No. 13-1428

In the Supreme Court of the United States

RON DAVIS, ACTING WARDEN,

Petitioner,

v.

HECTOR AYALA,

Respondent.

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

PETITION FOR REHEARING

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Respondent Hector Ayala ("Respondent") respectfully requests a rehearing of the opinion issued by the Court on June 18, 2015 under United States Supreme Court Rule 44, which states that "any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after the entry of judgment or decision… ."

In this case, Respondent challenged the *ex parte* procedure employed by the trial court in conducting an inquiry into the prosecution's peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79 (1986) – a procedure that deprived Respondent of: (1) rebuttal argument in response to the prosecution's proffered reasons or its strikes; (2) voir dire questioning aimed at rebutting the prosecution's reasons; (3) a full and proper comparative juror analysis; and (4) an adequate record.

Upon direct appeal, the California Supreme Court held that as a matter of state law the trial court committed error by excluding defense counsel from participating in the *Batson* hearings, and found this error to be harmless under state law. Respondent's Brief, p.5. The California Supreme Court did not render an express decision whether the exclusion of Respondent and his counsel from the *Batson* hearings constituted federal constitutional error. Respondent's Brief, p.7. Respondent filed a habeas petition, requesting the Ninth Circuit evaluate his federal constitutional claim properly framed for error and prejudice, namely, whether the trial court denied his Fourteenth Amendment right to procedural due process. The Ninth Circuit

correctly held that a federal constitutional error occurred and determined the error resulted in prejudice to Respondent under *Brecht*'s "substantial and injurious effect or influence" standard, which subsumes the AEDPA/*Chapman* standard. *Fry v. Pliler*, 551 U.S. 112, 119-122 (2007). This Court granted certiorari to review the Ninth Circuit's decision.

In the analysis and conclusion rendered in this matter, this Court presumed federal constitutional error, but analyzed whether the error resulted in "substantial and injurious" harm to Respondent as though Respondent had raised a substantive *Batson* claim rather than a procedural one. For these reasons, and those set forth below, this Court must now grant Respondent's petition for rehearing.

PROCEDURAL POSTURE

On June 18, 2015, this Court issued an opinion reversing the judgment of the Court of Appeals for the Ninth Circuit and remanding the case for further proceedings consistent with the opinion. In the case, this Court was presented with one question by petitioner. The court presented a second question to be addressed by the parties.

1. 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.

2. Whether the Court of Appeals properly applied the standard articulated in *Brecht v. Abrahamson,* 507 U.S. 619 (1993).

REASONS FOR REHEARING

In rendering its Opinion, though the Court presumed federal constitutional error, the Court addressed whether the error was harmless by analyzing the claim as though it were a substantive *Batson* claim, rather than a procedural claim based on the exclusion of defense counsel from the proceedings. Thus, as the dissent admonished, the Court "scour[ed] the record for possible support for the trial court's credibility determination without accounting for the flaws in the process that led to it." Dissenting Opinion, p. 15. In ignoring the procedural flaws that rendered the trial and California Supreme Court findings unreliable and, therefore, unworthy of unqualified deference, the Court failed to properly apply the Brecht standard.

I. THE COURT'S DECISION REJECTING THE NINTH CIRCUIT APPLICATION OF THE *BRECHT* STANDARD IN RESPONSE TO THE SECOND QUESTION PRESENTED IS AT ODDS WITH THE COURT'S PRIOR DECISIONS IN *O'NEAL V. MCANINCH* AND *FRY V. PLILER*

Applying the *Brecht* standard, this Court stated that Respondent must show he was "actually prejudiced" by the trial court's *ex parte Batson* hearings. Opinion, p.12. This Court explained that

Respondent "necessarily cannot satisfy this standard if a fairminded jurist could agree with the California Supreme Court's decision that the hearing was harmless beyond a reasonable doubt." Opinion, p.12. As the dissent specifically noted, this Court's application of the *Brecht* standard is incorrect. Under *Brecht*, "actual prejudice" results if the record raises " 'grave doubt[s]' about whether the trial judge would have ruled differently." Opinion, p.19, citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Habeas relief must be granted if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 621-23. Constitutional error is deemed to have a substantial and injurious effect…when a reviewing judge is in "grave doubt about whether "the error is harmless—that is, when the matter is so evenly balanced that [a judge] feels himself in virtual equipoise as to the harmlessness of the error." Dissenting Opinion, p.2, citing *O'Neal*, 513 U.S. at 435.

In determining the harmlessness of any error, where a federal court is in "grave doubt" or "virtual equipoise" as to the harmlessness of any error, the federal court should treat the error as if it were harmful and as if it had an effect on the verdict rendered by the jury or the trial court. *O'Neal*, 513 U.S. at 435-6. This Court has held that where the federal court finds error, it may not lightly discount the significance of such error but must have assurance that the error did not substantially sway the verdict. *Fry v. Pliler*, 551 U. S. at 125; accord *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Grave doubt exists if a judge finds the "matter so evenly balanced that he feels himself in virtual

equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435. As the dissent acknowledged, "Put differently, when a federal court is in equipoise as to whether an error was actually prejudicial, it must "treat the error, not as if it were harmless, but as if it affected the verdict (i.e. as if it had a substantial and injurious effect or influence in determining the jury's verdict." Dissenting opinion, p.2, citing *O'Neal*, 513 U.S. at 435. This Court's 5-4 decision as to whether the error had a substantial and injurious effect on the verdict illustrates the Court's "virtual equipoise" as to the harmlessness of the error suffered by Respondent, casting grave doubt and demanding this Court treat the federal constitutional error of the trial court's exclusion of defense counsel from the *ex parte Batson* hearings as harmful to Respondent. *Cf.* Opinion, p. 13 ("[W]e hold that any error was harmless with respect to all seven strikes."); Dissenting Opinion, p.15. ("[G]rave doubts exist as to whether counsel's exclusion from Ayala's *Batson* hearings was harmless.")

The Court did not adequately consider Respondent's fundamental argument that grave doubt exists as to whether the trial court's consideration of his *Batson* challenges were substantially influenced by the court's exclusion of Respondent's counsel during the *ex parte Batson* hearings, at which the court adjudicated the same. In fact, this Court completely sidestepped the contours of Respondent's claim, namely, that the exclusion of defense counsel from the *ex parte Batson* hearings is the federal constitutional error to be analyzed for prejudice. This Court's *Brecht* application erroneously focuses entirely on a discussion of the particular arguments the Ninth

Circuit suggested Respondent's lawyers could have made if defense counsel was permitted to be present at the *ex parte Batson* hearings. Dissenting Opinion, p.4. As the Dissent aptly adduced, "[T]his approach fails to account for the basic background principle that must inform the application of Brecht to Respondent's procedural *Batson* claim: the "[c]ommon sense" insight "that secret decisions based on only one side of the story will prove inaccurate more often than those made after hearings from both sides of the question." Dissenting Opinion, p.4, citing *United States v. Cronic*, 466 U.S. 648, 655 (1984) (internal quotation marks omitted). This Court's application of *Brecht* therefore falls short, not only because of its improper manner of application, but also due to its failure to identify the correct federal constitutional claim to which the standard must be applied.

Practically speaking, this Court's opinion rests solely on the conclusion that the outcome of the *ex parte Batson* hearings would have been no different had defense counsel been present. Opinion, p. 14, relying upon the California Supreme Court's holding that "on the well-developed records, defense counsel could argue nothing substantial that would change the court's rulings." Essentially, the Court engaged in a detailed dissection and refutation of the Ninth Circuit's conclusions related to what defense counsel "might have said" in the *ex parte Batson* hearings. The fact is, neither this Court's conclusions nor the Ninth Circuit's conclusions related to what defense counsel "might have said" can amount to anything more than speculation.

No one will ever know what defense counsel might have said, or whether his *Batson* challenges might have been sustained—to speculate is merely an academic exercise. The deprivation of the opportunity to speak is the federal constitutional error that has created grave doubt as to its prejudicial effect and has "impeded [Respondent's] ability to raise these claims on appeal." Dissenting Opinion, p.5. This Court failed to conclude if grave doubt exists, i.e. to consider whether, since this Court's opinion was decided by a mere one-vote majority, the Court was in virtual equipoise as to whether actual prejudice resulted from the procedural error embedded within the trial court's *ex parte Batson* hearings. Rehearing is necessary, for the court to evaluate Respondent's claim under the correct *Brecht* standard and determine whether Respondent's conviction must be vacated.

The Dissent properly points out two primary reasons why rehearing should be granted. First, this Court failed to acknowledge the absence of the "fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." Dissenting opinion, p.13, citing *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The exclusion of defense counsel from the *ex parte Batson* hearings prevented the requisite "adversarial presentation" that serves a critical role in the court's review of comparative juror analyses, and of the massive record in this case. Dissenting Opinion, p.4. This Court, "by suggesting that a trial judge can make a sound credibility determination without the benefit of an adversarial proceeding, ignores the procedural nature of the constitutional error whose existence it purports to

assume." Dissenting Opinion, p.13. Appellate courts defer to a trial court's credibility findings not only because of the proximity of the trial court judge to the proceedings, but also because of the expectations of procedural safeguards. The credibility findings warrant less deference, where, as here, the procedures are compromised.

Second, excluding defense counsel from the *ex parte Batson* hearings was prejudicial. If he had been permitted and only one of his challenges to the prosecutor's reasons for exclusion was credited by the Court, Ayala's conviction would be overturned. Dissenting Opinion, p. 4, citing *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). As the dissent noted, jury selection in this case lasted three months and involved more than 200 prospective jurors. Dissenting Opinion, p.5. With such an extensive record created, the trial judge was without doubt not aware of every possible questionnaire response. The limits of defense counsel's possible arguments as to *Batson* challenges he made cannot be dismissively limited by analysis of the record before the California Supreme Court (which record did not involve any input from defense counsel during the *ex parte Batson* hearings).

This Court's debate relating to the reasons for exclusion of the different identified jurors illustrates that it was likely at least that defense counsel would have brought to the trial court's attention one juror who was excluded for pretextual reasons – Olanders. D[1]. A comparison of Olanders D.'s answers to a

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[1] As noted by Justice Kennedy during Oral Argument, the "key person" was Olanders. D. Transcript of Oral Argument at 14,

seated juror – Ana L.'s answers raises grave doubt whether a trial court would not have disallowed all the prosecution's reasons for striking Olanders D.

The prosecution offered three reasons for striking Olanders D.: (1) that he had written in his questionnaire that did not believe in the death penalty and had not explained a subsequent change in position, (2) that his questionnaire answers were poor and not well thought out and (3) that Olanders lacked the "ability to fit in with a cohesive group of 12 people." Opinion, p. 14. The trial court rejected the third reason. *Id.* If defense counsel were present, it is likely he would have raised arguments that would have made the trial judge reconsider and change a *prima facie* credibility assessment of the prosecutor as to the other two reasons for striking Olanders D.

This Court points out that appellate courts cannot "on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." Opinion, p. 16, citing *Rice v. Collins*, 546 U.S. 333 (2006). Here, the available record was skewed. As the dissent points out, Olanders D.'s questionnaire was not available. If defense counsel had been present at the *ex parte Batson* hearings, he would likely have added to the record relevant statements relating to Olanders D.'s change in position regarding the death penalty as indicated in Olanders D.'s questionnaire.

Davis v. Ayala, 576 U.S.___ (2015). While this Brief specifically addresses only the exclusion of Olanders D., the same arguments derive as to the other jurors struck by the prosecution.

The exclusion of defense counsel has also impeded Respondent's ability to raise claims on appeal simply because Respondent's lawyers "didn't know what they didn't know," i.e. Respondent's lawyers were unaware of the statements and argument made by the prosecution at the *ex parte Batson* hearings due to the simple fact that Respondent's lawyers were not present. Dissenting Opinion, p.5. Moreover, even if it was possible for this Court to deduce whether defense counsel would have compelled a different outcome at the *ex parte Batson* hearings, the Court's review is "unduly constrained by a record that lacks whatever material facts the defense would have preserved had it been on notice of the assertions that it needed to challenge." Dissenting Opinion, p.5. This Court evaluated the record as if complete, giving very little consideration to the reality that the "vast majority of the questionnaires" completed by jurors "at the start of *voir dire*, including the questionnaires completed by the seven black and Hispanic jurors against whom the prosecution exercised its peremptory strikes," were lost. Dissenting Opinion, p.6. The loss of these questionnaires has severely hindered Respondent's ability to fully argue his claims on appeal. It has also inhibited every appellate court from performing a comprehensive juror analysis and has thus inhibited a complete, fair and accurate review.

The undisputed record confirmed the prosecution's argument during the *ex parte Batson* hearings contained no trial strategy, and on this basis, the exclusion of defense counsel was not justified. Opinion, p.5. The prosecution presented no other basis for excluding defense counsel from the *ex*

parte Batson hearings. This is error, and upon this basis alone, rehearing should be granted.

CONCLUSION

There could be no better illustration of "grave doubt" as to the harmlessness of the error, than here. First, the California Supreme Court did not expressly find the procedure engaged in by the trial court constituted a federal constitutional error. Thereafter, the federal District Court construed the California Supreme Court decision as not having decided whether the exclusion of defense counsel from the *ex parte Batson* hearings constituted a federal procedural due process violation. The District Court expressed *doubt* whether the trial court's procedure was constitutionally defective as a matter of "clearly established federal law."

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U. S. 322, 340 (2003); *Brumfield v. Cain*, No. 13-1433 (U.S. June 18, 2015). The Ninth Circuit, faced with an undecided question by the California Supreme Court and the District Court before it, applied *de novo* review as to the question of whether federal constitutional error occurred, since no deference could be rendered to a state court decision that didn't exist regarding the federal procedural due process error committed by the trial court. The Ninth Circuit concluded that the trial court had violated Respondent's federal constitutional rights.

Respondent is entitled to habeas relief if a reviewing judge has grave doubt, in other words, if a

reviewing judge is "in equipoise as to whether his lawyers' exclusion from the *Batson* hearings had an injurious effect on the trial court's failure to find by a preponderance of the evidence that any of the prosecution's peremptory strikes was racially motivated." Dissenting Opinion, p.7. Applying *Brecht* in the manner prescribed in *Fry*, the Ninth Circuit further concluded that because it could not conclude with certainty that the exclusion of defense counsel was not harmful to Respondent, habeas relief was appropriate. Nothing in this Court's decision would compel a different result from the Ninth Circuit. Accordingly, rehearing should be granted.

In light of this Court's precedent and the reasons set forth herein, this Court should vacate its June 18, 2015 opinion, grant Respondent habeas relief, and remand the matter to the lower court for proceedings consistent with its decision in *Batson* and its progeny, as set forth in the Ninth Circuit decision in *Ayala v. Wong*, 756 F.3d 656 (9th Cir. 2013).

Respectfully submitted,

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DATED: July 13, 2015

CERTIFICATE OF COUNSEL

As counsel of record for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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Counsel for Respondent