TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
BOBBY LYNN ROSS,	)	No. 86-5309
	)	
Petitioner,	)	
	)	
v.	)	
	)	
OKLAHOMA	)	

Pages: 1 through 44

Place: Washington, D.C.

Date: January 19, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

BOBBY LYNN ROSS,
Petitioner,
V. No. 86-5309
OKLAHOMA

Washington, D.C.
Tuesday, January 19, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

GARY PETERSON, ESQ., Oklahoma City, Oklahoma;
on behalf of the Petitioner.

ROBERT A. NANCE, ESQ., Asstant Attorney General of Oklahoma, Oklahoma City, Oklahoma;
on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 86-5309, Bobby Lynn Ross versus Oklahoma.

Mr. Peterson, you may proceed whenever you're ready.

ORAL ARGUMENT OF GARY PETERSON, ESQ.

ON BEHALF OF PETITIONER

MR. PETERSON: Thank you, Mr. Chief Justice, and may it please the Court.

The issue in this case is whether it's constitutional for a State to take away a preemptory challenge from a defendant in a capital case, to take it away by forcing him to use it to remove a juror from the jury who should have been removed for cause because he was unable to consider a life sentence.

This case was the type of case historically in which preemptory challenges have been regarded as most valuable. The defendant was black, he was charged and tried in a virtually all white community for the murder of a white police officer. The trial judge specifically found that the defendant's race was an issue in the trial.

QUESTION: Had there been a change of venue granted?

MR. PETERSON: Yes, there was. It was moved to the next adjoining county. The case had received a lot of publicity before trial.

QUESTION: Whereabouts in Oklahoma was it?

MR. PETERSON: This was in western Oklahoma, far western Oklahoma about 150 miles west of Oklahoma City.

Although he tried to kind of remedy the publicity by changing the venue, it turned out not to be -- the crime occurred in Elk City, Oklahoma.

QUESTION: Elk?

MR. PETERSON: Elk City.

QUESTION: That's way out in the panhandle, isn't it?

MR. PETERSON: Well, it's on Route 66 in western Oklahoma. The case was actually tried in Cheyenne, Oklahoma, which is a little town of 1300 people about 30 miles from Elk City.

He tried to remedy the publicity by changing the venue but it turned out really not to have very much effect. Almost all the jurors that were called had heard about the case and it appeared not to have been a very effective move.

There was a real danger of prejudice against the defendant under these circumstances, and challenges for cause or not an infallible way of obtaining an impartial jury. There's a real risk that some prejudice jurors are going to get by challenges for cause, are going to get by voir dire, and are going to get on the jury. That's where preemptory challenges are valuable.

QUESTION: Well, how many were given here?

MR. PETERSON: Nine.

QUESTION: Pardon?

MR. PETERSON: Nine in first degree murder statute.

QUESTION: Right. And your argument essentially is that one of them had to be wasted to remove the juror who should have been removed for cause anyway.

MR. PETERSON: That's right.

QUESTION: Now, you don't deny that Oklahoma could have provided only eight to begin with, or maybe even only what, two to begin with? Was there any obligation to provide any preemptory challenges at all?

MR. PETERSON: No, there's not.

QUESTION: None at all.

MR. PETERSON: There's only an obligation to have an impartial trial, but I don't think that there's any particular number that's required by the Constitution.

QUESTION: So your contention is that it violates fundamental fairness to give him only eight instead of nine, that's what it comes down to?

MR. PETERSON: That's right. I think the State legislature has to make a judgment of how many preemptory challenges are needed in a particular State to secure a fair trial. Pretrial publicity, the news media may be more pervasive in one State than another. Juror qualifications may be higher in one State than another.

So I think the fact that some States may have a smaller number of preemptory challenges doesn't necessarily answer the question. I think the only way that we can be sure

that the defendant received due process is if he got the statutory number that's allowed.

QUESTION: What if the Statute allowed the prosecution ten challenges and the defense nine?

MR. PETERSON: I think we have a problem with that. That's kind of a Wardius v. Oregon situation where there are non-reciprocal benefits where the State has a procedural edge on the defendant in conducting a trial.

QUESTION: What provision of the Constitution do you think would be violated by that, if any?

MR. PETERSON: The due process clause. Wardius v. Oregon was a situation where a notice of alibi statute applied only to the benefit of the prosecution and not to the defense, and the Court held in that situation that it was a denial of due process. And we think the same argument would apply here.

QUESTION: Well, what if the Oklahoma legislature had found in connection with enacting a statute, like Justice O'Connor poses, that we'd looked into all the jury challenges that have come up in Oklahoma, and on the average, we think the typical juror is a little more prejudice in favor of the defendant than in favor of the State. And therefore, we think we have empirical basis for saying that a ten:eight ratio will put them back to parity.

MR. PETERSON: It's hard for me to square that with Wardius v. Oregon, and I guess the legislature in Oregon concluded that the defense doesn't need this discovery as much

as the prosecution does. I don't think it's fair and I think that no State gives the prosecution more preemptory challenges than the defendant, and a lot of States give the defense more.

QUESTION: And that's how we decide. We say, is it fair, the way you do, is that how we decide this case?

MR. PETERSON: Well, I'm not sure that the question of ten versus nine really controls this case. I think the due process clause question turns on whether there's been a statutory right that's important enough that's been denied in this case that is entitled to the production of the due process clause.

QUESTION: Well, if you had eight challenges and one of them was just like this and you used the preemptory on that one, and you didn't use any of your other preemptories?

MR. PETERSON: I think it's easier to find harmless error in that situation, if the defendant didn't really need the preemptories in the first place, it's hard to see how it really harmed him to have to use one on this particular jury.

QUESTION: And the difference between that one and this one is?

MR. PETERSON: In this case, the defense used all their preemptories and asked for more, and didn't get them.

QUESTION: Did you ask for more preemptories?

MR. PETERSON: The defense lawyer asked for additional preemptories before the trial, but under our law in Oklahoma, the trial judge couldn't do it.

QUESTION: I know, but he didn't after this event, and he passed every juror, didn't he, that proceeded?

MR. PETERSON: He didn't try to prove challenge for cause against any of the jurors that were seated. Under our law, the trial judge could have given him more than nine preemptory challenges and he denied it once before and the law hadn't changed between the time of the pretrial ruling and the time of the stay.

QUESTION: Well, do you think, couldn't the Judge have, if he'd have asked and argued, the Judge could have changed his mind on disqualifying for cause, and in which event, the eight preemptories wouldn't have been exhausted.

MR. PETERSON: I think that the defense attorney had to accept the trial judge's ruling for whatever it was.

QUESTION: Counsel, you've been speaking of due process. I thought your case also rested on the Sixth Amendment?

MR. PETERSON: That's true. We have two arguments in this case. One is that the rule of Oklahoma procedure that requires you to use an preemptory challenge in order to remedy a Sixth Amendment violation in order to enforce the right to a Sixth Amendment impartial jury penalizes the exercise or the enforcement of the Sixth Amendment right.

QUESTION: Because in this case, you came up with a different jury than you would have had had the Judge ruled correctly?

MR. PETERSON: It could have been a different jury if the Judge ruled correctly.

QUESTION: Well, isn't it almost inevitable it would have been?

MR. PETERSON: The defense attorney certainly wanted more preemptories and I think if he'd had them, he would have used them.

QUESTION: Like one more?

MR. PETERSON: He wanted one more. Of course --

QUESTION: Does the case go off on more preemptories? Doesn't it go off on the proper use of such preemptories as were available to him? He had nine and he wanted the Court properly to permit him to use them?

MR. PETERSON: That's right.

QUESTION: I think we're going down a blind alley when we speak of different numbers of preemptories.

MR. PETERSON: The juror who was challenged for cause in this case. I don't think there was much dispute that he should have been removed. He said twice that he was going to return the death penalty upon conviction. He went on to say that he wouldn't consider any other possible penalty. The Oklahoma Court of Criminal Appeals specifically found that his responses were unequivocal, and that it was error to seat him.

QUESTION: Aren't we bound by that finding?

MR. PETERSON: I would say since our argument depends on a finding of a Sixth Amendment violation, that the Court has

the power to examine the facts and redetermine it. There's certainly no reason to. I think that it's clear that his answers were unequivocal and the Oklahoma Court was certainly right in its finding that it was error.

QUESTION: This is not a First Amendment case, this is a Sixth Amendment case. I would have thought that finding was binding.

MR. PETERSON: We would be happy if the Court considered it to be binding.

QUESTION: Of course, that juror was not, I mean, he was seated but didn't participate in the trial, right?

MR. PETERSON: That's right.

QUESTION: Because one of the preemptories was used to eliminate him, so basically what you're -- we really don't know what the effect of this was. You're saying one other juror might have been challenged for cause who -- you're not asserting that any of the jurors that were on the jury was known to be biased on in any way contrary to your client. You just think if you had one more preemptory, it would have been nice.

MR. PETERSON: We don't know if any of the other jurors on the jury were impartial or not. We do know that the defense attorney thought they were not impartial, because he specifically said that at the end of the jury selection. And of course, that's the type of situation where preemptory challenges are most valuable, when the defense attorney thinks

the jurors are biased but can't sustain a challenge for cause.

So we think that the laws of a preemptory challenge in the situation here was harmful.

It wasn't an option for the defense attorney just to leave this juror on the jury and complain about it later on appeal. Under our Oklahoma procedural rule, he had to use a challenge on him in order to preserve the right. If he had not used a preemptory challenge on this juror, he would have really been stuck with the result of the trial which was with a biased juror.

QUESTION: So there's no remedy at all then, effectively?

MR. PETERSON: As the Oklahoma Courts have treated this, yes, that's right.

On the question of harmless error, Chapman v. California says that the burden of proving that a constitutional error is harmless is on the beneficiary which is the State in this case. It also says that the burden of proof is proof beyond a reasonable doubt.

While we don't have to prove anything on the harmless error issue, we think that the evidence gives every indication that the error was in fact a harmful one. There's no dispute that if the defendant had another preemptory challenge, he could have used it to change the composition of the membership of the jury.

QUESTION: Yes, but might not the argument be made

that in order to show the argument was harmful, or not harmless, you would have to show that the other juror would have done something different? What you're talking about substituting one random juror for another really. Each of them passes challenge for cause. That one juror would have done something different than the one who was seated did?

MR. PETERSON: I think the burden is on the State to prove that the randomly selected another juror whose identity we don't know, whose background, whose beliefs we don't know, would have done the same thing as the actual juror. I think it's impossible for them to show that.

It's unclear that a harmless error analysis can ever be applied in a situation like that. This Court's jury selection cases going back to Strauder v. West Virginia have never tried to figure out what another juror would have done, or how he would have decided the case if the Constitutional error in jury selection had not occurred. I think it would be unprecedented for the Court to try to apply a harmless error analysis in that situation.

The evidence in this case was in conflict on the issue of guilt and the murder charge. The defendant said that he did not intend to kill the decedent. If a jury accepted that testimony, they would have to acquit him of murder. And there is conflicting evidence on the sentencing issue as well.

QUESTION: Did you represent the defendant on appeal?

MR. PETERSON: No.

QUESTION: Was there any, at any time, a statement by the attorney for the defendant that had he had another preemptory, he would have used it, and he would have used it against Mr. X or Mrs. Y?

MR. PETERSON: No, there was not, it's not in the record, no. And of course, that's part of our argument on the harmless error case, is that that type of statement, even if it was made in the way that the Oklahoma Court asked for it, wouldn't prove anything.

QUESTION: Well, it would prove something if the lawyer said, if a judge happened to ask the lawyer representing him on appeal, would you have used your preemptory to challenge anyone on that jury, and if so, who, and if he said, I wouldn't have used it, that's certainly harmless error, I suppose?

MR. PETERSON: I agree, it would be harmless error in that case. But what the defense attorney did in this case was simply --

QUESTION: He didn't say anything.

MR. PETERSON: Well, he said he believed that the jury was not impartial and it was not fair. I don't think that if he had identified a particular juror that he would have challenged, that it would have proven anything under the Gray v. Mississippi case. The reason is that the error that the trial judge made happened in the sixth round of jury selection. The statement that the Oklahoma court demanded a counsel that he didn't make would have been made after the ninth round.

If the sixth round had happened differently, if a judge had ruled differently, there could have been a bunch of different jurors on the panel by the time of the ninth round.

QUESTION: But when the petitioner's lawyer said he didn't think the jury was impartial, he was talking not in any legal sense because he agreed they weren't subject to challenge for cause. He just meant they weren't the kind of jury he would have liked to have try the case, don't you think?

MR. PETERSON: I think what he meant was what he said that it was not a fair and impartial jury. Perhaps he could not find evidence that he would need to sustain a challenge for cause.

QUESTION: He was speaking at least of his intuition and something that he couldn't prove to the satisfaction of the judge?

MR. PETERSON: Apparently so, that he did not have the proof.

QUESTION: Counsel, was the procedural due process claim ever made below?

MR. PETERSON: In some sense it was. Certainly the Sixth Amendment claim was made more clearly, but counsel in the lower court did invoke Swain v. Alabama and some cases like that, which we think kind of recognize a due process right preemptory challenge.

QUESTION: Mr. Peterson, I'm having some trouble with the notion that what constitutes harm is the substitution of

one impartial juror, that is, lawfully determined to be impartial, not challengeable for cause, for another impartial juror. Suppose that there's some error made by a judge that causes the case to be delayed, some legal error that causes the case to be delayed. Because it's delayed, you get a different jury than you would have had had the case come up earlier.

Now, I assume it's impossible in that case also for the State ever to prove that the jury you would have gotten on the earlier date would have convicted you just as the jury you got on a later date is. But I fail to see any constitutional violation there, and similarly here, it seems to me that once you've determined that you have seated a jury that is not challengeable by cause, that is fair and impartial, hasn't your client gotten substantial justice?

MR. PETERSON: Well, in the trial delay situation, the defendant doesn't have a right to have a particular jury hear his case. There's been no right relating to the composition of a jury.

QUESTION: To a particular jury to hear his case in this instance either.

MR. PETERSON: He does have a right to exclude particular jurors from the case as a result of a preemptory challenge, and the inevitable consequence of the right to exclude is the right to bring on somebody to replace him. And I think that's a distinction.

QUESTION: Well, I can think of a hypothetical under

the legislation requiring criminal trials to be brought on for trail promptly, so you could say he's entitled to have a jury selected as such and such a date, and because of some error by the Government, he isn't tried in time, how could you ever prove that the different jury he got would not have come out to a different result?

MR. PETERSON: One way to look at it, I guess, is the nature of the preemptory challenge right as opposed to some statute that just requires that a trial begin on such and such a date. A preemptory challenge is a right that this Court, itself, has said that this is one of the most important rights secured to the accused.

QUESTION: But here it's only a State law right, isn't it? You're not contending that there's any Federal Constitutional principle that requires preemptory challenges?

MR. PETERSON: That's right, but it's still an important right, and this Court has said so in its own decisions.

QUESTION: Yes, but you agree that Oklahoma wouldn't have had to accord any preemptory challenges at all?

MR. PETERSON: That's right. It is an important right. It has six and a half centuries of history behind it. I think it is regarded as a basic, a fundamental right of the criminal justice system. It's universally recognized in every State and Federal jurisdiction. It's the type like the right of appeal that the Court considered in Evitts v. Lucy, that's a

right that's important enough that the loss of it is a grievous loss. It's the type of grievous loss that brings the due process clause into play. Whereas, perhaps some other State procedure may not have quite the same magnitude and it may not be entitled to due process.

QUESTION: Mr. Peterson, if there had been one preemptory challenge that the defendant didn't exercise, would you be here?

MR. PETERSON: That's a harder case.

QUESTION: You said there might have been quite a difference in the jury, there might have been several different jurors. But what if there'd been one preemptory left over?

MR. PETERSON: There are tactical reasons why a defense attorney might not want to use the last one, because if he uses the last one, the last juror that comes on he can't strike, no matter how unfavorable he perceives that juror. It certainly would be a stronger case for harmless error than this one, but I'm not sure that the Court could say beyond a reasonable doubt that if he'd reserved one, that an additional preemptory challenge in the sixth round wouldn't still have changed the jury's composition.

The likelihood of a different outcome in a criminal case in Oklahoma if a jury membership is changed is especially strong on the question of sentencing. The reason for that is that Oklahoma's laws do not require a unanimous verdict on the question of sentence, if the jury should decide to impose a

life sentence, one juror, if that juror should become committed to returning a life sentence, can force the verdict of a life sentence. The Judge has to discharge the jury if they disagree and return a life sentence, even if there's just one juror on that jury whose in favor of a life sentence.

The State cannot prove beyond a reasonable doubt that the additional juror who would have been brought on if another preemptory challenge had been used would not have been that juror. And we think that that pretty much disposes of their harmless error argument, especially on sentencing, but that same juror could have led the whole jury to a different result on the whole case as well.

On the question of whether an additional preemptory challenge, if it had been available, would have been used in a way to change the jury's membership, the record shows that the defense lawyer did everything he could to get as many preemptory challenges as he could and use them all. He used all the ones up that he had. He tried to get some extra ones before trial unsuccessfully.

QUESTION: Mr. Peterson, when did he use his last? This occurred on the sixth round, when was the last one used?

MR. PETERSON: The last one was used on the ninth round.

QUESTION: Toward the very end.

MR. PETERSON: There's every reason to believe that if he had had another preemptory challenge in the ninth round,

he would have used it and it would have changed the jury's composition.

There were only two things he didn't do. He didn't ask for more challenges after the Judge made his mistake; that would have been futile. The Judge had already ruled that he wasn't entitled to them under the State law. The only other thing he didn't do was make a statement about who he would have challenged if he'd had another challenge, which he didn't, which the Oklahoma Court said should have been made at the end of the ninth round.

If the sixth round had been played out differently, the jurors of the ninth round would have been completely different, so what counsel did or didn't say at the end of the ninth round doesn't prove what would have happened if the Judge hadn't made the mistake earlier. And that's just, as we see it, is virtually the same as Gray v. Mississippi. In Gray, the Court said that a statement by counsel about how he would have used his preemptory challenges if the Judge had ruled differently on the previous challenges for cause, just didn't have any value in determining what would have happened. It didn't have any value in deciding whether harmless error occurred or not.

And we think the same ruling should be applied here.

QUESTION: Mr. Peterson, the harmless error requirement is not under the due process part of the case, right, but under the Sixth Amendment?

MR. PETERSON: As we see it, the harmless error analysis has to be gone through at least in some way no both.

QUESTION: Well, how does it work under the Sixth Amendment, what he was deprived of under the Sixth Amendment, you say, was an impartial jury, by seating the biased juror incorrectly, right?

MR. PETERSON: No. What we say on the Sixth Amendment argument is that the state impermissibly burdened the enforcement of the Sixth Amendment right by requiring the defendant to use up preemptory challenges, all of them, in order to preserve his right to obtain appellate review on the seating of a jury that was biased. It's kind of like Griffin v. California or those cases where the State has put some type of burden on the defendant's exercise of his right.

QUESTION: But that assumes you have a Federal right to nine preemptory challenges. Don't I have to accept that in order to agree with that analysis?

MR. PETERSON: No. I disagree. I think it just depends on what kind of right you have in the State. If the State says you have nine challenges, and as a condition of enforcing your Sixth Amendment right, they say, well, in that situation, you're only entitled to eight, I think they're burdening the exercise of the Sixth Amendment right, the enforcement of the Sixth Amendment right, I think that's an unconstitutional burden.

QUESTION: Any time in jury selection where a judge

refuses to disqualify this or that juror for cause, and the defense uses preemptories, then it's just open to have a court say well, the trial judge was wrong in seating those jurors and making the preemptories be used.

MR. PETERSON: Well, the State doesn't have to have a rule that says you have to use preemptories to correct this kind of error. In fact, a lot of States don't.

QUESTION: Well, it's a pretty poor risk, I suppose, but you wouldn't have needed to use your preemptories against those people and you certainly then could have had review of it. And you had review of it anyway in this case.

MR. PETERSON: If he hadn't used the preemptory challenge on Mr. Huling, it would have been waived. It could not have been reviewed by the appellate court. And there's a lot of decisions where they've said, we refuse to review it because you didn't exhaust your preemptory challenges.

QUESTION: Well, in any event, any time the judge makes a mistake in refusing to ask a juror to step down for cause, any time he makes a mistake and a preemptory's used, then we've got this kind of a case.

MR. PETERSON: If the State elects to enforce that type of rule where defendants have to use their preemptory challenges to correct the judge's error. If they don't do that, there's no problem. The defense can simply make a tactical decision about whether to remove the juror and if he doesn't, he can argue about the juror as impartial, and if he

does, there's probably going to be a --

QUESTION: Well, he's taking a terrific risk I suppose in that way.

MR. PETERSON: That's true.

QUESTION: In a death case.

MR. PETERSON: That would be a difficult choice to make.

QUESTION: What if a judge wrongfully under State law excuses someone on a hardship claim. Now, does that raise the same kind of problem?

MR. PETERSON: With respect to our due process clause claim, I think it does. I think that what our argument depends on is that there is an error of State law and that the judge didn't follow it.

QUESTION: That's all it takes to make a Federal due process claim.

MR. PETERSON: If the State Court requires that the defense use up preemptory challenges to remove these challenged jurors, I think that a mistake by a judge that takes away something valuable like a preemptory challenge is a denial of due process. That was what the Court held in Hicks v. Oklahoma.

QUESTION: Well, what if in the case I hypothesized, the trial judge says this person is granted a claim of hardship exemption. You say that's a violation of State law and you appeal to the Oklahoma Court of Criminal Appeals. That Court

says, no, it wasn't a violation of State law. Do you think you can bring that question here, was it a violation of Oklahoma law to excuse that person saying that the Oklahoma Court improperly construed Oklahoma law?

MR. PETERSON: I think the Court is going to have to give a very high degree of deference to what a State Court says it's State law is, and I think that the only situation that the Court is going to come -- that's going to come up here, is when the State Court says, yes, this is State law but we're just not going to follow it.

QUESTION: Your claim here I thought was the trial judge's refusal to disqualify that juror was a violation of Federal law?

MR. PETERSON: Analytically, I don't see that it matters on the due process claim what the reason was that the judge had for his mistake as long as it was mistake. It happened that the mistake in this case was a Sixth Amendment violation.

Our other argument about the burden that the State put on the Sixth Amendment right of course depends on there being a Sixth Amendment violation.

QUESTION: Mr. Peterson, don't you think one reason that States may have as many as nine preemptory challenges is that it's always a close call whether somebody ought to be excused for cause or not? Don't you think that one of the very reasons is that sometimes a judge may make a mistake, let

somebody on -- refuse to strike somebody for cause who ought to be and therefore we give you nine preemptories. If he makes such a mistake, then one of those --

MR. PETERSON: I think the reason the number is nine is that our legislature felt it was needed to empanel an impartial jury and that defendant should have all nine.

Unless there are further questions, I'll save the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Peterson.

We'll hear now from you, Mr. Nance.

ORAL ARGUMENT OF ROBERT A. NANCE, ESQ.

ON BEHALF OF RESPONDENT

MR. NANCE: Mr. Chief Justice, and may it please the Court.

The petitioner in this case was convicted of armed robbery and capital murder for the execution style slaying of a police officer. As the petitioner left the scene of the robbery, the police officer drove up and the petitioner shot the officer three times in the head with a 25 caliber pistol.

QUESTION: Are these facts really very important?

MR. NANCE: They are to the extent that if we get into harmless error, and I'd be happy to defer any presentation on that until the harmless error point comes up.

QUESTION: I think we can all agree that it was an offensive murder.

MR. NANCE: Well, it was offensive and to the extent

that petitioner's counsel has said there's a doubt about the guilt or it was a close case, I need to emphasize that it wasn't. The murder weapon was found in his pocket less than half an hour later. He confessed. The officer's stolen service revolver was found right next to him in the car. The stolen money and the deposit slips from the motel were found in the car. He was identified as one of the robbers and his footprint was found near the scene. There's really in this case no question about his guilt.

I'd also like to emphasize two things. That this is not a Witherspoon case in which a death prone jury has been empaneled. Nor is it a case when any member of any racial minority has been improperly excluded from the jury. As some of the earlier questioning pointed out, all of the jurors who sat were accepted for cause by the defense. I think that means that the defense was satisfied at the time of trial, that there was no biased juror or no juror who was legally disqualified to sit in this case.

The Court has repeatedly stated, and I understand counsel to have conceded that there is no Federal right to preemptory challenges. That that is a State-created right, and not a Federally created right.

QUESTION: Do you also concede that it was error for the Judge not to have excused this particular juror for cause?

MR. NANCE: I do, Justice O'Connor, I concede that's error.

I'd very briefly like to summarize why we think this Court should --

It was error not to exclude Juror Huling.

QUESTION: What kind of an error?

MR. NANCE: Your Honor, I think it was an error in the common law preemptory challenges. I don't think it was an error of constitutional dimension at that point because the final trial jury had not yet been set. It was just a preliminary ruling in the jury selection.

QUESTION: Suppose there were no preemptories and the Judge refused to disqualify that juror and he sat?

MR. NANCE: If he sat, Your Honor, I think we would have a Witherspoon problem in this case. And I think given the ruling of the Criminal Court of Appeals, there would have been a reversal at that level. But as it turned out in this case, the preemptory challenge acted something as a self-correcting mechanism as it is required to be under Oklahoma law.

The petitioner has cited several cases and has correctly stated the law. In Oklahoma, you have to use a preemptory challenge.

QUESTION: Under the opinion of the Court of Appeals, if this had been the ninth juror with his ninth preemptory up, what would he have done? He's used up nine preemptory challenges and this man comes up and says this. Under the opinion of the Court of Criminal Appeals of Oklahoma, wouldn't he have had to do something? It said it was error?

MR. NANCE: He would have had to make his challenge for cause which I think Justice Marshall, you assume he did.

QUESTION: Well, he did, and the Court said, no.

MR. NANCE: Then in that case, Your Honor, I think the Court of Criminal Appeals would have reversed.

QUESTION: That's what I think too.

QUESTION: And is it not true that there would have been reversal because there was a Federal Constitutional error? Do you think that it would be consistent with the Federal Constitution to seat this juror?

MR. NANCE: Oh, no. I think not.

QUESTION: So at the time of the trial judge's error, although it may well have been harmless because of later events, at that time, he did commit a Federal Constitutional error?

MR. NANCE: Your Honor, I think not. Because I think -- well, under an old case of this Court, Ex parte Spies which was decided in 1887, a similar thing happened. There was a challenge for cause which was denied. The Court at that time said that because that person had been taken off by preemptory, there was no violation. I think that is and should be the rule

QUESTION: The error isn't complete yet. The error isn't complete until the juror is finally picked and seated.

MR. NANCE: I think that's correct, Your Honor. And in Spies, the Court went on to discuss two jurors who were seated, but didn't discuss the ones who were not.

That's an older preemptory challenge case. Also, the petitioner cites a case called Pointer v. United States in which this Court affirmed a conviction when the defense and the Government simultaneously presented their challenges and they could have overlapped. And the defense argued that they had been deprived of some of their challenges or at least potentially so. And the Court said, no, you had your 20 challenges, you had your right, and it was affirmed.

The Oklahoma, as I say, petitioner correctly states, you have to use your challenge to remove a biased juror. It is not, as the petitioner kind of suggests, an unconditional right that unconditionally must always be given. The petitioner cites several cases. I have one which I've shared with the petitioner that's not in the briefs.

I might invite your attention to the Stott case which is at 538 P.2d 1065, where a similar situation happened here. And the Court of Criminal Appeals cited an even older case from 1908 for the proposition that if there has been an error on a challenge for cause, you're still required to purge that juror with a preemptory challenge.

And I think that that is a sensible rule. It's sensible for both the State and for the defendant. It's sensible for the State because it eliminates errors early on. You don't have to worry about having tried a case perhaps futilely with a reversible error in it. It's as I said before, a self-correcting system whereby these errors can be fixed

early.

And it's beneficial to the defendant in the sense that it requires a defendant to act in his own best interest and remove that potentially biased juror from his jury.

QUESTION: I don't understand what the relevance of this is? Are you saying that it's the law of Oklahoma not that you have nine preemptory challenges, but that you have nine or however many less than nine may remain after you use those that you're required to use to correct judge's errors in seating jurors, is that what the law is?

MR. NANCE: Your Honor, it's relevant, I believe, because of one of the arguments made by petitioner under Logan v. Zimmerman Brush which was in that case, the State law created a right to a hearing and that that right had been deprived by an established State procedure essentially a short statute of limitations to set a hearing. There is established State law here that you have to use a preemptory, but unlike in Logan, in Logan it was arbitrary, it was irrational and almost bizarre that the plaintiff didn't get his handicapped employment hearing.

In this case, the State of Oklahoma has a rational reason for what it does. That's the distinction and really the only reason I bring it up.

The petitioner also relies on Hicks v. Oklahoma, which I'd like to distinguish very briefly. In Hicks, this Court reversed a decision of the Oklahoma Court of Criminal

Appeals because the Oklahoma statutory right -- not a constitutional right or a direct constitutional right -- but there was an Oklahoma statutory right to jury sentencing, and the Court in that case said that the due process clause would protect that statutory right because it created a substantial and legitimate expectation that you would not be deprived of your life and liberty in that case except by a jury.

We think that the provision of preemptory challenges doesn't create such a substantial and legitimate expectation of practical control over a deprivation of life or liberty.

The petitioner's rule, I think, as Justice White pointed out, would almost require a trial judge to be perfect in his rulings for cause, because if he made a mistake and then the defendant had to use a preemptory challenge on that, there would be necessarily constitutional error. I don't think that that's a good rule, and I don't really think that is the law.

QUESTION: Mr. Nance, would Oklahoma law have allowed the Trial Court to give a tenth preemptory challenge?

MR. NANCE: Your Honor, it would not have allowed a tenth preemptory, although I concede I have no cases on it, I think it would have allowed the Judge to have the inherent authority to reverse himself on Juror Huling, if the trial counsel had made that argument.

QUESTION: Did the Court below find some procedural bar in this case because of the failure of defense counsel to do something at the end of voir dire?

MR. NANCE: It really didn't that I'm aware of. It went ahead and ruled on the issues, and then basically said there was no ground for reversal. Contrary to some of the petitioner's suggestions, there isn't any evidence in this record that trial counsel would have wanted or would have needed an additional preemptory after Juror Huling came up.

QUESTION: But the Court of Appeals did say it was error.

MR. NANCE: It did indeed, Your Honor.

QUESTION: Well, are you saying it's not error?

MR. NANCE: Well, the Court of Appeals said it was error to seat him because he had been taken off by --

QUESTION: It said the Court was in error. It didn't draw any limitations on it. It said the only excuse was that preemptory was available. That was the only excuse.

MR. NANCE: Well, that's essentially what it said, Your Honor.

QUESTION: That's essentially what they said. So I don't appreciate any of your argument that it wasn't error.

QUESTION: Well, you agreed that it was error.

MR. NANCE: Well, yes, it was erroneous to seat him, although in my view, it's not a constitutional error as it turned out because the preemptory cured it. If I was unclear in what I said before, I apologize.

I think that the self-correcting mechanism of the preemptory saved a Witherspoon violation in this case.

QUESTION: Well, what would happen if the Judge just never granted cause, and so you had to use your nine preemptories. Would that violate anybody's law?

MR. NANCE: Your Honor, I think it would, or could, at least.

QUESTION: Whose law? Federal or State? Or both?

MR. NANCE: Both, and this Court, of course, --

QUESTION: So this is just one-ninth of that?

MR. NANCE: That's right. I think the proper standard, because the preemptory challenges are State created rather than Federally-created rights, is did it make the trial fundamentally unfair, did it so affect the proceedings as to make the trial fundamentally unfair.

In your hypothetical, Justice Marshall, it's conceivable that if you just never got a challenge for cause sustained, and you had to use each and every one of your preemptories, --

QUESTION: It had to be removed because of publicity, didn't it?

MR. NANCE: That is correct, from one county to another.

QUESTION: And the county they moved it to was the county that the defendant's lawyer said, please don't send it to?

MR. NANCE: It was one of several that he did not want. The trial judge had to move it somewhere and he just

made a call to send it to Roger Mills. The trial judge did, Your Honor, on his own motion, remove three jurors who had been exposed to publicity and didn't feel like they should sit. And he did remove on the defense challenge for cause three more.

I don't really have any sense in this case that the trial Judge was biased, or there's any allegation that the trial judge didn't do anything right except this one call.

QUESTION: May I ask just one question. I know there's no Batson issue in this case. This was an all white jury and a black defendant and a white victim?

MR. NANCE: That's correct.

QUESTION: If there had been another preemptory, is there any possibility the racial composition of the jury would have been different? I don't know how many blacks were on the panel, but conceivably, that could --

MR. NANCE: It doesn't appear in the record. It's my understanding there were no blacks on the panel, Your Honor.

QUESTION: No blacks on the panel at all, I see.

MR. NANCE: And it's again not in the record, but I have consulted the census figures for 1980 for that county. There were 4,799 residents in 1980 and there was only one black resident.

QUESTION: I see.

MR. NANCE: Now, this case was tried three years later. That could have changed a little bit.

QUESTION: So my hypothesis is very unlikely on this?

MR. NANCE: It is, Your Honor, I think, if you're hypothesizing there could have been a black waiting in the wings.

QUESTION: It's unlikely that there might have been a little prejudice around?

MR. NANCE: No, I'm saying it's unlikely that just by the luck of the draw, there would have been black jurors ready in that county to come on. There is no allegation here that black jurors were excluded improperly, either from the veneer or from the trail jury.

Justice Stevens is correct. We don't have a Batson problem here.

Back to the trial counsel, he did not argue as he could have done that the ruling for cause was incorrect, and he did not ask to have that preemptory challenge returned to him. And his only complaint afterwards was that the jury contained no blacks and that he thought his client couldn't get a fair trial from a jury of his peers. Although again, I hasten to say, there's no Batson problem with improper racial exclusion here.

The Court has stated that the Constitution presupposes a jury chosen from a cross section of the community is impartial if the jurors can conscientiously and properly discharge their duty under the law. As I understand petitioner's argument in this case, there is no argument that it wasn't selected from a cross section, or that the jurors

weren't impartial or able to do their job.

Basically, the petitioner wants a reversal without any showing of prejudice. We think that would be senseless, it would be wasteful, and it would particularly be senseless and wasteful if there was no violation of the Constitution.

I'd like very briefly to distinguish the Gray case which petitioner relies on. In the Gray case, there had been, unlike this case, a Witherspoon error, that is, there had been a juror improperly excluded and at least theoretically, there had been a tribunal empaneled to return a verdict of guilt.

In that case, this Court said that there could be no harmless error, and if the error itself caused any change in the composition of the jury, it would have to stand. I think the petitioner's rule of automatic reversal in this case wrenches that no-harmless-error language from Gray from its foundation of a Witherspoon error and wants to engraft it in this case where there has been no such error, and no such death-prone jury empaneled.

This Court stated that when a juror is tried to an impartial tribunal and there's no serious argument that this jury was not impartial, and when a defendant has counsel, and of course, this defendant had good counsel, --

QUESTION: Still have three judges on the Court of Appeals?

MR. NANCE: There are three now, Your Honor. It's scheduled to be expanded --

QUESTION: I notice there were only two here.

MR. NANCE: Only two sitting, that's correct.

QUESTION: But they usually have three, don't they?

MR. NANCE: Yes, sir.

Where there's an impartial jury and defendant has counsel, this Court has stated, you can presume any other errors are subject to harmless error analysis. I want to hasten to say I don't think there's been a constitutional error, and I only address this because it's part if the petitioner's argument, and should you disagree with me, I certainly want to get --

QUESTION: Why did the Court below think there was harmless error?

MR. NANCE: It didn't really resolve it. It didn't say harmless error.

QUESTION: What did it say?

MR. NANCE: It said that because there was no juror who was objectionable sitting, there was no ground for reversal.

QUESTION: So in effect, they said the exercise of the preemptory removed any harm from the error?

QUESTION: They didn't say that.

MR. NANCE: That's not explicitly what they said. It can be read to say that.

QUESTION: But they didn't say that the evidence was so overwhelming that it's beyond a reasonable doubt any juror

would have arrived at the same result?

MR. NANCE: No, they did not say that.

QUESTION: Mr. Nance, would it not be true that the same reasoning, if you say, well, the jury that was empaneled was all free of bias because there's no challenges for cause, that you could give the same answer if the Judge had simply said, I think I'll only let you have seven preemptories, and the other have nine. I know the law requires nine, but I'm only going to give you seven because I think you only really need seven in the facts of this case. Because his ruling on this particular denial, it seems to me, was rather flagrantly wrong. And that would be a rather flagrant error too.

Wouldn't the reasoning say that you haven't shown that your jury was not impartial, so that's just too bad?

MR. NANCE: I think that would be worse than what we have here, Your Honor.

QUESTION: Why?

MR. NANCE: Because on the one hand, more like Logan v. Zimmerman Brush, that would just be an arbitrary and irrational sort of thing for a Judge to say.

QUESTION: Well, this is pretty extreme here. He says, the juror says no matter what the evidence shows, I'm going to vote for a death penalty. You don't want jurors like that on juries, do you?

MR. NANCE: Absolutely not.

QUESTION: So it seems to me you cannot have a much

more flagrant error in denying a challenge for cause than that, and I don't see why that's so different from saying I think that the jury that's on there is a pretty good sound jury, they're all local citizens that are unbiased, and I think you only need eight preemptories.

And why would you reverse that one, I don't understand, if you apply the reasoning of the Oklahoma Court of Appeals?

MR. NANCE: Well, --

QUESTION: They might reverse it in the State Court, but do you think it would violate the Federal Constitution?

MR. NANCE: I think it would come to a point, and quite frankly, Justice Stevens, I don't know where on the count down from nine, I would say it happened, where it could infect the whole proceeding and make if fundamentally unfair. If a judge gives no reason, and there is no reason for his action, and assuming, you know, that no bigot or no --

QUESTION: Mr. Nance, I just also thought of another consideration. I don't know if it's a legitimate consideration. I'd like your reaction to it.

Is the appearance of fairness in capital trials of this kind of any Federal significance. In other words, is there some value at stake in making the community feel that the trial has been conducted with a completely even hand before a man is sentenced to death?

MR. NANCE: There is, Your Honor. I think this Court

has said the appearance of fairness is important. The Court, of course, has also said that reversing for inconsequential errors would cause the public to criticize the judicial process. I think that a reversal in this case would be closer to the second problem. I think the public would have difficulty understanding why in a case where the defendant is so obviously guilty and the trial so obviously fair, there has been a reversal over --

QUESTION: That isn't what the Court below said.

MR. NANCE: Well, on the whole, they said the trial was fair. I think, as I was going to say, the public would have a hard time understanding a reversal over one preemptory challenge. I think that would just cause them puzzlement and I think it would also cause criminal defendants --

QUESTION: You're for fundamental justice?

MR. NANCE: Yes, sir, and I think this was a fundamentally fair trial.

QUESTION: And where in the world do you find that in the Constitution or any place else?

MR. NANCE: Well, Your Honor, I find it in cases like Donnelly v. DeChristofor where this Court says that when an error not specifically of constitutional origin like I think we've conceded here, about preemptory challenges, only merits reversal --

QUESTION: Well, fundamental justice says there's no constitution is needed. Fundamental justice is what the people

want. And you said, yes. I don't think you mean that. I'm sure you didn't.

MR. NANCE: You are rapidly persuading me that I didn't mean it, Your Honor. What I meant was --

QUESTION: You're worried about a sentence of death plus life. How do you do that? How do you do that? How do you execute both of those sentences?

MR. NANCE: Well, I don't know, Your Honor. I guess if you execute the death, the life sentence becomes moot. But when I think of fundamental fairness, I think of cases like Donnelly where unless the error infects the whole trial and makes it fundamentally unfair, there's no justification for reversal. And I really think that's the standard in the present case.

The central purpose in a criminal trial is the fair and rational determination of guilt. That was certainly done here.

Guilt was fairly and accurately established in both phases. In the guilt phase, virtually everyone who knew anything first hand about the crime had a chance to testify. In the sentencing phase, both sides had an opportunity to put on their testimony either in aggravation or in mitigation.

QUESTION: Perhaps this is repetitious, Mr. Nance, but all those arguments would equally apply if the Judge had simply said I'm not going to allow the defense any preemptory challenges. All those arguments would still be available. The

reasoning of the Oklahoma Court of Appeals would be available. The only thing that would be different is that it wouldn't seem so trivial because it's nine instead of one.

But analytically, it would be precisely the same issue, I think.

MR. NANCE: Well, analytically, Your Honor, under the standard I think should apply, that of the fundamental fairness standard, the result at least in my mind ought to be different because -- I don't want to get into fundamental justice here.

QUESTION: Because the judge looks biased in the case that I put.

MR. NANCE: That's right.

QUESTION: And you're not willing to say he looks biased in the case before us where he says I have no trouble with a juror who is perfectly willing to say in advance that he would impose the death sentence no matter what the evidence is.

QUESTION: Of course, in that example, the State is treating one defendant differently than others.

MR. NANCE: That's correct. And while the Judge clearly made a mistake, I don't think there's anything in the remainder of this record that indicates bias on his part. if you look at his challenges for cause, he let off a number that would have prejudiced the defense on his own. He sustained I believe three challenges for cause for the defense and several for the State. He pretty well went right down the middle.

QUESTION: Well, he's treating one defendant

differently from others in your case, too. I mean, he's in effect by his incorrect ruling deprived this defendant of one of the preemptories. So you really do have to confront the question, whether fundamental fairness means that you treat all of the criminal defendants exactly the same, or whether it means something less than that, that is that the process, even though it might be somewhat less than another criminal defendant got, is nevertheless a fundamentally fair one.

Isn't that basically what you have to support?

MR. NANCE: Yes, sir.

QUESTION: That equivalence is not a part of, precise equivalence is not a part of fundamental fairness is what you're saying?

MR. NANCE: That's right. The Court has repeatedly stated that defendant's entitled to a fair trial, not a perfect one. If we had to have exactly the same trial for different defendants, we could never do it. It would just be impossible.

In conclusion, I think that the Court's error, or the error as it was corrected by use of the preemptory challenge was not an error of constitutional dimension. Nor did it make the trial fundamentally unfair. And in my mind then, this Court's inquiry under its narrow due process standard and jurisdiction to reverse constitutional errors should cease.

We did not burden the right to an impartial jury any more than well simply the use of that preemptory challenge made an impartial jury a reality. It helped to effectuate an

impartial jury. Alternatively, if you find that there was some sort of due process problem here, I think because of the weight of the evidence, the almost acknowledged impartiality of the trier of fact and the presence of counsel for the defense, that error was harmless beyond a reasonable doubt under either analysis, my analysis or harmless error analysis.

And therefore I would ask this Court to affirm the judgment of the Oklahoma Court of Criminal Appeals.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nance.

Mr. Peterson, you have three minutes remaining.

MR. PETERSON: Unless the Court has further questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 2:56 p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: January 19, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 1/19/88

Margaret Daly

Official Reporter

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