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1 P R O C E E D I N G S

2 (11:05 a.m.)

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

5 Mr. Leven.

6 ORAL ARGUMENT OF JAMES K. LEVEN

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

4 It -- it seems quite a stretch to apply
5 those 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 full
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 is --

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 jury
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 -- have
6 rules that you have to be a resident of the county to
7 serve on that jury. And suppose a juror thinks that he
8 or she is a resident and gets the county line wrong or
9 doesn't know what the residency requirement. Under your
10 rule -- what is your term, an "unlawful adjudicator."
11 And then we have a -- we have a -- a Federal
12 constitutional standard that requires structural error
13 for any State -- for any violation of any State -- State
14 rule. That is 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 a jury pool in the first place. So it
23 would really be unfair to --

24 JUSTICE KENNEDY: 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 that a jury -- a juror can't be
18 prejudiced. All right. I think it's a very common
19 thing for prosecutors and defense lawyers to get into
20 arguments 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 versus United States
9 set forth the principle equating a right to an
10 adjudicator with lawful authority to decide at every
11 critical stage 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 --

1 JUSTICE GINSBURG: But you are not --
2 suggesting, because you conceded there was no basis for
3 a for-cause challenge, you are not -- you are not saying
4 that Gomez was unqualified or that she was biased. If
5 she was biased, you had a basis for that, she could be
6 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, our footnote in a
13 later case authored by Justice Scalia indicates
14 considerable doubt as to the viability and to the
15 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 for the purpose that a
25 peremptory challenge can be exercised without having to

1 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 -- to win your case,
5 that there is a constitutional basis, a constitutional
6 right to exercise a peremptory challenge, at least --
7 then you can you have a subset of that -- when the State
8 gives it to you. But I think Swain no longer stands for
9 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 had 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 no basis
18 for removing Gomez from the array. That is, the defense
19 would have already exercised three peremptory
20 challenges, she's number four, too bad. That would be
21 the end of it, right? She would sit on the jury.

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

1 out --

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

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

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

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

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

25 MR. LEVEN: Well, if I understand correctly,

1 Your Honor, the case involves peremptory challenges.

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

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

13 MR. LEVEN: Yes.

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

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

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

23 MR. LEVEN: Because this one involves a
24 State violation that resulted in an unlawful
25 adjudicator. Let's take --

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

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

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

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

24 MR. LEVEN: I would read the Illinois
25 Supreme Court opinion -- specifically what they did

1 state is that the trial court was incorrect in denying
2 the peremptory challenge, therefore that juror should
3 not have sat on the jury, that juror was wrongfully on
4 the jury.

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

12 Am I not correct about that?

13 MR. LEVEN: Well, the Illinois Supreme Court
14 only made one statement, that the peremptory was
15 wrongfully denied. Now, as far as elaborating on its
16 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. That's the basis for
23 the court affirming the conviction. It had nothing to
24 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 was concerned for this
7 person 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 on
11 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 then was not subject to a peremptory challenge.
19 Gomez was -- 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 read -- 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 obvious that they did it; but what -- what
5 would be the principle 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, 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 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 that the juror who presides in Cook County
2 must be a resident of the county.

3 JUSTICE SCALIA: Well, if you --

4 JUSTICE STEVENS: I just have one more
5 thought. And if it is such an unlawful adjudicator, it
6 would definitely be Federal constitutional error?

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, maybe that's

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

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

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

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

1 verdict.

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

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

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

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

1 facie case.

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

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

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

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

24 JUSTICE STEVENS: No, but I -- if the State
25 explicitly gave the trial judge that authority, would

1 that be constitutional?

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

5 JUSTICE SCALIA: The authority to challenge
6 preemptory challenge rights entirely? Right?

7 MR. LEVEN: Yes.

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

10 MR. LEVEN: Yes, the State can abolish
11 peremptory challenges if it wishes.

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

17 MR. LEVEN: In this case, though, we do have
18 peremptory challenges created by the State. And, Your
19 Honor, I request that I -- to reserve the remainder of
20 my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Scodro.

23 ORAL ARGUMENT OF MICHAEL A. SCODRO

24 ON BEHALF OF THE RESPONDENT

25 MR. SCODRO: Mr. Chief Justice, and may it

1 please the Court:

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

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

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

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

22 What the Illinois Supreme Court did
23 explicitly is to say, even if there were a due-process
24 violation here, we believe as a matter of Federal law
25 that would not trigger automatic reversal.

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

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

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

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

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

1 MR. SCODRO: I can't say Michigan versus
2 Long. That is an excellent question, Your Honor. I
3 mean I think that -- let me -- let me --

4 JUSTICE BREYER: Well, why did they get it
5 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 would --

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.

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

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

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

11 MR. SCODRO: That is not --

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

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

21 JUSTICE BREYER: I am not talking about
22 Magistrates, and I'm not talking about due process. I
23 am asking the question, just what I asked. Now, you
24 heard what I asked. It's about jurors.

25 MR. SCODRO: Right.

1 JUSTICE BREYER: All right? What is the
2 answer?

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

5 JUSTICE BREYER: I know. I'm not asking
6 that question. I am asking when a lawyer -- when a --
7 when a judge makes a mistake and excuses a juror whom he
8 shouldn't have excused because he thought the juror was
9 prejudiced, let's say, and he wasn't. The appeals court
10 says, you are wrong about excusing him. Does under
11 Federal law the defendant become entitled to a new
12 trial? Not under the Constitution, under whatever you
13 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 condition if we were
22 convinced there was no Federal or 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 correct federal

1 constitutional 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 Federal due-process violation.

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

9 MR. SCODRO: That is correct.

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

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

17 JUSTICE SCALIA: I know, but that's the
18 consequence of your answer to that question. It seems
19 to me there is much to be said for the disposition that
20 where a State court even in resolving a State-law
21 question uses a Federal principle, adverts specifically
22 to Federal law and cites Federal cases, it would cover
23 you.

24 MR. SCODRO: Your Honor, let me be clear.
25 What they did here is they had 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: I would say, Your Honor, I
11 think that if the Court were to conclude there is no
12 due-process violation, it would be an artificial
13 exercise to then embark on an analysis of a -- harmless
14 errors.

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

19 In Gonzales/Lopez that was the gist of much
20 of the debate between the majority of the --

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

1 is that entirely clear from the opinion?

2 MR. SCODRO: I --

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

6 MR. SCODRO: Well, two points, Your Honor.
7 First, in context with the briefs which independently
8 sought both State and Federal remand and page 171 of the
9 joint appendix where the court makes clear that we are
10 simply not going to resolve the question of whether
11 there is a Federal due-process violation, I think in
12 context it does become clear what the court has done
13 here is it certainly concluded there is not a State
14 right.

15 So it proceeded to say, well, what if there
16 is a Federal due-process entitlement? If that is the
17 case, let's proceed and decide, well, it's harmless
18 anyway. We don't need to then reverse this conviction.

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

1 Illinois Supreme Court to make clear what I think is
2 already clear -- but to make crystal clear that they
3 would apply a -- a harmless-error standard to this sort
4 -- this sort of declaration.

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

11 MR. SCODRO: Your Honor, I think that what
12 they have done is they just put the statement --

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

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

23 Indeed, the court suggests there probably
24 isn't by early arguments that you are pointing out that
25 this Court has long held since -- since Hilt in 1919 has

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

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

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

22 I think that -- and this underlying
23 assumption that judges understand, I think it's fair to
24 assume that the Illinois justices understood they could
25 go further as a matter of State law than Federal, but

1 not -- they couldn't provide fewer protections.

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

13 MR. SCODRO: Well --

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

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

1 delegated the authority properly in those cases. They
2 are not due process cases.

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

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

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

17 MR. SCODRO: Again, Your Honor, the
18 fundamental -- the lodestar analysis here in the due
19 process appeal -- in Buford, the Court said it did not
20 define it with precision, but it has always been
21 fundamental fairness, a community sense of fair play and
22 decency.

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

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

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

18 MR. SCODRO: This is true, Your Honor, but
19 in those contexts, the very State law that has created
20 those divisions, for whatever reason they have seen fit
21 to do so, is the proper authority to conclude whether or
22 not the error is so profound by having that person sit
23 that it ought not be a violation of due process -- that
24 it ought to be a void judgment. That's how these
25 Federal cases, Gomez and 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, and a bunch of Federal jurisdictions. All
6 right? In those jurisdictions, to your knowledge -- you
7 may not know this, you may not have looked it up -- but
8 what happens in the situation where a juror -- where a
9 juror should have been excused? I guess there's a new
10 trial. The juror should have been excused, but wasn't.
11 I guess 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 wrongly excused. All right? So
18 that's what the appeals court holds. What's the rule?
19 Again, do they go back and look and see if it's biased?
20 If the juror -- if the defendant didn't get the juror he
21 wanted, somebody else took his place, do they look to
22 see if that person was biased? And if not, say, too
23 bad, defendant, you may have been right, but you lost
24 the jury that you want, no remedy? What happens?

25 MR. SCODRO: It's my understanding -- I

1 don't believe -- I don't have cases to cite on that --
2 but I don't believe there would be a remedy because this
3 Court has said time and again that the preemptory right
4 and those surrounding it do not create a right to any
5 particular jury.

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

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

18 JUSTICE BREYER: Well, what about the last
19 hypothetical?

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

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

4 I will say, to answer your original question
5 as well about jurors who should not have sat but are not
6 deemed biased, Illinois certainly has a history of cases
7 to that effect, and the court -- the Illinois court has
8 handled them as a matter of Illinois law. The case in
9 1986, an alien sat, and the court concluded there was no
10 timely objection that was part of this analysis, but it
11 certainly was not a "nullity," in the court's words,
12 under those circumstances.

13 JUSTICE KENNEDY: What was that case?

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

18 JUSTICE KENNEDY: Oh, Illinois --

19 MR. SCODRO: -- in 1886. And it's a case in
20 which an alien sat on the jury, and there was, I
21 believe, as part of the court's analysis a failure to
22 make a contemporaneous objection, but they said it was
23 not a "nullity," to use the court's words, to seat this
24 improper juror and, again, made as a determination of
25 Illinois law, just as the question here as to what

1 remedy should be in effect is purely a question of
2 Illinois law.

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

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

20 MR. SCODRO: I think the answer to that is
21 no, Your Honor. And indeed, as we point out in our
22 brief, Cook County has several substantive divisions, so
23 that, for example, a criminal law division judge is not
24 authorized to sit on a family law matter, for example.
25 And yet Illinois law has made clear that if there's an

1 error, if you go to the wrong court and that is unlikely
2 to happen in the scenario I put forth, but it could
3 easily happen between law and chancery for example, and
4 does indeed happen. If that were be the case, the --
5 any error in going to the wrong court and having the
6 wrong court resolve your issue does not void the
7 judgment as a matter of law. And I certainly don't
8 think that would implicate due process concerns.

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

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Roberts?

13 ORAL ARGUMENT OF MATTHEW D. ROBERTS

14 ON BEHALF OF THE UNITED STATES,

15 AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENT

17 MR. ROBERTS: Mr. Chief Justice, and may it
18 please the Court:

19 Federal law does not require automatic
20 reversal of a conviction because the denial of a
21 peremptory challenge at most violated only his State law
22 rights. And even if his Federal constitutional rights
23 had been violated, harmless error review would apply.
24 The Constitution does not give criminal defendants the
25 right to peremptory challenges; therefore, a -- the

1 right of a State defendant like Petitioner to exercise
2 peremptory challenges derives entirely from State law,
3 and when erroneous denial of a preemptory challenge
4 deprives him only of State law right, and when the State
5 law rights alone have been violated, State law not
6 federal law dictates whether harmless error review
7 applies. The violation of a State law right doesn't
8 rise to a due process -- federal due process violation
9 unless it deprives the defendant of a fair trial.

10 And this Court has repeatedly held
11 that States can withhold preemptory challenges entirely
12 without impairing the right to an impartial jury or a
13 fair trial. It, therefore, follows that the erroneous
14 denial of a single preemptory challenge does not render
15 a trial fundamentally unfair.

16 JUSTICE ALITO: What if it's not a single
17 challenge. What if, let's say, each side has six, and
18 the trial judge just arbitrarily refuses to allow a
19 defendant to exercise any preemptory challenge, but the
20 jury -- the jury is ultimately selected, there is no
21 reason to think it's not a fair jury?

22 MR. ROBERTS: We'd still think that that
23 would not be a federal constitutional violation, and
24 even if it were some kind of a federal violation, that
25 it would be subject to review for harmlessness. If the

1 trial court could violate due process, if its actions so
2 skewed the balance of power over the selection of the
3 jury in favor of the government that it resulted in a
4 fundamentally unfair trial, but even the denial of
5 multiple preemptory challenges wouldn't rise to that
6 level.

7 JUSTICE STEVENS: Suppose the Illinois had a
8 statute that the prosecution gets 10 peremptories and
9 the defendants get one, would that raise a federal
10 question?

11 MR. ROBERTS: The question there would be
12 whether that so skewed -- the test that I said before.
13 I think the question would be that that's so skewed
14 about --

15 JUSTICE STEVENS: Isn't the answer pretty
16 clear that that would be unfair.

17 MR. ROBERTS: I don't -- I don't think that
18 the answer is clear at all. The State might rationally
19 conclude that because the government has to prove its
20 case beyond a reasonable doubt, because it has to
21 convince the jurors unanimously to rule in its favor and
22 because it has no right to appeal an unfavorable
23 determination by the jury, that the prosecution should
24 be entitled to more preemptory challenges. Of course,
25 this case doesn't --

1 JUSTICE KENNEDY: I will use that as an
2 examination question but let's hope it doesn't come up.

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

4 JUSTICE GINSBURG: But what about the --

5 JUSTICE STEVENS: The reason it's unlikely
6 is it is so clearly unconstitutional.

7 MR. ROBERTS: Well, we don't think it's
8 unconstitutional at all, Your Honor, but it is contrary
9 to what the common practice and the way things have been
10 approached in both the federal and State court.

11 JUSTICE GINSBURG: Mr. Roberts, if you do
12 get to harmless error, how do you deal with the question
13 that was raised by the Chief Justice, that is, there is
14 no way in the world that you can tell whether this was
15 harmless or not? You would have to imagine another
16 juror being on the panel, that juror could have swung
17 the case, could have had no influence, there is just no
18 way of knowing what would happen.

19 MR. ROBERTS: Well, I think that rests on
20 the mistaken premise that harmless error now just turns
21 on the predilections of the particular decisionmaker or
22 on speculation about what one particular juror would
23 have done differently than another. In fact, harmless
24 error -- the harmless error inquiry looks at the
25 hypothetical objective rational juror. And so, that's

1 what you look at and the difference between --

2 CHIEF JUSTICE ROBERTS: No, but maybe --
3 maybe you have an -- you know, the irrational juror.
4 You know, the holdout is not going to convict for any
5 reason.

6 MR. ROBERTS: But -- but that is not an
7 appropriate part of -- of a harmless error analysis just
8 like the fact that the jury might engage in
9 nullification is an appropriate part of the harmless
10 element.

11 If -- in Strickland, which is the best case,
12 I think, to explain how that is irrelevant to the
13 inquiry, even though it's part of the constitutional
14 there -- analysis there, the Court very clearly explains
15 that you don't look at the particular decisionmaker, you
16 don't speculate about nullification and about arbitrary
17 action and the like, it sort of transferable over.
18 That's just not an appropriate part -- analysis.

19 CHIEF JUSTICE ROBERTS: Well, even assuming
20 your premise, isn't it pretty difficult to know what a
21 rational juror would have done?

22 MR. ROBERTS: Well, we think that the
23 correct inquiry in this circumstance, given the nature
24 of the right, is to ask whether the error resulted in
25 the seating of a juror that was not impartial. And then

1 you look at the record in the case, the voir dire
2 record, and make that determination, and the government
3 bears the -- bears the burden of proof.

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

6 JUSTICE STEVENS: But that is almost the
7 same, at least in some states, as getting a new trial
8 anyway. If we find out after the fact that the jury was
9 biased, and in some States that's a reason for a new
10 trial in the discretion of the trial court, anyway.

11 MR. ROBERTS: That -- that -- that could be,
12 but --

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

15 MR. ROBERTS: Well, I think we are
16 respecting its fundamental -- its fundamental purpose,
17 Your Honor, which is to assist to help achieve the goal
18 of selecting an impartial juror.

19 JUSTICE BREYER: What is the law there?
20 That's what I am trying to get at. I mean, my initial
21 instinct would be that if a defendant doesn't get the
22 jury that the law entitles him to, that's an error. And
23 you normally would think it was harmful, because you
24 can't say, in honesty, it was harmless, it's the jury
25 that's supposed to decide. I suspect it would work out

1 that way. I have never looked into it. How has it
2 worked out?

3 MR. ROBERTS: Generally for errors like the
4 error you described before, where the judge
5 erroneously -- mistakenly excuses a juror in the belief
6 that the juror is disqualified for cause, where the
7 judge mistakenly substitutes a qualified alternate for
8 one of the jurors, or the judge places one alternate on
9 the jury instead of another, the courts have generally
10 looked at that for harmlessness and has not required
11 automatic reversal.

12 Indeed, even in the case of jurors that
13 don't satisfy --

14 JUSTICE BREYER: All right. So in other
15 words, they have often said you don't get a new trial?

16 MR. ROBERTS: Yes.

17 JUSTICE BREYER: Okay.

18 MR. ROBERTS: Yes. And even in the case of
19 jurors that don't meet the statutory requirements in the
20 federal courts of appeals have held that unless a biased
21 juror sits, a new trial is not required.

22 JUSTICE KENNEDY: But don't some of those
23 courts, rather than focusing on the qualifications of
24 the particular juror, look to the -- how close the case
25 was?

1 MR. ROBERTS: The harmless error analysis,
2 there are sort of a lot of different scenarios of types
3 of violations, and the standard that they use is not
4 clear in all of them. In the ones that -- the cases
5 that I found that involve the seating of jurors that
6 don't meet the federal statutory requirements, usually
7 they involve felons that didn't reveal that they were
8 felons, the courts have looked to the biased juror
9 standard.

10 Some courts have done that, others have
11 looked to whether it affects the verdict. They haven't
12 been exactly clear how you determine that, but --

13 CHIEF JUSTICE ROBERTS: That's because there
14 is no way to tell.

15 MR. ROBERTS: Well, I -- I think that --
16 that even if you had a standard that said to look to
17 whether there was an effect on the verdict, you can tell
18 precisely the way the Illinois Supreme Court applied
19 Neder here, if no rational jury could have acquitted,
20 then you know the substitution of one rational,
21 impartial juror for another didn't have an effect on the
22 outcome. And that doesn't violate the Sixth Amendment
23 to do that, Your Honor, because the underlying right --
24 the underlying error doesn't violate the Sixth
25 Amendment.

1 CHIEF JUSTICE ROBERTS: But a jury is a
2 fundamental protection of individual liberty, and in
3 your analysis you are having a judge decide what the
4 jury would --

5 MR. ROBERTS: No, Your Honor. As
6 Justice Ginsburg pointed out before, the Petitioner here
7 got a determination of guilt beyond a reasonable doubt
8 on every element of the offense from a fair and
9 impartial jury that was properly instructed. So we are
10 not having a judge substitute that at all.

11 CHIEF JUSTICE ROBERTS: The judge is making
12 a determination that a juror that should have been
13 sitting would act like the juror who was sitting
14 instead.

15 MR. ROBERTS: That is true. But the Sixth
16 Amendment doesn't give the defendant the right to any
17 particular jury, it doesn't give the defendant the right
18 to a jury that has been selected in compliance with
19 every jot and frivolous State law. And therefore, if
20 the underlying error, as the underlying error here where
21 you get a denial of preemptory, where a juror is seated
22 that even though that violated state law, assumably
23 here, that -- that that doesn't amount to a Sixth
24 Amendment violation.

25 And if the defendant got his Sixth Amendment

1 rights at trial, then the way you conduct harmless error
2 review can't violate his Sixth Amendment rights. He
3 already got them. And so it can be done and it doesn't
4 violate the Sixth Amendment.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Leven, you have two minutes remaining.

17 REBUTTAL ARGUMENT OF JAMES K. LEVEN

18 ON BEHALF OF THE PETITIONER

19 MR. LEVEN: Your Honor, the Hicks v.
20 Oklahoma case is a very important case as far as the due
21 process right to a unlawful adjudicator, because there
22 we had an unlawful sentencer. So, I would ask that the
23 Court consider that, that's a State case involving an
24 unlawful adjudicator. So we do have a due process
25 violation under that case.

1 As to the Sixth Amendment issue, the
2 Illinois Supreme Court did act inconsistently with the
3 Sixth Amendment as far as its manner of conducting
4 harmless error review, because harmless error review is
5 impossible to conduct in this situation, because in
6 order to do that, we would have to examine what the
7 particular jury would have done had it not been for the
8 error; and the particular jury in this case must be out,
9 because there the particular jury, the panel as a whole,
10 is illegally constituted, and the -- and it's impossible
11 to conduct your harmless error analysis.

12 JUSTICE ALITO: Why is that any harder than
13 harmless error analysis that is conducted all the time?
14 For example evidence is erroneously excluded from the
15 trial, and you ask was that a harmless error? But you
16 have to -- there has to be speculation about how this
17 jury would have received the additional evidence. What
18 -- what's the difference?

19 MR. LEVEN: Because in that situation, we
20 are looking at what the particular jury, how a
21 particular jury in that case would have resolved the
22 matter had the erroneously admitted evidence not been
23 admitted.

24 JUSTICE ALITO: But the court has no -- has
25 no inside information about the dynamics of that

1 particular jury. It's just -- it's deciding what a
2 rational jury would do, what a -- what a standard jury
3 would do.

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

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

10 MR. LEVEN: It probably could look at the
11 record as a whole to determine whether or not the -- the
12 particular jury that rendered the verdict would have
13 done the same thing had the erroneously admitted
14 evidence not -- not been -- not been introduced.

15 And in this case, we have a very different
16 situation. We have an illegal adjudicator, and we can't
17 determine whether that adjudicator would have resolved
18 the case differently had it not been -- it's impossible
19 to assess because of the -- the particular adjudicator
20 that resolved this case, in the present case, was
21 illegally composed.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

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

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