SUPREME COURT OF THE UNITED STATES

No. 98–1255

UNITED STATES, PETITIONER *v.* ABEL MARTINEZ-SALAZAR

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

[January 19, 2000]

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in the judgment.

I agree with the Court's analysis of the issue before us: Respondent has been accorded the full number of peremptory challenges to which he was entitled. The fact that he voluntarily chose to expend one of them upon a venireman who should have been stricken for cause makes no difference.

I do not join the opinion of the Court because it unnecessarily pronounces upon the question whether, had respondent *not* expended his peremptory challenge, he would have been able to complain about the seating of the biased juror. See *ante*, at 10 ("Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal"). Since he *did* expend the challenge, that issue is simply not before us.

I am far from certain, moreover, that the Court's suggested resolution of the issue is correct. It is easy enough to agree that we have no warrant "to read into Rule 24," *ante*, at 9, a requirement that peremptories be used to remove veniremen properly challenged for cause. The difficult question, however, is not whether Federal Rule of Criminal Procedure 24(b) requires exercise of the peremptory, but whether normal principles of waiver (not to say

the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent. I would not find it easy to overturn a conviction where, to take an extreme example, a defendant had plenty of peremptories left but chose instead to allow to be placed upon the jury a person to whom he had registered an objection for cause, and whose presence he believed would nullify any conviction.

The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point. Indeed, that *must* have been one of their purposes in earlier years, when there was *no appeal* from a criminal conviction, see *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 335–336 (1904)– so that if the defendant did not correct the error by using one of his peremptories, the error would not be corrected at all. It is certainly not clear to me that the institution of appeals exempted defendants from using peremptories for this original purpose, thereby giving them (in effect) additional challenges.

Because the question is not presented (and hence cannot be authoritatively resolved), I would leave it unaddressed.