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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-9995, Rivera v. Illinois.

Mr. Leven.

ORAL ARGUMENT OF JAMES K. LEVEN

ON BEHALF OF THE PETITIONER

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

The Petitioner lawfully exercised a peremptory challenge on juror Delores Gomez. As a result of the erroneous denial of that challenge, Ms. Gomez wrongfully sat on the jury and lacked authority to render a judgment. Petitioner's conviction should be reversed automatically for three separate and independent reasons.

First, the trial before an unlawful adjudicator is structural error. Two, the wrongful seating of a juror is structural error, because the effect of the error is impossible to determine --

JUSTICE GINSBURG: Are you putting -- are you equating this with a biased judge? The -- the category of structural error has been kept very narrow by this Court. And it seems to me that a juror who is perfectly qualified, who is conceded -- it is conceded

1 could not have been dismissed for cause, is quite a
2 different matter than a judge who -- who has taken a
3 bribe or who has a monetary stake in the case.

4 It -- it seems quite a stretch to apply those
5 decisions to -- to the case of a juror who was
6 qualified, and it was just a judge who was overexuberant
7 in denying a peremptory challenge.

8 MR. LEVEN: Well, our unlawful adjudicator
9 claim is not dependent on a finding or showing of bias.
10 A -- a juror who is illegally on the jury, who does not
11 have the authority to serve, would render the jury
12 improperly constituted. Therefore, there would be
13 structural error for a jury illegally constituted to
14 render a judgment irrespective of bias.

15 JUSTICE SOUTER: Okay. But your whole
16 argument that the -- that the juror was illegally
17 sitting and the jury was illegally constituted is a --
18 in effect a statement of the effect of State law. And
19 the State supreme court doesn't think that's the effect
20 under State law.

21 So it seems to me that the -- the whole
22 premise of your argument that there is something
23 inherently unlawful about the seating of that juror is
24 simply in -- in effect denied by the State supreme
25 court. And we take our law from them.

1 MR. LEVEN: Well, Your Honor, there are
2 State law and Federal law components to this issue.
3 Petitioner had a lawful right to excuse juror Gomez
4 under Illinois Supreme Court Rule 434.

5 JUSTICE GINSBURG: But no -- no
6 constitutional right, no constitutional right to the
7 peremptory challenge.

8 MR. LEVEN: Well, there is a constitutional
9 right to due process involved that --

10 JUSTICE SOUTER: But you -- you in effect
11 are saying that any violation of State law with respect,
12 let's say, to criminal trial procedure becomes, if not
13 remedied, a due process violation under Federal law.
14 That's -- that's your -- your unstated premise, isn't
15 it?

16 MR. LEVEN: No, Your Honor. The -- our
17 argument is very narrow in scope: That if a -- a juror
18 that is illegally constituted renders a verdict of
19 guilty, then that jury is an unlawful adjudicator. The
20 unlawful adjudicator claim is what triggers the right to
21 due process.

22 JUSTICE BREYER: There could be a thousand
23 reasons why under State law a particular jury is
24 improperly constituted. So you are saying whenever the
25 State, under whatever State laws it has, says that the

1 judge made a mistake about who to put on the jury, that
2 that violates the Federal Constitution.

3 JUSTICE KENNEDY: Just as an example, to
4 follow up on Justice Breyer's question -- and then can
5 you answer his question -- many States have rules that
6 you have to be a resident of the county to serve on that
7 jury. And suppose a juror thinks he or she is a
8 resident and gets the county line wrong or doesn't know
9 what the residency requirement. Under your rule -- what
10 is your term, an "unlawful adjudicator." And then we
11 have a -- we have a -- a Federal constitutional standard
12 that requires structural error for any State -- for any
13 violation of any State -- State rule. That is
14 Justice Breyer's question.

15 MR. LEVEN: Well, with respect to jury
16 qualifications such as age and citizenship, there is a
17 very delicate screening process that goes into effect.
18 So the problem of an unlawful adjudicator with respect
19 to, say, age would be a very, very rare phenomenon and
20 would rarely occur, because jurors who are too young to
21 serve, perhaps under 18 years old, would never make
22 their way to the jury pool in the first place. So it
23 would really be a very rare situation --

24 JUSTICE KENNEDY: Well, you are -- you are
25 avoiding the question by saying, oh, don't worry, there

1 are not going to be many violations of this sort, and
2 then you pick out age. But Justice Breyer began -- the
3 preface to his question was -- was that there are -- are
4 manifold requirements varying from State to State.

5 MR. LEVEN: Well, let's take your --

6 JUSTICE KENNEDY: What you are giving us is
7 a sweeping proposition, A, for the constitutional
8 principles that you are setting forth; B, for the
9 supervision and intrusion it would cause Federal courts
10 on the State system.

11 MR. LEVEN: Well, if we take the juror's
12 qualifications that were discussed in the State's brief,
13 it would appear that all the qualifications that are
14 discussed there would -- as I said, it would be a very
15 rare situation, indeed, for a --

16 JUSTICE BREYER: Well, why? One
17 qualification is a jury -- a juror can't be prejudiced.
18 All right. I think it's a very common thing for
19 prosecutors and defense lawyers to get into arguments
20 about whether a particular juror is or is not
21 prejudiced. Okay.

22 So sometimes the judge excuses them, maybe
23 five million times a year; and probably in a certain
24 percentage, maybe 5,000 or 500 or 50,000, the judge is
25 wrong. All right.

1 So the State appellate court says he's
2 wrong. So the jury wasn't made up properly.

3 Now you are saying in every one of those
4 cases that violates the Federal Constitution. I have
5 never heard of this before. It may be there is some
6 precedent for it. I don't know. That's why I am
7 asking.

8 MR. LEVEN: Well, Gomez v. United States set
9 forth the principle equating the right to an adjudicator
10 with lawful authority to preside at every critical stage
11 of the proceeding --

12 JUSTICE BREYER: So that means that held --
13 we have held in that case -- I had better look at it --
14 that in any instance where excusing a juror violates
15 State law that that is a violation of the Federal
16 Constitution? Which is the case that says that?

17 MR. LEVEN: Well, that -- that case did not
18 involve jurors, Your Honor, but it did involve a
19 magistrate who lacked the authority to preside over voir
20 dire. And the court held under a general principle of
21 law equating the right of -- the lawful-authority right
22 to the right to an impartial jury and used the phrase "a
23 basic fair trial right," meaning that the right to a
24 lawful adjudicator is a basic fair trial right. And
25 also in addition --

1 JUSTICE GINSBURG: But you are not -- you're
2 not suggesting, because you conceded there was no basis
3 for a for-cause challenge, you are not -- you are not
4 saying that Gomez was unqualified or that she was
5 biased. If she was biased, you had a basis for that;
6 she could be excused for cause.

7 MR. LEVEN: Well, there is a reasonable
8 possibility of bias with respect to Gomez because of her
9 extensive contacts with gunshot victims at Cook County
10 Hospital --

11 JUSTICE GINSBURG: But she was an
12 administrator. She wasn't a nurse. She didn't deal
13 with people who had gunshot wounds.

14 MR. LEVEN: Well, the Illinois Supreme Court
15 held that defense counsel's strike of Gomez was a valid
16 reason to have her removed from the jury. She could
17 have, even though she said -- even though she was not
18 challengeable for cause, the peremptory challenge is
19 there for a purpose, and that is --

20 JUSTICE SCALIA: You don't need a good
21 reason for a peremptory challenge.

22 MR. LEVEN: The peremptory -- if I
23 understand.

24 JUSTICE SCALIA: That's the whole fun of a
25 peremptory challenge: You don't need a good reason.

1 MR. LEVEN: Well, the purpose of the
2 peremptory challenge is to help to create a fair and
3 impartial jury.

4 JUSTICE SCALIA: Exactly. And for some
5 reason, I just think this person is not going to vote
6 for me. I don't know why. I just don't think so. I
7 don't want this person sitting on the jury. That's all
8 the reason you need.

9 MR. LEVEN: That's right. Under *Swain v.*
10 Alabama, a peremptory challenge can be exercised without
11 having to state a reason.

12 JUSTICE KENNEDY: Well, but our footnote in
13 our later case authored by Justice Scalia indicates
14 considerable doubt as to the viability and to the -- to
15 the correctness of that formulation in *Swain*.

16 MR. LEVEN: Well, with --

17 JUSTICE KENNEDY: Salazar, I think, is
18 the --

19 MR. LEVEN: Yes, *Martinez-Salazar* in its
20 footnote 4 determined that the automatic reversal rule
21 in *Swain* was subject to reconsideration due to the
22 advent of harmless error analysis.

23 But I was citing *Swain* for a different
24 purpose. I was citing *Swain* that -- for the purpose
25 that a peremptory challenge can be exercised without

1 having to state a reason, and that's a fundamental --

2 JUSTICE KENNEDY: No. No. I thought you
3 were citing Swain -- and I think you are going to have
4 to establish -- that peremptory -- in this case, to win
5 your case, that there is a constitutional basis, a
6 constitutional right to exercise a peremptory challenge,
7 at least -- then you can have a subset of that, when the
8 State gives it to you. But I think Swain no longer
9 stands for that proposition.

10 MR. LEVEN: I wasn't citing it for that
11 proposition, Your Honor. We have the case of *Evitts v.*
12 *Lucey*, for example, where the Court was analyzing the
13 right to an appeal. And the Court found that the right
14 to an appeal was not of constitutional origin, but once
15 the State had created a right to an appeal it had the
16 obligation to administer that right consistently with
17 fundamental fairness and due process.

18 So here we have a peremptory right that the
19 State of Illinois wasn't obligated to create. But once
20 it adopted that peremptory right, it was in effect
21 adopting the long venerable tradition of peremptory
22 challenges that has existed in this country since the
23 founding.

24 JUSTICE GINSBURG: But the -- well, first,
25 how many peremptories does Illinois law allow?

1 MR. LEVEN: For non-capital cases, it's
2 seven, Your Honor.

3 JUSTICE GINSBURG: Well, suppose a State
4 allowed only three peremptory challenges. There would
5 be nothing in the least unconstitutional about that,
6 right?

7 MR. LEVEN: Well, under *Ross v. Oklahoma*,
8 the State has the authority to regulate peremptory
9 challenges.

10 JUSTICE GINSBURG: And this was number four, was
11 it?

12 MR. LEVEN: I'm sorry?

13 JUSTICE GINSBURG: The challenge to Gomez
14 was the number four peremptory?

15 MR. LEVEN: Yes, Your Honor.

16 JUSTICE GINSBURG: And so if the State had
17 only three which it could do, there would be -- would be
18 no basis for removing Gomez from the array. That is,
19 the -- the defense would have already exercised three
20 peremptory challenges; she's number four, too bad. That
21 would be the end of it, right? She would sit on the
22 jury.

23 MR. LEVEN: Well, as to our unlawful
24 adjudicator claim that would be correct, because if the
25 defense did not have a peremptory challenge to exercise

1 in order to strike Gomez if the peremptories had run
2 out --

3 JUSTICE GINSBURG: But there's just
4 something unseemly about saying because the State is
5 generous in its peremptories, you have a grand
6 constitutional argument to make, even though there is no
7 constitutional right to any peremptory challenge?

8 MR. LEVEN: Well, the State is obligated,
9 consistent with due process, to provide that which it
10 promised. And if it promised --

11 JUSTICE SOUTER: That goes back to the point
12 which you rejected when I suggested -- I suggested
13 earlier that you were in effect arguing that every
14 violation of a State statute in this criminal context
15 amounted to a due process violation. And you say, no,
16 that's not what I am arguing. It seems to me that that
17 is exactly what you just said to Justice Ginsburg.

18 MR. LEVEN: Well, what makes the peremptory
19 challenge unique is its venerable tradition since the
20 time --

21 JUSTICE SOUTER: Well, we were talking about
22 peremptory challenges before and we are talking about
23 peremptory challenges now. Have you changed your
24 position from -- from the position you stated in answer
25 to my question?

1 MR. LEVEN: Well, if I understand correctly,
2 Your Honor, the case involves peremptory challenges.

3 JUSTICE SOUTER: Look, the question that I
4 thought I was asking and I thought you were answering
5 was this: Do you claim that every violation of State
6 law in the -- we'll say in the selection of jurors -- is
7 -- is automatically, if not remedied by the State, a
8 Federal due process violation? And you said, if I
9 recall correctly, no.

10 It seemed to me that in answering
11 Justice Ginsburg's question just now you were saying
12 yes. You said the State has to act consistently with
13 due process.

14 MR. LEVEN: Yes.

15 JUSTICE SOUTER: So -- so, do you stand by
16 the answer you gave me or is it in fact now your
17 position that every violation of State law that goes
18 unremedied becomes a Federal due process violation?

19 MR. LEVEN: No, I'm not saying that every
20 violation of State law, if unremedied --

21 JUSTICE SOUTER: All right. Then why does
22 this one become a due process violation if it's
23 unremedied.

24 MR. LEVEN: Because this one involves a
25 State violation that resulted in an unlawful

1 adjudicator. Let's take --

2 JUSTICE SOUTER: No, but that -- that then
3 goes back to an earlier question. It's an unlawful
4 adjudicator if State law says so. Federal law says you
5 don't even have to have peremptory challenges, you don't
6 even have to have a process for winnowing out the Gomez
7 jurors.

8 So, in effect, if you are saying that there
9 is something unlawful about the seating of the juror,
10 you are making a statement of State law, and the State
11 Supreme Court disagrees with you, which seems to me to
12 foreclose your argument.

13 MR. LEVEN: Well, the State disagreed with
14 our position as to the Federal automatic reversal law.
15 The court applied, and we would argue misapplied --

16 JUSTICE SOUTER: No, but the court -- the
17 Supreme Court of Illinois did not find anything unlawful
18 about the juror sitting. They said, yes, the perempt
19 should have been -- the peremptory challenge should have
20 been respected. But they did not say, and it seems to
21 me they clearly rejected the notion, that there was
22 something unlawful about the jury and unlawful about
23 that juror's participating in reaching a verdict; isn't
24 that correct?

25 MR. LEVEN: I would read the Illinois

1 Supreme Court opinion -- specifically what they did
2 state is that the trial court was incorrect in denying
3 the peremptory challenge, therefore that juror should
4 not have sat on the jury, that juror was wrongfully on
5 the jury.

6 JUSTICE SOUTER: No, no. The -- the
7 peremptory challenge should have been respected. But
8 the Illinois Supreme Court did not say, as I understand
9 it, that by allowing the juror to sit the juror was
10 acting in an unlawful capacity or that there was
11 something unlawful under State law about the jury's
12 action and the jury's verdict.

13 Am I not correct about that?

14 MR. LEVEN: Well, the Illinois Supreme Court
15 made one statement, that the peremptory was wrongfully
16 denied. Now, as far as elaborating on its reasoning --

17 JUSTICE SOUTER: Well, if they thought that
18 tainted everything that happened afterwards, it seems to
19 me they would have said, therefore, the verdict is no
20 good.

21 MR. LEVEN: No, because the court misapplied
22 this Court's precedent in Neder and Martinez-Salazar.
23 That's the basis for the court affirming the conviction.
24 It had nothing to do with the issue of whether or not
25 Gomez --

1 JUSTICE SOUTER: Yes, but it had everything
2 to do, it seems to me, with the issue of State law.
3 Regardless of whether they applied or misapplied a
4 precedent of ours respect -- with respect to Federal
5 constitutional law, it seems to me that the Illinois
6 Supreme Court has to have meant it was okay so far as
7 the validity of the verdict is concerned for this person
8 to participate.

9 MR. LEVEN: The Illinois Supreme Court found
10 that the verdict was valid because they thought that the
11 error was subject to harmless error review, in relying
12 on Neder and Martinez-Salazar.

13 JUSTICE SOUTER: So ultimately, there was --
14 there was no error under State law that needed to be
15 corrected?

16 MR. LEVEN: Well, there is an error in terms
17 of the adjudicator, Ms. Gomez, being seated on the jury
18 and under Rule 434 Petitioner had the right to a juror
19 that -- that was not subject to a peremptory challenge.
20 Gomez was wrongfully seated on that jury.

21 JUSTICE SOUTER: But so far as the ultimate
22 jury verdict was concerned, the Illinois Supreme Court,
23 I understand it to have said, was there is no error that
24 needs to be corrected under State law.

25 MR. LEVEN: I don't read the opinion that

1 way. I read --

2 JUSTICE SOUTER: Then why didn't they
3 correct it?

4 MR. LEVEN: Because they thought that the
5 error was subject to harmless error review under Federal
6 law. And we would argue the two positions.

7 JUSTICE SOUTER: You mean -- in other words,
8 you read the -- the -- the Illinois Supreme Court as to
9 say, this is a violation of our statutes and
10 constitution, a violation that would -- would entitle
11 this person to have the -- the verdict set aside and a
12 new trial, but because the Federal practice, applying
13 Federal constitutional law, is to engage in harmless
14 error analysis, we won't correct our State law error as
15 a matter of State law, and -- and we will in fact apply
16 a harmless error analysis that otherwise wouldn't apply
17 because it's Federal, and on that ground we will let the
18 verdict stand. Is that the way you read the Illinois
19 Supreme Court?

20 MR. LEVEN: No. The court declined to
21 determine whether a constitutional right had been
22 violated, but the court applied this Court's precedent
23 under Martinez-Salazar and Neder, the Federal harmless
24 error automatically reversal law that this Court has,
25 and used that to find that the error was subject to

1 harmless error review. The court did not --

2 JUSTICE KENNEDY: But -- but how -- how
3 could it do that if there were not some underlying
4 Federal constitutional right? I say "how could it do
5 that." It's obvious that they did it. What -- what
6 would be the principled basis for that analysis? What
7 would be the analytic framework that would lead it to
8 look to the Federal decisions? This is a State issue.

9 MR. LEVEN: Well, the court did not specify
10 why it did so, but it did rely on Neder and
11 Martinez-Salazar. And therefore --

12 JUSTICE KENNEDY: But we are asking you what
13 the analytic justification for that course of reasoning
14 is if that is indeed its course of reasoning.

15 MR. LEVEN: Well, it's hard for me to
16 speculate on the thinking of the Illinois Supreme Court.
17 But --

18 JUSTICE KENNEDY: Well, but you have to give
19 us a sustainable analytic framework if -- if we are
20 going to reverse their decision.

21 MR. LEVEN: Well, we argued at the Illinois
22 Supreme Court level that due process was violated; but
23 the Illinois Supreme Court declined to consider whether
24 a constitutional right had been violated and moved
25 accordingly to the question of whether or not automatic

1 reversal would apply or whether the error would be
2 subject to harmless error review.

3 But the Illinois Supreme Court did not say
4 anything about whether a constitutional right had been
5 violated except it declined to consider that issue, even
6 though it was argued at that level by -- by Petitioner.

7 Not only do we have a constitutional basis
8 for this Court to have access to its automatic reversal
9 law; the fact that the court did rely on -- the Illinois
10 Supreme Court relied on *Neder* and *Martinez-Salazar* gives
11 this Court authority to reach the issue of whether or
12 not to apply automatic reversal law under -- under its
13 authority to correct --

14 JUSTICE STEVENS: Of course, the Illinois
15 Supreme Court was assuming a Federal violation when it
16 decided what the reversal rule would be. But your
17 Federal violation determines -- is bottomed on the
18 notion that there was an unlawful adjudicator on the
19 jury. Would that reasoning apply, in regard to one of
20 the earlier questions, if you have a Cook County jury
21 and they had a juror from DuPage County and the law says
22 no, you have got to have a local juror, and it turns out
23 that they had wrongly seated such a juror? Would that
24 be an unlawful adjudicator.

25 MR. LEVEN: Yes, it would appear so if it --

1 if a State law stated that a juror qualification
2 requirement is that the juror who presides in Cook
3 County must be a resident of the county.

4 JUSTICE SCALIA: Well, if you -- I'm sorry.

5 JUSTICE STEVENS: I just have one more
6 thought.

7 And if it is such an unlawful adjudicator,
8 it would definitely be Federal constitutional error?

9 MR. LEVEN: Yes, because it would implicate
10 the due process clause.

11 CHIEF JUSTICE ROBERTS: But would it have to
12 be -- would it have to be structural error? I -- I
13 don't know why you don't argue that it's structural
14 error when the error is a wrongful denial of a
15 peremptory challenge, because it is impossible for you
16 to establish the harmfulness of error because, as
17 Justice Scalia pointed out, a peremptory challenge is
18 just a hunch on your part; you don't need any more. But
19 if it's something like he was in DuPage County rather
20 than Cook County, maybe that's something where it's fair
21 to put the burden of showing harmfulness on the
22 defendant.

23 MR. LEVEN: Well, Your Honor, the -- the
24 State under Chapman would be required to prove
25 harmlessness, and I think it would be impossible to

1 determine whether this -- this error would be harmful --
2 to determine harm --

3 CHIEF JUSTICE ROBERTS: Well, maybe that's
4 true. My point is that may be true with respect to a
5 peremptory challenge, but it doesn't seem to me to be
6 terribly difficult to say, well, he was in DuPage
7 County and not Cook County, so what's the big deal?

8 MR. LEVEN: Well, under harmless error
9 review, the appellate court envisions the actual jury
10 that rendered the verdict, whether or not the error
11 would have rendered the verdict different had it been --
12 had it not occurred. And in this case we have a -- we
13 can't analyze it from the perspective of whether this
14 jury would have rendered the same verdict absent the
15 error, because this jury that rendered the verdict is
16 illegally composed, it's illegitimate.

17 So what the Illinois Supreme Court did in
18 analyzing harmless error review is it substituted its
19 judgment for -- for the reviewing court, it substituted
20 its judgment for the -- for the jury. The --

21 JUSTICE GINSBURG: But we had an actual
22 jury. It's not as though you had no jury verdict and
23 then the court would say -- the court would say, we
24 think that this defendant was as guilty as they come;
25 but you had a jury with jurors who met all the State law

1 qualifications, already made the determination of guilt.
2 So that's a little different from the case where, say, a
3 judge would attempt the equivalent of a directed
4 verdict.

5 MR. LEVEN: Well, in this case I don't think
6 we can look at it from the perspective that the Court
7 normally looks at it from when it reviews -- adopts
8 harmless error review. In the normal situation the
9 court looks at whether or not the error contributed to
10 the verdict and whether or not the actual jury that
11 rendered the verdict would have rendered the same
12 verdict absent the error.

13 But we don't have -- we can't do it from the
14 perspective of the actual jury in this case, because the
15 actual jury here is illegal.

16 JUSTICE ALITO: Do you think the
17 Constitution prohibits the State from going further than
18 Batson to protect against the use of peremptory
19 challenges for discriminatory purposes? Specifically,
20 is there any reason why a State could not provide that
21 whenever -- that a trial judge always has the authority,
22 when the judge has any suspicion of discrimination, to
23 ask for an explanation from counsel as to the reason,
24 without having to establish -- without there having to
25 be a prima facie case?

1 MR. LEVEN: Well, that's our position, Your
2 Honor, because what the trial judge did in this case is
3 asked for a reason without having established any prima
4 facie case.

5 JUSTICE ALITO: Yes, well, that's what
6 Batson says has to be done in order to justify the
7 strike. When -- but is there any reason why a State
8 couldn't go further to guard against discrimination in
9 the use of peremptories?

10 MR. LEVEN: I apologize, Your Honor; I'm not
11 sure I understand about going further than -- under
12 Batson there is a three-step process, and the State must
13 establish a prima facie case of discrimination before
14 the judge is entitled to ask for any kind of
15 explanation. And here there wasn't any kind of gender
16 discrimination of any kind, according to the Illinois
17 Supreme Court. Therefore, the -- the judge in this case
18 was not authorized to even ask for an explanation. But
19 the explanation given by defense counsel is pretty good.

20 JUSTICE STEVENS: Yes, but Justice Alito's
21 question is could the State say as a matter of State law
22 whenever the trial judge has a hunch that there might
23 have been discriminatory purpose involved, may he refuse
24 to allow the preemptory challenge?

25 MR. LEVEN: Well, we argue that the judge

1 doesn't have sua sponte authority to --

2 JUSTICE STEVENS: No, but I -- if the State
3 explicitly gave the trial judge that authority, would
4 that be constitutional?

5 MR. LEVEN: Well, the -- the State has the
6 authority to have some regulation of preemptory
7 challenge rights.

8 JUSTICE SCALIA: It has the authority to
9 abolish preemptory challenge rights entirely, right?

10 MR. LEVEN: Yes.

11 JUSTICE SCALIA: So this is not a hard
12 question.

13 MR. LEVEN: Yes, the State can abolish
14 preemptory challenges if it wishes.

15 JUSTICE SCALIA: And, therefore, it could
16 take the much lesser step of allowing the trial judge,
17 if he has any suspicion that a preemptory-challenge
18 right is being used in violation of Batson, to disallow
19 it. What is wrong with that?

20 MR. LEVEN: In this case, though, we do have
21 preemptory challenges created by the State. And, Your
22 Honor, I request that I -- to reserve the remaining time
23 for my rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Scodro.

1 ORAL ARGUMENT OF MICHAEL A. SCODRO

2 ON BEHALF OF THE RESPONDENT

3 MR. SCODRO: Mr. Chief Justice, and may it
4 please the Court:

5 There is no due process violation here and
6 that takes care of this case at the threshold.

7 JUSTICE SCALIA: Well, does it really?

8 (Laughter.)

9 JUSTICE SCALIA: Suppose I agree with you
10 that there is -- there is no Federal constitutional violation.
11 But I also think that in assessing the consequence of a State
12 law violation the Illinois court here was looking to Federal
13 law and was trying to apply the Federal law of harmless error.

14 If that's the situation, would we not have
15 the obligation to determine, or would we have the
16 obligation to determine, whether it was properly
17 applying the Federal law of harmless error? Even though
18 it didn't have to, it chose to use the Federal law of
19 harmless error to -- to apply to this State violation.

20 MR. SCODRO: Justice Scalia, the briefs
21 before the Illinois Supreme Court raise two independent
22 grounds for automatic reversal by Petitioner. One was a
23 pure State law automatic reversal rule. The other was a
24 due process violation that would then trigger Federal
25 automatic reversal requirements.

1 What the Illinois Supreme Court did
2 explicitly is say, even if there were a due process
3 violation here, we believe as a matter of Federal law
4 that would not trigger automatic reversal.

5 What's certainly implied, because several of
6 the questions today have suggested, what is implied is
7 that if the court had believed that as a matter of
8 Illinois law there were an automatic reversal rule
9 required, that this was an unlawful juror to the
10 extent so profound that it voided the judgment and
11 required a new trial, under those circumstances the
12 court would never have had to reach that assumption,
13 much less go into any of the analysis it did.

14 So here the court was faced with both
15 claims, rejected both, but to reach the Federal claim
16 they must first show a due process violation. And
17 that's what they failed to do here.

18 CHIEF JUSTICE ROBERTS: So your answer to
19 Justice Scalia's question is what?

20 MR. SCODRO: The answer, Your Honor, is that
21 if the court had said, we are going to lockstep our
22 Federal -- or, rather, our State harmless error analysis
23 with the Federal question, the Federal analysis, and
24 whatever they say goes, then I would agree that under
25 those circumstances this Court could review that and

1 say, you got that wrong.

2 JUSTICE KENNEDY: What -- what case would
3 you cite for that proposition? And you can't say
4 Michigan v. Long.

5 MR. SCODRO: I can't say Michigan v. Long.
6 Excellent question, Your Honor. I mean, I think that --
7 let me -- let me --

8 JUSTICE BREYER: Why did they get it wrong?

9 MR. SCODRO: I'm sorry, Your Honor?

10 JUSTICE BREYER: Why do you say they got it
11 wrong?

12 MR. SCODRO: Oh, I don't think they did. I
13 was suggesting --

14 JUSTICE BREYER: But I mean even if it
15 were Federal? I don't know. I'm asking. Again, I
16 don't know.

17 MR. SCODRO: We think they analyzed it
18 absolutely correctly, as a matter of fact, Your Honor.

19 JUSTICE KENNEDY: Isn't this Johnson v.
20 Standard Oil and that -- that sort of thing?

21 MR. SCODRO: Right. I should say if the
22 court -- if the -- if the Illinois court wanted to back
23 away from Federal law at any point, they could certainly
24 do so. And so even if this Court were to say, you got
25 it wrong federally, they could of course at that point

1 say, no, we -- as a matter of State law, we are going to
2 apply a Brack standard or a Chapman standard.

3 JUSTICE BREYER: Is that clear as a matter
4 -- I don't know. Again, I'm asking. Is it clear as a
5 matter of Federal law that we have lots of Federal
6 trials, and in a Federal trial where a district judge
7 makes an error in excusing a juror -- he shouldn't have
8 excused the juror, there are many, many reasons for
9 doing it, so the jury is not properly as the defense
10 lawyer had the right to have it -- that that requires
11 automatically a new trial? Is that clear as a matter of
12 Federal law or not? And I --

13 MR. SCODRO: That is not --

14 JUSTICE BREYER: I don't know the answer.

15 MR. SCODRO: It is not clear, Your Honor.
16 In response to an earlier question, they cited Gomez.
17 And they -- and there is a line of cases including Gomez
18 that are cited in their brief. Those are Federal
19 supervisory authority cases in which the Court has said,
20 not as a matter of due process, interpreting the Federal
21 statute, in that case the Magistrate's Act, to conclude
22 that --

23 JUSTICE BREYER: I am not talking about
24 magistrates, and I'm not talking about due process.

25 MR. SCODRO: Correct.

1 JUSTICE BREYER: I am asking the question of
2 just what I asked. Now, you heard what I asked. It's
3 about jurors.

4 MR. SCODRO: Right.

5 JUSTICE BREYER: All right. What is the
6 answer?

7 MR. SCODRO: It is not -- that is not a due
8 process violation.

9 JUSTICE BREYER: I know. I'm not asking
10 that question. I am asking, when a lawyer -- when a --
11 when a judge makes a mistake and excuses a juror whom he
12 shouldn't have excused because he thought the juror was
13 prejudiced, say, and he wasn't, the appeals court says,
14 you are wrong about excusing him, does under Federal law
15 the defendant become entitled to a new trial? Not under
16 the Constitution; under whatever you want.

17 MR. SCODRO: I don't believe --

18 JUSTICE BREYER: Yes or no?

19 MR. SCODRO: I don't believe so, Your Honor.

20 JUSTICE BREYER: You think the answer is no,
21 okay.

22 JUSTICE STEVENS: Going back to
23 Justice Scalia's question, do you think we would have
24 jurisdiction of this certiorari petition if we were
25 convinced there was no Federal constitutional error;

1 they were merely trying to decide whether the State
2 court applied the correct constitutional standard in
3 correcting what it thought was a Federal constitutional
4 error?

5 MR. SCODRO: I don't, Your Honor. I think
6 the Federal question, if there is one presented, is
7 whether or not there is a threshold due process
8 violation.

9 JUSTICE STEVENS: And if there is none
10 there, we don't have jurisdiction to answer and give an
11 advisory opinion on how the Illinois Supreme Court
12 should run its shop.

13 MR. SCODRO: That is correct, Your Honor.

14 JUSTICE SCALIA: So the Illinois Supreme
15 Court can happily go along blaming everything on us, so
16 when it stands for reelection it can say, well, we are
17 just applying Federal law. Right?

18 MR. SCODRO: Your Honor, I think in this
19 case what the Illinois Supreme Court did is they
20 concluded --

21 JUSTICE SCALIA: No, but that's the
22 consequence of your answer to that question. It seems
23 to me there is much to be said for the disposition that
24 where a State court, even in resolving a State law
25 question, uses a Federal principle, adverts specifically

1 to Federal law, cites Federal cases, it becomes reviewable.

2 MR. SCODRO: Your Honor, let me be clear.

3 What they did here is they assumed the Federal
4 constitutional violation because they recognized that
5 there was no State entitlement to a new trial under
6 these circumstances. So they then said, well --

7 JUSTICE STEVENS: You -- they did make that
8 assumption, but you think the assumption is wrong. And
9 if we think the assumption is wrong, you would agree
10 with Justice Scalia we can go ahead and say, well,
11 you are running for reelection, so we are going to
12 correct your errors on Federal law.

13 MR. SCODRO: Obviously, Your Honor, I think
14 that if the Court were to conclude there is no due
15 process violation, it would be an artificial exercise to
16 then embark on an analysis of a proper harmless errors.

17 This Court has said time and again that
18 there is a close link between the alleged due process or
19 Sixth Amendment violation and the manner in which the
20 due process -- the harmless error analysis is conducted.

21 In Gonzalez-Lopez that was the gist of much
22 of the debate between the majority of the --

23 JUSTICE SCALIA: I would certainly agree
24 that if the only reason the Illinois Supreme Court used
25 the Federal harmless error rule was because it was

1 assuming a Federal constitutional violation, once we
2 reject that assumption, the whole thing drops out. But
3 is that entirely clear from the opinion?

4 MR. SCODRO: I --

5 JUSTICE SCALIA: Is it clear that the
6 Illinois Supreme Court wouldn't have used the same test
7 under simply Illinois law?

8 MR. SCODRO: Well, two points, Your Honor.
9 First, in context with the briefs, which independently
10 sought both State and Federal remand, and page 171 of
11 the joint appendix, where the court makes clear that we
12 are simply not going to resolve the question of whether
13 there is a Federal due process violation, I think in
14 context it does become clear what the court has done
15 here is it has certainly concluded there is not a State
16 right. So it's proceeded to say, well, what if there is
17 a Federal due process entitlement? If that is the case,
18 let's proceed and decide, well, it's harmless anyway.
19 We don't need to then reverse this conviction.

20 Now, I will say that if the Court harbors concerns --
21 if the Court were to conclude there is no due process
22 violation here, but harbors concerns that the Illinois
23 Supreme Court feels itself duty-bound to follow this
24 Court's jurisprudence on the question of harmlessness,
25 that at that point the Court could simply make the due

1 process ruling and remand and allow the Illinois Supreme
2 Court to make clear what I think is already clear, but
3 make crystal clear, that they would apply a -- a
4 harmless error standard to this sort -- this sort of
5 deprivation.

6 JUSTICE SCALIA: The problem is the -- the
7 only reason the Illinois Supreme Court found that there
8 was no error of constitutional dimension, meaning
9 Federal constitutional dimension, the only reason it --
10 it found that is because it found that the error was
11 harmless beyond a reasonable doubt.

12 MR. SCODRO: Your Honor, I think that what
13 they have done is they've just put the statement at 171 --

14 JUSTICE SCALIA: It is the cart before the
15 horse.

16 MR. SCODRO: They have run the analysis, and
17 what they have done, Your Honor, is said, look, any
18 error here of constitutional dimension would be
19 harmless. Therefore, we inform the reader on page 171,
20 we simply haven't reached the question. Please don't
21 read the foregoing analysis to suggest that we have made
22 a prior conclusion that there is indeed a due process
23 violation here.

24 Indeed, the court suggests there probably
25 isn't by early on in the opinion pointing out that this

1 Court has long held since -- since *Stilson* in 1919, has
2 long held that there is no due process entitlement to a
3 peremptory challenge. So I think in context it is quite
4 clear that what the court has done is it said, there is
5 nothing in here for you under Illinois law; under
6 Federal law, even if there were a due process violation,
7 it is simply not -- it is simply harmless error.

8 JUSTICE GINSBURG: Then -- then you would
9 have no objection to a remand that says, Illinois
10 Supreme Court, you can't blame it on Federal law. It's
11 up to you as a matter of State law. And now answer the
12 question that you didn't answer; that is, what is the
13 consequence under State law of an erroneous denial of a
14 peremptory? You would have no objection to such a
15 remand?

16 MR. SCODRO: Your Honor, we would have no
17 objection to that procedure, but I would caution that it
18 seems unnecessary in light of the fact that the parties
19 so clearly sought relief under both State and Federal
20 law and the fact that the supreme court -- the Illinois
21 Supreme Court concludes it doesn't need to reach -- the
22 way it analyzes the -- the constitutional question.

23 I think that -- and the underlying
24 assumption that judges understand, I think it's fair to
25 assume that the Illinois justices understood that they

1 could go further as a matter of State law than Federal,
2 but not -- they couldn't provide fewer protections.

3 JUSTICE KENNEDY: For the reasons that have
4 been discussed, it may be that we won't get to the
5 merits of the Petitioner's argument. But assuming we
6 do, the Petitioner talks about the -- I don't have --
7 the "unlawfully constituted jury." Is -- is -- what is
8 the distinction between the hypothetical case of the
9 juror who isn't a resident of the county and the State
10 says you have to be a resident of the county, what is
11 the distinction between that and, say, a non-Article III
12 judge sitting on a court of appeals panel? Why is one
13 structural and the other not?

14 MR. SCODRO: Well --

15 JUSTICE KENNEDY: And this would -- this
16 would be a little different than the juror who might be
17 biased or might not be biased, because this goes to a
18 hard qualification. It's just a hypothetical in the
19 case, but it's a -- it's a linchpin to the Petitioner's
20 argument.

21 MR. SCODRO: I should begin by saying that
22 the Gomez and Wingo and Nguyen decisions and others they
23 cite in that line for the non-Article III judge
24 proposition are themselves not due process conclusions,
25 but are conclusions as a matter of State -- of Federal

1 law, rather, the idea being that Congress simply hadn't
2 delegated the authority properly in those cases. They
3 are not due process cases.

4 But if one were to assume that those would
5 also be due process violations, to have a non-Article
6 III judge sit, I would distinguish those cases at that
7 point hypothetically by saying there is a profound --
8 profound difference between someone who lacks any and
9 all mantle of State authority, on the one hand, and a
10 juror who is properly sworn and who satisfies all the
11 statutory requirements for sitting as a matter of
12 Illinois law.

13 And I should note, in the reply brief
14 there's a point at which they contend --

15 JUSTICE KENNEDY: Well -- but the
16 hypothetical is it doesn't -- the juror doesn't satisfy
17 the requirement because he or she is from the wrong
18 county.

19 MR. SCODRO: Again, Your Honor, the
20 fundamental -- the lodestar analysis here in the due
21 process -- in *Butte v. Illinois*, the Court said they've
22 not defined it with precision, but it has always been
23 fundamental fairness, a community sense of fair play and
24 decency.

25 It seems to me that, as you move into a

1 judge with absolutely no mantle of State authority or --
2 and -- whatsoever, versus a juror who is properly sworn,
3 properly instructed, but who nevertheless sits from a
4 different neighboring jurisdiction -- and I should note
5 that in Cook County there are three jury jurisdictions,
6 so the errors could be legion just within Cook County in
7 terms of being from the wrong part of the county. It
8 seems to me that that sort of error simply doesn't come
9 anywhere close to the fundamental fairness --

10 CHIEF JUSTICE ROBERTS: Well -- but how do
11 you -- there is no way to tell. I mean, presumably the
12 State has a reason for restricting the jury pool to the
13 neighborhood. I mean, and that type of limitation does
14 go back to Blackstone, the vicinage of the -- of the
15 crime. So -- and there's no way to tell. There's no
16 way to tell whether the juror from DuPage County is
17 going to have a different view or a different
18 perspective or affected it in a -- or that it affected
19 the verdict in a particular case.

20 MR. SCODRO: This is true, Your Honor, but
21 in those contexts, the very State law that has created
22 those divisions, for whatever reason they have seen fit
23 to do so, is the proper authority to conclude whether or
24 not the error is so profound by having that person sit
25 that it ought not be a violation of due process -- that

1 it ought not be -- that it oughtn't be a void judgment.
2 Indeed, that's how these Federal cases, Gomez and the
3 others --

4 JUSTICE BREYER: Did -- that's exactly what
5 I can't figure out. I'm trying -- forget due process.
6 All right? Keep that out of your mind. We have
7 approximately 50 State jurisdictions, the District of
8 Columbia, a bunch of Federal jurisdictions. All right?
9 In those jurisdictions, to your knowledge -- you may not
10 know this, you may not have looked it up -- but what
11 happens in the situation where a juror -- where a juror
12 should have been excused? I guess there's a new trial.
13 The juror should have been excused, but wasn't. I guess
14 there's a new trial normally; is that right?

15 MR. SCODRO: If the juror is biased, yes,
16 but not if the juror is unbiased.

17 JUSTICE BREYER: If the juror is biased,
18 yes. Okay.

19 Now, suppose it's the defendant who wanted
20 the juror and he was -- he was wrongly excused. All
21 right, so that's what the appeals court holds. What's
22 the rule? Again, do they go back and look and see if
23 it's biased? If the juror -- if the defendant didn't
24 get the juror he wanted, somebody else took his place,
25 so they look to see if that person was biased, and if

1 not, say: Too bad, defendant; you may have been right,
2 but you lost the jury that you want, no remedy? What
3 happens?

4 MR. SCODRO: To my understanding -- I
5 don't believe -- I don't have cases to cite on this.
6 But I don't believe there would be a remedy because this
7 Court has said time and again that the preemptory right
8 and those surrounding it do not create a right to any
9 particular juror.

10 JUSTICE BREYER: So, at least in the case of
11 where he failed to get a peremptory, whether it's
12 Federal or whether it's State, the Federal law and most
13 State law is: You lost your right to a peremptory, one
14 of them. You should have had it, but you are out of
15 luck, if -- if the juror who replaced, the replacement,
16 the juror who was there, you know, who otherwise
17 wouldn't have been, is a fair juror.

18 MR. SCODRO: Your Honor, I thought you were
19 asking what happens if a particular juror the defendant
20 wanted did not sit, and under those circumstances I
21 would say that because this Court has held --

22 JUSTICE BREYER: Well, what about the last
23 situation?

24 MR. SCODRO: If your question -- that
25 indicates really the split in this case, Your Honor, and

1 the indirect split that was -- all of which was laid out
2 in the cert petition. There is -- there is
3 disagreement, though we would note that much of the
4 disagreement -- some of it -- is pre-Martinez-Salazar
5 and footnote 4 with its remarks about Swain. Some of it
6 is Federal, and therefore you don't have the same
7 concern about a threshold due process violation.

8 I will say, to answer your original
9 question, though, as well about jurors who should not
10 have sat, but are not deemed biased, Illinois certainly
11 has a history of cases to that effect, and the court --
12 the Illinois court has handled them as a matter of
13 Illinois law. In the case in 1886, an alien sat and the
14 court concluded there was no timely objection. That was
15 part of its analysis, but it certainly was not a
16 "nullity," in the court's words, under those
17 circumstances.

18 JUSTICE KENNEDY: What was that case?

19 MR. SCODRO: This is not cited in the
20 briefs, so I'm only citing it in response to a question.
21 It's a case called Chase from the Illinois Supreme Court
22 --

23 JUSTICE KENNEDY: Oh, an Illinois case.

24 MR SCODRO: -- in 1886. And it's a case in
25 which an alien sat on the jury, and there was, I

1 believe, as part of the court's analysis a failure to
2 make contemporaneous objection. But they said it was
3 not a "nullity," to use the court's words, to seat this
4 improper juror and, again, made as a determination of
5 Illinois law, just as the question here as to what
6 remedy should be in effect is purely a question of
7 Illinois law.

8 Again, they have simply failed to establish
9 a due process violation. This Court has said time and
10 again that there is no due process entitlement to
11 peremptory challenges. Much of what we accept as given
12 these days depends, hinges, upon that presumption,
13 including the Batson line, as the concurrence in
14 Miller-El pointed out in 2005, numerous restrictions on
15 peremptories that have been upheld since the 19th
16 century, which are laid out in the government's brief.
17 And indeed, the remarkable variety amongst States, some
18 of which has been touched upon today, where States,
19 State by State, provide very different numbers of
20 peremptory challenges and they provide very different
21 limits thereon as well.

22 JUSTICE ALITO: If the judge who sat on a
23 State trial was not authorized under State law to hear
24 that particular matter, would that be a due process
25 violation?

1 MR. SCODRO: I think the answer to that is
2 no, Your Honor. And indeed, as we point out in our
3 brief, Cook County has several substantive divisions, so
4 that, for example, a criminal law division judge is not
5 authorized to sit on a family law matter, for example.
6 And yet Illinois law has made clear that if there's an
7 error, if you go to the wrong court -- and that is
8 unlikely to happen in the scenario I put forth, but it
9 could easily happen between law and chancery for
10 example, and does indeed happen. If that were be the
11 case, the -- any error in going to the wrong court and
12 having the wrong court resolve your issue does not void
13 the judgment as a matter of law. And I certainly don't
14 think that would implicate due process concerns as well.

15 If the Court has no further questions, we
16 would ask that you affirm the judgment below.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Roberts.

19 ORAL ARGUMENT OF MATTHEW D. ROBERTS

20 ON BEHALF OF THE UNITED STATES,

21 AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENT

23 MR. ROBERTS: Mr. Chief Justice, and may it
24 please the Court:

25 Federal law does not require automatic

1 reversal of Petitioner's conviction because the denial
2 of a peremptory challenge at most violated only his
3 State law rights. And even if his Federal
4 constitutional rights had been violated, harmless error
5 review would apply. The Constitution does not give
6 criminal defendants the right to peremptory challenges.
7 Therefore, a -- the right of a State defendant like
8 Petitioner to exercise peremptory challenges derives
9 entirely from State law, and when the erroneous denial
10 of a peremptory challenge deprives him only of State law
11 right, and when the State law rights alone have been
12 violated, State law, not Federal law, dictates whether
13 harmless error review applies.

14 The violation of a State law right doesn't
15 rise to a due process -- Federal due process violation
16 unless it deprives the defendant of a fair trial.

17 And this Court has repeatedly held that
18 States can withhold peremptory challenges entirely
19 without impairing the right to an impartial jury or a
20 fair trial. It therefore follows that the erroneous
21 denial of a single peremptory challenge does not render
22 a trial fundamentally unfair.

23 JUSTICE ALITO: What if it's not a single
24 challenge? What if, let's say, each side has six, and
25 the trial judge just arbitrarily refuses to allow a

1 defendant to exercise any peremptory challenge, but the
2 juror -- the juror that's ultimately selected, there is no
3 reason to think it's not a fair jury?

4 MR. ROBERTS: We'd still think that that
5 would not be a Federal constitutional violation and,
6 even if it were some kind of a Federal violation, that
7 it would be subject to review for harmlessness. If --
8 the trial court could violate due process, if its
9 actions so skewed the balance of power over the
10 selection of the jury in favor of the government that it
11 resulted in a fundamentally unfair trial, but even the
12 denial of multiple peremptory challenges wouldn't rise
13 to that level, and certainly the denial of a single one
14 --

15 JUSTICE STEVENS: But supposing -- supposing
16 Illinois had a statute that said the prosecution gets
17 ten peremptories and the defendants get one. Would that
18 raise a Federal question?

19 MR. ROBERTS: The question there would be
20 whether that so skews -- the test that I said before. I
21 think the question would be does that so skew the
22 balance --

23 JUSTICE STEVENS: Isn't the answer pretty
24 clear that that would be unfair?

25 MR. ROBERTS: I don't -- I don't think that

1 the answer is clear at all. The State might rationally
2 conclude that, because the government has to prove its
3 case beyond a reasonable doubt, because it has to
4 convince the jurors unanimously to rule in its favor,
5 and because it has no right to appeal an unfavorable
6 determination by the jury, that the prosecution should
7 be entitled to more peremptory challenges. Of course,
8 this case doesn't present any --

9 JUSTICE KENNEDY: I will use that as an
10 examination question, but let's hope that it doesn't
11 come up.

12 MR. ROBERTS: It's unlikely to, but --

13 JUSTICE GINSBURG: But what about the --

14 JUSTICE STEVENS: The reason it's unlikely
15 is it's so clearly unconstitutional.

16 MR. ROBERTS: Well, we don't think that it's
17 unconstitutional at all, Your Honor, but it is contrary
18 to what the common practice and the way things have been
19 approached in both Federal and State courts.

20 JUSTICE GINSBURG: Mr. Roberts, if you do
21 get to harmless error, how do you deal with the question
22 that was raised by the Chief Justice? That is, there is
23 no way in the world that you can tell whether this was
24 harmless or not? You have to imagine another juror
25 being on the panel, that juror could have swung the

1 case, could have had no influence. There's just no way
2 of knowing what would have happened.

3 MR. ROBERTS: Well, I think that rests on
4 the mistaken premise that harmless error analysis turns
5 on the predilections of the particular decisionmaker or
6 on speculation about what one juror, what one particular
7 juror would have done differently than another. In
8 fact, harmless error -- the harmless error inquiry looks
9 at the hypothetical objective rational juror. And so,
10 that's what you look at and the difference between --

11 CHIEF JUSTICE ROBERTS: No, but maybe --
12 maybe you have an -- you know, the irrational juror, you
13 know, the holdout is not going to convict for any
14 reason.

15 MR. ROBERTS: But -- but that is not an
16 appropriate part of -- of harmless error analysis, just
17 like the fact that the jury might engage in
18 nullification isn't an appropriate part of the harmless
19 error analysis.

20 If -- and Strickland is the best case to -- I
21 think -- to explain how that is irrelevant to the inquiry,
22 even though it's part of the constitutional there --
23 analysis there. The Court very clearly explains that
24 you don't look at the particular decisionmaker, you
25 don't speculate about nullification, about arbitrary

1 action and the like; it's sort of transferable over.
2 That's just not an appropriate part of harmless error
3 analysis.

4 CHIEF JUSTICE ROBERTS: Well, I mean, you
5 get -- well, even assuming your -- your premise, isn't
6 it pretty difficult to know what a rational juror would
7 have done?

8 MR. ROBERTS: Well, we think that the
9 correct inquiry in this circumstance, given the nature
10 of the right, is to ask whether the error resulted in
11 the seating of a juror that was not impartial. And then
12 you look at the record in the case, the voir dire
13 record, and you make that determination, and the
14 government bears the -- bears the burden of proof.

15 So we don't think that that would be
16 difficult to do, Your Honor.

17 JUSTICE STEVENS: But that is almost the
18 same, at least in some States, as getting a new trial
19 anyway. If we find out after the fact that the juror
20 was biased, then in some States that's -- that's a
21 reason for a new trial in the discretion of the trial
22 court, anyway.

23 MR. ROBERTS: That -- that -- that could be,
24 but --

25 JUSTICE STEVENS: The point is you are not

1 giving much substance to the rule.

2 MR. ROBERTS: Well, I think we are
3 respecting its fundamental -- its fundamental purpose,
4 Your Honor, which is to assist to help achieve the goal
5 of selecting an impartial jury.

6 JUSTICE BREYER: What is the law there?
7 That's what I have been trying to get at. I mean, my
8 initial instinct would be that if a defendant doesn't
9 get the jury that the law entitles him to, that's an
10 error. And you'd normally think it was harmful, because
11 you can't say, in honesty, that it was harmless; it's
12 the jury that was supposed to decide. I expect it would
13 work out that way. I have never looked into it. How
14 has it worked out?

15 MR. ROBERTS: Generally for errors like the
16 error you described before, where the judge
17 erroneously -- mistakenly excuses a juror in the belief
18 that the juror is disqualified for cause, where the
19 judge mistakenly substitutes a qualified alternate for
20 one of the jurors, or the judge places one alternate on
21 the jury instead of another, the courts have generally
22 looked at that for harmlessness and not required
23 automatic reversal.

24 Indeed, even in the case of jurors that
25 don't satisfy --

1 JUSTICE BREYER: But -- all right. So in
2 other words, they have often said you don't get a new
3 trial?

4 MR. ROBERTS: Yes.

5 JUSTICE BREYER: Okay.

6 MR. ROBERTS: Yes. And even in the case of
7 jurors that don't meet the statutory requirements, the
8 Federal courts of appeals have held that unless a biased
9 juror sits a new trial is not required.

10 JUSTICE KENNEDY: But don't some of those
11 courts, rather than focusing on the qualifications of
12 the particular juror, look to the -- how close the case
13 was?

14 MR. ROBERTS: The harmless error analysis,
15 there are sort of a lot of different scenarios of types
16 of violations, and the standard that they use is not
17 clear in all of them. In the ones that -- the cases
18 that I found that involve the seating of jurors that
19 don't meet the Federal statutory requirements, usually
20 they involve felons that didn't reveal that they were
21 felons, the courts have looked to the biased juror
22 standard.

23 Some courts have done that. Others have
24 looked to whether it affects the verdict. They haven't
25 been exactly clear how you -- how you determine that,

1 but --

2 CHIEF JUSTICE ROBERTS: Well, that's because
3 there is no way to tell.

4 MR. ROBERTS: Well, I -- I think that --
5 that even if you had a standard that said to look to
6 whether there was an effect on the verdict, you could
7 tell precisely the way the Illinois Supreme Court
8 applied Neder here. If no rational jury could have
9 acquitted, then you know the substitution of one
10 rational, impartial juror for another didn't have an
11 effect on the outcome. And that doesn't violate the
12 Sixth Amendment to do that, Your Honor, because the
13 underlying right -- the underlying error doesn't violate
14 the Sixth Amendment.

15 CHIEF JUSTICE ROBERTS: But a jury is a
16 fundamental protection of individual liberty, and in
17 your analysis you are having a judge decide what the
18 jury would do.

19 MR. ROBERTS: No, Your Honor. As
20 Justice Ginsburg pointed out before, the Petitioner here
21 got a determination of guilt beyond a reasonable doubt
22 on every element of the offense from a fair and
23 impartial jury that was properly instructed. So we are
24 not having a judge substitute that at all.

25 CHIEF JUSTICE ROBERTS: The judge is making

1 the determination that a juror that should have been
2 seated would act like the juror who was seated instead.

3 MR. ROBERTS: That is true. But the Sixth
4 Amendment doesn't give the defendant the right to any
5 particular jury. It doesn't give the defendant the
6 right to a jury that has been selected in compliance
7 with every jot and tittle of State law. And therefore
8 if the underlying error, as the underlying error here
9 where you get a denial of a peremptory, where a juror is
10 seated that, even though that violated State law
11 assumably here, that -- that that doesn't amount to a
12 Sixth Amendment violation.

13 And if the -- if the defendant got his Sixth
14 Amendment rights at trial, then the way you conduct
15 harmless error review can't violate his Sixth Amendment
16 rights. He already got them. And so it can be done and
17 it doesn't violate the Sixth Amendment.

18 JUSTICE KENNEDY: There are any number of
19 alternatives that we can adopt in ruling for your
20 position. If we were to rule for your position, what do
21 you think is the most straightforward rationale?

22 MR. ROBERTS: Well, I -- we would obviously
23 like to have sort of alternative rulings that do both,
24 but I think the most logical way to approach the case is
25 to decide whether there was a violation of the

1 Constitution here and, because there wasn't one, to say
2 that State law governs the harmless error analysis.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Leven, you have two minutes remaining.

5 REBUTTAL ARGUMENT OF JAMES K. LEVEN

6 ON BEHALF OF THE PETITIONER

7 MR. LEVEN: Your Honor, the Hicks v.
8 Oklahoma case is a very important case as far as the due
9 process right to a lawful adjudicator, because there we
10 had an unlawful sentencer. So, I would ask that the
11 Court consider that. That's a State case involving an
12 unlawful adjudicator. So we do have a due process
13 violation under that case.

14 As to the Sixth Amendment issue, the
15 Illinois Supreme Court did act inconsistently with the
16 Sixth Amendment as far as its manner of conducting
17 harmless error review, because harmless error analysis
18 is impossible to conduct in this situation, because in
19 order to do that, we would have to examine what the
20 particular jury would have done had it not been for the
21 error; and the particular jury in this case must be out,
22 because there the particular jury, the panel as a whole,
23 is illegally constituted, and the -- and it's impossible
24 to conduct your harmless error analysis.

25 JUSTICE ALITO: Why is that any harder than

1 harmless error analysis that is conducted all the time?
2 For example, evidence is erroneously excluded from the
3 trial and you ask, was that a harmless error? But you
4 have to -- there has to be speculation about how this
5 jury would have received the additional evidence. What
6 -- what's the difference?

7 MR. LEVEN: Because in that situation, we
8 are looking at what the particular jury, how a
9 particular jury in that case would have resolved the
10 matter had the erroneously admitted evidence not been
11 admitted.

12 JUSTICE ALITO: But the court has no -- has
13 no inside information about the dynamics of that
14 particular jury. It's just -- it's deciding what a
15 rational jury would do, what a -- what a standard jury
16 would do.

17 MR. LEVEN: Whether that particular jury
18 would have reached the same verdict, which we can't do
19 in this case.

20 JUSTICE ALITO: No. But how does the Court
21 know anything particular about the jury when it conducts
22 that harmless error analysis? It doesn't.

23 MR. LEVEN: But it could look at the record
24 as a whole and determine whether or not the -- the
25 particular jury that rendered the verdict would have

1 done the same thing had the erroneously admitted
2 evidence not -- not been -- not been introduced.

3 And in this case, we have a very different
4 situation. We have an illegal adjudicator and we can't
5 determine whether that adjudicator would have resolved
6 the case differently had it not been for the error,
7 because it's impossible to assess because of the -- the
8 particular adjudicator that resolved this case, in the
9 present case, was illegally composed.

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

12 (Whereupon, at 12:05 p.m., the case in the
13 above-entitled matter was submitted.)

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