IN THE SUPREME COURT OF THE UNITED STATES

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JEFFREY UTTECHT, SUPERINTENDENT, :

WASHINGTON STATE PENITENTIARY, :

Petitioner :

v. : No. 06-413

CAL COBURN BROWN. :

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Washington, D.C.

Tuesday, April 17, 2007

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

APPEARANCES:

JOHN J. SAMSON, ESQ., Assistant Attorney General, Olympia, Wash; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

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

C O N T E N T S

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

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

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

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

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

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

JUSTICE SOUTER: Were they told what the --

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

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

JUSTICE SOUTER: Okay.

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

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

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

CHIEF JUSTICE ROBERTS: And how did he learn that?

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

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

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

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

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

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

for the death penalty.

MR. SAMSON: That is -- that is correct. Both -- both are correct, Your Honors. At joint appendix 62, he was asked for an example of why he believed the death penalty was appropriate, and he says, "I think if a person is or would be incorrigible and would reviolate if released, then it would be appropriate."

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

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

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

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

MR. SAMSON: That is correct.

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

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

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

CHIEF JUSTICE ROBERTS: One thing I couldn't

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It seems the court of appeals judge overlooked that.

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

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

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

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

JUSTICE SCALIA: Well --

JUSTICE KENNEDY: The point stands --

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

MR. SAMSON: Yes, Your Honor.

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

MR. SAMSON: That's exactly right, Your

Honor.

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

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

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

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

CHIEF JUSTICE ROBERTS: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SAMSON: Your Honor --

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

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

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

MR. SAMSON: Your Honor, if there is

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

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

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

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

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

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

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

JUSTICE SOUTER: And the question --

JUSTICE SCALIA: And secondly, he could

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

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

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

If I may --

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

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

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

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

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

And if I may reserve --

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

MR. SAMSON: Yes, Your Honor.

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

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

If I may reserve --

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

MR. SAMSON: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE PETITIONER

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

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

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

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

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

And this is a judge who, against the

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

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

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

JUSTICE BREYER: Well, what is --

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

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

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

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

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

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

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

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

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

(Laughter.)

JUSTICE BREYER: Well, that's probably right.

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

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

MR. DREEBEN: Well, Justice Breyer --

JUSTICE BREYER: If something like that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

have to give that some thought.

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

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

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

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

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

if instructed properly by the court?

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

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

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

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

MR. DREEBEN: Yeah.

JUSTICE STEVENS: The jurors mostly are pretty conscientious.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

Ms. Elliott.

ORAL ARGUMENT OF MS. SUZANNE LEE ELLIOTT,

ON BEHALF OF RESPONDENT

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

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

Court's controlling precedent in Witt versus Witherspoon.

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

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

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

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

the death penalty or life in prison without the possibility of parole, could you still consider under the appropriate evidence imposing the death penalty?" And Mr. Deal said, "I could consider it. Yes."

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

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

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

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

CHIEF JUSTICE ROBERTS: There are others.

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Well, you -- you --

JUSTICE KENNEDY: If this juror --

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

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

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

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

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

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

MS. ELLIOTT: That is correct.

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

MS. ELLIOTT: That's correct.

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

MS. ELLIOTT: Well the question --

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: 75 of the --

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

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

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

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

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

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

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

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

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

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

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

MS. ELLIOTT: Yes.

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

MS. ELLIOTT: The harm?

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

MS. ELLIOTT: Because there is no --

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

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

JUSTICE KENNEDY: I would like to hear the answer.

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

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

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

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

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

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

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

extraordinary or not.

JUSTICE KENNEDY: Thank you.

JUSTICE SCALIA: How many days did this take?

MS. ELLIOTT: 17, I believe.

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

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

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

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

MS. ELLIOTT: In seven.

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

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

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

JUSTICE KENNEDY: No. I think the

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

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

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

The --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. ELLIOTT: Yes, very much so.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: If that's the valid --

JUSTICE SCALIA: Of what law? Washington law?

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

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

CHIEF JUSTICE ROBERTS: Substantially impaired.

MS. ELLIOTT: -- substantially impaired test.

CHIEF JUSTICE ROBERTS: Which is a lot

different than irrevocably committed.

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

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

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

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

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

JUSTICE BREYER: We're not supposed to --

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

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

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

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

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

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

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

useful verb.

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

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

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

MS. ELLIOTT: Well, I think that --

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

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

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

MS. ELLIOTT: Oh.

JUSTICE STEVENS: Would that make a difference?

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

Did I understand your question?

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

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

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

MS. ELLIOTT: Absolutely. And if there had

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

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

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

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

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

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

MS. ELLIOTT: The Washington State Supreme

Court decision?

CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Ms. Elliott.

Mr. Samson, you have one minute remaining.

REBUTTAL ARGUMENT OF JOHN J. SAMSON
ON BEHALF OF THE PETITIONER

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

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

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

In addition, the arguments presented by

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

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

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