No. 11-35114

Filed: August 22, 2012
Before: M. Margaret McKeown, Richard C. Tallman,
and Ralph B. Guy, Jr., Circuit Judges

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA JAMES FROST,

Petitioner-Appellant,

v.

RON VAN BOENING,

Respondent-Appellee.

On Appeal from the United States District Court
for the Western District of Washington at Seattle
(District Court No. CV09-725TSZ)

The Honorable Thomas S. Zilly, United States District Judge

PETITION OF PETITIONER-APPELLANT FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES & RULES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

The law set forth in *Herring v. New York* is clear: depriving the defendant of the opportunity to make a proper closing argument on the evidence and applicable law violates the Sixth Amendment right to counsel and is structural error. *See Herring v. New York*, 422 U.S. 853 (1975); *Bell v. Cone*, 535 U.S. 685, 696 (2002) (recognizing *Herring* error as structural error); *United States v. Cronic*, 466 U.S. 648, 659, & n.25 (1984) (same).

The *Herring* violation in Mr. Frost's state trial is also clear. Mr. Frost was charged, along with two codefendants, with burglary, and as an accomplice to four robberies (allegedly as the getaway driver). Prior to summation, the court ordered Mr. Frost's counsel to choose between arguing reasonable doubt and duress, and required that he concede his client's guilt in order to present the duress defense:

> THE COURT: You cannot argue to the jury that the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. Riker[1] is very clear on this. You must admit the elements of the offense have been proved before you can use the duress offense . . . .
>
> [DEFENSE]: But am I not permitted to argue in the alternative, using duress and failure to prove in the alternative?
>
> THE COURT: No . . . .

[1] *State v. Riker*, 123 Wn.2d 351, 869 P.2d 43 (Wash. 1994).

ER 35. Faced with this "Hobson's choice," *Frost v. Van Boening*, __ F.3d __, 2012 WL 3590853 (9th Cir. Aug. 22, 2012) (McKeown, J., dissenting), App. 9583[2], defense counsel not only refrained from arguing reasonable doubt to the jury, he conceded his client's guilt. ER 186, 190, 194.

The trial court's curtailment of his summation denied Mr. Frost "of the constitutional right to present proper argument on alternative defense theories [and] created a Hobson's choice that violated Frost's Sixth Amendment Right to Counsel and his Fourteenth Amendment Due Process rights." App. 9583 (McKeown, J., dissenting). The Washington Supreme Court agreed, holding that the trial court misinterpreted state law in concluding that defense counsel had to choose between his two legitimate legal theories, and that the error "infringed upon Frost's due process and Sixth Amendment rights." *State v. Frost*, 160 Wn.2d 765, 161 P.3d 361, 369 (Wash. 2007); *id.* at 371 (Sanders J., dissenting). However, a five-member majority then concluded the error was subject to a harmlessness analysis. *Id.* at 369-71.

Despite the clarity of *Herring* and its manifest violation in Mr. Frost's trial, a divided Ninth Circuit panel concluded that this constitutional violation was subject to harmless error review, was harmless, and perhaps did not occur at all. *See* App. 9582-83.

[2] A copy of the Slip Opinion is attached and is cited as "App. ___."

The majority reaches its result by creating a new rule of AEDPA[3] review – "a super-AEDPA requirement," which conditions relief on "factual identity with Supreme Court precedent – which is not the law." App. 9585, 9589 (McKeown, J., dissenting). This new standard distorts the meaning of "clearly established federal law" under AEDPA. It also conflicts with and is an unreasonable application of *Herring*, and results from a series of legal and factual missteps and misstatements, including disregarding the significance of circuit precedent in assessing the metes and bounds of federal law and whether the state court acted unreasonably.

Rehearing or rehearing en banc, pursuant to Fed. R. App. P. 35 and 40, is warranted to address these important issues.

II. REASONS FOR REHEARING OR REHEARING EN BANC

A. The New "Super AEDPA Requirement" of Factual Identity with Supreme Court Precedent Conflicts with Supreme Court and Ninth Circuit Decisions and Presents an Issue of Exceptional Importance.

1. *Herring* clearly established that denying the defendant the opportunity to make a proper closing argument on the evidence and applicable law is structural error.

The Supreme Court in *Herring* left "no doubt that closing argument for the defense is a basic element of the adversary fact finding process in a criminal trial." 422 U.S. at 858. The Court recognized that "no aspect" of the adversarial process

[3] The Antiterrorism Effective Death Penalty Act, codified as amended 28 U.S.C. § 2241 *et seq.*

"could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862. Thus, a defendant, through counsel, has "a right to be heard in summation of the evidence from the point of view most favorable to him." *Id.* at 864.

As Judge McKeown describes in her dissent, "the [*Herring*] Supreme Court explained the critical importance of closing argument: 'The Constitutional right of a defendant to be heard through counsel *necessarily* includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem.'" App. 9583-84 (quoting *Herring*, 422 U.S. at 860) (emphasis in *Frost*). "Not only that, 'the trial court has *no discretion* to deny the accused such right.'" *Id*. (quoting *Herring*, 422 U.S. at 860).

The *Herring* Court took as self-evident that this "basic right of the accused to make his defense[,]" 422 U.S. at 859, and in particular, to argue reasonable doubt to the jury, was central to a fair trial:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of

> fact that there may be reasonable doubt of the defendant's guilt.

Id. at 862 (citing *In re Winship*, 397 U.S. 358 (1970)).

Herring recognized that a court may place limitations on a closing argument, such as by requiring that it hew to the evidence presented, not be overly long or repetitive, and "does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." 422 U.S. at 862. But nothing in *Herring* suggests that a trial judge may foreclose a legitimate legal argument. Rather, even in a case that appears "to be simple – open and shut – at the close of the evidence," "there is no certain way for a trial judge to identify accurately" whether "closing argument may correct a premature misjudgment and avoid an otherwise erroneous verdict" "until the judge has heard the closing summation of counsel." *Id.* at 863.

The Supreme Court has repeatedly found *Herring* error to be structural; that is, once the error has been committed, prejudice may be presumed. *See Cone*, 535 U.S. at 696 (including *Herring* among cases "where we found a Sixth Amendment error without requiring a showing of prejudice."); *Cronic*, 466 U.S. at 659, n.25 (listing *Herring* error as one "the Court has uniformly found constitutional error without any showing of prejudice"); *cf. Rose v. Clark*, 478 U.S. 570, 578 (1986) ("Harmless-error analysis thus presupposes a trial, at which the defendant,

represented by counsel, may present evidence and argument before an impartial judge and jury.")

There is good cause for this conclusion: "There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case." *Herring*, 422 U.S. at 864. The inability to quantify prejudice is a hallmark of structural error. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, n.4 (2006) ("here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.") (citations omitted).

Courts are unanimous in finding that preclusion of a legitimate defense theory, even when its falls short of a total denial of summation, violates the Sixth Amendment and is structural error. *See United States v. Miguel*, 338 F.3d 995 (9th Cir. 2003) ("the district court committed structural error when it precluded the defendants from arguing their theory of the case and instructed the jury that no evidence supported the defendants' theory"); *United States v. Kellington*, 217 F.3d 1084, 1099-1100 (9th Cir. 2000) (affirming grant of new trial for erroneously preventing defense counsel from arguing the importance of witness testimony in closing argument); *Conde v. Henry*, 198 F.3d 734, 739, 741 (9th Cir. 1999) (precluding defense counsel from arguing defense theory violated the right to

counsel and due process and was structural error). *See also Herdt v. Wyoming*, 816 P.2d 1299, 1302 (Wyo. 1991) (trial court's ruling that prevented a defendant in a sexual assault case from arguing in closing that the complaining witness consented, but permitted argument regarding the witness's credibility, "deprived appellant of his fundamental right to present closing argument" as set forth in *Herring*, and "[s]uch deprivation is legally presumed to result in prejudice.")

2. To circumvent *Herring's* governing legal principle, the panel majority creates a new "Super AEDPA Requirement" that exceeds AEDPA's standard and conflicts with Supreme Court and Ninth Circuit decisions.

The panel majority's effort to restrict the reach of *Herring* and minimize the magnitude of the trial court's Sixth Amendment violation culminates in its conclusion that "because the Supreme Court has never addressed in a holding a claim, such as the one presently before us, concerning a restriction on the scope of closing argument, the Washington Supreme Court's determination that the error was not structural does not require automatic reversal." App. 9571 (citing *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011).[4]

[4] The panel majority cites *Richter* for its conclusion that "'[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Both *Richter* and *Mirzayance*, however, involved applications of the *Strickland* standard, a general rule that, in the habeas context, is subject to "triple deference." *Doody v. Ryan*, 649 F.3d 986, 1007 n.5 (9th Cir. 2011) (en banc). *Herring*, in contrast, is a far more specific. It

"Unable to circumvent the legal principle announced in *Herring*, the majority improperly imposes a super-AEDPA requirement that the Supreme Court must have 'addressed in a holding' the 'restriction on the scope of closing argument.'" App. 9585 (McKeown, J., dissenting). The majority creates a "new requirement for AEDPA relief – factual identity with Supreme Court precedent – which is not the law." *Id.* at 9589. This new "super-AEDPA" rule exceeds the statutory standard, conflicts with Supreme Court precedent, and allows the panel majority, and future panels, to evade clear legal principles set by the Supreme Court and deny meritorious habeas petitions.

The statutory text of AEDPA requires that a state court's adjudication of the claim "result[ ] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" for habeas relief to be granted. 28 U.S.C. § 2254(d)(1).

The Supreme Court has expressly stated that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). Rather, "Section 2254(d)(1) permits a federal court to grant habeas relief based on the

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guarantees the accused the right to present a proper closing argument and directs that a denial of this right requires reversal.

application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003). *See also Wilcox v. McGee*, 241 F.3d 1242, 1244 (9th Cir. 2001) (per curiam) ("The Supreme Court need not have addressed a factually identical case; § 2254(d) only requires that the Supreme Court clearly determine the law.") (internal citation omitted).

The Court explained in *Andrade*, 538 U.S. at 71-72, that "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." It is the governing legal principles which must guide this Court's analysis under 28 U.S.C. § 2254(d)(1). *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258 (2007) ("ignoring the fundamental principles established by [the Supreme Court's] most relevant precedents" may be contrary to or an unreasonable application of clearly established federal law).

"The statute recognizes . . . that even a general standard may be applied in an unreasonable manner." *Panetti*, 551 U.S. at 953. Indeed, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 642, 667 (2004).

Contravening these established precepts, the panel majority strains to construe *Herring's* clear and comprehensive legal principle as nothing more than its narrowest possible fact-bound holding. The majority interprets *Herring* as establishing only "that 'a *total* denial' of the opportunity for final argument in a nonjury criminal trial violates the Sixth Amendment." App. 9572 (quoting *Herring*, at 858-59) (emphasis in *Frost*).

The panel majority is wrong. "Interpreting *Herring* as limited to absolute preclusion of final argument misreads the case." App. 9586 (McKeown, J., dissenting) "Total preemption of half the legitimate defenses is tantamount to absolute preclusion of argument on half the case. Here, as in *Herring*, that preclusion resulted in structural error." *Id.* And nothing in *Herring* offers that a trial court may force a defendant "to opt for one or the other legitimate defense – arguing duress or putting the government to its burden of proof," as occurred here. App. 9583 (McKeown, J., dissenting).

The panel majority even suggests that "'limiting the scope of closing summation'" may have been a proper exercise of the trial court's wide discretion. App. 9572-73 (quoting *Herring*, 422 U.S. at 862). In the majority's view, "Frost was not denied the opportunity to make a closing argument – he was afforded the opportunity to argue his defense of duress. But in so doing, his lawyer had to make a

choice because under state law one cannot be liable as an accomplice if the defense of duress is established." App. 9573.

The majority's conclusion utterly disregards the Washington Supreme Court's finding that Frost had an evidentiary basis "for counsel to argue that the State failed to prove Frost participated in each of his accomplices' criminal acts with adequate knowledge or promotion or facilitation[,]" *Frost*, 161 P.3d at 368-69, and that the trial court only foreclosed the defense's reasonable doubt argument because it misunderstood state law to require the defendant to concede guilt before presenting a duress defense. *See Frost*, 161 P.3d at 365 ("We hold the trial court erroneously interpreted our decision in *Riker* and, based on that erroneous interpretation unduly limited the scope of Frost's closing argument, thus abusing its discretion.")

As Judge McKeown notes, the Washington Supreme Court's "reference to abuse of discretion was legal speak for the fact that the trial court was flat wrong as a matter of law. The trial court's restriction was not an exercise of its 'great latitude controlling the duration and limiting the scope of closing summations.'" App. 9587 (quoting *Herring*, 422 U.S. at 862).

3. The panel majority strains to avoid the application of *Herring* by misrepresenting the facts of Mr. Frost's case.

Having recast *Herring* as limited strictly to its facts, the panel majority then mischaracterizes Mr. Frost's trial as involving a lesser-*Herring* violation. App. 9571-72. In truth, the Sixth Amendment violation was more egregious than what occurred in *Herring* in two respects: the trial court required defense counsel to concede guilt and curtailed only the defense summation, and not that of the prosecution.

First, the trial court not only denied Mr. Frost the opportunity to argue that the state had failed to prove its case beyond a reasonable doubt, it directed him to *concede* guilt. As the dissent concludes, "In fact, the compounding error here – requiring concession of guilt – was far worse than the error in *Herring*, where counsel's forced silence did not amount to a concession of guilt." App. 9587 (McKeown, J., dissenting).

Counterfactually, the panel majority suggests that Mr. Frost's counsel *strategically* conceded guilt to further the duress defense: "Defense counsel wisely conceded that fact to maintain credibility in urging the jury to nonetheless excuse his client's conduct because he acted under duress. The jury did not buy the defense." *See* App. 9573. Nothing could be further from the mark.

Rather, the trial court instructed Mr. Frost's counsel: "You must admit the elements of the offense have been proved before you can use the duress offense." ER 35. *See* ER 37 ("[A] defense of duress necessarily allows for no doubt that the defendant did the acts charged . . . ."). And that is just what Mr. Frost's counsel did. *See* ER 186 (conceding guilt on the Gapp robbery); ER 190 (conceding guilt on the Ronnie's Market robbery); ER 194 (conceding guilt on the T & A robbery). *Cf. United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (defense counsel's concession of guilt during summation "caused a breakdown in our adversarial system of justice" because it "lessened the Government's burden of persuading the jury," and that error required reversal).

Second, the *Herring* trial court – which sat as factfinder in that bench trial – had in fact "previously permitted appellant's counsel to summarize the evidence, on the occasion of the motion to dismiss at the close of the State's case[,]" 422 U.S. at 869 (Rehnquist, J., dissenting), but then refused to hear closing argument from *both* the prosecution and the defense. In contrast, Mr. Frost's trial court curtailed only the defense summation. *Compare Herring*, 422 U.S. at 856 ("I choose not to hear summations"), *with State v. Frost*, 161 P.3d at 364 ("The Court informed defense counsel that if he attempted to argue that the State had failed to meet its burden of

proof at to any of the robbery offenses, then the court would not instruct the jury on duress on those offenses.").

Despite defense counsel being subject to "the legal equivalent of . . . having one hand tied behind his back," App. 9583 (McKeown, J., dissenting), the panel majority concludes that "the state's burden of proof did not go uncontested" because Frost's counsel argued that "the state had failed to meet its burden of proof on [some counts.]" App. 9580. This conclusion squarely conflicts with the Washington Supreme Court's finding that "defense counsel did not argue that the State had failed to meet its burden of proof," *Frost*, 161 P.3d at 364, and relies on a misreading of the record. The panel majority highlights defense counsel's statement in closing that "we are asking you to find him not guilty, and even if you find him guilty, he is not guilty of the guns[,]"App. 9580 (quoting ER 196-97), but omits what defense counsel had just told the jury:

> we all have situations in which we wish we had handled something differently, and you know that Josh Frost is wishing that now. *The question is from his perspective under the threats of bodily harm to either him or his mom or his brother, is that window of time – did he take too long?* You might find that. I hope you don't. But you might find that.

ER 196 (emphasis added). Taken in context, it is clear counsel presented the only defense the trial court had permitted: Mr. Frost acted under duress. Counsel did not

challenge the government's proof; he made a plea for mercy, devoid of any application of law to fact as envisioned in *Herring*. *See* 422 U.S. at 860.

The prosecution capitalized on this in its rebuttal:

> Ladies and gentlemen, noticeably absent from [defendant's] closing argument is reference to the law. There is a reason for that. Because if [defense counsel] had pointed you to the law and pointed to the elements of the offenses and he pointed to the firearm instruction and made his argument you would realize that his argument is phoney, his arguments don't match up with what the law is and that is really what we are here for.

ER 203. The prosecution framed the defense's inability to address the reasonable doubt standard as a concession of guilt, when in fact the court had ordered the defense not to present its argument despite there being a basis for it. *See Frost*, 161 P.3d at 368.

B. The Panel Majority's Refusal to Recognize Any Value of Ninth Circuit Precedent in Determining what Constitutes "Clearly Established Law," and Whether the State Court Unreasonably Applied that Law Conflicts with This Court's Decisions and Presents an Issue of Exceptional Importance.

The panel majority evades the "contrary to" provision of § 2254(d)(1) by noting that the Supreme Court has been sparing in finding structural error, and treats the list of such instances in *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), as exhaustive. App. 9571. It ignores that the Supreme Court has repeatedly found

Herring error structural. *See supra* at 5, citing *Cone*, 535 U.S. at 696; *Cronic*, 466 U.S. at 659, n.25.

The panel majority also disregards this Court's own repeated recognition that *Herring* established the "fundamental right under the Sixth Amendment to present . . . [the accused's] theory of the case in closing arguments," *Kellington*, 217 F.3d at 1099-1100 (citing *Herring*, 422 U.S. at 858), and that this Court has consistently found structural error under circumstances similar to what occurred in Mr. Frost's trial. *See Miguel*, 338 F.3d at 1001-1002 (finding structural error where "the court erred in precluding counsel from arguing his theory and in instructing the jury that no evidence supported it."); *Conde*, 198 F.3d at 739-741 (precluding defense counsel from arguing defense theory violated the right to counsel and due process and was structural error). *Cf. Kellington*, 217 F.3d 1084 (affirming grant of new trial for erroneously preventing defense counsel from arguing the importance of witness testimony in closing argument).

The panel majority "brushes . . . aside"[5] *Miguel* as insufficient on its own to establish federal law. App. 9574. True enough. But, as the majority recognizes in its own "but see" citation to *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000), App. 9574, this Court has consistently looked to its own authority as persuasive in

[5] App. 9589 (McKeown, J., dissenting).

determining the scope of clearly established federal law and whether the state court applied that law unreasonably. *See , e.g., Fenenbock v. Director of Corrections for California, as amended* __ F.3d __, 2012 WL 3743171, *4 n.6 (9th Cir. Aug. 30, 2012) (citing *Duhaime*).

For example, this Court recently cited circuit decisions in determining whether clearly established law had been applied reasonably: "More important, it is apparent that a 'fair-minded' jurist could agree with the state court's conclusion that *Gideon* [*v. Wainwright*, 372 U.S. 335 (1963)] and *Faretta* [*v. California*, 422 U.S. 806 (1975)] do not require reappointment of counsel after an initial waiver of the right, *because our own cases have reached the same conclusion on this issue.*" *John-Charles v. California*, 646 F.3d 1243, 1250 (9th Cir. 2011) (emphasis added).

In contrast, the *Frost* panel majority disclaims that this Court's cases are of any consequence in assessing the objective unreasonableness of the Washington Supreme Court's conclusion that the *Herring* error was not structural. App. 9573-76. The panel majority attempts to distinguish *Miguel* and *Conde*, in part on the grounds that the former was a direct appeal, and the latter predated AEDPA. But this misses the significance of these decisions – that this Court has uniformly found *Herring* errors to be structural. Indeed, the majority cites no decisions, from this Court or any other, to the contrary.

As the dissent points out, "*Miguel* does not exist in a vacuum[,]" rather, "it illustrates the application of the legal principles from the Supreme Court's decision in *Herring* to a new set of facts." *Id.* at 9589-90 (McKeown, J., dissenting). "*Miguel* . . . raises an identical theory preclusion issue" as that posed by this case, and "delineates the metes and bounds of the structural error principle set forth in *Herring*: absolute preclusion of closing argument on a legitimate defense theory is a constitutional error that undermines the structure of the trial process." *Id.* The uniformity of this Court's cases makes clear that the Washington Supreme Court's decision was unreasonable.

III. CONCLUSION

Mr. Frost respectfully requests this Court grant this petition for rehearing with suggestion for rehearing en banc.

Respectfully submitted this 5th day of October, 2012.

s/ Erik B. Levin
Erik B. Levin
Assistant Federal Public Defender

s/ Lissa Shook
Lissa Shook
Research and Writing Attorney

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 and 40-1

I certify, pursuant to Circuit Rules 35-1 and 40-1, the attached Petition for Rehearing with Suggestion for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4,121 words.

DATED this 5th day of October, 2012.

s/ Erik B. Levin
Erik B. Levin
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF System. I have also mailed a copy of this document to Petitioner-Appellant Joshua Frost.

DATED this 5th day of October, 2012.

s/ Suzie Strait
Suzie Strait
Paralegal

NO. 11-35114

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA FROST,

Petitioner-Appellant,

v.

RON VAN BOENING,

Respondent-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. CV-09-00725-TSZ
The Honorable Thomas S. Zilly
United States District Court Judge

RESPONSE TO PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF THE CASE

Frost was convicted of crimes committed in five separate incidents over the course of eleven days. Frost and two other men, armed with firearms, robbed a residence, a fast food restaurant, a video store, and two convenience stores. When the police arrested Frost and his accomplices, they found several firearms, a cash register, safes, bank bags, and ski masks associated with the robberies inside Frost's home. Frost confessed to the police, and his confessions were played at trial. Frost also testified at trial, admitting he participated in the robberies, but claiming he acted under duress.

Defense counsel intended to argue both a lack of proof of accomplice liability and the defense of duress during closing summation. The judge ruled counsel could argue either that Frost committed the crimes under duress, or that the prosecution failed to prove Frost committed the crimes, but not both. Counsel limited his closing argument to the defense of duress. On appeal, Frost contended this restriction on the scope of closing argument was structural error under *Herring v. New York*, 422 U.S. 853 (1975). The Washington Supreme Court found the judge erred by restricting the scope of closing argument, but also found the error was harmless. *State v. Frost*, 160 Wn.2d 765, 771-83, 161 P.3d 361 (2007), *cert. denied* 552 U.S. 1145 (2008).

Frost sought habeas corpus relief. Among his claims, Frost challenged the restriction on the scope of the closing argument. CR 14, at 13. Respondent-Appellee (the State) asserted Frost was not entitled to relief under 28 U.S.C. § 2254(d). CR 15, at 21-27. First, the State argued the claim was not based upon clearly established federal law. CR 15, at 21-23. Although the Court in *Herring v. New York*, 422 U.S. 853 (1975) held a complete denial of closing argument is a constitutional error, the Court has not held a restriction on the scope of argument violates the Constitution. CR 15, at 21-23.[1] Second, the State argued that because the Supreme Court has not addressed the issue, the state court decision to apply a harmless error analysis was not an unreasonable application of clearly established federal law. CR 15, at 24-27.

The district court denied relief under 28 U.S.C. § 2254(d), concluding the state court adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law. ER 1-3 and 4-31. This Court affirmed the district court's judgment in a 2-1 opinion. *Frost v. Van Boening*, 692 F.3d 924 (2012). Frost now seeks rehearing by the panel and rehearing *en banc*. For the reasons set forth below, the Court should deny rehearing.

[1] The panel incorrectly concluded the State raised this issue for the first time on appeal. *Frost v. Van Boening*, 692 F.3d 924, 927 n. 2 (9th Cir. 2012). The State raised the issue in the district court. CR 15, at 21-23.

II. ARGUMENT

A. The Panel Majority Did Not Apply A Super AEDPA Requirement, But Instead Properly Applied The Heightened Standard Of Review Required By 28 U.S.C. § 2254(d)

The panel majority properly applied the heightened standard required by 28 U.S.C. § 2254(d). The panel majority correctly determined that because the Supreme Court has not held a restriction in the scope of closing argument is structural error, the state court decision to apply a harmless error analysis was not an unreasonable application of clearly established federal law.

The Antiterrorism and Effective Death Penalty Act (AEDPA) limits the federal court's authority to grant habeas corpus relief. *Harrington v. Richter*, 131 S. Ct. 770, 783 (2011). As the panel majority correctly noted, "The provisions of AEDPA 'create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings.'" *Frost*, 692 F.3d at 929 (quoting *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007)). "'This is difficult to meet, and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Frost*, 692 F.3d at 929 (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (internal citations and quotation marks omitted)).

A necessary prerequisite for relief under 28 U.S.C. § 2254(d) is that a claim must be based upon "clearly established Federal law." *Bobby v. Dixon*, 132 S. Ct. 26, 29 (2011); *Berghuis v. Smith*, 130 S. Ct. 1382, 1395-96 (2010); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008). This statutory phrase "refers to the holdings, as opposed to the dicta" of Supreme Court's decisions. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of this Court." *Thaler v. Haynes*, 130 S. Ct. 1171, 1173 (2010). That a rule may be necessarily implied by a holding is not sufficient to render the rule clearly established federal law. *Kane v. Espitia*, 546 U.S. 9, 10 (2005).

Frost contends that *Herring v. New York*, 422 U.S. 853 (1975) established a "governing legal principle" that the Washington Supreme Court failed to extend to the facts of his case. But as this Court sitting *en banc* determined, "Habeas relief for an unreasonable application of law can be 'based on an application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.'..., but only when the principle 'clearly extend[s]' to the new set of facts." *Murdoch v. Castro*, 609 F.3d 983, 990-91 (9th Cir. June 21, 2010) (*en banc*) (citations omitted). "[W]hen a state court may draw a principled distinction between the case

before it and Supreme Court case law, the law is not clearly established for the state-court case." *Murdoch*, 609 F.3d at 991. "If Supreme Court cases 'give no clear answer to the question presented,' the state court's decision cannot be an unreasonable application of clearly established federal law." *Ponce v. Felker*, 606 F.3d 596, 604 (9th Cir. 2010) (quoting *Wright*, 552 U.S. at 126; accord *Carey v. Musladin*, 549 U.S. 70, 77 (2006)); *see also Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004).

Here, Frost's claim requires more than simply applying the *Herring* rule to a case with slightly different facts. Application of *Herring* to Frost's case requires the extension of the *Herring* rule in a novel situation not addressed by the Supreme Court.

In *Herring*, the Court considered a judge's ruling that entirely denied counsel any closing argument. *Herring*, 422 U.S. at 854. At the conclusion of a bench trial, Herring's counsel asked "'to be heard somewhat on the facts.'" *Id.* at 856. Relying on a statute, the judge responded, "I chose not to hear summations." *Id.* at 856. The judge then found Herring guilty. *Id.* The Supreme Court vacated the conviction, holding the utter denial of closing argument violated the right to counsel. *Id.* 857-65. The *Herring* Court determined "there can be no justification for a statute that empowers a trial

judge to deny absolutely the opportunity for any closing summation." *Herring*, 422 U.S. at 863. Thus, the *Herring* Court clearly established that a trial judge may not entirely prohibit closing argument by the defense. *Id*. But *Herring* did not clearly answer the issue in Frost's case.

Unlike *Herring*, the trial judge here allowed Frost's counsel to make a closing argument. The judge restricted the scope of that argument, incorrectly requiring counsel to choose between two potential defenses, but counsel was still able to argue the defense of duress. *Herring* did not clearly answer the issue of whether a ruling that restricts the scope of argument, but does not entirely prohibit closing argument, is structural error. *Herring* itself recognized that aside from imposing an outright prohibition on closing argument, a judge retains broad discretion in controlling and limiting the scope of closing argument. *Herring*, 422 U.S. at 862. "This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations." *Id.* Consequently, while the Supreme Court has held that an outright prohibition on closing argument is prejudicial constitutional error, the Court has not determined whether a lesser restriction on the scope of closing argument is structural error.

Under Frost's view, the holding that a judge may not utterly prohibit any closing argument is sufficient to clearly establish a specific rule that any error in limiting the scope of closing argument is structural error. But the Supreme Court has repeatedly declared the establishment of a general rule does not clearly establish more specific rules for future cases. *See, e.g., Bobby v. Dixon*, 132 S. Ct. at 29-30 (Court did not clearly establish the rules applied by the Sixth Circuit in finding a *Miranda* violation); *Howes v. Fields*, 132 S. Ct. 1181, 1187-89 (2012) (Court did not clearly establish a prisoner is always in custody under *Miranda*); *Thaler v. Haynes*, 130 S. Ct. at 1173-75 (holdings on *Baston* claims did not clearly establish that a judge must personally observe a juror's demeanor before concluding demeanor provided a race neutral reason for excluding the juror); *Berghuis v. Smith*, 130 S. Ct at 1392-96 (precedent did not clearly establish a specific method or test that state courts must use in reviewing a claim that the jury was not drawn from a fair cross section of the community); *Renico v. Lett*, 130 S. Ct. 1855, 1865-66 (2010) (precedent did not clearly establish a three-prong standard for determining whether a trial court abused its discretion in declaring a mistrial on a hung jury); *Kane v. Espitia*, 546 U.S. at 10 (decision on right to self-representation did not clearly establish an implied right of access to a law library).

Frost's argument is analogous to the argument rejected by the Supreme Court in *Wright v. Van Patten*, 552 U.S. 120 (2008). In *Wright*, the Seventh Circuit determined that defense counsel's assistance was presumptively prejudicial because counsel participated in a plea hearing by speaker phone, rather than appearing in person. *Id*. at 123. Rejecting the state's argument that the Supreme Court had not clearly established such a rule, the Seventh Circuit determined the issue was not an "open constitutional question" because "'[t]he Supreme Court has long recognized a defendant's right to relief if his defense counsel was actually or constructively absent at a critical stage of the proceedings.'" *Id*. The Seventh Circuit relied on the Supreme Court's holding in *United States v. Cronic*, 466 U.S. 648 (1984) that prejudice may be presumed when counsel is totally absent or prevented from assisting the accused during a critical stage of the proceeding. *Wright*, 552 U.S. at 124-25. The Supreme Court reversed. "No decision of this Court ... squarely addresses the issue in this case ... or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Id.* at 125. "Our cases provide no categorical answer to this question...." *Id.* Since the Court's cases gave no clear answer to the issue, the Court concluded "'it cannot be said that the state court "unreasonab[ly] appli[ed] clearly established Federal law." *Id*.

The same result is true in Frost's case. While the Supreme Court has held that a complete denial of closing argument is prejudicial constitutional error, the Supreme Court has not clearly answered the issue of whether a lesser restriction on the scope of closing argument is structural error. The Court has not provided a categorical answer to this issue. *See Wright*, 552 U.S. at 125. Since the Washington Supreme Court could "draw a principled distinction between the case before it and Supreme Court case law, the law is not clearly established for the state-court case." *Murdoch*, 609 F.3d at 991. As the Supreme Court "has held on numerous occasions, … it is not '"an unreasonable application of clearly established Federal law"' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

B. The Panel Majority Correctly Determined That Circuit Court Opinions Are Not Clearly Established Federal Law

Frost faults the panel majority for not granting relief based upon the decisions in *Conde v. Henry*, 198 F.3d 734 (9th Cir. 1999), *United States v. Miguel*, 338 F.3d 995 (9th Cir. 2003), and *United States v. Kellington*, 217 F.3d 1084 (9th Cir. 2000). But the panel majority correctly recognized that this circuit case law is not clearly established federal law as required by AEDPA. *Renico*, 130 S. Ct. at 1866.

Frost argues the circuit case law serves "as persuasive authority in determining the scope of clearly established federal law and whether the state court applied that law unreasonably." Pet. at 16-17. But the Supreme Court in *Parker v. Matthews*, 132 S. Ct. 2148, 2149 (2012) rejected such an argument as "a text book example" of what ADEPA proscribes. The Court explained, "The Sixth Circuit also erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the Kentucky Supreme Court's decision." *Id*. at 2155. The Court stressed that "circuit precedent does not constitute 'clearly established Federal law," and it "cannot form the basis for habeas relief under AEDPA." *Id*. "Nor can the Sixth Circuit's reliance on its own precedents be defended in this case on the ground that they merely reflect what has been 'clearly established' by our cases." *Id*. "It was plain and repetitive error for the Sixth Circuit to rely on its own precedent in granting … habeas relief." *Id*. at 2155-56.[2] The panel majority's decision is proper in light of *Parker*.

[2] Moreover, none of the circuit case law cited by Frost even considered whether the rule applied in those cases was "clearly established Federal law." *Conde* involved a pre-AEDPA habeas corpus case, and *Miguel* and *Kellington* involved federal criminal proceedings not subject to 28 U.S.C. § 2254(d). Since these opinions did not consider threshold issue of whether the rule was clearly established by the Supreme Court, the opinions do not guide this Court in determining whether the state court decision was an unreasonable application of clearly established federal law.

Moreover, Frost incorrectly suggests the case law of this Court and other circuits consistently applies structural error to restrictions on closing argument. In *United States v. Bramble*, 680 F.2d 590, 592-93 (9th Cir. 1982), this Court considered whether the judge erred in restricting closing argument by precluding defense counsel's arguments concerning a lack of evidence. This Court concluded, "it was not reversible error to restrict counsel's argument. Counsel are allowed wide latitude in closing argument, but we need not decide whether the limits on closing argument that were laid down by the judge here were too strict. If they were, the error was harmless." *Id*. at 593. Similarly, in *United States v. Bautista*, 252 F.3d 141, 145 (2nd Cir. 2001), the Second Circuit, citing to *Herring*, determined that "[a] district court has broad discretion in limiting the scope of summation," and that "[t]here is no abuse of discretion if the defendant cannot show prejudice." Also, the Eighth Circuit has at least twice indicated that limitations on closing argument are not reversible error absent a showing of prejudice. *United States v. Davis*, 557 F.2d 1239, 1244 (8th Cir. 1977) (concluding there was no prejudice from alleged error in restricting closing argument); *Richardson v. Bowersox*, 188 F.3d 973, 979-80 (8th Cir. 1999) (concluding that even if the judge erred in restricting closing argument, the petitioner did not suffer manifest injustice as a result).

C. The Decision To Apply A Harmless Error Analysis Was Not An Unreasonable Application Of Supreme Court Precedent

Under AEDPA, "a state prisoner seeking a writ of habeas corpus from a federal court 'must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Bobby v. Dixon*, 132 S. Ct. at 27 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011)). In the absence of a Supreme Court holding that the error in this case was structural error, and in light of the Court's precedent that most errors are subject to harmless error analysis, the conclusion that harmless error applies was not unreasonable.

The Supreme Court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, '"most constitutional errors can be harmless."' *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). '"'"[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis."'"' *Recuenco*, 548 U.S. at 218 (quoting *Neder*, 527 U.S. at 8 (quoting *Rose v. Clark*, 478 U.S. 570, 579

(1986)). "Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal." *Recuenco*, 548 U.S. at 218. "In such cases, the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Recuenco*, 548 U.S. at 218-19 (quoting *Neder*, 527 U.S. at 9) (emphasis deleted)).

Applying the relevant Supreme Court precedent, the Washington Supreme Court reasonably determined the error here was a trial subject to harmless error analysis. ER 57-61. The state court's decision was not objectively unreasonable since "fairminded jurists could disagree" on the correctness of that decision. *Harrington*, 131 S. Ct. at 786.

The constitutional error in *Herring* involved the complete denial of closing argument, resulting in the complete or constructive denial of counsel as discussed in *Cronic*, *supra*. In that situation, prejudice is presumed. But here, the error was a lesser limitation on the scope of closing argument. Counsel was still allowed to argue Frost's primary defense of duress, the prosecutor stressed to the jury that it must prove Frost's guilt beyond a reasonable doubt, and the trial court properly instructed the jury on the burden of proof, the elements of the crimes, and the elements of accomplice liability. The state court could reasonably conclude that, rather than an error resulting a complete

denial of the right to counsel, the error here is more analogous to cases involving specific deficiencies in counsel's representation at trial, a situation reviewed under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Wright*, 552 U.S. at 124-26. As the Supreme Court stated, "'[W]hile there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule.'" *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008). Since the Supreme Court has not clearly held that the error in this case is structural, the state court's decision to apply a harmless error analysis was not unreasonable.

III. CONCLUSION

For the reasons stated above, the State respectfully asks this Court deny the petition for rehearing.

DATED this 6th day of November, 2012.

Respectfully submitted,

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IV. STATEMENT OF RELATED CASES

Respondent-Appellee is unaware of any pending appeal that may be deemed related to this case pursuant to Ninth Circuit Local Rule 28-2.6.

V. CERTIFICATE OF COMPLIANCE

I certify that, as directed by the Court's Order of October 17, 2012, the attached response to petition for rehearing does not exceed 15 pages or 4,200 words in length.

11-06-12
Date

s/ John J. Samson
John J. Samson, WSBA #22187
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2012, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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NO. 11-35114

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA FROST,

Petitioner-Appellant,

v.

PATRICK GLEBE,

Respondent-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CV09-725-TSZ-BAT
The Honorable Thomas S. Zilly
United States District Court Judge

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE REGARDING PREJUDICE ISSUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Frost and two accomplices committed five robberies over eleven days. When the police eventually arrested Frost, they found several items associated with the robberies inside Frost's home, and Frost confessed to committing the crimes. Frost also admitted at trial that he knowingly participated in the robberies, but claimed he acted under duress. At closing argument, the judge incorrectly ruled that defense counsel could argue either a lack of proof that Frost committed the crimes, or that Frost committed the crimes under duress, but not both. Frost's counsel argued the defense of duress. The jury convicted Frost. On appeal, Frost contended the judge's restriction on closing argument was constitutional error. The Washington Supreme Court agreed that the judge erred in restricting closing argument, but also found that the error was harmless. *State v. Frost*, 160 Wn.2d 765, 771-83, 161 P.3d 361 (2007).

Frost seeks relief under 28 U.S.C. § 2254(d). Frost cannot obtain relief because he cannot show both that he suffered actual prejudice from the judge's ruling, and that the Washington Supreme Court's decision was unreasonable. In light of the record as a whole, including the jury instructions and the overwhelming evidence of guilt, the judge's ruling did not prejudice Frost and the state court reasonably determined the error was harmless.

II. STATEMENT OF THE ISSUE

1. Should the Court should affirm the denial of habeas relief under 28 U.S.C. § 2254(d) because Frost has not shown the state court unreasonably applied clearly established federal law when it determined the limitation on closing argument was harmless error?

2. Should the Court affirm the denial of relief because the error did not cause actual prejudice under *Brecht v. Abrahamson*, 507 U.S. 619 (1993)?

III. STATEMENT OF THE CASE

A. The Evidence Overwhelmingly Proved Frost Knowingly Participated As An Accomplice In The Robberies

Over the course of eleven days, Frost and two other men committed five armed robberies. ER 41. The three men first assaulted and robbed an elderly couple during a home invasion robbery. ER 41. The three men then robbed a fast-food restaurant. ER 41. The third robbery occurred in an adult video store. ER 41. Frost had "cased" the store before the robbery, and also acted as the getaway driver. ER 41-42. The final two robberies occurred at convenience stores, with Frost again acting as the driver. ER 42.

An informant's tip led the police to Frost and his accomplices soon after the fifth robbery. When the informant saw Frost and the two accomplices trying to break open a safe in Frost's home, Frost admitted he was involved in

the robberies. ER 247 and SER 35-39. The informant left the house and went to the police. ER 250, 256-57 and 266. The police arrested Frost and searched his home that same day. SER 51-52. The police found firearms, a cash register, three safes, bank bags, gloves, and ski masks, all associated with the robberies. SER 51-80. After his arrest, Frost repeatedly confessed to knowingly participating in the robberies. SER 1-29 and 83-104. The prosecution charged Frost with robbery, burglary, attempted robbery, and assault. ER 42.

At trial, the prosecution presented extensive evidence that proved Frost was an accomplice in the robberies. *See* ER 222-25 (state appellate court opinion summarizing the facts). The evidence included testimony from the victims of the robberies, the observations of the informant, the items found in Frost's home that tied Frost to the robberies, and Frost's taped confessions. *See* ER 222-25; *see also, e.g.*, ER 137-155 (informant's testimony), SER 1-29 (Frost's confessions); SER 51-79 (items found during search of Frost's home).

Unable to seriously contest this evidence, Frost relied on a defense that he acted under duress. As part of this defense, counsel conceded during the opening statements that Frost was guilty of the first home invasion robbery. SER 45-46. Counsel made this concession to develop Frost's duress defense, stating that the evidence would show that while Frost "was along for the ride"

for the robberies that followed, he participated only out of fear that one of his accomplices would harm him or his family. SER 46. Frost also testified before the jury to support of his duress defense. Frost admitted to knowingly participating in the robberies. SER 106-97. Frost's testimony alone provided sufficient evidence to convict him as an accomplice because he admitted driving the men to the robbery locations knowing they were armed with firearms and intended to commit the robberies. *See, e.g.*, SER 194-96.

B. The Trial Judge Erroneously Restricted Closing Argument, But The Washington Supreme Court Found The Error Was Harmless

At the end of trial, the judge ruled that Frost's testimony entitled him to a duress instruction. ER 33-34. The judge said the instruction would apply to all of the charges, except the assault charges because Frost had not admitted committing the assaults. ER 34. Defense counsel asked, "Is the court telling me I have to explain to the jury that we admit all the elements of the all [*sic*] the offenses charged?" ER 34. The judge responded, "no," but said counsel could not ask the jury to apply the duress instruction to the assault charges because Frost denied committing the assaults. ER 35. The prosecutor expressed concern that counsel would argue first that the prosecution had not proven accomplice liability, and second that Frost acted under duress. ER 35. The judge responded that this would cause him to withdraw the duress instruction. ER 35.

The judge incorrectly believed that under Washington law a defendant cannot argue both "the state hasn't proved accomplice liability and claim a duress defense. You must opt for one or the other. . . ." ER 35. The judge said Frost's counsel could argue a duress defense because "your client just got on the stand and admitted everything except the assault in the second degree charge." ER 35. The judge pointed out that Frost's testimony proved he acted as an accomplice by being at least the getaway driver. ER 35-36.

The judge instructed the jury on the defense of duress and on the prosecution's burden to prove the elements of the offenses and accomplice liability beyond a reasonable doubt. ER 43 and 62. During closing argument, the prosecution repeatedly mentioned its burden to prove Frost's guilt beyond a reasonable doubt. ER 43. Defense counsel argued that the prosecution had not proven Frost's guilt as to the assault charges and the firearm sentencing enhancements. ER 187-90. As in opening statements, however, counsel admitted that Frost committed the home invasion robbery, and argued that Frost acted under duress in the subsequent robberies. ER 185-203. The jury convicted Frost as charged, with the exception of one assault charge. ER 43-44.

On appeal, the Washington Supreme Court held that the judge erred in restricting closing argument, but concluded the error was harmless. ER 45-62.

Noting the jury was properly instructed on the prosecution's burden of proof, the court considered whether the "untainted evidence" presented at trial was so "overwhelming that it necessarily leads to a finding of guilt." ER 61-62. Recognizing the judge's ruling restricted closing argument but did not taint any of the evidence, the court concluded beyond a reasonable doubt that the error was harmless because "'any reasonable jury' would have convicted Frost, even absent the trial court's limitation on counsel's argument." ER 61-62.

C. The District Court Denied Relief Because The State Court Decision On Harmless Error Was Not Unreasonable

Frost sought habeas corpus relief, contending among other things that the judge's restriction on closing argument violated due process and the right to counsel. CR 14, at 9-13. The magistrate judge issued a report and recommendation, recommending that the district court deny relief because the Washington Supreme Court's conclusion of harmless error was not an unreasonable application of clearly established federal law. ER 17-23.

The magistrate judge noted that while the judge restricted closing argument, Frost was still allowed to argue his central defense of duress. ER 16. In addition, the judge had properly instructed the jury on the prosecution's burden to prove each element of the crimes charged, including the elements of accomplice liability, and the prosecution reminded the jury of this burden in its

own closing argument. ER 16. The magistrate judge also noted the record supported the state court's determination that there was overwhelming evidence of Frost's guilt, since the record included Frost's taped confessions, his testimony at trial admitting his knowing involvement in the crimes, and the numerous items associated with the robberies found in his home. ER 17-20. Frost objected, but the district court adopted the report and recommendation, and denied the habeas petition. ER 1-3.

D. The Proceedings In This Court

A panel of this Court affirmed the district court's judgment in a 2-1 opinion. *Frost v. Van Boening*, 692 F.3d 924 (2012). The panel majority concluded the error did not cause actual prejudice in light of the record as a whole. *Id.* at 934. Describing the evidence of Frost's guilt as "overwhelming," the majority noted that this evidence included Frost's confessions, his own trial testimony, and the items from the robberies found in his home. *Id*. at 934-35. The majority also noted that, despite the judge's ruling, defense counsel still was able to argue a lack of proof as to the assault charges and the sentencing enhancements. *Id.* at 935-36. Finally, the majority noted the jury was properly instructed on the burden of proof, and was reminded of that burden during the prosecution's closing argument. *Id*. On rehearing *en banc*, the majority held the

restriction of closing argument was structural error, and therefore did not consider whether the error was harmless. *Frost v. Van Boeing*, 757 F.3d 910, 914-19 (2014). The Supreme Court reversed because the state court decision that the error was not structural was not an unreasonable application of clearly established federal law. *Glebe v. Frost*, 135 S. Ct. 429 (2014). The Supreme Court remanded for this Court to determine whether the state court unreasonably determined that the error was harmless in this case. *Id.* at 432.

IV. SUMMARY OF ARGUMENT

The trial judge improperly limited defense counsel's closing argument by ruling that Frost's counsel could not argue both a lack of proof and duress. The Washington Supreme Court determined the judge erred, but also concluded the error was harmless in light of the entire record. The judge properly instructed the jury on the prosecution's burden of proof, the prosecutor reminded the jury of this burden in his closing argument, defense counsel was still able to argue his primary defense, and the evidence overwhelming proved Frost's guilt. Frost is not entitled to relief because the state court decision was not an unreasonable application of clearly established federal law, and the error did not cause actual prejudice.

V. ARGUMENT

A. To Obtain Relief, Frost Must Show That The State Court Decision On Harmlessness Was Unreasonable, And That The Error Caused Actual Prejudice

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). The statute does not allow relief simply because the state court decision is incorrect or erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Rather, the statute allows relief only if the state court unreasonably applies the holdings of the Supreme Court to the facts of the case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). "[A] state-court decision is not unreasonable if '"fairminded jurists could disagree on [its] correctness."'" *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (other citations omitted)). To be unreasonable, the state court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

A state court determination that a trial error was harmless is an adjudication of the claim "on the merits" for purposes of 28 U.S.C. § 2254(d). *Davis*, 135 S. Ct. at 2198. Thus, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (emphasis in original) (citing *Mitchell v. Esparza*, 540 U.S. 12 (2003)). The Court may not grant relief "if the state court simply erred in concluding that the State's error were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell*, 540 U.S. at 18.

In addition, the Court may not grant relief unless the error resulted in actual prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 637-39 (1993). The *Brecht* actual prejudice standard applies regardless of whether the state court applied a proper harmless error analysis. *Davis*, 135 S. Ct. at 2199.

The Court need not formally apply both the AEDPA and *Brecht* standards, and may deny relief if either the state court decision was not unreasonable, or the error did not cause actual prejudice. *Fry*, 551 U.S. at 120;

Davis, 135 S. Ct. at 2199. But a petitioner must satisfy both the unreasonableness standard of 28 U.S.C. § 2254(d)(1), and the *Brecht* actual prejudice standard, in order to obtain habeas relief. *Fry*, 551 U.S. at 119-20; *Davis*, 135 S. Ct. at 2198-99. "While a federal habeas court need not formal[ly] apply both *Brecht* and "AEDPA/*Chapman*," AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief.'" *Davis*, 135 S. Ct. at 2198 (quoting *Fry*, 551 U.S. at 119). "In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis*, 135 S. Ct. at 2199 (citing *Fry*, 551 U.S. at 119-20).

B. The Washington Supreme Court Determination That The Error Was Harmless In This Case Was Not Objectively Unreasonable

The Washington Supreme Court determined the restriction on closing argument was harmless error in light of the evidence of Frost's guilt, the prosecutor's own argument that he must prove guilt beyond a reasonable, and the jury instructions. This was not an unreasonable conclusion.

The Washington Supreme Court first reasonably recognized that the judge's ruling, although limiting counsel's argument, did not taint any of the evidence admitted during trial. ER 61. All of the evidence, including Frost's taped confessions and his trial testimony admitting knowing participation in the

robberies remained properly before the jury. ER 61. The state court also reasonably recognized that the judge had properly instructed the jury on the prosecution's burden of proof, the elements of the crimes, and the elements of accomplice liability. ER 62. These instructions addressed the prosecution's burden of proof in general, and the specific requirements necessary to prove Frost guilty as an accomplice. ER 62. The Washington Supreme Court reasonably concluded that "in light of the overwhelming evidence of Frost's guilt and the fact that the jury was properly instructed, the trial court's error was harmless." ER 62-63. Although Frost disagrees with the state court's conclusion, he does not show the decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Consequently, Frost is not entitled to relief under 28 U.S.C. § 2254(d).

C. Frost Does Not Show The Error Caused Actual Prejudice In Light Of The Record In This Case

As the state court, the district court, the panel majority, and the *en banc* dissent all recognized, the judge's ruling did not prejudice Frost's defense. Although the judge made defense counsel choose between arguing either a lack of proof or duress, the ruling did not affect the jury's verdict in light of the evidence of Frost's guilt, the jury instructions, and the actual arguments of

counsel. The jury would have convicted Frost even if the judge had allowed counsel to argue a lack of proof as to accomplice liability.

First, the judge's ruling did not prevent Frost from advocating his primary defense of duress. Counsel was able to argue the primary defense theory that Frost committed the robberies while under duress. As he did in opening statements, long before the judge's ruling, Frost's counsel conceded Frost was guilty of the home invasion robbery, and conceded that Frost "went along for the ride" in committing the subsequent robberies. As he indicated in opening statements, counsel argued that Frost knowingly assisted in the subsequent robberies only because he feared his co-defendant would harm him or his family. In light of the overwhelming evidence that Frost knowingly participated in the robberies, the duress defense was the only chance Frost had at avoiding conviction. The judge's ruling did not injure this defense. Counsel presented the primary defense theory to the jury. The jury simply rejected it.

Second, the judge's ruling did not eliminate the jury's obligation to determine whether the prosecution proved Frost's guilt beyond a reasonable doubt. The judge properly instructed the jury that the prosecution had the burden to prove Frost's guilt beyond a reasonable doubt, properly instructed the jury on the elements of the crimes, and properly instructed the jury on the

elements of accomplice liability. ER 61-62. The jury instructions directed the jury to determine whether the prosecution met its burden of proof. ER 61-62. The prosecutor in closing argument referred to these instructions and reminded the jury of the burden of proof and of the prosecution's duty to prove all the elements of the crimes. Despite the judge's ruling, defense counsel was still able to remind the jury of the prosecution's burden of proof by arguing that the prosecution did not prove Frost's guilt as to the assault charges and the firearm sentencing enhancements. ER 187-92. The judge's ruling limited closing argument, but did not entirely eliminate the prosecution's burden of proof in this case.

Third, even if Frost's counsel had argued a lack of proof concerning the robbery charges, the jury would have rejected the argument because the evidence of Frost's guilt was overwhelming. Frost's taped confessions and his testimony at trial (all admitted into evidence before the judge's ruling) proved Frost knowingly assisted in the crimes. Frost's testimony that he acted as the driver with knowledge that his co-defendants were armed and intended to commit the robberies proved Frost was guilty as an accomplice. *See Waddington v. Sarausad*, 555 U.S. 179 (2009) (defendant was an accomplice to murder when he drove the car with knowledge that his passenger was armed

and intended to shoot students). Since the jury would have rejected any argument of lack of proof, the judge's ruling did not cause actual prejudice.

VI. CONCLUSION

Frost is not entitled to habeas relief because he does not show the Washington Supreme Court's decision that the error was harmless was an unreasonable application of clearly established federal law, and he does not show the error caused actual prejudice. The State respectfully asks this Court to affirm the district court's judgment denying the habeas corpus petition.

DATED this 20th day of July, 2015.

Respectfully submitted,

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VII. STATEMENT OF RELATED CASES

Respondent-Appellee is unaware of any pending appeal that may be deemed related to this case pursuant to Ninth Circuit Local Rule 28-2.6.

VIII. CERTIFICATE OF COMPLIANCE

I certify that, as directed by the Court's Order of June 22, 2015, the attached supplemental brief does not exceed 7,000 words.

7-20-15
Date

s/ John J. Samson
John J. Samson, WSBA #22187
Assistant Attorney General

IX. CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I caused to be electronically filed the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE REGARDING PREJUDICE ISSUE with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Erik B. Levin — erik_levin@fd.org
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Assistant Federal Public Defender
Amicus Curiae

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED this 20th day of July, 2015.

s/ Tera Linford
TERA LINFORD
Legal Assistant

No. 11-35114

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSHUA JAMES FROST,

Petitioner-Appellant,

v.

PATRICK GLEBE, Superintendent,
Stafford Creek Correctional Center

Respondent-Appellee.

On Appeal from United States District Court
Western District of Washington at Seattle
District Court No. CV09-725-TSZ
The Honorable Thomas S. Zilly
United States District Judge

PETITIONER-APPELLANT'S SUPPLEMENTAL BRIEF

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Table of Contents

Table of Authorities

CASES

CASES Cont'd

CASES Cont'd

STATUTES

INTRODUCTION

This brief is submitted in response to the Court's order that the parties address whether the preclusion of Mr. Frost's reasonable doubt argument in summation was harmless in light of *Glebe v. Frost*, 574 U.S. __, 135 S. Ct. 429 (2014) (per curiam) ("*Frost IV*"), and *Davis v. Ayala*, 576 U.S. __, 135 S. Ct. 2187 (2015). (Dkt. 94).[1]

The Court should issue the writ because denying Mr. Frost the right to present a reasonable doubt argument in summation had a substantial and injurious effect on the verdict. This Court found that the trial court error effectively took the reasonable doubt decision from the jury, even though, as the Washington state court unanimously concluded, Mr. Frost had an evidentiary basis to argue the state failed to prove his accessorial liability beyond a reasonable doubt. The prosecution's insistence that Mr. Frost concede reasonable doubt, and the emphasis it placed on his concession in its rebuttal summation, where it was freshest in the jurors' minds as they deliberated, lead to the inexorable conclusion that the error had a substantial effect on the verdict.

The Washington state court found the error harmless, but not under the federal standard, *Chapman v. California*, 386 U.S. 18 (1967). Instead, the state

[1]As used in this brief, "Dkt." references documents filed with this Court. "ER" references the Petitioner's Excerpts of Records filed which were filed with this Court. (*See* Dkt. 8)

court applied the Washington state untainted evidence test, which unlike the *Chapman* standard, considers only the strength of the prosecution's untainted evidence and eschews any consideration of the effect of the error. Not only is the Washington untainted evidence test contrary to federal law, but its use makes little sense, where, as here, the trial court error did not result in the admission of tainted evidence. Instead, the error prevented Mr. Frost's counsel from advocating for his client and holding the prosecution to its burden of proof, errors that struck at the very heart of the adversarial justice system.

ARGUMENT

PRECLUDING THE REASONABLE DOUBT SUMMATION HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE VERDICT AND THE WASHINGTON STATE COURT'S CONCLUSION THAT THE ERROR WAS HARMLESS WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW.

A. *Glebe v. Frost* and *Davis v. Ayala* Require Relief If the Trial Court Error Had a Substantial and Injurious Effect on the Verdict.

The Supreme Court in *Glebe v. Frost* reversed this Court's judgment in *Frost v. Van Boening*, 757 F.3d 910, 914 (9th Cir. 2014) ("*Frost III*"), *cert. granted, judgment rev'd sub nom. Glebe v. Frost*, 574 U.S. __, 135 S. Ct. 429 (2014) (per curiam, and found that the Washington state court reasonably concluded that denying Mr. Frost the right to present his reasonable doubt theory of defense in summation was not *per se* prejudicial because "it was not clearly

established that . . . [the trial court's] mistake ranked as structural error." *Frost IV*, 135 S. Ct. at 430. The Supreme Court left in place this Court's (and the Washington state court's unanimous) conclusion that the trial court violated Mr. Frost's Sixth Amendment right to counsel and Fourteenth Amendment right to due process when it required him to concede guilt beyond a reasonable doubt; and it remanded the matter to determine whether the error was harmless. *Id.*

Davis v. Ayala addressed the relationship between the postconviction harmless error standard, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and AEDPA[2] review of the state court harmless error finding, *Chapman v. California*, 386 U.S. 18 (1967). *Ayala* reaffirmed the Court's holding in *Fry v. Pliler*, 551 U.S. 112 (2007). "When a *Chapman* decision is reviewed under AEDPA, 'a federal court may not award habeas relief . . . unless *the harmlessness determination itself* was unreasonable.'" 135 S. Ct. at 2199 (quoting *Fry*, 551 U.S. at 119 (emphasis in original)). *Ayala* concluded that AEDPA does not require a separate AEDPA/*Chapman* and *Brecht* analysis because *Brecht* encompasses the AEDPA review standard. *Id.* (citing *Fry*, 551 U.S. at 120). "In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated

[2]Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2241, et seq.

his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Id.* (citing *Fry*, 551 U.S. at 119-120).

The *Brecht* harmless error standard "'is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.'" *Whelchel v. Washington*, 232 F.3d 1197, 1206 (9th Cir. 2000) (quoting *Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946)). *Brecht* mandates relief where the court "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995) (internal quotation marks and citation omitted). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, *or if one is left in grave doubt,* the conviction cannot stand." *Id.* at 438 (internal quotation marks and citation omitted) (emphasis in original). In making this decision, the Court should "take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *Kotteakos,* 328 U.S. at 764.

The state bears the burden of showing that constitutional trial error is harmless under *Brecht*. *See O'Neal*, 513 U.S. 432, 439 (1995); *Fry*, 551 U.S. 112,

121 n.3 (concluding no basis to find court below ignored *O'Neal* where state conceded that it bore the burden of persuasion); *accord United States v. Dominguez-Benitez*, 542 U.S. 74, 81, n.7 (2004) (noting that under *Brecht*, the state "has the burden of showing that constitutional trial error is harmless").

B. The Trial Court's Preclusion of Mr. Frost's Reasonable Doubt Summation Had a Substantial and Injurious Effect on the Verdict.

The Washington Supreme Court unanimously concluded that the trial court's erroneous decision to preclude Mr. Frost's reasonable doubt argument not only cost him his Sixth Amendment right to have his counsel challenge the sufficiency of the evidence in summation, but it lowered the prosecution's burden of proof in violation of due process. *Frost III*, 757 F.3d at 914 (9th Cir. 2014) (citing *State v. Frost*, 161 P.3d 361, 365-6, 368-9 (Wash. 2007) ("*Frost I*"). Washington law and the facts adduced at trial entitled Mr. Frost to argue that he acted under duress and that the prosecution failed to prove that he participated in his accomplices' criminal acts "with adequate knowledge of promotion or facilitation." *Frost I*, 161 P.3d at 368. This decision binds the federal court in habeas review. *See Bradshaw v. Rickey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus").

The state court error had a substantial and injurious effect on the verdict because, as this Court found, the error took reasonable doubt from the jury, despite a factual and legal basis for the argument. The state's insistence that the defense be precluded from arguing reasonable doubt underscored the importance of the concession to the prosecution, as did the state's emphasis on the concession in rebuttal summation, where it was freshest in the jurors' minds as they began deliberation.

The state charged Mr. Frost as an accomplice; under Washington law and "in accordance with due process, the State was required to prove the elements of accomplice liability, beyond a reasonable doubt, as to each offense." *Frost I*, 161 P.3d at 368 (citations omitted). This included proof that he "participated in each of his accomplices' criminal acts with adequate knowledge of promotion or facilitation. *See* RCW 9A.08.020(3)(a) (requirements for accomplice liability)." *Frost I*, 161 P.3d at 368. Under Washington law, mere presence and knowledge of criminal activity is not enough; an accomplice must have knowledge of the specific charged offense. *State v. Roberts*, 14 P.3d 713, 735 (Wash. 2000), *as amended on denial of reconsideration* (Mar. 2, 2001). Not only did the state bear the burden of proving that Mr. Frost had the requisite knowledge but, as the state court found, there was an "evidentiary basis, however slim, for counsel to argue that the State failed to prove Frost participated in each of his accomplices' criminal acts with

adequate knowledge of promotion or facilitation." *Frost I*, 161 P.3d at 368. The state court found this was "best illustrated by the robberies in which Frost was only a driver and remained in the car." *Id.* at 368–69.

While Mr. Frost generally admitted his involvement in the incidents in his trial testimony and recorded statements to police that were played at trial, his mental state at the time of the robberies was less clear cut. The Washington Supreme Court held that Mr. Frost's confession and his testimony left open the possibility of a mental state defense to the prosecution's theory that he was an accessory to the charged offenses. *Frost I*, 161 P.3d at 368. "The defense theory of the case was two-fold: there was reasonable doubt as to whether Frost's involvement rose to the level of an accomplice and, regardless, any actions he took were under duress. Defense counsel explained both theories in his opening statement and developed both throughout the trial." *Frost III*, 757 F.3d at 913.

The trial court, at the prosecutor's request, improperly derailed Mr. Frost's trial strategy just before summation by forcing him to concede guilt even though he had an evidentiary and legal basis to challenge the state's case of accessorial liability. "As the Court recognized in *Herring*, the primary purpose of a defendant's closing is to hold the State to its burden of proof." *Frost III*, 757 F.3d at 917 (citing *Herring v. New York*, 422 U.S. 853, 862 (1975) ("closing argument is the last clear chance to persuade the trier of fact that there may be reasonable

doubt of the defendant's guilt.")). Here, "defense counsel was forced to counter th[e state's] closing with 'one hand tied behind his back.'" *Frost III*, 757 F.3d at 916 *(*quoting *Frost v. Van Boening*, 692 F.3d 924, 936 (9th Cir. 2012) (McKeown, J., dissenting) ("*Frost II*")).

The trial court instructed Mr. Frost's counsel: "You must admit the elements of the offense have been proved before you can use the duress offense." (ER 35). (*See* ER 37) ("[A] defense of duress necessarily allows for no doubt that the defendant did the acts charged . . . ."). Mr. Frost's counsel followed the trial court's order and conceded his client's guilt. (*See* ER 186) (conceding guilt on the Gapp robbery); (ER 190) (conceding guilt on the Ronnie's Market robbery); (ER 194) (conceding guilt on the T & A robbery). The trial court order precluding Mr. Frost from arguing reasonable doubt to the jury "took the question of reasonable doubt from the jury" *Frost III*, 757 F.3d at 917.[3]

[3]The respondent has argued, counterfactually, that Frost *did argue reasonable doubt* in summation, an argument which was adopted by the panel majority below to adopt. *Frost II*, 692 F.3d 924. This Court, however, flatly rejected respondent's argument and for good reason. *See Frost III*, 757 F.3d at 913 ("As a result, defense counsel never argued in closing that the State had failed to meet its burden of proof."). Petitioner has always maintained the argument was based on a misreading of the record. (*See, e.g.,* Dkt. 6 at 13 n.3). Like this Court, the Washington Supreme Court also concluded that "defense counsel did not argue that the State had failed to meet its burden of proof[.]" *Frost I*, 161 P.3d at 364. The respondent has never argued that the state court's conclusion in this regard was clearly unreasonable, and therefore it must stand. *See Williams v. Swarthout*, 771 F.3d 501, 506 (9th Cir. 2014) (noting that under AEDPA, the federal habeas

The fact that the trial court prevented Mr. Frost from contesting the *mens rea* element of accomplice liability, even though he had an evidentiary basis to do, demonstrates prejudice. *See United States v. Miller*, 767 F.3d 585, 601 (6th Cir. 2014) (finding erroneous jury instruction was not harmless because it concerned the "defendants subjective motivations[,]" a contested element of the offense). In the analogous context of a faulty jury instruction, the Supreme Court in *Neder v. United States*, held that "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." 527 U.S. 1, 19 (1999). This Court has already found that Mr. Frost contested the *mens rea* element of the charges and the state court concluded the evidence was sufficient to support this defense. Consequently, the error is not harmless.

Moreover, in assessing the prejudice from a trial court error that prevented defense counsel from advocating for his client, the court should assume the full damaging potential of that advocacy. For example, where the constitutional error prevented the defense from doing something—such as fully cross-examining a witness—the Court has taught that the "correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing

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court is "required to defer to" state court decision even when it favors the petitioner).

court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). *See id.* ("Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.") (citations omitted).

The prosecution's insistence, here, that the defense counsel concede criminal liability underscores the importance of the concession to the prosecution's case and is further evidence of the substantial effect the concession had on the verdict. *See Arizona v. Fulminante*, 499 U.S. 279, 297-8 (1991) (prosecutor's statement to court during a suppression hearing that witness credibility was an importance issue was evidence of the witness's materiality). During the charging conference, for example, the state explained, "My concern is we are going to see him get up in closing and argue, first of all, we haven't proved accomplice liability for any of them and then saying duress." (ER 35). That Mr. Frost's reasonable doubt argument concerned the prosecution is evidence that the issue was substantial and

that precluding the defense from arguing it had an injurious effect on the trial's outcome.

The prosecution's rebuttal summation also emphasized the effect of the *Herring*/*Winship*[4] error and reflected its importance to the prosecution case. The prosecution "pounced on the failure of defense counsel to argue that the State hadn't proven the elements of the crime, calling it 'noticeably absent,'" and suggesting that Mr. Frost's counsel abandoned the argument because he knew "'his argument is phoney,'" *Frost III*, 757 F.3d at 913-4.

The Supreme Court routinely emphasizes the importance of the prosecution's summation in evaluating trial error prejudice. *See*, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (the "likely damage [from suppressed statements favorable to the defense] is best understood by taking the word of the prosecutor . . . during closing arguments[.]");[5] *Strickler v. Greene*, 527 U.S. 263, 295 (1999) (citing absence of summation on testimony as evidence that the suppression of impeachment evidence was not material); *Fulminante*, 499 U.S. at 297-8 (concluding coerced confession was prejudicial based, in part, on prosecutor's summation); *Taylor v. Kentucky*, 436 U.S. 478, 487-488 (1978)

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[4]*In re Winship*, 397 U.S. 358 (1970).

[5]*Kyles* noted that the materiality standard under *United States v. Bagley*, 473 U.S. 667 (1985), is more demanding than the *Brecht* standard. *Kyles*, 514 U.S. at 435.

(concluding jury instruction error in combination with the prosecution's arguments "created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial.").

This Court has also repeatedly found that the prosecution's summation illuminates the effect of the trial court error. *See, e.g., Ocampo v. Vail*, 649 F.3d 1098, 1114 (9th Cir. 2011) (confrontation clause violation "in combination with the prosecutor's closing argument remarks had a substantial and injurious effect or influence in determining the jury's verdict.'); *Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir. 2005) ("'[t]he likely damage [of suppressed evidence] is best understood by taking the word of the prosecutor'" and looking at what was stated in closing argument) (quoting *Kyles*, 514 U.S. at 444); *Hayes v. Brown*, 399 F.3d 972, 986 (9th 2005) (en banc) ("The importance of [a witness's] testimony was underscored by the prosecution in its closing argument"); *Alcala v. Woodford*, 334 F.3d 862, 873 (9th Cir. 2003) (finding prejudice when the prosecutor [has] capitalized on defense counsel's deficient performance and used it to his advantage in closing arguments) (cited in *Duncan v. Ornoski*, 528 F.3d 1222, 1246 (9th Cir. 2008)); *Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir. 2002) (prosecutor's reliance on certain evidence in closing demonstrated "reasonable probability" that, but for trial counsel's failure to investigate contrary evidence, result would have been different).

That the trial court error here occurred at the end of trial only enhanced its effect on the jury's deliberations. As this Court has noted, prejudice inheres most strongly from those improprieties that are "presented at end of trial and therefore 'freshest in the mind of the jury when they retired to deliberate.'" *Crotts v. Smith*, 73 F.3d 861, 867 (9th Cir. 1996) (citing *United States v. Jenkins*, 7 F.3d 803, 808 (9th Cir. 1993)). And in *United States v. Sanchez*, this Court found it "significant that '[t]he prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations.' Given the timing, the impact was likely to be significant, and the court did not intervene." 659 F.3d 1252, 1259 (9th Cir. 2011) (quoting *United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001)).

Although evidence existed to support the jury's verdict, it was not as clear cut as the Respondent claims. The Washington state court recognized this when it found an "evidentiary basis" for Mr. Frost's counsel "to argue that the State failed to prove Frost participated in each of his accomplices' criminal acts with adequate knowledge of promotion or facilitation." *Frost I*, 161 P.3d at 368. Underscoring the ambiguity in the evidence was the fact that the jury was instructed on December 11, 2003, but did not return a verdict until December 17, 2003. (ER 325). *See, e.g.*, *Mayfield v. Woodford*, 270 F.3d 915, 926 (9th Cir. 2001) (en banc) (citing the brevity of jury deliberations as reflecting the relative strength of the

case); *See also Murtishaw v. Woodford,* 255 F.3d 926, 974 (9th Cir. 2001) (considering the length of jury deliberations as probative of whether trial court error had a substantial and injurious effect on the verdict).

For these reasons, the Respondent here cannot carry its burden of disproving that the trial court error had a substantial and injurious effect on the verdict and this Court should issue the writ.

C. The Washington State Court Found the Error Harmless Under the Washington State Untainted Evidence Test, Which is Contrary to the *Chapman* Harmless Error Standard.

As noted above, *Davis v. Ayala* does not require "a separate AEDPA/*Chapman* and *Brecht* analysis" because "*Brecht* test subsumes the limitations imposed by AEDPA." 135 S. Ct. at 2199 (citing *Fry*, 551 U.S. at 119-120). That is, a state court finding that a trial error is harmless is unreasonable where the federal habeas court concludes the error had a substantial and injurious effect on the verdict. *See Ayala*, 135 S. Ct. at 2211 (describing *Ayala* as holding, "If a trial error is prejudicial under *Brecht*'s standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable.") (Sotomayor, J., dissenting).

Here, the state court's harmless error analysis was unreasonable for another reason. The Washington state court did not apply the *Chapman* harmless error standard, which requires the court to "weigh the evidence against the effect of the

error." *Yates v. Evatt*, 500 U.S. 391, 404 (1991) *disapproved of on other grounds by Estelle v. McGuire*, 502 U.S. 62 (1991). Instead, the state court applied the Washington overwhelming untainted evidence test which "'*looks only at the untainted evidence* to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.'" *Frost I*, 161 P.3d at 370 (quoting *State v. Guloy*, 705 P.2d 1182 (Wash. 1985)) (emphasis added).[6]

Four members of the Washington Supreme Court dissented and took issue with the overwhelming untainted evidence. *Frost I*, 161 P.3d at 372 (Sanders, J. dissenting). The dissent correctly identified the flaw in the five-member majority's reasoning. As the dissent argued, "we are concerned here with arguments—not evidence." *Id.* "A jury interprets and understands the evidence through the lens of the attorneys' final arguments. We cannot determine what evidence is or is not tainted because we do not know how the jury would have interpreted the evidence in light of the proposed arguments." *Id.*

Whereas the Washington overwhelming untainted evidence test "looks only" at the untainted evidence, federal law, on the other hand, *requires* that the effect of error be considered in assessing the effect of the constitutional error. The *Chapman*

[6]The trial court also found the error harmless because the trial court had instructed the jury on reasonable doubt. *Frost I*, 161 P.3d at 371. *But see Carter v. Kentucky*, 450 U.S. 288 (1981) (rejecting state's argument that the otherwise proper jury instructions corrected trial court's error).

harmless error standard asks "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (emphasis in original). In *Chapman*, the Court rejected California's harmless error standard and its "emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'" 386 U.S. at 23. Instead, the Court endorsed the approach it took in *Fahy v. Connecticut*, 375 U.S. 85 (1963). "'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman*, 386 U.S. at 23 (quoting *Fahy*, 375 U.S. at 86-87). Ultimately, *Chapman* found prejudice despite a "reasonably strong 'circumstantial web of evidence'" because the state could not prove "beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to [Chapman's] convictions." *Id.* at 26.

Since *Chapman*, the Court has repeatedly reaffirmed that assessing the effect of the error must be a part of the harmless error analysis. In *Yates v. Evatt*, the Court emphasized that to assess harm, "a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict" 500 U.S. at 404. "Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as

against the effect probative force [of the error]." *Id.* *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) ("Whether such an error is harmless in a particular case depends upon a host of factors" including the significance of the error and the overall strength of the prosecution's case) (citations omitted); *Bumper v. North Carolina*, 391 U.S. 543, 550 & n.16 (1968) (erroneous admission of evidence not harmless under *Chapman* where it was "plainly damaging" and "there can be doubt that the petitioner was the[] perpetrator").

The ultimate question in assessing prejudice is the impact of the error. "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates*, 500 U.S. at 403; *Schneble v. Florida*, 405 U.S. 427, 430-32 (1972) ("Not only is the independent evidence of guilt here overwhelming, . . . but the allegedly inadmissible statements . . . at most tended to corroborate certain details of petitioner's comprehensive confession."); *Neder v. United States*, 527 U.S. 1, 17 (1999) (in evaluating the prejudice from a missing element from a faulty jury instruction "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."); *Bumper*, 391 U.S. at 562 & n.16.

Respondent would, no doubt, point to the Court's description of the prosecution's "'overwhelming evidence' of guilt" in *Harrington v. California*, 395 U.S. 250, 254 (1969), as proof that Supreme Court has permitted, and perhaps even endorsed, Washington's "overwhelming untainted evidence" test. This argument has no more than surface appeal. In fact, *Harrington* did just what Washington's untainted evidence test forbids: it weighed the impact of the constitutional *Bruton*[7] errors against the strength of the prosecution's case. *Harrington* even warned against "giving too much emphasis to 'overwhelming evidence' of guilt" and identified the ultimate question as "the probable impact of the two confessions [admitted in violation of *Bruton*] on the minds of an average jury" *Id.* at 254 (citing *Chapman*, 386 U.S. at 42-5). Ultimately, *Harrington* concluded they had little impact because the statements were cumulative, not in dispute, and the case against him was otherwise overwhelming. 345 U.S. at 253-4. In other words, *Harrington* is an example of the need to weigh the prejudicial effect of the error against the strength of the case. *See Schneble*, 405 U.S. at 430 (describing *Harrington* weighing "the overwhelming evidence of Harrington's guilt, and the relatively in prejudicial impact of these codefendants' statements"); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (question is whether error "might have affected" outcome);

[7]*Bruton v. United States*, 391 U.S. 123 (1968) (admission of non-testifying codefendant's statement violates the Sixth Amendment Confrontation Clause).

Delaware v. Van Arsdall, 475 U.S. at 684 ("[w]hether such an error is harmless in a particular case depends upon a host of factors" including the significance of the error and the overall strength of the prosecution's case) (citations omitted).

In contrast, the Washington untainted evidence test eschews any consideration of the effect of the error. The case in which Washington adopted the rule, *State v. Guloy*, 705 P.2d 1182, claimed to have derived the test, which looks "only at the untainted evidence," from two Supreme Court cases, *Parker v. Randolph*, 442 U.S. 62 (1979), *abrogated by Cruz v. New York*, 481 U.S. 186 (1987); and *Brown v. United States*, 411 U.S. 223 (1973). 705 P.2d at 1191. *Guloy* misread *Randolph* and *Brown*. In those two cases, the Court clearly weighed the force of the evidence against the prejudicial effect of the constitutional violation. *See Randolph*, 442 U.S. at 70-1 ("In some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at trial was harmless error.); *Brown*, 411 U.S. at 231 (finding error harmless where "the testimony erroneously admitted was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury"). In *Frost I*, the state court not only failed to weigh the prejudicial effect of the error, it failed to take its effect into account at all.

In sum, the Washington state court's application of the untainted evidence test was contrary to the *Chapman* harmless error standard.

D. The Court Should Also Consider the Cumulative Effect of the Error in Conjunction with the Admitted *Brady* and *Napue* Violations.

Following oral argument before the en banc panel, the Court directed the parties to brief whether it should expand the certificate of appealability to address Mr. Frost's claims the prosecution had wrongfully withheld the plea agreement of a key cooperating witness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and then knowingly elicited false testimony from that witness about the agreement, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). (Dkt. 66.) The Court also directed the parties to address whether there was cause and prejudice to excuse the procedural default of these claims, given the *Brady* allegation and the state's continued delay in disclosing the plea agreement. (*Id.*). In the briefing that followed, Respondent conceded that the prosecution hid the cooperator's plea agreement and solicited false testimony from the cooperating witness. (Dkt. 68 at 4-5.) Ultimately, the Court denied the matter as moot and declined to expand the certificate of appealability when it issued the writ based on the *Herring*/*Winship* violations. *Frost III*, 757 F.3d at 919. To the extent that the matter is no longer moot, the Court should revisit it. The state's concession of prosecutorial misconduct is relevant given that the Supreme Court has held that a trial error (such as the

limitation on summation) "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not 'substantially influence' the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. This case presents such an example. Moreover, to the extent the state court refused to consider the *Brady*/*Napue* claims, the AEDPA limitation on relief is irrelevant. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

CONCLUSION

For these reasons, the Court should grant the writ of habeas corpus.

Dated: July 20, 2015.

Respectfully submitted,

s/Erik B. Levin
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), counsel informs the Court *Boysen v. Herzog*, 14-35919, an appeal of a denial of a petition for a writ of habeas corpus, 28 U.S.C. § 2254, raises a closely-related issue of whether the Washington state untainted evidence test is contrary to the *Chapman* harmless error test.

In addition, *Cornett v. Uribe*, 13-16174, an appeal currently on submission with this Court addresses the effect of *Davis v. Ayala*, 576 U.S. __, 135 S. Ct. 2187 (2015), on the federal habeas corpus harmless error standard.

DATED this 20th day of July 2015.

s/Erik B. Levin

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief used proportionally-spaced typeface of at least 14 points and contains no more than 7000 words, including headings, footnotes, and quotations.

DATED this 20th day of July 2015.

s/Erik B. Levin

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED this 20th day of July 2015.

s/Erik B. Levin