and disappear into it. One wore a red-and-black plaid Pendleton-style shirt or jacket. As they passed her she noticed that one appeared to be concealing a bulky object, which could have been a gun. Neither looked the same as defendant. The lighting at the scene was poor and she could not see where they went. But a minute or two later a man (evidently Castillo) emerged running from the complex and fell onto South Forty-third Street as shots rang out. Pittman took shelter in the liquor store.

As mentioned, the other defense theory was that

men living behind the automobile body shop, themselves drug dealers, had committed the murders. There was testimony that Hector Antonio Figueroa Hernandez, known by his nickname “Tony,” and Eduardo “Lalo” Sanchez lived in that locale. Figueroa moved there about four days after the killings. After Figueroa moved in, Sanchez’s uncle saw him and Sanchez wearing guns at the waist. Sanchez had a .22-caliber gun, and Figueroa had a .38. It appeared, from sudden increases in household wealth and unusual activity, that Sanchez and Figueroa had begun a drug-dealing business. Sanchez’s uncle reported his suspicions to the police.

ISSUES ON APPEAL

I. Jury Selection Issues

Defendant exhausted all of his peremptory challenges and expressed dissatisfaction with the jury as sworn. He raises several claims regarding jury selection. As we will explain, the trial court erred in permitting the prosecutor to explain *ex parte* and outside defendant’s presence his reasons for peremptorily challenging certain prospective jurors. But the error was harmless.

A. Holding Ex Parte Hearings on Reasons for Peremptory Challenges

Three times, and with respect to seven prospective jurors, defendant argued that the prosecutor was exercising peremptory challenges to jury panelists on the basis of their race or ethnicity. Such an action would, of course, be improper. (*People v. Wheeler* (1978) 22 Cal. 3d 258, 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79.)

The trial court asked the prosecution to explain

its reasons for the challenges. After the prosecutor said he did not wish to reveal his strategy, the court declared that it planned to hold an ex parte hearing from which defendant and his counsel would be excluded. Defense counsel stated that he had no objection to being excluded from discussions of strategy, but that “I think I am entitled to be present” otherwise, in case the prosecution’s “statement is a misstatement of the facts” and to “make sure the record is clear as to what the statement of facts is.” The court held three ex parte hearings, and ruled each time that the prosecutor was not challenging jury panelists because of race or ethnicity. At issue here is the propriety of the hearings at which the court reached its decisions.

“Under *Wheeler*, there is a presumption that a prosecutor uses his peremptory challenges in a constitutional manner. [Citation.] The defendant bears the burden to show, prima facie, the presence of purposeful discrimination. [Citation.] If he succeeds, the burden shifts to the prosecutor to show its absence.” (*People v. Alvarez* (1996) 14 Cal. 4th 155, 193.)

The details of the procedure for conducting an inquiry on a claim of improper group bias against prospective jurors are well known. In the first step of the three-part *Wheeler* inquiry, “‘[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within

the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association” ’ ’ ” (*People v. Box* (Aug. 17, 2000, S019798) — Cal.4th — [p. 25].) Next, the burden shifts to the challenged party to provide a race-neutral explanation for the exercise of peremptory challenges. (*People v. Hayes* (1999) 21 Cal. 4th 1211, 1284.) At the third step of the *Wheeler* challenge process—the determination by the trial court whether the opponent of the peremptory challenge has proved purposeful racial discrimination—the trial court must consider at least two possibilities. If the prosecutor acknowledges that he challenged a prospective juror for an impermissible reason (see *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256, fn. 1), then, of course, the *Wheeler* motion must be granted. If the prosecutor does not so state, but instead offers the court race-neutral reasons, it must still determine whether those stated reasons are untrue and pretextual. (*People v. Alvarez, supra*, 14 Cal. 4th 155, 196.)

Provided that the inquiry proceeds within the general framework just articulated, no particular procedures are constitutionally required. As the United States Supreme Court said of *Batson* hearings, “It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.” (*Powers v. Ohio* (1991) 499 U.S. 400, 416.) “The response of courts across the country has created a rather wide spectrum, ranging from those that recommend an adversary proceeding of some type to those that

permit the prosecutor's explanation to be received in camera and ex parte." (*Gray v. State* (1989) 317 Md. 250, 257 [562 A.2d 1278, 1282].)

Preliminarily, we review for an abuse of discretion the trial court's implicit rulings that the prosecution presented matters of strategy that justified ex parte hearings during challenges on *Wheeler* grounds.

At the end of the first ex parte hearing, the trial court implied, and implicitly found, that the prosecutor had "divulge[d] certainly to some extent prosecution strategy in terms of jury selection." During the second and third hearings, the court impliedly so ruled again, ordering, without prompting from the prosecutor, that the proceedings be sealed.

In the first and second hearings, the prosecutor said that he was disposed to challenge prospective jurors who were unable to express themselves well, or who appeared to be "nonconformist." (See *People v. Wheeler, supra*, 22 Cal. 3d 258, 275 [peremptory challenge may be exercised against one whose "clothes or hair length suggest an unconventional lifestyle"].) In sum, he was simply giving the reasons for his challenges, reasons that defendant was entitled to hear and that disclosed no secrets of trial strategy. It was unreasonable to exclude defendant from those hearings.

At the third hearing, the prosecution mentioned its 10-point rating system for prospective jurors, a rating given by a three-person committee including a psychologist, and the prosecutor discussed individual committee members' ratings of various prospective jurors. Even so, he was not divulging strategic information that defendant could use to his

advantage at trial—he was merely describing the prosecution’s system of jury selection, a process to which defendant was a passive bystander.

Given that no matters of trial strategy were revealed, we conclude that the court abused its discretion in implicitly or explicitly ruling that they were.

The next question is whether it was error to exclude defendant from participating in the hearings on his *Wheeler* motions. We conclude that, as a matter of state law, it was.

As a general matter, ex parte proceedings are disfavored. (See generally *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178 [excluding public from proceedings]; *People v. Wright* (1990) 52 Cal. 3d 367, 402 [ex parte communications with jurors]; *People v. Beeler* (1995) 9 Cal. 4th 953, 1014 (conc. and dis. opn. of Kennard, J.).) “Two basic defects are typical of ex parte proceedings. The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party’s own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court’s initial decision” (*United Farm Workers of America v. Superior Court* (1975) 14 Cal. 3d 902, 908.)

Ex parte proceedings following a *Wheeler* motion may create similar problems and, in the main, it is error to conduct them. “In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an *in*

camera discussion can be arranged.” (*Georgia v. McCollum* (1992) 505 U.S. 42, 58.) This, however, is not such a case.

The question whether ex parte communications are proper in ruling on a *Wheeler* motion has not arisen in California decisional law. But the same or closely related issues have arisen in federal and other state cases discussing analogous motions brought under *Batson v. Kentucky*, *supra*, 476 U.S. 79. While some decisions have tolerated an ex parte *Batson* hearing procedure on the ground that the United States Constitution permits it (*U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340; *U.S. v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1202), it seems to be almost universally recognized that ex parte proceedings following a motion regarding peremptory challenges allegedly made on the basis of improper group bias are poor procedure and should not be conducted unless compelling reasons justify them. (*People v. Hameed* (1996) 88 N.Y.2d 232, 237-238 [644 N.Y.S.2d 466, 469, 666 N.E.2d 1339, 1342]; *U.S. v. Roan Eagle* (8th Cir. 1989) 867 F.2d 436, 441; *Gray v. State*, *supra*, 317 Md. 250, 257-258 [562 A.2d 1278, 1282]; *U.S. v. Tindle* (4th Cir. 1988) 860 F.2d 125, 132-133 (conc. & dis. opn. of Murnaghan, J.); *U.S. v. Garrison* (4th Cir. 1988) 849 F.2d 103, 106; *U.S. v. Tucker*, *supra*, 836 F.2d at p. 340; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452 [civil case].) We agree.

U.S. v. Thompson, *supra*, 827 F.2d 1254, presented the issue and the countervailing values involved: “The question presented to us is ... whether the district judge erred by permitting the [prosecutor] to state her reasons to him ex parte and then ruling on the objection without divulging the

reasons to defense counsel. In resolving this issue we must consider and reconcile two fundamental principles of our criminal justice system. The first is that the district judge has broad discretion to fashion and guide the procedures to be followed in cases before him. [Citations.] The second principle is that adversary proceedings are the norm in our system of criminal justice, [citation], and ex parte proceedings the disfavored exception.” (*Id.* at p. 1257.)

U.S. v. Thompson, *supra*, 827 F.2d 1254, further explained: “The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decisionmaker—judge or jury—has the benefit of forceful argument by both sides....

“There are, to be sure, occasional departures from this norm. The district judge makes an ex parte review of the prosecution’s evidence to determine whether it falls within the rule of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963). [Citations.] Also, the district judge normally considers on an ex parte basis whether to reveal to the defense the identity of a government informant. [Citation.] But, as these examples illustrate, situations where the court acts with the benefit of only one side’s presentation are uneasy compromises with some overriding necessity, such as the need to act quickly or to keep sensitive information from the opposing party. Absent such compelling justification, ex parte proceedings are anathema in our system of justice and ... may

amount to a denial of due process.” (*U.S. v. Thompson, supra*, 827 F.2d 1254, 1258-1259.)

In addition to the foregoing general considerations, it is error in particular to conduct ex parte proceedings on a *Wheeler* motion because of the risk that defendant’s inability to rebut the prosecution’s stated reasons will leave the record incomplete. We discuss this problem *post*, at page 18.

We turn to the question of prejudice. We have concluded that error occurred under state law, and we have noted *Thompson*’s suggestion that excluding the defense from a *Wheeler*-type hearing may amount to a denial of due process. We nonetheless conclude that the error was harmless under state law (*People v. Watson* (1956) 46 Cal. 2d 818, 836), and that, if federal error occurred, it, too, was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24) as a matter of federal law. On the record before us, we are confident that the challenged jurors were excluded for proper, race-neutral reasons.

As mentioned, the ex parte hearings pertained to seven prospective jurors. With respect to Olanders D., the prosecutor stated he had exercised the challenge in part because his questionnaire indicated he opposed the death penalty. The prosecutor acknowledged Olanders D.’s oral statements that his views had changed, but commented that his answers were “not totally responsive to the questions of either counsel for the defense or myself.” He further stated, in essence, that Olanders D.’s difficulties in communicating led him to question whether he would “fit in” on the jury. The court disagreed with the latter point, noting, “it may well be that he would get along very well with 12 people,” but added: “I think the other observations of counsel are accurate and

borne out by the record.”

In the ex parte discussion of Galileo S., the prosecutor indicated that on *Hovey* voir dire (*Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 80-81) to determine his attitudes toward the death penalty, the prospective juror showed that he was a “nonconformist person who has had numerous run-ins with the law. We determined through his rap sheets that he has three or four more arrests other than those that he has told us about.” Moreover, the prosecutor also asserted that “his attitude is such that I think it would create alienation and hostility on the part of the other jurors.” The trial court agreed, commenting on Galileo S.’s “paranoia ... concerning the justice system.”¹

With respect to Barbara S., the prosecutor said that he had assigned her a rating of zero on the prosecution team’s 10-point scale, and that the other two reviewers had given her a three and a six. “During the questioning process ... I very quickly formed the opinion that there was something wrong with [Barbara S.]. Her responses were extremely slow, and I began to suspect that she was possibly under the influence of drugs. [¶] ... [S]he had ... an empty look in her eyes, ... a lack of really being totally in tune with what was going on.” He noted further that her “answers did not make sense, that they did not relate to the questions presented.” He also commented that Barbara S. appeared “somewhat

¹ Our own review of the record tends to confirm some of these observations. Galileo S. referred to the average juror as “Joe Six-Pack,” and he stated that “[m]ost people bother me.” He also exhibited a somewhat flippant attitude in responding to various questions during general voir dire.

angry” when she initially came into court. The trial court disagreed with the last point, interpreting her demeanor as reflecting nervousness rather than hostility. But it concluded that overall it “certainly [could not] quarrel” with the prosecutor’s impressions of Barbara S. or with the peremptory challenge based on her individual characteristics.

With respect to Gerardo O., the prosecutor cited in justification of his excusal his difficulties in writing, understanding and reading English. He also mentioned his idiosyncratic dress and demeanor, his evident aloofness from other prospective jurors, and his inability to articulate any opinion about the death penalty. The trial court noted that the record supported the prosecutor’s assessment of Gerardo O.’s responses.²

The prosecutor justified his challenge of George S. on the ground he had served on a jury once before and was the holdout juror, which made the prosecutor feel “extremely uneasy.” On the prosecution evaluation committee’s 10-point scale, the prosecutor had rated George S. about one; the other two members had rated him at one and two. The prosecutor mentioned he thought George S. was

² Our own review of the record tends to confirm these observations. Gerardo O. acknowledged on voir dire that someone else had to complete his questionnaire for him. He appeared to have difficulty understanding the nature of the proceedings the jury might have to follow, and he admitted to defense counsel that he did not understand some of his questions. Following, and despite, defense counsel’s thorough examination, when the prosecutor asked Gerardo O. if he understood that the government was seeking the death penalty against defendant, he said, “I didn’t know that.” Gerardo O. also stated he was unsure whether he could impose the death penalty.

Greek (as his surname might suggest), rather than Hispanic, as the defense implied in making the *Wheeler* motion, “but I wasn’t paying attention to the racial aspect of the case.” The prosecutor offered additional reasons for the challenge: George S. had once applied to be a police officer but was rejected, and the prosecutor feared it might have been for psychological reasons. Further, the prosecutor expressed unease with his *Hovey* voir dire responses. (*Hovey v. Superior Court*, *supra*, 28 Cal. 3d 1, 80-81.) The trial court confirmed the accuracy of the prosecutor’s observations.

With respect to Luis M., the prosecutor explained he exercised the challenge because the prospective juror was leery of the death penalty and because he had investigated the case on his own, prior to *Hovey* voir dire. Luis M. had stated: “In my neighborhood ... some people happen to know the accused, and I just questioned a couple of people [about] the character of the [defendant].” Luis M. had also made inquiries regarding the facts of the case. The court stated that the peremptory challenge was proper.

With respect to Robert M., the prosecutor reminded the trial court that he had passed on challenges to the jury at one point, leaving Robert M. seated. He stated he had rated Robert M. between a four and a five, while the other prosecutorial reviewers had assigned him ratings of four and five, respectively. He explained that he had determined, before beginning the selection process, that he would prefer not to have jurors who scored five or less, and that he ultimately exercised the challenge because he was skeptical Robert M. could impose the death penalty. The court noted that although Robert M.’s questionnaire indicated he favored the death penalty,

his voir dire answers varied to an extent that one might entertain a legitimate concern whether he could impose it, and it agreed that was an appropriate reason for a peremptory challenge.

In summary, the record reveals the following facts in support of the view that the prosecutor was not engaged in racial or ethnic discrimination. The court credited the prosecutor's opinions that Olanders D. opposed the death penalty, that Barbara S. was in a dazed state, that George S. had been a holdout juror and had been rejected for a law enforcement position, and that Robert M. was less than desirable from the prosecution's point of view. Galileo S., among other deficiencies, had (unless the prosecutor was misleading the court) not been honest regarding his criminal past. Luis M. admitted that he had investigated the case. Gerardo O. struggled with English and did not understand the proceedings. A prosecution committee, including a psychologist, gave Barbara S., George S., and Robert M. poor or mediocre suitability ratings. George S.'s surname is not obviously Spanish, and the prosecutor stated that he was unaware of his Hispanic heritage.

On these facts, we are confident that the prosecutor was not violating *Wheeler*, and that defense counsel's presence could not have affected the outcome of the *Wheeler* hearings.³ Moreover, the

³ The dissent does not come to grips with the record's strong factual base for our conclusion that the error was harmless. It evidently concludes that one need not, and should not, "credit this record." (Dis. opn., *post*, at p. 298.)

We will not "credit this record" willy-nilly, but we are obliged to scrutinize it closely. We are mindful that whether or not of federal constitutional dimension, the error here is not structural; it is an error in the conduct of the trial that requires
(continued...)

trial court's rulings in the ex parte hearing indisputably reflect both its familiarity with the record of voir dire of the challenged prospective jurors and its critical assessment of the prosecutor's proffered justifications. To the extent the rulings expressed agreement with the prosecutor's characterizations of the prospective jurors and their responses, they also support the court's implicit conclusion that the prosecutor did not fabricate his justifications and they were grounded in fact.

Defendant argues that the court's error in holding the *Wheeler* hearings ex parte was prejudicial because his lack of opportunity to rebut the prosecution's justifications for the challenges resulted in an incomplete record. We have agreed that such a result is theoretically possible. It is a reason for our conclusion that holding an ex parte hearing on a *Wheeler* motion ordinarily is state law error.

In particular, defendant maintains that a prosecutor might offer a reason unanticipated by the defense that sounds neutral, but in fact is untrue. His point is this: he is required, in making his prima facie case, to try to anticipate all the justifications the prosecutor may have for peremptorily challenging the prospective juror. But there are some he simply may not be able to anticipate. For example, the prosecutor might declare that he challenged a

(...continued)

us to consider the record. In other words, the error does not fall within the category of those that the law recognizes as reversible per se, i.e., "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," "transcend[ing] the criminal process" and "defy[ing] analysis by 'harmless-error' standards." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-311.)

prospective juror because he silently mouthed an obscenity toward the prosecution table during voir dire. Defense counsel might not have noticed that act. But having been apprised of it, they could point out that other unchallenged prospective jurors did the same thing, that the prosecutor saw them do it, that those prospective jurors were not in a protected group, and that he did not peremptorily challenge them. (Accord, *U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260.)

Although such a possibility exists in the abstract, nothing suggests that something similar occurred here. Rather, the trial court heard the criteria the prosecutor articulated—criteria furnishing reasons for the challenges that were, at a minimum, plausible, and that the record often supports—and expressly agreed that each of the excusals was proper. It impliedly found the prosecutor's stated justifications to be honest. We will not reverse the judgment on the basis of speculation regarding theoretical possibilities of the type discussed above.

A second concern, voiced by the *Thompson* majority, was that a prosecutor might offer a reason that is legally improper—i.e., the product of impermissible group bias—but that the trial court overlooks. (*U.S. v. Thompson*, *supra*, 827 F.2d 1254, 1260.) That was the case in *People v. Snow* (1987) 44 Cal. 3d 216, in which the trial court admitted that it was unfamiliar with *Wheeler* (*Snow*, *supra*, 44 Cal. 3d at pp. 224, 226) even though “[v]oir dire occurred ... several years after *Wheeler* was filed.” (*Id.* at p. 224.) In this case, however, the court was thoroughly familiar with *Wheeler* and the requirements that case imposed. We have now reviewed the records of two cases tried by this superior court judge in respect of

the same crimes: defendant's and Ronaldo Ayala's (*People v. Ayala* (2000) 23 Cal. 4th 225). In both, the trial judge showed himself to be in command of the law and the facts. He was diligent, prepared, knowledgeable, and engaged in the proceedings, including those relating to defendant's *Wheeler* motion. The concern voiced in *Thompson*, though real in the abstract and bearing fruit in *People v. Snow*, *supra*, 44 Cal. 3d 216, is of no moment in this case.

U.S. v. Thompson, *supra*, 827 F.2d 1254, is distinguishable in additional respects from this case. First, the *Thompson* majority, observing that all it had before it concerning the propriety of the challenges was the prosecutor's explanation of her reasons and the district judge's ruling, professed itself unable to place confidence in the latter in the face of the record's "[un]reassuring" "silence." (*Id.* at p. 1261.) Here, by contrast, the record, even if not as complete as it might have been had defendant participated in the *ex parte* hearings, is well developed. In particular, the trial court's remarks constitute a valuable assessment of the prosecutor's justifications. Second, the *Thompson* majority noted that in attempting to justify one of her challenges, the prosecutor cited the fact that the prospective juror and defendant were both Black. (*Id.* at p. 1260; see *id.* at p. 1256, fn. 1.) As the *Thompson* majority correctly observed, "the fact that the potential juror might identify too much with the defendant because they are of the same race is precisely what *Batson* said [is] not legitimate." (*Id.* at p. 1260.) A reviewing court might well entertain a reasonable doubt regarding the propriety of the challenge on such a record. But nothing comparable appears in the record before us.

In sum, when a trial court decides to hold a *Wheeler* hearing, it is possible, in the abstract, that the defense's contribution might make a difference in the ultimate ruling, which is why *Wheeler* hearings generally should be adversarial. On this well-developed record, however, we are confident that defense counsel could not have argued anything substantial that would have changed the court's rulings. Accordingly, the error was harmless.

Defendant also contends that the error violated his rights to be present and to be represented by counsel as guaranteed by the state and federal Constitutions and by California statutory law. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; Pen. Code, §§ 977, subd. (b), 1043, subd. (a); *People v. Waidla* (2000) 22 Cal. 4th 690, 741-742.) And he claims violations of rights under the Fifth, Eighth, and Fourteenth Amendments to the federal Constitution. We need not address these contentions in detail, for our analysis shows that the erroneous exclusion of the defense from the *Wheeler* hearing was harmless beyond a reasonable doubt under the federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. 18, 24, and also harmless under the state law standard of *People v. Watson*, *supra*, 46 Cal. 2d 818, 836. (Cf. *Rushen v. Spain* (1983) 464 U.S. 114, 118-119 (*per curiam*) [assuming the trial court's erroneous ex parte communications with juror implicated the defendant's federal constitutional rights to presence and to counsel, the error was harmless]; *People v. Wright*, *supra*, 52 Cal. 3d 367, 402-403 [same]; *People v. Hogan* (1982) 31 Cal. 3d 815, 849-850 (lead opn.), disapproved on another ground in *People v. Cooper* (1991) 53 Cal. 3d 771, 836 [temporary absence of counsel during jury deliberations assessed under harmless error

standard]; *People v. Knighten* (1980) 105 Cal. App. 3d 128, 132-133 [same].)

B. Challenge Regarding Rights of Excluded Prospective Jurors

In tandem with his *Wheeler* claim, defendant also maintains that the ex parte proceedings make it impossible to determine whether race-based exclusion may have occurred, to the detriment of prospective jurors who enjoy a right under the equal protection clause not to be discriminated against in jury selection on the basis of race. (*Powers v. Ohio, supra*, 499 U.S. 400, 409.) Again, on the record before us, we are confident that no such exclusion occurred. The prosecutor articulated, at a minimum, plausible criteria for his excusals, the trial court agreed that the excusals were proper, and to the extent the written record before us touches on the prosecutor's stated reasons, it confirms that they were not pretextual.

C. Loss of Certain Prospective Jurors' Questionnaires

Defendant claims that his constitutional right to a meaningful review of his conviction and sentence has been infringed by the loss of the bulk of prospective juror questionnaires. The questionnaires of the seated jurors and alternates were preserved, but almost all others have been lost.

As a general matter, we disagree. We addressed, and rejected, a similar claim in *People v. Alvarez, supra*, 14 Cal. 4th 155, where we said: "[D]efendant maintains that his *Wheeler*[-]*Batson* claim must be resolved in his favor on the ground that the record on appeal is not adequate to permit meaningful review. The deficiency of which he complains is the absence

of certain questionnaires, which were completed by prospective jurors, then lodged with the superior court, subsequently lost by its clerk's office, and finally determined by the superior court to be beyond reconstruction. A criminal defendant is indeed entitled to a record on appeal that is adequate to permit meaningful review. That is true under California law. [Citation.] It is true as well under the United States Constitution—under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved. [Citation.] The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*Id.* at p. 196, fn. 8.)

With regard to the prospective jurors whose questionnaires were lost but who are not identified by defendant as the subject of *Wheeler* challenges, this court will not in any event compare the views of those jurors excused by peremptory challenges with those who were not excused on that basis. (*People v. Jackson* (1996) 13 Cal. 4th 1164, 1197; cf. *id.* at pp. 1248-1249 (conc. opn. of Mosk, J.) [urging a contrary approach].) Under this court's precedent, therefore, the loss of the questionnaires could not have prejudiced him. With regard to the prospective jurors whose questionnaires were lost and who were the subject of *Wheeler* challenges, we have already explained that the record is sufficiently complete for us to be able to conclude that they were not challenged and excused on the basis of forbidden group bias. Thus, even if there was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California, supra*, 386 U.S. 18, 24), and under state law any error also was harmless (*People v. Watson, supra*, 46 Cal. 2d 818, 836).

*D. Denying Motions to Discharge the Jury
Panel and Certain Prospective Jurors for
Cause or Continue the Trial Because of News
Accounts*

Defendant's brother Ronaldo Ayala was tried shortly before defendant for crimes arising from the same events. In the aftermath of news coverage of the death sentence imposed on Ronaldo Ayala, defendant moved either to dismiss the jury panel or to continue the trial until the coverage's effects had lessened. He also moved to excuse certain prospective jurors for cause, namely their exposure to the coverage. The trial court denied his motions, and he claims error as a result.

The People contend that defendant failed to preserve his claim for review, to the extent his motion sought discharge of the jury panel, because the trial court denied the motion as premature without prejudice, pending voir dire, and he failed to renew it afterward. The question is close, but we disagree. The People are correct that the court denied the motion to discharge the panel as premature. It appears, however, that the court may have reiterated its prior denial of the motion to discharge the panel at the point at which defendant moved to be equipped with additional peremptory challenges—in other words, when jury selection was well underway. At least implicitly, the court finally denied the motion. We will proceed to decide the matter on the merits.

Doing so, we observe that there was no need to discharge the jury panel unless, after the jury was selected, jurors were sworn who, because of their knowledge of the trial or sentence, or both, of Ronaldo Ayala, could not be fair in defendant's case. (See *People v. Pride* (1992) 3 Cal. 4th 195, 228-229.)

Near the end of jury selection, the trial court stated that it had excused for cause “any juror[s] that showed a slight leaning that [knowledge of Ronaldo Ayala’s case] might well impact their ability to be fair to [defendant]” The parties agree that defendant challenged 36 panelists for cause on the basis of their knowledge of the Ronaldo Ayala case, and that of those, 13 were excused, leaving 23. Defendant acknowledges that those 23 prospective jurors agreed that their knowledge of the Ronaldo Ayala case would not affect their ability to try his fairly. He claims, however, that the opposite must be true because Ronaldo Ayala’s death sentence was reported on television and in the newspapers, and the prospective jurors were exposed to the information.

That, however, is not enough. Defendant’s claim is purely speculative. He acknowledges that the panelists testified that they would not be improperly affected by their knowledge of the sentence in Ronaldo Ayala’s case. He produces no evidence to support his claim that the jury panel was irretrievably tainted by exposure to Ronaldo Ayala’s case and should have been excused. For the same reason, his argument that his motion to continue the case should have been granted is without merit.⁴

Defendant next contends that eight prospective jurors should have been removed for cause because they could not be fair and impartial.

“Either party may challenge an individual juror

⁴ Defendant also claims that the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their equivalents in article I, sections 15, 16, and 17 of the California Constitution, were violated. For the reasons explained in the text, we do not agree.

for ‘an actual bias.’ [Citation.] ‘Actual bias’ in this context is defined as ‘the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.’ [Citations.] A sitting juror’s actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. [Citation.] ‘Grounds for ... discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists.’ [Citation.] The term ‘actual bias’ may include a state of mind resulting from a juror’s actually being influenced by extraneous information about a party.” (*People v. Nesler* (1997) 16 Cal. 4th 561, 581 (lead opn.).)

“ ‘On review, if the juror’s statements are equivocal or conflicting, the trial court’s determination of the juror’s state of mind is binding. If there is no inconsistency, we will uphold the court’s ruling if it is supported by substantial evidence. [Citations.]’ [Citation.] A juror’s bias need not ‘be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.’” (*People v. Carpenter* (1999) 21 Cal. 4th 1016, 1035.)

We turn to the specific prospective jurors to whom defendant refers.

Charles G. had read a newspaper article about the killings in 1985 when they occurred, and was vaguely aware that another man, whose name he could not

recall, had recently been sentenced to death as a result. He denied that he would be influenced by Ronaldo Ayala's sentence; rather, it was possible that "two people might be accused and only one of them is guilty." Acknowledging that defendant might prefer jurors who were "absolutely ... ignorant of the situation," he testified that he could be fair and impartial. "I'd only judge by the trial that I'm on."

The trial court ruled that Charles G. could be impartial despite his awareness of Ronaldo Ayala's case. The record supports its ruling. There was no error in denying the challenge for cause.

Lois B. testified on voir dire that she worked at home and would keep the television on in the background. By that means she might have heard something about the case, but she did not pay attention to it. She thought that defendant's brother might have been convicted of crimes, but was not sure. She stated in essence that this fleeting exposure would not affect her ability to be impartial.

Defense counsel challenged Lois B. as an afterthought, and only because "[i]t's my intention to challenge any juror who has knowledge of Ronaldo Ayala's case." Her challenge was so perfunctory that the trial court did not explicitly rule on it. But it told the prospective juror to await further instructions, and so implicitly denied it. The record supports its implicit ruling. There was no error in denying the challenge for cause.

Charles C. testified on voir dire that he had what may be characterized as an extremely vague recollection that there might have been another trial arising from the killings and that someone may have been convicted. He testified that "my knowledge is so

hazy that I'm not going to rely on it."

The trial court ruled that Charles C.'s knowledge of the case was trifling and that he could be impartial. The record supports its ruling. There was no error in denying the challenge for cause.

Catherine S. had only the faintest memory of Ronaldo Ayala's case. She recalled reading or hearing that another criminal defendant with the same last name had been convicted of something, but knew nothing more and knew nothing about the Ronaldo Ayala proceedings or outcome. The trial court denied without comment defendant's challenge for cause, which was based as much on counsel's suspicion that "I'm not sure she's been entirely candid" as on what she said on voir dire.

On this record, we see no evidence that Catherine S.'s vague awareness of Ronaldo Ayala's trial affected her impartiality. The court's ruling was proper.

Dwight S. testified that he experienced a "bit of exposure" to the legal consequences of the murders when he saw a newspaper headline about Ronaldo Ayala's sentence. He did not read the accompanying article. After completing his questionnaire, he realized that defendant might be Ronaldo Ayala's brother. He testified that he assumed the evidence in the two cases must be different, or the two would have been tried jointly, and that Ronaldo Ayala's sentence would not affect his ability to be impartial. The trial court denied defendant's challenge for cause, commenting that Dwight S. "would make his decision based upon the evidence as it comes in this case."

The record supports the trial court's observation. There was no error in denying the challenge for

cause.

Robert K.'s exposure to publicity was the same as Dwight S.'s. But as in Dwight S.'s case, Robert K.'s answers on voir dire made clear that he would not prejudge the case against defendant. In the abstract, he opined, "one brother can intimidate another brother to come along with him ... or they both can be willing participants." (Indeed, portraying defendant as the deferential follower of Ronaldo Ayala was part of the defense strategy at the penalty phase.) He insisted that he could be impartial. The trial court denied defendant's challenge for cause, and the record supports its decision. There was no error in so ruling.

Ingeburg C. had read a newspaper article reporting Ronaldo Ayala's sentence and mentioning that jury selection in defendant's case was pending. She testified that she only vaguely recalled its content and that "it doesn't affect me"; "I have an open mind, and you have to prove ... that he's guilty."

The trial court denied defendant's challenge for cause. Reviewing the record, we see no evidence that Ingeburg C.'s knowledge of Ronaldo Ayala's sentence affected her impartiality. The record is, rather, entirely to the contrary. The ruling was proper.

The other prospective juror to whom defendant refers, Bette C., was not, in fact, the object of a challenge for cause.

In sum, the court committed no error under state law in respect of any of the contentions defendant presents regarding the aspects of jury selection discussed in this section. Because defendant's constitutional claims are predicated on a violation of state law, they must be rejected.

In addition, defendant claims that the trial court improperly denied a motion to give him additional peremptory challenges. As a result, he claims, three jurors, unable to be impartial because they knew about Ronaldo Ayala's conviction or sentence, or both, were seated.

He refers to Jurors Lois B., Charles C., and Charles G. But as we have explained, there was no evidence of bias among them. Because the factual predicate of his claim is inaccurate, it cannot be sustained on review.

E. Claim of Error in Excusing a Prospective Juror Because of Her Views on Capital Punishment

Defendant claims that the Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court granted the prosecution's motion to excuse a prospective juror for substantially impaired ability to follow the law regarding capital punishment. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

"As we [have] explained ..., '[w]hen a prospective juror's views about the death penalty "would 'prevent or substantially impair the performance of his [or her] duties as a juror'" [citation], the juror is not impartial and may be challenged "for cause."'" (*People v. Earp* (1999) 20 Cal. 4th 826, 853.) This test applies equally to defense and prosecution challenges. (*Ibid.*) As stated, "'if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. [Citations.]' [Citation.] A juror's bias need

not 'be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.'" (*People v. Carpenter, supra*, 21 Cal. 4th 1016, 1035.)

Linda J.'s answers were inconsistent. Initially she testified that she would "find it difficult" to return a verdict of death. She stated that she went beyond being unsure about imposing the death penalty; rather, "I don't think I'm capable of that." But she also testified that she favored the death penalty in the abstract, and she hypothesized that the trial might enable her to summon the will to impose it.

After initially denying the prosecution's challenge for cause on the ground that Linda J. was "impaired, but not substantially," the trial court later reversed itself, finding that her ability to serve as a juror was substantially impaired.

Because Linda J.'s answers were inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror. There was no violation of any constitutional right.

F. Denying Two Challenges for Cause by Defendant

Defendant claims that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16, and 17 of the California Constitution were violated when the trial court denied his motions to excuse two prospective jurors for substantially

impaired ability to follow the law regarding capital punishment.

In response to initial questions by the court, Herman J. testified, without qualification or equivocation, that he would not automatically vote for the death penalty if the case reached that stage. Then defense counsel questioned him about his statement on his questionnaire that the death penalty should always be imposed for calculated, methodical murder. In response to leading questions, Herman J. testified, contrary to his response to the court's question, that he would always impose the death penalty for an intentional killing accompanied by a special circumstance, and in essence that he would not pay attention to the defense case in mitigation at the penalty phase.

Asked by the prosecutor whether he could consider mitigating evidence at a penalty phase, Herman J. testified, "I would want to consider the evidence and the additional information. [¶] Even though I felt, maybe, that he should get the death penalty, I would still be willing to consider any other ... additional evidence."

The prosecutor asked: "Are you of the frame of mind that any witness called—if any witness were called by the defense on the subject of mitigating evidence, that that witness would be absolutely wasting his time ... ?" Herman J. responded, "Well, I don't think it should be absolutely concrete. [¶] I would be willing to hear additional statements, or anything that ... might alter the situation. [¶] ... [¶] Even though I believe in the death penalty and all that, I'm not so set in my ways that I wouldn't listen to ... anything that might alter the decision" He added that he would not always impose the death

penalty “regardless of the situation or regardless of additional information.” He also testified that he could follow an instruction to return a verdict for death only if the aggravating evidence substantially outweighed the mitigating.

Defense counsel then asked Herman J. to explain his inconsistent statements. The prospective juror testified that when “I realized I answered your question by saying ... if found guilty without a shadow of a doubt I would want the death penalty, but I wasn’t ... considering the fact that you have additional evidence that alters, possibly alters it. [¶] ... [¶] ... I’m just saying I would ... always be willing to listen to additional evidence ... and possibly change to a life sentence.” In sum, Herman J. testified that he might be presented with evidence “important enough to consider the life sentence rather than the death penalty, even though I lean towards the death penalty.” But that mitigating evidence would have to be “strong” and “meaningful” to alter his predisposition to impose the death penalty.

Defendant argued, without success, to the trial court that Herman J.’s final answer confirmed what many of his others had suggested: that he would impose the death penalty unless presented with mitigating evidence that substantially outweighed that in aggravation, and hence could not follow his oath. He renews that argument here.

The trial court made no comment on its ruling beyond a statement that Herman J. was not substantially impaired. On this record, we cannot say that substantial evidence did not support the ruling. We believe that Herman J.’s testimony pointed to two views that did not conflict. He testified that his own predilection, unmoored by legal instruction, would be

to impose death unless there was a substantial reason not to. But he also testified, not inconsistently, that he could and would follow an instruction that directed him not to follow his own predilection but instead the law. Substantial evidence supports the court's ruling.

Patricia P.'s daughter was a San Diego County Sheriff's deputy, and her son was a police officer with the Chula Vista Police Department. He had previously been a San Diego police officer. Patricia P. testified that she thought the justice system was too lenient and that a criminal defendant should bear the burden of proving innocence. In her questionnaire, she stated that she favored increased use of the death penalty, and automatic imposition of a capital sentence for multiple murder—one of the special circumstances charged here. But on voir dire examination by defense counsel, she stated that she "would like to think that there would be other options" than the death penalty even in a multiple-murder case. And she also testified that she could follow the law on the presumption of innocence and the requirement of proof beyond a reasonable doubt even if such tenets contradicted her beliefs, that she could consider evidence in mitigation even if defendant were convicted of multiple murders, and that she would follow an instruction that she could not vote for the death penalty unless the aggravating evidence substantially outweighed that in mitigation.

Defendant challenged Patricia P. for cause on the ground that her views of the law substantially impaired her ability to follow her oath as a juror. The court disagreed, stating that "clearly this [prospective] juror is not impaired." Substantial evidence supports that determination. As with

Herman J., there was substantial evidence that she could separate her personal beliefs from her duties as a juror.

In conclusion, we discern no violation of any constitutional provision.

*G. Representation of Hispanics and the Young
in Jury Pool*

Defendant, who is Hispanic, contends that underrepresentation of Hispanics in the jury pool violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. He also claims that underrepresentation of the young violated his rights to a representative jury pool. He brought the same claims at trial, but the trial court rejected them.

These are the same claims that were presented in *People v. Ayala*, *supra*, 23 Cal. 4th 225, 256-257.) We rejected them there, and again do so here.

With regard to young people, the trial court ruled that the young are not a cognizable group, but even if they were, there was no improper exclusion of them in the jury selection process.

“California courts have not been receptive to the argument that age alone identifies a distinctive or cognizable group within the meaning of [the representative cross-section] rule.” (*People v. McCoy* (1995) 40 Cal. App. 4th 778, 783 [citing cases].) We need not decide, however, whether peremptory challenges on the basis of age violate the strictures of *Batson* or *Wheeler*; defendant simply does not persuade, any more than he does regarding Hispanic jurors, that the young were improperly excluded

under the jury selection system in place. As the People observe, aside from a mention of statistical disparity in the presence of young people as a result of the jury selection process, a factor that does not by itself establish systematic exclusion (*People v. Ayala, supra*, 23 Cal. 4th 225, 257), the only fault defendant finds with the process is that the master list of the jury pool was only updated annually, so that those who turned 18 during the year would not be included and some 18 year olds would turn 19. We do not believe that amounts to systematic exclusion. In order to avoid that effect or a similar one, the master list would have to be updated daily. The law does not require such diligence.

II. Guilt Phase Issues

A. Search of the Garage Office and Seizure of Items Therefrom

At trial, defendant filed a motion to exclude evidence obtained from a search of the automobile body shop garage where the murders occurred. (§ 1538.5.) He claimed that (1) searching the premises, and (2) removing therefrom certain small items, namely “vodka containers, orange juice containers and beer cans in which [he had] a proprietary interest,” violated his rights under the Fourth Amendment to the United States Constitution and article I, section 13 of the California Constitution.

The evidence regarding the relevant fingerprint evidence is as follows: The police recovered two orange juice containers and a vodka bottle from the office where the victims’ bodies lay. One orange juice container was full; the other contained a small amount of liquid. A fingerprint examiner identified

defendant's fingerprint on one of the orange juice containers. An evidence technician had obtained the print, but he failed to note whether it came from the full or the almost empty container. **(16)**

We apply the Fourth Amendment standard in deciding what remedy may be available following a claim of unlawful search or seizure. (*In re Lance W.* (1985) 37 Cal. 3d 873, 886-887; *Bowens v. Superior Court* (1991) 1 Cal. 4th 36, 47.)

“ ‘An appellate court’s review of a trial court’s ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] “The [trial] court’s resolution of each of these inquiries is, of course, subject to appellate review.” [Citations.] [¶] The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, ... is also subject to independent review.’ “ (*People v. Alvarez, supra*, 14 Cal. 4th 155, 182.)

The claim is without merit. Even if defendant left the containers at the automobile body shop while there as an invitee or a social guest, he had no expectation of privacy in the premises. “ ‘ “[O]ccasional presence on the premises as a mere guest or invitee” ’ ” is insufficient to confer such an

expectation. (*U.S. v. Chaves* (11th Cir. 1999) 169 F.3d 687, 691.) Moreover, the trial court found that he had abandoned the containers—a factual finding supported by substantial evidence and to which, accordingly, we defer. Abandoning them, he relinquished any expectation of privacy in them. As a general matter, “the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilage thereof.” (*People v. Machupa* (1994) 7 Cal. 4th 614, 629, fn. 5; see *People v. Roybal* (1998) 19 Cal. 4th 481, 507-508; see also *Abel v. United States* (1960) 362 U.S. 217, 240-241.)

For the foregoing reasons, we find defendant’s Fourth Amendment claims to lack merit, and reject them.

B. Radiologist’s Testimony on Bullet Size

Defendant claims that the court erred under state law in permitting testimony outside of the expertise of a witness.

Before the radiologist testified, Pedro Castillo testified that two guns were used in the robbery. Defendant had one, Ronaldo Ayala the other. Castillo did not testify that the two exchanged weapons at any point; rather, both kept control of their respective guns. He further testified that a shot was fired at him as he tried to flee and he felt the impact of a bullet. According to other testimony, .22-caliber bullet casings were found on the curb near South Forty-third Street, and a .38-caliber bullet was found in the body shop office, near Dominguez’s foot. The murder victims had all been shot exclusively by a .38-caliber gun, except Dominguez, who received one .22-

caliber and one .38-caliber wound. Hence, the best interpretation of the evidence at that point was that defendant shot Rositas and Zamora twice and Dominguez once with his .38-caliber gun, all execution-style, whereas Ronaldo Ayala shot Dominguez once and Castillo with his .22-caliber gun.

That interpretation was buttressed by the testimony of Leland Everett Kellerhouse, Jr., M.D. The shot that hit Castillo remained in his body, so it was decided to tape bullets of known caliber to Castillo's skin and take X-ray photographs capturing those bullets and the one in his body to determine the caliber of the latter projectile. Dr. Kellerhouse, a diagnostic radiologist certified as an expert in that area, was preparing to testify about the content of the X-rays, but defense counsel objected, saying "if he's going to give an opinion as to the caliber of the bullet, I'll object" The court asked, "Based upon the comparison of the projectiles? [¶] The objection is noted, overruled."

Dr. Kellerhouse then proceeded to explain that the bullet inside Castillo was lodged about 1.5 inches below the skin. An investigator taped two bullets to Castillo's skin above the location of the lodged bullet. The prosecutor asked Dr. Kellerhouse if he knew the caliber of the taped bullets, but he declined to give a definitive answer, saying, "I'm not an expert in ballistics." He did testify, however, that the X-ray would hardly distort, if it did so at all, the relative sizes of the bullets, so that a comparison of size based on the X-ray would be valid.

On redirect examination, the prosecutor asked Dr. Kellerhouse, "applying ... your expertise [in] the interpretation of X-rays, and considering the

technique that was utilized in this case, do you have an opinion as to whether the projectile within Mr. Castillo ... was of the same size as either of the two that were taped to Mr. Castillo's stomach?" Dr. Kellerhouse responded that "the deformed projectile within the patient most likely represents ... the same caliber as ... the [taped] projectile ... just to the left ... of the projectile within the patient." The investigator then testified that the smaller projectile he taped to the body was a .22-caliber bullet. Apparently that was the bullet that the X-ray showed to be taped immediately to the left of the lodged bullet.

Defendant contends that the foregoing amounted to expert testimony in ballistics, a topic in which Dr. Kellerhouse was not an expert.

The contention is without merit. Dr. Kellerhouse acknowledged that he was not a ballistics expert, and declined to testify about the bullets' caliber. He did testify that both bullets appeared to be the same "caliber," by which he could have meant the same size—defendant did not object or ask the radiologist to clarify his meaning in further examination. As a radiologist, Dr. Kellerhouse could testify that the bullets were located so that their relative size would not be distorted in the X-ray photographs.

Defendant next claims that the court failed to follow the rule of *People v. Kelly* (1976) 17 Cal. 3d 24, regarding the admission of scientific evidence via expert testimony, when it permitted Dr. Kellerhouse to testify about the results of the purported bullet-comparison experiment.

Kelly "set forth certain 'general principles of admissibility' of expert testimony based on new scientific techniques, including the following

‘traditional’ two-step process: ‘(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.’” (*People v. Leahy* (1994) 8 Cal. 4th 587, 594, italics omitted, quoting *People v. Kelly*, *supra*, 17 Cal. 3d 24, 30, italics omitted.)

But *Kelly* does not apply here. This was not an experiment at all. As we recently stated, “The *Kelly* test is intended to forestall the jury’s uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate.” (*People v. Venegas* (1998) 18 Cal. 4th 47, 80.) But here, where “a procedure isolate[d] physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly*.” (*People v. Webb* (1993) 6 Cal. 4th 494, 524 [holding that *Kelly* does not apply to a chemical, laser, and photographic process used to expose and identify defendant’s fingerprint on duct tape found at the crime scene].) There was no *Kelly* error in presenting the evidence.

Next, defendant asserts in essence that Dr. Kellerhouse conducted a scientific experiment that did not satisfy foundational relevance requirements. One requirement is that “the experiment must have been conducted under substantially similar conditions as those of the actual occurrence” (*People v. Bonin* (1989) 47 Cal. 3d 808, 847.)

Setting aside any question whether defendant has waived this claim, we find it to lack merit. The X-ray procedure was not an experiment performed in order to duplicate the conditions of the crime—as stated, it was not an experiment of any kind. Rather, it was simply a procedure that gave the radiologist an opportunity to describe a physical effect of the shooting that the jury could not discern without expert help.

C. Excluding Admission of Evidence of Arming During Prior Crime

The trial court ruled that defendant could not impeach Castillo with an inquiry whether, some 14 years before his testimony, he had been convicted of a felony: possessing narcotics for sale while armed with a .22-caliber pistol. The court allowed defendant to inquire about Castillo's conviction for drug possession for sale, but not about any element of the offense that he was armed. It ruled that evidence of being armed would be substantially more prejudicial than probative under Evidence Code section 352.

Defendant claims that the court erred in excluding the evidence under Evidence Code section 352. In particular, he asserts, knowing about Castillo's prior gun possession might have led the jury to wonder about Castillo's criminal sophistication and whether Castillo's story that defendant and Ronaldo Ayala killed Rositas, Zamora, and Dominguez, was true. He argues that depriving him of the opportunity to raise that question was error. We disagree.

In ruling on the question whether evidence is substantially more prejudicial than probative, the trial court enjoyed broad discretion. (Evid. Code,

§ 352.) “[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.” (*People v. Wheeler* (1992) 4 Cal. 4th 284, 295.) And the truth-in-evidence provision of the California Constitution (art. I, § 28, subd. (d)), contrary to defendant’s claim, did not limit the court’s power to exclude the evidence under section 352. The provision itself so provides.

One might conclude, of course, that it would not unduly consume time or confuse the jury to allow defendant to inquire into the arming aspect of Castillo’s conviction. But we are required to defer to the trial court’s ruling. Given that the conviction was 14 years old and the fact that Castillo was armed would not have revealed any further character trait that would have been particularly telling for impeachment purposes, we are unable to say that the trial court abused its discretion in ruling as it did.⁵

D. Denying Motion for Mistrial

Defendant claims that the trial court committed reversible error under state law when it denied his motion for a mistrial following a witness’s reference to Ronaldo Ayala’s case.

Juan Manuel Meza testified for the prosecution. He had previously testified at Ronaldo Ayala’s trial.

⁵ Defendant also claims that the court’s ruling violated the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 28, subdivision (d) of the California Constitution. For the reasons explained in the text, we do not agree.

(*People v. Ayala*, *supra*, 23 Cal. 4th 225, 243-244.) The parties agreed, in a discussion with the court and Meza before Meza's testimony, that Meza would refer to Ronaldo Ayala's trial by a euphemism such as "the 'previous proceedings' or the '1988 proceedings' and that the word 'trial' is not to be utilized."

As Meza was beginning to testify about defendant and Ronaldo Ayala's plan to rob and murder people at the automobile body shop, this exchange occurred between the prosecutor and Meza:

"Q. Did I tell you that we would ask the judge to reconsider your sentencing?

"A. Yes.

"Q. And when was that to have occurred?

"A. When I testified on the case of Ronaldo Ayala."

Defendant objected, but the court overruled the objection, stating, "As to the sequence and [insofar as] it was to be at a hearing, the answer will remain." At the next recess, defendant moved for a mistrial on the basis that Meza "was not to allude to the trial of Ronaldo Ayala," but the court denied the motion.

We review a ruling denying a motion for mistrial for abuse of discretion. (*People v. Welch* (1999) 20 Cal. 4th 701, 749.) We find none. "[A] motion for mistrial should be granted only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala*, *supra*, 23 Cal. 4th 225, 282.) Defendant has not shown that any irreparable damage—indeed, any damage at all—occurred here. Meza's comment was, as the People argue, innocuous. The jury had already been exposed to evidence that Ronaldo Ayala robbed and killed along with

defendant. Indeed, Meza himself testified, without objection, that Ronaldo Ayala said, at a meeting to plan the robbery, that every victim of the robbery was to be bound with duct tape and killed. Finally, the jury was instructed, before beginning to deliberate, that it was not to discuss or consider the legal fate of any perpetrator other than defendant. There was no error.

And for the foregoing reasons, we also reject defendant's argument that the trial court committed reversible error in failing to grant his motion for mistrial because the prosecutor, in his rebuttal argument, referred twice to witnesses' attendance at more than one trial.

THE PENALTY PHASE

FACTS

I. Prosecution's Case

In addition to defendant's prior felony convictions, the prosecution presented evidence of his prior violent criminal activity. In chronological order, the evidence related to the following episodes:

A. Holdup and Hostage-taking at Fast-food Restaurant in 1975

This episode underlay defendant's 1975 felony conviction for burglary. Witnesses testified that on March 28, 1975, he held up the Picnic 'N Chicken fast-food restaurant on Euclid Avenue at Eighth Street in National City. He held a gun to an employee's head while the manager complied with his demand for money. After collecting the money, he announced that he and his hostage, a woman, were departing, but the manager said the cash weighed too much for the hostage to carry and offered to

substitute himself, which defendant allowed. The manager and defendant walked outside, where a police officer shot defendant, allowing the manager to escape unhurt.

B. Stabbing Another Prison Inmate in 1976

Robert Richard Maytorena testified that he shared space in a dormitory at Tehachapi State Prison with defendant. Defendant asked to borrow his radio and Maytorena refused. The two had other disputes. On August 25, 1976, Maytorena awoke to find defendant stabbing him with a screwdriver. He jumped up. Defendant looked startled, as if surprised he had not killed him, and ran away.

Maytorena was taken to the hospital. He testified that he lost his spleen and a kidney and that he was told it was miraculous he had survived. At the time of trial he still suffered flashbacks of the incident, and he had continuing medical problems from the stabbing.

C. Killing Another Prison Inmate in 1982

Witnesses testified that defendant stabbed Jesse (or Jessie) Manuel Apodaca to death on September 6, 1982, in an exercise yard at Folsom State Prison. Daniel Apodaca, Jesse Apodaca's brother, testified that he saw defendant stabbing him multiple times, and he did not see anyone else stabbing him. A pathologist testified that Jesse Apodaca suffered five stab wounds, and died of a stab wound to the heart.

II. Defense Case

Defendant did not testify at the penalty phase, but various relatives testified about his background, along the lines of the testimony given in *People v. Ayala*, *supra*, 23 Cal. 4th 225, 296-297. In addition,

Marjorie Suarez, defendant's half sister, testified that their mother, Rosa Ayala, was and remained an alcoholic, and that she was not affectionate or demonstrative. She explained that many of Rosa Ayala's children had encountered misfortune: some were in prison and one had died of a heroin overdose. She begged the jury to spare defendant's life.

Rosa Ayala testified that defendant has four children and is married. She testified that he was respectful of his parents as a child.

Jose R. Ayala, defendant's father, testified with the aid of an interpreter.⁶ When defendant was about 12 to 14 years old, his half brother Ernie almost died of a heroin overdose. Jose Ayala had to break down the bathroom door to rescue him. He told the jury that he wanted defendant to be punished, not by death, but "in jail, so that his children would see him."

Barbara Moreno, defendant's sister, testified that as an adult, defendant, who lived across the street, would help take care of her children when needed. She further testified that defendant was a warm parent and husband, despite a difficult home life; their father was once jailed for domestic violence.

Defendant's half sister, Esther Brosnan, testified that Rosa Ayala "[n]ever grew up" and should not have had eight children.

Defendant introduced evidence to suggest that Ronaldo Ayala was the ringleader of the crimes at the body shop. Various witnesses testified that Ronaldo Ayala was the leader of the two brothers and

⁶ In *People v. Ayala*, *supra*, 23 Cal. 4th 225, 296, defendant's father is identified as Rogelio "Joe" Ayala.

that defendant was under his influence.

The defense also presented evidence to cast doubt on defendant's role in the prison assaults, particularly the killing of Jesse Apodaca. It called two witnesses, Guadalupe Navarro and Jorge Ramirez Acosta, also then incarcerated at Folsom, who controverted other accounts of the stabbing. Both testified that immediately afterward prison guards lined up several inmates against the wall, but defendant was not among them—he was nearby, but not in the immediate vicinity of the mortally wounded inmate. By contrast, other witnesses, including the guard involved, had testified that a guard grabbed defendant while he was still stabbing and kicking Apodaca, or immediately afterward, and placed him under arrest against the wall.

The prosecution impeached Navarro with evidence that he had told investigators he did not want to gain a reputation as a “rat” by testifying against another inmate. And Daniel Apodaca, called as a rebuttal witness, testified that neither Navarro nor Acosta was in the exercise yard when his brother was killed.

There had been testimony that the inmate who stabbed Apodaca did so using his right arm, and the defense used it to its advantage. James Grisolia, M.D., a clinical neurologist, testified regarding the weakness of defendant's right arm and shoulder that stemmed from being shot during the 1975 Picnic 'N Chicken robbery. Dr. Grisolia explained that defendant had fairly good mobility in his right arm, but that the arm and his right hand were weak, as were the muscles that elevate the arm and wrist. His condition would have been worse in the past, and Dr. Grisolia doubted that he would have been able to

penetrate a victim's rib with a knife held in his right hand and inflicted a wound in the heart. But he noted that defendant was left-handed, and acknowledged that his left hand would be able to inflict a knife wound to the heart.

The defense also presented evidence to the jury that defendant had never been charged with Apodaca's killing, or in any other prison assault. A former parole officer testified that the authorities' policy is to prosecute in-prison crimes if there is sufficient evidence to do so. And there was testimony that defendant and Apodaca had reconciled, following an exchange of insulting remarks, when Apodaca apologized.

ISSUES ON APPEAL

Defendant presents a number of legal arguments related to the penalty phase proceedings. As will appear, none has merit.

A. Prosecutor's Appointment to Municipal Court Bench

Following the close of the guilt phase, the parties discussed whether to tell the jury that the lead prosecutor, Woodward, had just been appointed to the San Diego Municipal Court and would no longer appear for the People. The trial court was inclined to inform the jury of the fact. Defendant urged that the court instead limit itself to saying Woodward had departed for positive professional reasons. To do otherwise, he argued, would be to burnish the prosecution's stature before the jury and improperly enhance the possibility of a verdict of death.

The trial court, stating that Woodward's appointment was public knowledge, disagreed. It said

that it did not wish to lose credibility with the jurors, in essence by giving them a vague and unsatisfying explanation for Woodward's absence, and informed them that Woodward had departed for an appointment to the bench, a process that had been underway before the prosecution of defendant.

Defendant renews his argument here. He claims that informing the jury of Woodward's elevation to the bench enhanced the prosecution's stature, depriving him of a trial before an impartial judge because the trial court now appeared to be the prosecutor's colleague, and violating his constitutional right to due process of law generally.

We reject defendant's claim. It is purely speculative. Nothing in the record shows that the jury was influenced in any way by Woodward's appointment. The same applies to defendant's argument that the trial court now appeared to the jury to be on the side of the prosecution. We also note that the prosecutor's departure was, so to speak, a clean break. Although the jury knew that the People were seeking the death penalty, the jurors had not yet heard the prosecution's case that defendant should be executed. The jury had already returned its verdict of guilt, and that verdict could not have been influenced by Woodward's appointment.

B. Prosecutor's Remark About Taking Case Seriously

At closing argument, the prosecutor urged that defendant be sentenced to death, meriting nothing less, and said that she did not ask for the death penalty "lightly." Defendant asked the court to assign misconduct to the remark because it amounted to a personal endorsement of the need for the verdict, but

the court ruled that the prosecutor's comment was proper and denied the motion.

On appeal, defendant claims that the ruling violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. He also contends that it contravened state law beyond the constitutional guaranty, and indeed his constitutional claims are predicated on state law error.

"When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of." (*People v. Osband* (1996) 13 Cal. 4th 622, 689.)

"[A] prosecutor may not ... vouch personally for the appropriateness of the verdict he or she urges." (*People v. Benson* (1990) 52 Cal. 3d 754, 795.) But there is no reasonable likelihood that the jury would have understood the prosecutor's remark as doing so. She was stating "what was obvious and altogether unobjectionable—i.e., that it was the People's position that defendant's crimes called for the ultimate sanction." (*Ibid.*) By declaring that she did not take that position lightly, she was saying that it was the People's considered position, and not whimsical. (*People v. Scott* (1997) 15 Cal. 4th 1188, 1219.) But that was stating the obvious. We discern no misconduct. Because there was no violation of defendant's state law rights, and his constitutional claims are predicated on his state law claim, we reject them as well.

*C. Failing to Instruct Not to Double-count
Aggravating Factors*

It will be recalled that the jury convicted defendant of three murders and found true a special circumstance of multiple murder. It also convicted him of two attempted robberies and found true a special circumstance of felony-murder attempted robbery. Defendant claims that the court violated the Eighth and Fourteenth Amendments to the United States Constitution in refusing to give this instruction, which he requested, to the jury before it decided the penalty: “You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [¶] In other words, do not consider the same factors more than once in determining the presence of aggravating factors.”

Instead, the court instructed the jury thus: “In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case You shall consider, take into account and be guided by the following factors, if you find them to be applicable in this case: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.” This was, in substance, the standard language of part of CALJIC No. 8.85 (5th ed. 1988).

In *People v. Melton* (1988) 44 Cal. 3d 713, we stated, “The literal language of [factor] (a) presents a theoretical problem ... since it tells the penalty jury to consider the ‘circumstances’ of the capital crime

and any attendant statutory ‘special circumstances.’ Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any ‘circumstances’ which were also ‘special circumstances.’ On defendant’s request, the trial court should admonish the jury not to do so. [P] *However, the possibility of actual prejudice seems remote*” (*Id.* at p. 768, second italics added.)

“When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, ‘“we inquire ‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.”’” (*People v. Welch, supra*, 20 Cal. 4th 701, 766.)

We discern no such reasonable likelihood here. “[W]e have already concluded that the standard instructions do not inherently encourage the double counting of aggravating factors. [Citations.] We have also recognized repeatedly that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor.” (*People v. Barnett* (1998) 17 Cal. 4th 1044, 1180.) There was no misleading argument here.

The prosecutor’s closing argument separated the murders and other crimes at the body shop as circumstances of the crime under section 190.3, factor (a) from the evidence of defendant’s other prior misconduct, informing the jurors that they were not to consider the circumstances of the crimes both under section 190.3, factor (a), and as prior violent criminal activity (*id.*, factor (b)) or as prior felony convictions (*id.*, factor (c)). Pointing to information presented in chart form, she said, “The boards that are in yellow represent [defendant’s] felony

convictions. The boards that are in red represent his violent acts, and the board that is in purple represents the underlying crimes in the body shop.” In sum, she said nothing that might mislead the jury as defendant suggests. (See *People v. Barnett, supra*, 17 Cal. 4th 1044, 1179.) As stated, this record gives no indication of a reasonable likelihood that the jury applied the instructions given it in a legally improper manner.

D. Other Claims

Defendant claims that the 1978 death penalty scheme is unconstitutional in various respects—for example, in permitting the prosecution to introduce evidence of his prior violent criminal activity at the penalty phase. But as a ““general matter at least, the 1978 death penalty law is facially valid under the federal and state charters.... We see no need to rehearse or revisit our holdings or their underlying reasoning.”’” (*People v. Ochoa* (1998) 19 Cal. 4th 353, 478.) We will, however, touch on defendant’s key arguments. Jury unanimity is not required to establish the truth of unadjudicated crimes. (*People v. Carpenter, supra*, 21 Cal. 4th 1016, 1061.) Defendant was not entitled to a separate jury for the penalty phase. (*People v. Pride, supra*, 3 Cal. 4th 195, 252.) The delay in presenting evidence of unadjudicated crimes did not amount to a stale prosecution (*People v. Ayala, supra*, 23 Cal. 4th 225, 300) or violate any statute of limitations (*People v. Carpenter, supra*, 21 Cal. 4th at p. 1061). The argument that each California county improperly applies its own standards to death penalty prosecutions is without merit. (*People v. Holt* (1997) 15 Cal. 4th 619, 702; see also *People v. Ochoa, supra*, 19 Cal. 4th at p. 479.) And the combination of

numerous available special circumstances and the prosecution's charging discretion does not render the death penalty law invalid. (See *People v. Lucas* (1995) 12 Cal. 4th 415, 478.)

DISPOSITION

The judgment is affirmed.

Mosk, J.

Baxter, J., Werdegarr, J., Chin, J., and Brown, J., concurred.

DISSENT

GEORGE, C. J., Dissenting.

I agree with the majority's conclusion that the ex parte procedure employed by the trial court to review defendant's challenge to the prosecution's use of peremptory challenges under *People v. Wheeler* (1978) 22 Cal. 3d 258, 276-277 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) was error, but I disagree with its unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless. I believe that applicable state and federal precedent clearly requires that we reverse defendant's conviction and remand this case for a new trial.

I.

During voir dire, defendant's counsel made three separate *Wheeler/Batson* motions, based upon the prosecution's challenges to seven potential jurors who were members of a racial or ethnic minority. The trial court was uncertain whether the first two motions (concerning two jurors each) stated a prima facie case, but in an abundance of caution it asked

the prosecution to respond with reasons for those challenges, and it held hearings on those motions. The trial court expressly found that the third defense motion (concerning three jurors) stated a prima facie case, asked the prosecution to respond, and held a hearing on that motion as well.

In response to the first motion, the prosecution stated: “I can do that [i.e., provide reasons for the peremptory challenges], but I would do it in chambers, without the presence of counsel [¶] They are not entitled to our strategy.” In reply, defense counsel stated: “*But I think I ... am entitled to be present with respect to their statement, to the extent that their arguments — that their statement is a misstatement of the facts, and I think I’m entitled to at least make sure the record is clear as to what the statement of facts is.*” (Italics added.) Defense counsel immediately added: “With respect to strategy, I certainly don’t want to pry into the strategy.” The court thereafter allowed the prosecutor to state his reasons at all three hearings in camera, outside the presence of defendant and his counsel, with the proceedings reported but the record sealed.¹

II.

I first explain why I agree with the majority that the trial court erred by conducting the *Wheeler/Batson* hearing outside the presence of

¹ In response to the third motion, the court stated that it would “request further clarification from the People.” The prosecutor responded, “Would the court do that in private, or are we requiring it for counsel?” The court replied, “It will be a matter of record. It will happen in private.” Defense counsel asked, “Does the court wish us to leave the courtroom?” The court replied, “Yes.”

defendant and his counsel. Under the procedure established in *Wheeler* and *Batson*, once a defendant presents a prima facie case that the prosecution has employed peremptory challenges in a racially discriminatory manner, the prosecution is provided with an opportunity to explain or rebut that showing. *But the burden of persuasion on this issue still, and always, remains with the defendant.* This has long been the operating assumption under both *Wheeler* and *Batson*. (See, e.g., *Purkett v. Elem* (1995) 514 U.S. 765, 768 [“the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike”].) Seen in this light, it becomes clear why a defendant must have the right to be present with counsel and to participate in the proceeding when the prosecution undertakes its rebuttal. *The defendant’s obligation to persuade the court continues even after the prosecution has made its statement*, and accordingly, a clear majority of decisions has recognized that a defendant must have the right to be present with counsel in order to comment on, and possibly offer surrebuttal to, the prosecution’s representations. (See, e.g., *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1258-1259 (*Thompson*); *U.S. v. Roan Eagle* (8th Cir. 1989) 867 F.2d 436, 441; *U.S. v. Gordon* (11th Cir. 1987) 817 F.2d 1538, 1541, vacated and remanded on another point (1988) 836 F.2d 1312; *Ex Parte Branch* (Ala. 1987) 526 So.2d 609, 624; *Gray v. State* (1989) 562 A.2d 1278, 1282-1283; *Com. v. Futch* (1995) 647 N.E.2d 59, 61-62; *Harper v. State* (Miss. 1987) 510 So.2d 530, 532; *State v. Antwine* (Mo. 1987) 743 S.W.2d 51, 63-64; *People v. Hameed* (1996) 666 N.E.2d 1339, 1342; *Buck v. Com.* (1994) 443 S.E.2d 414, 415; see also Note, *Defense Presence And Participation: A Procedural Minimum for Batson v.*

Kentucky Hearings (1989) 99 Yale L.J. 187.)²

As Judge Kozinski observed for the court in *Thompson, supra*, 827 F.2d 1254, defense counsel serves two crucial functions when the prosecution states its reasons at a *Wheeler/Batson* hearing. First, the presence of the defendant and his or her counsel may assist the court in probing the prosecution's stated reasons and uncovering pretextual justifications — for example, counsel might be able to point out that other nonexcluded jurors had the same attribute put forth as a reason for excluding the subject juror. (*Thompson, supra*, 827 F.2d at p. 1260.) In the same vein, defense counsel also might be able to argue that reasons advanced by the prosecution are legally improper. (*Ibid.*) The court in *Thompson* observed that the trial judge “might be able to detect some of these deficiencies by himself, but that is not his normal role under our system of justice. He would have to take on the role of defense counsel — inventing possible arguments as to why the prosecutor's stated reasons might not be sufficient —

² Decisions from the Sixth and Seventh Circuits of the United States Courts of Appeals, reflecting the minority view, generally have permitted the use of ex parte hearings in this context, and have left to the court's discretion whether to include the defendant's counsel in that procedure. (*United States v. Davis* (6th Cir. 1987) 809 F.2d 1194, 1201; *U.S. v. Tucker* (7th Cir. 1988) 836 F.2d 334, 340.) Even so, the court in *Tucker* expressed a preference for holding adversarial, rather than ex parte, hearings in this context, “whenever possible.” (*Tucker*, at p. 340.) By contrast, another minority group of cases—actually a subset of the majority rule—requires an evidentiary hearing after a prima facie case of group bias has been established. (E.g., *State v. Green* (N.C. 1989) 376 S.E.2d 727, 728; *Goode v. Shoukfeh* (Tex. 1997) 943 S.W.2d 441, 452] [civil case, stating the general rule].)

while at the same time keeping an open mind so as to rule on the motion impartially.” (*Ibid.*) And there may be valid arguments that a trial court will overlook unless assisted by an able, interested defense counsel. (*Id.*, at pp. 1260-1261.) Finally, “[a]t least as to some matters, the court simply might not have the time to ferret out the facts.”³ (See *id.*, at p. 1260, fn. 4.)

Second, as the court observed in *Thompson, supra*, 827 F.2d 1254, defense counsel performs another important function at a *Wheeler/Batson* hearing: preserving “for the record, and possible appeal, crucial facts bearing on the judge’s decision.” (*Thompson, supra*, 827 F.2d at p. 1261.) The court in *Thompson* stated: “This is a case in point. All we have before us concerning this issue is the prosecutor’s explanation of her reasons and the district judge’s ruling. For all we know, however, every one of the jurors picked might have worn jeans or voted to acquit a prior defendant [(these were among the prosecution’s reasons for challenges)]. Our trust in the learned district judge does, of course, make us quite certain that this could not have been the case. *However, if we are to review the district judge’s decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel fails to point out any such facts after learning of the*

³ For example, if the prosecution stated that it challenged a juror because the juror was a neighbor of or lived near the defendant, a trial judge unfamiliar with the juror’s neighborhood might not be able to determine whether this was so, but defense counsel (possibly assisted by the defendant) might be able to shed light upon the matter.

prosecutor's reasons. [¶] Here, the record's silence cannot be reassuring.... Since defense counsel did not learn of the prosecutor's reason until long after the trial, the fact that he failed to point out any discrepancies cannot give us the confidence we would normally have when the record is mute. [¶] In short, we respectfully disagree with the view that defense counsel has nothing to add once he has pointed out the potential *Batson* violation *Defense counsel could say things that might persuade the district judge or, failing that, he could say things that might persuade us. Both functions are crucial to our adversary system and to the principles of due process it serves.*" (*Ibid.*, italics added.)

Under *Thompson* and its progeny — including today's decision — a defendant has a right to be present and have his or her counsel orally rebut the prosecution's justifications unless it is shown that an ex parte procedure is necessary in order to protect some overriding interest that favors the maintenance of secrecy and the exclusion of the defendant (and counsel) as well as the public. We recently described some categories of such overriding interests in the related context of a defendant's Sixth Amendment right to a public and open trial, and the public's First Amendment right of access to criminal and civil trials. (See generally *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal. 4th 1178, 1205 (*NBC*) [defendant's Sixth Amendment right to public trial]; *id.*, *passim* [public's First Amendment right of access to all significant parts of criminal and civil trials].)⁴

⁴ In the present matter, defendant has not asserted that the ex parte and in camera procedure employed below violated his Sixth Amendment right to a public trial. The voir dire process has been recognized as being among the proceedings to
(continued...)

For example, under appropriate circumstances, matters involving national security, a confidential informant, or an undercover investigation, may be revealed in camera and be kept from the public (see *NBC, supra*, 20 Cal. 4th at p. 1222, fn. 46), and, as the majority observes, the Ninth Circuit Court of Appeals in *Thompson* equated with such matters the prosecution's interest in keeping confidential certain aspects of tactics and strategy. (*Thompson, supra*, 827 F.2d at p. 1259.) But the court held in *Thompson* that on the facts presented in that case (as demonstrated by the ex parte, in camera sealed record) the prosecution's *Batson* justifications were merely routine (they consisted of "the potential jurors' profession, attitude, dress, address and the fact that one had acquitted in a prior case"). (*Thompson*, at p. 1259.) This, concluded the Ninth Circuit, did not amount to protectable strategy or tactics. (*Ibid.*) The majority here properly concludes likewise (maj. opn., *ante*, at pp. 261-262): the

(...continued)

which the right to a public trial and public access rights apply. (E.g., *Press-Enterprise Co. v. Superior Court of Cal.* (1984) 464 U.S. 501 [First Amendment context, criminal case voir dire].) And under *both* the Sixth and First Amendments, a trial court is not permitted to close a trial proceeding unless the court first "provides notice to the public on the question of closure and after a hearing finds that (i) there exists an overriding interest supporting closure; (ii) there is a substantial probability that the interest will be prejudiced absent closure; (iii) the proposed closure is narrowly tailored to serve that overriding interest; and (iv) there is no less restrictive means of achieving that overriding interest." (*NBC, supra*, 20 Cal. 4th at p. 1181; see also *id.*, at p. 1205 [same rules apply in First Amendment and Sixth Amendment contexts].) There is no indication that the trial court considered any of these factors in the present case, or that it made any such finding.

prosecutor's stated reasons for exercising peremptory challenges did not implicate or reveal trial strategy. Accordingly, *assuming* for the purpose of analysis that the protection of confidential strategy may serve as an overriding interest that will justify the holding of ex parte, in camera hearings in this context, the facts here presented do not implicate any such interest and hence no adequate justification existed for excluding defendant and his counsel from the *Wheeler/Batson* hearing.⁵ The trial court erred by proceeding ex parte.

III.

The majority finds error under state law, and assumes for the purpose of analysis that the exclusion of a defendant and defense counsel from a *Wheeler/Batson* hearing also offends the federal Constitution. (Maj. opn., *ante*, at p. 264.) Yet the majority concludes that, on the facts of this case, the erroneous exclusion of defendant and his counsel from the jury selection hearing was harmless under state law (*People v. Watson* (1956) 46 Cal. 2d 818, 836 (*Watson*)) and under the stricter federal constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (Maj. opn., *ante*, at p. 264.)

First, the majority's application of the test for harmless error is suspect. Although the majority (*ante*, at p. 269) cites analogous cases which in turn

⁵ Because the majority agrees that on these facts the prosecution's stated reasons for the exercise of peremptory challenges did not implicate trial strategy, the majority's suggestion that the need to protect trial strategy may constitute an overriding interest that may justify ex parte or in camera proceedings is dictum.

stress that (i) “*prejudice will be presumed*” if the “denial of counsel at the critical stage of a criminal proceeding[] ... may have affected the substantial rights of the accused” and that (ii) “[o]nly the most compelling showing to the contrary will overcome the presumption” (*People v. Knighten* (1980) 105 Cal. App. 3d 128, 132-133 (*Knighten*))⁶—and although the majority apparently concedes, as it must, that the denial of counsel here *may have* affected defendant’s substantial rights (maj. opn., *ante*, at pp. 267-268)—nothing in the language, approach, tone, or structure of the majority opinion suggests that the majority’s harmless error analysis has been undertaken with these two crucial *Knighten* principles in mind.

In any event, even if the majority properly were to expressly acknowledge and apply a presumption of prejudice in this case, the majority would be unable to properly rely upon the record made below to reach

⁶ Accord, *People v. Hogan* (1982) 31 Cal. 3d 815, 849-850 (*Hogan*) (lead opn. of Bird, C. J.) (quoting and applying the same standard, and finding reversible error); see also *People v. Lozano* (1987) 192 Cal. App. 3d 618, 624-626 (same); *People v. Dagnino* (1978) 80 Cal. App. 3d 981, 989 (same). In *Dagnino*, *supra*, the court, after quoting from *Glasser v. United States* (1942) 315 U.S. 60, 76, and *Mempa v. Rhay* (1967) 389 U.S. 128, 134, explained: “[W]hile denial of counsel at the ‘critical stage’ of a criminal proceeding is not necessarily prejudicial as a matter of law, prejudice will be presumed where the denial ‘*may have affected*’ the substantial rights of the accused. Only the ‘most compelling showing’ to the contrary will suffice to overcome the presumption, and courts will not engage in ‘nice calculations’ in making such a determination. And of course the foundational constitutional requirement, in determining the harmlessness of such error, is *Chapman v. California*’s mandate that the ‘court must be able to declare a belief that [the denial of counsel] was harmless beyond a reasonable doubt.’” (*People v. Dagnino*, *supra*, 80 Cal. App. 3d at p. 989, italics in original.)

a reliable decision on the *Wheeler/Batson* issue. The record on this issue is incomplete, having been erroneously constructed with the input of only the prosecution and the court, and without crucial and necessary participation by defendant and his counsel. The court in *Thompson, supra*, 827 F.2d 1254, addressing this same issue, explained that we cannot credit the prosecutor's explanations for the challenges (and the court's rulings thereon), because "*the very reason we hold the procedure to have been deficient is that, without defense counsel's participation, the transcript is likely to be incomplete or misleading, as it is in this case. The government cannot rely on a transcript reflecting such fundamentally flawed procedures to show that that defendant suffered no prejudice.*" (*Id.*, at p. 1261, italics added.)

The method by which the majority proposes to find no prejudice here — reviewing the transcripts of the ex parte hearings in support of its conclusion that the prosecutor's stated reasons amply justified the peremptory challenges — is precisely the form of analysis rejected in *Thompson, supra*, 827 F.2d 1254, and its progeny. (Accord, *U.S. v. Alcantar* (9th Cir. 1990) 897 F.2d 436 (*Alcantar*) [revg. conviction pursuant to *Thompson*].) It is difficult to imagine how the majority could reach its conclusions that the record is "well developed," and that "defense counsel could not have argued anything substantial that would have changed the court's rulings" (maj. opn., *ante*, at p. 268), while faithfully approaching the error by *presuming* prejudice and by recognizing that "[o]nly the most compelling showing to the contrary will overcome the presumption" of prejudice. (*Knighten, supra*, 105 Cal. App. 3d 128, 133.)

The court concluded in *Thompson* that the erroneous exclusion of the defendant and his counsel from the hearing, and the resulting deficient record, produced a defect in the trial that rendered the record inadequate for purposes of appellate review. (*Thompson, supra*, 827 F.2d at p. 1261, fn. 5 [contrasting such error with trial errors that are subject to harmless error analysis].) The court in *Thompson* did not immediately reverse, however. Instead, it remanded “for a hearing ... on the prosecution’s motive in exercising its peremptory challenges. If the district court finds that the passage of time has rendered such a hearing meaningless, it shall vacate defendant’s convictions and schedule a new trial.” (*Thompson, supra*, 827 F.2d at p. 1262.)

Assuming the general propriety of such an after-the-fact hearing on remand, that approach is unavailable to us here, because even if the trial judge,⁷ the prosecutor, and defense counsel can be located now, it would be fanciful to expect those persons—*11 years after the event*—to be able meaningfully to reconstruct the record of the seven *Wheeler/Batson* motions here at issue. Facing a similar problem in *People v. Hall* (1983) 35 Cal. 3d 161, we observed that “[t]he proceedings were conducted more than three years ago. It is unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor

⁷ The trial judge now serves as a member of the federal judiciary.

examined the venire and exercised his other challenges.” (*Id.*, at p. 171; see also *People v. Snow* (1987) 44 Cal. 3d 216, 227 [relying upon *Hall, supra*, and declining to remand six years after the event]).⁸ Further, a remand also would be impracticable and inadequate in this case because the extensive written juror questionnaires of the vast majority of panelists who participated in the general voir dire have been lost and apparently destroyed. Thus, as a result of the trial court’s error, we are left with a record that is inadequate for our review and that cannot be reconstructed at this time. Accordingly, a reversal of the conviction and a remand for a new trial is the only appropriate remedy.

The majority purports to distinguish this case from *Thompson, supra*, 827 F.2d 1254, by observing that here, during the three ex parte hearings, the prosecution offered various justifications for challenges to the seven jurors, and in all seven instances the trial court stated on the record that it agreed with the prosecution’s position (although in a

⁸ The futility of a remand here is additionally demonstrated by *Alcantar, supra*, 897 F.2d 436. There, the court remanded for an after-the-fact hearing only two years after erroneous ex parte *Batson* proceedings. On remand, the trial court reported that “[t]here [is] simply no way in this case, given the two-year delay before the hearing, for the court and the parties to reconstruct the circumstances as they existed at the time of trial.” (*Id.*, at p. 439.) Nonetheless, the trial court purported to affirm its prior decision that the peremptory challenges were proper, and declined to order a new trial. On appeal from the remand, the Ninth Circuit reversed, holding that the hearing held two years after the jury selection and trial did not provide a “meaningful process for testing whether the prosecutor’s reasons for striking the [minority] jurors were racially neutral.” (*Id.*, at p. 438.)

few instances it rejected some of the prosecution's reasoning). Accordingly, the majority asserts that the present case, unlike *Thompson*, presents a situation in which the reviewing court has the benefit of the trial court's remarks assessing the prosecutor's reasons for the challenges, and that this in turn allegedly provides us with a "*well-developed*" record. (Maj. opn., *ante*, at p. 268, italics added.)

The majority fails in its attempt to distinguish *Thompson*. As noted above, the court in that case explained in detail why it would be improper to conclude that a trial judge in this situation can fill in the gaps and create an adequate (much less a well-developed) record. (See *Thompson, supra*, 827 F.2d at pp. 1260-1261.) As defendant asserts, "[i]t is unrealistic to expect that a judge in the midst of trial will be able to pick out the discrepancies in a prosecutor's justifications, especially where, as here, 70 panelists, whose questionnaires alone covered 77 questions ..., participated in the general voir dire." Contrary to the majority's view and as *Thompson* itself shows, the circumstance that the trial court made a few comments on the record does not support a determination that the erroneous *ex parte* procedure was harmless beyond a reasonable doubt.⁹

⁹ The majority also attempts to distinguish *Thompson* by observing that there, unlike the present case, the prosecutor once mentioned race when articulating her reasons for one of the challenges. (Maj. opn., *ante*, at p. 268.) This observation is accurate, but irrelevant to the issue we consider here. The court in *Thompson* mentioned the cited circumstance in the course of illustrating the necessity for defense counsel to be present in order to be able to probe the prosecutor's reasons and create an adequate record (*Thompson, supra*, 827 F.2d at p. 1260), and as noted above, the court in *Thompson* found reversible error because the trial court erroneously held an *ex parte* hearing—
(continued...)

The irony and fallacy of the majority's approach is apparent. While eschewing the prospect of reversal based upon defendant's "speculation regarding theoretical possibilities" (maj. opn., *ante*, at p. 267) that a properly created record might have presented a different picture "that would have changed the court's rulings" (maj. opn., *ante*, at p. 268), the majority is quite willing to *assume* that the record is "well developed" (*ibid.*) and substantially as it would have been had defendant and his counsel not been erroneously excluded from the hearings. I agree with the federal circuit court's assessment in *Thompson*: we simply cannot credit this record, and an appellate court cannot serve its review function when it cannot be satisfied that the record is complete as to the relevant facts. (*Thompson*, *supra*, 827 F.2d at p. 1261.)

IV.

Defendant asserts in related contentions that the ex parte procedure violated his state and federal constitutional rights to be present and to be represented by counsel. The majority relegates these substantial claims to a cursory paragraph in which it appears to concede the existence of the errors, but concludes that they were harmless beyond a reasonable doubt for the same reasons set forth earlier in its opinion. (Maj. opn., *ante*, at pp. 268-269,

(...continued)

and not because the prosecution's challenges were themselves improper. Here as well, we focus upon the adequacy of the record in light of the erroneous ex parte procedure. The circumstance that the prosecutor in the present case did not mention race as a reason for any challenge has no bearing on the question of the adequacy of the record for purposes of appellate review.

citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119 (*per curiam*); *People v. Wright* (1990) 52 Cal. 3d 367, 402-403; *People v. Hogan, supra*, 31 Cal. 3d 815, 849-850; and *People v. Knighten, supra*, 105 Cal. App. 3d 128, 132-133.) The four cases relied upon by the majority, however, are inapposite: none concerned a situation, like this one, in which the erroneous absence of a defendant and his or her counsel *created an incomplete record* of a critical and contested trial hearing, and hence the cases do not stand for the proposition that a defect such as we address here can be found harmless beyond a reasonable doubt.

In any event, the majority again fails to acknowledge, much less abide by, the law set out in the cases upon which it relies. As noted above, the majority's cited cases stress that error such as this, if properly subjected to harmless error analysis, is *presumed* to be prejudicial, and “[o]nly the most compelling showing to the contrary will overcome the presumption.” (*Knighten, supra*, 105 Cal. App. 3d 128, 133, *italics added*.) In *Knighten, supra*, 105 Cal. App. 3d 128, a compelling showing did overcome the presumption of prejudice: defense counsel, who had been excluded erroneously from an initial exchange between the court and the jury, immediately thereafter participated in further open court proceedings during which counsel's “suggestions and objections were carefully heeded” (*id.*, at p. 134), thereby eliminating any possibility of prejudice. By contrast, in *People v. Hogan, supra*, 31 Cal. 3d 815, 850, a similar error resulted in the jury's receiving inadmissible and prejudicial information concerning the defendant's reluctance to undergo a polygraph examination, and hence no compelling showing necessary to overcome the presumption of prejudice could be made. Once again, the majority provides no

indication that it has approached the question of harmless error with the traditional *Knighten* principles in mind.

V.

The majority exhorts this dissenting opinion to “come to grips with the record’s strong factual base for our conclusion that the error was harmless.” (Maj. opn., *ante*, at p. 266, fn. 3.) As I have observed (and as the Ninth Circuit noted under the same circumstances in *Thompson*, *supra*, 827 F.2d 1254, 1261), the record here is irremediably incomplete; any perceived strength is illusory and cannot be relied upon.¹⁰

Neither the majority nor any of the briefs cites *any* appellate decision that has found harmless the erroneous exclusion of the defense from a crucial portion of jury selection proceedings, and my own research similarly has not uncovered any such ruling. Today’s opinion carries the dubious distinction of being the first such decision. Because I

¹⁰ The majority’s assessment of the strength of the record is erroneous in yet another respect. The majority asserts that we can have confidence in the record because the trial judge below showed himself to be “diligent, prepared, knowledgeable, and engaged” in the *Wheeler* proceedings in both this case and in another recently decided matter. (Maj. opn., *ante*, at p. 268.) As the Ninth Circuit explained in *Thompson supra*, 827 F.2d 1254, “[o]ur trust in the learned [trial] judge” does not permit us to draw the inference adopted by the majority: “*If we are to review the [trial] judge’s decision, we cannot affirm simply because we are confident he must have known what he was doing. We can only serve our function when the record is clear as to the relevant facts, or when defense counsel [is present at the Wheeler/Batson hearing and] fails to point out any such facts after learning of the prosecutor’s reasons.*” (*Id.*, at p. 1261, italics added.)

find the majority's reasoning unpersuasive and inconsistent with established law, I dissent.

George, C.J.

Kennard, J., concurred.