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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-5247, Fry versus Pliier.

Mr. Haltom.

ORAL ARGUMENT OF VICTOR S. HALTOM

ON BEHALF OF PETITIONER

MR. HALTOM: Mr. Chief Justice, and may it please the Court:

The constitutional error that occurred in Mr. Fry's third trial is the type of error that can result in a conviction of an innocent person. Notwithstanding the nature of the error that occurred in Mr. Fry's trial, no court has reviewed the effect of that error or evaluated the effect of that error under the constitutionally mandated Chapman standard.

Mr. Fry's position is simply that he is entitled to one bite at the Chapman apple. In the California Court of Appeals, that State appellate court should have, but did not, rectify the constitutional trial error that occurred in this case. Had that court complied with this Court's precedent, that court would have first identified the constitutional error that occurred at trial, namely the chambers error, and second, reviewed the effect of that error, assessed the

1 effect of that error under the Chapman test.

2 The failure of that court to do so, the
3 unreasonable decision-making of that court, relegated
4 Mr. Fry to seeking relief in Federal habeas proceedings.

5 It scarcely seems reasonable --

6 JUSTICE KENNEDY: I suppose he could have
7 come here on direct.

8 MR. HALTOM: He could have, Your Honor,
9 however, he didn't have the right to counsel to come
10 following his appeal to the State appellate court, and
11 then after the denial of his petition, it would be a
12 discretionary review in the California Supreme Court, he
13 no longer had the right to counsel.

14 And the fact of the matter is if he had
15 filed a petition for writ of certiorari following that,
16 it would have effectively been asking at that stage for
17 a type of error correction.

18 It scarcely seems logical that the scope of
19 the remedy to which Mr. Fry is entitled for the
20 constitutional violation that he suffered, that that
21 should be curtailed based upon simply the unreasonable
22 decision-making of the State appellate court in the --

23 JUSTICE SCALIA: Well, if we're talking
24 about what -- where is the logic in the result that I
25 believe you're position produces, which is that a

1 prisoner who loses in the State court on harmless
2 grounds, because the State court finds it's harmless,
3 obtains no habeas relief in Federal court unless the
4 error actually prejudiced him. Whereas if the State
5 court never reached the harmless ground, and erred
6 on -- or ruled on whether the violation occurred,
7 whether there was any constitutional violation, then he
8 would obtain relief if there is merely a reasonable
9 probability of harm.

10 Now, you know, why would there -- what does
11 he care whether -- whether the error below consisted in
12 an erroneous harmless determination or an erroneous
13 determination that there was no violation? Why should
14 there be a different standard of review between the two?

15 MR. HALTOM: Justice Scalia, that's the
16 point raised in the Solicitor General's amicus brief
17 here. And in Mr. Fry's case, what happened was that
18 there was a harmless error analysis conducted, albeit
19 truncated, by the State appellate court. But it was not
20 a Chapman analysis. And that failure of the State
21 appellate court to engage in a Chapman analysis is
22 contrary to this Court's precedent. It ignores Chapman,
23 it also would be an attack on --

24 JUSTICE SCALIA: Let's assume another
25 violation, the court erroneously determines --

1 erroneously -- that there was no constitutional
2 violation at all. Its error is not with regard to the
3 harmlessness, but with regard to whether there was a
4 constitutional violation. Why should there be one
5 standard of review for one error and a different
6 standard of review for the other, regardless of whether
7 the State court conducted Chapman or not?

8 MR. HALTOM: I don't know that necessarily
9 there has to be one standard of review for the other --
10 for one or the other, Your Honor. Our position in this
11 case is simply following the logic of this Court's
12 decision in Mitchell versus Esparza, that this Court or
13 any Federal habeas court needs to consider what the
14 State appellate court did. You cannot divorce -- there
15 is the underlying constitutional violation that occurred
16 in Mr. Fry's trial. Then that error is compounded when
17 a State appellate court fails to assess the effect of
18 that error under the Chapman standard.

19 JUSTICE SCALIA: You could say the same
20 thing when the State court has erroneously determined
21 that there was no violation.

22 In that case, you apply the Kotteakos
23 standard. I just don't understand the rationale of
24 applying a higher standard to the other error.

25 MR. HALTOM: Well --

1 JUSTICE GINSBURG: I thought the State court
2 didn't find that there was error. I thought the State
3 court said, this was cumulative, I'm not going to let it
4 in.

5 MR. HALTOM: That's correct.

6 JUSTICE GINSBURG: It wasn't until we got
7 into the Federal court that there was an error found.
8 As far as the State was concerned, there was no reason
9 to engage in any kind of harmless error review, Chapman
10 or not, because there was no error.

11 MR. HALTOM: That's correct. That's in
12 pages 94 to 97 of the joint appendix. The State
13 appellate court concluded there was no error as a matter
14 of State law in this case. The court also concluded
15 that there was no constitutional error.

16 Then in a footnote, footnote 17 on page 97
17 of the Joint Appendix, the State appellate court stated
18 in the alternative, effectively, there was no prejudice
19 that Mr. Fry possibly could have suffered in this case.
20 However, in making that alternative holding, the State
21 appellate court, the California court, was applying
22 what's known as the Watson standard, which as this Court
23 has repeatedly recognized, is the functional equivalent
24 of the Kotteakos type standard.

25 JUSTICE SCALIA: And it is that

1 determination that you are objecting to here. The
2 harmless determination.

3 MR. HALTOM: I am, Your Honor. Obviously,
4 we are objecting to the State court's finding of no
5 underlying substantive constitutional violation, as well
6 as the State court's determination that there was no --

7 JUSTICE SCALIA: But for the former, you are
8 perfectly content with our applying Kotteakos. And for
9 the latter, however, you say we have to apply Chapman.
10 I just don't see the logic of that.

11 MR. HALTOM: Well, first of all, this case,
12 since it has now been determined in the Federal courts
13 that there was an underlying constitutional violation,
14 does not present that question. We do -- and I
15 understand the position that you are raising,
16 Justice Scalia, that there is a potential split in the
17 logic there. I don't think the Court has to resolve
18 that here.

19 Some of the lower Federal courts have
20 determined that now, in light of AEDPA, the Brecht
21 standard has been completely supplanted. Some courts
22 have construed this Court's decision in Mitchell versus
23 is Esparza to lead to that conclusion. And that may
24 very well be the case. However, I don't think the Court
25 needs to ultimately address that proposition in this

1 case.

2 CHIEF JUSTICE ROBERTS: As I read the
3 Court's opinion in Brecht, the Brecht standard on
4 harmlessness is based on the structural consideration
5 that your under collateral review at that point, rather
6 than under direct review. You would apply a different
7 harmlessness standard that doesn't seem to take into
8 account the fact that it's collateral review rather than
9 direct.

10 MR. HALTOM: Certainly, Mr. Chief Justice,
11 collateral review, as this Court pointed out in Brecht,
12 can result in a more deferential standard of harmless
13 error inquiry. The -- those considerations that led
14 this Court in Brecht to adopt Kotteakos rather than
15 Chapman apply across-the-board in all habeas cases.

16 However, a central theme of the Brecht
17 decision was that there have been Chapman analysis
18 conducted by the State appellate judiciary --

19 CHIEF JUSTICE ROBERTS: Well, I guess that's
20 where maybe we -- is the subject of debate, whether the
21 central theme in Brecht was, this is collateral review,
22 and that calls for a different standard, or whether the
23 central theme was Chapman review had been undertaken,
24 and therefore, that calls for a different standard.

25 I'm not sure I agree with you that the

1 latter is the case.

2 MR. HALTOM: I agree that it could be -- it
3 is a debatable point. But the -- to ignore the
4 circumstance that this Court stressed, I think
5 undoubtedly stressed in Brecht that there had been that
6 State appellate review is to basically divorce the
7 holding in Brecht from the factual context in which that
8 case -- or out of which that case arose.

9 JUSTICE SCALIA: The dissenters certainly
10 thought that that was the consequence, the dissenters in
11 Brecht. They said that Kotteakos would apply even where
12 the State court has found that "no violation has
13 occurred."

14 MR. HALTOM: That's true, Justice Scalia.

15 JUSTICE SCALIA: In other words, never
16 approached the harmlessness thing. That's what the
17 dissenters thought.

18 MR. HALTOM: The dissenters thought that the
19 import of Brecht was that it was going to apply
20 across-the-board in Federal habeas --

21 JUSTICE BREYER: And I don't think the
22 majority said the contrary. I mean, I wrote it. I
23 mean, I don't know -- what counts is what I wrote, not
24 what I thought. But if you read it, I don't think it
25 decides this question.

1 What I wonder, though, is why does the --
2 how does this case present the issue you want to argue?
3 I'm -- Justice Ginsburg made me wonder about that. As I
4 understand it, the trial court said, I'm not going to
5 let this witness testify, it is cumulative. All right.
6 And then the appeals court said, well, that wasn't a
7 mistake. And one reason it wasn't a mistake is that
8 this witness added nothing. There could no possible
9 prejudice, says the trial court, when he excluded that
10 person. That means it was cumulative, that means it did
11 nothing, and that was the appeals court. So the appeals
12 court finds no error.

13 Now, we get over to the Federal court. And
14 they say, oh, no, this witness added a lot. Well, they
15 couldn't have thought this witness added a lot to the
16 point where the constitution is violated unless they
17 disagreed with that decision of making no possible
18 difference. Very well. We disagree, send it back. End
19 of case.

20 Now, where does it raise all this stuff
21 about harmless error and -- I mean, when I -- it is hard
22 for me to get my mind around this issue, because it's so
23 complicated. How does this case raise it?

24 MR. HALTOM: Well, I suppose, Your Honor,
25 because of the fact that the State appellate court

1 didn't simply state, we find no error, and leave it at
2 that, but rather, the State appellate court also raised
3 the point that, in a footnote, in a truncated manner,
4 that there is no possible --

5 JUSTICE BREYER: Was that as a reason for
6 there not being error? Or was it in the context of
7 saying, well, even if there was a mistake, there was no
8 possible prejudice. What does the footnote mean, in
9 your opinion? The second?

10 MR. HALTOM: Yes.

11 JUSTICE BREYER: What is the footnote
12 number?

13 MR. HALTOM: It's footnote 17.

14 JUSTICE BREYER: Okay. I'll read it.

15 CHIEF JUSTICE ROBERTS: Page what?

16 MR. HALTOM: It's 97 in the Joint Appendix,
17 Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 JUSTICE BREYER: Thank you. Very helpful.
20 The other thing which I brought up, so I might as well
21 get both my questions out, is that years ago I read a
22 decision by Judge Leventhal that made a big impression
23 on me. And he was a very good judge. It's in a
24 different context, it's the same problem.

25 He said, I originally thought this was the

1 case dreamed of by law professors, a case where I could
2 conscientiously say, although I consider the findings
3 clearly erroneous, so I'd reverse if it were a judge's
4 decision, nonetheless, there is support and substantial
5 evidence. And therefore, I affirm it, because it comes
6 from an agency.

7 But when I think about it, I don't think
8 there's substantial evidence either. Okay. In other
9 words, has there ever been a case in the history of
10 mankind where you think a judge has actually thought to
11 himself, after reviewing the record, oh, I think that
12 this is harmless, so I'll affirm. But I don't think
13 it's harmless beyond a reasonable doubt, so I'll
14 reverse.

15 I mean, I find it very difficult to get
16 myself in that state of mind, where I think such a thing
17 is possible.

18 MR. HALTOM: I agree with you, Your Honor.
19 It's angels on the pin of a needle, I guess is the
20 phrase here, and this case may be a case where the
21 difference between Chapman and Brecht could be of
22 consequence. If you'd look at the district court's
23 treatment of this case, at the district court level the
24 court stated: "Mr. Fry comes close to demonstrating
25 actionable error," and that court is applying the Brecht

1 standard. The district court states: "I cannot rule
2 out prejudice in this case." So seemingly had that
3 court applied Chapman, Mr. Fry would have prevailed in
4 the district court.

5 Likewise, in the Ninth Circuit we have the
6 dissenting justice concluding that there is prejudice
7 even under the Brecht standard, and then we have the
8 panel majority in ruling against Mr. Fry on the
9 prejudice issue stating that had Pamela Maples'
10 testimony been admitted that would have substantially
11 bolstered Mr. Fry's claim of independence. That
12 statement seems inconsistent with the finding that it is
13 harmless error under Brecht; and even if it's not
14 inconsistent it seems that had that court been applying
15 the Chapman standard, that court would have ruled in
16 Mr. Fry's --

17 JUSTICE STEVENS: If I could come back to,
18 may I ask this question: Is part of your argument that
19 even under the Brecht standard it was not harmless?

20 MR. HALTOM: Yes, Your Honor.

21 JUSTICE STEVENS: This is a case, am I
22 correct, where there were two, two hung juries and then
23 a five-week deliberation in this case? And there was a
24 harmless -- and the testimony of Maples was she had seen
25 a guy who didn't fit the description do the killing?

1 MR. HALTOM: Correct, Your Honor.

2 CHIEF JUSTICE ROBERTS: Where is that in the
3 question presented?

4 JUSTICE KENNEDY: It says that if the Brecht
5 standard applies, does the Petitioner or the State bear
6 the burden? I guess that's the narrower question, who
7 has the burden.

8 MR. HALTOM: Well, the Respondent has
9 essentially conceded that under O'Neal that they bear
10 the risk of non-persuasion.

11 JUSTICE BREYER: But O'Neal, I thought
12 O'Neal just says that this word "burden of proof" is out
13 of place when you talk about an appellate judge reading
14 the record.

15 MR. HALTOM: I think that that was what the
16 holding in the majority opinion was, but I think, as
17 Justice Thomas pointed out in his dissenting opinion,
18 the effect of that is to allocate the risk of
19 non-persuasion to the State. And so I think that
20 that's -- I could be wrong, but it seems to me a
21 semantic point.

22 And to Justice Stevens' question, as you
23 pointed out in your concurrence in Brecht, the Kotteakos
24 standard which this court adopted in Brecht is an
25 exacting standard. And in applying that standard, if

1 you'd look at this case, the Court's decisions,
2 Sullivan, Kotteakos, say that the focus has to be on the
3 jury. Here we have a jury in the third trial that
4 deliberated for 23 court days after 29 court days --

5 CHIEF JUSTICE ROBERTS: You're now arguing
6 that under Brecht this should not have been harmless; is
7 that the point you're making?

8 MR. HALTOM: Yes, Your Honor.

9 THE COURT: Okay. Now, I didn't hear the
10 answer to my question. I'm not sure that is in the
11 question that you presented and on which we granted
12 cert. It says which standard applies, who bears the
13 burden. I don't see anything saying is this -- was it
14 erroneous to conclude that this was harmless under
15 Brecht.

16 MR. HALTOM: Well, I believe, number one,
17 does it matter which standard applies as part of the
18 question presented? Does it matter which harmless error
19 standard is implied? My answer to that is no, because
20 Mr. Fry prevails under either Brecht or Chapman.

21 And this Court could in this case simply
22 decide this case on that very narrow question, like many
23 court do where this issue is raised, this intellectually
24 challenging issue of what should a habeas court apply,
25 Brecht or Chapman, when there has been no Chapman

1 analysis in the State court or when there has been an
2 objectively unreasonable Chapman analysis in the State
3 court. Most courts confronted with that issue say, we
4 don't need to decide the question here because either
5 the error was plainly harmless under both of those
6 standards or plainly not harmless under both of these
7 standards. And I simply recounted the history of the
8 litigation below in the Federal courts to point out that
9 this could be a case where that make a difference. It
10 seems like --

11 JUSTICE SCALIA: The trouble with reading
12 that second question that way is that, you know, it
13 follows from your first question, which speaks in the
14 generality of cases. It's not speaking to this case.
15 Your first question presented is, if constitutional
16 error in a State trial is not recognized by the
17 judiciary until the case ends up in Federal court, is
18 the prejudicial impact assessed under the standard set
19 forth in Chapman or in Brecht? That's the first
20 question. Very generalized.

21 Second question: Does it matter which
22 harmless-error standard is employed? I didn't take that
23 to mean does it matter in this case which of the two. I
24 thought it meant, you know, is there any difference
25 between the two standards? Don't you think that's fair

1 reading of it.

2 MR. HALTOM: No, Your Honor.

3 JUSTICE SCALIA: You think it means, does it
4 matter in this case which harmless -- you think that
5 second sentence means would, would the defendant be
6 entitled to reversal of the conviction no matter which
7 harmless error standard is employed? You think that's
8 what it means?

9 MR. HALTOM: I think that that is the import
10 of that portion of the question.

11 JUSTICE GINSBURG: Is that a question on
12 which we would be likely to grant cert?

13 MR. HALTOM: Perhaps not if that was the
14 only question in and of itself, but perhaps so because,
15 as I indicated before, as Justice Stevens stressed in
16 his concurring opinion in Brecht, the Kotteakos standard
17 is a demanding standard. And look at this case. If the
18 error in this case can be deemed harmless under any
19 standard, then what cannot? What is prejudice when
20 you're looking at the jury and when you have a jury
21 where nine days into the deliberations at least five of
22 them voted that Mr. Fry was not guilty. They told the
23 judge that they were at an impasse. This jury struggled
24 mightily with this evidence.

25 JUSTICE STEVENS: Would you help me with one

1 thing I'm not terribly clear about, though. Is it clear
2 which -- what side the magistrate thought had the burden
3 of persuasion?

4 MR. HALTOM: It is not, and it seems as
5 though, looking at the language that the magistrate
6 judge utilized in his findings and recommendations, that
7 he was looking to me, to Mr. Fry, to meet that burden.
8 And I quoted his language in my brief and to the Ninth
9 Circuit and I argued to the Ninth Circuit that the
10 burden of persuasion had been improperly allocated to
11 Mr. Fry. However, that issue was simply not addressed
12 in the Ninth Circuit's opinion.

13 JUSTICE STEVENS: Does your opponent now
14 concede that the State has the burden?

15 MR. HALTOM: Yes, Respondent concedes that
16 their burden -- that it's their burden --

17 JUSTICE BREYER: How do they say that after
18 I thought I wrote an opinion for the majority of the
19 Court which said this concept is not applicable in --
20 when you're reviewing a record for harmless error. It's
21 not a question of presenting evidence. What I think it
22 said is that it's not a question of presentation of
23 evidence. In such a case, we think it's conceptually
24 clear for the judge to ask directly, do I the judge
25 think that the error substantially influenced the

1 judge's -- the jury's decision? Now, maybe I was wrong,
2 but I think there was a majority of the Court that
3 agreed with it.

4 MR. HALTOM: Yes, Your Honor. And I think
5 your point, as I understood it, in O'Neal was that it
6 analytically does not make sense --

7 JUSTICE BREYER: To talk about burdens of
8 proof?

9 MR. HALTOM: -- when the appellate court is
10 --

11 JUSTICE BREYER: Yes. But that's my basic
12 question in this case and it's a serious question.
13 Suppose I think, which I do think, that I as a judge can
14 conscientiously review a record and decide for myself
15 whether I think this error of the judge was harmless,
16 and if I really try I can bring myself to understand
17 this question. Regardless of what I think, could
18 another judge, say a State judge, reasonably have
19 thought the opposite? I can do that mentally.

20 You try to get me to make more fine
21 distinctions than that, I cannot do it. I can't. I'm
22 sorry. I admit it.

23 Now, if that's the state of mind that I can
24 get myself into -- and I believe that's true of many
25 judges -- how do I write words that are realistic in

1 this area?

2 MR. HALTOM: I think that that's a question,
3 Your Honor, that this court has struggled with. As
4 Justice Scalia pointed out in his concurring opinion in
5 Dominguez Benitez, that we're talking about with these
6 harmless error standards ineffable gradations of
7 probability that are beyond even the judicial mind to
8 grasp. But I think if we just tie it to the facts of
9 this case, I think that in the explanation you just gave
10 that there is no reasonable judge who could look at this
11 case and conclude --

12 JUSTICE ALITO: There are many situations in
13 which an appellate court has to apply a legal standard
14 to facts in criminal cases and civil cases. In a
15 criminal case, an issue on appeal could be whether
16 there's sufficient evidence to support the verdict. Do
17 you think there's a burden of persuasion on appeal on
18 all of those issues?

19 MR. HALTOM: With respect to a standard
20 sufficiency analysis, no, Justice Alito. It's just a
21 question for the appellate judge to discern, was there
22 sufficient evidence in the record reviewing the evidence
23 in the light most favorable to the prosecution.

24 JUSTICE ALITO: What's the difference
25 between that and applying any harmless error standard?

1 It's exactly the same kind of analysis. It's a
2 different legal test, but you're applying, you're
3 applying the law to facts.

4 MR. HALTOM: I agree. And I don't quarrel
5 at all with the way that the court described -- said
6 that looking at the prejudice inquiry or a harmless
7 error inquiry in the O'Neal case, that it doesn't fit to
8 look at it in terms of the allocation of burden. I
9 don't think that this case ultimately turns on that,
10 except to the extent that the magistrate judge when he
11 wrote his finding and recommendations that were adopted
12 by the district court judge did state that he was
13 looking to Mr. Fry to make the sufficient showing --

14 JUSTICE GINSBURG: Are you talking about
15 what's on the bottom of page 181 of the joint appendix?
16 That was the only place that I found where the
17 magistrate expressed a view on this. It reads: "The
18 court does not find that there has been" -- "the court
19 does find that there has been an insufficient showing.
20 So that "insufficient showing" means showing by the
21 Petitioner." Is that what you're relying on?

22 MR. HALTOM: Yes. That's exactly what I'm
23 relying on, Your Honor.

24 So, going back to specifically the facts of
25 this case, this Court could, as I indicated earlier,

1 without regard to the thorny Chapman versus Brecht
2 question, decide this case solely in terms of, under
3 Brecht, does Mr. Fry prevail; and we look at the nature
4 of the constitutional violation that occurred.

5 CHIEF JUSTICE ROBERTS: That wouldn't help
6 us resolve the conflict in the circuits between which
7 standard is applicable, though, right?

8 MR. HALTOM: No, it certainly would not,
9 Your Honor. And this Court may very well deem that to
10 be necessary. But I think also that this Court
11 fashioning a decision which is faithful to the
12 requirement that -- or the principle that Kotteakos is
13 an exacting standard, would also be an important
14 constitutional principle. In a case like this, where
15 there has been no Chapman review and where the Chapman
16 court stated that we need a rigorous harmless error
17 standard in order to safeguard convictions, safeguard
18 against erroneous convictions where there is a close
19 question of guilt or innocence, that hasn't happened in
20 this case and it would be appropriate for this Court to
21 fashion a rule or holding in this case that would ensure
22 that that happens.

23 JUSTICE GINSBURG: And that would put 2254
24 out of sync with 2255, where I understand if it's a
25 Federal conviction then it's always Brecht on

1 post-conviction relief?

2 MR. HALTOM: As I understand that question,
3 the Solicitor General pointed out in the introduction of
4 its amicus brief that there are some 2255 cases where
5 there's been an intervening change in the law which
6 could involve this question of Brecht versus Chapman.
7 And I've cited in my brief a district court case, United
8 States versus Monsanto, where the court concluded, in
9 accordance with the position that I'm advocating, that
10 it makes no sense for a reviewing court in a habeas
11 proceeding to apply the Brecht standard blindly without
12 regard to what was done in prior proceedings, but rather
13 there's no need for deference, where the -- the big
14 issue in Brecht, as I understand it, was this Court was
15 concerned about simply repeating a harmless error
16 analysis that the State court had already done; and
17 we're not asking this Court to do that in this case.

18 The same concern, Justice Ginsburg, holds
19 over in certain limited 2255 cases.

20 If I may save the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Haltom.

23 Mr. Moody.

24 ORAL ARGUMENT OF ROSS C. MOODY

25 ON BEHALF OF THE RESPONDENT

1 MR. MOODY: Mr. Chief Justice, and may it
2 please the Court:

3 Federal habeas is limited in scope and
4 purpose. It is not a continuation of the appellate
5 process. Rather, it is an extraordinary remedy limited
6 by fundamental concepts of federalism, comity, and State
7 sovereignty. In Brecht, this court held that the
8 stringent Chapman standard was inappropriate for use on
9 collateral review. Instead, in order to strike a proper
10 balance between State and Federal interests, the actual
11 prejudice standard of substantial and injurious effect
12 on the verdict should be used in collateral cases.

13 Petitioner is asking for an exception to
14 this rule. He claims that if he did not receive Chapman
15 review in State court, he should receive it on Federal
16 habeas. That was not the rule in Brecht and it should
17 not be adopted by this Court here. The Brecht decision
18 did not state an exception based on the State standard
19 used. The key in Brecht was that appropriate balance
20 between the Federal Government and the State. This
21 Court has never treated cases where there was not a
22 state Chapman finding differently from other cases. It
23 applies Brecht throughout. In the Penry case and in the
24 O'Neal case there was no Chapman finding in state court,
25 yet this Court applied Brecht and made no comment about

1 that.

2 JUSTICE GINSBURG: You said in your brief
3 that the remedy, if the Petitioner wants to assure he's
4 going to get Chapman review someplace, then he should
5 have sought cert -- direct review from the State court's
6 conviction. Did you say that?

7 MR. MOODY: Yes, Your Honor.

8 JUSTICE GINSBURG: But realistically, the
9 likelihood that such a petition would be successful,
10 passing the problem that the Petitioner is not likely to
11 have a lawyer, does the likelihood that this Court would
12 grant cert on such a question is very slim.

13 MR. MOODY: I agree, the likelihood of the
14 cert grant in that circumstance is slim but it does not
15 change the fact that once you come to court under 2254,
16 you are asking for collateral review. And in collateral
17 review, it's inappropriate to apply the Chapman
18 standard.

19 JUSTICE SCALIA: I suppose you could say
20 that of all the questions that go into habeas under
21 2254, that they could have brought up directly but the
22 chances are their being taken here are negligible?

23 MR. MOODY: I, I agree with that, Your
24 Honor.

25 CHIEF JUSTICE ROBERTS: Counsel, if the

1 State court had conducted a Chapman review, erroneously,
2 how would that be reviewed under Federal habeas? You
3 would ask under AEDPA whether it was an unreasonable
4 application of Chapman?

5 MR. MOODY: Yes, Your Honor. First you
6 would ask if it was an unreasonable application of
7 Chapman. If you found that it was not, then the case is
8 over, there's no need to grant the writ. If you found
9 that it was, you would proceed and do a Brecht analysis.
10 And that's what we learned from --

11 CHIEF JUSTICE ROBERTS: That seems awfully
12 refined, doesn't it, to do two different analyses? Is
13 this an -- is this an unreasonable application of
14 Chapman? And then apply the Brecht standard after
15 determining that it was an unreasonable application of
16 Chapman?

17 MR. MOODY: I don't disagree. I'm merely
18 trying to make sense of the various decisions in this,
19 in this arena. There's some tension between the Esparza
20 decision and other decisions of the Court; and one has
21 to find a place for AEDPA standard. So we would not
22 object to simply an application of Brecht which is what
23 this Court has always done. But as far as it seems to
24 suggest there may be an interim step.

25 JUSTICE BREYER: Suppose we apply Brecht.

1 This is what I'm having to little trouble with but I'd
2 appreciate your commenting or straightening this out.
3 The Ninth Circuit holds two things according to the SG
4 in the briefs. He states them very well. The first is
5 let's look at this witness. The testimony was excluded.
6 Now the Ninth Circuit says that exclusion was
7 unreasonable of -- an unreasonable application of
8 clearly established Federal law, because that testimony
9 of the witness that was excluded was not only material,
10 it would have substantially bolstered the claim of
11 innocence. So that's their finding on the merits.

12 Then they go on to say, but the exclusion
13 was harmless.

14 How could both those things be true? How
15 could it be true that the reason that there was error in
16 excluding it was that the evidence is so important that
17 it substantially bolsters the claim of innocence?
18 That's one thing they say.

19 But the exclusion was harmless. I just fail
20 to understand how anyone could think both those things.
21 But maybe in the context of the case it was possible,
22 but that's what I'd appreciate your explaining.

23 MR. MOODY: I think that the explanation is
24 as follows. When you're analyzing the denial of a
25 defense type of evidence, a Chambers claim, you first

1 look to see how it fit into the defense. And that is
2 what they were doing. You're not looking at the entire
3 case. You're looking only at the defense.

4 And so in the sense that something is better
5 than nothing, adding a twelfth witness instead of eleven
6 may improve the defense case.

7 And yet nonetheless, when you move to the
8 next question, which is, was there a substantial and
9 injurious effect on the verdict in the case, and now
10 you're not just looking at the defense, you're looking
11 at everything that was available to the jury -- it may
12 be that there was still so much other evidence that it
13 could overcome whatever increase you received on the
14 defense.

15 JUSTICE ALITO: Why is it necessary for us
16 to try to reconcile those two statements? The Ninth
17 Circuit may well have been wrong in finding that there
18 was a violation at all, but we have to assume that, for
19 purposes of the question that's presented to us. So why
20 shouldn't we just analyze the harmless error question
21 independently of what they said about whether there was
22 a Chambers violation?

23 MR. MOODY: We would not object to that.
24 I'm trying to -- I'm trying to assist Justice Breyer in
25 that perceived imbalance between a finding of a

1 substance above and then a finding of harmless error
2 before.

3 JUSTICE ALITO: Well, every time evidence is
4 excluded on the grounds that it is cumulative, or is the
5 equivalent of a 403 balancing in Federal Court, there's
6 not a constitutional error under Chambers and related
7 cases, is there?

8 MR. MOODY: Yes. We agree. That's
9 certainly the law of this Court. And in this, in --
10 well, let me move on. I'd like to make a couple of
11 other points.

12 JUSTICE SOUTER: May I go just back to
13 Justice Breyer's question for a second?

14 MR. MOODY: Sure.

15 JUSTICE SOUTER: And I mean, I think your
16 answer to Justice Breyer was a very good answer as a, as
17 sort of a general statement. But in -- would you agree
18 that in this case, if we -- if we do proceed, number
19 one, to agree with you that Brecht is the standard, and
20 we then do proceed to apply Brecht here or to determine
21 whether Brecht was properly applied here, that in this
22 particular case, the, the record indicates that the case
23 was so close that there would have to be a finding of
24 harmful error, or at least it would be impossible to
25 find harmless error. Even applying Brecht clear.

1 And you know what I'm getting at. I mean,
2 five weeks of deliberation. The question after,
3 whatever it was, two weeks, and four ballots, and so on.
4 Obviously this -- this case was just to tottering on the
5 edge. So even if we, if we do get to the point of
6 applying Brecht, wouldn't it be impossible to say that
7 he's -- he gets no relief under Brecht?

8 MR. MOODY: No, I would disagree with that.
9 You've the sixth court to hear this case. The prior
10 five have all rejected his claim. And while --

11 JUSTICE STEVENS: But two or three of those
12 did it on an improper ground, that you agree with now,
13 don't you?

14 MR. MOODY: No, I don't agree with that.

15 JUSTICE STEVENS: For purposes of argument.

16 MR. MOODY: For purposes of argument I do.
17 The district court and the Ninth Circuit both applied
18 Brecht and found that this was not an error which --

19 JUSTICE GINSBURG: It was two to one in the
20 Ninth Circuit.

21 MR. MOODY: This is true.

22 JUSTICE GINSBURG: Judge Rawlinson I think
23 said that using the Brecht standard, that there was
24 actual prejudice.

25 MR. MOODY: Yes, she did. There was a

1 dissent in the Ninth Circuit.

2 JUSTICE STEVENS: Isn't this the -- I may
3 have it wrong -- but isn't this the case in which the
4 witness was unique not cumulative because she was the
5 only one who was completely disinterested.

6 MR. MOODY: No. I would disagree with that.
7 She's been characterized that way. But, and I want to
8 point out that, I would like to clarify the record in
9 response to your question, Justice Stevens. You asked
10 whether or not she saw another man commit the murder.
11 And counsel appeared to agree with you. That was not
12 her testimony. Her testimony was that she overheard
13 someone else confessing to murders that may or may not
14 have been these murders.

15 And the -- and this was a very long case.
16 This case lasted eleven weeks, it involved a hundred
17 witnesses. You can look at the opinions it produced in
18 state court and in the district court. They're each 100
19 pages long. It's not unreasonable to expect the jury to
20 take a long time to decide that case.

21 Now there are 25 court days of
22 deliberations --

23 JUSTICE SOUTER: Five, five weeks?

24 MR. MOODY: Five weeks, 25 court days, 24 of
25 which were taken up with read back. Several -- several

1 holidays. I mean if you want to go through and look at
2 it, now --

3 JUSTICE SOUTER: Do you know of any other
4 case in which the jury deliberated for five weeks?

5 MR. MOODY: I haven't attempted to find one.
6 It is a long deliberation.

7 JUSTICE SOUTER: I'm sure there's an example
8 somewhere, but I -- I practiced law for over 40 years,
9 and I never heard of it.

10 JUSTICE GINSBURG: At what point, how many
11 weeks had gone by when they said they were hung?

12 MR. MOODY: I believe that was -- I keep,
13 I've been switching back and forth between calendar days
14 and court days. So forgive me. I believe that was on
15 the eighth court day. And at that point, when they
16 announced they were hung, they selected a new foreperson
17 and then rolled up their sleeves and went back in and
18 deliberated the case.

19 JUSTICE BREYER: So --

20 MR. MOODY: And after --

21 JUSTICE BREYER: Go ahead.

22 MR. MOODY: After they selected the new
23 foreperson, they asked for 15 read backs, including the
24 crucial evidence in the case. The ballistics experts.
25 They asked for that. They asked for the testimony of

1 the in-custody witness who heard the confession of
2 Mr. Fry. They asked for Mr. Fry's testimony.

3 JUSTICE STEVENS: Did they ask for a read
4 back of Mrs. Maples' testimony?

5 MR. MOODY: Well, Mrs. Maples' testimony was
6 not admitted. It was excluded.

7 JUSTICE STEVENS: Oh, that's right. Of
8 course.

9 MR. MOODY: But they did not --
10 significantly they did not ask for read back of the
11 witnesses who testified similarly to, to Ms. Maples.
12 The third party culpability case was basically not
13 credited by the jury. They did not a read back of those
14 witnesses.

15 JUSTICE KENNEDY: Well, maybe, maybe you'd
16 end up --

17 JUSTICE STEVENS: Well, maybe a critical
18 witness was left out. That argues the other way, I
19 think.

20 MR. MOODY: I would encourage the Court to
21 carefully look at what Ms. Maples was going to say. If
22 you look in her own words, and I'm quoting: I was just
23 in and out of the room. I just listened to bits and
24 pieces of it. And that's at joint appendix 10. This,
25 this witness may have been Mr. Hurtz's cousin, and not

1 his ex-girlfriend, or his ex-girlfriend's mother, but
2 she did not have very much to say about this. She said
3 she didn't hear the beginning of the statement. She
4 could not tell you whether it was a serious discussion.
5 She was in and out of the room. She heard only bits and
6 pieces.

7 JUSTICE BREYER: But what she heard was that
8 they were going to kill, this other person was going to
9 kill a man and a woman, and it turned out that that was
10 the crime at issue.

11 MR. MOODY: With respect, that's not what
12 she heard.

13 JUSTICE BREYER: What did she hear?

14 MR. MOODY: What she heard was a statement
15 that he had killed a man and a woman. And this was not
16 immediately after the offense. This is 18 months after
17 the offense, this is not next day.

18 JUSTICE BREYER: Do you think -- do you
19 think, do you think I should do this? I'm still
20 looking, I'm worried about on the one hand, as you are,
21 having this Court announce too many six-part tests, and
22 having a lot of words and it becomes easy to make a
23 mistake for a judge and then you never finish a
24 proceeding. I'm worried about that, as are you.

25 MR. MOODY: Yes.

1 JUSTICE BREYER: At the same time, I think
2 what counts is what the judge does, the reviewing judge.
3 Not what -- quite what the test says.

4 So there has to be a conscientious effort to
5 decide, was there -- was it harmless? Could a
6 reasonable jurist in California have concluded the
7 opposite? Okay.

8 So maybe we should do it in this case. We
9 simply try ourselves to go through this record, make
10 that determination to show by example, rather than by
11 trying to find a form of words.

12 MR. MOODY: Well, you don't do it very
13 often. I understand that that's something you could do
14 if you wanted to. I think that this is just a classic
15 case where two courts applied the Brecht standard and
16 reached their conclusions and there's nothing really
17 remarkable about it.

18 JUSTICE KENNEDY: The third party
19 perpetrator that Maples was going to talk about
20 according to the prosecution's theory, was Hurtz or
21 Hearst?

22 MR. MOODY: Hurtz. Yes.

23 JUSTICE KENNEDY: And there -- there was a
24 link between Hurtz, there was an acquaintanceship
25 between Hurtz and the victim?

1 MR. MOODY: That's right.

2 JUSTICE KENNEDY: Was that established in
3 other testimony or would that all have come out just
4 only through Maples?

5 MR. MOODY: Actually, I'm thinking about my
6 answer because I was thinking about Borelli. There were
7 three third party culpability, potential targets in this
8 case. And I believe that Hurtz, the testimony of
9 several of the witness who were admitted did testify of
10 a link between Cindy Bell and Hurtz.

11 JUSTICE SOUTER: Otherwise, I mean, they
12 couldn't have found it was cumulative if -- if that had
13 not been the case.

14 MR. MOODY: In order to -- I need to correct
15 the record on that as well. The trial judge did not
16 find that this was cumulative. He found a lack of
17 foundation. What happened was, was Ms. Maples was
18 offered as a witness --

19 JUSTICE SOUTER: But -- on appellate review
20 in California, they found it cumulative, didn't they?

21 MR. MOODY: The alternative prejudice
22 holding, the footnote 17, they said it would have been
23 cumulative.

24 JUSTICE KENNEDY: Right. Okay.

25 MR. MOODY: Yes.

1 JUSTICE SOUTER: And they -- they couldn't
2 have found that if there hadn't been some evidence on
3 Hurtz, apart from Maples?

4 MR. MOODY: Oh, that's right. Yes. There
5 was, and that's really my point. My point is that 11
6 third party culpability witnesses were allowed to
7 testify in this trial. And one was excluded.

8 JUSTICE KENNEDY: How did Hurtz's name enter
9 into the trial?

10 MR. MOODY: Well --

11 JUSTICE KENNEDY: Why did anybody mention
12 him?

13 MR. MOODY: Well, for one thing, he was
14 called to testify and asked if he killed these people.
15 Mr. Hurtz testified at this trial. The jury got to see
16 him, they got to look him in the eye, they got to hear
17 him on direct, they got to hear him on cross. And they
18 did not ask for a read back of that testimony.

19 JUSTICE SOUTER: And if Maples' testimony
20 had come in, I presume they could have cross-examined
21 him on the basis of Maples' testimony?

22 MR. MOODY: Well, he stated he never said he
23 killed these people. And he, he stated he'd never said
24 he killed a man and a woman in a car. So it -- it went
25 to what Maples would have said, and also --

1 JUSTICE KENNEDY: Did he say he'd killed
2 peoples otherwise, or at other times?

3 (Laughter.)

4 MR. MOODY: He also denied doing that.

5 JUSTICE KENNEDY: Well, but then at that
6 point in time, Maples, Maples' conviction -- Maples'
7 testimony becomes, assuming there's a foundation,
8 becomes more relevant.

9 MR. MOODY: I would disagree, simply because
10 she says she didn't hear the conversation well enough to
11 really give her testimony any true probative value in
12 the case because she was in and out of the room. She
13 didn't hear the beginning. She didn't hear the end.
14 And when she's asked, was it a serious discussion, she
15 says, I don't know. So this could be -- this could be
16 something very different --

17 JUSTICE STEVENS: That's classic going to
18 the weight of the evidence. That goes to the weight,
19 not the admissibility.

20 MR. MOODY: Ordinarily I would agree with
21 that. And if we knew, Your Honor, that he was speaking
22 about these killings, then certainly it would go to the
23 weight. But since he was speaking about killings that
24 she said she didn't know if they were in California, New
25 Jersey, she didn't know when they occurred, and

1 therefore -- in California we ask that before you
2 present third party culpability evidence you tie it to
3 this crime.

4 JUSTICE STEVENS: So we don't assume that
5 he's committed a whole lot of killings, I don't suppose?

6 MR. MOODY: Well, it's -- he may have
7 committed other killings, but if did not confess to
8 committing these killings then there's no probative
9 value to her testimony.

10 CHIEF JUSTICE ROBERTS: Do you think the
11 question of the application of Brecht is included within
12 the questions presented?

13 MR. MOODY: No. I briefed it because I was
14 concerned that the Court might reach it, but I don't
15 think it is fairly presented.

16 The only other point that I wanted to make
17 is that if one accepts Petitioner's rule it will
18 basically swallow up the Brecht standard and return to a
19 near wholesale application of Chapman on collateral
20 review. As Tyson and Trigg pointed out, many, many
21 times Petitioners come to court and they have a case
22 where there was no finding of constitutional error in
23 State court and therefore no Chapman application, but
24 they're going to assert that in Federal court. And so
25 if in every one of those cases you apply Chapman, then

1 you really have reduced application of Brecht.

2 JUSTICE GINSBURG: But on the other side,
3 State courts say, we don't have, we don't have to bother
4 in any case with Chapman because when it goes over into
5 the Federal court they're going to apply Brecht.

6 MR. MOODY: I don't think we should assume
7 that the State courts are going to do that. I think
8 that what -- it's sort of like what we said earlier in
9 the argument, Your Honor, where not every evidentiary
10 ruling is a constitutional violation. I would say most
11 of them are not. And this Court has not drawn a bright
12 line of exactly where that is. So in many cases, this
13 is just an erroneous exclusion of evidence at best. And
14 so, therefore, the State court would not be going to a
15 Chapman standard because it would not be finding error.

16 And with that, I'm prepared to submit.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Millett?

19 ORAL ARGUMENT OF PATRICIA A. MILLETT

20 ON BEHALF OF THE UNITED STATES, AS AMICUS

21 CURIAE, SUPPORTING RESPONDENT

22 MS. MILLETT: Mr. Chief Justice, and may it
23 please the Court:

24 The distinction between collateral review
25 and direct review is deeply rooted in the law, and what

1 Petitioner is asking is to have the standard of review
2 for harmlessness in collateral review become the same
3 standard as direct review whenever the courts on direct
4 review got Chapman wrong or unreasonably applied it.
5 That is the exact same argument Mr. Brecht made in this
6 Court. He got Chapman review. They cited Chapman.
7 They didn't cite it here. That's the only difference.

8 Mr. Brecht came to this Court and said they
9 unreasonably applied Chapman review and I should get it
10 again on habeas, and this Court said that there is a
11 deep difference, a deep distinction, between collateral
12 review and direct review and that distinction turns upon
13 the fundamental rule of habeas corpus, and that is not
14 to sit here as the sixth court on direct review of a
15 long record where difficult calls were made. It is to
16 correct fundamental miscarriages of justice, grievous
17 wrongs that have caused custody in violation of
18 constitutional --

19 JUSTICE STEVENS: May I ask two questions
20 and then you can proceed. One, do you take a position
21 on who has the burden of persuasion? That's the first
22 question. And do you have an opinion on proper
23 application of Brecht in this case?

24 MS. MILLETT: If I can adopt
25 Justice Breyer's language from O'Neal and say that this

1 Court eschewed couching this discussion in terms of
2 burden of persuasion. We accept O'Neal's holding what
3 then there is equipoise, which did not what happened in
4 this case, the tie goes to --

5 JUSTICE STEVENS: But you do agree if it
6 were in equipoise the State would have the burden?

7 MS. MILLETT: The tie would go to the
8 prisoner, yes. Were it in equipoise, because the State
9 would have the burden the State would lose. I don't
10 think that's what happened in this case. I think what
11 Justice Breyer, what this Court said O'Neal said is, the
12 way you articulated it, instead of burden of proof is
13 that it's a level of conviction on the part of the court
14 and what the judge will say in, what the court said in
15 O'Neal, is, do I think the error substantially
16 contributed to the jury's verdict? And that is
17 essentially what the court said here on 181 at the very
18 bottom when it said "The court doesn't find that there's
19 an insufficient showing" -- that's the same way of
20 saying I haven't been persuaded -- that the error
21 contributed to the verdict. So I don't think that this
22 case in any sense could turn upon, whether we call it
23 the burden of persuasion or the proper level of
24 conviction on the part of the court. This court was not
25 persuaded and that is all that matters. When the court

1 is not persuaded and not left in equipoise, the prisoner
2 loses.

3 The second question you asked was whether we
4 have a position on application of Brecht, and we do.
5 We've laid it out in our brief. We think that in no
6 sense does this record support the notion, support the
7 argument, that there was a substantial and injurious
8 effect when the twelfth out of eleven witnesses was
9 excluded, talking about third party culpability. And
10 that requires not just looking at what, in isolation,
11 what evidence was in there about Mr. Hurtz. There was I
12 think six or seven witnesses who said they heard him
13 either say he did it or he was there or he was involved.

14 But it requires looking at the whole record.
15 And there were -- the defense here was not a Hurtz
16 versus Fry. This was a case where the defense did an
17 excellent job. It was a well defended case, and threw
18 up a buffet of options for the jury, none of which it
19 bought on.

20 In the third trial you had what you didn't
21 had in the prior trials. You had ballistics evidence
22 that linked his gun to the crime. You have his own
23 admission, his own testimony, that he left the house
24 that night with the gun, with the bullets, and went out
25 in the truck that was seen at -- a truck of the same

1 type, that was seen at the crime scene.

2 JUSTICE STEVENS: I have the same problem
3 Justice Souter does, in all candor. The jury takes five
4 weeks to decide the case and there's a fairly
5 interesting bit of testimony that doesn't get in. And
6 to say to be totally satisfied it didn't have an
7 injurious effect on the deliberations is a close
8 question, I think.

9 MS. MILLETT: Well, two answers. If it's a
10 close question, if AEDPA and if Kotteakos and Brecht
11 mean anything, it's that the close calls go to the State
12 and are not overturned by the sixth court on review.

13 JUSTICE STEVENS: No, but an equally divided
14 call goes the other way.

15 MS. MILLETT: I'm sorry?

16 JUSTICE STEVENS: If it's not just a close
17 call, but if it's equal, it goes the other way.

18 MS. MILLETT: It is, and no one has thought
19 this was equal. The two courts -- the three courts, the
20 California Court of Appeals also said in any event
21 there's no possible prejudice.

22 Now, how they could say no possible
23 prejudice under a State standard and still say, ah, but
24 it would have affected the verdict under Chapman, is not
25 something I'm able to understand. So I think you have

1 --

2 JUSTICE SOUTER: Neither am I. But I draw a
3 different conclusion from it from the one you're
4 drawing.

5 MS. MILLETT: I guess I misunderstand your
6 point, because I think when the court said there's no
7 possible prejudice --

8 JUSTICE SOUTER: I mean, I cannot accept the
9 State -- the conclusion that there was no possible
10 prejudice, on the premises that Justice Stevens a moment
11 ago and I a moment before sort of put out. I just do
12 not find that a reasonable conclusion.

13 MS. MILLETT: Well, again, even if the Court
14 thinks there may have been some chance, may have been --
15 you know -- relevant testimony -- this Court can well
16 disagree and can conclude that this was abuse of
17 discretion. If it were Federal Rule of Evidence 403,
18 you could decide this was a an abuse of discretion.
19 Whether it was unconstitutional, so clearly
20 unconstitutional as to merit under AEDPA and under
21 Brecht reversal of the conviction 12 years after the
22 fact --

23 JUSTICE GINSBURG: I thought the AEDPA
24 question was out of it because that hasn't been -- there
25 was no cross-appeal on that question. I thought it was

1 a given, a given in this case, that the California
2 courts did not apply or unreasonably applied clearly
3 established Federal law.

4 I didn't think that was an issue in the
5 case. I think we took it on the assumption that it was
6 such an error.

7 MS. MILLETT: Again, the Respondents in this
8 case have not conceded constitutional error, and in
9 their brief they repeat that. And I think there's a
10 question whether a court should --

11 JUSTICE GINSBURG: It's not raised here.
12 There was no cross-appeal from that.

13 MS. MILLETT: Well, a Respondent is entitled
14 to defend on any ground supported by the record. But
15 even assuming that, we'll assume the error, assumes that
16 there was an error and one assumes that it was -- which
17 is hard for me to get to, but one assumes it was clearly
18 unconstitutional in this close call, the type of call
19 that's made hundreds of times in every trial, balancing
20 this, and the combination of lack of foundation and
21 cumulativeness. It's hard for me to understand when
22 that rises to the level of unconstitutionality.

23 But if we assume that it did, you have the
24 two courts that applied the Brecht standard here. And
25 the district court decision here is nearly 100 pages

1 long. It's a very careful, methodical analysis.

2 JUSTICE GINSBURG: That's because there were
3 many, many issues raised.

4 MS. MILLETT: There's many issues, but also
5 it was being careful and it was being very methodical.
6 And it went through this and it went through this
7 record. That court went through true this record, more
8 than 5,000 transcript pages, 11 week of trial, more than
9 100 witnesses. And it was on that --

10 CHIEF JUSTICE ROBERTS: I suppose if we're
11 going to apply the Brecht standard ourselves, we would
12 have to do the same thing.

13 MS. MILLETT: I think that's what this Court
14 has said.

15 The other thing I want to get back to is the
16 question about the length of jury deliberations. Sure,
17 this was really wrong. Now, they changed forepersons in
18 midstream and got a reasonable doubt instruction
19 repeated. Who knows what happened. But what I will not
20 concede -- I will concede it's long, but I will not
21 concede that the mere fact of length of deliberations
22 says anything about if this one particular error in
23 applying a balancing test substantially affected the
24 verdict. I think the length of deliberations is so
25 incredibly speculative.

1 JUSTICE STEVENS: You will concede it was a
2 close case, won't you?

3 MS. MILLETT: I will concede it was, I will
4 concede it was a difficult case.

5 JUSTICE STEVENS: If you take five weeks
6 it's pretty clearly a close case.

7 MS. MILLETT: That's right. But you know,
8 the whole the point of federal habeas corpus is that
9 this is not filling in the gaps in direct review. We're
10 not going to give you --

11 CHIEF JUSTICE ROBERTS: There's no evidence
12 or inference that it was close on the alternative
13 murderer theory, which is the only thing that Maples'
14 testimony goes to.

15 MS. MILLETT: That's exactly right. In
16 fact, if you look at the closing arguments, Mr. Hurtz
17 has a couple of references in a two-day closing
18 argument. That was not the centerpiece of his case.

19 JUSTICE STEVENS: It has to be close on an
20 alternative murderer. It wasn't suicide. Obviously, if
21 he didn't do it, somebody else did. So if it's a close
22 case from the first, it's obviously a close case for the
23 second.

24 MS. MILLETT: No, but as to who did it and
25 whether Hurtz did it or whether -- remember, what the

1 defense is trying to show is not who did it; it's that
2 this person didn't do it, and whether it was them or
3 someone else is what we don't know.

4 Again, this is Federal habeas corpus before
5 this Court, and I don't think that the misapplication of
6 a valid rule of evidence, which is not what this Court
7 has in Chambers, Holmes, or any of the cases that were
8 involved, was so -- that simply disallowed the twelfth
9 out of eleven witnesses on third party culpability is so
10 clearly erroneous, it was so clearly impacting the
11 verdict in this case, as to warrant a retrial 15 years
12 after the crime.

13 And yes, the jury -- it was close in the
14 sense that they worked a long hard time. But at the end
15 of the day, they were unanimous. There's nothing close
16 about unanimous. And I think it would be the wrong
17 message to say that a jury that works as hard as this
18 one did, did the readbacks, culled through this
19 record --

20 JUSTICE STEVENS: Yes, but we don't know
21 what they would have done if they had this evidence that
22 was excluded. That's the problem.

23 MS. MILLETT: One never knows that in habeas
24 corpus. But what you do when you look at what they were
25 focusing on, they were focusing on the two ballistics

1 experts. They had them read back right next each other.
2 They made that call. It's their job to do it.

3 JUSTICE SOUTER: But the reason they may
4 have been doing that is that they may very well have
5 thought that the evidence indicating third party guilt
6 was close and perhaps persuasive and what they wanted to
7 know was whether the evidence going specifically to this
8 defendant was strong enough to overcome it.

9 MS. MILLETT: May I answer? One would have
10 expected at least one readback on third party
11 culpability instead of three readbacks of Mr. Fry's
12 testimony which put himself that night with the gun in
13 the truck, and which he said -- you know -- and
14 beforehand he agreed he might have said he wanted to
15 blow them away.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Haltom, you have three minutes
19 remaining.

20 REBUTTAL ARGUMENT OF VICTOR S. HALTOM

21 ON BEHALF OF PETITIONER

22 MR. HALTOM: Thank you. The trial counsel
23 --

24 JUSTICE KENNEDY: Mr. Haltom, before you go
25 drifting, counsel, into the evidentiary questions in the

1 case, I have one question. Two cases. A, Hurtz did not
2 testify at all. B, he did. Is the foundation ruling
3 any different in the two cases insofar as Maples'
4 testimony or is it the same? I.e., is there a lesser
5 showing for foundation if Hurtz did testify?

6 MR. HALTOM: I think that possibly the
7 foundation with Hurtz there could be increased. The
8 jury sought Mr. Hurtz.

9 JUSTICE KENNEDY: Oh, you mean, oh, you mean
10 more? You have to be more strict for foundation after
11 Hurtz testified? I was suggesting the opposite.

12 MR. HALTOM: Well, I was just thinking that
13 his presence there would be relevant. The jury actually
14 saw him. They heard a truck driver describing, a
15 neutral truck driver, describing the actual killer, who
16 in no way fit the description of Mr. Fry.
17 Unfortunately, the record doesn't indicate what Mr.
18 Hurtz looked like, but the jury saw it. And if the jury
19 saw that that truck driver was describing a man that
20 looked like Mr. Hurtz, then that --

21 JUSTICE GINSBURG: But there were all kinds
22 of infirmities in that truck driver's testimony,
23 including the time, the timing of the murder.

24 MR. HALTOM: There were infirmities in his
25 testimony, Your Honor. However, he came from Missouri,

1 so maybe he was looking at a Missouri clock. We don't
2 know. But why would that man make up a story? He has
3 no axe to grind in this case. And then his testimony is
4 corroborated by a gentleman who sees him immediately
5 after it and says: He looked like he had just seen a
6 ghost, and described seeing a double execution-style
7 murder. Now --

8 JUSTICE STEVENS: That was all presented to
9 the jury, right?

10 MR. HALTOM: That was all presented to the
11 jury. However, Ms. Maples' testimony was not, and
12 counsel did not argue that heavily focused on Mr. Hurtz'
13 guilt. She certainly did argue it, but the reason that
14 she didn't is because, as the Court of Appeals, the
15 California Court of Appeals, said, the other seven
16 witnesses who said Mr. Hurtz said he had killed the
17 Bells were all described as having been flimsy witness
18 who gave contradictory unbelievable testimony.

19 CHIEF JUSTICE ROBERTS: Well, how strong is
20 this witness, who didn't even know if it was a serious
21 conversation, didn't hear the beginning of it, and
22 didn't -- couldn't tell whether he was talking about
23 something that happened 10 years before or 2 days
24 before?

25 MR. HALTOM: Mr. Chief Justice, she was

1 extremely strong. Page JA-78 in the joint appendix,
2 Respondent concedes she was the only unbiased witness
3 concerning Mr. Hurtz's -- concerning Mr. Hurtz. She
4 heard this, her cousin, saying he shot a man and a woman
5 in a parked car, first shooting the woman in the head,
6 then shooting the man, getting blood all over himself.
7 That linked up with all the other confessions in this
8 case. Interlinking confessions just like in Chambers
9 were deemed to provide adequate assurance of
10 reliability.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.

13 (Whereupon, at 11:06 a.m. the case in the
14 above entitled matter was submitted.)

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