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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's petition presents the question whether a state court decision rejecting a federal claim on the ground that any error that may have occurred was harmless is an "adjudicat[ion] on the merits" for purposes of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* Pet. i. That question is important and recurrent (*see* Pet. 22-23), and has produced a conflict in the circuits (Pet. 20-22)—indeed, one that has deepened in the time since the petition was filed. In addition, this case starkly illustrates how federal habeas courts can inappropriately set aside reasonable state-court decisions by first avoiding AEDPA's restrictions on *de novo* review of federal questions, and then mistaking this Court's decision in *Fry* v. *Pliler*, 551 U.S. 112 (2007), as a license to proceed "'without regard for the state court's harmlessness determination'" (Pet. App. 31a-32a; *see* Pet. 23-27). It is thus also an appropriate vehicle for this Court to provide further guidance as to the proper application of *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), to a state court judgment subject to AEDPA deference.

1. Respondent first argues that the California Supreme Court implicitly held there was federal error in the jury selection process at respondent's trial (although the court "made no express finding" to that effect, Opp. 11), and that it was therefore appropriate for a federal habeas court either to accept that holding or to review the question *de novo* (Opp. 16). Alternatively, he argues that, if the state court did not resolve the question of federal error, *de novo* review "is the only logical standard of review" under AEDPA, because "no deference can be given to a decision that was never rendered." Opp. 22. The point these

arguments miss is that whether or not the state court thought there had been federal error, its ultimate judgment was that respondent's conviction should be sustained because, on the facts of the case, any error that might have occurred was harmless beyond a reasonable doubt. *See* Pet. App. 203a, 210a, 211a. That determination was an "adjudicat[ion] on the merits" for purposes of Section 2254(d); and the state judgment of conviction is the "decision" that may be set aside, under AEDPA, only if it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Whether a habeas petitioner can make that demanding showing does not depend on what, if anything, the state court might have concluded about a point of federal law under the *de novo* standard that applies on direct appeal.

As the petition explains (at 15-18), that conclusion follows from this Court's prior cases. The Court has made clear that, absent some clear indication that a state court decision rested on some procedural principle, federal courts must presume that any federal claim raised in the case was adjudicated on the merits. *Harrington* v. *Richter*, 131 S. Ct. 770, 784-785 (2011). There need not be "an opinion from the state court explaining the state court's reasoning," nor any express announcement that a claim was rejected on the merits. *Id.* at 784. The presumption applies when the state court rejects a federal claim without expressly addressing it, absent unusual circumstances such as some clear indication that the claim was "overlooked." *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094-1097 (2013). Rejection of a claim for unstated reasons could, of course, reflect a state court's determination that a federal error might have occurred, or indeed did occur, but was harmless in the context of the case. There is no reason to treat such

an adjudication differently if the state court explains its determination rather than simply incorporating it in an unexplained judgment. And if rejection of a federal claim for unstated reasons—potentially including a conclusion of harmlessness—is an "adjudicat[ion] on the merits" for purposes of AEDPA, as *Richter* and *Williams* hold, then it must be the state court's judgment, rather than its reasoning, to which the federal courts owe deference. Accordingly, in any case, whether the habeas petitioner can show that the state court's *judgment* sustaining the state conviction is "contrary to . . . clearly established Federal law" should be "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003).

Here, there is no question that the California Supreme Court's judgment was based on consideration of the merits of respondent's claim, rather than on some procedural default or non-merits bar. *See* Pet. 16-17. The state court acknowledged the presentation of a federal claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986); expressly noted the fact that this Court had declined to mandate particular procedures for implementing *Batson*; and ultimately concluded that any potential federal error under *Batson* during the jury selection for respondent's trial was, on the extensive record before the court, harmless beyond a reasonable doubt. Pet. App. 198a-199a, 203a. As Judge Callahan observed in dissent, "although there may be some question as to whether the California Supreme Court actually found that there was a 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." *Id*. at 80a. Under these circumstances, the state court's determination of harmlessness was an

adjudication of respondent's federal claim on the merits within the meaning of § 2254(d).

2. As the petition explains (at 20-22), the Ninth Circuit's contrary conclusion in this case conflicts directly with the Tenth Circuit's decision in *Littlejohn* v. *Trammell*, 704 F.3d 817, 850 n.17 (10th Cir. 2013). When Judge Ikuta's dissent from the denial of rehearing en banc in the court of appeals pointed out this conflict, the panel majority declined to offer any response. *See* Pet. 22. Respondent adopts the same approach, not even citing *Littlejohn* in his brief in opposition—let alone attempting to distinguish the case or refute its reasoning. Meanwhile, since the filing of the petition, a divided panel of the Sixth Circuit has joined the Ninth in holding that a state court conclusion that any federal error was harmless is not "an adjudication on the merits for the purposes of § 2554(d)'s relitigation bar." *McCarley* v. *Kelly*, ___ F.3d ___, 2014 WL 3360833 (6th Cir. July 10, 2014); *see id*. at *13 (Daughtrey, J., dissenting on this point). Relying on *Ayala*, the Sixth Circuit, too, simply ignores *Littlejohn*: "Like the Ninth Circuit in *Ayala v. Wong*, '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.'" *Id*. at *6 (citation omitted); *compare Littlejohn*, 704 F.3d at 850 n.17 ("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.").[1] The deepening division in the courts of

[1] The current Westlaw version of the Sixth Circuit's opinion in *McCarley* cites to the pre-amendment version of the Ninth Circuit's decision in *Ayala*, and cites that version to (continued…)

appeals on this recurrent question underscores the need for this Court's review.

Respondent does cite three decisions of this Court that he contends support the Sixth and Ninth Circuits' side of this debate: *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Porter* v. *McCollum*, 558 U.S. 30, 39 (2009). *See* Opp. 22, 30-33; *see also* Pet. App. 19a-21a. In *Rompilla* and *Wiggins*, this Court concluded under AEDPA that state courts had "unreasonably applied" the clearly established framework of *Strickland* v. *Washington*, 466 U.S. 668 (1984), when they rejected claims of constitutionally deficient performance by counsel. The Court then analyzed *de novo* the prejudice component of the *Strickland* test, which the state courts had not reached. *See Rompilla*, 545 U.S. at 389-390; *Wiggins*, 539 U.S. at 534. In *Porter*, the Court similarly reviewed the deficient-performance component of a *Strickland* claim *de novo* after concluding that the state court had unreasonably applied established law in rejecting the claim on lack-of-prejudice grounds. *Porter*, 558 U.S. at 31, 39.

Wiggins, *Rompilla*, and *Porter* all differ from this case (and from *Littlejohn* and *McCarley*) because they involved the application to particular sets of facts of a constitutional test that all acknowledged was "clearly established Federal law" for purposes of determining whether a constitutional violation occurred. In each case the question was whether the state court's application of one component of that test to the facts of the case before it was "unreasonable" within the

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volume 720 rather than 730 of the Federal Reporter. The language quoted by the Sixth Circuit may be found at Pet. App. 18a, and in the final version of the Ninth Circuit's decision at 756 F.3d 656, ___, 2014 WL 707162, *7.

meaning of Section 2254(d)(1), and this Court concluded that it was. *See Wiggins*, 539 U.S. at 520-521, 534; *Rompilla*, 545 U.S. at 380, 390; *Porter*, 558 U.S. at 44. The state courts had not applied the other component of the test, and this Court undertook to do so itself. That approach might have made practical sense in the specific context of those cases. It does not make sense where a state court has determined that a claimed federal error, if it occurred, was harmless, and the question on federal habeas review is not application of a clearly established rule to particular facts but whether a claimed federal rule is "clearly established" in the first place.

Moreover, *Wiggins*, *Rompilla*, and *Porter* were all decided before *Richter* and *Williams*, and none of them actually analyzed what standard of review was appropriate under AEDPA where a state court had occasion to address only one aspect of a federal claim. To the extent the analysis in this Court's later decisions raises questions about an issue addressed only implicitly or in passing in the *Wiggins* cases, that simply underscores the need for further review. *See, e.g.*, Brian R. Means, Postconviction Remedies § 29.4 (4th ed. 2014).

3. Respondent appears to suggest that applying the proper AEDPA standard of review would make no difference in this case because respondent had a "clearly established" right to have his counsel present at each colloquy in which the trial court asked the prosecutor to explain his peremptory challenges. Opp. 16-21. That is not correct. Certainly, the Sixth Amendment guarantees a criminal defendant the right to have counsel present at all critical stages of an adversarial criminal proceeding. *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009) (citing *United States* v. *Wade*, 388 U.S. 218, 227-228 (1967)); *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932). This Court has

recognized voir dire as a "critical stage" of the proceedings. *Gomez* v. *United States*, 490 U.S. 858, 873 (1989). And respondent's counsel was present for, and participated actively in, the voir dire in this case. He was excluded only from the prosecutor's proffers of race-neutral reasons for his challenges. The California Supreme Court held that, absent special circumstances, that exclusion was state-law error; and the State does not contend here that it was or is a desirable practice. But no decision of this Court has ever held that such an exclusion is federal constitutional error. Absent a square holding by the Court to that effect, under § 2254(d) a federal court may not set aside respondent's state conviction as "contrary to … clearly established Federal law." *See, e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006).

Indeed, as the California Supreme Court noted in considering respondent's claims, this Court expressly declined to prescribe particular procedures for state courts to follow in implementing *Batson*. *See* Pet. App. 198a; *Batson*, 476 U.S. at 99 & n.24. As the petition explains (at 19), the Sixth and Seventh Circuits have expressly permitted *ex parte Batson* proceedings. And in *Georgia* v. *McCollum*, 505 U.S. 42, 58 (1992), this Court observed that such proceedings are permissible at least "[i]n the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy." Here, while the state court concluded that *ex parte* proceedings should only be employed for reasons more compelling than those established by the record in this case, no authority compelled it to conclude that the exclusion here necessarily violated respondent's federal rights. *See* App. 76a-80a (Callahan, J., dissenting) (rule not dictated by precedent for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989)). For the same reason, a federal habeas court could not

properly conclude that a state judgment affirming respondent's conviction in the face of that federal claim must be "so lacking in justification" that it can only reflect "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-787.

4. Finally, respondent defends the Ninth Circuit's conduct of its own harmless error review under *Brecht* v. *Abrahamson*, 507 U.S. 619, with no regard at all for the California Supreme Court's careful review of the record and reasoned conclusion that any federal error was harmless beyond a reasonable doubt. Opp. 26-37. As the petition explains (at 23-27), however, the utterly non-deferential review undertaken by the federal court of appeals in this case cannot be what Congress and this Court intended in framing and construing AEDPA.

In *Fry* v. *Pliler*, 551 U.S. at 119, this Court first restated its conclusion in *Mitchell* v. *Esparza*, 540 U.S. 12 (2003), that a federal court may grant habeas relief only if a state court's own harmless error determination was objectively unreasonable. The Court then reasoned that if a state court was required to apply *Chapman* v. *California*, 386 U.S. 18 (1967), and conclude that a federal constitutional error was harmless beyond a reasonable doubt, then even deferential AEDPA review of that conclusion would be "more liberal" to habeas petitioners than a federal court's instead considering, under *Brecht*, whether the record demonstrated "actual prejudice." *See Fry*, 551 U.S. at 119-120. On that ground the Court concluded that use of the *Brecht* standard would be more appropriate under AEDPA, because that Act was intended to limit, not expand, the proper grounds for habeas relief. *Id*. *Fry* likewise reiterated concerns raised in *Brecht* regarding the finality of state court

judgments and the difficulty of retrying defendants many years after their crimes, emphasizing again that "'[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effects on the trial process . . . and . . . 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).

In light of that reasoning, *Fry* cannot have been intended to authorize the sort of harmless error review undertaken by the Ninth Circuit panel majority in this case. On the contrary, if *Fry* and *Brecht* are applied as the court of appeals applied them here, then the central reform of AEDPA—deference to reasonable state court decisions—has simply vanished when the determination in question is one of harmless error.

To be clear, the State understands the logical sense in which the *Brecht* standard could be thought to "subsume[]" even deferential review of a state court determination applying the more stringent *Chapman* standard. As a practical matter, however, that is often not how lower federal courts understand their mandate under *Fry* and *Brecht*. This case is a good example of the phenomenon. *See, e.g.*, Pet. App. 186a (Ikuta, J., dissenting from denial of rehearing en banc) ("[T]he 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."). Accordingly, it is also a particularly good vehicle for review of the question whether a state court's determination of harmlessness is an "adjudicat[ion] on the merits" under AEDPA. The careful harmlessness review undertaken by the California Supreme Court, combined with the thorough second-guessing of that decision by the federal court of

appeals, present the "adjudication" question in sharp relief. And even if the court of appeals properly reached the prejudice question, the way it addressed that question aptly illustrates the need for further guidance from this Court concerning how to apply *Brecht* in a case otherwise subject to AEDPA deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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