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IN THE SUPREME COURT OF THE UNITED STATES

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STEPHEN DUNCAN, WARDEN, :

Petitioner : No. 14-1516

v. :

LAWRENCE OWENS. :

- - - - - x

Washington, D.C.
Tuesday, January 12, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

CAROLYN E. SHAPIRO, ESQ., Solicitor General of Illinois, Chicago, Ill.; on behalf of Petitioner.

BARRY LEVENSTAM, ESQ., Chicago, Ill.; on behalf of Respondent.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-1516, Duncan v. Owens.

Ms. Shapiro.

ORAL ARGUMENT OF CAROLYN E. SHAPIRO

ON BEHALF OF THE PETITIONER

MS. SHAPIRO: Mr. Chief Justice, and may it please the Court:

The Seventh Circuit in this case violated AEDPA when it granted habeas relief to Respondent in the absence of precedent from this Court, clearly establishing that Respondent's allegations rise to the level of a constitutional violation.

JUSTICE SOTOMAYOR: Let's assume the judge said, instead of what he said -- so make the assumption my way -- I don't know if the witnesses are telling the truth or not, but I believe he's guilty. I'm not sure about their credibility, but I believe he's guilty because he wanted to get rid of this guy because of a -- a drug deal gone bad.

Would that violate due process?

MS. SHAPIRO: It would violate due process if the judge did not find the element, the -- the -- that the evidence provided by the State proved the

1 elements beyond a reasonable doubt. But it would --
2 does not violate due process, or at least it does not
3 clearly establish that it would violate due process, for
4 the finder of fact to speculate about a nonelement of
5 the crime where it is -- where the finder of fact does
6 not disavow or otherwise --

7 JUSTICE SOTOMAYOR: Well, this isn't
8 speculation. The judge said who -- Larry Owens knew he
9 was a drug dealer; Larry Owens wanted to knock him off;
10 I think the State's evidence has proved that fact;
11 finding of guilty of murder.

12 Proved that Larry Owens wanted to knock him
13 off?

14 MS. SHAPIRO: The State's evidence did
15 establish that Larry Owens wanted to knock him off,
16 because the State's evidence established that Larry
17 Owens approached him and hit him over the head with a
18 baseball bat several times.

19 JUSTICE KAGAN: Sorry, Ms. Shapiro. Could
20 I -- could I take you back, because I just didn't
21 understand -- and I'm sure it was me -- the -- the
22 answer that you gave to Justice Sotomayor's first
23 question.

24 And I think it's important, because it
25 focuses on what the actual issue is here: How much is

1 at issue between the parties?

2 If you had a judge that said, I don't think
3 the evidence is up to snuff here, and then said, the
4 thing that takes me over the line is what I think about
5 the defendant's motive, and that's what allows me to say
6 that the defendant is guilty, and that had not been
7 proved, that had -- the State had never offered that
8 into evidence. It really just came out of the judge's
9 head for whatever reason. Right?

10 Do you think that that would be a due
11 process violation?

12 MS. SHAPIRO: Well, I think it would first
13 depend somewhat on if -- on habeas review on how the
14 State appellate court or supreme court interpreted the
15 record and interpreted what the judge had said. If the
16 State appellate court interpreted what the judge had
17 said so that the judge was saying he did not believe
18 that the evidence produced by the State proved the
19 elements beyond a reasonable doubt, that would be a
20 Winship error or a Jackson error, which is not
21 Respondent's claim here.

22 If the State appellate court read the
23 record, interpreted the -- what the trial court said
24 differently and thought that the trial court did think
25 that the -- that the evidence was sufficient but was

1 trying it together by trying to tell a story that made
2 sense to himself, then it would not violate --

3 JUSTICE KAGAN: Yes. Okay. But then -- so
4 the first alternative that you gave, and you said it's
5 not the claim here, but I would have thought it was the
6 claim here because you -- there is obviously a dispute
7 about how to read these words. And we can talk about
8 the -- how to read these words. Right?

9 But once you say, as I think you said, and I
10 think you properly said, Look, if what the -- the
11 judge's various comments on motive was basically taking
12 him over the line, was -- that that was the basis for
13 the verdict of guilty, that he didn't think that all the
14 evidence, the other evidence was enough and that that
15 was crucial to his finding, then, if I understand you
16 right, you would say that's a due process violation
17 because at that point the verdict of guilty is based on
18 evidence that was never presented.

19 MS. SHAPIRO: If the -- if the judge found
20 that the elements had not been proven beyond a
21 reasonable doubt.

22 JUSTICE KAGAN: Well, the judge is just
23 saying it's not -- you know, this is not enough, and
24 it's necessary for me to think about motive as the
25 missing piece.

1 MS. SHAPIRO: That does not necessarily
2 violate due process because -- or it's -- it's certainly
3 not clearly established that that would necessarily
4 violate due process. Factfinders are free to develop a
5 theory of the case that is not presented by the State as
6 long as it is consistent with the evidence and as long
7 as the evidence itself is sufficient to establish guilt
8 beyond a reasonable doubt.

9 JUSTICE KAGAN: Oh, I see. So you think
10 that it doesn't matter if the judge thought that the
11 evidence was insufficient as long as the evidence was,
12 in fact, sufficient.

13 MS. SHAPIRO: If the judge said that he
14 found the evidence insufficient, that would --

15 JUSTICE KAGAN: Yes. The judge says, you
16 know, all of this evidence, it's not enough. For me,
17 motive is critical to a finding of guilt here.

18 MS. SHAPIRO: Again, it would depend on how
19 the -- the -- the State court, State appellate courts
20 interpreted the record. I think that is ambiguous, as
21 you've described it, whether the judge is saying that he
22 finds that the elements have not been proven beyond a
23 reasonable doubt or if the judge is saying that he needs
24 to find some way of telling a story about this case that
25 makes sense to him.

1 The first would be a due process violation.
2 The second, it's not clearly established.

3 JUSTICE KAGAN: Okay. I mean, so maybe I'm
4 putting words in your mouth, and so tell me if I am.
5 But what I just heard was, look, if he's just telling a
6 story to himself and he basically believes that the
7 evidence that was presented is enough, but he wants to
8 tell a story about some other things that make this all
9 make sense, that's one thing. But -- but if he's really
10 filling in the pieces and deciding -- and -- and
11 determining guilt based on something that was never in
12 the record, that's another thing entirely, and that that
13 would run into all our statements about one accused of a
14 crime is entitled to have his guilt determined solely on
15 the basis of evidence at -- introduced at trial and so
16 forth.

17 MS. SHAPIRO: It -- it -- yes, I -- but it
18 has to be quite clear that that's what's happening, both
19 because we have a presumption that judges know and
20 follow the law and especially on habeas review that
21 presumption applies with special force. Because on
22 habeas review, we -- we assume not only that the
23 original trial judge knows and follows the law but that
24 the State courts that are reviewing his decision know
25 and follow the law.

1 JUSTICE KAGAN: Okay. So now I'm going to
2 go back to Justice Sotomayor's second question. And --
3 but, I mean, just take a look at what he said here. All
4 right?

5 His first sentence is, all of the witnesses
6 skirted the real issue. All right? So all of the
7 witnesses -- there's something wrong with what we've
8 heard from all of the witnesses. They all skirted the
9 real issue.

10 Okay. So what was the real issue? What was
11 the real issue?

12 And then he says, the issue to me is that
13 you have a drug dealer on a bike who Larry Owens, the
14 defendant, knew was a drug dealer, and Owens wanted to
15 knock him off. That's the real issue.

16 And then he says, the State's evidence has
17 proved that fact.

18 What's that fact? Well, that fact is the
19 same thing that he's just said is the real issue, that
20 there was a drug dealer on the bike who knew -- and the
21 defendant knew he was a drug dealer and wanted to knock
22 him off.

23 And then he says, okay. Finding of guilty.

24 I mean, to me, I -- I guess with all the
25 deference in the world, it's just this judge saying,

1 there's something wrong with all the evidence that's
2 been given to me, and here's what's really moving me to
3 find him guilty.

4 MS. SHAPIRO: So, first, if that were what
5 the judge said, that interpretation, it's not clearly
6 established that -- that that would violate due process,
7 for the reasons I've already said, that a finder of fact
8 can develop a theory of the case to tie it together that
9 is consistent with the evidence.

10 JUSTICE KAGAN: But that --

11 JUSTICE KENNEDY: But I thought it was
12 clearly established -- I thought you agreed -- page 14,
13 I think, of your reply brief -- that it is clearly
14 established that it would be a violation of -- of Taylor
15 and -- and Turner if the factfinder bases its verdict on
16 evidence not in the record.

17 MS. SHAPIRO: On -- when we -- and when we
18 discussed that in our reply brief, we talked about the
19 possibility that a judge would say, I -- I -- I don't --
20 the evidence isn't sufficient so -- but I know that this
21 defendant's brother committed a similar crime, and for
22 that reason only I'm finding him guilty.

23 JUSTICE KENNEDY: Well, but to begin with,
24 we have a -- a general statement: The evidence must be
25 based -- pardon me -- the verdict must be based on the

1 evidence in the record. Correct?

2 MS. SHAPIRO: Correct.

3 JUSTICE KENNEDY: All right. And we agree
4 with that.

5 MS. SHAPIRO: Yes.

6 JUSTICE KENNEDY: Then I don't see how -- I
7 don't understand your answer to Justice Kagan.

8 MS. SHAPIRO: The -- the precedent can be
9 read -- that -- that language can be read at a very high
10 level of generality, which is not appropriate for AEDPA
11 review.

12 Under due process -- and it's especially
13 important when we're talking about due process-claims
14 that this Court respect AEDPA's requirement that the
15 clearly established law have a certain level of
16 specificity. Of course, it's clearly established that
17 every defendant is entitled to a fair trial, but that
18 alone does not mean that every allegation of a fair
19 trial -- by -- of an unfair trial --

20 JUSTICE GINSBURG: But here, the issue is,
21 was the defendant convicted on the basis of information
22 that wasn't in the record. And I think you would have
23 to answer that if it's clearly established, that a
24 conviction must be based on evidence presented at the
25 trial --

1 MS. SHAPIRO: Certainly.

2 JUSTICE GINSBURG: -- cannot be based on
3 evidence that the judge heard at the local bar --

4 MS. SHAPIRO: Certainly.

5 JUSTICE GINSBURG: -- for example.

6 MS. SHAPIRO: Yes.

7 But in -- and in this case, it's important
8 to note that the Illinois Appellate Court reviewed the
9 record, and the Illinois Appellate Court concluded that
10 in fact, the judge's speculation about motive was not a
11 material factor in the verdict. And that conclusion is
12 also entitled to deference by this Court, as --

13 JUSTICE SOTOMAYOR: I'm not sure -- you
14 know, the problem is that you're making an allegation
15 I'm not sure about. They had trouble with one of the
16 witnesses. They wrote it. Correct?

17 MS. SHAPIRO: They -- they said that they
18 thought that Evans -- that there was -- Evans' testimony
19 had its problems, yes.

20 JUSTICE SOTOMAYOR: All right. So that
21 leaves it to a one-witness ID of a witness who -- who,
22 at best, saw the defendant once, when he turned around
23 to leave the scene for a few seconds.

24 MS. SHAPIRO: From a distance of about 8
25 feet.

1 JUSTICE SOTOMAYOR: Right. I mean, once.
2 Fleeting look.

3 How can you draw a reasonable inference that
4 the judge wasn't troubled by the witnesses when he says
5 I think all of the witnesses skirted the real issue.

6 MS. SHAPIRO: Several -- several answers to
7 that question.

8 First, Mr. Johnnie's testimony, which the
9 appellate court discussed at some length and which the
10 appellate court concluded was reliable, was essentially
11 unimpeached. And both eyewitnesses were unrebutted.
12 They both agreed and identified the defendant on several
13 occasions as the person who --

14 JUSTICE SOTOMAYOR: Well, except that
15 evidence failed to identify him in court.

16 MS. SHAPIRO: No. Evans did identify him in
17 court. What Evans misidentified was the photograph he
18 had selected from the photo array. But when asked to
19 identify defendant in court, he did so, as the person
20 who --

21 JUSTICE SOTOMAYOR: It's pretty easy to --
22 to identify a defendant in court. They sit next to the
23 defense attorney. I've always thought it's been a
24 wonderfully -- a ritual with no meaning.

25 But putting that aside, I guess my question

1 is: You say that Johnnie's testimony was sufficient. I
2 don't disagree with that. But what they didn't say was
3 that it was credible, or that the judge found it
4 credible. Those are two different findings.

5 MS. SHAPIRO: Certainly. The judge must
6 have found it credible, because if he didn't believe
7 Johnnie, we -- what -- what you would have to presume is
8 that this judge said, well, I don't think that the State
9 witnesses have established the elements beyond a
10 reasonable doubt. I don't think Johnnie is credible.
11 So I'm going to disregard one of the most basic --

12 JUSTICE SOTOMAYOR: No. All the judge had
13 to say was, I'm not sure he's credible.

14 And what takes me over the line is this
15 motivation, this theory that I have.

16 MS. SHAPIRO: It is not clearly established
17 that that theory, in this -- in this situation would --
18 would violate due process where it is consistent with
19 the evidence, is not contradicted by the evidence, and
20 where the elements are sufficient.

21 JUSTICE SOTOMAYOR: This is quite
22 interesting. You can draw an inference about a
23 defendant based on no evidence. No one said he was a
24 drug dealer, I presume. Did he have any convictions for
25 drug dealing?

1 MS. SHAPIRO: He did not.

2 JUSTICE SOTOMAYOR: He did not. So the
3 judge could just make this up out of whole cloth.

4 MS. SHAPIRO: The --

5 JUSTICE SOTOMAYOR: And that's not
6 extraneous evidence.

7 MS. SHAPIRO: It's not evidence at all.
8 Fact finders are allowed to rely on their experience and
9 common sense when they -- when they evaluate the
10 evidence. For example, in *Parker v. Matthews*, the
11 defendant had a -- a partial defense of extreme -- that
12 he was operating under extreme emotional disturbance.
13 He had an expert who said he was operating under extreme
14 emotional disturbance, but the jury rejected that
15 defense. And this Court said that the jury was free to
16 do so, in part based on their own personal experience
17 and personal understanding of what emotional disturbance
18 means.

19 So jury -- so factfinders are free to
20 consider what they know -- background information that
21 they know about the world, and they bring that into the
22 factfinding process.

23 JUSTICE SOTOMAYOR: That's a new theory. I
24 didn't read that in your brief, that somehow, the judge
25 was right. He can -- he can assume that Owens knew that

1 the defendant was a drug dealer.

2 MS. SHAPIRO: No. We -- we argued in our
3 brief, that -- that the -- that the judge is free, like
4 any factfinder, to make inferences based on his common
5 sense and experience. That's not the same thing as
6 saying that the judge is free to ignore -- to convict --
7 convict in a situation where he finds that the elements
8 have not been proven beyond a reasonable doubt.

9 This Court could say that a situation
10 like -- as -- that we're talking about violates due
11 process, but not on a habeas -- not in a habeas case.

12 JUSTICE KAGAN: Well, I guess I -- this goes
13 back to Justice Kennedy's question, I guess. We have
14 these statements repeated over and over again. One
15 accused of a crime is entitled to have his guilt or
16 innocence determined solely on the basis of evidence
17 introduced at trial. And what I hear you saying now --
18 and tell me if this is not what you're saying -- but
19 what I hear you saying now is well, that's true as to
20 real things that are extraneous to a proper factfinder's
21 role, all right? But it's not true, as to -- I mean,
22 I'm just going to say -- this made-up facts. It's not
23 true as to made-up facts; that's different. You can
24 make up facts, and -- and made-up facts don't come
25 within this rule.

1 Is that what you're saying?

2 MS. SHAPIRO: I'm saying several things.

3 First, it's not clearly established that a
4 factfinder can't -- can't tie together the case to his
5 satisfaction by review -- by coming up with a theory
6 that's consistent with the evidence.

7 But in addition --

8 JUSTICE KAGAN: It's not just -- it's --
9 it's not just like so I feel good about the case when I
10 go home at night. I mean, this is a factfinder who has
11 a -- a very clear role, which is to adjudicate guilt or
12 innocence. And motive, although not an element in
13 Illinois, motive is relevant to identification, which,
14 in this case, was all about identification. Everybody
15 said that this case was about identification.

16 So when the judge starts making up things
17 about motive -- and I thought that the State really did
18 not contest that this was all made up, that none of it
19 was in the record that got -- you know, who knows how he
20 got this. But he starts making up these things about
21 motive, and then indicating that these things about
22 motive are relevant to his adjudication. To me, I mean,
23 clearly established or not, that just fits under this
24 Taylor principle.

25 MS. SHAPIRO: The -- that interpretation of

1 what the judge said and did was rejected by the Illinois
2 Appellate Court.

3 JUSTICE KAGAN: I agree with you that
4 there's a question of interpretation. So, I mean, it
5 seems to me like everything comes down to that. Like,
6 if you thought that this judge just made up facts and --
7 and then said, this is critical to my finding of guilt,
8 I mean, I just think you'd have to say that that's a due
9 process violation under Taylor. That -- that what you
10 do have is you have the ability to come back and say,
11 but that's not what the judge meant. That's not what
12 the judge said, right?

13 MS. SHAPIRO: Correct.

14 JUSTICE KAGAN: Okay. So -- so that narrows
15 the issue.

16 But then it's just like what was he saying,
17 if that wasn't what he was saying?

18 MS. SHAPIRO: Well, there --

19 JUSTICE ALITO: Let me give you a hypothesis
20 of what he may have been saying, because I think this
21 may be a little bit too hard on the judge.

22 This was an unusual prosecution. It was a
23 murder prosecution where there was no evidence of
24 motive. I think that's pretty rare. The judge may have
25 been saying something like this: I have -- I have

1 identification evidence here.

2 And by the way, I -- I read the -- the
3 whole -- everything -- the whole record and -- that's in
4 the appendix and the closing argument of defense
5 counsel. There was no -- the defense here was not that
6 these were witnesses who made an honest mistake. They
7 just didn't get a good opportunity to see the -- to see
8 the perpetrator. The -- the -- argument of the defense,
9 as I read it very clearly, was that something was going
10 on here and these two witnesses were identifying --
11 were -- were falsely -- knowingly identifying the wrong
12 person. Something was going on.

13 There's evidence that the victim was selling
14 drugs, very strong evidence that the victim was selling
15 drugs, and that's what was going on here. And so the
16 judge said -- may have said to himself, why does the --
17 the -- why would the accused take a baseball bat and
18 beat this kid, this 17-year-old kid who has a lot of
19 drugs in his pockets, riding around on a bike? Why
20 would he just beat this kid to death?

21 And there -- he -- I would be concerned
22 about finding this -- the defendant guilty if I thought
23 there was no motive in this case. But I can see that
24 there could well be a motive in this case, because
25 people in the drug trade kill each other. And that

1 seems to be exactly what was going on here. Is that --
2 is that not a fair interpretation of what the judge was
3 saying?

4 MS. SHAPIRO: I think that's an extremely
5 fair interpretation of what the judge was saying. And I
6 think it is consistent also with what the Illinois
7 Appellate Court said when the Illinois Appellate Court
8 said that the speculation about motive was not a
9 material factor in -- in the verdict.

10 JUSTICE BREYER: Well, no. It actually said
11 -- so I've been looking at this because it puzzles me
12 what standard we're supposed to use. He does say
13 there's no evidence that the two eyewitnesses knew each
14 other, had any reason to conspire and fabricate their
15 testimony. Next sentence: "Therefore, in light of
16 these identifications, the trial court's speculation" --
17 this is page 128 -- "the trial court's speculation as to
18 defendant's motive for assaulting Nelson will be
19 construed as harmless error."

20 Error. And the judge who's dissenting
21 doesn't deny that it's error. He says it's error. He
22 just doesn't think it's harmless. So now we have a case
23 where it looks like the only words I can find on this in
24 Illinois concede that it's error. Or they say it's
25 error. Indeed, they say it's harmless error.

1 Therefore, the issue is harmlessness. What am I
2 supposed to do? What standard do I apply out of 2254 if
3 in fact they think it's error? Or even if they didn't
4 decide it and we -- it's debatable, obviously -- we
5 think it's error; we don't have to give them any
6 deference, I guess. How does it work?

7 MS. SHAPIRO: The -- this Court has to give
8 deference to the Illinois Appellate Court's conclusion
9 that defendant's due process rights were not violated.

10 JUSTICE KAGAN: But they didn't conclude
11 that. I mean, Justice Breyer has asked -- you have to
12 give deference, I would think, on the -- the Brecht
13 question, the question of harmlessness. But why would
14 you have to give question on the merits -- on the merits
15 issue? There was no merits determination.

16 I mean, there are two ways to read this
17 opinion, and neither one indicates that deference ought
18 to be given on the merits. One way to read it is that
19 they said it was error, but that it was harmless error.
20 The other way to read it is that notwithstanding the
21 fact that they said it was harmless error, they didn't
22 really mean that. They didn't reach a decision as to
23 the question of whether it was error. But even if
24 that's the case, there's still nothing to give deference
25 to on the merit side.

1 MS. SHAPIRO: I disagree. When the Illinois
2 Appellate Court said the -- the -- it said -- the
3 language that Justice Breyer quoted, it was just after
4 they are analyzing the State's argument. On page 119a,
5 the -- the appellate court explains that the State
6 further argues that even if this Court determines that
7 the trial judge's comments were improper, they should be
8 deemed harmless since there's no indication that the
9 comments constituted a material factor in defendant's
10 conviction. They then go on to discuss the evidence and
11 conclude that this speculation would be construed as
12 harmless error.

13 So what they are saying is error -- the best
14 reading of this opinion -- they're saying is error was
15 the speculation. It wasn't necessarily appropriate for
16 the judge to be doing that. But they're not saying that
17 there was constitutional error here. Indeed, it would
18 not be coherent for them to say that it was not a
19 material factor in the verdict and -- and then not
20 discuss whether that was constitutional error.

21 The second, in terms of whether or not --
22 even if you believe that the Illinois Appellate Court
23 didn't directly address the merits, 2254(d) still
24 requires deference to its conclusions. It
25 unquestionably concluded that the defendant's due

1 process rights were not violated because if -- because
2 it affirmed the conviction.

3 JUSTICE KAGAN: Well, on harmlessness
4 grounds.

5 MS. SHAPIRO: It is not clear that this --
6 the -- perhaps on harmlessness grounds. But even if on
7 harmlessness grounds, under cases like Harrington and
8 Davis v. Ayala, that's a -- there's still a decision on
9 the merits, an adjudication on the merits, and 2254(d)
10 still requires deference to that adjudication on the
11 merits.

12 JUSTICE KAGAN: Whose adjudication on the
13 merits?

14 MS. SHAPIRO: The Illinois Appellate
15 Court's.

16 JUSTICE KAGAN: We might be going in
17 circles, but I thought you just said if -- even if we --
18 we view this opinion as not reaching a determination on
19 the merits.

20 MS. SHAPIRO: You could view this opinion as
21 deciding the question of whether his due process rights
22 were violated, deciding that question based solely on
23 harmless error, although I said, that -- that is not --
24 we don't believe that's the best reading of the --

25 JUSTICE SCALIA: Isn't that a merits

1 determination?

2 MS. SHAPIRO: Yes. It is a merits
3 determination.

4 JUSTICE SCALIA: I always thought
5 harmless -- harmlessness --

6 JUSTICE KAGAN: Harmlessness, you get
7 deference on. There's no question. Harmless, you get
8 deference on. The question is whether you get deference
9 on the notion that this surmising about motive was not
10 error. Because -- because to me, I read this opinion
11 and I say they -- they never say it's not error. Quite
12 the opposite. They declare it harmless error.

13 MS. SHAPIRO: The -- the -- ultimately, the
14 question that the Court has to answer under 2254(d) is
15 whether the State's adjudication results in a decision
16 that is in violation of an unreasonable application of
17 clearly established law of this Court. It's -- it's
18 ultimately the adjudication that this Court is looking
19 at. And the harmless -- even if you believe it's just a
20 harmlessness determination on which they decided, that
21 is under Davis v. Ayala on merits determination, and so
22 the adjudication is entitled to deference.

23 JUSTICE KAGAN: Okay. So harmlessness, I
24 think you're right, is entitled to deference. But
25 assume if you think that this judge unconstitutionally

1 convicted somebody on the basis of evidence that had
2 never been introduced at trial. If you think that, how
3 could that not be harmful? That's -- I mean, it's
4 almost tautological. If the error is that he convicted
5 somebody on the basis of evidence that was not proper to
6 think about, well, of course, that's harmful. That's
7 why he convicted him.

8 MS. SHAPIRO: Yes, and for that reason, we
9 believe the best reading of the -- of the opinion is
10 that they did not find constitutional error. Because if
11 it was not a material factor in the verdict, it could
12 not have been a violation of his due process rights.

13 I'd like to reserve the rest of my time for
14 rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Levenstam.

17 ORAL ARGUMENT OF BARRY LEVANSTAM

18 ON BEHALF OF THE RESPONDENT

19 MR. LEVENSTAM: Mr. Chief Justice, and may
20 it please the Court:

21 The Illinois Appellate Court unanimously
22 found that there was no evidence that Mr. Owens knew
23 Mr. Nelson was dealing drugs, or that he was himself
24 involved with gangs or with the illegal drug trade. And
25 subsequently, the presentence report revealed that he

1 had no convictions whatsoever.

2 The Court then said that this was -- by a
3 two-to-one margin -- this was harmless error. And I
4 recognize that harmlessness is entitled to deference,
5 and I intend to discuss that. But it seems to me that
6 really, we're past the -- the point of -- of whether
7 there was evidence concerning knowledge.

8 JUSTICE SCALIA: Doesn't -- doesn't the case
9 really -- much of the case hinge on what -- what you
10 mean by error? If you mean by error simply introducing
11 into your decision matters that were not in the record
12 that had no support in the evidence, if that's what you
13 mean by error, it's one thing. It's another thing if
14 you mean by error using evidence that was not in the
15 record as a basis for your decision. And which of the
16 two you -- you assign this to, it seems to me,
17 determines the outcome of the case.

18 MR. LEVENSTAM: I agree. And it seems to
19 me, based on what he said, after saying -- expressing
20 dissatisfaction with the witnesses' testimony, he said
21 what the real issue was to him -- and I have yet to be
22 in front of a trial court making a, you know, bench
23 trial decision who calls the real issue something other
24 than what he has to decide to --

25 JUSTICE GINSBURG: But what about the

1 presumption that the judge knows and applies the law?
2 And I don't think there's a rational judge who would
3 think it proper to base a conviction on conjecture that
4 has no evidentiary basis. So if we add to this that we
5 presume the judge knows and applies the law, and that is
6 he knows the defendant must be convicted on the basis of
7 evidence presented in court.

8 MR. LEVENSTAM: Well, there are two
9 presumptions at -- at -- at work, in a sense. This is a
10 morning seems filled with presumptions.

11 The presumption that he knows the law, I
12 think, is absolutely correct. And I think that
13 presumption is a reason why we know that he found motive
14 an integral part of his conclusion of guilt, and that is
15 because the Illinois Supreme Court decided the People v.
16 Smith case in 1990, and it reversed a conviction that
17 was based on identification that rested on motive. And
18 it said it is essential, if you are going to convict
19 someone based on a motive theory, that you find the
20 knowledge that the accused have the actual knowledge
21 necessary to generate the motive.

22 And when he makes that finding, who --
23 defendant knew he was a drug dealer, he is going through
24 the paces in Illinois law to establish the motive that
25 is then the basis for the following finding of guilty of

1 murder.

2 CHIEF JUSTICE ROBERTS: I think we've gotten
3 pretty far afield from the issue here.

4 Which case of ours clearly established that
5 it's due process-error when a judge speculates about an
6 issue that is not pertinent to guilt and there's
7 sufficient evidence of guilt on all the elements? Which
8 case of ours says that?

9 MR. LEVENSTAM: There is no case that says
10 that, Your Honor. But this is different from that
11 situation because this is precisely how guilt is
12 determined. The fact that it's not an -- an element
13 doesn't mean that it's not what he rested his guilty
14 verdict on.

15 CHIEF JUSTICE ROBERTS: I just want to -- I
16 mean, under AEDPA, isn't it critical that there be a
17 case --

18 MR. LEVENSTAM: Yes, that Turner --

19 CHIEF JUSTICE ROBERTS: -- as opposed to
20 what you're saying is the case is: Well, you know, we
21 have cases that say you can't be guilty if there wasn't
22 evidence of guilt.

23 MR. LEVENSTAM: Right.

24 CHIEF JUSTICE ROBERTS: But that -- that's
25 a -- our cases clearly make sure --

1 MR. LEVENSTAM: Turner --

2 CHIEF JUSTICE ROBERTS: -- that that's too
3 high a level of generality.

4 MR. LEVENSTAM: Well, no. I think Turner
5 and Taylor are per -- all of those cases --

6 CHIEF JUSTICE ROBERTS: Taylor -- Taylor
7 says the problem is the judge said you can infer from
8 the fact that the person has been arrested and indicted,
9 right? Is that -- that's Taylor?

10 MR. LEVENSTAM: There was some -- there was
11 a bad instruction there, yes.

12 CHIEF JUSTICE ROBERTS: Okay. Well, that's
13 very different from here. The judge is the factfinder.
14 He's not instructing anybody on anything.

15 What about Williams? That -- they -- the
16 Seventh Circuit only cited three of our cases, right?

17 MR. LEVENSTAM: Yes. We've cited a few
18 more.

19 CHIEF JUSTICE ROBERTS: Well, I know. But
20 that doesn't count, right? It's the ones that the
21 Seventh Circuit counted -- cited under AEDPA.

22 MR. LEVENSTAM: Well, I -- I think if it
23 exists in those cases, interweave and cite themselves,
24 cases like Shepherd v. Maxwell, and Irving --

25 CHIEF JUSTICE ROBERTS: Yeah. Well, what

1 about three cases: Taylor is about an erroneous
2 instruction to a jury. That's not what this is.

3 Williams. Williams. That's the prison
4 attire case, right? The people are --

5 MR. LEVENSTAM: Yes.

6 CHIEF JUSTICE ROBERTS: Nothing like that is
7 here. That's an outside influence on the -- on the
8 factfinder.

9 And Holbrook is the sheriffs who were --

10 MR. LEVENSTAM: Right.

11 CHIEF JUSTICE ROBERTS: -- blanketed.
12 Nothing like that happens here.

13 MR. LEVENSTAM: Each of those cases applied
14 a -- what I would call a prophylactic application of due
15 process to avoid a jury coming to a conclusion based on
16 outside-the-record facts or assumptions.

17 Here, what we have is a trial court judge
18 who has told us, on the record, that that's exactly what
19 he's done. And so --

20 CHIEF JUSTICE ROBERTS: That's -- what is
21 exactly what he's done?

22 MR. LEVENSTAM: That he -- he's told us he
23 has based his finding on motive, based it on the
24 knowledge -- which is not -- which is not supported in
25 the record.

1 JUSTICE BREYER: But that's not what the
2 State says. The State says you read the relevant three
3 sentences: The issue was you have a 17-year-old youth
4 on a bike who is a drug dealer; who Larry Owens knew he
5 was a drug dealer. Larry Owens wanted to knock him off.
6 I think the State's evidence has proved that fact. You
7 see?

8 So two members of the Illinois Supreme Court
9 say the words "that fact" refer to the sentence, Larry
10 Owens wanted to knock him off. And the sentence
11 preceding that is the judge's speculation as to why.

12 One judge in the Supreme Court says what you
13 said, that when you read that together, it means "that
14 fact" referred to the motive.

15 Now, there we are. And the question is what
16 are we supposed to do? Is there enough here to say that
17 they are clearly wrong, those two members?

18 MR. LEVENSTAM: Yes --

19 JUSTICE BREYER: I mean, there we are, the
20 Seventh Circuit thought, yeah. There is.

21 MR. LEVENSTAM: Well --

22 JUSTICE BREYER: They're clearly wrong. The
23 -- it doesn't refer to the preceding sentence. It
24 refers to the preceding two sentences.

25 MR. LEVENSTAM: Well --

1 JUSTICE BREYER: Have -- have I got the
2 issue?

3 MR. LEVENSTAM: Well, perhaps that's one way
4 of looking at it, yes. But -- but --

5 JUSTICE BREYER: That seems to be the way
6 that your -- your --

7 MR. LEVENSTAM: If --

8 JUSTICE BREYER: -- opponents are looking
9 and it.

10 MR. LEVENSTAM: If the court reporter had
11 put a comma there, I think what he's -- what --
12 everything from "skirted the real issue." Because what
13 he then does is define the real issue: What he has
14 to -- what is going to bring him over the line to be
15 beyond a reasonable doubt.

16 And the issue to me is -- and it goes all
17 the way on from there to the end, and "that fact," the
18 issue to him is the "that fact." I don't think -- I
19 don't think you can get to -- precisely because Illinois
20 law, which I think he was following his error was of
21 fact -- says you need to establish knowledge to create
22 motive.

23 CHIEF JUSTICE ROBERTS: What if the -- what
24 if the record said -- the judge says, okay, I -- you
25 know, the -- the State has satisfied all of the elements

1 required for murder in -- in Illinois. You know, the
2 real issue here is about these gangs selling drugs. In
3 other words, is there -- and if, in fact -- I mean, does
4 that make a difference?

5 MR. LEVENSTAM: Yes.

6 CHIEF JUSTICE ROBERTS: Okay.

7 MR. LEVENSTAM: Yes.

8 CHIEF JUSTICE ROBERTS: Now, why don't we
9 accept the presumption that the judges are presumed to
10 know the law and are following it, and interpret that in
11 light of -- in light of that record?

12 MR. LEVENSTAM: Well, but --

13 CHIEF JUSTICE ROBERTS: Because you don't
14 challenge that there's sufficient evidence of guilt, do
15 you?

16 MR. LEVENSTAM: The -- no, that's not our
17 issue. I mean, that was challenged below, but that's no
18 longer at issue in the case.

19 The -- the presumption that he's referring
20 to -- that the -- the Illinois Appellate Court is
21 referring to there, is a presumption concerning the
22 trial court's relying only on properly-admitted
23 evidence, and it's the presumption this Court explained
24 is necessary in Williams v. Illinois to enable trial
25 judges to try cases. But that -- so that they can set

1 aside, presumably, the -- the evidence they've heard
2 that's inadmissible and proceed on the admissible
3 evidence.

4 But that's not what's happened here. What's
5 happened here is there is no evidence whatsoever of
6 Mr. Owens knowing or being involved in any of this
7 business. And then you have the judge specifically
8 saying that he knew that fact, that Mr. Owens knew that
9 Mr. Nelson was dealing drugs. And that --

10 JUSTICE SCALIA: I'm not sure -- I'm not
11 sure what he means when he says "the issue here." He
12 might have meant only the question here, the -- the
13 unresolved question. What perplexes me here is that we
14 don't have any evidence of motive. And that would be a
15 question. And so he -- you know, he supplies that, but
16 he --

17 MR. LEVENSTAM: But it --

18 JUSTICE SCALIA: -- doesn't say --

19 MR. LEVENSTAM: -- it --

20 JUSTICE SCALIA: He doesn't say that it's
21 necessary to his decision.

22 MR. LEVENSTAM: Well, it -- it seems to me
23 they -- the real -- again, I've -- I've not seen a trial
24 court judge faced with the -- having to determine guilt
25 or innocence frames a real issue as being an irrelevant

1 sort of back story kind of --

2 JUSTICE BREYER: Yeah, but you're assuming
3 what their argument is. But the question is what is the
4 real issue.

5 MR. LEVENSTAM: Well, we --

6 JUSTICE BREYER: We can get something
7 further.

8 Were you the trial judge -- trial lawyer?

9 MR. LEVENSTAM: No, no, no, no, no, no.

10 JUSTICE BREYER: But you've read the record
11 pretty well?

12 MR. LEVENSTAM: Oh, yes.

13 JUSTICE BREYER: So now, I think all of the
14 witnesses skirted the real issue. Okay? What did they
15 skirt?

16 MR. LEVENSTAM: Well --

17 JUSTICE BREYER: They skirt what they didn't
18 talk about.

19 MR. LEVENSTAM: But --

20 JUSTICE BREYER: So what was the rest of the
21 trial about?

22 MR. LEVENSTAM: Well, no --

23 JUSTICE BREYER: What was the issue in the
24 trial?

25 MR. LEVENSTAM: The -- the trial is an

1 extremely short one, and I recommend it to Your Honor.

2 It's --

3 JUSTICE BREYER: And what is it about?

4 MR. LEVENSTAM: -- about a hundred pages.

5 It's about this event that happened

6 outside --

7 JUSTICE BREYER: No. I understand that.

8 But I mean -- what -- what he says is the witnesses

9 skirted the real issue.

10 If you will tell me that all they talked
11 about was: We identify him -- no, your identification
12 is no good; yes, our identification is good; no, it
13 isn't; yes, it is -- if that's what it was about, then
14 that couldn't be the real issue, so they're -- that they
15 skirted, because they didn't skirt it.

16 MR. LEVENSTAM: I -- I --

17 JUSTICE BREYER: So something else has to
18 be; therefore, motive. But is that what happened?

19 MR. LEVENSTAM: No.

20 JUSTICE BREYER: What happened?

21 MR. LEVENSTAM: I believe what happened is
22 the judge did not believe these people's story; that
23 he -- I'm speculating now, too. But the -- but the fact
24 is that the harmlessness is something that --

25 JUSTICE BREYER: No. You don't understand

1 my question, because it was favorable to you.

2 My question was -- my question was what did
3 those witnesses talk about. He says they skirted the
4 real issue. I want to know what they talked about --

5 MR. LEVENSTAM: Well, they --

6 JUSTICE BREYER: -- the rest of the trial.

7 MR. LEVENSTAM: They talked about what they
8 saw, and they talked about their identifications. It
9 was very brief. And what I'm saying is, by skirting the
10 real issue, he's saying that he does not credit what
11 they've said.

12 CHIEF JUSTICE ROBERTS: So wait. So they're
13 -- what they were talking about is the identification?

14 MR. LEVENSTAM: Yes.

15 CHIEF JUSTICE ROBERTS: And you're saying
16 what the judge said is I don't think Larry Owens was the
17 guy? I don't --

18 MR. LEVENSTAM: No, no, no, no.

19 CHIEF JUSTICE ROBERTS: -- think --

20 MR. LEVENSTAM: I don't think they're
21 telling the truth here about what really happened out
22 there that night.

23 CHIEF JUSTICE ROBERTS: So he's saying you
24 think he determined that they had not really identified
25 the perpetrator. And yet, because he thought it was a

1 drug -- this guy was a drug dealer, well, he ought to be
2 found guilty anyway?

3 MR. LEVENSTAM: I -- I can't speak beyond
4 the words --

5 CHIEF JUSTICE ROBERTS: No, but it's very
6 important --

7 MR. LEVENSTAM: I --

8 CHIEF JUSTICE ROBERTS: -- as we try to read
9 this statement, and I'm -- I think it's --

10 MR. LEVENSTAM: But --

11 CHIEF JUSTICE ROBERTS: -- if you think the
12 judge did not think this was the guy but the guy who
13 happened to be there was a drug dealer and so he
14 sentenced him on first degree murder, I -- that's a
15 pretty incredible submission.

16 MR. LEVENSTAM: No, that's not what I'm
17 saying.

18 CHIEF JUSTICE ROBERTS: Well, what are
19 you --

20 MR. LEVENSTAM: Because the guy that was
21 there was not -- had -- there was no basis for him --
22 for anyone thinking he was a drug dealer, and that's the
23 point.

24 I -- I think that --

25 CHIEF JUSTICE ROBERTS: Well, I thought -- I

1 thought you said that the real issue was that the judge
2 did not think that the witnesses were credible.

3 MR. LEVENSTAM: The -- I'm sorry. I think
4 what I meant to say was that, when he said the -- the
5 witnesses skirted the real issue, it was reflecting some
6 measure of dissatisfaction with the witnesses'
7 testimony.

8 Now, I don't know what that was. I -- I --
9 I don't know. But what I do know is he immediately says
10 what -- he then frames what the issue is to him. And in
11 framing what the issue is to him, he says that Mr. Owens
12 knew that this victim was a drug dealer and wanted to
13 knock him off, presumably because he's a drug dealer.
14 And from the very next thing that he says, his finding
15 of guilty of murder.

16 So those things follow one right after the
17 other. It is the only thing -- it is the only fact that
18 he discusses after expressing whatever dissatisfaction
19 he has with the witnesses' testimony.

20 And so it is -- at a minimum, it is an
21 integral part of the process that he has gone through to
22 reach the finding of guilt.

23 JUSTICE KAGAN: When --

24 JUSTICE BREYER: That's what you say, but
25 what I want to put -- there's -- I'm trying to get the

1 other side, so you have to answer that squarely. And --
2 and maybe I'll put it this way:

3 There's -- well, the judge has been sitting
4 there through this fairly short trial. He is annoyed at
5 all these witnesses. They've been pussy-footing what's
6 going on. They saw the murder. No problem about that.
7 But they're not explaining it because they're frightened
8 of saying what it's involved in.

9 And he's fed up, so he's going to say, I'm
10 going to say what's really happening here. What's
11 really happening here is this is a drug deal that
12 failed. Or something like that.

13 So that's the explanation of what he said.

14 If you could bring him back and say, judge,
15 did you mean motive played a role here?

16 He'd say, of course not. Of course not. It
17 didn't play a role in my decision. All that played a
18 role in my decision was what the witnesses said, which
19 was, he's the guy. I was just saying what's going on.

20 Now, what's -- I think they're saying
21 something like that.

22 MR. LEVENSTAM: And my answer to that is
23 that is speculation upon speculation upon speculation,
24 and it's not a basis for putting somebody behind bars
25 for 25 years.

1 And the harmless error -- they bear the risk
2 on harmless error. The State. They have to explain --
3 if they want to explain something other than what's on
4 the page, that's for them to do.

5 And the -- the Illinois Appellate --

6 JUSTICE SCALIA: No, you -- you -- you have
7 to establish that it's error --

8 MR. LEVENSTAM: Yes.

9 JUSTICE SCALIA: -- before they have to
10 establish that it's harmless.

11 MR. LEVENSTAM: Well, the only --

12 JUSTICE SCALIA: But -- and what
13 Justice Breyer was saying is it wasn't error. He's just
14 speculating, trying to make sense of the whole thing,
15 but that wasn't the basis for his decision.

16 You have to establish that it was the basis
17 for his decision, whereupon there is error, whereupon
18 the State has to show that it's harmless.

19 MR. LEVENSTAM: Well, whereupon I point back
20 to the Illinois Appellate Court conclusion that this was
21 error, three-to-zip error, two-to-one --

22 JUSTICE SCALIA: Well, again, that --
23 that -- that depends on what you mean by error. If --
24 if all they mean by it was error that you should not
25 bring in, in your opinion, any -- any facts that are not

1 on the record, it's a mistake to do that -- I think
2 that's what they meant by it was error.

3 MR. LEVENSTAM: Well, and that's what I
4 think they thought he did, and I think they decided that
5 was error, and then they turned and did a harmless-error
6 analysis. And their harmless-error analysis was
7 insufficient, I think, for three reasons. Okay?

8 I believe that it was -- it fails the
9 Brecht-Kotteakos test because they simply took a look at
10 the remaining evidence and they did not make any effort,
11 as the Seventh Circuit did, to assess precisely what
12 impact this knowledge/motive finding had on the judge.
13 And as we've pointed out in our briefs, the simple
14 answer long ago would have been to remand it and ask the
15 judge, and then we wouldn't be here.

16 But the -- so that's number one.

17 Number two --

18 JUSTICE GINSBURG: But that's not what --
19 what happened. The Seventh Circuit required a new
20 trial, right?

21 MR. LEVENSTAM: Yes. The Seventh Circuit
22 did --

23 JUSTICE GINSBURG: Okay. And what is the
24 posture of this -- the case at -- at the moment?

25 MR. LEVENSTAM: It's -- it's stayed pending

1 this Court's determination.

2 JUSTICE SOTOMAYOR: There's a new trial that
3 was necessitated by the judge's death, correct?

4 MR. LEVENSTAM: Yes.

5 JUSTICE SOTOMAYOR: The judge who passed --

6 MR. LEVENSTAM: The -- yes. Who --

7 JUSTICE SOTOMAYOR: -- who made the
8 findings?

9 MR. LEVENSTAM: Yes. The judge is gone.
10 The judge is -- is -- has -- is -- has passed away a
11 few -- just a few years ago.

12 JUSTICE ALITO: Yes.

13 JUSTICE GINSBURG: Is that --

14 MR. LEVENSTAM: In the --

15 JUSTICE GINSBURG: Is that who made this
16 statement? The trial judge?

17 MR. LEVENSTAM: Yes.

18 JUSTICE ALITO: The one statement that the
19 judge made that you claim is utterly unsupported by the
20 evidence, I gather, is the statement: "Larry Owens knew
21 he was a drug dealer."

22 MR. LEVENSTAM: Yes.

23 JUSTICE ALITO: That's the -- that's the
24 only one?

25 MR. LEVENSTAM: Yes.

1 JUSTICE ALITO: Now, there -- could --
2 there's some evidence from which one might infer that.
3 It might be insufficient. It would depend on the
4 standard of review. But there's evidence that -- that
5 Nelson, the victim, was selling drugs. Could you not
6 infer -- could a reasonable finder of fact not infer
7 from the record here that this kid, this 17-year-old kid
8 with 40 packages of drugs, who's hanging around in front
9 of this -- in front of this bar, was there for the
10 purpose of selling drugs?

11 MR. LEVENSTAM: That -- that would be a
12 reasonable inference.

13 JUSTICE ALITO: And the -- and the -- the
14 defendant walked up to -- there's evidence that the
15 defendant walked up to this kid standing in front of
16 the -- of the bar selling drugs, and spoke to him for
17 some period of time, right?

18 MR. LEVENSTAM: Well, that would be
19 Mr. Evans, not Mr. Johnnie. Mr. Johnnie comes --

20 JUSTICE ALITO: Yes, but there's evidence of
21 that, if -- if you believe that, that that took -- that
22 took place, right?

23 MR. LEVENSTAM: There is Mr. Evans'
24 testimony.

25 JUSTICE ALITO: There's evidence of that.

1 So could someone infer from those two facts that -- that
2 if this kid was pretty openly selling drugs and the
3 defendant walked up and spoke to him to some -- for some
4 period of time, he knew what he was doing?

5 MR. LEVENSTAM: On -- yes. But the Illinois
6 Appellate Court has already told us that Mr. Evans'
7 testimony was -- his -- his credibility was severely
8 undermined, and it was contradicted by Mr. Johnnie's
9 testimony specifically, which the Illinois Appellate
10 Court relied on, although erroneously, because they
11 misapplied Neil v. Biggers. And the -- and the fact is
12 that they can -- they held, and I think you defer to
13 this, that there is no evidence that Mr. Owens knew
14 Mr. Nelson was dealing drugs.

15 JUSTICE ALITO: Now, the question on -- on
16 the merits of -- putting aside the issues of -- of AEDPA
17 and harmless error, when would it -- when does it
18 violate due process for a judge in a bench trial to make
19 a finding on a fact that is not needed for conviction?
20 And what case of ours --

21 MR. LEVENSTAM: Well --

22 JUSTICE ALITO: -- sets out the standard for
23 that?

24 MR. LEVENSTAM: Again, as I said, there is
25 no case of yours that sets forth the standard for that.

1 JUSTICE ALITO: What is the --

2 MR. LEVENSTAM: But here --

3 JUSTICE ALITO: What is the standard?

4 MR. LEVENSTAM: The -- well, the standard is
5 the due process standard in Turner and Taylor and the
6 other cases that the Seventh Circuit cited and that
7 we've cited.

8 But that the fact is that the motive was a
9 part of the identification analysis.

10 JUSTICE ALITO: Well, I'm trying to figure
11 out what the standard is, if you could put it in words.

12 Suppose that the -- the trial judge had made
13 a finding, like the -- the court of appeals appears to,
14 about the -- the -- the time of nautical twilight, and
15 suppose the trial judge was wrong on that. Then what?

16 So the trial judge has made a finding of
17 fact on a fact that's not necessary for conviction.
18 Might conceivably have some relevance to the
19 determination. So what is the due process standard for
20 determining whether that requires a new trial?

21 MR. LEVENSTAM: Well, I think at that point
22 you -- you would do a harmless-error analysis.

23 JUSTICE KAGAN: Mr. Levenstam, I -- I guess
24 I don't understand why you're -- I would have thought
25 that the answer to Justice Alito's question was that

1 you're not saying that what happened here -- what went
2 wrong here, you're not saying, is that there was a
3 superfluous finding of fact.

4 MR. LEVENSTAM: Well --

5 JUSTICE KAGAN: You're saying that there is
6 a superfluous finding of fact that actually went into
7 the judge's --

8 MR. LEVENSTAM: Well, yes.

9 JUSTICE KAGAN: -- final determination.

10 MR. LEVENSTAM: Yes. I --

11 JUSTICE KAGAN: It was not just any old
12 superfluous finding of fact.

13 MR. LEVENSTAM: Yes.

14 JUSTICE KAGAN: It was not superfluous. It
15 was a made-up finding of fact that created the judge's
16 final conclusion that the man was guilty. That played
17 some role in that final conclusion.

18 MR. LEVENSTAM: And -- and I apologize if I
19 haven't said that already, but that is certainly our
20 point, is that -- that the judge framed the issue, laid
21 out the issue, found the fact that was directly in front
22 of the finding of conviction --

23 JUSTICE SOTOMAYOR: And --

24 MR. LEVENSTAM: -- and it was the only fact
25 specified by the judge in reaching that conclusion.

1 JUSTICE SOTOMAYOR: -- in Taylor --

2 JUSTICE ALITO: It depends -- when you're
3 reading this -- in reading what the judge said, it
4 depends on -- the reasonableness of what the judge said
5 may depend on whether you think that the judge inferred
6 that Larry Owens killed the victim because he knew he
7 was a drug dealer, or whether the judge was -- in
8 attempting to fill in the blanks of this case, inferred
9 that he knew he was a drug dealer from the fact that
10 there was proof that he killed him.

11 MR. LEVENSTAM: But there --

12 JUSTICE ALITO: So if you know that the
13 victim is a drug dealer and the defendant talked to the
14 victim, and then the defendant proceeded to beat his
15 brains out with a baseball bat, you could probably infer
16 from that the reason why he did it was that he knew he
17 was a drug dealer, could you not?

18 MR. LEVENSTAM: The reason why whoever did
19 it did it because -- yes, I think that's right. The
20 problem comes with Mr. Owens and the evidence that links
21 him. And that's where we get to the harmless-error
22 analysis, and the Illinois Appellate Court's
23 harmless-error analysis was constitutionally inadequate.

24 CHIEF JUSTICE ROBERTS: But I -- I'm sorry.
25 You said the problem is with the evidence that linked

1 him to the --

2 MR. LEVENSTAM: Mr. Owens, right.

3 CHIEF JUSTICE ROBERTS: But you're not
4 challenging the sufficiency of that evidence.

5 MR. LEVENSTAM: I'm challenging the
6 credibility of that evidence. The trial court never
7 found it credible. In fact, he expressed some concerns
8 about the witness.

9 CHIEF JUSTICE ROBERTS: Well, but
10 credibility was the key issue in the trial, right?

11 MR. LEVENSTAM: Yes. Yes. And -- and
12 unfortunately, the Illinois Appellate Court, in
13 reviewing this, said specifically here there is no
14 indication whether or not the trial judge assessed the
15 credibility of the eyewitnesses, resolved conflicts in
16 their testimony, or waived the evidence or drew
17 reasonable inferences therefrom.

18 And then it proceeded to do essentially just
19 that, which it can't do because it didn't see any of
20 these people. And the -- and it is clear from the
21 record that there was a fair amount of equivocation by
22 even Mr. Johnnie. His -- his behavior that evening was
23 extremely suspicious. The Illinois Appellate Court made
24 basically mistake after mistake in its harmless-error
25 analysis.

1 CHIEF JUSTICE ROBERTS: But that -- seems to
2 me like you're challenging the sufficiency of the
3 evidence, and I -- again, as I -- as the case comes
4 before us, we assume there is sufficient evidence to
5 convict under every element of the crime.

6 MR. LEVENSTAM: I'm -- I'm challenging the
7 sufficiency of the Illinois Appellate Court's
8 harmless-error analysis, upholding the conviction in
9 light of the fact that it concluded that there were no
10 credibility determinations that it could rely upon made
11 below. Typically, there is an assumption that
12 credibility analysis is done, and that's what's -- the
13 appellate court works from.

14 But here the appellate court tells us that
15 it's is assuming there are none. And then it goes and
16 it applies the Neil v. Biggers analysis, which is
17 analysis determining the reliability of
18 identification --

19 JUSTICE SCALIA: That doesn't make any
20 sense. You're saying that the -- what -- the Illinois
21 Supreme Court thought the opinion below was, was that
22 the judge didn't think eyewitness testimony proved that
23 this was the guy who -- who hit him with a baseball bat.
24 But nonetheless, he thought this guy was a drug dealer
25 and that will be enough. I -- that doesn't make any

1 sense. The trial court must have accepted the
2 credibility --

3 MR. LEVENSTAM: Your Honor --

4 JUSTICE SCALIA: -- of one or both of -- of
5 the witnesses.

6 MR. LEVENSTAM: I don't -- I'm telling
7 you -- I'm reading you the Illinois Appellate Court
8 opinion, and I'm telling you I agree with you when it
9 doesn't make any sense, comes out time and again,
10 because it doesn't make any sense, because this was a
11 terribly botched job.

12 And even under the deferential standards of
13 Brecht and Kotteakos, the trial court got it -- based it
14 on evidence that wasn't in the record, and the Illinois
15 Appellate Court affirmed based on legally inadequate,
16 harmless-error analysis, constitutionally inadequate and
17 objectively unreasonable.

18 They applied -- instead of applying
19 harmless-error law, they applied this Neil v. Biggers.
20 It's a reliability analysis for whether something gets
21 admitted into evidence. It's not the outcome. It's the
22 inflow into the trial, not the determination at the end
23 that this guy Johnnie, who's been hiding out from the
24 police all night and then hides out from the police for
25 a week, is -- is somehow credible. He's the guy that's

1 been telling the trial judge, oh, we talked to the
2 police. Well, it turns out on cross-examination he
3 didn't talk to the police. It was his driver who talked
4 to the police.

5 CHIEF JUSTICE ROBERTS: I'm sorry, counsel.
6 Maybe I'm just repeating myself. That sounds like
7 you're arguing the sufficiency of the evidence.

8 MR. LEVENSTAM: But Your Honor, it is not a
9 direct sufficiency. I am challenging the Illinois
10 Appellate Court's harmless-error analysis. It went
11 through and said Mr. Johnnie should be believed because
12 X, Y, and Z. And I am telling you that in conducting
13 its harmless-error analysis, it overlooked A, B, C, D, E
14 all the way through W.

15 CHIEF JUSTICE ROBERTS: Yes, you're saying
16 we're not challenging the sufficiency of the evidence.
17 We are challenging the Illinois court's determination
18 that it was harmless error that there was not sufficient
19 evidence.

20 MR. LEVENSTAM: The mode of analysis was
21 wrong. The -- as I said, the Neil v. Biggers analysis
22 is a reliability analysis that talks about
23 admissibility. It doesn't allow the Court to make a
24 credibility determination in the absence of --

25 JUSTICE GINSBURG: I thought you -- you're

1 conceding that there was sufficient evidence. If all
2 there had been is these two eyewitnesses, there would be
3 nothing you could object to. But what you're saying is
4 that the error that this judge made in confining this
5 motive based on evidence is not in the record, that that
6 error had a substantial influence on the judgment that
7 it rendered.

8 MR. LEVENSTAM: Yes, substantial and
9 injurious.

10 JUSTICE GINSBURG: So indeed, there was
11 sufficient evidence, yes, but the finding of the
12 conviction rested on an error that had --

13 MR. LEVENSTAM: Absolutely. And that was
14 not harmless under Brecht and Davis.

15 If there are no further questions, I will
16 thank the Court and sit down.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Shapiro, you have four minutes
19 remaining.

20 REBUTTAL ARGUMENT OF CAROLYN E. SHAPIRO
21 ON BEHALF OF THE PETITIONER

22 MS. SHAPIRO: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 I -- I'd like to start by talking briefly
25 about the harmless-error analysis that the Illinois

1 Appellate Court undertook.

2 Even assuming -- which we do not concede --
3 that they found constitutional error and then went ahead
4 and did a harmless-error analysis, at best, the
5 Respondent here can argue -- is trying to argue that
6 it -- that it engaged in an unreasonable application of
7 Chapman, that's only one thing that Respondent here
8 would have to establish to overcome -- to -- to
9 establish that the error was not harmless. He also has
10 to meet the Brecht standard of -- that the error, if
11 any, had a substantial and injurious effect on the
12 verdict.

13 The Illinois Appellate Court found that the
14 speculation about motive did not -- was not a material
15 factor in the verdict; therefore, it could not have been
16 a harmful error.

17 Second, I'd like to say something about the
18 role of motive in a case involving --

19 JUSTICE GINSBURG: Could you explain how
20 they were able to make that finding that the motive that
21 the judge specified based on evidence that's not in the
22 record, that that didn't have an influence?

23 MS. SHAPIRO: Certainly. The Illinois
24 Appellate Court talks about the evidence at trial. And
25 -- and talk -- talked about the fact that the judge has

1 just sat through a trial in which he's heard two
2 eyewitnesses, unrebutted eyewitnesses identify the
3 defendant as the -- as the killer. It would not -- the
4 Illinois Appellate Court's conclusion that it -- putting
5 that evidence together with the presumption of
6 regularity, the Illinois Appellate Court presumes that
7 the motive was -- concludes -- excuse me -- that the
8 motive was not -- the speculation about motive was not a
9 material factor in the verdict.

10 And motive is not -- as -- as it's been
11 pointed out, motive is not an element of murder in
12 Illinois. And motive -- although motive can be used to
13 establish identity, it doesn't have to be used to
14 establish identity. People v. Smith is a case about
15 whether or not the -- the State can put in evidence of
16 motive without establishing that the defendant knew
17 about the -- this evidence that they're putting in.

18 It has nothing whatsoever to do with whether
19 motive is a necessary part of establishing identity in a
20 case where you have two unrebutted eyewitnesses.

21 To conclude, for Respondent to prevail, this
22 Court would have to find that the trial judge would have
23 disregarded some of the most basic principles of -- of
24 jurisprudence and found the defendant -- and you would
25 have to conclude that the Illinois Appellate Court's

1 factual conclusions were -- both factual and legal
2 conclusions were objectively unreasonable. On AEDPA,
3 those conclusions cannot be reached and the Seventh
4 Circuit should be reversed.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case in the
9 above-entitled matter was submitted.)

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