No. 13-1428

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANTHONY J. DAIN
Counsel of Record
ROBIN L. PHILLIPS
PROCOPIO CORY HARGREAVES & SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
(619) 238-1900
Anthony.Dain@procopio.com
Robin.Phillips@procopio.com

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether a state court's finding that federal error was harmless beyond a reasonable doubt is to be reviewed under the *Brecht* standard.

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STATEMENT OF THE CASE

1. Trial

In 1989, Respondent, Hector Ayala ("Ayala") was tried for the murder of three men, which occurred in 1985. *See* PA 2a-3a.[1] Jury selection began with over 200 potential jurors, each of whom had survived hardship screening and completed a 77-question, 17-page questionnaire. PA 3a. Using these juror questionnaires, it took the parties over three months to select a jury of twelve. *Id.* During jury selection, each side was allotted 20 peremptory challenges. *Id.* Of these 20 challenges, the prosecution used 18. *Id.* Seven of the prosecution's 18 challenges were used to strike each prospective juror available for challenge, who was of black or Hispanic descent. *Id.* As a result of these 7 strikes by the prosecution, the jury was devoid of any black and Hispanic members. *Id.* In response, Ayala, who is Hispanic, brought three separate motions[2] pursuant to *People v. Wheeler*, 22 Cal.3d 258 (1978) – California's equivalent to *Batson v. Kentucky*, 476 U.S. 79 (1986) – claiming that the prosecution was systematically excluding minority jurors on the basis of race. PA 3a-4a & n.1.

Upon the first *Batson* motion, the court required the prosecution to state its reasons for challenging the jurors in question, and the prosecutor responded that he did not want to reveal his strategy. PA 4a, 196a-197a. Over the defense's

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[1] "PA" refers to the appendix filed with the petition for writ of certiorari.

[2] These motions are referred to as the *Batson* motions.

objections, the court then held a private hearing with the prosecution, outside the presence of Ayala and his lawyer, at which the prosecutor stated his reasons for the peremptory challenge. PA 4a. Upon the second and third *Batson* motions, the trial court continued to employ this ex parte, *in camera* procedure to hear and consider the prosecutor's purported reasons for challenging prospective minority jurors. *Id.* The court did so despite finding, by the third *Batson* motion, that the defense had established a prima facie showing of racial discrimination. *Id.* The court denied all three *Batson* motions, ruling that the prosecution had race-neutral reasons for striking each of the seven minority jurors. PA 4a.

Ayala was convicted on three counts of murder, one count of attempted murder, one count of robbery and two counts of attempted robbery. PA 2a, 5a. Ayala subsequently received a death sentence. PA 190a.

During the jury selection process, the court collected all of the juror questionnaires. PA 5a. However, at some point during or following the trial, all the questionnaires, except those of the twelve jurors, the six alternates and four additional prospective jurors, were lost. *Id.* The juror questionnaires of the remaining 193 prospective jurors have never been located. *Id.*

2. The California Supreme Court

On direct appeal from his conviction, Ayala challenged the ex parte, *in camera Batson* hearings as being unconstitutional. PA 5a. Ayala also appealed on the basis that the loss of the jury

questionnaires deprived him of his constitutional right to a meaningful appeal of the denial of his *Batson* motions.[3] *Id.* A divided California Supreme Court upheld Ayala's conviction on the basis of harmless error, with a vigorous dissent by Chief Justice George. PA 189a-261a.

The court found that "no matters of trial strategy were revealed" by the prosecution during the *Batson* hearings.[4] PA 10a, 200a. The court held "as a matter of state law," that "it was error to exclude defendant from participating in [the *Batson* hearings]." PA 10a, 200a. Relying on multiple federal cases which themselves rely on federal constitutional law, the court concluded: "it seems to be almost universally recognized that ex parte [*Batson* hearings] … should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *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)). In Ayala's case, because the prosecution revealed no matters of trial strategy during the *Batson* hearings, there were no such "compelling reasons," and the court "concluded that error occurred under state law." PA 11a, 203a.

In recognizing error under state law, the California Supreme Court quoted extensively from

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[3] Ayala also appealed on numerous other grounds. *See*, *e.g.*, PA 214a-226a.

[4] The three ex parte, *in camera Batson* hearings conducted by the trial court in Ayala's case are referred to as "the *Batson* hearings."

United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987), a case in which the Ninth Circuit held the ex parte *Batson* hearings to violate federal constitutional law. PA 15a, 201a-203a. For example, the court took from *Thompson* that "[a]bsent such compelling justification, ex parte proceedings are anathema in our system of justice and … may amount to a denial of due process." PA 202a-203a (quoting *Thompson*, 827 F.2d at 1258-59). The California Supreme Court agreed with *Thompson*, stating: "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." PA 203a. The court thus held "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." *Id.*

Regarding prejudice, in spite of finding error, the California Supreme Court held "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." PA 203a.

The California Supreme Court rejected Ayala's claim regarding the lost juror questionnaires on the basis of prejudice, finding that even if the loss of the questionnaires "was federal error, it was harmless beyond a reasonable doubt (*Chapman v. California*, supra, 386 U.S. 18, 24) …." PA 25a, 213a.

In dissent, Chief Justice George vociferously disagreed with the California Supreme Court majority's "unprecedented conclusion that the erroneous exclusion of the defense from a crucial portion of jury selection proceedings may be deemed harmless." PA 6a, 245a. The Chief Justice pointed out that "the majority would be unable to properly rely upon the record made below to reach 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." PA 253a-254a. Chief Justice George reasoned that "it 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." PA 257a. Chief Justice George found the record to be "irremediably incomplete" and that because of the lost juror questionnaires, "the record cannot be reconstructed." PA 260a, 256a. The dissent thus concluded that "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." PA 258a (citing *Thompson*, 827 F.2d at 1261).

3. The Ninth Circuit's Federal Habeas Review

On habeas review, the Ninth Circuit considered two of Ayala's claims of constitutional violation: (i) the exclusion of Ayala and his counsel from the *Batson* hearings; and (ii) the loss of the

juror questionnaires. PA 6a-8a. These claims were reviewed by the Ninth Circuit pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). PA 2a.

The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error, or made no determination as to whether this was federal constitutional error. PA 2a, 22a n.5. The Ninth Circuit therefore conducted a de novo review of Ayala's exclusion from the *Batson* hearings to conclude that this was federal constitutional error. PA 2a. The court similarly found the loss of the juror questionnaires to be federal constitutional error. PA 26a.

The Ninth Circuit reviewed the California Supreme Court's prejudice holding that any federal error in Ayala's case was harmless, under the standard prescribed in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (whether the error had a "substantial and injurious effect or influence in determining the jury's verdict"). PA 2a, 31a. The court held 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." PA 34a.

The Ninth Circuit reasoned as follows:

> 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 [*United States v. Thompson*, 827 F.2d 1254, 1260-61 (9th Cir. 1987)]. 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). …

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.* …

This second deficiency is greatly augmented by the loss of the jury questionnaires. … 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. Thus, we cannot perform a fair 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. 322, 342 (2003)]. 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.*

PA 35a-38a (footnotes omitted). The Ninth Circuit then launched into a 14-page analysis of the prosecution's reasons for striking three of the minority jurors, in order to demonstrate that even on the partial surviving record, many of the prosecution's reasons appear to be false, discriminatory, or pretextual. PA 38a-51a.

The Ninth Circuit concluded its finding of prejudice under the *Brecht* standard as follows:

> 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 v. United States*, 328 U.S. 750, 765 (1946).

> 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.

PA 52a-53a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The California Supreme Court Either Found Federal Error, in Favor of Ayala, or Intentionally Did Not Reach the Question of Federal Error. Assuming the California Supreme Court Found Federal Error, the Ninth Circuit Correctly Followed AEDPA in Reviewing This Finding.

a. The Best Interpretation of the California Supreme Court's Decision Is That the Court Found Federal Error, Because Its Finding of *Wheeler* Error Under California Law Necessarily Encompasses *Batson* Error Under Federal Law and the Court Based Its Decision on Federal Law.

The California Supreme Court made no express finding as to whether the exclusion of Ayala and his counsel from the *Batson* hearings was federal constitutional error. PA 11a. Rather, the court held that it was state error to exclude Ayala and his

lawyer from the *Wheeler* [*Batson*] hearings. PA 10a, 200a.

There are two reasonable bases for inferring that the California Supreme Court found federal error. First, the court must have inherently found federal error because "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)." PA 15a. Under *Batson*, before the prosecution is required to state its reasons for a peremptory strike, the defense must make a prima facie showing to "raise an inference" that the strike was made based on race. *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986). Under California's *Wheeler* standard, before the prosecution is required to state its reasons for a peremptory strike, the defense must "show a strong likelihood that" the strike was impermissibly based on race. *People v. Wheeler*, 22 Cal.3d 258, 280 (1978). California's standard is thus more demanding than *Batson*. *See Johnson v. California*, 545 U.S. 162, 173 (2005). It follows that since the California Supreme Court found state law error in the *Wheeler* procedure followed in Ayala's case, the court must necessarily also have found this to be federal constitutional error according to *Batson* procedure. As the Ninth Circuit correctly put it: "[B]ecause *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." PA 22a n.6. The Ninth Circuit's holding is consistent with *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013), in which this Court held that "if the state-law rule subsumes the federal standard – that is, if it is at

least as protective as the federal standard – then the federal claim may be regarded as having been adjudicated on the merits."

Second, the California Supreme Court based its finding of state law error on federal constitutional law. The court held that it is "almost universally recognized" that ex parte *Batson* hearings are erroneous, expressly relying on multiple federal cases that themselves rely on federal constitutional law. PA 201a, 10a-11a, 14a-15a (citing, among other federal cases, *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)). In addition, the California Supreme Court's reasoning quoted extensively from *United States v. Thompson*, 827 F.2d 1254 (9th Cir. 1987), in which the Ninth Circuit held ex parte *Batson* hearings to violate federal constitutional law. PA 15a, 201a-203a. Indeed, the court's ultimate finding of state law error in Ayala's case mirrored the reasoning in *Thompson*: "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." PA 203a (where *Thompson*, 827 F.2d at 1258-59 states: "[a]bsent such compelling justification, ex parte proceedings are anathema in our system of justice and … may amount to a denial of due process."). "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." PA 15a.

That the California Supreme Court relied for its finding of state law error upon federal cases and federal law, is in and of itself sufficient to conclude that the California Supreme Court also found federal error. This Court has held that when a state court relies on federal cases or federal law to reach a finding on an issue of state law, without expressly making a finding on the federal issue, the state court has similarly decided the federal issue. *Johnson v. Williams*, 133 S. Ct. 1088, 1098-99 (2013). In *Williams*, a California court had found there to be no state law error partly on the basis of federal cases relying on federal law, without expressly making any finding as to federal error. *Id.* This Court held in *Williams*, that because the California court's state law error analysis relied on federal law, the court had likewise found no error under federal law. *Id.*

The obverse (of the *Williams* case above) is necessarily true with respect to the California Supreme Court's analysis in Ayala's case. PA 16a. The California Supreme Court found the exclusion of Ayala from the *Batson* hearings to be error under state law (in comparison to *Williams*, where the state court found no state law error), and cited to multiple federal cases relying on federal law. PA 201a-203a. This Court reasoned, in *Williams*, that the California Supreme Court "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." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). Here, the California Supreme Court also 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 Ayala's favor by its reliance on cases that held analogous conduct to be erroneous under the federal Constitution. PA 16a-17a.

b. The Ninth Circuit Correctly Followed AEDPA in Reviewing the California Supreme Court's Finding of Federal Error.

Right at the outset, the Ninth Circuit recognized that Ayala's appeal was to be reviewed pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[5] PA 2a. The Ninth Circuit held that the California Supreme Court either determined that Ayala's exclusion from the *Batson* hearings was federal constitutional error, or made no determination as to whether this was federal constitutional error. PA 2a, 22a n.5. Of these two possibilities, the Ninth Circuit decided it

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[5] The AEDPA provision at issue reads as follows: "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. § 2254(d).

more likely that the California Supreme Court found federal constitutional error, because the California Supreme Court (i) found state law error, (ii) based on federal constitutional law, (iii) and the same analysis would lead to a finding of federal constitutional error, (iv) which is the approach supported by this Court in *Williams* (as discussed in the previous section). *See* PA 14a-17a.

Assuming the California Supreme Court found federal error in favor of Ayala, the proper standard of review for this finding would be an issue of first impression. PA 12a n.4. Accordingly, there are three possible standards of review: (i) deference to the California Supreme Court's finding pursuant to AEDPA *in favor of Ayala*;[6] (ii) de novo review; and (iii) no review at all, on the basis that a state court's determination in favor of Ayala cannot be relitigated on habeas review. *Id.* Under all three standards of review, the result is the same according to the Ninth Circuit's holding: there was federal constitutional error in Ayala's trial. PA 12a n.4.

The State argues that under AEDPA review, Ayala should lose, because there is no clearly established federal law forbidding the exclusion of a defendant and his counsel from *Batson* hearings. *See* Certiorari Pet., pp. 18-20. The State is mistaken. The exclusion of the defense from *Batson* hearings is forbidden according to the Sixth Amendment's right

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[6] In this case, the California Supreme Court's determination that there was federal constitutional error (in favor of Ayala), could only be overturned if this determination "was contrary to, or involved an unreasonable application of, clearly established Federal law …." 28 U.S.C. § 2254(d).

to counsel. PA 55a-56a. The Sixth Amendment's right to counsel applies to all 'critical' stages of the proceedings because defendants must be guaranteed "counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 224–25 (1967). This right has been clearly established federal law since its inception, and its scope has been well established by multiple holdings from this Court. *See*, *e.g.*, *White v. Maryland*, 373 U.S. 59, 60 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). "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." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Only when the essential guarantee of the assistance of counsel has been met can there be a "true adversarial criminal trial … envisioned by the Sixth Amendment …." *Id.* "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Indeed, without the right to counsel, defendants cannot be guaranteed a fair trial. *See id.* at 658 ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (citation omitted).

This Court has held that "jury selection is 'a critical stage' of the felony trial …." *Peretz v. United States*, 501 U.S. 923, 950 (1991) (citing *Gomez v. United States*, 490 U.S. 858, 873 (1989)). "[I]n

affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: '[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.'" *Gomez v. United States*, 490 U.S. 858, 873 (1989) (quoting *Lewis v. United States*, 146 U.S. 370, 374 (1892) (citations omitted)). Given that (i) the Sixth Amendment's right to counsel applies to all critical stages of trial, and that (ii) jury selection is a critical stage of trial, it follows that defendants have a constitutional right to counsel at *Batson* hearings, and this right is violated when counsel is excluded from *Batson* hearings without compelling reasons.

Batson made clear that a court must consider "all relevant circumstances" in deciding whether a prosecutor's stated reasons for striking a particular juror are race-neutral, and, if race-neutral, whether they are his actual reasons. 476 U.S. at 96–99; *see Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). Thus, Defense counsel must perform "two crucial functions" at *Batson* hearings. *United States v. Thompson*, 827 F.2d 1254, 1260 (9th Cir. 1987). The first is "to point out to the district judge where the government's stated reason may indicate bad faith." *Id.* at 1260. The second is to "preserve for the record, and possible appeal, crucial facts bearing on the judge's decision." *Id.* at 1261. The *Thompson* Court explained:

> 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.

Thompson, 827 F.2d at 1261. Only with the presence and assistance of defense counsel can a trial judge and subsequent appellate judges properly evaluate discriminatory intent by the prosecution under *Batson*. PA 58a; *Thompson*, 827 F.2d at 1260-61. Excluding the defense from *Batson* hearings without some compelling justification therefore violates the Constitution. PA 58a; *Thompson*, 827 F.2d at 1259-61.

The California Supreme Court recognized defendants' right to counsel at *Batson* hearings, admitting that: "it seems to be almost universally recognized that ex parte [*Batson* hearings] … should not be conducted unless compelling reasons justify them." PA 201a, 10a-11a, 14a-15a (citing, among other cases, *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)). This Court has also held, with regard to *Batson* hearings, 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). This of course means that absent compelling reasons for an *in camera Batson* hearing (as in Ayala's case), the exclusion of counsel from *Batson* hearings is unconstitutional.

The State doggedly harps on the fact that *Batson* declined to set forth "particular procedures" to be followed upon a *Batson* challenge by the defense. *See* Certiorari Pet., pp. 3, 7, 10, 12, 13, 16, 18-20. The State is essentially arguing that no clearly established rule exists unless this Court has ruled on the particular factual scenario implicating a constitutional right. The State's argument is preposterous, as it would require this Court to instantiate specific rules for each and every factual scenario in which a proceeding may be unconstitutional. That this Court declined to micromanage the appropriate methods a trial court may employ to ensure constitutional rights are protected, does not mean there are no clearly established constitutional rights which must be observed.

This Court need not prescribe particular procedures according to which *Batson* hearings must occur, any more so than the Court need prescribe particular procedures according to which any other part of a constitutionally-afforded trial must occur (such as opening statement, closing argument or witness examination). That this Court did not specify all of the procedures for conducting *Batson* hearings is not a preordained blessing for trial courts to conduct *Batson* hearings in any manner whatsoever without constraint. It means courts may exercise discretion in conducting *Batson* hearings,

provided they are conducted in a constitutional manner.

The State mistakenly argues that because some courts have permitted the exclusion of defense counsel from *Batson* hearings in compelling circumstances, there is no clear rule prohibiting the exclusion of defense counsel from *Batson* hearings. *See* Certiorari Pet., pp. 19-20. The Ninth Circuit correctly dispelled this faulty notion outright: "[M]any 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." PA 55a n.21; *see also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (noting that the federal constitutional due process right to defend "is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").

The exclusion of defense counsel from *Batson* hearings is unconstitutional (barring compelling reasons), just as the exclusion of defense counsel from other critical stages of trial (e.g., closing argument or witness examination) is unconstitutional (barring exceptional circumstances). Although compelling reasons permitting the exclusion of defense counsel from *Batson* hearings might sometimes exist, this does nothing to detract from the clear establishment of the rule that excluding defense counsel from *Batson* hearings is unconstitutional, unless there are compelling reasons.

2. In the Alternative, Assuming the California Supreme Court Did Not Reach the Question of Federal Error, the Ninth Circuit Correctly Applied De Novo Review.

In the alternative, assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal constitutional error, the proper standard of review is de novo. PA 12a n.4, 17a; *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. Trammel*, 705 F.3d 1167, 1218 (10th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 624 (7th Cir. 2012). De novo is the only logical standard of review, as AEDPA cannot apply if there was no decision by the California Supreme Court, i.e., no deference can be given to a decision that was never rendered. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur 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."); *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*") (citations omitted); *Porter v. McCollum*, 558 U.S. 30, 39 (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."). "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." PA 19a.

Under de novo review, the Ninth Circuit correctly held that it was federal constitutional error to exclude Ayala and his counsel from the *Batson* hearings, because there was no compelling justification for doing so, given that none of the prosecution's reasons for its peremptory strikes revealed matters of trial strategy. PA 24a.

The Ninth Circuit also properly applied de novo review in analyzing the loss of the juror questionnaires, because the California Supreme Court decided this claim based on prejudice alone, and did not reach the question of whether the loss of the questionnaires constituted federal error. PA 25a, 213a ("Thus, even if there was federal error, it was harmless beyond a reasonable doubt."). The Ninth Circuit correctly found that the loss of the juror questionnaires deprived Ayala of his federal due process right to a meaningful appeal, because the lost questionnaires render the record inadequate for appeal. PA 25a-27a.

a. The *Richter/Williams* Presumption Is Inapplicable Because the Basis for the California Supreme Court's Holding Is Known.

The *Richter/Williams* presumption is inapplicable here. *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011); *Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013). In *Richter* and *Williams*, this Court established the rebuttable presumption that when a state court is silent as to a fairly presented federal claim, the claim was adjudicated (rejected) on

the merits (against the petitioner) absent "any indication or state-law procedural principles to the contrary." *Richter*, 131 S. Ct. at 784-85; *Williams*, 133 S. Ct. at 1094. "The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 131 S. Ct. at 785.

Here, the *Richter/Williams* presumption is rebutted because there is excellent reason to think that the "most likely interpretation" of the California Supreme Court's finding is that Ayala's exclusion from the *Batson* hearings was federal constitutional error, for the reasons discussed in detail in Section 1(a), namely: that the California Supreme Court (i) found state law error, (ii) based on federal constitutional law, (iii) and the same analysis would lead to a finding of federal constitutional error, (iv) which is the precise approach supported by this Court in *Williams*, 133 S. Ct. at 1098-99. PA 14a-17a.

In addition, it was unnecessary for the California Supreme Court to find federal error in order to reject Ayala's claim. PA 14a. Ayala would have to meet two prongs to prevail on his claim of federal constitutional error: first, Ayala would have to demonstrate federal error, and second, he would have to demonstrate prejudice. PA 6a. The California Supreme Court was able to, and did, deny Ayala relief based only on the second prong of prejudice, by concluding that the federal error, if any, was harmless. PA 14a, 203a. The State seeks to apply the *Richter/Williams* presumption against Ayala to the issue of federal error, even when there was no reason for the California Supreme Court to

reach the question of federal error. In accordance with "long established legal principles, the California Supreme Court had every reason not to decide unnecessarily a question of federal constitutional law." PA 21a, 18a; *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("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."). Thus, the California Supreme Court had no reason to reach the question of federal error once it had decided that any error would have been harmless, as the federal error question was of no consequence.

The State misunderstands the purpose of the *Richter/Williams* presumption. The presumption addresses the situation in which a state court has denied relief, while being silent as to a federal claim. Here, however, the California Supreme Court was not silent as to Ayala's federal claim. The court analyzed his claim, discussing the applicable federal authority in depth, and specifically denied relief only on the basis of prejudice. Thus, there is no need to apply any presumption.

Most troubling is the State's attempt to impose the *Richter/Williams* decisions to create an absurd fictional presumption that the exclusion of Ayala and his counsel from the *Batson* hearings was not federal error. Irrespective of what can be presumed from the California Supreme Court's reasoning, it is impossible to infer that the court found Ayala's exclusion not to be federal error. The court found Ayala's exclusion to be state law error, while relying on federal law, and the court's same

analysis can only lead to a finding of federal error – this error being "almost universally recognized," as the court itself observed. PA 201a.

3. The Ninth Circuit Correctly Reviewed the California Supreme Court's Harmless Error (*Chapman*) Decision Under the *Brecht* Standard of Review.

The California Supreme Court held that if federal error occurred in Ayala's case, any such error "was harmless beyond a reasonable doubt" pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967). PA 203a. Prior to *Fry v. Pliler*, 551 U.S. 112 (2007), this decision was subject to the AEDPA/*Chapman* standard of review, i.e., whether the California court's determination of harmless error (under *Chapman*) constituted an unreasonable application of federal law. PA 32a n.13. However, in *Fry*, this Court clarified that the correct standard of review for harmless error determinations under AEDPA is set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Fry*, 551 U.S. at 119-122. The *Brecht* standard is whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. In *Fry*, this Court held that the *Brecht* standard "subsumes" the "more liberal" AEDPA/*Chapman* standard. *Fry*, 551 U.S. at 119-120. The Ninth Circuit thus correctly reviewed the California Supreme Court's harmless error decision under *Brecht's* "substantial and injurious effect" standard. PA 31a.

The State manufacturers an argument that the courts have "struggled" as to how to apply *Brecht* when reviewing harmless error decisions under AEDPA, citing cases from the Ninth and Seventh

Circuits. Certiorari Pet., pp. 24-25. There is no "struggle" among the courts that *Brecht* is the standard to be applied when reviewing harmless error decisions under AEDPA, as all of the State's cited cases recognize that *Brecht* is the governing standard of review. *See Merolillo v. Yates*, 663 F.3d 444, 455 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 102 (2012); *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011); *Cudjo v. Ayers*, 698 F.3d 752, 768-69 (9th Cir. 2012); *Kamlager v. Pollard*, 715 F.3d 1010, 1016 (7th Cir. 2013); and *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009). The cases cited by the State merely noted that courts may apply the AEDPA/*Chapman* standard before applying *Brecht*, and in some of the State's cited cases the courts indeed disposed of claims based on an AEDPA/*Chapman* analysis without having to perform a *Brecht* analysis. *See id.* This is of no consequence, because the *Brecht* standard subsumes the AEDPA/*Chapman* standard, and therefore any claim which cannot meet the AEDPA/*Chapman* standard necessarily cannot meet the *Brecht* standard. *See Fry*, 551 U.S. at 119-120. Similarly, a claim which satisfies the *Brecht* standard necessarily also satisfies the AEDPA/*Chapman* standard. *See id.*; PA 32a n.13. Indeed, in Ayala's case, the Ninth Circuit held that its finding of prejudice under *Brecht* inherently constitutes a finding of prejudice under AEDPA/*Chapman*. PA 32a n.13.

The State then wrongly criticizes the application of *Fry* in Ayala's case, because the Ninth Circuit applied *Fry* "to set aside [a state court's decision] without any regard for the reasonableness of the state court's analysis of the harmless-error question." Certiorari Pet., p. 25. This is not error –

it is the precise approach dictated by *Fry*: "We hold 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* …, whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*." 551 U.S. at 121-22 (emphasis added) (citations omitted).

Regardless, the Ninth Circuit correctly held that the federal errors in Ayala's case (exclusion from the *Batson* proceedings and loss of the juror questionnaires) were prejudicial under *both* the *Brecht* and the AEDPA/*Chapman* standards. PA 32a n.13. The Ninth Circuit's reasoning was solid:

> 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*, 827 F.2d at 1260-61]. First, Ayala's counsel could have pointed out where the prosecution's purported justifications might be pretextual or indicate bad faith. …
>
> 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. …

> This second deficiency is greatly augmented by the loss of the jury questionnaires. … Thus, we cannot perform a fair comparative juror analysis as required by *Batson*. *See* [*Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)].
>
> 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. 322, 342 (2003)]. 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.*

PA 35a-38a (footnotes omitted).

The unreasonableness of the California Supreme Court's harmless error decision is perhaps best evidenced by the fact that if this Court were now faced with reviewing the rejection of Ayala's *Batson* challenges made at his trial, the Court would be unable to do so because the record is "irremediably incomplete" (as Chief Justice George said in his dissent from the California Supreme Court's ruling).

PA 260a. The Ninth Circuit agreed: "[B]ecause 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." PA 52a. This prejudice is exacerbated by the loss of the juror questionnaires. *Id.*

The Ninth Circuit soundly concluded 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." PA 34a.

4. There Is No Conflict Among the Circuits that When AEDPA Applies, the State Court's Error Analysis Is to be Governed by AEDPA, and the Prejudice Analysis Is to be Governed by *Brecht*.

The Ninth Circuit's review of Ayala's appeal was governed by AEDPA. PA 2a. As discussed above, the Ninth Circuit reviewed Ayala's claim of federal constitutional error according to the two prongs of which it is comprised: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. PA 6a. The correct method of analysis for Ayala's claim is to review each of these prongs separately under AEDPA, as the Ninth Circuit did, which is in accordance with the method of analysis followed for claims of ineffective assistance of counsel brought under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* claims also have two prongs: a defendant must show (1) that counsel's performance was deficient, and (2) that the

deficient performance prejudiced the defendant. *Id.* at 687. A *Strickland* claim only succeeds if both prongs are met, and fails if either prong is not satisfied. *Id.* State courts are thus able to deny *Strickland* claims by deciding only one of the prongs. In such cases, this Court reviews a *Strickland* claim by analyzing each prong separately under AEDPA. *Wiggins v. Smith*, 539 U.S. 510, 520-21, 528-29, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 380-390 (2005); *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009). Although the *Strickland* tests (for error and prejudice) and standards of review differ from those applicable in Ayala's case (*see Richter*, 131 S. Ct. at 788), the method of analysis (analyzing each prong separately under AEDPA) in reviewing *Strickland* claims is analogous.

In both *Wiggins* and *Rompilla*, this Court reviewed *Strickland* claims which had been denied based on the first *Strickland* prong, i.e., the state courts found no deficiency in counsel's performance. *Wiggins*, 539 U.S. at 517-18; *Rompilla*, 545 U.S. at 378. Applying AEDPA, this Court analyzed each *Strickland* prong separately. *Wiggins*, 539 U.S. at 520-21, 528-29, 534; *Rompilla*, 545 U.S. at 380-90. In both cases, the first prong was subject to AEDPA's "unreasonable application of law" standard, because this was the prong, which the state courts had decided. *See Wiggins*, 539 U.S. at 520-34; *Rompilla*, 545 U.S. at 380-89. The second prong (prejudice) was subject to de novo review, because this was the prong which the state courts had not decided. *Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 390.

This Court again followed the *Wiggins/Rompilla* method of reviewing each

Strickland prong separately in *Porter v. McCollum*, 558 U.S. 30 (2009), where the state court had denied relief based on the second *Strickland* prong, finding that the defendant suffered no prejudice. *Porter*, 558 U.S. at 36-37, 39-40. Applying AEDPA, this Court reviewed the first *Strickland* prong de novo, because the state court made no finding as to whether the defendant's counsel was deficient. *Id.* at 39. Only the second *Strickland* prong (prejudice) was subject to AEDPA's "unreasonable application of law" standard, because this was the prong, which the state court had decided (and *Brecht* does not apply in *Strickland* cases). *Id.* at 40; *see* PA 34a n.14 (citing *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009)).

Here, the Ninth Circuit correctly followed the method of analysis set forth by this Court in *Wiggins*, *Rompilla* and *Porter* for reviewing – under AEDPA – claims comprising two prongs, by separately analyzing each of the two prongs of Ayala's claim: (1) the existence of federal error, and (2) prejudice to Ayala resulting from the error. Regarding the first prong: (i) assuming the California Supreme Court found federal error (in Ayala's favor), the Ninth Circuit affirmed this finding both under AEDPA's "unreasonable application of law" standard and under de novo review; and (ii) assuming the California Supreme Court made no determination as to whether Ayala's exclusion from the *Batson* hearings was federal error, the Ninth Circuit found federal error under de novo review. PA 12a n.4, 17a. Regarding the second prong, the Ninth Circuit found prejudice under the *Brecht* standard, which "subsumes" the "more liberal" AEDPA/*Chapman* standard, in accordance with *Fry*. PA 32a n.13, 34a.

The State wrongly takes issue with the *Wiggins*, *Rompilla* and *Porter* method of reviewing – under AEDPA – claims comprising two prongs, by separately analyzing each prong. Certiorari Pet., p. 18. The State argues that the appropriate method of review should be to analyze Ayala's federal claim "as a whole." *Id.* This approach is illogical, because one cannot properly analyze a scenario requiring two decisions, without examining both decisions. Nevertheless, the State argues for analyzing Ayala's federal claim "as a whole," because the State seeks to wrongly impose on Ayala the *Richter* standard of review, i.e., that under AEDPA, the California Supreme Court's judgment cannot be set aside unless there is "is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *See* Certiorari Pet., p. 18; *Richter*, 131 S. Ct. at 786.

Even if the State had its way and Ayala's claim were to be resolved "as a whole," the single decision on review would be the California Supreme Court's finding (pursuant to *Chapman v. California*, 386 U.S. 18, 24 (1967)) that "if federal error occurred, it, too, was harmless beyond a reasonable doubt." PA 203a. The State seems to agree that this would be the single question before the Court according to its 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 …." Certiorari Pet., p. i. This Court has ruled unequivocally in *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007): "We hold 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*." Thus, *Brecht* – and not *Richter* – would be the controlling standard if Ayala's claim were to be resolved "as a whole."

The State's argument that *Richter's* "fairminded jurist" standard applies is incorrect. As the Ninth Circuit aptly explained to the dissent in Ayala's case (the dissent having taken the same position as the State):

> 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. …. 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 [seven] 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.

PA 33a n.14.

Furthermore, *Richter's* "fairminded jurist" standard is specially tailored to reviewing whether there is error in *Strickland* cases (deficient representation by counsel), but not to Ayala's case. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) ("Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)."). At issue here, is the standard of review to be applied to the prejudice prong of Ayala's claim. The *Richter* standard is not intended to be applied in Ayala's case, because the *Richter* standard is for reviewing decisions regarding the *error prong* of a claim. *See id*. at 785-86. Moreover, this is not a *Strickland* case, and *Strickland* cases are reviewed uniquely: "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' …, and when the two apply in tandem, review is 'doubly' so …." *Richter*, 131 S. Ct. at 788 (citations omitted).

The State is frustrated because it views the Ninth Circuit's approach as having avoided AEDPA review, arguing that the AEDPA "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." Certiorari Pet., p. 18. In this regard, the State is its own source of frustration, because the State has it wrong. First, the best interpretation of the California Supreme Court's judgment is that the court did in fact find federal error (*see* Section 1(a)).

Second, the Ninth Circuit has conducted its entire review under AEDPA, and applied AEDPA correctly. The Ninth Circuit followed this Court's method in *Wiggins*, *Rompilla* and *Porter* for reviewing claims comprising two prongs under AEDPA. In so doing, AEDPA's "unreasonable application of law" standard is appropriate assuming the California Supreme Court found federal error in favor of Ayala, and is "subsumed" in the stricter *Brecht* standard of review for prejudice.

The State's argument that the Ninth Circuit's "*de novo* federal review under AEDPA" will open a floodgate of de novo review of state court rulings deserving of AEDPA review, is also of no moment. *See* Certiorari Pet., p. 22. First, the Ninth Circuit employed de novo review in two scenarios: (i) the scenario assuming the California Supreme Court found federal error in *Ayala's favor* (in which case the standard of review is an issue of first impression, with the likely alternative being the AEDPA standard, which would work against the State); and (ii) the scenario assuming the California Supreme Court made no determination as to whether there was federal error. As the State itself recognizes, the Ninth Circuit's decision in these scenarios applied de novo review "*under AEDPA*," i.e., not to the exclusion of AEDPA. *See* Certiorari Pet., p. 22 (emphasis added). The State's argument is thus nonsensical, because even under AEDPA, de novo review is required in these scenarios. Second, the method of review employed by the Ninth Circuit is correct (as discussed earlier in this section), and has always been the proper method of review to be employed since the passing of AEDPA. Therefore, the State's concern about opening a floodgate of de novo review

is unfounded, because such a 'floodgate' has always been open, and yet there has been no flood of de novo review by any federal court to which the State can point.

CONCLUSION

For at least the reasons stated above, Ayala respectfully requests that the State's petition for a writ of certiorari be denied.

Respectfully submitted,

ANTHONY J. DAIN
Counsel of Record
ROBIN L. PHILLIPS
PROCOPIO CORY HARGREAVES
& SAVITCH LLP
525 B Street, Suite 2200
San Diego, CA 92101
(619) 238-1900
Anthony.Dain@procopio.com
Robin.Phillips@procopio.com

Counsel for Respondent

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