OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. ABEL MARTINEZ-SALAZAR.

CASE NO: 98-1255

PLACE: Washington, D.C.

DATE: Monday, November 29, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 98-1255

ABEL MARTINEZ-SALAZAR. :

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Washington, D.C.

Monday, November 29, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MICHAEL GORDON, ESQ., University, Mississippi; on behalf of the Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 98-1255, United States v. Abel Martinez-Salazar.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

This case concerns a recurring problem in Federal jury selection: the erroneous refusal of a trial judge to dismiss a potential juror for cause, followed by the defendant's exercise of a peremptory challenge to remove that juror.

The Ninth Circuit held in this case that that sequence of events requires automatic reversal of a conviction whenever the defendant goes on to exhaust his peremptory challenges during jury selection. We disagree with that result for three alternative theories.

First, the use of a peremptory challenge to exclude a juror who should have been excused for cause is not a denial or impairment of the peremptory challenge right, but is a proper purpose for which the challenge is used.

Second, assuming that there is an impairment of the peremptory challenge right in a case like this one, that impairment does not warrant reversal of an otherwise fair trial where the jury that is actually empaneled and sits is impartial within the meaning of the Sixth Amendment.

And third, even if there is a case in which, despite the impartiality of the jury that sits, there might be an error in the peremptory challenge process that affects substantial rights, no such effect should be found in a case like this one where the defendant had concededly untrammeled use of 9 out of 10 of his peremptory challenges and never indicated on the record that he objected to any panel member that was actually empaneled and seated on the jury.

QUESTION: Mr. Dreeben, you -- you mentioned I think peremptory challenge right impairment. What is the source of those peremptory challenge rights?

MR. DREEBEN: The source of peremptory challenge rights in the Federal system is rule 24 of the Federal Rules of Criminal Procedure which provides a right of peremptory challenge to the defense in criminal cases that increases in number depending on the type of case that there is.

Now, rule 24 does not, by its terms, spell out

what procedures trial courts should use to administer the peremptory challenge process. And this Court has long made it clear that trial courts have discretion to formulate appropriate procedures.

QUESTION: I take it then it really is impossible to justify the Ninth Circuit's reasoning if there's a constitutional question here where we're talking about Federal rules.

MR. DREEBEN: That's right, Mr. Chief Justice. The -- the only impairment that is conceivable on this record in our view would be of the rule 24 right of peremptory challenge. The Ninth Circuit, in effect, converted what it thought was a violation of the rule into a due process problem by reasoning that any time a defendant is deprived of a rule-based right, the defendant is also deprived of a procedural right protected by the Constitution. That is not a theory that this Court has ever endorsed in its analysis of a variety of rule-based and statutory rights, particularly in the context of Federal habeas corpus. And as a --

QUESTION: But as far as rules are concerned, Mr. Dreeben, this case is -- is perhaps larger than -- on the face because the same peremptory challenge by rule, by Federal rule, exists on the civil side. So, is your argument today based on the consequences of not allowing a

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challenge for cause improperly -- does that -- would that follow equally for civil peremptory for-cause challenges?

MR. DREEBEN: Certainly, Justice Ginsburg, I think that the rule that -- that we are arguing for today would apply equally, if not even more strongly, in the civil context.

This Court has already made clear in the McDonough v. Greenwood case that errors in the voir dire process that might impair the intelligent exercise of peremptory challenges do not rise to the level of harmful error requiring reversal of a -- of a civil judgment. And the principle that the Court applied in that case is that the cost to society, to the courts, to the litigants is too high to reverse a conviction simply because an error in the jury selection process might have infringed a party's desire to remove a particular juror on a peremptory basis rather than for cause.

Now, if the error in question in jury selection actually results in the seating of a biased juror and the defendant has adequately preserved that challenge, that is an entirely different case because that case goes to the heart of what the Sixth Amendment protects for the defendant.

QUESTION: Do you adequately preserve it if you object and say, I want an extra peremptory? Suppose --

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suppose the biased juror is seated wrongfully. All the peremptories have been exercised and you ask for an additional peremptory. Is -- is that preserving your right?

MR. DREEBEN: Well, in our view it would -- it would not result in an error that would require reversal of the conviction.

QUESTION: Even if you have no peremptories left and the judge doesn't give you one?

MR. DREEBEN: Unless the -- the juror who you would have exercised the peremptory against is in fact a biased juror so that he sits on the jury --

QUESTION: No, no. I'm assuming that he didn't.

MR. DREEBEN: If he does not -- if he does not sit on the jury, our position is that the claim may be preserved, but the claim doesn't warrant relief because the costs to society are simply too high to reverse a conviction simply because a defendant has been deprived of, in that -- in the hypothetical that Your Honor has given, one peremptory challenge.

QUESTION: So, there's never any prejudice. There will never be any prejudice.

MR. DREEBEN: There will be prejudice, Justice Souter, if in fact the defendant is forced by virtue of the exhaustion of peremptory challenges to accept a juror

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on his panel who is biased.

QUESTION: Okay. But -- but that -- that's because he is accepting a juror who should have been excused for cause. There will never be any prejudice from, in effect, the abridgement of the -- the peremptory challenge right itself.

MR. DREEBEN: If the Court accepts our primary harmless error theory that the only cognizable harm that the defendant can assert is the deprivation of an impartial jury, that's correct.

Now, we have a fall-back --

QUESTION: But in -- in effect, you -- that -- that says, forget peremptories. The -- the only issue that you can pursue is the issue of a biased juror whom you have claimed should have been excused for cause.

MR. DREEBEN: Well, Justice Souter, it doesn't say to the litigants or to Federal trial judges, forget peremptories. There is a rule-based right that's at issue here.

QUESTION: Well, I think it says, forget them if the judge doesn't let you have them because the only issue that can be pursued is the issue of the biased juror who should have been excused for cause.

MR. DREEBEN: Well, there are a variety of different scenarios that could come up. In the Federal

system, if a judge announced at the outset of the trial, which I'm not aware that any judge has done, but if the judge announced at the outset of the trial, in my courtroom we simply don't have peremptory challenges, I think they're a waste of time and inefficient, I would assume that a defendant would be able to pursue a extraordinary writ in a court of appeals and have that error corrected.

QUESTION: What if he -- what if he doesn't -- what if he, in fact, goes to trial? I take it at the end of the trial, he would get no relief on your theory, absent the seating of a biased juror who should have been excused for cause anyway.

MR. DREEBEN: That's correct, and I would expect that the appellate court would write a rather strong opinion that would admonish that trial judge and others in the circuit not to flout the rules of procedure.

QUESTION: Mr. Dreeben, what if --

QUESTION: Well, I suppose under your rule it works the other way around because if -- if -- I suppose the trial judge could say, you know, there's a lot of close for-cause issues here. I'm not sure. You guys -- you people exercise your peremptories first and then I'll rule on the for-cause.

MR. DREEBEN: Well, I think that a defendant

would have a different objection in that case, which would be that there the -- the judge had essentially changed the way the peremptory challenges were -- were administered under settled rules of the common law, and therefore he could tell the judge that that is not the way that peremptory challenges are administered.

Now, the question --

QUESTION: Would he get a reversal on appeal?

QUESTION: Would he get an appeal?

QUESTION: That's -- that's the issue. You -- you would say still no reversal --

MR. DREEBEN: That's right.

QUESTION: -- on appeal unless there's been a --

What if -- what if -- I take it to be the Government's position that peremptories must be used to strike a biased juror. Suppose -- suppose counsel is so certain that a biased juror is -- is being seated over his objection that he does not use his last peremptory to strike that -- that biased juror. He says, I'm going to use this peremptory for somebody else.

MR. DREEBEN: This Court --

QUESTION: And the biased juror is -- is then seated.

MR. DREEBEN: This -- this Court --

QUESTION: Now, is it the Government's position that he -- that there's no harm because he had a peremptory which he could have used to strike that biased juror?

MR. DREEBEN: I think that would be our position, Justice Scalia, but it's important to distinguish --

QUESTION: Do you have a fall-back position? Because that one is not very attractive.

(Laughter.)

QUESTION: So, what's your second position?

MR. DREEBEN: Well, Justice O'Connor, that -- that fact scenario was not actually the fact scenario of this case, and I would -- would agree that it is a far more serious intrusion upon the defendant's rights and upon the integrity of the judicial system if a biased juror actually sits on the panel. There are States that have determined that in the administration of the peremptory challenge process, there should be no gamesmanship about whether a biased juror sits or doesn't sit.

QUESTION: So, we -- we could --

QUESTION: Well, let's suppose that we don't accept the Government's proposal, your first choice here. Then what's your fall-back position?

MR. DREEBEN: Our fall-back harmless error position is that the question in a case in which the defendant is claiming that his peremptory challenge rights have been infringed is whether there is a significant enough effect on those rights to justify setting aside the conviction.

QUESTION: You don't have to retreat that far in order to overcome the objection that Justice O'Connor and I find rather -- rather significant. That is to say, you can still maintain your first position on harmless error without going the further step to say, moreover, even when a biased juror is seated, when you had one peremptory left that you could have used to strike him, that -- that is harmless error. I mean, that -- that goes beyond what -- it seems to me what you -- what you need to say in order to sustain this case under your -- under your -- your primary theory.

Your primary theory is if a biased juror is seated, there's harm. And in the hypothetical I've given you, biased juror has been seated, but you're trying to, you know, take a bigger bite and say, moreover, it doesn't even matter if a biased juror is seated so long as you had a peremptory left which you could have used to strike him. I -- I don't know why you have to go that far.

MR. DREEBEN: I don't have to go that far and I

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don't want to fall back any farther than I have to. But let me point --

(Laughter.)

QUESTION: Don't fall back all the way to your second theory. You can still use your first -- your first biased juror theory and --

MR. DREEBEN: That principle could be applied consistently to cover both cases.

QUESTION: But, Mr. Dreeben, it would leave out the case where the lawyer says, I know I don't have a basis for a challenge for cause. I can't say this would be a biased juror. But he just seems fishy to me. I don't think he'd be good for my client. That's what a peremptory is supposed to do. And that you -- you say would be immunized from appeal. Just too bad.

MR. DREEBEN: Essentially, Justice Ginsburg, where the Ninth Circuit and the Government disagree on this case is how serious an injury that is to the fairness of the trial. The Ninth Circuit's position is that regardless of how fair the actual unfolding of the trial process is, whether the defendant had counsel who performed effectively, introduced the evidence that he wanted to introduce, got an opportunity to cross examine the Government's witnesses, and had a impartial jury within the Sixth Amendment -- the Ninth Circuit's position

is, despite all of that, the impairment of a rule-based, non-constitutional peremptory challenge, even a single one, requires tossing out the entire results of the trial and starting over.

Our position is simply that that is far too high a price to pay in a case in which the error does not affect the fundamental fairness of the trial, as an infringement of peremptory challenges does not.

This Court has reserved the category of structural error, error that justifies setting aside the results of a trial even though one cannot determine any effect on the outcome, for very serious and deep constitutional injuries to the fundamental structure of the trial, such as the total denial of counsel, or the sitting of a biased judge, or the denial of a proper reasonable doubt instruction, the kind of error that fundamentally infects the trial with unfairness or unreliability.

Our position is that the denial or infringement of a single peremptory challenge simply does not rise to that level.

QUESTION: But in this case, even the -- I think you -- you gave us at the outset three stopping points. In this case you could say, well, even if that were the rule, this doesn't make it because -- because this

defendant didn't point to any juror sitting on that jury that the defendant would have exercised a peremptory against.

MR. DREEBEN: That -- that's correct, Justice Ginsburg, and that would be falling back all the way further than some members of the Court have suggested that the Government needs to go. That is a case-specific result in this case because this defendant, when he got to the end of the jury selection process, and the judge said, well, I have a bunch of jurors in the box and I'm about to swear them, any objection, the defendant said, no. In this case there was no request for an additional peremptory challenge to use it against any other juror, and even if there might be an opportunity for the Court to consider reversing a conviction merely because of the impairment of peremptory challenges, I don't think this is that case.

QUESTION: Yes, but nothing -- you -- you don't want anything to turn on whether he requested a further perempt, do you? Because if anything does, everybody is going to request a further perempt and then we're going to have that case.

MR. DREEBEN: Well, I think that that is a substantial risk, Justice Souter. I also think that it's true that trial lawyers, when they're selecting a jury,

are trying to obtain either a result that wholly favors their client -- the defendant will be seeking an acquittal -- or at the very least a hung jury. And so, a -- a defense lawyer may not be willing to take the risk that he'll have some sort of reversible error on appeal.

QUESTION: Does the Government take any position as to the purpose of a peremptory challenge provided by the rules? Is it just to obtain an impartial jury, or is it also permitted -- is one of its permitted uses to get a jury that's simply favorable to the client, not impartial at all?

MR. DREEBEN: Well, that -- that is in fact the way peremptories are used, Mr. Chief Justice.

QUESTION: Yes, I know that.

(Laughter.)

MR. DREEBEN: The -- the legitimate purposes that have been ascribed by historical sources, going back to Blackstone, for the peremptory challenge include a buffer zone for the impartiality of the juror. Judges may make mistakes. Peremptory challenges help clean up those mistakes and safeguard the fundamental Sixth Amendment value which is at stake here.

The peremptory challenge also serves some more symbolic or atmospheric purposes of making the defendant more comfortable with the jury that actually is going to

decide his fate, and giving some assurance to the community that because the litigants have participated in jury selection, the body that actually decides the case is fairly disposed to decide it based on the facts and the evidence and the law.

The question here is since the jury that actually sat is indisputably impartial, are those additional values of the peremptory challenge, its reassurance to the litigants of the fairness of the trial, and its reassurance to the community that the verdict should be respected -- are those values sufficient to justify throwing out the results of an otherwise fair trial?

And our judgment is that they are not. They are important values, but they are not constitutionally protected values. They are neither values that go to the fundamental fairness of the judgment, nor do they go to the reliability of the ultimate conviction that ensued in this case. And as a result --

QUESTION: Of course, this case doesn't have to be decided on constitutional grounds. Theoretically they could be right under the rules.

MR. DREEBEN: That's correct.

QUESTION: Yes.

MR. DREEBEN: That's correct. I don't think

that there's any question that in our view the most that could be said is that there was an infringement of a rule-based right.

The first position that we have for the Court's consideration is that Federal law ought to be construed the same way that Oklahoma law was construed in Ross v. Oklahoma, which is to say that the peremptory challenge should properly be regarded as serving the purpose of protecting the impartiality of the jury.

QUESTION: But, Mr. Dreeben, there's not a word in the advisory committee note that suggests that the Federal peremptory challenge was to be used when the judge makes an error for cause. That was the Oklahoma law. But if you read the Federal rules, on the civil side and on the criminal side, they say, you have X number of peremptory challenges.

MR. DREEBEN: Oklahoma law was the same, Justice Ginsburg. There was nothing in the statutes or the rules that governed the court that determined whether there would be a procedural error if the defendant had to use a peremptory challenge to cure a for-cause strike, or to put it another way, whether once a defendant does cure the error in the for-cause denial, he has been deprived of anything protected under the rules.

QUESTION: Oh, no. You have to go further than

that, or to put it another way, whether if he doesn't challenge it and fails to use -- if he does challenge it, but fails to use his peremptory to get rid of it, he's been injured. I mean, the Oklahoma rule is you must use -- you must use -- a peremptory, which is the rule you're arguing for.

MR. DREEBEN: Well, Justice Scalia, I don't think that I have to have both halves of that rule.

QUESTION: Since you're talking about -- about the Oklahoma rule and you're saying that the Federal statute should be interpreted the same way, I assume that's how you want us to interpret the Federal statute.

MR. DREEBEN: I would have that interpretation, but I don't think that it's essential that the Court agree with that in order to agree that there is no infringement of the peremptory challenge when the defendant actually does what he does in this case because assuming that he could get review if he lets the biased juror sit on the jury and he actually has a fact-finder who doesn't satisfy the Sixth Amendment and this Court determines that's an error that warrants review either under reserved -- preserved error or plain error, it doesn't mean that he should also have the opportunity of having it the other way, actually using his peremptory challenge to remove that biased juror and still getting reversal on the theory

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that his peremptory challenge rights have been infringed.

And that's where we fundamentally part company with respondent. Respondent would have it that the defendant automatically gets reversal of his conviction if the judge makes even a single error in assessing a for-cause challenge. And that is not an uncommon experience in the Federal system.

One of the reasons why it doesn't result in the reversal of convictions in many circuits is they employ the rule that we're advocating here. If the defendant uses his peremptory challenge and the juror doesn't actually sit, then the defendant has not suffered the sort of harm that warrants reversing his conviction.

QUESTION: Mr. Dreeben, I asked you about the civil case because the Third Circuit in this Kirk against Raymark Industries case took the same position on the civil side that the Ninth Circuit took on the criminal side; that is, if you are denied a challenge for cause improperly, you get a new trial. The Third Circuit --

MR. DREEBEN: Even -- and that's right, and even if the juror is removed with a peremptory challenge, that's the position that the Third Circuit would take.

QUESTION: Yes.

MR. DREEBEN: And that's what we disagree with in this case.

Most of the courts that have adopted a rule of automatic reversal for these sorts of errors in the peremptory challenge process have relied on Swain v. Alabama and on dictum that appears in that decision in which the court said that the denial of the peremptory challenge is so important that it warrants a reversal without any further showing of error.

Now Swain, of course, didn't involve any question of an infringement of the defense peremptory challenges. That statement had no relationship to the facts of the case.

But Swain was citing and relying on cases from the 19th century that had reversed convictions without any inquiry into whether there was harmful error. Those decisions all preceded the enactment of the Federal harmless error statute and the Federal harmless error rule. And it's our submission that that dictum, which was not authoritative in the case in which it was announced in any event, should not be followed by this Court today because the approach taken in Federal law is that if an error does not have the sorts of harms that warrant reversal, it shall be disregarded.

Now, there are two ways to look at the problem of harmless error. One is to say, is there a -- is there a perceptible effect on the -- on the outcome of the case?

When all that you have is the denial of a peremptory challenge, there is no way to say that there is a perceptible effect on the outcome of the case. That kind of analysis applies when there is evidence that shouldn't have been admitted but was admitted or evidence that was excluded that should have been let in to the case, and it's possible to make an analysis of the entire record and determine whether there was injurious error.

The other category of harmless error analysis is what the Court has sometimes referred to as structural error which is the sort of fundamental deprivation of the basic elements of the trial process. And in that context, the Court does not look to see whether there is an effect on the outcome of the case. Reversal is automatic.

The Ninth Circuit has sorted out this error into the structural error box. The Government's position is that was wrong, that there is no way to categorize this error on the level of the errors that merit treatment as structural error.

QUESTION: Do -- do you have any way to tell us how often difficult for-cause questions come before trial courts? I -- I just have no feeling for how often the judge really has to make a close call on for-cause.

MR. DREEBEN: I think judges make close calls in virtually every case in which juries are empaneled because

many jurors --

QUESTION: On for -- on for-cause challenges.

MR. DREEBEN: On for-cause challenges not so much on whether the juror is actually qualified, whether he's a citizen and whether he's over 18 and whether he speaks English, but on the question of whether the juror can really be impartial.

QUESTION: But it's an easier case for the Government on appeal if the juror has been seated because of cases like Wainright against Witt where you defer to the -- the trial judge's ruling on the thing.

MR. DREEBEN: That's right, and there is the principle of abuse of discretion and it's hard to overcome that. So, most challenges to for-cause that the judge rejects do not result in appellate reversal.

But it's important to remember that jury selection doesn't take place with the parties having transcripts in front of them of what jurors actually said. They have to rely on the recollections of the judge and the parties. You're dealing with a lot of different jurors.

In this case, if you read the jury selection process, many, many jurors were brought in for individual questioning because of things that they said on the questionnaire. Some of those jurors, when questioned more

closely about whether they would favor one side or the other, ultimately concluded yes, Your Honor, I would be able to follow your instructions and apply the law to the facts of this case.

QUESTION: Are -- are there any courts that have, if it's just a cause -- excuse this juror for cause. The judge says no. The judge is wrong on appeal. Are there any courts that don't give a new trial in that circumstance? I'm leaving peremptories out of it.

MR. DREEBEN: When the -- when the juror actually sits on a case?

QUESTION: Yes.

MR. DREEBEN: Yes. There are -- there are courts that will treat it as a waiver of the defendant's right to challenge the juror --

QUESTION: Oh, no, but leaving peremptories out of it.

MR. DREEBEN: Well, it's hard to leave peremptories out of it, Justice Breyer, because --

QUESTION: I see. They all go on that theory. It's the Oklahoma type theory.

MR. DREEBEN: What -- what normally -- what -- no, they don't all go on that theory.

QUESTION: I mean, the ones that don't, they either give him a new trial or they go on that theory.

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MR. DREEBEN: Correct. And those cases treat the failure to exercise a peremptory as a waiver of the right to complain about the impartiality of the jury or the lack of impartiality of the jury.

QUESTION: I have a question just about the terms of the rules. In a case like this where there are multiple defendants, I -- I guess it's clear that the judge could have given further perempts, could have allowed more beyond the -- what was it -- 10?

MR. DREEBEN: Correct.

QUESTION: In a case in which there is a single defendant, does the judge have any discretion to increase the number?

MR. DREEBEN: The judge probably does have inherent authority to do it, and if he did it --

QUESTION: But not under the terms of the rule.

MR. DREEBEN: He does not have it under the terms of the rule, and one could read the rules quite strictly to say only in multi-defendant cases can a judge do it.

In fact, the process of jury selection is basically aimed towards achieving an impartial fact-finder that can decide the case, and the judge has to have latitude to ensure that he basically gets it right because we have a very strong interest in assuring the finality of

the verdict. It's hard to get everybody to come to court for the trial. It costs a lot of money. It takes a lot of time for everybody. Once that is done, the judge has to have a certain amount of latitude to make sure that this particular jury will not be subject to it being assailed on appeal.

In this very case, for example, there was a question that arose about whether one of the selected jurors could sit on the jury because he had absconded after jury selection and he didn't quite come back for some further instructions by the court, and then he was later found and brought back to court. The judge said, I don't really want any problems with this. The defendant has objected. The Government's position is sort of up in the middle. I'm just going to not put the guy on the jury so that I have the assurance that there will be no reversible error claims that will remain at the end of jury selection.

I'd like to save the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Dreeben.

Mr. Gordon, we'll hear from you.

ORAL ARGUMENT OF MICHAEL GORDON

ON BEHALF OF THE RESPONDENT

MR. GORDON: Mr. Chief Justice, may it please

the Court:

I think Justice Souter's question regarding the -- whether there would be any prejudice ever found under the Government's proposed rule is very telling. What we're discussing here are two alternative propositions for addressing harmless error in the case. If the Government is correct in its primary position in this case, the error will almost always be harmless.

QUESTION: That -- the error would not be harmless where a biased juror was, in fact, seated. Isn't that correct?

MR. GORDON: That -- that's correct. Only where the -- where the trial court has made 10 or more errors in the Federal system would that ever occur, otherwise under the Government's primary theory, the defendant would have waived the right to assert a Sixth Amendment violation later on down the road.

QUESTION: But where -- where a biased juror has been seated, yes, you -- you would be able to claim that this error was harmful, but -- but that ability is totally superfluous. It doesn't give you anything you wouldn't have without it anyway because you'd be able to say the juror should have been excused, and the error was failure to grant the motion to strike for cause.

MR. GORDON: Well, I agree with that. I think

the Government's position offers the defendant nothing and relegates the peremptory challenge into nothing less than a tool to clean up trial court errors on for-cause challenges.

And I think what it does is it completely ignores the primary and the core value of a peremptory challenge. Analytically peremptory challenges are very distinct from for-cause challenges. They are intended to be exercised on an otherwise qualified jury pool.

QUESTION: Yes, but the rule that you propose would turn every for-cause ruling of the judge into an automatic reversal it seems to me.

MR. GORDON: Well, I -- I would disagree with that.

QUESTION: And I think that would be troublesome.

MR. GORDON: Well, Justice O'Connor, I would disagree with that characterization for two reasons.

First, we need to look at the system as it now exists today, and most of the circuits have taken the position consistent with the Ninth Circuit Court of Appeals. The primary question as to whether the district court made a mistake with respect to a for-cause challenge is already reviewed under an abuse of discretion standard. It allows the district court quite a lot of discretion

before ever reversing that conviction.

We understand that even in the Government's reply brief they concede that that decision is virtually unassailable. It's only in the rare case, perhaps in 2, maybe 1 percent of the cases, do we ever reach the position where the district court has abused its discretion and failed to remove the juror for cause. I would suggest to you it's the existence of peremptory challenges that allow the -- that allow the courts of appeals to have some comfort in -- in applying that very discretionary standard of review.

The second issue is --

QUESTION: I mean, why shouldn't -- why shouldn't your client have been put to the -- to the hard choice of if he was so sure about -- about the impropriety of seating this juror, he shouldn't have wasted one of his peremptories. It was really your choice to shoot the peremptory on it, wasn't it?

MR. GORDON: No. I disagree with that proposition. Defendant has the right to use the challenge, the peremptory challenge, in any event in any way he sees fit. When the district court made a mistake with respect to the for-cause challenge, he is viewing the prospective juror, Juror Gilbert in this case who said that he would favor the prosecution, and he is looking at

other jurors for another kind of bias, that kind of bias that cannot be articulated. It cannot be expressed in any meaningful way.

QUESTION: Well, that's -- that's one -- one -- that's one version certainly. Now, I won't say it's implausible. In the Ross case, Oklahoma had a different version. And I -- I think some States follow that.

I mean, it's not inexorable that one reach the conclusion you reach that peremptories are so valuable that they should never have to be used to repair a possible error on the part of the trial judge.

MR. GORDON: I think that's -- that's partially true. I don't think it's illogical in a sense, but I think that question ought to be addressed not by the judiciary but by the legislative branch.

QUESTION: But again, the -- the Government isn't -- doesn't have to say that you -- you were forced to use it. They're not -- they don't need Oklahoma's position. It isn't a question of whether you had to waste your peremptory. The fact is you chose to use your peremptory that way. Question: Did you get 10 peremptories? Answer: You got 10 peremptories. You chose to waste one of them to strike a juror who would have been -- should have been disqualified for cause anyway. Your remedy for that problem, if you were so sure

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about it, was to get the case reversed on appeal, but you chose to use one of your 10 peremptories. It seems to me you haven't been harmed.

MR. GORDON: I think --

QUESTION: It was your choice.

MR. GORDON: I think, Justice Scalia, that ignores the reality of the trial. As the Government has explained, the defense attorney is in there to defend the case and to win the case. He wanted to have both an objectively fair and impartial jury as required by the Sixth Amendment, and he wanted to be able to remove those jurors whom he perceived prejudiced in this case.

After all, we have to understand why we have peremptory challenges. We have peremptory challenges because we entrust counsel to intuit with respect to prospective jurors in this case. Defense counsel --

QUESTION: But, Mr. Gordon, in this case there wasn't even the suggestion by counsel that if I had that extra peremptory, juror 10 would not have been on that panel. So, we're talking in kind of abstract terms when in this case, there was neither a biased juror sitting on the panel, nor even one that the defense counsel said I would have challenged this one if I could have.

MR. GORDON: With all due respect, Justice Ginsburg, I disagree with that proposition for two

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reasons. The first is, when we take a look at the record itself, the defendant -- when the for-cause challenge was denied, it was denied twice. The defendant asked for the for-cause challenge to be granted. It was denied. The defense remind -- reminded the district court that -- that the juror had indicated a disregard for the presumption of innocence. Prior to each ruling, the district court indicated that if the defendant wanted to use a peremptory challenge, he could use that peremptory challenge. It ignores the realities of trial to have the defendant stand up or sit up, or wherever he was at, and ask the -- ask the district court for something that had been expressly denied.

In that case -- and secondly --

QUESTION: For the record, he could have said, Your Honor, I've been obliged to use my peremptory, but I want it on the record that I would have used it against one of these jurors.

MR. GORDON: Well, he -- the earliest possible opportunity he could have done that was not at the time the peremptory challenge -- or the for-cause challenge was denied. It would have been after the exercising of peremptory challenges. We know that when the first meaningful opportunity arose to ask for additional peremptory challenges, when juror -- prospective juror --

actually it became Petit Juror Finck ended up missing, he asked for an additional peremptory challenge. In fact, he asked twice for an additional peremptory challenge.

We have to keep our eye on the ball in my view. The eye on the ball is the Government has to prove -- if we're dealing with harmless error, has to prove the actions of prejudice. And the question is on this record where the defendant was told to use a peremptory challenge, if that's what he wanted to, and when the defendant asked for additional peremptory challenges at the -- when Juror Finck ended up missing and the -- on the first day of trial actually objected to the composition of the jury, whether on that record the Government is able to prove an absence of prejudice.

QUESTION: Well, when he asked for a further perempt, wasn't it because a juror had been excused and was going to be replaced? Was that it?

MR. GORDON: That's correct. And I think that demonstrates that had he been given the opportunity to exercise peremptory challenges, along with the fact that he had exhausted all his peremptory challenges, that he intended to use the peremptory challenge --

QUESTION: But that -- that absconding juror was, in fact, replaced by the alternate against whom no peremptory had been exercised.

MR. GORDON: Well, that's -- well, we know that when the defense counsel and the Government are exercising peremptories, they focus at the very beginning of the panel. I mean, that's -- they're -- they're looking at the most likely jurors to end up sitting on the petit. The fact that the -- that juror at the very end may have ended up sitting there was an -- was really just an act of fortuity that that juror --

QUESTION: But there could have been a peremptory challenge exercised against the alternate and there wasn't.

MR. GORDON: And I agree with that. But my point is that, A, the defendant -- or the defense counsel in this case, the trial counsel in this case, could have speculated very correctly that that juror was not likely to sit on the petit jury --

QUESTION: Petit jury.

MR. GORDON: Petit jury? Petit jury and, B, that he -- and, B, he did not have an opportunity to exercise that peremptory challenge.

QUESTION: But it is the case, isn't it, to make sure that I understand the answer to Justice Ginsburg's question, that at the time the original panel selection plus the selection of an alternate was concluded, your client did not at that point go to the court or his

counsel didn't go to the court and say, Judge, I want to exercise one more peremptory? I can't do so because you forced me to use it to -- to strike the juror whom I object to for cause. He did not do that.

MR. GORDON: That is absolutely correct.

QUESTION: How is the judge supposed to know that he's making a mistake? I mean, judges aren't mind-readers. You argue here that the judge has made a mistake of law and you never told him. Or it wasn't you, but I mean, the lawyer didn't tell him, Judge, you're making a mistake. That's the point of having to object.

MR. GORDON: I disagree with that. We -- we -- I think what you're -- and the amici --

QUESTION: What part do you disagree with?

MR. GORDON: The part --

QUESTION: The part that judges aren't mind-readers or the part --

(Laughter.)

MR. GORDON: Well, I'll leave that for you to decide.

(Laughter.)

MR. GORDON: The amici points out I think quite accurately that we must distinguish between pointing out the error and pointing out the consequences of the error. In this case when the district court denied the peremptory

challenge -- or the for-cause challenge, the only logical consequence is that defendant was going to exercise a peremptory challenge to remove that. And in fact, we know from the record that's exactly what the district court anticipated when the defense counsel moved to strike that juror for cause.

QUESTION: So, the error was denying a for-cause challenge. Certainly you could appeal that error. Of course. Unfortunately, it didn't hurt you because he didn't sit.

All right. What's the next error?

MR. GORDON: Well, that next -- well, that's the harm. The harm of the error --

QUESTION: No. I mean, is there any other error he made? I agree he made the error of denying the for-cause challenge. Now, was there another error he made?

MR. GORDON: No, I don't think that's -- I don't think there was any other error. I think the other --

QUESTION: You're up here on another error.

MR. GORDON: Well, the consequence of that error. I think it's -- it's really -- it's playing with words a little bit because the consequence of the error is the denial of the peremptory challenge rights, and that it's a natural consequence and it's the only consequence that can flow from a -- from the denial of a for-cause

challenge under the Sixth Amendment.

QUESTION: No. It's the only consequence when you choose to use one of your peremptories.

I'm -- I'm less interested in the harmless error issue than I am in the issue of whether there has been a violation of the rule at all. It seems to me we've been discussing the -- you know, the question of whether -- whether the judge excuses somebody for cause or not as -- as being a black and white. You have this category of jurors who should be stricken for cause and all the rest who shouldn't be stricken for cause. In the real world, it -- it's not all that clear. Maybe it is on review, but when it comes before the trial judge, it's a spectrum. And -- and some of them could go into either category.

Why isn't it realistic to -- to view rule 24 as saying, look it, if you're in some doubt as to whether this clearly falls into the category where -- where he should have been stricken for cause, that's one of the things your peremptories is for? And you used it that way here and you got your full 10 peremptories.

MR. GORDON: Justice Scalia, I think --

QUESTION: No violation of the rule. Period.

MR. GORDON: I believe we need to understand the value of the jury system. The reason why we have a jury system is because we have a healthy disrespect -- or a

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healthy respect for the distance between the court and a jury. It's a buffer for the defendant. During the trial, rule 24 plays a very subtle role in that healthy distance between the two of them. The district court makes objective review of prospective jurors. The defendant, sitting with his defense counsel, has the opportunity to disagree with those rulings, and when he does disagree, the peremptory challenge gives him that right. But when the district court is incorrect on an objective viewing, as was -- as is conceded in this case, the error must be reversed.

And I think it's important to understand that the defendant in this case receives no windfall under the Government's second fall-back position and third fall-back position precisely because the conviction would have been reversed under this Court's decision in Ross v. Oklahoma.

QUESTION: It depends upon whether you view the purpose of rule 24 as embracing the ability of the defendant to strike those jurors who are -- you know, maybe should have been excused for cause, maybe shouldn't. If you view the purpose of rule 24 as being, you know, to allow that -- that play in the joints, then it seems to me there has -- there has simply been no violation of it. You use -- you use the peremptory for exactly one of the

purposes for which it was designed, to take care of these doubtful cases where maybe -- maybe he should have been stricken for cause, maybe he shouldn't. But you have your peremptory if you choose to -- I'm not saying you must use it that way, but if you choose to use it that way, which is what this case involves. You got your 10 peremptories.

MR. GORDON: The play that you speak of I think is important, but I think the play is resolved in the highly deferential standard of review given to the district court when it reviews those sorts of errors.

QUESTION: Well, why do you say the case would have been reversed under Ross against Oklahoma? This case.

MR. GORDON: If the defendant would have left the peremptory challenge and used his peremptory challenge on another juror, it is clear from the record that prospective Juror Gilbert would have become a juror who sat on the alternate jury.

Under the Court's decision in Ross v. Oklahoma, although those weren't the facts of the specific case --

QUESTION: Well, that makes it rather difficult to say that if -- if it's a different case, why it would have been reversed under Ross, doesn't it?

MR. GORDON: Well, I'm assuming two things. Number one, I'm assuming that the Government's concession

would hold true at the appellate court level, that the juror that actually sat, Juror Gilbert, then would have sat under your hypothetical, and we would have had a fair -- or rather, an unfair and partial juror sit on the jury panel. And that, from my reading of this Court's decision in Ross, is a violation of the defendant's right to -- under the Sixth Amendment to a fair and impartial jury that sat.

Ultimately I wanted to go back to Justice Scalia's question because I think we need to look at whether it's appropriate for this Court to rule that rule 24 actually embraces this notion of whether the defendant is required to remove those jurors --

QUESTION: Rule -- rule 24 on its face, of course, doesn't embrace any notion other than you get 10 peremptories. Your client got 10 peremptories.

MR. GORDON: I -- I think that in the sense that if you put a gun to somebody's head, then he got all 10 peremptories. He was forced to use it in any meaningful sense of the word. The defendant was on trial and facing a score or more of years in prison. If he wanted to have a fair and impartial jury, we now at least know in retrospect that the judge, under an abuse of discretion standard, abused his discretion. He let a juror sit who said he --

QUESTION: That was never reviewed by the court of appeals. It was stipulated, was it not?

MR. GORDON: No, it was not. At the court of appeals, in fact, that was the only position the Government took, that the district court had not abused its discretion, and Juror Gilbert -- or the removal -- failure to remove -- I apologize -- prospective Juror Gilbert was not an abuse of discretion.

QUESTION: And the court of appeals held otherwise in this case?

MR. GORDON: The court of appeals held otherwise in this case. And it's only upon the filing of the petition for rehearing and suggestion for rehearing en banc at the Ninth Circuit and the petition for certiorari in this Court that the Government changed its position and actually flip in the case and say -- where it said at the Ninth Circuit we agree that the court abused its discretion, we think that violates due process, and then at the -- at this level the court took -- the Government took the opposite position in this case.

QUESTION: You don't -- you don't think this is a due process situation, do you?

MR. GORDON: I do. I mean, I think that --

QUESTION: How can you say that when we're talking about violation of a rule? We don't reach

constitutional questions if we can decide them under rules or statutes.

MR. GORDON: I agree, but I think the cases this Court has decided, for example, Logan v. Zimmerman, for example, Hicks v. Oklahoma -- what we can glean from those --

QUESTION: Those are way out on the margin I think.

MR. GORDON: Well, I agree. I think -- I think this case goes to those cases way out on the margin. What we're looking at is the --

QUESTION: Well, do you want your case to be decided in a way that is regarded as way out on the margin?

(Laughter.)

MR. GORDON: I mean, I don't know if I can speak to that. I think that --

QUESTION: I think a good advocate would say no.

(Laughter.)

MR. GORDON: Well then, no.

(Laughter.)

MR. GORDON: The -- I think what we can glean from Logan v. Zimmerman and -- and Hicks v. Oklahoma are when there are important rights at stake -- and, indeed, this is one of the most important rights afforded to the

criminal defendant -- that a denial of that right does rise to procedural due process levels.

QUESTION: Under our jurisprudence, you don't reach any constitutional question unless you find that the statute requires a particular thing. And here we're construing a statute -- a rule that, it seems to be generally conceded, could be construed one way or the other. And if we can construe the rule in -- in a way that will give your client the relief he seeks, there just isn't any basis for a -- Ross was constitutional because we don't have the final say about how the Oklahoma statutes are construed.

MR. GORDON: I -- I agree. And I -- I don't think it's necessary -- and I hope I set forth that clearly in our brief. It's not necessary for the Court to reach the conclusion that we have a -- a procedural due process violation in order to affirm the Ninth Circuit's opinion. It would be obviously affirmed on different grounds in that way.

But if we find that it's a rule 24 violation, we're going to leapfrog into a very difficult area I think and that area is dealing with the structural error versus non-structural error and the appropriate harmless error standard. And then the Court is faced with those two very diverging options, one --

QUESTION: I'm sorry. Go on.

MR. GORDON: No. I was just going to say one that requires reversal almost all of the time once we -- once we get past that very discretionary standard of review, and one that requires a finding of harmlessness all the time once we -- unless the district court makes the unfortunate series of 10 rulings erroneously on -- on for-cause challenges.

I'm sorry for interrupting.

QUESTION: Have we ever used the -- the structural error concept in a context other than a constitutional one? Have we ever used it to find a -- a statutory -- a harmful statutory violation?

MR. GORDON: Justice Souter, you raise a good point. It's a very -- the answer is I couldn't find any case in that regard.

QUESTION: I don't think there is any.

MR. GORDON: And I think the -- the reason why this case is different is we can look at the peremptory challenge as truly a unique tool in the creation of a jury.

QUESTION: But, you know, I -- I'm not at all sure that it would raise a grave constitutional question if a State abolished peremptory challenges on both sides. I realize that that's debatable, but it doesn't seem to -

- you know, if -- if you say you're entitled to an unbiased jury, no one would disagree with that. But if you say you're entitled as a matter of fundamental fairness to 10 peremptory challenges, I think a lot of people would disagree with that.

MR. GORDON: I think the number of peremptory challenges is a decision, Chief Justice, that has to be left to the grace of Congress in this case. And if we're going to change the number of peremptory challenges, as proposed by the Government, by requiring that the defendant affirmatively really engage in his own prosecution and clean up Sixth Amendment violations, then we're requiring -- or modifying rule 24 in a very substantive and drastic way. And we have procedures under I believe it's title 28 that allow the court to recommend changes to rule 24 and then allow Congress to reject or accept those modifications. And we know that that procedure has been employed in the last 20 years. We know that rule 24 has been modified since Swain's decision in 1965.

QUESTION: But rule 24 doesn't say anything about automatic reversal. It's part of a set of rules that has, on the one hand, you get 10 peremptory challenges, and on the other hand, you disregard errors that are not substantial. And if there is an impartial

jury in fact, then how can one say that a substantial right -- the substantial right being the impartial jury -- has been affected?

MR. GORDON: I think the focus, Justice Ginsburg, is not on -- necessarily on the right to a fair and impartial jury, although I think that's important --

QUESTION: Well, that's a right that sounds like it has constitutional dimensions.

MR. GORDON: Correct, and I think that's true. But if you take a look at rule 52, we speak to an effect on a substantial right. The substantial right involved in this case is the right to a peremptory challenge. What we're doing I think if we adopt --

QUESTION: Well, that's -- that's what you say, and it's a question, what is the substantial right for purposes of rule 52?

MR. GORDON: Yes. I think that -- in my view. And I think in this Court's view --

QUESTION: Then you're just saying that anytime you don't get what the rules say you should get, it affects a substantial right, and that can't be.

MR. GORDON: I agree with you, it can't be. And I hope that's not what I said.

What I'm trying to say is this Court has ruled continuously since the last century and up through Holland

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in this case that the right to a peremptory challenge is an essential right afforded to the accused during the jury trial process. And the reason why it's essential is that it allows the defendant to play a role in his jury selection outside the role of the judge. It really furthers the goal of a trial by jury in that -- in that respect.

And we've recognized -- this Court has continually recognized that a trial by jury deserves a peremptory challenge. In fact, this Court in Holland stated that although the Court previously in Stilson said it was not a necessary right under the Sixth Amendment, it arguably is a substantive right and that the right is so essential that it does not -- the right to peremptory challenge -- it cannot be trumped by the Sixth Amendment, for example, in Holland.

I'm sorry, Justice Ginsburg.

QUESTION: Well, where do you -- I suppose as you say due process, you are saying that peremptories -- not merely peremptories, but 10 peremptories are required by due process. That seems to be what you're saying.

MR. GORDON: Well, I think that I'm not saying that due process would always require 10 peremptories. The decision as to whether -- or as to the number of peremptory challenges offered to the criminal defendant is

a decision made by the legislature, in this case Congress.

QUESTION: And then you say whatever number the legislature picks, if that number is not observed, there's one short, it's a due process violation.

MR. GORDON: Well, I don't -- I don't believe that. I think it's not a matter of it not being observed. It's a matter of it being arbitrarily denied. And when we speak to an arbitrary denial of a peremptory challenge in this case, we're talking about the district court denying the for-cause challenge.

QUESTION: I'm not clear on what you mean by arbitrarily denied. And you're not suggesting that this trial court wasn't acting in total good faith trying to achieve an unbiased jury. He may have made a mistake, but to call it arbitrary I think is questionable.

MR. GORDON: I think when -- I don't agree with the concept. I think when the district court makes a -- abuses its discretion, it makes an arbitrary and capricious decision, as evidenced by the -- the standard of review in this case, and denies a for-cause challenge after the defendant -- after the prospective juror in the case states that he would favor the prosecution and never effectively in any way retreat from that position, it is in fact an arbitrary denial.

QUESTION: What if -- what if rule 24 read that

each side shall get 10 peremptory challenges but those challenges shall be required to be exercised if and in a case like this where the -- the lawyer is of the view that the district court has erroneously denied a for-cause challenge?

MR. GORDON: I think that is perfectly acceptable depending -- well, your hypothetical is, Chief Justice, that the rule has been amended, and I think --

QUESTION: Exactly. Would that be a constitutional -- could -- could there be any constitutional challenge to a rule like that?

MR. GORDON: Mr. Chief Justice, I don't think so.

QUESTION: I mean, it's not a hard question. I mean --

MR. GORDON: I don't think so.

QUESTION: -- we've said several times that you don't constitutionally have to have any peremptory challenges at all.

MR. GORDON: I agree, and I think --

QUESTION: Well, if you give 10 but say you got to use them to correct any errors by the judge, how could that possibly be a constitutional violation?

MR. GORDON: I agree. I was -- I -- what we need to do is -- what I needed to do is understand the

Chief Justice's position that it was an amended rule and it was amended appropriately. And so long as the rule in my view is amended by Congress, or at least amended under the procedures set forth by Congress, then there would be no -- certainly no procedural due process violation.

We -- I mean, we need to -- all we need to do is look at the cases from late last century and early this century. In every instance, this Court looked at whether peremptory challenges provided the defendant with the essential right to de-select those jurors, and the Court in those cases that it did, it held --

QUESTION: But the -- the Court in those days just reversed convictions right and left that would never be reversed today.

MR. GORDON: But the Court in those cases weren't reversing the convictions. In every one of the cases cited by the Government other than Harrison v. the United States, the Court said there was no error made when the defendant was forced to de-select the proper jurors and precisely for two reasons.

One, it -- the Court looked at the nature of peremptory challenges, and when -- when that was not undermined, the Court didn't reverse the conviction.

And number two, the Court looked at the very terms of the statutes involved, the rules of procedure

involved there and -- and stated that the defendant received precisely what he was entitled to under the Federal rules -- under those rules of procedure. They weren't Federal at that time.

QUESTION: Mr. Gordon, maybe I shouldn't waste your time with this because you're not relying exclusively on the constitutional violation. But I don't understand how there can be a constitutional violation if you accept that the rule, as rewritten pursuant to the Chief Justice's hypothetical, would be constitutional; that is, if -- if what the Government argues had been written into the statute, you acknowledge that would be -- that would be constitutional. But you say that since it is not written into the statute, to interpret the statute that way would somehow be unconstitutional or -- or how can you get a constitutional violation once you acknowledge that this could happen if expressly approved by Congress?

MR. GORDON: Well, let me just state it this way. In order for the rule to be expressly approved by -- or in order for the rule to be amended, it has to be expressly approved by Congress. The other alternative is we're looking at rule 24 as it now exists today without the modification. Assuming, I think appropriately, that our interpretation is correct, the deprivation of the right violates the rule, the procedures set forth under

rule 24. Nonetheless --

QUESTION: I can see that argument, but I can't see the further step: and violates the Constitution.

MR. GORDON: I think the -- the point I'm trying to make is there are -- as Chief Justice Rehnquist points out, there are some cases more on the fringe when we're dealing with very fundamental rights where the erroneous denial of a procedural right can rise to a procedural due process violation.

And -- and I agree with you, Justice Scalia, we don't have to go that far. I think all we need to do is decide that rule 24, if it were to be amended, ought to be amended in -- in accordance with procedure and that we had a violation of rule 24 in that instance.

QUESTION: May I ask in this case did the trial judge require that the peremptory challenge be used right after the particular juror was interrogated, or could you have saved your peremptories till the end of the -- all 12 jurors were ready to be seated and then say, I'll -- I'll challenge A, B, and C?

MR. GORDON: What the district court did in this case is that he -- we -- they -- I wasn't part of the trial. They exercised their peremptory challenge at the conclusion of all the voir dire in this case.

QUESTION: I see.

QUESTION: Thank you, Mr. Gordon.

Mr. Dreeben, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: There are many things that a trial judge can do in orchestrating jury selection that have effects on the defendant's peremptory challenges that are equally severe, if not more severe than this one.

The trial judge, can in a multi-defendant case require all the defendants to exercise their peremptory challenges together without extending any additional challenges so that each defendant is reduced down from the number, in effect, of 10 provided in the rule to 5 because he's sharing with another defendant.

The trial judge can require the parties to select the jury by exercising their challenges simultaneously, which is in fact what happened in this case. And in that event, the defendant may exercise his challenges against somebody who would have been removed by the Government in any event.

And the trial judge can say to the parties, you must make a challenge for cause and then instantaneously, if it's denied, exercise a peremptory challenge, and if you do -- don't do that, you may not challenge that juror.

Each of these entirely legitimate procedures may

from the defendant's point of view, infringe what would otherwise be his free and untrammeled right to exercise peremptory challenges. The rule that we ask for here, which is that if the defendant does actually exercise his peremptory challenge to remove a juror who should have been removed for cause, he cannot claim error on appeal. He has been given the substance of the right and there is no basis for reversing the conviction.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY: Ilona M. May
(REPORTER)