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4	On behalf of the Petitioner
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8	On behalf of the United States, as amicus
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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, I think --

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: 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 the problem --

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, yeah, 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 JUSTICE SOUTER: Yes, but it had everything



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

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

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

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

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

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

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

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

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

19 MR. LEVEN: No. The court declined to  
20 determine whether a constitutional right had been  
21 violated, but the court applied this Court's precedent  
22 under Martinez-Salazar and Neder, the Federal harmless  
23 error automatically reversal law that this Court has,  
24 and used that to find that the error was subject to  
25 harmless error review. The court did not --

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

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

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

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

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

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

1 subject to harmless error review.

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

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

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

24 MR. LEVEN: Yes, it would appear so if it --  
25 if a State law stated that a juror qualification

1 requirement is that the juror who presides in Cook  
2 County must be a resident of the county.

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

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

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

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

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

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

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

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

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

19 JUSTICE GINSBURG: But we had an actual  
20 jury. It's not as though you had no jury verdict and  
21 then the court would say -- the court would say, we  
22 think that this defendant was as guilty as they come;  
23 but you had a jury with jurors who met all the State law  
24 qualifications, already made the determination of guilt.  
25 So that's a little different from the case where, say, a

1 judge would attempt the equivalent of a directed  
2 verdict.

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

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

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

24 MR. LEVEN: Well, that's our position, Your  
25 Honor, because what the trial judge did in this case is

1 asked for a reason without having established any prima  
2 facie case.

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

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

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

23 MR. LEVEN: Well, we argue that the judge  
24 doesn't have sua sponte authority to --

25 JUSTICE STEVENS: No, but I -- if the State



1 explicitly gave the trial judge that authority, would  
2 that be constitutional?

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

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

8 MR. LEVEN: Yes.

9 JUSTICE SCALIA: So this is not a hard  
10 question.

11 MR. LEVEN: Yes, the State can abolish  
12 preemptory challenges if it wishes.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Scodro.

24 ORAL ARGUMENT OF MICHAEL A. SCODRO

25 ON BEHALF OF THE RESPONDENT

1 MR. SCODRO: Mr. Chief Justice, and may it  
2 please the Court:

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

5 JUSTICE SCALIA: Well, does it really?  
6 Suppose I agree with you that there is -- there is no  
7 Federal constitutional violation. But I also think that  
8 in assessing the consequence of a State law violation  
9 the Illinois court here was looking to Federal law and  
10 was trying to apply the Federal law of harmless error.

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

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

23 What the Illinois Supreme Court did  
24 explicitly is say, even if there were a due process  
25 violation here, we believe as a matter of Federal law

1 that would not trigger automatic reversal.

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

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

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

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

24           JUSTICE KENNEDY: What -- what case would  
25 you cite for that proposition? And you can't say

1 Michigan v. Long.

2 MR. SCODRO: I can't say Michigan v. Long.  
3 Excellent question, Your Honor. I mean, I think that --  
4 let me -- let me --

5 JUSTICE BREYER: Why did they get it wrong?

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

7 JUSTICE BREYER: Why do you say they got it  
8 wrong?

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

11 JUSTICE BREYER: Does that mean even if it  
12 were Federal? I don't know. I'm asking. Again, I  
13 don't know.

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

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

18 MR. SCODRO: Right. I should say if the  
19 court -- if the -- if the Illinois court wanted to back  
20 away from Federal law at any point, they could certainly  
21 do so. And so even if this Court were to say, you got  
22 it wrong federally, they could of course at that point  
23 say, no, we -- as a matter of State law, we are going to  
24 apply a Brack standard or a Chapman standard.

25 JUSTICE BREYER: Is that clear as a matter

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

10 MR. SCODRO: That is not --

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

12 MR. SCODRO: It is not clear, Your Honor.

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

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

22 MR. SCODRO: Correct.

23 JUSTICE BREYER: I am asking the question,  
24 just what I asked. Now, you heard what I asked. It's  
25 about jurors.

1 MR. SCODRO: Right.

2 JUSTICE BREYER: All right. What is the  
3 answer?

4 MR. SCODRO: It is not -- that is not a due  
5 process violation.

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

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

15 JUSTICE BREYER: Yes or no?

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

17 JUSTICE BREYER: You think the answer is no,  
18 okay.

19 JUSTICE STEVENS: Going back to  
20 Justice Scalia's question, do you think we would have  
21 jurisdiction of this certiorari petition if we were  
22 convinced there was no Federal constitutional error;  
23 they were merely trying to decide whether the State  
24 court applied the correct constitutional standard in  
25 correcting what it thought was a Federal constitutional

1 error?

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

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

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

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

15 MR. SCODRO: Your Honor, I think in this  
16 case what the Illinois Supreme Court did is they  
17 concluded --

18 JUSTICE SCALIA: No, but that's the  
19 consequence of your answer to that question. It seems  
20 to me there is much to be said for the disposition that  
21 where a State court, even in resolving a State law  
22 question, uses a Federal principle, adverts specifically  
23 to Federal law, cites Federal cases, it would cover you.

24 MR. SCODRO: Your Honor, let me be clear.  
25 What they did here is they assumed the Federal

1 constitutional violation because they recognized that  
2 there was no State entitlement to a new trial under  
3 these circumstances. So they then said, well --

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

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

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

18 In Gonzalez-Lopez that was the gist of much  
19 of the debate between the majority of the --

20 JUSTICE SCALIA: I would certainly agree  
21 that if the only reason the Illinois Supreme Court used  
22 the Federal harmless error rule was because it was  
23 assuming a Federal constitutional violation, once we  
24 reject that assumption, the whole thing drops out. But  
25 is that entirely clear from the opinion?



1 MR. SCODRO: I --

2 JUSTICE SCALIA: Is it clear that the  
3 Illinois Supreme Court wouldn't have used the same test  
4 under simply Illinois law?

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

17 Now, I will say that if the Court harbors concerns --  
18 if the Court were to conclude there is no due process  
19 violation here, but harbors concerns that the Illinois  
20 Supreme Court feels itself duty-bound to follow this  
21 Court's jurisprudence on the question of harmlessness,  
22 that at that point the Court could simply make the due  
23 process ruling and remand and allow the Illinois Supreme  
24 Court to make clear what I think is already clear, but  
25 make crystal clear, that they would apply a -- a

1 harmless error standard to this sort -- this sort of  
2 deprivation.

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

9 MR. SCODRO: Your Honor, I think that what  
10 they have done is they've just put the statement --

11 JUSTICE SCALIA: It is the cart before the  
12 horse.

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

21 Indeed, the court suggests there probably  
22 isn't by early on in the opinion pointing out that this  
23 Court has long held since -- since *Stilson* in 1919, has  
24 long held that there is no due process entitlement to a  
25 peremptory challenge. So I think in context it is quite

1 clear that what the court has done is it said, there is  
2 nothing in here for you under Illinois law; under  
3 Federal law, even if there were a due process violation,  
4 it is simply not -- it is simply harmless error.

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

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

20 I think that -- and the underlying  
21 assumption that judges understand, I think it's fair to  
22 assume that the Illinois justices understood that they  
23 could go further as a matter of State law than Federal,  
24 but not -- they couldn't provide fewer protections.

25 JUSTICE KENNEDY: For the reasons that have

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

11 MR. SCODRO: Well --

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

18 MR. SCODRO: I should begin by saying that  
19 the Gomez and Wingo and Nguyen decisions and others they  
20 cite in that line for the non-Article III judge  
21 proposition are themselves not due process decisions,  
22 but are conclusions as a matter of State -- of Federal  
23 law, rather, the idea being that Congress simply hadn't  
24 delegated the authority properly in those cases. They  
25 are not due process cases.

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

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

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

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

22           It seems to me that, as you move into a  
23 judge with absolutely no mantle of State authority or --  
24 and -- whatsoever, versus a juror who is properly sworn,  
25 properly instructed, but who nevertheless sits from a

1 different neighboring jurisdiction -- and I should note  
2 that in Cook County there are three jury jurisdictions,  
3 so the errors could be legion just within Cook County in  
4 terms of being from the wrong part of the county. It  
5 seems to me that that sort of error simply doesn't come  
6 anywhere close to the fundamental fairness --

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

17 MR. SCODRO: This is true, Your Honor, but  
18 in those contexts, the very State law that has created  
19 those divisions, for whatever reason they have seen fit  
20 to do so, is the proper authority to conclude whether or  
21 not the error is so profound by having that person sit  
22 that it ought not be a violation of due process -- that  
23 it ought not be -- that it oughtn't be a void judgment.  
24 Indeed, that's how these Federal cases, Gomez and the  
25 others --

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

12 MR. SCODRO: If the juror is biased, yes,  
13 but not if the juror is unbiased.

14 JUSTICE BREYER: If the juror is biased,  
15 yes. Okay.

16 Now, suppose it's the defendant who wanted  
17 the juror and he was -- he was wrongly excused. All  
18 right, so that's what the appeals court holds. What's  
19 the rule? Again, do they go back and look and see if  
20 it's biased? If the juror -- if the defendant didn't  
21 get the juror he wanted, somebody else took his place,  
22 so they look to see if that person was biased, and if  
23 not, say: Too bad, defendant; you may have been right,  
24 but you lost the jury that you want, no remedy? What  
25 happens?

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

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

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

19 JUSTICE BREYER: Well, what about the last  
20 situation?

21 MR. SCODRO: If your question -- that  
22 indicates really the split in this case, Your Honor, and  
23 the indirect split that was -- all of which was laid out  
24 in the cert petition. There is -- there is  
25 disagreement, though we would note that much of the



1 disagreement -- some of it -- is pre-Martinez-Salazar  
2 and footnote 4 with its remarks about Swain. Some of it  
3 is Federal, and therefore you don't have the same  
4 concern about a threshold due process violation.

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

15 JUSTICE KENNEDY: What was that case?

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

20 JUSTICE KENNEDY: Oh, an Illinois case.

21 MR SCODRO: -- in 1886. And it's a case in  
22 which an alien sat on the jury, and there was, I  
23 believe, as part of the court's analysis a failure to  
24 make contemporaneous objection. But they said it was  
25 not a "nullity," to use the court's words, to seat this

1 improper juror and, again, made as a determination of  
2 Illinois law, just as the question here as to what  
3 remedy should be in effect is purely a question of  
4 Illinois law.

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

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

23           MR. SCODRO: I think the answer to that is  
24 no, Your Honor. And indeed, as we point out in our  
25 brief, Cook County has several substantive divisions, so

1 that, for example, a criminal law division judge is not  
2 authorized to sit on a family law matter, for example.  
3 And yet Illinois law has made clear that if there's an  
4 error, if you go to the wrong court -- and that is  
5 unlikely to happen in the scenario I put forth, but it  
6 could easily happen between law and chancery for  
7 example, and does indeed happen. If that were be the  
8 case, the -- any error in going to the wrong court and  
9 having the wrong court resolve your issue does not void  
10 the judgment as a matter of law. And I certainly don't  
11 think that would implicate due process concerns as well.

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Roberts.

16 ORAL ARGUMENT OF MATTHEW D. ROBERTS

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE,

19 SUPPORTING THE RESPONDENT

20 MR. ROBERTS: Mr. Chief Justice, and may it  
21 please the Court:

22 Federal law does not require automatic  
23 reversal of Petitioner's conviction because the denial  
24 of a peremptory challenge at most violated only his  
25 State law rights. And even if his Federal

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

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

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

20 JUSTICE ALITO: What if it's not a single  
21 challenge? What if, let's say, each side has six, and  
22 the trial judge just arbitrarily refuses to allow a  
23 defendant to exercise any peremptory challenge, but the  
24 jury -- the jury that's ultimately selected, there is no  
25 reason to think it's not a fair jury?

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

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

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

20           JUSTICE STEVENS: Isn't the answer pretty  
21 clear that that would be unfair?

22           MR. ROBERTS: I don't -- I don't think that  
23 the answer is clear at all. The State might rationally  
24 conclude that, because the government has to prove its  
25 case beyond a reasonable doubt, because it has to

1 convince the jurors unanimously to rule in its favor,  
2 and because it has no right to appeal an unfavorable  
3 determination by the jury, that the prosecution should  
4 be entitled to more peremptory challenges. Of course,  
5 this case doesn't --

6 JUSTICE KENNEDY: I will use that as an  
7 examination question, but let's hope that it doesn't  
8 come up.

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

10 JUSTICE GINSBURG: But what about the --

11 JUSTICE STEVENS: The reason it's unlikely  
12 is it's so clearly unconstitutional.

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

17 JUSTICE GINSBURG: Mr. Roberts, if you do  
18 get to harmless error, how do you deal with the question  
19 that was raised by the Chief Justice? That is, there is  
20 no way in the world that you can tell whether this was  
21 harmless or not? You have to imagine another juror  
22 being on the panel, that juror could have swung the  
23 case, could have had no influence. There's just no way  
24 of knowing what would have happened.

25 MR. ROBERTS: Well, I think that rests on

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

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

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

17 If -- and Strickland is the best case to, I  
18 think, to explain how that is irrelevant to the inquiry,  
19 even though it's part of the constitutional there --  
20 analysis there. The Court very clearly explains that  
21 you don't look at the particular decisionmaker, you  
22 don't speculate about nullification, about arbitrary  
23 action and the like; it's sort of transferable over.  
24 That's just not an appropriate part of harmless error  
25 analysis.

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

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

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

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

20 MR. ROBERTS: That -- that -- that could be,  
21 but --

22 JUSTICE STEVENS: The point is you are not  
23 giving much substance to the rule.

24 MR. ROBERTS: Well, I think we are  
25 respecting its fundamental -- its fundamental purpose,



1 Your Honor, which is to assist to help achieve the goal  
2 of selecting an impartial juror.

3 JUSTICE BREYER: What is the law there?

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

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

21 Indeed, even in the case of jurors that  
22 don't satisfy --

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

1 MR. ROBERTS: Yes.

2 JUSTICE BREYER: Okay.

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

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

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

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

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

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

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

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

22                   CHIEF JUSTICE ROBERTS: The judge is making  
23 the determination that a juror that should have been  
24 seated would act like the juror who was seated instead.

25                   MR. ROBERTS: That is true. But the Sixth

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

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

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

19 MR. ROBERTS: Well, I -- we would obviously  
20 like to have sort of alternative rulings that do both,  
21 but I think the most logical way to approach the case is  
22 to decide whether there was a violation of the  
23 Constitution here and, because there wasn't one, to say  
24 that State law governs the harmless error analysis.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Leven, you have two minutes remaining.

2 REBUTTAL ARGUMENT OF JAMES K. LEVEN

3 ON BEHALF OF THE PETITIONER

4 MR. LEVEN: Your Honor, the Hicks v.

5 Oklahoma case is a very important case as far as the due  
6 process right to a lawful adjudicator, because there we  
7 had an unlawful sentencer. So, I would ask that the  
8 Court consider that. That's a State case involving an  
9 unlawful adjudicator. So we do have a due process  
10 violation under that case.

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

22 JUSTICE ALITO: Why is that any harder than  
23 harmless error analysis that is conducted all the time?  
24 For example, evidence is erroneously excluded from the  
25 trial and you ask, was that a harmless error? But you

1 have to -- there has to be speculation about how this  
2 jury would have received the additional evidence. What  
3 -- what's the difference?

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

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

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

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

20 MR. LEVEN: But it could look at the record  
21 as a whole and determine whether or not the -- the  
22 particular jury that rendered the verdict would have  
23 done the same thing had the erroneously admitted  
24 evidence not -- not been -- not been introduced.

25 And in this case, we have a very different

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

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
8 The case is submitted.

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

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