

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   JEFFREY UTTECHT, SUPERINTENDENT,       :

4   WASHINGTON STATE PENITENTIARY,       :

5                    Petitioner               :

6                    v.                         :   No. 06-413

7   CAL COBURN BROWN.                     :

8   - - - - - x

9   Washington, D.C.

10    Tuesday, April 17, 2007

11

12    The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 1:00 p.m.

15 APPEARANCES:

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17       Olympia, Wash; on behalf of Petitioner.

18 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor  
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20       behalf of the United States, as amicus curiae,  
21       supporting Petitioner.

22 SUZANNE LEE ELLIOTT, ESQ., Hartford, Conn; on behalf of  
23       Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 06-413, Uttecht versus Brown.

Mr. Samson.

ORAL ARGUMENT OF JOHN L. SAMSON,

ON BEHALF OF PETITIONER

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

The Ninth Circuit's conclusion that Mr. Brown is entitled to habeas corpus relief should be reversed for three reasons. First, under section 2254(e)(1) of the Antiterrorism and Effective Death Penalty Act, the trial judge's dismissal of Mr. Deal from the jury is a finding of fact of substantial impairment that is presumed correct unless it is rebutted by clear and convincing evidence. Mr. Brown has not presented such evidence because the record before the State court supports the decision to remove Mr. Deal, especially since the trial judge had the opportunity to observe Mr. Deal and the defense had no objection to his removal.

Second, under 2254(d)(2), the State-court decision was based on a reasonable determination of the

1 facts. Since the finding of fact was correct it is  
2 necessarily reasonable.

3 And third, under 2254(d)(2), the State-court  
4 decision was not contrary to Supreme Court precedent.  
5 Since the trial court applied the correct standard under  
6 Witt and found as fact that Mr. Deal was substantially  
7 impaired and this case is materially indistinguishable  
8 from Witt, the State court's decision was a reasonable  
9 application of clearly established Federal law.

10 Mr. Deal did indicate in the voir dire that  
11 he could impose the death penalty and consider it, but  
12 his other statements created an ambiguity which the  
13 trial judge was in the best position to resolve.

14 JUSTICE SOUTER: Counsel, may I ask you one  
15 thing, which I have assumed, and I think is correct, but  
16 I'd like to be sure of it. Is it the case, is it  
17 correct, that prior to the voir dire questions, no one  
18 had given a statement to the venire people of what the  
19 law was with respect to the imposition of the death  
20 penalty? Is that correct?

21 MR. SAMSON: Not exactly, Your Honor. Prior  
22 to the individual voir dire, they were -- there was  
23 instructions given to the jurors. Prior to the filling  
24 out of the questionnaire --

25 JUSTICE SOUTER: Were they told what the --

1 I forget how many factors are enumerated under the  
2 Washington law -- Were they told what they were?

3 MR. SAMSON: No, Your Honor, it was more a  
4 general instruction regarding how the system operates.

5 JUSTICE SOUTER: Okay.

6 MR. SAMSON: In the individual voir dire of  
7 Mr. Deal --

8 JUSTICE GINSBURG: But one piece of  
9 evidence that -- one piece of information that wasn't  
10 given apparently because Juror Z didn't know about it,  
11 was that life meant life without parole. Because when  
12 he was questioned, he was surprised, he didn't know that  
13 that was the law.

14 MR. SAMSON: Your Honor, he learned an hour  
15 before his questioning that that was the law. He was  
16 not informed of that -- of that law when he filled out  
17 his questionnaire. But approximately an hour before the  
18 individual questioning, he was informed of that, and he  
19 indicated that in his questioning that he had just  
20 learned an hour ago.

21 CHIEF JUSTICE ROBERTS: And how did he learn  
22 that?

23 MR. SAMSON: He learned that from the  
24 instructions given by the trial judge as well as through  
25 the statements by defense counsel and by the prosecutor.

1           And the defense counsel reminded Mr. Deal of  
2 the fact that there was life without parole. She asked  
3 him if he can consider both options, death and life  
4 without parole. He said he could. And then defense  
5 counsel asked why do you think the death penalty is  
6 appropriate? And he stated again, as he stated in his  
7 questionnaire, it would be a case where the person was  
8 incorrigible and would reviolates if rereleased.

9           JUSTICE GINSBURG: He gave that as an  
10 example. He didn't say: And that's the only  
11 circumstance in which I would be willing to vote for the  
12 death penalty.

13           MR. SAMSON: That is correct, Your Honor,  
14 but the prosecutor in viewing Mr. Deal's responses  
15 through the course of the voir dire, the prosecutor  
16 viewed Mr. Deal as saying the only time, or I would have  
17 great difficulty in imposing the death penalty, unless  
18 the person would be released and would be in a position  
19 to -- to reoffend or kill again.

20           JUSTICE SCALIA: Did he say, "for example,"  
21 with regard to the quotation that Justice Ginsburg  
22 mentioned? I didn't recall that he said "for example."

23           JUSTICE GINSBURG: He was asked to give an  
24 example. He didn't say for example. And he didn't say  
25 this would be the only situation in which I would vote

1 for the death penalty.

2 MR. SAMSON: That is -- that is correct.

3 Both -- both are correct, Your Honors. At joint  
4 appendix 62, he was asked for an example of why he  
5 believed the death penalty was appropriate, and he says,  
6 "I think if a person is or would be incorrigible and  
7 would reviolates if released, then it would be  
8 appropriate."

9 And, in fact, the only two examples he ever  
10 gave of when he believed it would be appropriate is when  
11 a defendant wants to die or a defendant would be  
12 released on parole and could kill again. And the  
13 prosecutor specifically asked Mr. Deal, can you think of  
14 an example, or a situation of when you would be able to  
15 impose a death penalty now knowing there is life without  
16 parole, and Mr. Deal -- at joint appendix 71 to 72 --  
17 said "I would have to give that some thought. Like I  
18 said up until an hour ago I did not realize that life  
19 without parole was an option."

20 JUSTICE KENNEDY: Would you agree that if we  
21 grant your position and grant you relief, that it would  
22 be something of an extension over Witt and Darden, in  
23 that the jurors in Witt and Darden had fixed views, that  
24 they were as a matter of conscience opposed to the  
25 penalty?

1           MR. SAMSON: Your Honor, I would agree that  
2 the statements given by the jurors in Witt and Darden  
3 were not exactly what Mr. Deal said. But I think the  
4 general rule that the deference given to the trial judge  
5 would be the same rule. And we are only asking this  
6 Court to apply the rule.

7           JUSTICE KENNEDY: I understand that. But I  
8 do think that the views of this juror, Deal --

9           MR. SAMSON: That is correct.

10          JUSTICE KEENEDY: -- were somewhat more  
11 equivocal than in the cases I've mentioned.

12          MR. SAMSON: They were, Your Honor. There  
13 was not a statement as in Witt and Darden where the  
14 jurors said that they had an opposition to the death  
15 penalty and would have difficulty applying it. That is  
16 correct. The statements were -- were different.

17                 And certainly if the judge viewing a juror  
18 of this type determined that the juror was not impaired,  
19 then that decision would also be entitled to deference.  
20 In fact, an example occurred in this case, Juror Obeso,  
21 the judge -- there was a challenge by the prosecutor.  
22 There was actually an objection by the defense. And the  
23 judge said Mr. Obeso says that he can follow the law and  
24 impose the death penalty and I believe that he can.

25          CHIEF JUSTICE ROBERTS: One thing I couldn't

1 clearly discern from your brief is the significance you  
2 attached to the defendant's -- defense failure to  
3 object. How does that enter into our analysis?

4 MR. SAMSON: Your Honor, there's two points  
5 made from the failure to object. The first is it  
6 explains why there's no evidence, expressed evidence,  
7 regarding demeanor or credibility or even an express  
8 statement as to substantial impairment.

9 The second is that as the Court stated in  
10 Witt, it is a significant factor the court may consider  
11 in its evidence that show the judge acted appropriately.

12 JUSTICE KENNEDY: It seems to me on that  
13 point that the State is somewhat surprised and  
14 whipsawed. And I understand that the Washington court  
15 reached the issue. It is not independent State ground.  
16 I take it the prosecutor had some peremptories left?

17 MR. SAMSON: Yes, Your Honor. The  
18 prosecutor had two.

19 JUSTICE KENNEDY: How late in the process  
20 was -- was Deal considered? Was he one of the early  
21 jurors or one of the late jurors?

22 MR. SAMSON: He was one of the -- the early  
23 jurors. He was on November 3rd, which was about five to  
24 six days into the individual voir dire on the death  
25 qualification.

1 JUSTICE KENNEDY: This was about a 17-day  
2 voir dire?

3 MR. SAMSON: That is correct, Your Honor.  
4 And --

5 JUSTICE KENNEDY: Well, that cuts a little  
6 bit against the peremptory. I mean, if it was early in  
7 the game the prosecutor might not have exercised the  
8 peremptory.

9 MR. SAMSON: Well the peremptories were not  
10 exercised until the death qualification and the other  
11 for-cause challenges were done.

12 JUSTICE KENNEDY: Oh, I see. So the whole  
13 jury is -- I see.

14 MR. SAMSON: Yes, Your Honor. So they --  
15 they completed all the death qualification. And then  
16 those jurors that remained they had further individual  
17 voir dire, and the defense and the prosecutor then used  
18 their peremptories interchangeably to remove jurors.

19 JUSTICE STEVENS: May I go back to the  
20 Chief's question about the failure to object? I think I  
21 got the impression from Judge Kozinski's opinion that he  
22 thought that the Washington Supreme Court found that  
23 with respect to two out of the three jurors at issue  
24 that there had been a finding that they were  
25 substantially impaired, but with respect to this juror,

1 that the Washington Supreme Court seemed to rely on the  
2 failure to object as the principal explanation for their  
3 decision.

4 MR. SAMSON: I would -- I would disagree  
5 with that, Your Honor.

6 The -- the State Supreme Court on page 171a  
7 of the petition appendix specifically was citing to Witt  
8 and the rules from Witt. And that includes the rule  
9 that the trial judge's exclusion of a juror constitutes  
10 a finding of fact.

11 CHIEF JUSTICE ROBERTS: I thought  
12 Justice Stevens' articulation of Judge Kozinski's  
13 opinion was exactly right but I thought you would in  
14 response cite us to page 208a where the Washington  
15 Supreme Court said that those jurors' views, including  
16 Mr. Deal, "would have prevented or substantially  
17 impaired their ability to follow the court's  
18 instructions and abide by their oaths as jurors."

19 It seems the court of appeals judge  
20 overlooked that.

21 MR. SAMSON: They did, Your Honor. They  
22 did. And that is a specific finding of fact by the  
23 State supreme court, in addition to --

24 JUSTICE GINSBURG: Is it a finding? It's  
25 listed under "Findings and Conclusions." Under

1 "Findings," I thought under "Findings" the -- the  
2 findings were that he misunderstood the standard. He  
3 said beyond a shadow of a doubt, rather than beyond a  
4 reasonable doubt. And what other finding of fact was  
5 there? Because this one is listed under conclusions.  
6 "From the facts, I conclude that he would be impaired."  
7 But the impairment is a conclusion from what facts?

8 MR. SAMSON: It is from all the facts that  
9 the State Supreme Court had before it. Its  
10 one-paragraph analysis of Mr. Deal did not lay out all  
11 the facts that were before the court. And the statement  
12 208a, although it's listed as a conclusion, essentially  
13 constitutes a finding of fact. And even if this Court  
14 were to say that is not a finding of fact, it contains  
15 with it the implicit finding of fact.

16 JUSTICE SCALIA: Well --

17 JUSTICE KENNEDY: The point stands --

18 JUSTICE SCALIA: Why does it have to be a  
19 finding of fact? Aren't we obliged under AEDPA to give  
20 deference to any reasonable conclusion from the facts?

21 MR. SAMSON: Yes, Your Honor.

22 JUSTICE SCALIA: So even if it is just a  
23 conclusion, AEDPA still applies to it unless it's a  
24 totally unreasonable conclusion, right?

25 MR. SAMSON: That's exactly right, Your

1 Honor.

2 JUSTICE KENNEDY: But the point stands that  
3 the court of appeals was just incorrect in -- in not  
4 noting what's there at 208. It's just not a fair  
5 summary of what the Washington Supreme Court did.

6 MR. SAMSON: Yes, Your Honor. The Ninth  
7 Circuit found that the State courts made no finding of  
8 fact and, as Mr. Brown has essentially admitted in his  
9 response brief, there are two State court findings of  
10 facts. There's one by the Washington Supreme Court and  
11 one by the trial judge.

12 CHIEF JUSTICE ROBERTS: Is this something  
13 particular under Washington procedure, this  
14 summary-and-conclusion section at the end of the  
15 opinion?

16 MR. SAMSON: No, Your Honor. I think this  
17 is more just the style of the justice who wrote the  
18 opinion and how he writes his opinions.

19 CHIEF JUSTICE ROBERTS: All right.

20 JUSTICE SOUTER: I take it your position is  
21 that if the State courts had made, or had expressed, no  
22 conclusion other than the final conclusion that he is  
23 impaired, that that conclusion itself would be entitled  
24 to AEDPA deference if the record could be read to  
25 support it; is that correct?

1                   MR. SAMSON: Yes, Your Honor. Yes, Your  
2 Honor. The AEDPA --

3                   JUSTICE SOUTER: If that's the case, then  
4 AEDPA deference is more than deference, isn't it? AEDPA  
5 deference has reached on your view the conclusion that  
6 if there is any factual support in a record, the  
7 ultimate conclusion of the court will be upheld, whereas  
8 I thought AEDPA deference went to factfinding and to  
9 express conclusions that the court drew.

10                  MR. SAMSON: Your Honor, we're not saying  
11 that there will never be a case where the deference  
12 given to a trial judge and the deference given to a  
13 State court in factual determinations can be overcome.  
14 Certainly, it's hard to think of one, but there can be a  
15 case where that deference could be overcome.

16                  JUSTICE STEVENS: Isn't this perhaps just  
17 such a case? Because this finding by the Supreme Court  
18 of the State is based only on the written record, so it  
19 does not get any benefit of observing the demeanor of  
20 the witness -- I mean, the demeanor of the prospective  
21 juror; isn't that correct?

22                  MR. SAMSON: It is correct the State Supreme  
23 Court --

24                  JUSTICE STEVENS: So if we disagreed and  
25 thought there was not evidence in the written record

1 that would support that conclusion, we should not give  
2 deference to that appellate court finding.

3 MR. SAMSON: Your Honor, but the appellate  
4 court finding also was based on the trial court finding  
5 of fact, and the State Supreme Court recognized, as this  
6 Court did in Witt, that deference must be given to the  
7 trial judge, who did have the opportunity to observe the  
8 juror.

9 JUSTICE SOUTER: But the trial judge made no  
10 conclusion about demeanor. He didn't say anything about  
11 demeanor, did he?

12 MR. SAMSON: No, Your Honor, and neither did  
13 the --

14 JUSTICE SOUTER: If we're going to get --  
15 that takes -- it seems to me it takes deference yet one  
16 further step. We're saying that even if there is  
17 nothing on the record about demeanor, we are supposed to  
18 assume that a trial judge drew a conclusion based on  
19 demeanor. I mean, that is not deference. I mean,  
20 that's simply imputing fiction.

21 MR. SAMSON: Your Honor, there's no evidence  
22 on demeanor because the defense counsel did not object.

23 JUSTICE SOUTER: Why is it the defense  
24 counsel's obligation to object? It seems to me that if  
25 the State is objecting, saying I want this juror

1 removed, and the trial judge is saying, okay, I will  
2 remove him, that there is an obligation to make a  
3 record.

4 MR. SAMSON: Your Honor --

5 JUSTICE SOUTER: Wouldn't there be? I guess  
6 my point is if there isn't, then in effect you are  
7 making the defendant responsible for creating a record  
8 to support what the other side asks for.

9 MR. SAMSON: Your Honor, as this Court  
10 explained in Witt, when there is no objection or no  
11 dispute as to the factual issue in the trial court, the  
12 judge had no reason to elaborate on his findings and  
13 therefore he has no obligation to do so.

14 JUSTICE SOUTER: But that means that the --  
15 that the argument for sustaining the trial judge's  
16 action on the ground that the trial judge could observe  
17 demeanor in effect is the elimination of judicial review  
18 on that subject, because we know that if the venire  
19 person was present in the courtroom and the judge was  
20 present in the courtroom, the judge probably looked at  
21 him, and if that is enough to sustain judicial action on  
22 the grounds that we defer to demeanor, then there's no  
23 judicial review at all. I think that's what Judge  
24 Kozinski said.

25 MR. SAMSON: Your Honor, if there is

1 absolutely no evidence to support the trial judge's  
2 conclusion in the record --

3 JUSTICE SOUTER: I'm talking about demeanor.  
4 I'm talking about demeanor. And there's nothing as I  
5 understand it on the record about demeanor.

6 MR. SAMSON: Yes, Your Honor. In Marshall  
7 versus Lonberger the Court said there is no requirement  
8 for explicit finding as to credibility.

9 JUSTICE SOUTER: And if there is no  
10 requirement that there be anything on the record about  
11 demeanor, then there is no judicial review on that point  
12 at all, is there?

13 MR. SAMSON: Not on demeanor, but there can  
14 be judicial review on the other facts that are presented  
15 in the record.

16 JUSTICE SCALIA: Of course there is on  
17 demeanor. I mean, I suppose, to begin with, is it not  
18 the case that the burden is on the habeas applicant to  
19 show that demeanor did not make the difference? It's  
20 the burden on him to show that it was an unreasonable  
21 determination.

22 MR. SAMSON: It is the burden on him to  
23 present clear and convincing evidence.

24 JUSTICE SOUTER: And the question --

25 JUSTICE SCALIA: And secondly, he could

1 present such evidence if he showed that there was  
2 absolutely no ambiguity in what the person's statements  
3 said, so that demeanor could not have made a difference.  
4 But in a case where the statements are seemingly  
5 contradictory or arguably contradictory, demeanor is  
6 very relevant and it's the burden, it seems to me, of  
7 the Petitioner to show that demeanor wasn't what made  
8 the difference.

9           And besides which, wasn't there some part of  
10 the record that you referred to where he said "and I  
11 believe him"?

12           MR. SAMSON: Yes, Your Honor. That's as to  
13 a different juror when there was an objection, and  
14 because there was no objection there was no obligation.

15           If I may --

16           JUSTICE SOUTER: Is there any way that he  
17 can show that demeanor didn't make a difference when the  
18 record is absolutely silent on demeanor? Is there any  
19 way he can show that?

20           MR. SAMSON: Your Honor, he could attempt to  
21 bring evidence in a State court collateral -- he  
22 actually filed a motion for reconsideration as to  
23 another juror. He did not do that in this case.

24           JUSTICE STEVENS: May I ask to be sure I  
25 understand the record, because I did miss something

1 before. Did the trial judge say in so many words that  
2 Deal's views would have prevented or substantially  
3 impaired his ability to follow the court's instructions  
4 and abide by the rules of the jurors?

5 MR. SAMSON: The trial judge made no such  
6 express finding because there was no objection raised.

7 And if I may reserve --

8 JUSTICE STEVENS: So that's the point of the  
9 absence of objection. That's why he didn't make the  
10 critical finding.

11 MR. SAMSON: Yes, Your Honor.

12 JUSTICE STEVENS: Because the judge didn't  
13 make the critical finding.

14 MR. SAMSON: He would have made a finding if  
15 there was an objection.

16 If I may reserve --

17 CHIEF JUSTICE ROBERTS: You may reserve the  
18 remainder of your time for rebuttal.

19 MR. SAMSON: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

21 ORAL ARGUMENT OF MICHAEL R. DREEBEN

22 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

23 SUPPORTING THE PETITIONER

24 MR. DREEBEN: Thank you, Mr. Chief Justice,  
25 and may it please --

1 JUSTICE STEVENS: May I -- just to finish up  
2 the thought because you're equally well-prepared. How  
3 do we know the trial judge would have made that a  
4 finding if there had been an objection?

5 MR. DREEBEN: Justice Stevens, this is a  
6 record in which the trial judge showed that he was  
7 meticulously careful in applying the standard from  
8 *Wainwright* versus *Witt*. In the joint appendix, I  
9 believe at pages 7 through 9, there's an extensive  
10 discussion of how the judge is going to apply the *Witt*  
11 standard evenhandedly. He's going to eliminate those  
12 jurors who are life-biased. He's going to eliminate  
13 those jurors who --

14 JUSTICE STEVENS: Does that respond to the  
15 possible suggestion that Judge Kozinski made that what  
16 he really did was act on the basis of no objection,  
17 rather than on the basis of a finding that he failed to  
18 make?

19 MR. DREEBEN: I don't think so,  
20 Justice Stevens, because it's very clear that he told  
21 the parties, if you have any question, if you have any  
22 problem with any of the objections that are made, speak  
23 up and I will intervene and question the juror myself  
24 and clarify it.

25 And this is a judge who, against the

1 background of the entire voir dire, clearly was making a  
2 good faith effort to apply the Witt standard. There  
3 were 12 objections by the prosecution to various jurors  
4 that they should be excused for cause because of  
5 inability to apply the law as Washington gives it. The  
6 defense objected, I believe, to seven of those; and the  
7 prosecution lost on five of those occasions.

8           So the judge basically went with the defense  
9 when the defense spoke up and objected. There were two  
10 jurors that were excused over the defense objection.  
11 The transcript is also in the voir dire on those and it  
12 shows that the defense objected and said these jurors  
13 can apply the standard under the law, and the judge  
14 found that they could not and excused them.

15           In the case of Juror Deal there is  
16 absolutely no reason to believe that the judge wouldn't  
17 have done exactly the same thing if the defense had  
18 objected.

19           JUSTICE BREYER: Well, what is --

20           JUSTICE KENNEDY: In fact the defense -- I  
21 know, Justice Breyer, just on this point. The defense  
22 actually volunteered "no objection."

23           MR. DREEBEN: Said "We have no objection."  
24 And I think that this is one of the three significant  
25 legal errors that the Ninth Circuit made in disposing of

1 this challenge. This Court made clear in *Wainwright*  
2 versus *Witt* that the absence of a defense objection is  
3 very critical in assessing whether a judge's implied  
4 finding of bias is to be upheld on appeal. And it's for  
5 the reason that my colleague mentioned in part: If the  
6 judge is not asked to give a fuller explanation, there  
7 is no reason to expect --

8 JUSTICE BREYER: What has this to do with  
9 the -- aside from the explanation, when I read through  
10 the transcript, as I have, it seemed to me in the  
11 transcript he didn't say a word that suggested he's  
12 against giving the death penalty. He kept saying yes,  
13 in special circumstances, not always. Then they get  
14 into this thing where he's been thinking of a person who  
15 will in fact commit a crime again. And then it's put to  
16 him directly: Have you thought about that he won't be  
17 committing a crime again if he's in jail the rest of his  
18 life. He says: You're right; I hadn't really thought  
19 it through.

20 I want to know, thinking it through, could  
21 you consider the death penalty? Do you think under the  
22 conditions where the man would never get out again you  
23 could impose it? Yes, sir.

24 So you don't think that parole is an option,  
25 et cetera, repeating it. Death penalty? I could

1 consider it. Then could you impose it? I could if I  
2 was convinced that was the appropriate measure.

3 And it's absolutely clear he's not thinking  
4 of the repetition. It is clear he is thinking that it's  
5 some kind of a mean. And I compared that with Witt,  
6 where the person just says no, I can't, and I compared  
7 it with this other case, Gray, and they say it's illegal  
8 to push him off the jury, a woman who is confused, and  
9 finally she says: I think I could.

10 MR. DREEBEN: Justice Breyer, I think your  
11 question goes to the heart of the case.

12 (Laughter.)

13 JUSTICE BREYER: Well, that's probably  
14 right.

15 MR. DREEBEN: But the reason it goes to the  
16 heart of the case, Justice Breyer, is that you and I and  
17 every other appellate lawyer and judge who has looked at  
18 this is dealing with a cold record, but the only person  
19 who actually saw and heard this juror give the responses  
20 was the trial judge.

21 JUSTICE BREYER: So what is it that he could  
22 have done? Was he shaking, making faces? Was he  
23 shaking his head to indicate he believed the opposite?

24 MR. DREEBEN: Well, Justice Breyer --

25 JUSTICE BREYER: If something like that

1 happens, isn't a prosecutor of any sense going to say, I  
2 want it noted for the record that the witness while he  
3 said these words was chortling inwardly or something  
4 like that?

5 MR. DREEBEN: Well, Justice Breyer, there  
6 were five separate occasions during Juror Deal's voir  
7 dire in which he expressed either uncertainty or a  
8 misconception about what the death penalty should be  
9 imposed for when measured against Washington law.

10 And the overarching point that I make before  
11 I talk about those five instances is that this is a  
12 record in which there is confusion and uncertainty about  
13 whether Juror Deal really can adhere to the law. And in  
14 those circumstances, the only judge who can truly  
15 resolve that and determine whether he should be credited  
16 is the trial judge. And this Court has made that point  
17 over and over again in describing its voir dire.

18 JUSTICE KENNEDY: If there is confusion, is  
19 that grounds for excluding him?

20 MR. DREEBEN: Confusion alone is not. If  
21 it's confusion it must rise to a level of preventing or  
22 impairing the juror's ability to follow the law.

23 JUSTICE GINSBURG: Mr. Dreeben, at this  
24 point, this juror, he doesn't know anything about  
25 aggravating circumstances. He doesn't know about

1 mitigating circumstances. He hadn't been told what the  
2 standard of -- that it was beyond a reasonable doubt.

3 And to say that he should be criticized  
4 because when he was asked to give an example he said one  
5 thing and not another, it seems if you just read the  
6 transcript, that there's nothing disqualifying. So as  
7 you said, everything is the weight falls on the  
8 demeanor, which an appellate court can't review.

9 MR. DREEBEN: I think that that's right,  
10 Justice Ginsburg. It doesn't mean that there is no  
11 judicial review at all, in response to Justice Souter's  
12 question and I think the concern underlying your own.  
13 There has to be fair support in the record for the  
14 conclusion that the trial judge could have resolved the  
15 question of the juror's competence to sit in the way  
16 that he did.

17 And if you had a record in which everything  
18 that the juror said is consistent with complying with  
19 State law, which I don't think this record is, and the  
20 prosecutor objected, and the judge says granted, and  
21 there's no explanation, I think that would be difficult  
22 to uphold, even if it is possible that everyone in the  
23 courtroom knew that the judge was relying on demeanor.

24 JUSTICE SOUTER: Is there anything in this  
25 record to indicate that the judge did rely on demeanor?

1                   MR. DREEBEN: What is -- no. There's  
2 nothing explicit. But this Court has said over and over  
3 again that there does not have to be because in this  
4 case, in particular, since there was no objection, the  
5 judge did not elaborate on his reasons at all. But the  
6 Court has gone further in Witt and in Darden and  
7 building on cases like Patton versus Yount, and made  
8 clear that it is implicit in a judge's action in  
9 response to an objection that he has relied on the  
10 totality of the law and his observations.

11                   And here there were two instances during the  
12 defense colloquy in which the juror specifically said  
13 that his example of when the death penalty is  
14 appropriate is a circumstance when somebody is  
15 incorrigible and will reoffend if released. And then  
16 three times during the prosecution's voir dire, he  
17 volunteered, first of all, that it would have to be in  
18 my mind very obvious that the person would reoffend.  
19 And this was a particularly significant answer because  
20 it wasn't given in response to a death penalty question,  
21 it was given in response to whether he could apply the  
22 reasonable doubt standard to the crime.

23                   He again comes back to the reoffend notion  
24 after having State law explained to him again, and said,  
25 could you consider imposing the death penalty, he said I

1 have to give that some thought.

2 JUSTICE SOUTER: But he had not been given,  
3 as I understand it, the explanation of what the -- I  
4 keep saying nine factors. Whatever the enumerated State  
5 factors were. He had not been told that at any point,  
6 had he?

7 MR. DREEBEN: No, but I think the important  
8 point, Justice Souter, is that under Washington law  
9 there were really only two alternatives, life without  
10 parole or death.

11 JUSTICE SOUTER: Yes, but the -- the  
12 questioning was what grounds are you going to look to  
13 make that decision; and he had not been instructed on  
14 Washington law on that at all.

15 MR. DREEBEN: The concern that I think the  
16 prosecutor had and that the judge accepted is that this  
17 juror's vision of when capital punishment is appropriate  
18 is when somebody will get out and kill again. And under  
19 that analysis, you would never impose capital punishment  
20 under Washington law, because the defendant is never  
21 going to get --

22 JUSTICE STEVENS: But does it follow that  
23 his limited cases -- the views about when the death  
24 penalty is appropriate would translate into views on  
25 whether he could or could not impose the death penalty

1 if instructed properly by the court?

2 MR. DREEBEN: Not -- not automatically,  
3 Justice Stevens. I mean, this is a juror --

4 JUSTICE STEVENS: Doesn't it have to be  
5 automatic in order to justify the result in this case?

6 MR. DREEBEN: No. What has to be the  
7 case -- and this Court in Witt made clear that it was  
8 not going to apply an unmistakable certainty  
9 requirement -- is that the judge has to conclude that  
10 juror's views would prevent or substantially impair the  
11 juror in applying the law. And the judge had to make a  
12 call based on what he saw and what none of us did, of  
13 whether this juror's views --

14 JUSTICE STEVENS: Isn't there a world of  
15 difference -- at least it has been my experience in  
16 trials like this -- of what a juror will do on his own  
17 and what he thinks the law might be, and what is fair,  
18 and so forth, as opposed to what a -- a juror will do in  
19 response to proper instructions?

20 MR. DREEBEN: Yeah.

21 JUSTICE STEVENS: The jurors mostly are  
22 pretty conscientious.

23 MR. DREEBEN: Yes, they there are. And --

24 JUSTICE STEVENS: Is there any reason to  
25 believe this guy wasn't?

1           MR. DREEBEN: Well the judge found one. By  
2 excusing him after having --

3           JUSTICE STEVENS: Well -- without -- because  
4 there was no objection.

5           MR. DREEBEN: Well he made clear -- if I may  
6 conclude -- he made clear at the outset as I think I did  
7 when I started my presentation, that this record shows a  
8 judge who was conscientiously applying the Witt  
9 standard.

10           CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Dreeben.

12           Ms. Elliott.

13           ORAL ARGUMENT OF MS. SUZANNE LEE ELLIOTT,

14                           ON BEHALF OF RESPONDENT

15           MS. ELLIOTT: Mr. Chief Justice, may it  
16 please the Court:

17           There were in our view two findings by the  
18 Washington courts here. The first by the trial court is  
19 objectively -- an objectively unreasonable determination  
20 of the facts in light of the evidence presented, and  
21 thus the writ should be granted under 50 -- 28 --  
22 2254(d)(2). And the supreme court's decision -- and  
23 I'll get to a moment to where I think their decision is,  
24 in the record, which conflicts with the State's view of  
25 where that is -- was an unreasonable application of this

1 Court's controlling precedent in Witt versus  
2 Witherspoon.

3 And I would direct the Court to, in terms of  
4 the State Supreme Court's finding, to page 173a of the  
5 appendix of the petition for certiorari. But I would,  
6 of course, first like to start with the actual record in  
7 this case.

8 In this case, the Washington State trial  
9 court's decision to excuse Juror Deal for cause was  
10 objectively unreasonable based upon the record, because  
11 Juror Deal said many times on the record, when presented  
12 with the question of whether or not he could impose the  
13 death penalty under the sketchy view he had of  
14 Washington State's statutory capital punishment scheme,  
15 that he could do so.

16 CHIEF JUSTICE ROBERTS: But that's the  
17 beginning of the questioning, isn't it? It is not the  
18 end of it. It is surely not the law that just, whenever  
19 a juror says sure, I'll follow the instructions, that  
20 he's automatically -- has to be seated?

21 MS. ELLIOTT: No, Your Honor. But it went  
22 beyond that. And at page 73 of the joint appendix, the  
23 very question was put to him by the prosecutor. "Now  
24 that you know that in Washington, if you find the  
25 defendant guilty, you're only going to have two choices,

1 the death penalty or life in prison without the  
2 possibility of parole, could you still consider under  
3 the appropriate evidence imposing the death penalty?"

4 And Mr. Deal said, "I could consider it. Yes."

5 CHIEF JUSTICE ROBERTS: After several times  
6 saying the only time he would consider it is if the  
7 person is going to reoffend. I mean, if he just gets  
8 the right answer once out of six times and it's the last  
9 time, is the judge required to ignore the prior  
10 colloquy?

11 MS. ELLIOTT: No, Your Honor, but I don't  
12 think he only said it once out of those times. Judge  
13 Kozinski identified in his opinion six times, and those  
14 are found on the record of proceedings at page 62, at  
15 page 72, and again at page 73. And he was repeatedly  
16 asked -- and once he was asked, "First I'm going to ask  
17 you if you could consider it" -- this is on page 72 --  
18 "and then I'm going to ask you if you could impose it,  
19 Even if he would never get out."

20 CHIEF JUSTICE ROBERTS: But look at page --  
21 look at page 62. He says, you know, could -- could  
22 you -- when do you think the death penalty is  
23 appropriate? If the person would reviolates if released.

24 MS. ELLIOTT: But that is one of, under --

25 CHIEF JUSTICE ROBERTS: There are others.

1 MS. ELLIOTT: -- Washington law it's an  
2 appropriate consideration. And that's the -- and then  
3 that was the example he gave, but he didn't say but I'm  
4 never going to do it, if he -- if my only choice is  
5 death or life in prison.

6 And I think that the State's reading of the  
7 voir dire here actually expands both the objection made  
8 by the prosecutor and the -- the substance of the  
9 colloquy with juror Deal.

10 JUSTICE ALITO: What do you make of the fact  
11 that twice just before his final statement he's given  
12 exactly the question whether he could -- whether he  
13 impose the death penalty in any situation other than  
14 when the person might get out and kill again, and he --  
15 his answers are at best equivocal. The first time he  
16 says, "I would have to give that some thought." That's  
17 on 72. And then he says, "I do feel that way if parole  
18 is an option; without parole as an option I believe in  
19 the death penalty." Which is totally ambiguous. What  
20 do you make of those answers?

21 MS. ELLIOTT: I make of those answers as  
22 being entirely appropriate under the questions given and  
23 also demonstrating that he's clearly not a juror who is  
24 substantially impaired or whose views would prevent him  
25 from considering the instructions that would be given to

1 him at the end of this case. If fact include him as a  
2 --

3 CHIEF JUSTICE ROBERTS: What if the -- what  
4 if the voir dire -- what if the juror said just what he  
5 said on a few occasions, that I would consider it if the  
6 person would reviolated? And that was all. Would That  
7 be a basis for excusing him?

8 MS. ELLIOTT: Under your hypothetical, no.  
9 If, however, he said I will never impose the death  
10 penalty if the only choice is life without and the death  
11 penalty, I think that would be problematic under  
12 Washington law.

13 But he never said that. That's the reading  
14 the State gives his voir dire but it's not there.  
15 Because that would prevent him from making the decision  
16 that Washington requires.

17 JUSTICE SCALIA: Well, you -- you --

18 JUSTICE KENNEDY: If this juror --

19 JUSTICE SCALIA: -- you insist that he come  
20 out and say in so many words, I am going to be an  
21 unreliable juror. That's -- that's not the way it  
22 happens. And somebody has to evaluate whether indeed  
23 he's shading the truth a little bit and whether, in  
24 fact, he will be impaired in his service.  
25 And some of these -- some of these answers suggest that.

1 And it -- it is not an easy call to simply say well, you  
2 know, unless he comes out and admits yes, I'm going to  
3 be a lousy juror, nobody is going to say that.

4 MS. ELLIOTT: Well, Your Honor, I agree that  
5 nobody is going to say that, although in other cases, in  
6 other records and cases cited by the State here, in  
7 fact, trial judges have made records of those kinds of  
8 situations, which are not present here. And in fact,  
9 for example, I believe it was Gray versus Mississippi,  
10 the judge got the feeling that jurors were giving  
11 answers that would get them off the panel.

12 JUSTICE SCALIA: Why -- why was there no  
13 objection if this was so clear? If this fellow had  
14 answered all the questions the way you would expect a --  
15 a good juror to answer, why was there no objection when  
16 the State moved to dismiss him?

17 MS. ELLIOTT: It is not required under  
18 Washington law. And, in fact --

19 JUSTICE KENNEDY: Well, he objected. There  
20 were 12 instances --

21 MS. ELLIOTT: That is correct.

22 JUSTICE KENNEDY: -- in which the prosecutor  
23 wanted to excuse; in seven of those, there was an  
24 objection.

25 MS. ELLIOTT: That's correct.

1 JUSTICE KENNEDY: So he certainly knew how  
2 to object. And you absolutely trap the trial judge here  
3 by not indicating to him that he should make some  
4 further finding. In fact, the -- the -- the lawyer  
5 doesn't just remain silence. He's standing and says I  
6 have no objection.

7 MS. ELLIOTT: Well the question --

8 JUSTICE GINSBURG: Judge Kozinski thought  
9 the reason there was no objection was that this juror  
10 came across as being pro-death penalty. Isn't that what  
11 he said?

12 MS. ELLIOTT: That's what he said. I --

13 CHIEF JUSTICE ROBERTS: You don't go as far  
14 as Judge Kozinski on that, do you?

15 (Laughter.)

16 MS. ELLIOTT: On two points I don't go as  
17 far as Judge Kozinski. One, I believe that actually  
18 there has to be some deference to implicit findings; let  
19 me clarify that, and I know the State has pointed that  
20 out. I think Judge Kozinski's language was a little  
21 loose there. I think he probably agrees with me.

22 As to the -- the failure to object, first of  
23 all, if the court says, first of all, are there any  
24 objections; now again we have admitted that what he said  
25 was I have no objection. But the -- under Washington

1 law, the prosecutor, the judge, and the defense attorney  
2 all knew that this issue could be raised for the first  
3 time on appeal.

4 The prosecutor -- and I'm not saying on  
5 habeas review, but in the trial court, a challenge for  
6 cause, the burden falls on the prosecutor to articulate  
7 a basis.

8 JUSTICE SCALIA: Well, that's fine. But --  
9 but competent counsel knows that getting something  
10 overturned on appeal is a lot harder than getting it  
11 done right the first time. And he also knows that if  
12 you raise an objection, you're more likely to get it  
13 done right.

14 I can't imagine why if he thought this  
15 person was not properly strikeable he would have sat --  
16 indeed not just sat silent but said I have no objection.  
17 It just doesn't make any sense.

18 MS. ELLIOTT: Well I think he made a  
19 mistake, then.

20 JUSTICE SCALIA: Well, he made the same  
21 mistake the judge did. I wonder who else was there that  
22 made the same mistake. I mean, you know, it makes you  
23 think maybe, maybe the judge was right.

24 MS. ELLIOTT: Well, Your Honor, the only  
25 basis we have for the trial judge's ruling is the

1 objection made by the prosecutor. And the -- assuming  
2 he incorporated that as the basis for his ruling. What  
3 prosecutor said was that -- he had two rulings. First,  
4 he said I think he's overcome his problem with the  
5 explanation about reasonable doubt. And so that's not  
6 an issue in this case. And he said, "and I don't think  
7 he has said anything that overcame this idea that -- of  
8 he must kill again before he imposed the death penalty  
9 or be in a position to kill again."

10 That, it's our position is incorrect,  
11 under -- an incorrect summation of what happened in the  
12 voir dire and, in fact --

13 JUSTICE SCALIA: Where -- where are you  
14 quoting from?

15 MS. ELLIOTT: I'm quoting from page 75.  
16 Which is Mr. Matthews --

17 JUSTICE SCALIA: 75 of the --

18 MS. ELLIOTT: Of the joint appendix. Which  
19 is Mr. Matthews' objection. And the court makes  
20 basically an unadorned grant of that objection for  
21 cause.

22 JUSTICE KENNEDY: And incidentally the court  
23 did not say are there any objections? The court did not  
24 say that.

25 MS. ELLIOTT: I'm sorry, Your Honor. The

1 court says, "the bailiff will excuse you. Counsel, any  
2 challenge to this particular juror?" That's at the  
3 bottom of page 74. And then what Mr. Mulligan says is:  
4 "We have no objection."

5 JUSTICE KENNEDY: Well, but the court didn't  
6 say is there an objection? So you're incorrect.

7 MS. ELLIOTT: I'm sorry. So --

8 CHIEF JUSTICE ROBERTS: Now on the that,  
9 just the language you just focused on, on page 75, if  
10 that was correct, you disagree with it, but if the court  
11 concluded that the juror had not overcome the idea that  
12 he must kill again before imposing the death penalty,  
13 that would be a sufficient basis for excusing him?

14 MS. ELLIOTT: Under Washington law, I think  
15 there would be a sufficient basis for excusing juror  
16 Deal if he said I now know what the statutory scheme is,  
17 and only if there's some possibility for release of  
18 Mr. Brown and the opportunity for him to kill again,  
19 would I impose the death penalty.

20 We know that would prevent him from imposing  
21 Washington's statutory scheme because once finding him  
22 guilty, the juror will never be released again. So the  
23 possibility of release would not be there. And so he  
24 would reject the notion that you must consider  
25 mitigating factors if there's no possibility of release.

1                   We argue in our brief that that's not what  
2 he said. And in fact, Juror Deal was a thinking juror,  
3 a juror who could, in fact, consider all of the options.  
4 We disagree, of course, with the prosecutor's summary  
5 that this concern about recidivism was somehow central  
6 or pivotal to Juror Deal.

7                   JUSTICE KENNEDY: You think he could have  
8 imposed the death penalty in this case?

9                   MS. ELLIOTT: Yes.

10                  JUSTICE KENNEDY: What's the harm then in  
11 replacing him, from your standpoint?

12                  MS. ELLIOTT: The harm?

13                  JUSTICE KENNEDY: You're complaining about  
14 the excusal of a juror who by your own submission could  
15 impose the death penalty. So why am I here?

16                  MS. ELLIOTT: Because there is no --

17                  JUSTICE GINSBURG: You say you don't need  
18 harm.

19                  MS. ELLIOTT: Because there is no harm in --  
20 analysis.

21                  JUSTICE KENNEDY: I would like to hear the  
22 answer.

23                  MS. ELLIOTT: My answer is because it's a  
24 constitutional issue and this juror could also have  
25 considered the mitigating circumstances that would have

1 been proposed by the -- at that stage that were clearly  
2 on the table for argument in front of the jury at the  
3 penalty phase.

4 JUSTICE GINSBURG: You are pointing to this  
5 as structural error, so you have a death case, and so  
6 you have the kind of error that you don't have to prove  
7 is harmful.

8 MS. ELLIOTT: Under Gray versus Mississippi,  
9 I don't have to -- Mr. Brown does not have to prove that  
10 it's harmless.

11 JUSTICE GINSBURG: And then you're zeroing  
12 in on this particular juror and the colloquy, but  
13 shouldn't we look at the entire -- seating of the  
14 jurors, including that there were -- what were there --  
15 seven attempts by the prosecutor to have a for-cause  
16 excusal?

17 JUSTICE KENNEDY: There were actually 12, I  
18 think. Weren't there 12 objections by the prosecution?  
19 I was going to ask, we've already destroyed the rebuttal  
20 time of your colleagues, but it seems to me that this is  
21 a large number of challenges by the prosecutor. Can you  
22 comment on that? 12? And then the defense objected to  
23 seven, and five objections were sustained.

24 MS. ELLIOTT: I can't say in the vast  
25 universe of capital cases in Washington whether that's

1 extraordinary or not.

2 JUSTICE KENNEDY: Thank you.

3 JUSTICE SCALIA: How many days did this  
4 take?

5 MS. ELLIOTT: 17, I believe.

6 JUSTICE SCALIA: 17 days? Less than one a  
7 day. That's pretty good.

8 CHIEF JUSTICE ROBERTS: Yeah. How many  
9 paraded by? I mean, do we know?

10 MS. ELLIOTT: I didn't count on a daily  
11 basis, Your Honor. In a capital case in Washington, 17  
12 days is probably pretty average, maybe a little short.

13 JUSTICE GINSBURG: But it does seem that  
14 this trial judge was doing a conscientious job. He  
15 granted five of the -- rejected five of the  
16 prosecutor's, and how many of those had been where  
17 defense counsel had objected?

18 MS. ELLIOTT: In seven.

19 JUSTICE GINSBURG: He objected in seven and  
20 in five of those --

21 MS. ELLIOTT: No. He objected in 12, and  
22 seven of those were granted, that's my understanding.

23 JUSTICE GINSBURG: No, I'm not talking about  
24 the prosecutor --

25 JUSTICE KENNEDY: No. I think the

1 prosecution challenged 12 times. There were seven  
2 objections. Five were sustained.

3 MS. ELLIOTT: Excuse me. I'm sorry, Your  
4 Honor. I misunderstood your question.

5 So yeah, I don't disagree that this Court  
6 should look at the entire record of voir dire, and I  
7 don't disagree that Judge Martinez is a conscientious  
8 trial judge. The problem in this case is that when he  
9 granted the challenge for cause to this juror, he did  
10 not and he could not find that this juror was  
11 substantially impaired. He could not -- he was not  
12 prevented from following Washington law.

13 The --

14 CHIEF JUSTICE ROBERTS: In your view, do we  
15 look at this any differently through AEDPA than if we  
16 were looking at this on direct review?

17 MS. ELLIOTT: Well, yes. I mean, you have  
18 to view it through the lens of the statute.

19 CHIEF JUSTICE ROBERTS: So that makes a  
20 difference in the standard of review that we apply in  
21 this case?

22 MS. ELLIOTT: Well, there is -- prior to the  
23 enactment of AEDPA, there was -- this Court said you  
24 give deference to the trial court's findings. AEDPA  
25 has, of course, codified that deference by saying that

1 the trial judge has to be objectively unreasonable based  
2 upon the facts developed at the trial court level.

3 CHIEF JUSTICE ROBERTS: So, does that mean  
4 we give a greater degree of deference?

5 MS. ELLIOTT: I don't think this Court has  
6 said what, on balance, what the difference between the  
7 kind of deference that was required under Witherspoon  
8 is, as weighed against the kind of deference now. It's  
9 clear Congress wanted to provide a substantial amount of  
10 deference to the trial court and limit habeas review of  
11 State-court decisions. But as Judge Kozinski pointed  
12 out in his opinion in this case, that didn't mean that  
13 they were going to completely eliminate Federal habeas  
14 review.

15 CHIEF JUSTICE ROBERTS: I'm just trying to  
16 get a handle on your view as to whether the standard of  
17 review with respect to deference to the State court is  
18 different in this respect than it would be on direct  
19 review?

20 MS. ELLIOTT: Yes. I think it's more -- I  
21 think under habeas review, it's a more substantial  
22 review, because we have to show not only that the  
23 findings were unreasonable but they were objectively  
24 unreasonable, which I think is a different standard than  
25 saying you give deference to the trial court.

1 JUSTICE STEVENS: May I ask -- one of the  
2 most troubling parts about this case is the failure to  
3 object. As I understand, under Washington law, that  
4 doesn't make any difference; review is exactly the same  
5 as it would have been if there had been an objection.  
6 But under our review as a matter of Federal  
7 constitutional law, should it make a difference?

8 MS. ELLIOTT: I don't think so. I think  
9 it's one of those peculiarities of Washington law that  
10 you should give respect to, but it is essentially  
11 meaningless in the context of this case, because all the  
12 parties knew this case was going to be reviewed and  
13 reviewed. I mean, there's automatic appellate review.

14 JUSTICE STEVENS: Do you have any response  
15 to Justice Kennedy's concern that this really allows for  
16 a mouse trapping of the trial judge who very likely  
17 would pay less attention to the issue when the counsel  
18 doesn't object, just as a realistic way that this kind  
19 of thing is handled?

20 MS. ELLIOTT: Well, I respect his concerns  
21 about bushwhacking or mouse trapping, but the fact of  
22 the matter is that that's Washington law and the judge  
23 was well aware of it, as were the parties.

24 JUSTICE KENNEDY: Well, let me put it to you  
25 this way: There's no demeanor finding here. Suppose

1 the judge had made a demeanor finding. That would be  
2 different, the case would be a different case, wouldn't  
3 it?

4 MS. ELLIOTT: Yes, very much so.

5 JUSTICE KENNEDY: And if the objection is  
6 what prevents the demeanor finding, then maybe we should  
7 be able to consider the fact that there was no  
8 objection, even though Washington law doesn't require it  
9 before it will consider the issue.

10 MS. ELLIOTT: But there's nothing in the  
11 record that says that the reason that the judge didn't  
12 mention the demeanor, or the prosecutor who made the  
13 objection didn't mention demeanor. Certainly, it seems  
14 to me that if demeanor had been a concern based upon the  
15 answers given by the juror here, and because the  
16 prosecutor had the laboring oar at the trial court to  
17 provide a basis for the challenge for cause, he would  
18 mention it.

19 CHIEF JUSTICE ROBERTS: I thought your  
20 brother made the point that there was a more elaborate  
21 explanation of the trial judge's determinations when  
22 there had been an objection.

23 MS. ELLIOTT: I do believe that he had a  
24 more lengthy explanation where there were objections.  
25 But whether or not that would have -- there was

1 something in the demeanor of this particular judge here  
2 that he simply didn't mention, it can't be found here.

3 JUSTICE SCALIA: Well, but he said for one  
4 of the other witnesses, I just don't -- I don't believe  
5 him. And if that had been his problem here, he  
6 presumably would have said the same thing.

7 MS. ELLIOTT: Well, presumably then, he  
8 would have said that in response to the prosecutor's  
9 objection, which was not that we don't believe Juror  
10 Deal to be credible.

11 JUSTICE SCALIA: Not if there's no opposing  
12 objection by defense counsel. When there was, and when  
13 part of his reason for granting the motion to strike the  
14 juror was demeanor, he mentioned demeanor.

15 MS. ELLIOTT: That's correct, and here he  
16 didn't. So I think the assumption here is he was  
17 granting the objection on the basis provided by Mr.  
18 Matthews, which was incorrect both under Washington law  
19 and under the facts developed in the voir dire.

20 JUSTICE BREYER: Is the law on this, because  
21 you've read the cases more recent probably -- I've  
22 skimmed through some but not read them all, as I'm sure  
23 you have. And the statement of the law that I want to  
24 know, is it still valid law, is in Witherspoon on 522,  
25 Justice Stewart in the footnote. And what he says in

1 that footnote is, "the most that can be demanded of a  
2 venire man in this regard is that he be willing to  
3 consider," and those are his italics, "to consider all  
4 of the penalties provided by State law, and that he not  
5 be irrevocably committed before the trial has begun to  
6 vote against the penalty of death, regardless of the  
7 facts and circumstances that might emerge. If the voir  
8 dire testimony in a given case indicates that venire men  
9 were excluded on any broader basis than this, the death  
10 sentence cannot be carried out." Is that still a valid  
11 statement of the law or has it changed?

12 MS. ELLIOTT: That is still a valid  
13 statement of the law.

14 JUSTICE BREYER: If that's the valid --

15 JUSTICE SCALIA: Of what law? Washington  
16 law?

17 JUSTICE BREYER: No, this is Justice Stewart  
18 of the Supreme Court.

19 MS. ELLIOTT: This Court, which has been  
20 shortened into a --

21 CHIEF JUSTICE ROBERTS: Substantially  
22 impaired.

23 MS. ELLIOTT: -- substantially impaired  
24 test.

25 CHIEF JUSTICE ROBERTS: Which is a lot

1 different than irrevocably committed.

2 MS. ELLIOTT: Well, it's substantially  
3 impaired is prevent or substantially impair, the  
4 ability. And this juror never --

5 CHIEF JUSTICE ROBERTS: You would agree that  
6 substantially impair is not the same as irrevocably  
7 committed?

8 MS. ELLIOTT: Yes, I would agree, because  
9 you could say I favor the death penalty, as this juror  
10 did, and still sit on the jury.

11 JUSTICE BREYER: This doesn't say -- that's  
12 one of the things it says. But the other is, "the most  
13 that can be demanded of a venire man is that he be  
14 willing to consider" -- that's the word that's  
15 italicized -- now, is there any -- "and if you exclude  
16 him on a broader ground than that, the death sentence  
17 cannot be carried out". Now, is there anything in any  
18 later case that suggests a change in that respect?

19 MS. ELLIOTT: No, Your Honor. In fact, the  
20 cases affirm that. And in fact, this juror was  
21 precisely the kind of juror that I think is appropriate  
22 to sit. What he said was, I can consider.

23 JUSTICE BREYER: We're not supposed to --

24 JUSTICE SCALIA: Well, he said that, but  
25 elsewhere he sort of indicated that he couldn't consider

1 it unless it were a situation in which this person would  
2 be able to commit the crime again.

3 MS. ELLIOTT: But none of those statements  
4 indicated he would be prevented from voting for the  
5 death penalty, or that he was substantially impaired  
6 from doing that.

7 JUSTICE SCALIA: Oh, I think they did  
8 indicate that unless that was the situation, he wouldn't  
9 consider imposing the death penalty. I think that's  
10 precisely what they indicate.

11 MS. ELLIOTT: Well, if it means only that he  
12 would consider the issue of future dangerousness, it  
13 wouldn't prevent him under Washington law. Because  
14 under Washington law, first of all, the presumption is  
15 for life. And second of all, the consideration of  
16 whether or not a person would recidivate is both an  
17 aggravating and a mitigating factor. So the fact that  
18 he's concerned about reoffense is perfectly appropriate.

19 Where I think he could be prevented is if he  
20 said, if this -- unless this guy is going to be released  
21 in the future, and I don't think that's what he said  
22 here, Your Honor. What he said was, recidivism is  
23 important.

24 JUSTICE SCALIA: I like recidivate by the  
25 way. I'm going to use it in an opinion. It's a very

1 useful verb.

2 JUSTICE STEVENS: May I go back to my  
3 concern about the failure to object again. Supposing  
4 this defense counsel instead of just saying no  
5 objection, said no objection, I think he's a hanging  
6 juror?

7 MS. ELLIOTT: I think he's a hanging juror?

8 JUSTICE STEVENS: In other words, he thought  
9 contrary to the prosecutor, his appraisal of this man  
10 was that he's going to be pro-death penalty, and he let  
11 that be known. Would that make a difference?

12 MS. ELLIOTT: Well, I think that --

13 JUSTICE STEVENS: I don't think it would  
14 under Washington law. I don't suppose it would.

15 MS. ELLIOTT: Well, if the juror said -- it  
16 would make a difference under Morgan if the juror said  
17 I'm not going to consider any mitigating factor.

18 JUSTICE STEVENS: No, no. The juror just  
19 did exactly what he did here, but everybody is  
20 evaluating demeanor in the courtroom, and defense  
21 counsel's evaluation of the demeanor is I don't want  
22 that juror, he's going to hang my client, and that's  
23 what he thought and he let it come out when he told the  
24 judge no objection.

25 MS. ELLIOTT: Oh.

1 JUSTICE STEVENS: Would that make a  
2 difference?

3 MS. ELLIOTT: It wouldn't make a difference  
4 under Washington law because it could be raised for the  
5 first time on appeal, if that wasn't what the record  
6 demonstrated.

7 Did I understand your question?

8 JUSTICE STEVENS: You did. Do you think it  
9 should make a difference to us if we think that he  
10 didn't really want this guy on the jury?

11 MS. ELLIOTT: I don't think there's anything  
12 in the record to suggest that, but for his lack of  
13 objection. Because there's no harmless error analysis,  
14 I don't think it can make a difference to this Court,  
15 and because in Washington we have this peculiar rule  
16 which says you don't have to object.

17 JUSTICE KENNEDY: Does the fact that this is  
18 structural error, that there's no harmless error  
19 analysis, mean that we should be very careful to give  
20 substance to the rule that there's deference to the  
21 trial judge? And in fact, in the Witt case, we said  
22 that the determination to excuse a juror is based on  
23 determinations of demeanor and credibility that are  
24 within the trial judge's province. We said that.

25 MS. ELLIOTT: Absolutely. And if there had

1 been a mention of demeanor on this record, I think this  
2 Court's decision would be easy.

3 JUSTICE KENNEDY: Witt presumes that there  
4 is that judgment made by the district judge, whether or  
5 not it's mentioned. It was not mentioned in Witt.

6 MS. ELLIOTT: Well, what Judge Kozinski then  
7 says about that is if on the record -- you have a cold  
8 record here which demonstrates in our view that the  
9 juror is completely qualified to serve, and nothing  
10 about him would prevent him from serving. And you have  
11 no mention of demeanor by the trial judge, but  
12 speculation on the part of the prosecution, then all  
13 substantive evidence review of juror challenges in  
14 capital cases is dead and --

15 JUSTICE KENNEDY: Should I defer to Judge  
16 Kozinski's observation or to the Supreme Court's opinion  
17 in Witt?

18 MS. ELLIOTT: You should defer to the  
19 Supreme Court's observation in Witt, but only I think if  
20 there's some indication on the record that there is  
21 demeanor. And --

22 CHIEF JUSTICE ROBERTS: Well, there's a  
23 third choice which under AEDPA is the Washington  
24 State-court decision to which we should defer.

25 MS. ELLIOTT: The Washington State Supreme

1 Court decision?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MS. ELLIOTT: The Washington State Supreme  
4 Court decision suffers a different problem, I think,  
5 Your Honor, which is that what the Washington State  
6 Supreme Court said on page 173 was that "on voir dire he  
7 indicated he would impose the death penalty where the  
8 defendant 'would reviolated if released,' which is not a  
9 correct statement of the law." And in fact, that is --  
10 the considerations about whether or not  
11 Mr. Brown would reviolated whether in prison or not are  
12 considerations under Washington law in a death penalty  
13 case.

14 CHIEF JUSTICE ROBERTS: On page 208, though,  
15 the Washington Supreme Court also stated the standard,  
16 as I understand it from Witt, that Mr. Deal's views  
17 "would have prevented or substantially impaired his  
18 ability to follow the court's instructions."

19 MS. ELLIOTT: But -- I agree that there is a  
20 summary that says that. But the substantive basis for  
21 the trial court's decision -- I think -- is back at  
22 page, as I said, 173a, where he --

23 JUSTICE GINSBURG: Isn't the number of the  
24 page that you gave telling this is an appeal from a  
25 capital sentence, and there are umpteen challenges made.

1 So the judge is dealing with Richard Deal in one  
2 paragraph. The defendant raised a host of challenges,  
3 and so there's not perfect consistency with what these  
4 two passages in the opinion. But mustn't we take into  
5 account what this was? This was the defense brought out  
6 every objection they probably could conceive of and they  
7 didn't put particular emphasis on this, so it comes out  
8 this way.

9 MS. ELLIOTT: Well, if you're -- you mean in  
10 terms of the -- in the trial court? Or in the State  
11 Supreme court's opinion?

12 JUSTICE GINSBURG: In the Supreme Court.  
13 Now we're talking about the Washington Supreme Court.  
14 You said they got it wrong because they said in this  
15 paragraph that he got the law wrong, he made an  
16 incorrect statement of the law because he said he would  
17 impose the death penalty where the defendant would  
18 reviolated if released, which is not a correct statement  
19 of the law.

20 We don't know exactly what that court meant  
21 by that paragraph, but we do know that the Washington  
22 Supreme Court was facing -- I don't know how many  
23 objections they were dealing with in this opinion, but a  
24 great many.

25 MS. ELLIOTT: Yes, and so if you then turn

1 to the end of the opinion, if that's what you're asking,  
2 at 208, there's kind of a summary of their basis for all  
3 of the challenges made by Mr. Brown to all sorts of  
4 things in the case.

5           There were also challenges to other jurors  
6 as well. And there are separate paragraphs where the  
7 court -- those jurors that are mentioned in the summary  
8 paragraph, where the court then explains the various  
9 reasons why it's upholding the trial judge as to those  
10 jurors as well.

11           JUSTICE GINSBURG: Well, my point is simply  
12 that when a court is faced with so many challenges, this  
13 particular one, there had been no objection at the  
14 trial. So an appellate court might think we don't have  
15 to spend too much time on that one.

16           MS. ELLIOTT: That is true. It appears as  
17 though what they did was to -- because this is not what  
18 the trial judge said, this is the basis for the  
19 objection by the prosecutor, that they assumed the trial  
20 judge adopted the prosecutor's objection.

21           In sum, there's nothing in the record that  
22 supports a conclusion here that Juror Deal could not  
23 subordinate his personal views about the death penalty  
24 or that he would frustrate the State's legitimate  
25 purpose in carrying out the State's legitimate interest

1 in a constitutional capital death penalty scheme. So we  
2 would ask this Court to affirm the opinion of Judge  
3 Kozinski in the Ninth Circuit and grant the writ of  
4 habeas corpus in this case. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 Ms. Elliott.

7 Mr. Samson, you have one minute remaining.

8 REBUTTAL ARGUMENT OF JOHN J. SAMSON

9 ON BEHALF OF THE PETITIONER

10 MR. SAMSON: Thank you, Mr. Chief Justice.

11 In response to the questions regarding the  
12 Witherspoon language and whether it's still good law,  
13 the Court in Witt essentially said that is no longer the  
14 standard. The standard instead is the substantial  
15 impairment standard, and it is not required to show that  
16 the juror would never impose the death penalty or  
17 automatically vote against it by unmistakable clarity.

18 And the fact that there were -- in response  
19 to Justice Ginsburg's question -- the fact that there  
20 were so many claims presented to the State Supreme Court  
21 may explain in part the summary opinion regarding this  
22 particular issue. AEDPA does not require a perfect  
23 opinion by the State court to survive review. It only  
24 requires reasonableness and an objective standard.

25 In addition, the arguments presented by

1 Mr. Brown are essentially: We disagree and the Federal  
2 courts should disagree with the factfinding process done  
3 by the State courts. But the fact that a reviewing  
4 court reviewing the same transcript may reach a  
5 different factual determination is not sufficient. If  
6 the view reached by the State court is supported by  
7 evidence and is -- thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 The case is submitted.

10 (Whereupon, at 2:00 p.m., the case in the  
11 above-entitled matter was submitted.)

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