No. 18A-96

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD JOSEPH KEHOE,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the suppression hearing in this federal criminal case, the district court explicitly relied on Petitioner's race to conclude that there was reasonable suspicion to support the police's warrantless seizure and subsequent frisk of his person. On direct appeal, the Fourth Circuit concluded that "the district court's repeated reference to [Petitioner's] race during the suppression hearing was clearly improper." *United States v. Kehoe*, 893 F.3d 232, 240 (4th Cir. 2018).

The Fourth Circuit nevertheless affirmed the district court's denial of Mr. Kehoe's suppression motion because, the court of appeals concluded, "the district court's references to [Petitioner's] race at the suppression hearing did not prejudice him, and so do not require reversal." *Id*. at 241. This Court has recognized, however, that the right to an impartial judge is so fundamental that a violation thereof is a structural error.

The question presented is whether the clearly improper use of a person's race by a judge to support a finding of reasonable suspicion justifying a warrantless search and seizure is structural error or whether it is subject to harmless error review.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 7a of the appendix to the petition and is reported at 893 F.3d 232 (4th Cir. 2018). The unpublished ruling of the district court appears at pages 8a to 27a of the appendix to the petition.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over

Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on June 20, 2018. No petition for rehearing was filed. The Chief Justice granted two extensions of time to Saturday, November 17, 2018, in which to file this petition, in application No. 18A96. *See* S. Ct. R. 30.1

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Introduction

The federal district judge in this case relied on the Petitioner's race to find reasonable suspicion of criminal activity excusing the warrantless seizure and search of his person. The United States Court of Appeals for the Fourth Circuit recognized that the district court's use of race was "clearly improper" and held that "it is axiomatic that race alone cannot furnish reasonable suspicion of criminal activity." The court of appeals nonetheless affirmed the district court because it concluded that the district court's reliance on race was not a reversible error. Pet. App. 6a.[1]

Factual Background

One night in August 2016, Petitioner Edward Kehoe, a white man, was spending time with friends in the billiards room of a business in Newport News, Virginia, named RJ's Sports Bar. Two calls for service were made to the 911 system shortly past midnight, and a Newport News police officer named Gary Lipscomb responded. C.A.J.A. 47, 71-72, 121 (DVD exhibit with audio of 911 calls and police body camera video).

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[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

The first 911 call was regarding "a white male in a blue and white striped shirt, has a gun on his side, covered by a shirt." C.A.J.A. 75.[2] Officer Lipscomb knew before he entered RJ's that in Virginia, "[a] person that had a concealed weapons permit would be allowed inside a bar, as long as they were not drinking any alcohol while inside the bar." C.A.J.A. 77; *see* Va. Code § 18.2-308.012(B).[3]

A police officer was wearing a body camera that recorded the police's approach, seizure, frisk, and eventual arrest of Mr. Kehoe, and a video file was introduced in evidence at the suppression hearing. C.A.J.A. 56, 121. Officer Lipscomb also testified about the events of that night. Officer Lipscomb testified that the bartender told Officer Lipscomb that the person in question was "not acting out of control or anything like that[.]" C.A.J.A. 53. The bartender told Officer Lipscomb that he had not seen the patron in question with a gun, but had heard that others had seen it, and the bartender himself had seen a bulge. C.A.J.A. 82, 83. Officer Lipscomb did not testify that he asked the bartender whether the

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[2] As described further below, the district court relied on Mr. Kehoe's race in its reasonable suspicion analysis. *See* infra. Moreover, there was no identification issue in this case. There was never any question or confusion about which person inside the establishment was the subject of the 911 calls. Pet. App. 2a.

[3] "No person who carries a concealed handgun onto the premises of any restaurant or club as defined in § 4.1-100 for which a license to sell and serve alcoholic beverages for on-premises consumption has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 may consume an alcoholic beverage while on the premises. A person who carries a concealed handgun onto the premises of such a restaurant or club and consumes alcoholic beverages is guilty of a Class 2 misdemeanor." Va. Code § 18.2-308.012(B).

man in question had been drinking, or was drunk.[4] The bartender also told Officer Lipscomb where the customer in question, the white man in the blue and white shirt, was located. C.A.J.A. 82.

Officer Lipscomb and at least three other officers went into the room of RJ's with the pool tables, and found Mr. Kehoe sitting at a table against a wall, talking with a black male friend, and watching others play a game of pool. C.A.J.A. 53-54, 63-64, 121 (video at 2:18). Mr. Kehoe was not holding a drink, nor were there any drinks or empty glasses on his table. C.A.J.A. 54, 62, 84, 121 (video at approximately 2:18). The police never asked Mr. Kehoe whether he had been drinking, nor was he charged with public intoxication. C.A.J.A. 67, 93. Officer Lipscomb testified that Mr. Kehoe was not engaged in any disorderly conduct or confrontation, and as he spoke with the officers he remained calm and polite and was never aggressive. C.A.J.A. 63. Officer Lipscomb did not observe either a firearm or a bulge consistent with a firearm on Mr. Kehoe's person. C.A.J.A. 55.

Officer Lipscomb testified that because of the loud music and confined space (due to the pool table), he asked Mr. Kehoe multiple times to go outside with the police, but Mr. Kehoe did not consent to leave the room, or to be frisked. C.A.J.A. 54, 84, 121 (video at 4:14). The police demanded that Mr. Kehoe provide identification, which he did. C.A.J.A.

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[4] The parties vigorously contested below whether there was reasonable suspicion for the police to believe that Mr. Kehoe had violated the Virginia statute that prohibits drinking alcohol in a bar while armed. *See* supra n.3. The details of this conversation are not audible on the police body camera video played at the hearing.

121 (video at 4:04). Officer Lipscomb asked Mr. Kehoe whether he had any weapons or a concealed carry permit, and Mr. Kehoe said he did not. C.A.J.A. 86, 121 (video at 4:10).

The police officers then placed their hands on Mr. Kehoe and physically walked him outside of RJ's. C.A.J.A. 64-65, 121 (video at 4:33). Outside RJ's, Officer Lipscomb told Mr. Kehoe he was being detained, handcuffed, and frisked. C.A.J.A. 88. The police frisked Mr. Kehoe, and found a firearm near his right hip at the waistline. C.A.J.A. 88, 91. The police arrested Mr. Kehoe.

Proceedings in the District Court

A federal grand jury in the Eastern District of Virginia charged Mr. Kehoe with one count of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). C.A.J.A. 9. Mr. Kehoe filed a motion to suppress the firearm on the basis that there was not reasonable suspicion to justify the warrantless seizure and frisk. C.A.J.A. 12. The district court orally denied the motion at the suppression hearing, C.A.J.A. 118, and also issued a written order, C.A.J.A. 122-41.

The district court relied on Mr. Kehoe's race in its reasonable suspicion analysis. The court expressly mentioned Mr. Kehoe's race in comparison to the race of the other customers at RJ's, several times, both at the hearing and in its written order. *E.g.*, C.A.J.A. 83 ("The Court: Was he the only white man there?"), 112, 116, 119, 125 (written order). This reliance on Mr. Kehoe's race, for any reason other than simple identification (not at issue in this case), and especially as a factor towards supposed reasonable suspicion, was error. Especially when coupled with the court's explicit comparisons to notorious white

supremacist and murderer Dylann Roof, this error was an independent basis for reversal, in addition to the *Terry* errors Mr. Kehoe raised below.[5]

The district court expressly mentioned Mr. Kehoe's race during some of the testimony, C.A.J.A. 83, and again during defense counsel's argument, which was also when the court effectively announced its denial of the motion. The district court did not require or allow the government to argue in opposition before denying the motion. Instead, the district court questioned defense counsel throughout his argument and then announced that it was denying the motion to suppress. For example, the district court stated:

> THE COURT: What scares me, Mr. [defense counsel] – let me tell you. I'm looking at the pictures. What's he doing there after midnight with a gun? It scares the heck out of me. It just scares me no end. Let me tell you something. Here's a bar that's under investigation because it has so many problems – and that's been established – and here are some callers talking about a man having a gun in there, and *then they say it's a white man*, after midnight. And I'm looking at these pictures. *It looks to me like I didn't see any other white men in there*. Did you?

C.A.J.A. 112 (emphases added).

The district court also stated: "I don't see anything to this, myself, that would cause me to believe that they didn't have a reasonable suspicion of criminal activity. If that's the case, then we can't stop an incident like occurred in South Carolina unless we wait until they shoot them. Is that what you want?" C.A.J.A. 116. The district court's statement appears to be a reference to the Dylann Roof shooting, a notorious murder case in which a white man

[5] Mr. Kehoe is not seeking certiorari on his Fourth Amendment *Terry* claims.

shot numerous black victims at a church in South Carolina because of his racist beliefs.[6] The highly-publicized Roof trial took place a few weeks before the suppression hearing in this case. The district court later added: "Let me ask you a question. You know that fellow that walked in that place in South Carolina? What was suspicious about him? Have you got to wait for them to get shot?" C.A.J.A. 119.

The court later stated: "I haven't found out what he was doing in the poolroom yet. He said he was sitting there, where there was an exit, with a weapon, among people that were there. There were people there. What was he doing? You say, oh, I guess you could say he was watching the pool game. Maybe. Or maybe he was watching the players. Was that it?" C.A.J.A. 118.

When defense counsel in this case noted that the police video itself showed an innocent explanation – Mr. Kehoe simply sitting at a table and talking with a friend, quietly watching a pool game – the court responded only: "I'll tell you what, Mr. [defense counsel]. You convince the Court of Appeals. You're not going to convince me." C.A.J.A. 118. The district court thereby denied the motion to suppress without any argument from the government. The district court then repeated its finding that Mr. Kehoe "may have been the only white male patron in the bar" – in its written order denying the motion to suppress. Pet. App. 11a.

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[6] *United States v. Roof*, 225 F. Supp. 3d 438 (D.S.C. 2016) (summarizing factual allegations of Roof murders).

Mr. Kehoe later entered a conditional guilty plea that preserved his right to appeal the denial of the motion to suppress. C.A.J.A. 142. The district court sentenced Mr. Kehoe to serve 24 months in prison, to be followed by 2 years of supervised release. C.A.J.A. 156.

Proceedings in the Court of Appeals

On direct appeal to the United States Court of Appeals for the Fourth Circuit, Mr. Kehoe argued that the district court found reasonable suspicion of some sort of presumed criminal activity based at least in part on the fact that Mr. Kehoe is a white man and his companions that night were black men, and that the district court's reliance on his race in this case was unconstitutional. Mr. Kehoe argued that the district court must be reversed because it explicitly relied on Mr. Kehoe's race in both its oral and written denial of the motion to suppress.

The United States did not argue to the Fourth Circuit that the district court's improper reliance on the use of Mr. Kehoe's race was a harmless error. Rather, the United States denied that the district court relied on Mr. Kehoe's race in this manner at all, and argued that Mr. Kehoe "mischaracterizes the court's comments." Brief of the United States at 24, *United States v. Kehoe*, 893 F.3d 232 (4th Cir. 2018) (4th Cir. No. 17-4536), 2018 WL 539522. Rather, the United States claimed, the district court only referred to race for identification purposes (as the 911 caller in fact had, *e.g.*, the white man in the striped shirt). *Id*. at 24-25. The Fourth Circuit rejected this argument of the United States, stating directly "we cannot agree." Pet. App. 5a.

The Fourth Circuit held that the district court's

> statements during the suppression hearing seem to us to indicate that it believed Kehoe's conduct was more suspicious because he was of a different race than the other RJ's patrons. For example, the court told counsel to address whether "there was a reasonable suspicion of whomever that white person was *in this particular bar with the clientele that was in that bar*." And the district court repeatedly expressed concerns about why Kehoe (a white man) would go to RJ's (a bar with mostly black patrons) after midnight with a gun. The court also compared Kehoe's conduct to recent racially motivated murders of African-American churchgoers by a white man and suggested that if the officers had not arrested Kehoe, he too might have engaged in racially motivated violence.

Pet. App. 5a.

The Fourth Circuit correctly held that "the mere fact that a person of one race is present among a group that is predominantly of another race does not provide a basis of suspicion of criminal activity." Pet. App. 5a-6a. The Fourth Circuit continued: "The district court's repeated reference to Kehoe's race during the suppression hearing was clearly improper." Pet. App. 6a.

That is, the district court's use of Mr. Kehoe's race in this case was a legal error, and the Fourth Circuit correctly recognized it as such. The Fourth Circuit held that "racial remarks like those at issue here have no place in our judicial system, and we do not in any way condone them." Pet. App. 6a.

Although the United States had not argued that the district court's reliance on race as a factor toward reasonable suspicion was harmless error – instead arguing that Mr. Kehoe's race was used only to identify him, Brief of the United States at 25, supra – the court of appeals next concluded that the district court's use of Mr. Kehoe's race, while "clearly

improper," was not a reversible error because "it did not prejudice him[.]" Pet App. 6a. The Fourth Circuit concluded that because there was police body camera video footage that it could review, the court of appeals itself could determine that there was reasonable suspicion supporting the warrantless seizure of Mr. Kehoe.

The Fourth Circuit therefore declined to reverse the district court despite its "clearly improper" reliance on race. Pet. App. 6a. The Fourth Circuit affirmed the district court, and Mr. Kehoe's conviction.

REASONS FOR GRANTING THE PETITION

The Court Should Grant the Petition Because the "Clearly Improper" Use of a Criminal Defendant's Race to Find Reasonable Suspicion of Criminal Activity Cannot Be a Harmless Error, Because It Is A Form of Judicial Bias, and Because Both the Use of Race in this Manner and the Holding That it Is Harmless Harm the Integrity and Public Reputation of the Criminal Justice System

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). This Court should grant Mr. Kehoe's petition for certiorari for one reason: the "clearly improper" use of a defendant's race by a United States District Judge in a federal criminal case is structural error, not subject to harmless error review. The decision of the court of appeals that the use of the defendant's race in such a way is and could be harmless "is an important question of federal law that has not been, but should be, settled by this Court," and also calls for an exercise of this Court's supervisory power lest the public reputation of the federal courts be harmed. S. Ct. R. 10(a).

"The unmistakable principle underlying [jury race discrimination] precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (citing *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). "The duty to confront racial animus in the justice system is not the legislature's alone." *Pena-Rodriguez*, 137 S. Ct. at 867.

While this Court has had many opportunities to speak to the nature of bias in the jury system, the issue in this case – overt racial bias in the criminal justice system exhibited by a judge – thankfully is far more rare. It is, however, no less critical that racial bias by a judge be both remedied, and stamped out. Indeed, given both the actual power and the symbolic nature of a judge as a neutral arbiter in the justice system, it is perhaps even more important that the judge be both actually free, and perceived by the public to be free, from racial bias.

The Court recently wrote:

> Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U.S. __, __, 135 S. Ct. 2187, 2208 (2015). It thus injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S., at 556, 99 S. Ct. 2993 (internal quotation marks omitted).

Buck v. Davis, 137 S. Ct. 759, 778 (2017). The Court could not have been more clear: "it is inappropriate to allow race to be considered as a factor in our criminal justice system." *Id*. (citation and quotation omitted). And while the procedural posture of *Buck* was different, the Court recognized that the right to be free from racial bias in the criminal justice system should not be a right without a remedy. Indeed, the Court allowed petitioner Buck to surpass

some of the procedural hurdles surrounding federal habeas review of a state court judgement, noting that "the people of Texas lack an interest in enforcing a capital sentence obtained on so flawed a basis." *Buck*, 137 S. Ct. at 779. Here, Mr. Kehoe is a federal criminal defendant on direct appeal; his remedy should not be more difficult to obtain.

There "are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). The examples the Court gave in the margins of *Chapman* included an "impartial judge." *Id.* n.8. The Court since has summarized its own constitutional harmless error jurisprudence. "We have recognized that 'most constitutional errors can be harmless.' '[I]f the defendant had counsel and was tried by *an impartial adjudicator*, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" *Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting and citing *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *Rose v. Clark*, 478 U.S. 570, 579 (1986)) (emphasis added). The *Neder* Court recognized that a "biased judge" would "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 8-9.

More recently, in *Weaver v. Massachusetts*, the Court summarized what have come to be called structural errors, those that mandate automatic reversal.

> The Court recognized, however, that some errors should not be deemed harmless beyond a reasonable doubt. *Id.*, at 23, n. 8, 87 S. Ct. 824. These errors came to be known as structural errors. *See Fulminante*, 499 U.S., at 309-310, 111 S. Ct. 1246. The purpose of the structural error doctrine is to ensure insistence on

> certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id.*, at 310, 111 S. Ct. 1246. For the same reason, a structural error "def[ies] analysis by harmless error standards." *Id.*, at 309, 111 S. Ct. 1246 (internal quotation marks omitted).

Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-08 (2017) (first citation to *Chapman*, supra). As the Seventh Circuit has summarized, "[t]he subset of errors that mandate automatic reversal is a small one. It includes errors such as the complete denial of counsel, *a biased judge*, racial discrimination in the selection of the grand jury, the denial of self-representation, the denial of a public trial, and a defective reasonable doubt instruction." *United States v. Harbin*, 250 F.3d 532, 543-44 (7th Cir. 2001) (emphasis added).

"Put another way, these errors deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (citation, quotation, and alteration omitted).

The Court in *Weaver* outlined "three broad rationales" that make an error structural rather than amenable to harmless error analysis. 137 S. Ct. at 1908. "First, an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest[,]" including the right to self-representation. The Court noted that the "right is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper

way to protect his own liberty." *Id*. at 1908. "Because harm is irrelevant to the basis underlying the right, the Court has deemed a violation of that right structural error." Harm is also irrelevant to the basis underlying the right at issue here. A violation of the constitutional right to equal protection under the law and to an impartial judge is not about harm, much as the right to represent oneself is not.

"Second, an error has been deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to select his or her own attorney, the precise effect of the violation cannot be ascertained." *Weaver*, 137 S. Ct. at 1908 (internal quotation and citation omitted). "Third, an error has been deemed structural if the error always results in fundamental unfairness." *Id*. "These categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural. For these purposes, however, one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id*. (internal citation omitted).

The use of a criminal defendant's race by a judge as a factor towards reasonable suspicion "results in fundamental unfairness." The pernicious effect of racial bias in the criminal justice system also "is too hard to measure." And the equal protection of the law and a criminal justice system free from racial bias – especially by judges – protects interests other than just erroneous convictions. Freedom from judicial racial bias protects the public reputation and integrity of the justice system itself. The Court recognized this in *Buck*, writing: "Relying on race to impose a criminal sanction 'poisons public confidence' in the

judicial process." *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 576 U.S. __, __, 135 S. Ct. at 2208). "It thus injures not just the defendant, but 'the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts." *Id*. (quoting *Rose*, 443 U.S. at 556 (internal alterations omitted)).

Then-Judge Sotomayor recognized that bias by a judge is structural error, writing:

> As explicated by the Supreme Court, structural error encompasses defects in trial components that do not bear directly on the presentation or omission of evidence and argument to the jury, but rather that relate to the impartiality of the forum or the integrity of the trial structure writ large. It includes *bias on the part of the judge*, a discriminatory jury selection process, a total deprivation of the right to counsel or the denial of the right to self-representation at trial, and the denial of a public trial.

United States v. Yakobowicz, 427 F.3d 144, 155 (2d Cir. 2005) (Sotomayor, J.) (emphasis added).

While this Court has held that even constitutional errors can be harmless if the government can meet its burden to show that the error was harmless beyond a reasonable doubt, those cases all assume the existence of an "impartial adjudicator." A case involving "clearly improper" racial bias by the district judge therefore is not one in which the harmless doctrine error should apply. Indeed, perhaps that is why the United States did not argue in its brief to the Fourth Circuit that the error was harmless.[7] Pet. App. 5a.

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[7] The Fourth Circuit also erred in two other respects. The government did not meet its burden to show that the error was harmless beyond a reasonable doubt, in that the government did not raise harmlessness as an issue. Rather, the Fourth Circuit raised it sua sponte. "[I]t is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the

The "clearly improper" use of a federal criminal defendant's race by a United States District Judge is an instance of racial bias forbidden by the Fifth and Fourteenth Amendments that cannot be excused by the invocation of the harmless error doctrine. The use of race in such a manner can never be harmless. It harms not only Mr. Kehoe, but the integrity of the criminal justice system as a whole.

The reasoning of the district court that led to Mr. Kehoe's conviction simply cannot be allowed to stand. For example, the district court stated to counsel: "You may proceed to show what was in the minds of the police in order to determine if there was a reasonable suspicion of whomever that white person was in this particular bar *with the clientele that was in that bar*." C.A.J.A. 79 (emphasis added). For whatever reason, the district court repeatedly injected Mr. Kehoe's race into this proceeding in a way that was far beyond just identifying which customer was "the white man in the blue-and-white striped shirt" – which was never a question. While using Mr. Kehoe's race as the 911 caller did, for mere identification of the subject of the call, is unobjectionable, the district court insisted on using Mr. Kehoe's race in distinction to the largely African- American clientele of RJ's Sports Bar and as therefore suspicious – repeatedly, inappropriately, and unconstitutionally.

United States." *Bumper v. North Carolina*, 391 U.S. 543, 550 n.16 (1968).

In addition, the Fourth Circuit did not use the *Chapman* beyond-a-reasonable-doubt standard that applies when the right at issue is a constitutional right, *Chapman*, 386 U.S. at 26, instead declaring simply that "the district court's references to Kehoe's race at the suppression hearing did not prejudice him, and so do not require reversal." Pet. App. 6a.

The district court explicitly stated at the hearing that it found reasonable suspicion, and denied the motion, because Mr. Kehoe was the only white man in a sports bar surrounded by African-American customers. This fact was, according to the district court, suspicious "of criminal activity," C.A.J.A. 116, and it "scare[d]" him, C.A.J.A. 112, and he also found it reminiscent of notorious white racist murderer Dylann Roof, C.A.J.A. 116, 119.

For example, with regard to reasonable suspicion, the district court stated:

> THE COURT: What scares me, Mr. [defense counsel] – let me tell you. I'm looking at the pictures. What's he doing there after midnight with a gun? It scares the heck out of me. It just scares me no end. Let me tell you something. Here's a bar that's under investigation because it has so many problems – and that's been established – and here are some callers talking about a man having a gun in there, and *then they say it's a white man*, after midnight. And I'm looking at these pictures. *It looks to me like I didn't see any other white men in there*. Did you?

J.A. 112 (emphases added). Defense counsel immediately responded: "I didn't poll it, Your Honor. From what I could see, the video doesn't tell and show everyone that was in the bar. The bar was – " C.A.J.A. 112-13. The district court interrupted counsel to continue: "It certainly doesn't. *It scares me as to what Kehoe's intentions were*." C.A.J.A. 113 (emphasis added).

This back and forth with counsel shows the district court explicitly questioning Mr. Kehoe's intentions – based solely on him being the only white man in the pool room. This is a finding of suspicion based on Mr. Kehoe's race, compared to the race of the other customers of RJ's Sports Bar. This is not a reference to Mr. Kehoe's race solely for purposes of identification, that is, to determine who or where the white man in the striped shirt was.

It is a statement of the court's fear and a finding of reasonable suspicion because Mr. Kehoe is white, and he was in the pool room of RJ's with black people. Such a race-based finding is patently unconstitutional. And the Fourth Circuit so held. Pet. App. 5a-6a.

Because the district court improperly relied on its perception of Mr. Kehoe being the only white man at RJ's Sports Bar, in approving the warrantless seizure of Mr. Kehoe, this case stands as a blatant example of the impermissible use of race. The race of the person seized should not, and must not, factor in to any reasonable suspicion analysis. The Fourth Circuit held that "the mere fact that a person of one race is present among a group that is predominantly of another race does not provide a basis of suspicion of criminal activity. The district court's repeated reference to Kehoe's race during the suppression hearing was clearly improper." Pet. App. 5a-6a (footnote omitted). The Fourth Circuit stated "it is axiomatic that race alone cannot furnish reasonable suspicion of criminal activity. *See*, *e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-87 (1975). The suggestion that someone is more likely to engage in a crime because of his or her race is equally impermissible." Pet. App. 6a n.5.

The district court's written order omitted most of the racial bias exhibited at the hearing. But the transcript speaks for itself. The inexplicable injection of race into this proceeding by the district court, and the court's reliance on Mr. Kehoe's race not as a simple identifying feature but rather as a factor that contributed to its finding of reasonable suspicion – and in the district court's own words, what "scared" it – was patently unconstitutional, and required reversal. The Fourth Circuit got the first part correct, but not

the second. Racial bias by a district judge is always prejudicial, and cannot be a harmless error.

This Court must exercise its supervisory power to vacate a judgment of conviction that rested on such reasoning. The decision of the Fourth Circuit that this error did not require reversal because it did not prejudice Mr. Kehoe was wrong, because a clearly improper use of a defendant's race by a judge is an constitutional error that is not subject to harmless error review. It harmed not only Mr. Kehoe, but the integrity and public reputation of the justice system itself. Freedom from racial bias in the justice system – that is, the right to a hearing before a judge who does not exhibit racial bias against criminal defendants – cannot be a right without a remedy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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