SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, WARDEN *v.*
RUSSELL COLEMAN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98–437. Decided December 14, 1998

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Busy appellate judges sometimes write imperfect opinions. The failure adequately to explain the resolution of one issue in an opinion that answers several questions is not a matter of serious consequence if the decision is correct. In this case, there might have been a slight flaw in the Court of Appeals' brief explanation of why the invalid instruction given to the jury was not harmless, but, as I shall explain, the Court's ruling was unquestionably correct.

The State does not challenge the conclusion that the jury was given an unconstitutional instruction. It merely argues that this trial error should not "command automatic reversal . . . without application of the harmless error test of *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993)."[1] And respondent Coleman does not contend that *Brecht* is inapplicable. He merely argues that the Court of Appeals actually performed the *Brecht* inquiry, albeit in an expedited fashion. Thus, the only controversy before this Court is whether the Court of Appeals was faithful to *Brecht*, and sufficiently explicit in its adherence.

Three aspects of the *Brecht* test for harmless error are significant here: (1) the test requires the reviewing judge to evaluate the error in the context of the entire record; (2)

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[1] Pet. for Cert. i.

it asks whether the constitutional trial error at issue had a "'. . . substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht*, 507 U. S., at 637 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)); and (3) if the judge has grave doubt about whether the error was harmless, the uncertain judge should conclude that the error affected the jury's deliberations and grant relief, see *O'Neal* v. *McAninch*, 513 U. S. 432 (1995).

In this case, it is undisputed that both the District Court and the Court of Appeals made a thorough examination of the entire record. The District Court's 117-page opinion carefully analyzed each of the respondent's nonfrivolous attacks on his conviction and concluded that the judgment of guilt should stand. With respect to the death penalty, however, the District Judge decided that the inaccurate and misleading instruction describing the Governor's commutation power was unconstitutional and "would likely have prevented the jury from giving due effect to Coleman's mitigating evidence."[2] Although the judge did

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[2] App. to Pet. for Cert. 149. The District Court concluded more fully:

"Coleman was entitled, under the Eighth and Fourteenth Amendments, to a sentencing jury that could fairly review the evidence he presented to show that he should not be sentenced to death. *See e.g., Boyde* [v. *California*, 494 U. S. 370, 377-378 (1990)]; *Lockett* [v. *Ohio*, 438 U. S. 586, 605 (1978)]. Considered in light of the prosecution argument, the aggravating evidence and the record as a whole, the commutation instruction would likely have prevented the jury from giving due effect to Coleman's mitigating evidence. *See Hamilton* [v. *Vasquez*, 17 F. 3d 1149, 1163 (CA9), *cert. denied*, 512 U. S. 1220 (1994)]; *cf. Boyde*, 494 U. S. at 370.

"Believing that the governor could, single-handedly, render Coleman eligible for parole, for example, the jury would have found it difficult to give 'a reasoned moral response' to testimony about Coleman's temper and his history of incarceration that was introduced to explain his behavior. *See Hamilton*, 17 F. 3d at 1160. During its deliberation, the jury requested a copy of Coleman's prior felony convictions, which [suggests] that it gave them considerable weight. RT 1068-72. Yet the

not use the exact words that this Court used in its opinions in *Kotteakos*, *Brecht*, and *O'Neal*, it is perfectly clear that he was convinced that the instruction had a "substantial and injurious effect" on the jury's deliberations. This conclusion is reinforced by the statement of a juror ex-

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instruction prevented the jury from learning that Coleman's prior convictions not only weighed against him in aggravation but also made parole considerably less likely. *See* [*California* v. *Ramos*, 463 U. S. 992, 1008 (1983)] (penalty-phase jury may consider many factors in determining whether death is the appropriate punishment); *see also Penry* [v. *Lynaugh*, 492 U. S. 302, 324 (1989)] (penalty-phase instruction unconstitutionally allowed jury to give aggravating, but not mitigating, effect to evidence of petitioner's mental retardation).

"The need for accurate parole-related instructions is heightened when the prosecution argues the issue of a defendant's future dangerousness. *See Simmons* [v. *South Carolina*, 512 U. S. 154, 164 (1994)] (due process violated when trial court refused to give accurate parole-eligibility instruction to rebut prosecution's argument about future dangerousness). Here, the prosecutor built his penalty-phase case around Coleman's prior felonies and his propensity for violence, both in and out of prison. His closing argument, in particular, told the jury that Coleman 'has already demonstrated what he is capable of doing on numerous occasions to each and every one of us. . . . He is manipulative, he is dangerous to all of us.' RT 1011-12, 1029-30; *see Simmons*, [512 U. S., at 157] (prosecutor alluded to future dangerousness by arguing that death sentence would be 'a response of society to someone who is a threat[']); *Hamilton*, 17 F. 3d at 1162 (prosecutor argued that [Hamilton] would be 'conniving and devising ways to manipulate the system and get out[']). This argument may have caused the jury to speculate about the possibility that Coleman would be released if he were not sentenced to death.

"Because the instruction, in the context of Coleman's penalty-phase proceeding, gave the jury inaccurate information and potentially diverted its attention from the mitigation evidence presented, his death sentence violates the Eighth and Fourteenth Amendments: 'The jury in this case deliberating under these instructions could not have made the constitutionally mandated reasoned and informed choice between a sentence of life imprisonment without possibility of parole and a sentence of death.' *See Hamilton*, 17 F. 3d at 1164." *Id.*, at 149–151 (footnote omitted).

plaining how the invalid instruction had, in fact, affected the jury's deliberations.[3]

Because there is no reason to believe that the District Court's evaluation of the impact of the invalid instruction was incorrect, it is not surprising that the Court of Appeals affirmed without writing extensively about the harmless-error issue. It reasoned, in brief, that if there was a reasonable likelihood that the jury had applied an invalid instruction in a way that prevented the consideration of constitutionally relevant evidence, the error necessarily satisfied the *Brecht* test. Instead of spelling out its reasoning at length, it merely cited an earlier en banc decision of the Ninth Circuit that came to a similar conclusion. See *McDowell* v. *Calderon*, 130 F. 3d 833, 838 (1997), cert. denied, 523 U. S. __ (1998).[4]

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[3] "[A]ccording to juror Verda New, the possibility of parole was a much discussed topic in deciding whether respondent should live or die: '[The jurors] openly discussed that Russell Coleman would be released from prison unless we sentenced him to death. Several jurors stated that he could be paroled if we sentenced him to life in prison. . . . Many of the jurors expressed their fear that if we failed to sentence Mr. Coleman to death, the courts or the Governor could allow him to be released from prison. This was the most significant part of our discussions regarding the appropriate penalty.'" Brief in Opposition 7.

[4] Although this Court's *per curiam* opinion quotes the relevant paragraph from the opinion below, see *ante*, at 4, the Court inadvertently omits the citation to *McDowell* that explained the Court of Appeals' reasoning. In *McDowell*, the en banc court stated:

"The question, then, is whether this fundamental error had any 'substantial and injurious effect or influence' on the jury's sentence of death, *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). To answer this question, we look for specific guidance to *Boyde* v. *California*, 494 U. S. 370 (1990). In *Boyde*, the Supreme Court confronted a claim that an arguably ambiguous jury instruction 'restrict[ed] impermissibly a jury's consideration of relevant [penalty phase] evidence. . . .' To evaluate such a claim, the Court fashioned a reviewing yardstick which we find appropriate here: The proper inquiry in such a case is whether there is

Perhaps there may be cases in which a more detailed and written analysis of the harmless error issue should precede an appellate court's decision to affirm a trial court's conclusion that an unconstitutional jury instruction in a capital sentencing proceeding was not harmless. But even if that be true, there are three good reasons for not requiring the Court of Appeals to take a second look at the issue in this case.

First, in the context of the entire record as analyzed by the District Court, the result here is correct. Second, a fair reading of the Chief Justice's opinion for the Court in *Boyde* v. *California*, 494 U. S. 370 (1990), indicates that the heightened "reasonable likelihood" standard endorsed in that case was intended to determine whether an instructional error "require[s] reversal." *Id.*, at 379, 380. There is little reason to question the soundness– at least in most applications– of the reasoning of the en banc opinion in *McDowell* on which the Court of Appeals relied in this case. Third, there is a strong interest in bringing all litigation, and especially capital cases, to a prompt conclusion. This Court's ill-conceived summary disposition will needlessly prolong this proceeding.

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a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence.' *Id.* at 380. If the answer is 'yes,' the error necessarily satisfies the *Brecht* test for substantial and injurious error. . . . We conclude on these facts, in these circumstances, and in the light of controlling authority that the error did substantially injure and influence the jury's verdict." *McDowell* v. *Calderon*, 130 F. 3d, at 838 (footnote omitted).

Four judges dissented from *McDowell*'s conclusion that it was reasonably likely that the jury erred in their application of an instruction used in that case, see *id.*, at 841, but no judge took issue with the logic of the harmless-error analysis quoted above, see *id.*, at 842–843 (Thompson, J., dissenting); see also *id.*, at 843–845 (Kozinski, J., dissenting).

Whatever the shortcomings of the Court of Appeals' review, they surely are not so great as to warrant an expenditure of this Court's time and resources. This is especially so because our decision today is unlikely to change the result below. Ordinarily, we demand far more indication that a lower court has departed from settled law, or has reached an issue of some national significance, before we grant review. The purported error in this case does not satisfy that standard.

Accordingly, I would deny the petition for writ of certiorari and, therefore, respectfully dissent.