SUPREME COURT
OF THE UNITED STATES

In the Matter of:

BOBBY LYNN ROSS,

Petitioner,

v.

OKLAHOMA.

No. 86-5309

Pages: 1 through 49

Place: Washington, D.C.

Date: April 18, 1988

HERITAGE REPORTING CORPORATION
Official Reporters
1220 L Street, N.W., Suite 600
Washington, D.C. 20005
(202) 628-4888

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

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

ROBERT A. NANCE, ESQ., Assistant 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

CHIEF JUSTICE REHNQUIST: We'll hear now argument in Number 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 THE PETITIONER

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

Oklahoma has a statute that grants a defendant in a first degree murder case nine preemptory challenges.

The issue in this case is whether it's constitutional for a state to take away one of those preemptory challenges during a capital murder trial.

The way that this issue came up was when the trial judge made what everybody now agrees was a very serious mistake. During the jury selection in this case, the trial judge overruled a defense challenge for cause against a juror, Mr. Huling, who said that he would return only a death sentence upon conviction and that he would not consider any possible other penalty.

This juror was plainly unqualified under the Sixth Amendment and even the state now concedes that he was unqualified to sit on the trial.

But once the challenge for cause was overruled, there was only one thing to stop this juror from sitting on this case

and that was if one party or the other removed him by a preemptory challenge.

The way that jury selection proceeded in this case was that the parties used their preemptory challenges in alternation. One side would use a challenge, they would bring on a replacement juror, and then the other side would use a challenge.

The first party to come up with a preemptory challenge to use, after Mr. Huling was seated, was the state, and what did the state do with its preemptory challenge after Mr. Huling was seated? They waived it. They didn't use it on anybody. They were quite happy to see Mr. Huling sit as a juror in this case.

The state apparently was not interested in correcting with its own preemptory challenges what they now concede to be a rather flagrant error by the trial judge. They apparently felt it was the better use of the challenge to just waste it.

QUESTION: Do they concede that it was a flagrant error? I think they've conceded that it was wrong, but I thought that, if I recollect their brief correctly, they do make the argument that there was some ambiguity in that juror's responses, that some of his earlier responses were inconsistent with that statement that you quoted.

MR. PETERSON: Your Honor, I was relying on the last oral argument in this case. Mr. Nance conceded that it would

violate the Sixth Amendment for this juror to sit.

QUESTION: Well, but, I understand that, but that's a little different from saying that it was a flagrant violation, so that you can make the statement that the state must have known there was a violation and the state could have solved the problem by using one of its preemptories.

MR. PETERSON: The state conceded it was a Sixth Amendment violation. We contend that the Sixth Amendment violation in this case was a flagrant one.

QUESTION: Okay.

QUESTION: Well, I thought the state took the position that in view of Oklahoma's procedure of letting a preemptory be used to solve the problem of the failure to excuse the juror that, in fact, there was no error at the end of the line.

I mean, that was what I understood the argument to be.

MR. PETERSON: That was their argument, but they did concede that if this juror had sat, it would have violated the Sixth Amendment. We --

QUESTION: Well, but the juror didn't sit, of course.

MR. PETERSON: That's correct, but the cost of that to the defense was that it lost one of its nine preemptory challenges.

The only way to keep this juror off was for the

defense to use a preemptory challenge of its own. There was no help coming from the state to correct the error.

QUESTION: Just before we leave the question about the juror, this doesn't come up to us on habeas. There was no findings. There were no findings that a particular juror would have been challenged?

MR. PETERSON: The defense attorney did not specifically identify any juror that actually sat on the jury whom he would have removed. He did specifically say that he did not think that the final trial jury was fair and impartial.

QUESTION: But he didn't say that as to any particular juror he would have exercised his last preemptory challenge?

MR. PETERSON: He didn't have any preemptory challenges left.

QUESTION: Or that he would have exercised an additional preemptory challenge?

MR. PETERSON: He didn't say as a hypothetical matter, if I had more preemptory challenges, I would use it upon Juror X. Of course, it's part of our argument that even if he had made such a statement, it wouldn't have proved anything because the mistake happened earlier in the jury selection and if the mistake hadn't happened, we could have ended up with a different panel of jurors facing him by the end of jury selection. So that it just doesn't prove anything and,

of course, we're relying on the Gray v. Mississippi case on that issue.

QUESTION: Well, you are going somewhat beyond that, aren't you? Aren't you saying that if any juror is wrongfully excluded -- wrongfully included, calling for a preemptory challenge that you have automatically as a lawyer?

MR. PETERSON: Well, I don't think it's necessary to argue that in this case. Of course, this was a death penalty case, and we would say that in a death penalty case, there should be a very scrupulous adherence to procedures, perhaps more so than in other cases.

QUESTION: Well, suppose the judge just makes an error and seats a juror that he shouldn't, and you use one preemptory challenge extra, automatic reversal?

MR. PETERSON: It would depend on whether the state had a rule that required you to use a preemptory challenge in order to correct the judge's error. If there was no such rule, there would be no problem. It would just be a tactical question about whether to remove a juror or not use a challenge and then argue on appeal that the juror shouldn't have been seated.

So, I think that the constitutional violation depends on the defendant being forced to use a preemptory challenge to remove somebody, be forced to give up a valuable right as a result of a mistake.

QUESTION: One reads the Oklahoma Code of Criminal Appeals opinion and one gets the impression that that is one of the purposes of preemptories in Oklahoma, is to correct that sort of thing, that this is not a miscarriage of the preemptory system, but it's one of the things you use it for.

MR. PETERSON: We disagree. I mean, the statutes do not say that. In fact, the statutes, Oklahoma statutes, say the direct opposite thing. They say preemptory challenges are not to be used until people who are challengeable for cause are removed from the jury.

I think the most you can read into the Oklahoma court decisions is that they have prescribed some kind of procedure for bringing appeals on claims of error based on overruling challenges for cause. They haven't said that the right of preemptory challenge is extinguished if the judge happens to make an error in a case.

In fact, in this case, they seem to say that the right of preemptory challenge -- if the defendant had been able to point to somebody objectionable or in another case, they used the expression unacceptable, that was still on the jury, they would have a grant of relief.

So, I don't think they're saying that you just have to sacrifice your preemptory challenges for the cause of justice in Oklahoma. I just don't think that's the law in Oklahoma.

QUESTION: Well, are you complaining that you had to use the extra preemptory challenges?

MR. PETERSON: We are complaining that we had to effectively waste a preemptory challenge by using it to excuse Juror Huling.

QUESTION: But are you complaining that you had to use all of your preemptory challenges in order to make -- bring this appeal?

MR. PETERSON: I think that that puts a very big burden on the assertion of the Sixth Amendment right to an impartial jury to have to exercise all of your preemptory challenges and that's one of our arguments on our Sixth Amendment claim, is that the state has prescribed procedures that are so burdensome to enforce the right to an impartial jury, and one of those rights is you have to exhaust all your preemptory challenges even though there may be a tactile reason to save one.

QUESTION: Well, if you had four and you only lost one, and you only had to use one improperly, then you're not hurt if you had three extra ones that you more or less had to burn, shall we say, simply in order to take an appeal.

MR. PETERSON: I think if you had --

QUESTION: I don't see where the harm is.

MR. PETERSON: I think if you had a situation where three were left, I think you'd have a pretty good harmless

error case. Of course, in this case, the defense alleges every single one of his preemptory challenges --

QUESTION: But you are saying that you're concerned that he was forced to do this in order to appeal, and I'm saying he either used them properly or he didn't need them.

MR. PETERSON: We don't know why he exercised his preemptory challenges the way he did. In fact, our statute says he doesn't have to state any reason why he did it.

I think what we're saying is that the procedure does put a burden on the enforcement of the Sixth Amendment right in this case. Of course, the case that you've posited would be a good case for harmless error.

Oklahoma had a procedural rule, as I've said, that required this defense attorney to remove Mr. Huling from the jury. If he hadn't done that, he would have been basically saddled with the result of the trial. He would have had an unappealable, uncorrectible trial in violation of the Sixth Amendment. He would not have been able to claim on appeal that Mr. Huling should not have sat on the jury.

He really had no choice in this matter. He had to use the preemptory challenge in order to protect the defendant's constitutional rights to a fair trial under the Sixth Amendment. Once he used the preemptory challenge on Mr. Huling, he had one less that was available to use on other jurors.

This loss of a preemptory challenge violated the Constitution.

The Oklahoma court agreed that Mr. Huling should have been removed by the trial judge for cause, but they refused to give any remedy for the loss of the preemptory challenge that followed from following Oklahoma's procedure. In effect, the court said that the loss of the preemptory challenge was a harmless error. We disagree.

Preemptory challenges are valuable because they change a jury's membership, and a change in jury's membership can lead to a change in the outcome of the case, that could have led to a chance in the outcome of this case.

There was conflicting evidence at the trial of this case. For example, on the question of whether the defendant had the intent to kill. That was an element of the defense. There was also conflicting evidence on the sentencing issues. A different jury could have resolved those conflicts differently.

This was the kind of case where the defense needed all nine of its preemptory challenges and not just eight of them. My client was black. He was tried in a virtually all-white community for the murder of a white police officer. The officer and his family are residents of the area. My client was not.

The trial judge specifically found that my client's

race was an issue in the trial. The homicide had received extensive pre-trial publicity, so much so that the trial judge granted a change of venue in the case, but he only moved the case to the next adjoining county where virtually all of the jurors that were called for service had read the same pre-trial publicity as in the original county. It turned out really not to have been very effective at all.

There was a very real danger of prejudice in the community against my client in this case, and there was a corresponding need for the full complement of preemptory challenges, all nine, to remove prejudiced jurors from the jury.

The defense lawyer in this case unsuccessfully asked for extra preemptory challenges before trial. He used up all the ones he had during trial. Although he didn't specifically challenge any of the jurors that actually sat on the case for cause, he did say at the end of jury selection that he did not think that the jury was fair and impartial.

That's exactly the situation in which preemptory challenges are most valuable. When the defense believes the jurors are not impartial and believes they are biased, but he doesn't have the proof that's needed to establish a challenge for cause.

QUESTION: Well, he also said that he couldn't get a fair jury in that locale anyway, hadn't he?

MR. PETERSON: That's what he said in his change of venue motion.

QUESTION: Right. So, I mean, there's no reason to attribute that statement to the fact that -- to this one juror. He didn't think he could get a fair jury in this locale no matter how many preemptories he had been given.

MR. PETERSON: Well, let me back up. He said he couldn't get a fair jury trial in Beckham County, which is where the case was originally held. He also said that he didn't want the venue moved to Roger Mills County. I'm not sure he ever said one way or the other whether he could or couldn't get a fair trial in Roger Mills County. It's clear that he didn't want the case tried there, though. That was where it ended up, though.

Preemptory challenges are especially important on the question of punishment in Oklahoma. If even one juror becomes committed to a life sentence during the penalty trial in a death penalty case, the judge has to discharge the jury and return a life sentence in the case.

So, a change of even one juror brought about by a preemptory challenge can change the outcome of a penalty trial in Oklahoma from death to life and, of course, that one juror could lead the jury to a different outcome on the guilt phase of the trial as well.

QUESTION: So, you're saying that any time a

preemptory challenge is improperly required of the attorney, because of for cause challenges, improperly-denied, automatic reversal?

MR. PETERSON: If the defense, as in this case, has used up all of its preemptory challenges, has asked for more, has expressed a need for every single preemptory challenge that they get and they don't get the full number, as a result of an error by a government official, in a death penalty case, in particular, yes, I think that that would be grounds for automatic reversal.

While a change of even one juror could have been critical, it's important to note that one preemptory challenge could have made more difference than just one juror on the final jury. When the judge made his mistake in this case, the parties between them had a total of eight preemptory challenges left and only eight of the actual trial jurors had been seated at that point.

It's conceivable that if the judge had ruled differently on the challenge for cause, the parties could have been motivated to exercise their preemptories differently in response. That's the teaching of Gray v. Mississippi. It's conceivable that the parties could have used their eight remaining challenges to remove the eight actual jurors from the jury and it could have resulted in a completely different jury panel by the end of the trial.

Under the circumstances of this case, the loss of a preemptory challenge was a serious loss. It was one of constitutional dimension.

The right to preemptory challenge is, of course, a state-created right, but it's nonetheless an important one. The Court has called it in its own decisions one of the most important rights secured to the accused. It has six and a half centuries of history behind it. It's recognized in every single state and federal jurisdiction as an essential part of jury trial.

When a preemptory challenge is taken away, as here, it's a significant loss. It's like the loss of another kind of state-created right that the Court considered in Evvits v. Lucey, rights to an appeal. Even though it's created by the state, an appeal can't be taken away after it's given without denying due process of law.

The loss of a preemptory challenge is the same kind of grievous loss that brings the due process clause into play.

The decision of this Court that comes closest to the situation here is Hicks v. Oklahoma. That case involved another state-created right, the right to jury sentencing. The defendant in the Hicks case had a right under state law, not under the Constitution, to be sentenced by a jury.

Although there's no constitutional right to be sentenced by a jury, the Court still held the denial of the

state-created right to jury sentencing denied due process of law. The right to jury sentencing in Hicks was important because the jury could return a different sentence than a judge could return.

The right to preemptory challenge is important because one jury can return a different verdict than another jury, and a preemptory challenge is the tool, is the instrument that brings about a change of one jury into a different jury.

The right to preemptory challenge should be treated in the same way as the right to jury sentencing in Hicks. If it's taken away by mistake, by a government official, then there has been a serious deprivation, a denial of due process of law.

QUESTION: I presume the same thing would be true if the judge wrongfully excuses somebody for cause as opposed to wrongfully not excusing for cause. I mean, you really have to make every call right or you would have affected the jury panel, and if getting a jury, a different jury panel, although a jury panel that is found to be fully fair, -- you have no constitutional claim this wasn't a fair panel, right?

MR. PETERSON: We don't know whether it was fair or not. All we know is that a defense lawyer didn't think it was fair because that's what he said.

QUESTION: Well, if you could bring a constitutional claim that it was not fair, that there was someone there who

had a bias, who should have been excused for cause, you'd have a different case, wouldn't you?

MR. PETERSON: We don't have the proof that this Court would require.

QUESTION: You don't have that case. So, we have to assume it was a fair jury. You're saying any mistake that alters the composition of the jury, but you alter the composition of a jury if you excuse somebody for cause erroneously. Right?

MR. PETERSON: I disagree. The right -- you don't have any right to have people -- there's no corresponding right -- there's no inverse preemptory challenge. There's no right to have people that you want to have on the jury on the jury. There is no right personal the defendant can assert. Since there's been no invasion of a right, the defendant has a right to insist that somebody stay on the jury. I don't think that an erroneous ruling on excluding a person from a jury, unless it offended Witherspoon or some of these other cases, would create a constitutional problem under the due process clause.

QUESTION: Well, it seems to me the notion you've been urging, that somehow there has to be one expected jury and if you don't get that, even though there's no reason to think it was an unfair jury, you've been deprived of something of significance, is simply not consonant with that notion.

There are a lot of different juries you might have

gotten.

MR. PETERSON: The whole purpose of a preemptory challenge is for the defense to remove people that it thinks are bias from the jury when it doesn't have the proof to sustain a challenge for cause.

The fact that we don't have the proof I don't think really answers the question of whether it was important or not to deny a preemptory challenge. Here, the defense lawyer wanted preemptory challenges. There was a background of prejudice, potential prejudice, against my client in the community. He used up every one he had. He asked for more and couldn't get them.

I think it was a serious loss in this case, and the cases that you perhaps hypothesize wouldn't create the same situation.

QUESTION: Why do you say that there's no right to not have a juror excused for cause? Do you think that -- don't you have a right to a panel fairly selected from the veneer that shows up?

MR. PETERSON: I know of no right in the Constitution or any statute in Oklahoma that says that --

QUESTION: You think a judge can shake it down. I bet you you'd be up here in another case if the judge just arbitrarily dismissed nine of the veniremen just because he didn't like them.

MR. PETERSON: There's no statute in Oklahoma that gives the defendant the right to insist that somebody stay on the jury.

There has been no violation of any state-created right that would create a due process clause problem.

The state here really has two arguments why the due process clause was violated. One is that you're not really entitled to nine preemptory challenges under Oklahoma law. You're really only entitled to nine preemptory challenges less however many mistakes a judge makes in the case. If you have a real top-notch trial judge that rules right on challenges for cause, you're entitled to nine. If you have maybe a more mistaken-prone trial judge, you're entitled to eight or six or zero or whatever the judge decides to give you.

QUESTION: Well, a lot of cause challenges are pretty close calls, aren't they?

MR. PETERSON: They can be.

QUESTION: And in your -- still under your view, any error for cause challenge requires reversal?

MR. PETERSON: Certainly in --

QUESTION: Where a preemptory challenge is used.

MR. PETERSON: -- a death case, if the state has a rule requiring the defense to use preemptory challenges to correct the trial judge's error, and if the defense has manifested in some way that they need the preemptory challenge,

if it's clear that it's not a harmless error, yes, in that case, there should be an automatic reversal.

There's been a loss of a very serious right in that situation, and there's no way to say it's harmless.

The problem with the state's argument about the defendant really isn't entitled to nine preemptory challenges is unsupported by our statutes. The statutes just do not say that. They say the defendant is entitled to nine and they don't put any conditions on it.

The case law doesn't say that the right to preemptory challenge is extinguished by a trial judge's error either. In fact, in this case, they said that the defendant's -- they certainly didn't say it in this case. In fact, they seem to suggest if the defendant had followed a little different procedure, one that we say has no meaning under Gray v. Mississippi, they would have granted the reversal in this case.

So, the defense doesn't have to sacrifice its preemptory challenges in order to correct the trial judge's error. The state is wrong when it says that you're entitled to something less than nine preemptory challenges under Oklahoma law.

The state's other argument is that even if the defendant is entitled to nine preemptory challenges, a trial with eight preemptory challenges doesn't deny what they call fundamental fairness.

The state hasn't been too clear on what -- how you judge what is or isn't fundamentally fair. Certainly it doesn't seem fair for my client to be getting eight preemptory challenges in his case while other first degree murder defendants in Oklahoma are getting nine.

Presumably, the statutes of Oklahoma are some evidence of what the people of Oklahoma speaking through their legislature regard as fundamentally fair, and those statutes say that the fair number is nine, not eight.

QUESTION: Did the state use its nine?

MR. PETERSON: They used five and waived four.

QUESTION: So, then, it used five and you had eight.

MR. PETERSON: In fact, yes.

QUESTION: Without including the one you had to use improperly.

MR. PETERSON: In fact, yes. Of course, the state had the opportunity to use all nine and that may have influenced how the defense used theirs.

But instead of focusing on fundamental fairness, a more appropriate inquiry, we submit, is whether the defendant received the process that he was due under the law. Since that's what the Fourteenth Amendment says, this Court has said that the law in due process of law includes state law. Just like the law in this case, that require nine preemptory challenges.

The defendant was due nine preemptory challenges under Oklahoma's law. He only received eight of them. If he is imprisoned and executed as a result of a trial which he receives only nine -- eight of his nine challenges, the state has deprived him of his life and his liberty without due process of law and that violates the Fourteenth Amendment.

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

We don't have any burden of proof on this issue, but the record gives every indication that the error was, in fact, a harmful one and not a harmless one.

To establish harmless error, there's no dispute that if the defendant had had another preemptory challenge, he could have used it to alter the membership of the jury. To establish harmless error in this kind of situation, they would either have to show one of two things.

One, that a different jury would have decided the case in the same way, or, two, that even if the defendant had had the full use of all nine of his preemptory challenges, he wouldn't have used them in a way that would have changed the jury's membership. It would be impossible for the state to establish either of those propositions in this case beyond a

reasonable doubt.

On the question of whether a different jury would have decided the case in the same way, this Court's harmless error decisions in jury selection cases going back a hundred years have never tried to go back and figure out what a different jury would have done in a case, but for a constitutional error in jury selection. It would be unprecedented for the Court to start doing that now.

But even if it did, the evidence in this case was in conflict. For example, on the question of intent to kill. A different jury could have reached a different result.

On the question of whether additional preemptories would have been used, if it had been available by the defense attorney, the record shows that he asked for additional preemptories before trial and was denied them. He used up all the preemptories he had during trial. In view of the fact he told the trial judge that he was dissatisfied with the twelve actually-impanelled juries, there was every reason to believe that if he had had the full use of his nine preemptory challenges, he would have used the one that had to be used on Mr. Huling against another juror and by doing that, he would have changed the jury's membership.

There were only two things that he didn't do. He didn't ask for more preemptory challenges after the judge made his mistake. That would have been futile. Under Oklahoma law,

the judge couldn't increase the number of preemptory challenges for the party.

The other thing he didn't do was to say as a hypothetical question that he would have exercised a challenge if he had another one available against some juror that actually sat on the panel.

But that's the same kind of statement by counsel that the Court considered in Gray v. Mississippi, and the Court said in that case that it had no probative value as to whether an error was harmful or harmless.

The error in this case occurred in the sixth round. That was when the judge made his mistake. If the judge had ruled differently in the sixth round, there could have been an entirely different panel by the time the ninth round came around.

So, what counsel did or didn't say about the panel that was left after the ninth round doesn't prove one way or the other what would or wouldn't have happened if the judge hadn't made his mistake in the sixth round.

The state cannot prove beyond a reasonable doubt that the constitutional error in this case was harmless.

We ask that the judgement of the Court of Criminal Appeals of Oklahoma be reversed, and I would reserve the balance 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. NANCY, ESQ.

ON BEHALF OF THE RESPONDENT

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

There are three issues presented in this case, and I believe there are three that are not.

The first is whether the circumstances of the removal of potential Juror Huling from the panel by a preemptory challenge rather than by a challenge for cause deprived the Petitioner of his Sixth Amendment right to a fair and impartial jury.

The second issue that is presented is whether the circumstances of the removal of that potential juror deprived the Petitioner of life or liberty without due process of law.

The third question as presented by the Petitioner is if there was a constitutional violation, is that violation harmless beyond a reasonable doubt.

The three issues that I think are not present in this case are that this is not a Witherspoon death-prone jury case. This is not a Batson improper-racial exclusion case. And this is not a case in which there is any demonstrable, articulatable bias or prejudice on the jury that actually sat.

As I think is agreed here, trial counsel accepted for cause each and every juror who sat and made no objection to

those jurors, but only complained that there were no blacks on the jury and that the Petitioner was, therefore, denied a fair trial by a jury of his peers.

I'd like very briefly to summarize why I believe that the circumstances of this case present no constitutional error, and why this Court should affirm the judgment of the Court of Criminal Appeals.

This Court has stated, and I think it appears conceded here, that preemptory challenges in this sort of case are creatures of state law rather than creatures of constitutional law.

Some members of this Court over the years have sought the complete abolition of preemptory challenges in criminal cases. The Sixth Amendment to the Constitution requires a fair trial before an impartial and differently-chosen jury and there is no argument whatsoever that the Petitioner in this case did not receive such a trial.

There is no allegation here that the judge's error with regard to Juror Huling or potential Juror Huling affected the impartiality of the jury that actually sat.

We believe the Oklahoma statutes in this case do not create a substantial and legitimate expectation of influence, direct influence over the deprivation of life or liberty and, therefore, preemptory challenges as a state right are not constitutionalized by the due process clause.

The longstanding Oklahoma law which requires the use of a preemptory challenge to correct a trial judge's error on a challenge for cause is a reasonable and legitimate state rule which benefits both the petitioner or the criminal defendant and the state.

The error in this case, as we see it, did not affect a specific constitutional right and, therefore, we are bound by the narrow due process formula of fundamental fairness and that there was nothing about the procedures in the trial court that was fundamentally unfair.

The trial was fair. Guilt was reliably established beyond a reasonable doubt, and the Petitioner had competent trial counsel.

QUESTION: You keep emphasizing the trial was fair. Was the refusal to exclude that juror because of his statement, was that fair? I'm using your word, fair.

MR. NANCE: It was an error, Your Honor. So, I would say that it was not fair.

QUESTION: Does an error keep a trial from being fair?

MR. NANCE: An error may or may not affect the fairness of the whole trial. I think the trial judge was wrong, but there were inconsistent statements by the particular juror. On two occasions, he said that he would not consider anything but death.

QUESTION: He never explained his reasons.

MR. NANCE: He never did, Your Honor. That's correct.

QUESTION: So, how can I assume that you say what he said when he didn't say it?

MR. NANCE: Well, I don't guess you could assume that I speak for the judge.

QUESTION: I can't accept your reading of his mind.

MR. NANCE: I don't -- I wouldn't pass myself off as reading his mind. I could talk about what's in the record. He said twice that he would only impose death, but he told the prosecutor once and the defense lawyer once that he would consider a life sentence.

So, he basically kind of said I'll go this way and I think the trial judge was wrong, but he wasn't flagrantly wrong or flagrantly unconstitutional. I wouldn't say that.

I think as Justice O'Connor stated, in our view, at the end of it, there was no error because of the availability of a preemptory challenge, and in any event, as the Court has said and as has been conceded, preemptory challenges aren't constitutionally required.

In some of the earlier cases, --

QUESTION: Well, does any state give more preemptory challenges to the prosecution than to the defense?

MR. NANCE: I frankly don't know, Your Honor. I'm

not aware of any.

QUESTION: I believe some states give more to the defense than to the prosecution.

MR. NANCE: That wouldn't surprise me, but I'm not aware of any state where the converse happens.

QUESTION: Well, suppose a state gave the prosecution twice as many preemptories as to the defense, violation there? Constitutional problem?

MR. NANCE: I think there very well could be because that would be, at least in my mind, fundamentally unfair. Unless there was a question in the first argument about empirical evidence that showed jurors leaned to the defense and you had to rebalance it.

In the absence of something very good along those lines, I'd say that would make things unfair.

I need to take issue, I think, with --

QUESTION: So, a misallocation or a disproportionate grant of preemptory challenges can give rise to a constitutional problem, then it's just a question of degree, correct?

MR. NANCE: I think so. I think that's correct.

QUESTION: And here you say that one more preemptory challenge does not rise to the degree of the constitutional violation?

MR. NANCE: That's true. That's precisely what we

say.

I need to take issue, if I may, with the argument that the Petitioner only got eight and the state got nine.

The Oklahoma law and the cases cited by the Petitioner and in the Farrell case, which was an Oklahoma case, relied upon by the Court of Criminal Appeals in this opinion, and I think in the Stock case, which I mentioned in the first argument, has long required the use of preemptory challenges to correct an error of this sort.

So, to say what the law in Oklahoma requires based on the statute and ignoring the case law doesn't fully characterize and fairly characterize what the law is. The Petitioner had a legitimate expectation to nine preemptories, and he got them and used every one. One of them he used to correct what I concede was an error, but that is consistent with the Oklahoma scheme of things and he didn't lose anything that had been granted him thereby nor was there a different rule really imposed in this case than there would be in any other criminal case in Oklahoma in which something similar happened.

The Court has said that nothing in the Constitution requires the grant of preemptories, but the trial by impartial jury is what is required. So, I turn my emphasis to looking at whether or not the trial was impartial.

In Lockhart, this Court said that the Constitution

presupposes a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints on that jury, so long as the jurors can conscientiously and properly carry out their sworn duty under the law, and the facts of a particular case.

There is no argument whatsoever in this case that the jury that sat in Mr. Ross' trial did not meet that standard. There was a potential Witherspoon problem had Mr. Huling been seated, but the use of the preemptory challenge was a self-correcting mechanism that took care of that problem.

There is no evidence in the record that the trial counsel wanted or needed additional preemptory challenges, and that's significant. I think we can get into trouble if we try to adhere too closely to Gray. If the trial lawyer had had a problem, had had a real problem with that jury, he could have spoken up and should have spoken up and tried to get the judge to give him a preemptory back or articulate that problem that he was trying to remove.

That would have shown, whether he was successful or not, that would have shown the possibility of some problem with that jury, which simply is not there. He didn't ask for additional preemptories after the mistake was made. He didn't argue that he had been improperly deprived of a preemptory or that the ruling on the challenge for cause was wrong.

He only complained, as I said before, that there were

no blacks on the jury and he didn't think his client could get a fair trial by a jury of his peers. That jury that was seated was indifferently chosen and was accepted by that lawyer as a jury in which there was no one who was challengeable for cause. No one biased or prejudiced on that jury.

QUESTION: Where was the trial? What city was it in?

MR. NANCE: It was in Cheyenne, Your Honor, which is in Roger Mills County.

QUESTION: I know where that is.

MR. NANCE: It's in far western Oklahoma. It abuts the Texas Panhandle.

There was no allegation at trial and there's really no allegation even now that there was any specific problem of bias or prejudice with any specific juror on that jury. If there were, either the Court of Criminal Appeals or this Court could address that problem.

Instead, we want basically or the Petitioner wants basically in this case a rule of reversal without showing of prejudice, and I think Justice Kennedy's question is apropos. You would have a rule of automatic reversal every time there had been an erroneous ruling on a challenge for cause that required you to use a preemptory.

QUESTION: Of course, in fairness, Gray v. Mississippi points in that direction. I recognize you can distinguish it factually, but isn't the teaching of that case

that we're just not going to speculate about what another jury would have been like?

MR. NANCE: It does, Your Honor. It does point in that direction and that, of course, is one part of the Gray opinion on a life and would like the Court not to speculate about the jury that might have been impanelled, but to look at the fairness of this jury because there simply isn't any complaint that can be made about it.

QUESTION: One way where this case differs from Gray, does it not, in Gray, there was a juror seated who was subject to challenge?

MR. NANCE: Well, as I recall Gray, there was a woman excluded who should have been seated under Witherspoon and went out on a challenge for cause. So, there was a Witherspoon, if I'm remembering Gray correctly, there was a Witherspoon error in Gray, and under those circumstances, circumstances which aren't present here, the Court said it would not speculate on what the jury might --

QUESTION: In Gray, a woman was excluded. A juror was excluded who should have been included.

MR. NANCE: That's correct.

QUESTION: Here, there was a juror who was excluded who should have been excluded, but under the wrong challenge.

MR. NANCE: That's correct. I would agree Mr. Huling should not have sat and ultimately, of course, didn't sit.

QUESTION: And a juror included who might not have been included.

MR. NANCE: That is also correct, although --

QUESTION: And some other juror excluded who might not have been excluded.

MR. NANCE: If you say so, Your Honor. I'm not sure I follow.

But, in any event, I assume all of the jurors or potential jurors we're talking about are fair jurors, and you're talking about the substitution of one fair juror for another. I don't think that anywhere in the scheme of things there was one right jury for this case, and it was just a matter of --

QUESTION: No, but isn't it true that that argument would apply no matter how great the disproportion between the number of preemptories to the defense and the number for the prosecution? You could always make that argument, it seems to me, if you can't prove anything wrong with anybody who actually sat.

MR. NANCE: Well, you could make the argument, Your Honor. I'm not sure that it would be persuasive, and I think it probably would be fundamentally unfair.

QUESTION: If it's not persuasive in that case, why is it persuasive in this one?

MR. NANCE: Well, if, on the one hand, for instance,

you're permitting the state just to keep excluding until it's perfectly happy, --

QUESTION: Well, no. Say they had nine preemptories and the defense has none. Then, maybe they got a fair jury. It's perfectly possible. You can have a fair jury if you just took them out of the hat by random. I often think that would be better than having all these complex procedures we have, to tell you the truth.

But the question really is, is it fair to tilt the scales just a little bit. Nine to eight isn't very serious, but why is it different in terms of what you can actually prove than if it was fourteen to seven? You never know what's in a juror's mind. You presume they're all doing their best.

MR. NANCE: Well, that is correct, Your Honor, and I suppose there comes a time when a difference of degree becomes a difference in kind, and --

QUESTION: It's clear that there's a difference in kind between nine versus eight and eight versus eight. It's a difference in degree when it's eight versus nine instead of eight versus ten or eight versus eleven or eight versus twelve because one is equal, the other it is unequal.

MR. NANCE: Well, I guess I have to differ with the idea that it was unequal in this case. But accepting that, eight to nine isn't very serious. That's -- I couldn't have said that any better.

QUESTION: And you would say that they're not unequal because what each side got was nine preemptories with the understanding that they might have to use a certain number of them to exclude jurors who were wrongfully seated.

MR. NANCE: Just so, Your Honor. That --

QUESTION: And the state got the same number on that assumption.

MR. NANCE: Correct.

QUESTION: The state was lucky enough in this trial not to have to use one of them to exclude a jury that was wrongfully seated, but all it got was nine minus whatever it would have to use.

MR. NANCE: And it could have happened the other way, that there might have been a juror who should have come off under Witherspoon and didn't.

QUESTION: Don't you agree that if the judge had said at the beginning of the trial or some place during the trial that the defendant shall have eight challenges and the prosecution shall have nine, that that would be error?

MR. NANCE: It would, indeed, be error.

QUESTION: That would be error.

MR. NANCE: Yes, sir.

QUESTION: What's the difference between that case and this one?

MR. NANCE: The difference between that case and this

one is that in this case, the judge acting as a judge simply made a mistake. In that case, where the law guarantees both sides nine, he just says --

QUESTION: Suppose in the first one, he made a mistake.

MR. NANCE: Well, it was just a mistake of law or whatever that --

QUESTION: Mistake in what you said. I'm using your words.

MR. NANCE: Well, it would clearly be erroneous, and it probably would be --

QUESTION: Error?

MR. NANCE: It would be error. It would definitely be error.

QUESTION: It would be error?

MR. NANCE: Yes, but before I get into --

QUESTION: Well, if it's error, it's error here.

MR. NANCE: Well, Your Honor, it would clearly be an error of the common law of preemptory challenges or the statutory law of preemptory challenges in Oklahoma. I don't know and I'm not really willing to concede that it would make the trial fundamentally unfair, which I think would be the more narrow ground that this Court would look at it on.

QUESTION: To use Justice Scalia's example, we start out each gets nine and they just have to use them to correct

judge's errors, so that's equal. It just happens the judge makes nine rather obvious, I don't want to use the word flagrant, but clear errors that benefit the prosecution, so all nine of one side have to be used and the other nine aren't, is it still equal?

MR. NANCE: I think not there, Your Honor, and --

QUESTION: So, you don't really look at the way it starts out because it's true, as they started out, they all had nine and they all were subject to the problem they might have to use them to correct judge's errors, but you sort of lose the equality if the judge's errors got in one direction and not the other.

MR. NANCE: And then you have a serious suspicion of a biased judge or whatever.

QUESTION: We don't have to presume bias. Mistakes just happen to tilt the scales in that particular way. I would assume the judge acted in good faith.

MR. NANCE: Well, yes, and that's the point of the difference in degree becoming a difference in kind. You'd have what at eight and nine may not look very serious, begins to look very serious, indeed, if it went all the way.

If I could, I'd like to turn for a moment to the due process argument. Unlike Hicks v. Oklahoma, the law in preemptory challenges in this case does not create a substantial and legitimate expectation of direct influence from

the deprivation of life or liberty.

In Hicks, this Court said that the Fourteenth Amendment protected the Oklahoma provisions for jury sentencing because the jury directly fixed the terms of the fundamental deprivation of liberty.

I don't read anything in Hicks to say that the Fourteenth Amendment constitutionalizes every trial procedure or provision of state law for criminal trials. The Petitioner, I think, in this case, had a substantial and a legitimate expectation to nine preemptories with the traditional caveat of Oklahoma law that if the judge erred on a challenge for cause, you had to use a preemptory to correct that in the first instance.

He, of course, received his nine and used them in one case to remove Juror Huling. I think the use of preemptory challenges is too tangential to the final verdict and sentencing to give a substantial and legitimate expectation of influence over the verdict or deprivation of life or liberty because, of course, there's been no evidence taken, no argument made, no instruction by the Court, no deliberation by the jury. It's one of the earliest things that happens in a trial, and one error in that case with the law of preemptory challenges, I think, is just too attenuating.

The Petitioner in the brief also relies on the Logan v. Zimmerman Brush case and makes the argument, which has been

advanced here, that there's an Oklahoma procedure that deprives him of his right to preemptories.

I think that is based upon the false premise that preemptories have to be in Oklahoma completely free and clear of any interference. As we discussed before, both sides have, there is a state procedure that requires their use to correct errors.

The Petitioner cited some cases. The Court of Criminal Appeals relied on the Farrell case. I cited Stock, I think, in the first argument, but unlike the irrational state procedure which in Logan deprived the plaintiff of his right to a cause of action, this rule is a reasonable rule.

QUESTION: But, General Nance, isn't the reason for the rule -- correct me if I'm wrong on this -- is that the state wants to be sure that the defendant is not taking advantage of an objection that he really wasn't sincere about, that they really wanted to be sure that juror didn't sit, and, so, they insisted that if they want to rely on the error as a ground for reversal, that they actually have exercised a preemptory to make sure it wasn't just an objection that sort of pro forma to something they really didn't care about?

It seems to me that would make a very sensible rule, and it wouldn't create any problem at all as long as there are plenty of preemptories to go around. The only problem that's created is when it does have this unusual effect, having one

side having more than the other.

See, if you had unlimited preemptories, then you would certainly insist on that, then the rule would solve the problem of the sort of phony objection by the trial court.

MR. NANCE: Well, I think the purpose for the rule is to remove error in the first instance, to remove it when it can be addressed by the trial court, much like making you object to improper evidence. Once it's in, it's in. So, you have to make a timely objection and apprise the court of why you think this evidence shouldn't come in or a confession or whatever it is.

And that point is legitimate. I suppose there could be an element of worrying about the defense just challenging everyone for cause and trying to build error. I think the main thing is to require the defense to correct that error when it's correctable, not try the case and go up on appeal and have to do it again, and that's legitimate.

If, in fact, there is a biased juror or a biased potential juror, to make the defense take him off, and the equality of it is in the other case, as in Gray, I guess, if there was someone who just said adamantly they would never consider the death penalty, and there is a challenge for cause made and not sustained, then the prosecution has to take them off.

The circumstances of that rule could go either way in

individual cases, but the rule is the same either way, and the law, of course, benefits the state by making those trials which really ought to be socially significant events as error-free as possible and, therefore, our rule is not the irrational sort of rule the Court condemned in Logan.

On the harmless error question, I think it is clear and I don't hear any argument to the contrary that the error in this case did not affect the truth-seeking function of the jury. I don't hear any evidence -- I hear hints, but I don't hear any serious argument that the error in this trial did not affect any of the non-truth-seeking constitutional values that the court would be interested in, like having racial bias.

In Batson, a racially-biased jury may or may not be fair to the defendant, but there are independent constitutional grounds in the Fourteenth Amendment, equal protection clause, that just say we're not going to permit it. Whether that jury is in any given case fair or not, we won't permit racial discrimination.

There's no argument in this case that there was any error in that sort of constitutional value, and unlike in Gray, there was no tribunal impanelled to return a verdict of death, and, so, I think the Petitioner's suggested rule that anything that would change the composition of the jury really doesn't apply because it kind of takes that part of Gray out of context.

In Gray, there had been a Witherspoon violation. Here, there has not been.

There's been some suggestion now that there was evidence in dispute, particularly about the intent to kill. I think not. The evidence in this case was that the Petitioner shot a police officer in the head with a 25 calibre pistol at close range three times.

I just cannot see any conceivable circumstances in the fact when a man who does that doesn't intend to kill. The evidence was that as he left the robbery of a motel, the police officer drove up, he shot the police officer, was arrested in a nearby town half an hour away, half an hour later. The murder weapon when he was patted down was found in his pocket. The officer's service revolver was found next to the seat where he was sitting. The booty from the robbery was in his car. His foot print matched the foot print at the scene. He was identified as one of the robbers, and after being Mirandized, he confessed.

There is simply no question about the evidence of this man's guilt. In the sentencing proceeding, the jury found five aggravating circumstances. This Court has stated that when a person is tried to an impartial jury and has counsel, you can strongly presume that any other error is harmless.

Counsel suggests that harmless error in jury selection just doesn't work and it would be unprecedented. I,

of course, don't want you to find any constitutional error, but I can explain why I think harmless error would apply in this case.

That is, because your usual jury selection error occurs because there is some sort of bias that has happened to that jury. Whether it's racial bias or it's bias because of pre-trial publicity or there's bias because people in the jury know the defendant and think he's a rascal or whatever, there is some bias on that jury, and under the harmless error doctrine, you assume there's been an impartial decision-maker or the other kind of jury error is a non-fact-finding/non-biased prejudice-kind of error that's, for instance, based on a race, that the court just says and rightly so won't be tolerated.

This Court has previously stated that it should affirm where a finding of guilt is made beyond a reasonable doubt and that everyone is entitled to a fair trial but not a perfect one.

The central purpose of the criminal trial is the factual determination of guilt, and it was determined beyond a reasonable doubt unquestionably in this case. The Court has stated that it shouldn't reverse for inconsequential errors because that encourages litigants to abuse the judicial process and the public to ridicule it.

That would be the precise result here. If there were

an initial preliminary error in the jury selection in an otherwise fair trial in which the defendant is clearly guilty, the public would be dumbfounded, I must submit, and would only be caused to disrespect the judicial process.

Any error, if it was constitutional, and we think it was not, is harmless beyond a reasonable doubt. It didn't affect or abort the trial process.

Therefore, for those reasons, we respectfully ask the Court to affirm the judgment of the Court of Criminal Appeals.

If you have no further questions, that concludes my presentation.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nance.

Mr. Peterson, you have three minutes remaining.

ORAL ARGUMENT OF GARY PETERSON, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. PETERSON: What the state says, in essence, is that the right to preemptory challenge in Oklahoma is conditioned by the state's right to arbitrarily take those challenges away as a result of mistakes.

Even if that were the rule, it wouldn't be consistent with the due process clause of the Fourteenth Amendment. The state may not have to give these challenges in the first place, but once it does, it can't just take them away as a result of mistakes by government officials. It has to comply with the due process clause.

QUESTION: It depends upon what you regard the state as having given. I mean, why can't you regard the state as having said, look, it's often a close call whether a juror should be seated or not, and we don't want to ruin the trials with that, so we're going to give you many more preemptory challenges than we think you need. But the deal is you get nine but both sides, we're treating you equally, you both have to undrestand you have to use these when you think the judge has made a mistake in seating a juror.

Why is that unfair? Why is it unequal?

MR. PETERSON: They don't have to give the right in the first place, but when they do, I think it's just a constraint of the Fourteenth Amendment. It's like the right of appeal. You may not need it in eighty percent of the cases, but if they just take it away arbitrarily, as a mistake, it's still a serious loss.

QUESTION: The state is subject to the same rules. If it wants to get a juror off the panel the judge seated, they have to exercise that. Maybe -- what if the state has exercised the preemptory to get such a juror off in this case, would you be here?

MR. PETERSON: No. The state doesn't have to give these preemptory challenges, but once it does, it has to not take them away as a result of mistakes and when it does, it's violated the due process clause.

QUESTION: My question again. The defendant in this case exercised the preemptory challenge to get off a wrongfully-seated juror, is that right?

MR. PETERSON: Correct.

QUESTION: Now, what if in the same case, the state had had to do the same thing, would you be here?

MR. PETERSON: If the state had had to remove the juror in this case?

QUESTION: No, no. Just another juror.

MR. PETERSON: Oh, I see.

QUESTION: They both started out with nine and they both ended up with eight, according to you.

MR. PETERSON: Well, the due process clause doesn't protect the state, it protects individuals.

QUESTION: Well, I still ask you. Would you be here?

MR. PETERSON: No.

QUESTION: The state says we're going to give preemptories only for the purpose of challenging people who you think were seated improperly, can't be used for any other purpose, it can only be used where you believe the juror was improperly allowed on in the face of a for cause challenge, would that be okay?

MR. PETERSON: I think if they defined that rule in advance to where the defense knows about it before the trial begins, and it's fair to both sides, then that would be a

legitimate limitation.

QUESTION: But this Oklahoma case law was in effect at the time this case was tried. It was clear under Oklahoma law that that's the deal. You get nine and you use -- both sides use as many of them as you need to remedy the errors.

MR. PETERSON: You didn't know when the jury selection began whether the judge was going to make a mistake or not, and I think that's the difference. You can't know how to exercise your preemptory challenges correctly and effectively unless you know whether the judge is going to make a mistake. He isn't going to come in and say, counsel, I'm going to make three mistakes during this jury selection and you can plan out your strategies accordingly.

That didn't happen and because it didn't, the defense couldn't use its preemptories effectively and it did violate the due process clause.

CHIEF JUSTICE REHNQUIST: Thank you.

Thank you, Mr. Peterson.

The case is submitted.

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-5309

CASE TITLE: Bobby Lynn Ross v. Oklahoma

HEARING DATE: April 18, 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 Supreme Court of the United States,

and that this is a true and accurate transcript of the case.

Date: April 18, 1988

Margaret Daly

Official Reporter

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