1   IN THE SUPREME COURT OF THE UNITED STATES

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3   MICHAEL RIVERA,   :

4   Petitioner   :

5   v.   :   No. 07-9995

6   ILLINOIS.   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Monday, February 23, 2009

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11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:05 a.m.

14   APPEARANCES:

15   JAMES K. LEVEN, ESQ., Chicago, Ill.; on behalf of the

16   Petitioner.

17   MICHAEL A. SCODRO, ESQ., Solicitor General, Chicago,

18   Ill.; on behalf of the Respondent.

19   MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor

20   General, Department of Justice, Washington,

21   D.C.; on behalf of the United States, as amicus

22   curiae, supporting the Respondent.

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1   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   JAMES K. LEVEN, ESQ.

4   On behalf of the Petitioner   3

5   MICHAEL A. SCODRO, ESQ.

6   On behalf of the Respondent

7   MATTHEW D. ROBERTS, ESQ.

8   On behalf of the United States, as amicus

9   curiae, supporting the Respondent   25

10   REBUTTAL ARGUMENT OF

11   JAMES K. LEVEN, ESQ.

12   On behalf of the Petitioner   52

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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?

11

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,

13

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 --

14

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

15

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 --

17

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 --

18

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

22

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,

37

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 --

38

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

42

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

43

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 thing 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

46

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

53

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.)

Blackstone 38:12
blame 35:9
blaming 31:11
bottomed 20:16
bound 33:22
Brack 28:24
Breyer 5:22 7:2 7:16 8:12 28:4 28:7,11 29:1 29:12,21 30:1 30:5,15,17 39:1,14 40:6 40:18 48:19 49:14,17
Breyer's 6:4,14
bribe 4:3
brief 7:12 29:16 37:11 42:11,22
briefs 26:16 33:7 41:15
Buford 37:19
bunch 39:5
burden 21:19 48:3

C

C 2:1 3:1
called 41:16
capacity 16:9
care 26:3
cart 34:13
case 3:4 4:3,5 8:13,16,17 10:13 11:4,11 14:1 22:24 23:2,11,22,24 24:1,10,14 25:17 26:3 27:23 29:19 31:15 33:17 36:7,18 38:17 40:6,21 41:8 41:13,16,19 43:4 45:20,25 46:17 47:11 48:1 49:12,18

49:24 52:11,20 52:20,23,25 53:8,21 54:6 54:15,18,20,20 54:23,24
cases 8:4 12:1 29:15,17 31:22 37:1,2,5 38:25 40:1 41:6 50:4
category 3:23
cause 4:1 7:9 9:6 9:18 49:6
caution 35:16
century 42:10
cert 40:23
certain 7:23
certainly 27:1 32:21 33:13 41:6,11 43:7
certiorari 30:21
challenge 3:11 3:12 4:7 5:7 9:3,18,21,25 10:2,10,25 11:6 12:13,24 13:6,18 15:18 16:2,6 17:18 21:13,15 22:2 24:21 25:4,5,6 35:2 43:21 44:3,14,17,19
challengeable 9:18
challenges 11:22 12:4,9,20 13:21,22 14:1 15:4 23:16 25:11,18 42:6 42:14 43:25 44:2,11 45:5 45:24
chancery 43:3
changed 13:22
Chapman 21:22 28:24
Chase 41:16
Chicago 1:15,17

Chief 3:3,8 21:9 21:25 25:21,25 27:14 38:8 43:11,17 46:13 47:2,19 50:13 51:1,11 52:15 54:22
chose 26:14
circumstance 47:23
circumstances 27:7,21 32:3 40:16 41:12
cite 27:24 36:22 40:1
cited 29:14,16 41:14
cites 31:22
citing 10:23,24 11:3,10 41:15
citizenship 6:16
claim 4:9 5:20 12:23 14:4 27:11
claims 27:11
clause 21:8
clear 29:1,2,9,13 31:24 33:1,3,9 33:12 34:1,2,2 35:3 42:25 45:16,18 50:4 50:12
clearly 15:20 46:6 47:14
close 32:16 38:7 49:24
Columbia 39:5
come 22:21 38:6 46:2
common 7:18 46:9
community 37:21
compliance 51:18
components 5:2
composed 22:13

54:21
conceded 3:25 4:1 9:2
concern 41:2
concerned 17:6 17:21
concerns 33:20 33:21 43:8
conclude 29:20 32:11 33:20 38:21 45:19
concluded 31:16 33:13 41:9
concludes 35:20
conclusion 34:21
conclusions 36:24
concurrence 42:8
condition 30:21
conduct 52:1 53:5,11
conducted 32:18 53:13
conducting 53:3
conducts 54:8
Congress 36:25
consequence 26:7 31:18 35:12
consider 19:22 20:4 52:23
considerable 10:14
consistent 13:8
consistently 11:16 14:11
constituted 4:12 4:13,17 5:18 5:24 36:6 53:10
constitution 6:2 8:4,16 18:9 23:14 30:12 43:24 52:13
constitutional

5:6,6,8 6:12 7:7 11:5,5,14 13:4,5 17:4 18:12,20 19:3 19:23 20:3,6 21:6 25:1 26:6 30:22,24 31:1 32:1,24 34:7,8 34:17 35:21 43:22 44:23 47:13
contacts 9:9
contemporane... 41:22
contend 37:12
context 13:13 33:7,12 35:2
contexts 38:19
contrary 46:8
contributed 23:6
convict 47:4
conviction 3:14 16:23 33:18 43:20
convince 45:21
convinced 30:22
Cook 9:9 20:19 21:1,18 22:4 38:3,4 42:22
correct 12:23 15:23 16:12 18:2,13 20:12 30:24,25 31:9 32:9 47:23
corrected 17:14 17:23
correcting 30:25
correctly 13:25 14:8 28:15
correctness 10:15
counsel 23:20 24:16 25:21 43:11 52:15 54:22
counsel's 9:15

country 11:22
county 6:6,8 9:9
  20:19,20 21:1
  21:2,17,18
  22:4,4 36:8,9
  37:16 38:3,4,5
  38:14 42:22
course 19:12,13
  20:13 28:22
  45:24
court 1:1,12 3:9
  3:24 4:19,25
  5:4 8:1,20 9:14
  11:12,13 15:10
  15:14,15,16,25
  16:1,7,13,21
  16:23 17:5,8
  17:21 18:7,18
  18:19,21,23,25
  19:8,15,21,22
  20:2,7,8,9,10
  20:14 22:6,14
  22:16,20,20
  23:3,6 24:14
  26:1,8,17,22
  27:3,8,10,17
  27:21 28:19,19
  28:21 29:17
  30:9,24 31:7
  31:11,15,20
  32:11,15,22
  33:4,9,12,19
  33:20,22,24
  34:1,6,23,25
  35:3,9,19,20
  36:11 37:19
  39:18 40:3,17
  41:7,7,9,16
  42:4 43:1,5,6,9
  43:18 44:10
  45:1 46:10
  47:14 48:10
  50:18 52:23
  53:2,24 54:7
courts 7:9 49:9
  49:20,23 50:8
  50:10

court's 16:22
  18:21 33:23
  41:11,21,23
cover 31:22
create 10:2
  11:19 40:4
created 11:15
  25:18 38:19
crime 38:12
criminal 5:12
  13:13 42:23
  43:24
critical 8:11
crystal 34:2
curiae 1:22 2:9
  43:15

_____ D _____
D 1:19 2:7 3:1
  43:13
days 42:6
deal 9:12 22:4
  46:12
debate 32:20
decency 37:22
decide 8:10
  30:23 33:17
  48:25 51:3
  52:12
decided 20:15
deciding 54:1
decision 19:19
decisionmaker
  46:21 47:15
decisions 4:5
  19:7 36:21,23
declaration 34:4
declined 18:19
  19:22 20:4
deemed 41:6
defendant 21:20
  22:21 30:11
  39:16,20,23
  40:15 44:1,9
  44:19 48:21
  51:16,17,25
defendants

43:24 45:9
defense 7:19
  9:15 12:18,24
  24:16 29:7
define 37:20
definitely 21:6
delegated 37:1
delicate 6:17
Delores 3:11
denial 3:12
  21:12 35:12
  43:20 44:3,14
  45:4 51:21
denied 4:24
  16:15
denying 4:7 16:1
Department
  1:20
dependent 4:9
depends 42:7
deprives 44:4,9
derives 44:2
described 49:4
determination
  22:23 41:24
  45:23 48:2
  51:7,12
determine 3:20
  18:20 21:24
  26:11,12 50:12
  54:11,17
determined
  10:20
determines
  20:16
dictates 44:6
difference 37:7
  47:1 53:18
different 4:2
  10:23 22:8,24
  36:15 38:2,15
  38:15 42:14,15
  50:2 54:15
differently
  46:23 54:18
difficult 22:3
  47:20 48:5

dimension 34:7
  34:8,17
dire 8:20 48:1
directed 22:25
disagreed 15:12
disagreement
  40:24,25
disagrees 15:10
disallow 25:15
discretion 48:10
discrimination
  23:19 24:5,10
  24:13
discriminatory
  23:16 24:20
discussed 7:12
  7:14 36:3
dismissed 4:1
disposition
  31:19
disqualified
  49:6
distinction 36:7
  36:10
distinguish 37:5
district 29:4
  39:4
division 42:23
divisions 38:20
  42:22
doing 29:7
doubt 10:14
  34:10 45:20
  51:7
drops 32:25
due 5:9,13,21
  10:21 11:17
  13:8,14 14:7
  14:12,17,21
  19:21 21:8
  29:18,22 30:3
  32:18 36:23
  37:2,4,18
  38:23 39:2
  41:3 42:4,5,18
  43:8 44:8,8
  45:1 52:20,24

due-process
  26:2,20,23
  27:12 31:4
  32:12,16 33:11
  33:16,21,25
  34:21 35:1,5
Dupage 20:20
  21:17 22:3
  38:14
duty 33:22
dynamics 53:25
D.C 1:8,21

_____ E _____
E 2:1 3:1,1
earlier 13:12
  15:2 20:19
  29:14
early 34:24
easily 43:3
effect 3:20 4:18
  4:18,19,24
  5:10 6:17
  11:20 13:12
  15:7 41:7 42:1
  50:17,21
elaborating
  16:15
element 47:10
  51:8
embark 32:13
engage 18:12
  47:8
entirely 25:6
  33:1 44:2,11
entitle 18:9
entitled 24:11
  30:11 45:24
entitlement 32:2
  33:16 35:1
  42:5
entitles 48:22
envisions 22:6
equating 3:22
  8:9,21
equivalent
  22:25

erroneous 3:12
  35:12 44:3,13
erroneously
  49:5 53:14,22
  54:13
error 3:18,19,20
  3:23 4:13 6:12
  10:22 17:10,10
  17:13,15,22
  18:4,4,13,13
  18:15,23,24,25
  19:25 20:1
  21:6,10,12,12
  21:14,24 22:5
  22:7,12,15
  23:5,6,9 26:9
  26:13,15 29:5
  30:22 31:1
  34:7,9,17 35:6
  38:6,22 43:1,5
  43:23 44:6
  46:12,20,24,24
  47:7,24 48:22
  49:4 50:1,24
  51:20,20 52:1
  52:14 53:4,4,8
  53:11,13,15
  54:9
errors 32:9,14
  38:4 49:3
ESQ 1:15,17,19
  2:3,5,7,11
establish 11:4
  21:14 23:21
  24:10 42:3
established
  23:25
evidence 53:14
  53:17,22 54:14
Evitts 11:11
exactly 10:4
  13:16 39:1
  50:12
examination
  46:2
examine 53:6
example 6:3

11:12 42:23,24
  43:3 53:14
excellent 28:2
excluded 53:14
excuse 5:3
excused 9:6 29:6
  30:8 39:9,10
  39:17
excuses 7:22
  30:7 49:5
excusing 8:14
  29:5 30:10
exercise 11:6
  12:24 32:13
  44:1,19
exercised 3:10
  10:10,25 12:19
existed 11:22
explain 47:12
explains 47:14
explanation
  23:20 24:12,15
  24:16
explicitly 24:25
  26:23
extended 27:6
extensive 9:9
extinction 36:7

—————————
F
—————————
faced 27:10
facie 23:22 24:1
  24:10
fact 14:15 18:14
  20:8 28:15
  35:17,19 46:23
  47:8 48:8
failed 27:13 40:7
  42:3
failure 41:21
fair 8:23,24 10:2
  21:18 35:23
  37:21 40:13
  44:9,13,21
  51:8
fairness 11:17
  37:21 38:7

family 42:24
far 16:15 17:5
  17:20 52:20
  53:3
favor 45:3,21
February 1:9
federal 5:2,13
  6:2,11 7:9 8:4
  8:15 14:6,17
  15:3,13 17:3
  18:4,11,12,16
  18:22 19:3,7
  20:14,16 21:6
  26:6,8,9,13,14
  26:21,24 27:2
  27:11,18,19,19
  28:12,20 29:3
  29:3,4,10,16
  29:18 30:11,22
  30:25 31:3,4
  31:13,21,22,22
  31:25 32:9,23
  32:24 33:8,11
  33:16 34:8
  35:5,9,18,25
  36:24 38:25
  39:5 40:8,8
  41:2 43:19,22
  44:6,8,23,24
  45:9 46:10
  49:20 50:6
federally 28:22
feels 33:22
felons 50:7,8
fewer 36:1
figure 39:2
find 15:16 18:24
  48:8
finding 4:9
first 3:17 6:22
  11:24 27:12
  33:7
fit 38:20
five 7:23
focusing 49:23
follow 6:4 33:23
follows 44:13

footnote 10:12
  10:20 41:1
foreclose 15:11
foregoing 34:20
forget 39:2
formulation
  10:15
forth 7:8 8:9
  43:2
for-cause 9:3
found 11:13
  17:8 34:6,9,9
  50:5
founding 11:23
four 12:10,14,20
framework 19:6
  19:18
frivolous 51:19
full 4:21
fun 9:24
fundamental
  11:1,17 37:18
  37:21 38:7
  48:16,16 51:2
fundamentally
  44:15 45:4
further 23:14
  24:5,8 35:25
  43:9

—————————
G
—————————
G 3:1
gender 24:12
general 1:17,20
  8:20
generally 49:3,9
generous 13:3
getting 48:7
Ginsburg 3:21
  5:5 9:1,11
  11:24 12:3,10
  12:13,16 13:2
  13:16 22:18
  35:7 46:4,11
  51:6
Ginsburg's
  14:10

gist 32:19
give 19:17 31:6
  43:24 51:16,17
given 24:16 42:6
  47:23
gives 11:8 20:9
giving 7:6 48:14
go 24:5 27:9
  31:11 32:7
  35:25 38:11
  39:19 43:1
goal 48:17
goes 6:17 13:10
  14:16 15:2
  27:20 36:16
going 7:1 10:5
  11:3 19:19
  23:14 24:8
  27:17 28:24
  30:19 32:8
  33:10 38:14
  43:5 47:4
Gomez 3:11,13
  5:3 8:8 9:4,8
  9:15 12:13,18
  12:25 15:5
  17:16,19 29:14
  29:15 36:21
  38:25
Gonzales/Lopez
  32:19
good 9:20,25
  16:20 24:16
government
  45:3,19 48:2
government's
  42:11
governs 52:14
grand 13:4
ground 18:16
grounds 26:18
guard 24:5
guess 39:9,11
guilt 22:23 51:7
guilty 5:19
  22:21
gunshot 9:9,13

H

hand 37:8
handled 41:8
happen 43:2,3,4
  46:18
happened 16:18
happens 39:8,24
  40:15
happily 31:11
harbors 33:19
  33:21
hard 19:14 25:8
  36:17
harder 53:12
harmful 21:24
  48:23
harmfulness
  21:14,19
harmless 10:22
  17:10 18:4,12
  18:15,22,25
  20:1 22:5,15
  23:5 26:9,13
  26:15 32:13
  33:17 34:10,18
  35:6 43:23
  44:6 46:12,15
  46:20,23,24
  47:7,9 48:24
  50:1 52:1,14
  53:4,4,11,13
  53:15 54:9
harmlessness
  21:23 33:24
  44:25 49:10
harmless-error
  27:18 32:18,23
  34:3
hear 3:3 42:17
heard 8:5 29:24
held 8:12,13,20
  9:15 34:25
  35:1 40:17
  44:10 49:20
help 10:2 48:17
Hicks 52:19
Hilt 34:25

hinges 42:7
history 41:6
holdout 47:4
holds 39:18
honesty 48:24
Honor 5:1,16
  8:18 11:11
  12:2,15 14:1
  21:21 23:24
  24:7 25:19
  27:16 28:2,6
  29:13 30:16
  31:2,14,24
  32:10 33:6
  34:11,16 35:15
  37:17 38:18
  40:14,21 42:21
  46:8 48:5,17
  50:23 51:5
  52:19
hope 46:2
horse 34:14
Hospital 9:10
hunch 21:16
  24:19
hypothetical
  36:7,17 37:14
  40:19 46:25
hypothetically
  37:6

I

idea 36:25
II 37:4
III 36:11,22
Ill 1:15,18
illegal 23:12
  54:16
illegally 4:10,13
  4:16,17 5:18
  22:13 53:10
  54:21
illegitimate
  22:13
Illinois 1:6 3:4
  5:4 9:14 11:19
  11:25 15:16,24

16:7,13 17:4,8
17:21 18:7,17
19:15,20,22
20:2,8,13
22:14 24:13
26:8,17,22
27:4 28:19
31:7,10,15
32:22 33:4,5
33:22 34:1,6
35:4,8,19,24
37:10 41:6,7,8
41:16,18,25
42:2,25 45:7
50:18 53:2
imagine 46:15
impairing 44:12
impartial 8:22
  10:3 44:12
  47:25 48:18
  50:21 51:9
implicate 21:7
  43:8
implied 27:3
important 52:20
impossible 3:20
  21:13,23 53:5
  53:10 54:18
improper 41:24
improperly 4:12
  5:24
including 29:15
  42:7
inconsistently
  53:2
incorrect 16:1
independent
  3:16 26:17
independently
  33:7
indicates 10:13
  40:21
indirect 40:22
individual 51:2
influence 46:17
inform 34:18
information

53:25
inherently 4:23
initial 48:20
inquiry 46:24
  47:13,23
inside 53:25
instance 8:14
  22:9
instinct 48:21
instructed 38:1
  51:9
interpreting
  29:18
introduced
  54:14
intrusion 7:9
involve 8:18,18
  50:5,7
involved 5:9
  24:20
involves 14:1,23
involving 52:23
irrational 47:3
irrelevant 47:12
irrespective
  4:14
issue 5:2 16:24
  17:1 19:7 20:4
  20:10 43:6
  53:1

J

JAMES 1:15 2:3
  2:11 3:6 52:17
Johnson 28:16
joint 33:9
jot 51:19
judge 3:22 4:2,6
  6:1 7:22,24
  22:25 23:18,19
  23:24 24:11,14
  24:19,22,25
  25:13 29:4
  30:7 36:11,22
  37:5,24 42:16
  42:23 44:18
  49:4,7,8 51:3

51:10,11
judges 35:23
judgment 3:14
  4:14 22:16,17
  27:6 38:24
  43:7,10
jurisdiction
  30:21 31:6
  38:2
jurisdictions
  38:3 39:4,5,6
jurisprudence
  33:23
juror 3:11,19,24
  4:5,10,16,23
  5:3 6:7 7:17,20
  8:14 15:8,17
  16:2,3,8,8
  17:17 20:20,21
  20:22,25 21:1
  27:5 29:5,6
  30:7,8 36:8,15
  37:8,14,25
  38:14 39:8,9
  39:10,12,13,14
  39:17,20,20
  40:11,12,13,15
  41:24 46:16,16
  46:22,25 47:3
  47:21,25 48:18
  49:5,6,21,24
  50:8,21 51:12
  51:13,21
jurors 6:20 8:18
  14:5 15:6
  22:22 29:24
  41:5 45:21
  49:8,12,19
  50:5
juror's 7:11
  15:22
jury 3:13 4:10
  4:11,13,17
  5:17,19,23 6:1
  6:7,15,22 7:17
  8:2,22 9:16
  10:3,7 12:21

Miller-El 42:8
million 7:23
mind 39:3
minutes 52:16
misapplied
  15:14 16:21
  17:2
mistake 6:1 30:7
mistaken 46:20
mistakenly 49:5
  49:7
Monday 1:9
monetary 4:3
move 37:23
moved 19:23
multiple 45:5

N

N 2:1,1 3:1
narrow 3:23
  5:17
nature 47:23
Neder 16:22
  17:11 18:22
  19:9 20:9
  50:19
need 9:20,25
  10:8 21:16
  33:18 35:20
needed 17:13
needs 17:23
neighborhood
  38:11
neighboring
  38:2
never 6:21 8:5
  27:8 49:1
nevertheless
  38:1
new 18:11 27:7
  29:9 30:11
  32:2 39:9,11
  48:7,9 49:15
  49:21
Nguyen 36:21
non-Article
  36:11,22 37:4

non-capital 12:1
normal 23:5
normally 23:4
  39:11 48:23
note 37:11 38:2
  40:24
notion 15:20
  20:17
nullification
  47:9,16
nullity 41:11,23
number 12:10
  12:14,20 52:5
numbers 42:14
numerous 42:9
nurse 9:12

O

O 2:1 3:1
objection 35:8
  35:13,16 41:10
  41:22
objective 46:25
obligated 11:19
  13:7
obligation 11:16
  26:11,12
obvious 19:4
obviously 52:9
occur 6:20
occurred 22:9
offense 51:8
oh 6:25 28:9
  41:18
Oil 28:17
okay 4:15 7:21
  17:5 30:18
  39:15 49:17
Oklahoma 12:7
  52:20
old 6:21
once 11:14,19
  32:24
ones 50:4
opinion 15:25
  17:24 31:7
  33:1

oral 1:11 2:2 3:6
  25:23 43:13
order 12:25 24:3
  53:6
origin 11:14
original 41:4
ought 38:23,24
outcome 50:22
overexuberant
  4:6

P

P 3:1
page 2:2 33:8
  34:18
panel 36:12
  46:16 53:9
part 21:16 38:5
  41:10,21 47:7
  47:9,13,18
participate 17:7
participating
  15:22
particular 5:23
  7:20 38:16
  40:5,15 42:18
  46:21,22 47:15
  49:24 51:17
  53:7,8,9,20,21
  54:1,4,8,12,19
parties 35:17
people 9:13
percentage 7:24
perempt 15:17
peremptories
  11:25 12:25
  13:4 24:6 42:9
  45:8
peremptory
  3:11 4:7 5:7
  9:18,21,22,25
  10:2,10,25
  11:4,6,18,20
  11:21 12:4,8
  12:14,19,24
  13:6,17,21,22
  14:1 15:4,18

  16:2,6,14
  17:18 21:13,15
  22:2 23:15
  25:11,18 35:2
  35:13 42:5,14
  43:21,25 44:2
peremptory-c...
  25:14
perfectly 3:25
person 10:5,7
  17:7 18:10
  38:22 39:22
perspective
  22:10 23:3,11
  38:15
petition 40:23
petitioner 1:4,16
  2:4,12 3:7,10
  5:3 17:17 20:5
  26:18 36:5
  44:1 51:6
  52:18
Petitioner's 3:14
  36:4,18
phenomenon
  6:19
phrase 8:22
pick 7:2
place 6:22 39:21
places 49:8
play 37:21
please 3:9 26:1
  34:19 43:18
point 13:10 22:1
  28:20,23 33:24
  37:5,12 42:21
  48:13
pointed 21:15
  42:8 51:6
pointing 34:24
points 33:6
pool 6:22 38:10
position 13:23
  13:23 14:16
  15:13 23:23
  52:7,7
positions 18:5

possibility 9:8
power 45:2
practice 18:11
  46:9
precedent 8:6
  16:22 17:3
  18:21
precisely 50:18
precision 37:20
predilections
  46:21
preemptory
  24:21 25:3,6
  40:3,7,9 44:3
  44:11,14,19
  45:5,24 51:21
preface 7:3
prejudiced 7:18
  7:21 30:9
premise 4:22
  5:14 46:20
  47:20
present 54:20
presented 31:3
preside 8:19
presides 21:1
presumably
  38:9
presumption
  42:7
pretty 24:16
  45:15 47:20
prima 23:22,25
  24:10
principle 8:9,20
  19:5 31:21
principles 7:8
prior 34:21
probably 7:23
  34:23 54:10
problem 6:18
  13:9 34:5
procedure 5:12
  35:16
proceed 33:17
proceeded 33:15
proceeding 8:11

process 5:9,13
  5:21 6:17
  11:17 13:8,14
  14:7,12,17,21
  15:5 19:21
  21:8 24:9
  29:18,22 30:4
  32:18 36:23
  37:2,4,19
  38:23 39:2
  41:3 42:4,5,18
  43:8 44:8,8
  45:1 52:21,24
profound 27:6
  37:6,6 38:22
prohibits 23:14
promised 13:9
proof 48:3
proper 38:21
properly 8:2
  26:12 29:7
  37:1,9,25 38:1
  51:9
proposition 7:7
  11:9,11 27:24
  36:23
prosecution
  45:8,23
prosecutors
  7:19
protect 23:15
protection 51:2
protections 36:1
prove 21:22
  45:19
provide 13:8
  23:17 36:1
  42:14,15
pure 26:19
purely 42:1
purpose 9:19
  10:1,24,24
  24:20 48:16
purposes 23:16
put 6:1 21:19
  34:12 43:2
putting 3:21

p.m 54:24

———— **Q** ————
qualification
  7:17 20:25
  36:17
qualifications
  6:16 7:12,13
  22:23 49:23
qualified 3:25
  4:6 49:7
question 6:4,5
  6:14,25 7:3
  13:24 14:2,10
  15:2 19:24
  24:18 25:9
  27:15,19 28:2
  29:14,23 30:6
  30:20 31:3,18
  31:21 33:10,23
  34:19 35:11,21
  40:20 41:4,15
  41:25 42:1
  45:10,11,13
  46:2,12
questions 20:19
  27:2 43:9
quite 4:2,4 35:2

———— **R** ————
R 3:1
raise 26:17 45:9
raised 46:13
rare 6:19 7:15
rarely 6:20
rational 46:25
  47:21 50:19,20
  54:2
rationale 52:8
rationally 45:18
reach 20:10 27:8
  27:11 35:20
reached 34:19
  54:5
reaching 15:22
read 15:24
  17:24,25 18:6

  18:7,17 34:20
reader 34:18
really 6:23 26:4
  40:21
reason 9:16,21
  9:25 10:5,8,11
  11:1 23:17,20
  23:25 24:4
  32:22 34:6,8
  38:10,20 44:21
  46:5 47:5 48:9
reasonable 9:7
  34:10 45:20
  51:7
reasoning 16:16
  19:12,13 20:18
reasons 3:16
  5:23 29:6 36:2
REBUTTAL
  2:10 52:17
recall 14:7
received 53:17
recognized 32:1
reconsideration
  10:21
record 48:1,2
  54:11
reelection 31:12
  32:8
refuse 24:20
refuses 44:18
regard 20:18
Regardless 17:2
regulate 12:8
regulation 25:3
reject 32:25
rejected 13:11
  15:20 27:11
relied 20:9
relief 35:18
rely 19:9 20:8
relying 17:10
remainder
  25:19
remaining 52:16
remand 33:8,25
  35:8,14

remarkable
  42:12
remarks 41:1
remedied 5:13
  14:6
remedy 39:24
  40:2 42:1
removed 9:16
removing 12:18
render 3:14 4:11
  4:14 44:14
rendered 22:7,8
  22:11,12 23:8
  23:8 54:12
renders 5:18
repeatedly
  44:10
replaced 40:11
replacement
  40:11
reply 37:11
request 25:19
require 43:19
required 21:22
  27:5,7 49:10
  49:21
requirement 6:9
  21:1 37:15
requirements
  7:4 37:10
  49:19 50:6
requires 6:12
  29:8
reserve 25:19
residency 6:9
resident 6:6,8
  21:2 36:8,9
resolve 33:10
  43:6
resolved 53:21
  54:17,20
resolving 31:20
respect 5:11
  6:15,18 9:8
  17:3,3 22:1
respected 15:19
  16:6

respecting 48:16
Respondent
  1:18,22 2:6,9
  25:24 43:16
response 29:14
  41:15
restricting
  38:10
restrictions 42:9
rests 46:19
result 3:12
resulted 14:24
  45:3 47:24
reveal 50:7
reversal 10:20
  15:13 18:23
  19:25 20:7,11
  20:15 26:18,19
  26:21,25 43:20
  49:11
reverse 19:19
  33:18
reversed 3:15
review 17:10
  18:4,25 20:1
  22:6,15 23:5
  27:21 43:23
  44:6,25 52:2
  53:4,4
reviewing 22:16
reviews 23:4
right 5:3,6,6,9
  5:20 7:18,25
  8:9,21,21,22
  8:23,23,24
  10:9 11:6,13
  11:13,15,16,18
  11:20 12:6,21
  13:6 14:20
  17:17 18:20
  19:3,23 20:3
  25:6,15 29:8
  29:25 30:1
  33:14 39:3,6
  39:11,17,23
  40:3,4,9 43:25
  44:1,4,7,12

45:22 47:24
49:14 50:23
51:16,17 52:21
rights 25:4,6
43:22,22 44:5
52:1,2
rise 44:8 45:5
Rivera 1:3 3:4
Roberts 1:19 2:7
3:3 21:9,25
25:21 27:14
38:8 43:11,12
43:13,17 44:22
45:11,17 46:3
46:7,11,19
47:2,6,19,22
48:11,15 49:3
49:16,18 50:1
50:13,15 51:1
51:5,11,15
52:9,15 54:22
Ross 12:7
rule 5:4 6:10,14
10:20 17:17
20:15 27:5
32:23 39:18
45:21 48:14
52:7
rules 6:6
ruling 33:25
52:6
rulings 52:10
run 12:25 31:8
34:15
running 32:8

—— **S** ——
S 2:1 3:1
Salazar 10:17
sat 3:13 16:3
41:5,9,20
42:16
satisfies 37:9
satisfy 37:14
49:13
saying 5:11,24
6:25 8:3 9:3

13:3 14:10,18
15:7 36:20
37:6
says 5:25 8:1,16
15:3,3 20:20
24:3 30:10
35:8 36:9
Scalia 9:20,24
10:4,13 21:3
21:15 25:5,8
25:12 26:4,16
31:10,17 32:7
32:21 33:3
34:5,13
Scalia's 27:15
30:20
scenario 43:2
scenarios 50:2
Scodro 1:17 2:5
25:22,23,25
26:16 27:16
28:1,6,9,14,18
29:11,13,25
30:3,14,16
31:2,9,14,24
32:10 33:2,6
34:11,15 35:15
36:13,20 37:17
38:18 39:12,25
40:14,20 41:14
41:19 42:20
scope 5:17
screening 6:17
seat 41:23
seated 17:16,19
20:22 51:21
seating 3:19
4:23 15:8
47:25 50:5
see 39:19,22
seen 38:20
selected 44:20
51:18
selecting 48:18
selection 14:5
45:2
sense 37:21

sentencer 52:22
separate 3:15
serve 4:11 6:7
6:21
set 8:9 18:10
setting 7:8
seven 12:2
shop 31:8
show 27:12
showing 4:9
21:19
side 44:17
simply 4:24 33:5
33:10,24 34:19
35:6,6 36:25
38:6 42:3
single 44:14,16
sit 12:21 16:8
37:5 38:22
40:16 42:24
sits 38:1 49:21
sitting 4:17 10:7
15:17 36:11
37:10 51:13,13
situation 7:15
23:5 26:10
39:8 53:5,19
54:16
six 44:17
Sixth 32:17
50:22,24 51:15
51:23,25 52:2
52:4 53:1,3
skewed 45:2,12
45:13
Solicitor 1:17,19
somebody 39:21
sorry 12:12 28:6
sort 7:1 28:17
34:3,4 38:6
47:17 50:2
52:10
sought 33:8
35:18
SOUTER 4:15
5:10 13:10,20
14:2,14,20

15:1,15 16:5
16:17,25 17:12
17:20 18:1,6
24:2
specifically
15:25 23:16
31:21
specify 19:8
speculate 19:15
47:16
speculation
46:22 53:16
split 40:21,22
sponte 24:23
stage 8:11
stake 4:3
stand 14:14
18:17
standard 6:12
28:17,24,25
30:24 34:3
50:3,9,16 54:2
stands 11:8
31:12
state 4:18,19,20
4:24 5:2,11,23
5:25,25 6:13
6:13,13 7:4,4
7:10 8:1,15
10:11 11:1,7
11:15,19 12:3
12:8,16 13:3,7
13:13 14:4,6
14:11,16,19,24
15:3,9,9,12
16:1,10 17:1
17:13,23 18:13
18:14 19:7
20:25 21:22
22:22 23:14,17
24:4,9,18,18
24:24 25:2,10
25:18 26:15,19
27:18 28:23
30:23 31:20
32:2 33:8,13
35:10,12,18,25

36:9,24 37:8
37:24 38:10,19
39:4 40:8,9
42:13,13,17,17
43:21 44:1,2,4
44:4,5,7 45:18
46:10 51:19,22
52:14,23
stated 13:23
20:25
statement 4:18
15:9 16:14
34:12
states 1:1,12,21
2:8 6:5 8:8
42:12,13 43:14
44:11 48:7,9
State's 7:12
State-law 26:7
31:20
statute 13:13
29:19 45:8
statutes 18:8
statutory 37:9
49:19 50:6
step 25:13
STEVENS
20:13 21:4
24:17,24 30:19
31:5 32:4 45:7
45:15 46:5
48:6,13
straightforward
52:8
stretch 4:4
Strickland
47:11
strike 9:15
12:25 24:4
structural 3:18
3:19,23 4:13
6:12 21:10,11
36:12
sua 24:23
subject 10:21
17:10,18 18:4
18:24 20:1

44:25
submitted 54:23
54:25
subset 11:7
substance 48:14
substantive
42:22
substitute 51:10
substituted
22:15,16
substitutes 49:7
substitution
50:20
suggest 34:20
suggested 13:11
13:11 27:2
suggesting 9:2
suggests 34:23
supervision 7:9
supervisory
29:17
supporting 1:22
2:9 43:16
suppose 6:7 12:3
26:5 39:16
45:7
supposed 48:25
supreme 1:1,12
4:19,24 5:4
9:14 15:10,16
15:25 16:7,13
17:5,8,21 18:7
18:18 19:15,21
19:22 20:2,9
20:14 22:14
24:14 26:17,22
31:7,10,15
32:22 33:4,22
34:1,6 35:9,19
35:19 41:16
50:18 53:2
sure 24:8
surrounding
40:4
suspect 48:25
suspicion 23:19
25:14

sustainable
19:18
Swain 10:9,15
10:21,23,24
11:3,8 41:1
sweeping 7:7
sworn 37:9,25
swung 46:16
system 7:10

—————————
T

T 2:1,1
tainted 16:18
take 4:25 7:11
14:25 25:13
taken 4:3
takes 26:3
talking 13:20,21
29:21,22
talks 36:5
tell 38:9,13,13
46:14 50:14,17
term 6:10
terms 17:15
38:5
terribly 22:3
test 33:4 45:12
Thank 25:21
43:11 52:15
54:22
thereon 42:15
thing 7:19 28:17
32:25 44:22
54:13
things 46:9
think 4:19 7:5
7:18 10:5,6,17
11:3,8 21:23
22:21 23:2,13
26:6 28:3,9,14
28:18 30:17,20
31:2,14 32:5,6
32:11 33:11
34:1,11 35:2
35:22,23 42:20
43:8 44:21
45:13,17 46:7

46:19 47:12,22
48:4,15,23
50:15 52:8,11
thinking 19:15
thinks 6:7
thought 11:2
14:3,3 16:17
17:9 18:3 21:5
30:8,25 40:14
thousand 5:22
three 3:15 12:4
12:17,19 38:3
three-step 24:9
threshold 26:3
41:3
time 13:19 25:20
32:15 40:3
42:4 53:13
timely 41:10
times 7:23
today 42:13
touched 42:13
tradition 11:21
13:18
transferable
47:17
trial 3:17 5:12
8:23,24 16:1
18:11 23:18,24
24:19,25 25:13
27:7 29:4,9
30:12 32:2
39:10,11 42:17
44:9,13,15,18
45:1,4 48:7,10
48:10 49:15,21
52:1 53:15
trials 29:4
trigger 26:20,25
triggers 5:20
true 22:1,1
38:18 40:25
51:15
trying 26:9
30:23 39:2
48:20
turns 20:21

46:20
two 3:18 18:5
26:17 33:6
52:16
type 38:11
types 50:2

—————————
U

ultimate 17:20
ultimately 17:12
44:20
unanimously
45:21
unbiased 39:13
unconstitutio...
12:5 46:6,8
underlying 19:2
35:22 50:23,24
51:20,20
understand 9:23
13:25 16:7
17:22 24:8
35:23
understanding
39:25
understood
35:24
unfair 6:23
44:15 45:4,16
unfavorable
45:22
unique 13:18
United 1:1,12,21
2:8 8:8 43:14
unlawful 3:17
4:23 5:19,20
6:10 12:22
14:24 15:2,8
15:16,21,21
16:9,10 20:17
20:23 21:5
27:5 52:21,22
52:24
unlawfully 36:6
unlawful-adju...
4:8 6:18
unnecessary

35:17
unqualified 9:4
unremedied
14:17,19,22
unseemly 13:3
unstated 5:14
upheld 42:10
use 23:15 24:6
26:14 41:23
46:1 50:3
uses 31:21
usually 50:6

—————————
V

v 1:5 3:4 10:9
11:11 12:7
52:19
valid 9:15 17:9
validity 17:6
variety 42:12
varying 7:4
venerable 11:21
13:18
verdict 5:18
15:22 16:11,19
17:6,9,21
18:10,17 22:7
22:8,11,12,19
23:1,7,8,9
38:16 50:11,17
54:5,12
versus 8:8 27:25
28:1,16 37:25
viability 10:14
vicinage 38:12
victims 9:9
view 38:15
violate 45:1
50:22,24 52:2
52:4
violated 18:21
19:21,23 20:4
43:21,23 44:5
51:22
violates 6:2 8:4
8:14
violation 5:11

5:13 6:13 8:15 13:13,14 14:4 14:7,16,17,19 14:21,24 18:8 18:9 20:14,16 25:15 26:2,6,7 26:15,20,24 27:12 30:4 31:4 32:1,12 32:17,24 33:11 33:21 34:22 35:5 38:23 41:3 42:4,19 44:7,8,23,24 51:24 52:12,25

violations 7:1 37:4 50:3

void 38:24 43:6

voided 27:6

voir 8:19 48:1

vote 10:5

W
---

want 10:7 30:13 39:24

wanted 28:19 39:16,21 40:16

Washington 1:8 1:20

wasn't 8:2 9:12 11:10,19 24:12 30:9 39:10 52:13

way 6:22 17:25 18:17 35:20 38:9,13,13 46:9,14,18 49:1 50:14,18 52:1,11

we'll 14:5

whatsoever 37:25

win 11:4

Wingo 36:21

winnowing 15:5

wishes 25:11

withhold 44:11

words 18:6 41:11,23 49:15

work 48:25

worked 49:2

world 46:14

worry 6:25

wouldn't 18:15 26:11 33:4 40:13 45:5

wounds 9:13

wrong 6:8 7:25 8:2 25:16 27:22 28:5,8 28:22 30:10 32:5,6 37:15 38:5 43:1,5,6

wrongful 3:18 21:12

wrongfully 3:13 16:3,15

wrongly 20:22 39:17

X
---

x 1:2,7

Y
---

yeah 15:17

year 7:23

years 6:21

young 6:20

0

07-9995 1:5 3:4

1
---

10 45:8

11:05 1:13 3:2

12:05 54:24

171 33:8 34:18

18 6:21

1886 41:19

19th 42:10

1919 34:25

1986 41:9

2

2005 42:9

2009 1:9

23 1:9

25 2:9

3
---

3 2:4

4
---

4 10:20 41:1

434 5:4 17:17

5

5,000 7:24

50 39:4

50,000 7:24

500 7:24

52 2:12