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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 08-1341

v. :

GLENN MARCUS :

- - - - - x

Washington, D.C.

Wednesday, February 24, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

ERIC D. MILLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

HERALD PRICE FAHRINGER, ESQ., New York, New York; on behalf of Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear
argument next in Case 08-1341, United States v. Marcus.
Mr. Miller.

ORAL ARGUMENT OF ERIC D. MILLER
ON BEHALF OF THE PETITIONER

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

The court of appeals erred in holding that
reversal of Respondent's conviction was appropriate on
plain error review if there was any possibility, no
matter how unlikely, that the jury's verdict was based
entirely on conduct predating the enactment of the
statute.

Under Rule 52(b), a defendant asserting a
forfeited claim of error may prevail only by showing at
a minimum a reasonable possibility that the error
actually affected the outcome of the case. In
particular, the fourth prong of the Olano plain error
test requires a defendant to show a serious effect on
the fairness, integrity, or public reputation of judicial
proceedings. That test calls for a case-specific,
fact-intensive inquiry, and the defendant cannot satisfy
it if there is no reasonable possibility that the error

1 affected the outcome.

2 The decision of the court of appeals is
3 inconsistent with this Court's cases applying prong four
4 of the plain error test, Johnson, Cotton, and most
5 recently Puckett from just last term. Puckett
6 established that the prong four inquiry is case-specific
7 and fact-intensive and that a per se rule at prong four
8 is inappropriate. And that's exactly what the court of
9 appeals adopted here, applying a per se rule that if
10 there's any possibility of prejudice, reversal is
11 required.

12 In addition, Johnson and Cotton made clear
13 that when the error is one that affects an issue on
14 which the evidence is overwhelming or essentially
15 uncontroverted, the defendant has not shown a serious
16 effect on the fairness, integrity, or public reputation
17 of judicial proceedings, and, indeed, reversal in that
18 context on the basis of a forfeited error that didn't
19 affect the outcome would undermine public confidence in
20 the judicial system.

21 JUSTICE GINSBURG: Are there errors that
22 are -- that are so basic that they would call for an
23 automatic new trial? You say this -- this is not such
24 a -- such an error.

25 MR. MILLER: This Court has reserved the

1 question of whether, for example, a structural error
2 would automatically satisfy the "affects substantial
3 rights" component of the -- of prong three of the Olano
4 test.

5 JUSTICE GINSBURG: What do you mean by
6 "structural"?

7 MR. MILLER: Well, the sort of error that,
8 if properly preserved, would result in automatic
9 reversal without an assessment of harmlessness.

10 JUSTICE GINSBURG: Yes, but if you can be
11 concrete, other than a reasonable doubt charge, what
12 else would be structural?

13 MR. MILLER: Well, I mean in Johnson, for
14 example, the Court had not yet decided Neder, and so in
15 Johnson it was unclear whether the omission of one
16 element, the failure to instruct the jury on one element
17 of the offense, was a structural error. And in Johnson,
18 the Court said, even assuming that that's a structural
19 error and even assuming that, therefore, the defendant has
20 satisfied prong three, showing an effect on the
21 substantial rights, nonetheless the court of appeals has
22 to apply prong four and has to evaluate on the basis of
23 the record and the facts in that particular case whether
24 there was an effect on the fairness, integrity, and
25 public reputation of judicial proceedings.

1 And in that case, the Court said that there
2 wasn't, because the evidence on the point that was the
3 subject of the instructional error was overwhelming, and
4 essentially uncontroverted. And that's, in our view, the
5 sort of analysis, the sort of case-specific assessment
6 of the facts the court of appeals should have undertaken
7 in this case.

8 The effect of the decision below is
9 essentially to carve out a special rule of plain error
10 review that's applicable only to a particular kind of
11 error; namely --

12 JUSTICE ALITO: Can I ask you this? Prong
13 three of -- of Olano looks to prejudice, right? And
14 then it's your position that prong four also looks to
15 prejudice? Where you have two prejudice inquiries, one
16 is more searching than the other, perhaps?

17 How do they fit together in that relation --
18 in that regard?

19 MR. MILLER: Well, that's -- that's right.
20 We think that prong three in the case of a
21 constitutional error requires at least a reasonable
22 possibility of prejudice, and prong four I think demands
23 at least that much and, in some cases, may demand more.

24 One example of a case where a defendant
25 could satisfy prong three but not prong four would be,

1 for example, a Melendez-Diaz kind of error. If you had
2 a drug possession case where the only evidence that the
3 substance the defendant possessed was cocaine was a
4 laboratory certificate admitted without confrontation,
5 that would be a plain error under Melendez-Diaz, and
6 that would -- the defendant would be able to show an
7 effect on his substantial rights, because if that was
8 the only piece of evidence, he would have been entitled
9 to a directed verdict without it. Nonetheless --

10 JUSTICE KENNEDY: Under three.

11 MR. MILLER: Under prong three. But looking
12 at prong four, the Court would say -- I mean, if, for
13 example, the defendant had had an opportunity to subpoena
14 the chemist, if he hadn't controverted the accuracy of the
15 report, there would be no basis for concluding on those
16 facts that there was a serious effect on the fairness or
17 integrity or reputation of the proceedings.

18 JUSTICE KENNEDY: You answered Justice Alito
19 by saying there are cases in which your inquiry is more
20 searching, more demanding, under four. It might also be
21 the other way around. I mean, if you satisfy -- if,
22 under three, you find that it hasn't affected the
23 outcome, then I don't know where you'd go under four.

24 MR. MILLER: If, under three, the defendant
25 fails, then you don't need to apply prong four, because

1 prong four -- prong four is essentially an
2 implementation of the discretion conferred by the word --

3 JUSTICE KENNEDY: Yes.

4 MR. MILLER: -- "may" in Rule 52(b). In
5 order for the court to have any authority to correct
6 a plain error, it must be one that affects substantial
7 rights. So --

8 JUSTICE KENNEDY: Yes. There -- there is an
9 overlap.

10 MR. MILLER: There is some overlap in the
11 inquiries, but we think that, you know, as the Court
12 made clear in Puckett, rule four requires a
13 fact-intensive, case-specific inquiry.

14 JUSTICE ALITO: So under -- under three, the
15 court could conclude that the defendant has shown that
16 it isn't clear beyond a reasonable doubt, for a
17 constitutional error, that the error didn't affect the
18 outcome, so the defendant would clear prong three, but
19 in prong four, a defendant might still lose if it's
20 fairly clear, but not beyond a reasonable doubt that --
21 is that -- that how it would work?

22 MR. MILLER: Or if, you know, as in the --
23 my Melendez-Diaz example, or if the nature of the evidence
24 in the case shows that, you know, apart from the effect
25 on the defendant's rights of that particular error, that

1 error, in the context of the case, doesn't undermine
2 public confidence in the outcome.

3 What the court of appeals did here was to
4 create a special rule applicable only to those errors
5 involving the failure to instruct the jury that they may
6 not convict solely on pre-enactment evidence. The court
7 didn't give any reason why those errors should be
8 treated differently from other kinds of errors.
9 Instead, it was simply applying a line of circuit
10 precedent that went back to cases predating Olano.

11 And there is no reason for creating a
12 special rule in that context. To the contrary, Johnson
13 emphatically rejected the proposition that there are
14 errors that are not subject to Rule 52(b) analysis. And
15 the Court said that even errors implicating fundamental
16 constitutional rights like the Sixth Amendment -- Sixth
17 Amendment right to trial by jury in Johnson or the Fifth
18 Amendment right to a grand jury in Cotton are also
19 subject to the application --

20 JUSTICE SCALIA: You don't want us to do it,
21 right? You want us to remand it so that they can do it,
22 right? Is that --

23 MR. MILLER: This Court's usual practice
24 when there's an issue that wasn't passed upon below is
25 to leave it to be considered on remand. We think that's

1 particularly appropriate because of the fact- and
2 record-intensive nature of the argument in this case.

3 So, if the Court does reach that issue, we
4 would urge the Court to adopt the analysis of the
5 concurring judges below, who said that, with respect to
6 the forced labor conviction, Respondent's conduct in the
7 pre-enactment and post-enactment periods were
8 essentially identical, such that there is no basis in
9 the record on which a rational jury could have concluded
10 that he violated the statute in the pre-enactment
11 period --

12 JUSTICE KENNEDY: The point may be
13 tangential, but if both counsel were aware of the date
14 problem, that 2001 was the enactment of the statute, and
15 the jury was later properly instructed, do you think
16 that the government would find it important to introduce
17 the evidence of the pre-enactment conduct, just to set
18 forth scheme, plan, design, purpose, to tell the jury
19 the story?

20 MR. MILLER: Indeed, it would. In order to
21 establish a violation of the forced-labor statute, the
22 government had to show that Respondent had obtained
23 labor services by threats of serious harm or by a
24 scheme, pattern, or plan intended to cause the victim to
25 believe that she would suffer serious harm.

1 And so, in this case, there was essentially a
2 uniform course of conduct of the Respondent obtaining
3 labor services, making threats of harm, and, indeed,
4 brutally carrying out those threats. And so the
5 pre-enactment threats and pre-enactment acts carrying
6 out the threats would certainly be relevant to show that
7 the post-enactment threats were indeed genuine threats
8 and that the victim could take them seriously as
9 threats, and that they did indeed induce her to provide
10 the labor or services.

11 JUSTICE GINSBURG: What about the argument
12 that was made that in the pre-enactment period the
13 Web site was created, and that's when the -- that was the
14 really hard labor, as compared to just keeping it up to
15 date?

16 MR. MILLER: Well, there -- I mean, the
17 statute refers to "labor or services." And creating a
18 Web site is a kind of labor or service, and maintaining a
19 Web site is also a kind of labor or service. And
20 there's -- as the concurring judges in the court of
21 appeals noted, there's no basis on which the jury could
22 have concluded that one satisfies the statute but the
23 other does not. They're both -- they both fall
24 comfortably within the ordinary meaning --

25 JUSTICE STEVENS: Mr. Miller, can I ask you

1 this question? We are construing Rule 52(b) here, not --
2 as construed in Olano, which has developed the four
3 factors.

4 In your view, does the character of the
5 violation, in this case an ex post facto violation, does
6 that ever make a difference? Could a court ever think
7 that one kind of constitutional violation is a little
8 bit more serious than another, or are they all fungible?

9 MR. MILLER: I think in Johnson the Court
10 quite clearly said that even very serious constitutional
11 errors are subject to the same analysis under
12 Rule 52(b). And certainly there's --

13 JUSTICE SCALIA: Well -- well, but the same
14 constitutional analysis includes step four, which is
15 whether it undermines confidence in the result. And
16 don't you think that some constitutional violations more
17 undermine confidence than others?

18 MR. MILLER: Absolutely. And the test that
19 would be applied would be the same, but the result of
20 that test might be different. For example, if the --

21 JUSTICE STEVENS: Would it not also be
22 possible that some constitutional violations undermine
23 confidence a little more than others?

24 MR. MILLER: Yes. I mean, if the error were,
25 for example, a biased judge -- I mean, that would be one

1 that would almost invariably undermine confidence in
2 the integrity of the proceedings.

3 JUSTICE STEVENS: Then why is the Second
4 Circuit so wrong to say: We think ex post facto
5 violations are perhaps a little more serious than some
6 others.

7 MR. MILLER: Well, because the error, the
8 essential error in this case, was the failure to give
9 the jury an instruction telling them that they could not
10 convict on the basis of pre-enactment conduct. And that
11 is essentially analogous to the error that you had in
12 Johnson, where there was a failure to give the jury an
13 instruction telling them that they had to find
14 materiality. And there --

15 JUSTICE STEVENS: Are all omissions in jury
16 instructions fungible, then? I'm -- here we have an
17 omission in a jury instruction relating to the Ex Post
18 Facto Clause. Does -- the fact that it relates to the
19 Ex Post Facto Clause doesn't give it any extra weight or
20 any lesser weight in the analysis?

21 MR. MILLER: I think in the context of an
22 error like this, there isn't any reason to attach extra
23 weight --

24 JUSTICE SCALIA: I suppose if the
25 instruction told the jury in a criminal case that you

1 can find the defendant guilty if you think it more
2 likely than not that he committed the crime, that might
3 be different, don't you think?

4 MR. MILLER: Yes. That very well might be
5 different. That's right.

6 JUSTICE KENNEDY: Do you agree that this is
7 ex post facto, as opposed to a general due process
8 violation?

9 MR. MILLER: No. I mean -- that's right.
10 The Ex Post Facto Clause regulates the content of the
11 laws that Congress can pass, and there would be an ex
12 post facto issue in the case if Congress had tried to
13 make section 1589 retroactive, but it didn't. And
14 everyone agrees that section 1589 applies only
15 prospectively.

16 So the constitutional violation, if there is
17 one, comes from the possibility that the defendant could
18 have been convicted on the basis of Congress -- of
19 conduct that did not violate the statute.

20 JUSTICE KENNEDY: Well, you -- you agree
21 that there is a violation?

22 MR. MILLER: There is a violation in the
23 failure to instruct. And we think it's the
24 Due Process Clause that is the source of the requirement
25 that the defendant not be convicted on the basis of the

1 conduct that doesn't violate a statute.

2 If there are no further questions, I'd
3 like to reserve the remainder of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Fahringer.

6 ORAL ARGUMENT OF HERALD PRICE FAHRINGER

7 ON BEHALF OF THE RESPONDENT

8 MR. FAHRINGER: Mr. Chief Justice, and if it
9 please the Court:

10 We do believe there are errors that are so
11 basic that they require a reversal automatically. And
12 certainly one of them is trying a person for conduct for
13 2 years that violated no law. It's almost
14 unimaginable and it's unheard of. There are very few
15 cases that even come close to resembling --

16 JUSTICE KENNEDY: Well, except that I think
17 most trial judges would have admitted this evidence with
18 the proper instruction to the jury, that it's background
19 evidence so you -- you can't tell the jury the story and
20 just begin in 2001, or it doesn't make much sense to
21 them.

22 MR. FAHRINGER: That's --

23 JUSTICE KENNEDY: Now, I agree there was not
24 a proper instruction here, there should have been an
25 objection, and so forth. But in an ordinary trial, this

1 evidence would have come in with the proper limiting
2 instruction.

3 MR. FAHRINGER: What's so important about
4 that, if it please Your Honor, is that he couldn't have
5 been convicted on that evidence. The court would have
6 instructed that this evidence was received --

7 JUSTICE KENNEDY: Of -- of -- of course, the
8 jury would have to be instructed very carefully.

9 MR. FAHRINGER: But here, Your Honor, all
10 this evidence came in, and he could be convicted and was
11 convicted on the -- what we lend -- we think lends an
12 awful lot of force to our argument here is that the
13 government has conceded that he could have been
14 convicted exclusively on the pre-enactment conduct
15 alone. That that was --

16 JUSTICE GINSBURG: Convicted, but not --
17 there was a possibility, but not a reasonable
18 possibility. That is, it's conceivable, but the
19 government also is urging the reasonable
20 possibility that it is not likely, given the character of
21 the evidence in the post-enactment period.

22 MR. FAHRINGER: Well, Your Honor, I
23 understand that, but I certainly -- I'd like to say
24 first, in terms of the concession that was made here, you
25 are talking about 2 years of conduct that came into a

1 trial that is really quite extraordinary and terribly
2 dynamic.

3 The one -- last third of that, Your Honor, I
4 think cannot -- even though it came post-statute, it
5 cannot be used to legitimize that first 2 years.
6 And -- and the jury heard all of it, and -- and as a
7 matter of fact, what we attach a great deal of importance
8 to, the last question the jury asked of the judge: We
9 want to know what constitutes labor.

10 And they put in their note the -- the
11 largest task of all, the building and the designing of
12 the Web site and then maintaining it. And that was all
13 pre-enactment; the threats were all pre-enactment.

14 JUSTICE KENNEDY: And this was a long -- a
15 long jury deliberation.

16 MR. FAHRINGER: It was out for 7 days,
17 Your Honor. Seven days the jury deliberated over this
18 case.

19 JUSTICE GINSBURG: Justice Kennedy suggested
20 that, even though the conduct was pre-enactment, it
21 would have come in to show pattern, scheme. So it's one
22 -- one thing is to say the evidence, the jury would not
23 have seen that evidence, would not have heard the
24 evidence, and another to say the judge should have
25 charged them: Now, you cannot use this evidence that

1 you've heard for another purpose. You cannot use it to
2 determine his guilt or innocence.

3 MR. FAHRINGER: But -- but, Your Honor, I
4 wanted to mention to the Court, of course, Rule 403 that
5 says that if the prejudice of the evidence outweighs the
6 probative value. I think if we could take ourselves
7 back to that trial court and a lawyer stood up and said,
8 Your Honor, we want to put in 2 years of background
9 evidence, I -- I think there's a good likelihood that
10 it would have been excluded. I don't think you can
11 say --

12 JUSTICE KENNEDY: Well, you can be pleased
13 that I was not the trial judge.

14 (Laughter.)

15 MR. FAHRINGER: Sorry to hear that, Your
16 Honor.

17 But in the -- in the course of taking in
18 some evidence as background, I don't think it's ever
19 been of this magnitude in a unique case where the
20 evidence that's coming in bears directly on the
21 liability. And I think the -- the question is terribly
22 important because, obviously, it shows the jury was
23 focused on the pre-enactment conduct, even with the
24 forced labor.

25 JUSTICE ALITO: Does the --

1 JUSTICE BREYER: I assume you could make all
2 that argument on remand, if we remand it. But what's
3 your argument -- apparently from what I've read in this
4 case, the Second Circuit uses a standard of plain error
5 that nobody else uses.

6 MR. FAHRINGER: Well --

7 JUSTICE BREYER: And it says that all the other
8 circuits say: This is our set of standards, and we've
9 set them forth. And the Second Circuit says: No, it's
10 -- you have to have a new trial if there's any
11 possibility, no matter how unlikely.

12 MR. FAHRINGER: Well --

13 JUSTICE BREYER: Now, nobody else uses that.
14 It seems contrary to our cases, and is there any
15 justification for their using it?

16 MR. FAHRINGER: Yes.

17 JUSTICE BREYER: Because unless I can hear a
18 justification, I would guess I would vote to say send it
19 back and let them use the same standard anybody else
20 does.

21 MR. FAHRINGER: Well, one point you make,
22 Your Honor, that I --

23 JUSTICE BREYER: What's your response to
24 that?

25 MR. FAHRINGER: It's certainly welcome, and

1 that is that we are seeking a retrial here. You know,
2 you speak in just genuine fairness that -- that the
3 gentleman can be tried on that conduct that was
4 post-enactment.

5 But in response to Your Honor's question, I
6 think, Your Honor, the -- the -- the difficulty is, in
7 this whole case is, it all ran together in front of the
8 jury, and they saw all of this proof with no
9 instruction, with no demarcation, and -- and the --
10 the mere weight, the volume of the 2 years out in
11 front of that had to have a --

12 JUSTICE BREYER: So why don't you make
13 the --

14 JUSTICE SCALIA: Address the test used by
15 the Second Circuit. That's what we're concerned about.

16 MR. FAHRINGER: Oh, I'm sorry.

17 JUSTICE SCALIA: And that's what the
18 question pertained to. They're using a test nobody
19 else used, that does not comport with -- with our prior
20 opinions. Why shouldn't we send it back and tell them,
21 you know, use the right test?

22 MR. FAHRINGER: Your Honor, I think -- and I
23 choose my words carefully -- I think that this test
24 under this circumstance was justified. When the court
25 saw the magnitude of the error here, they had to say if

1 there was any possibility that the jury
2 relied exclusively --

3 JUSTICE BREYER: The very magnitude of
4 the error would argue for -- you'd win on any test.
5 I mean, why does that say you have to use a special test
6 that is specially designed to find when there is hardly
7 any error? Here there's such a bigger error,
8 according -- that you think that you would have won
9 under any test.

10 So that -- so why -- why do you do have to
11 have this special favorable test? That's -- that's the
12 question that I'm thinking of. I'm not thinking of
13 whether you are right or whether you are wrong on the --
14 how much evidence there was and how awful it was.

15 MR. FAHRINGER: I think -- to answer Your
16 Honor's question, which is a -- an incisive one, and
17 that is because, Your Honor, it's only -- the court made
18 it very clear, we're only applying this test to ex post
19 facto, and I think in this instance you are right, the
20 magnitude of the error prompted them to say that if
21 there was any possibility that this 2 years of conduct
22 -- the jury could have based their verdict
23 exclusively on that, we think we had to be granted a new
24 trial.

25 JUSTICE STEVENS: Mr. -- may I ask this

1 question about the -- I -- I should know this, but I
2 don't. To what extent has the regular test that my
3 colleagues referred to applied in ex post facto cases in
4 other circuits?

5 MR. FAHRINGER: The -- the Olano test, Your
6 Honor?

7 JUSTICE STEVENS: Yes.

8 MR. FAHRINGER: Well, the possibility test has
9 been used in the Third Circuit in the Tykarsky case. It
10 has also been used in several States --

11 JUSTICE STEVENS: Were those ex post --

12 MR. FAHRINGER: -- Georgia being one.

13 JUSTICE STEVENS: -- ex post facto cases?

14 MR. FAHRINGER: Yes. Yes, Your Honor.

15 And --

16 JUSTICE STEVENS: So that it isn't
17 necessarily a conflict between this case and all other
18 plain error cases; it's a narrow category of cases
19 involving ex post facto violations?

20 MR. FAHRINGER: In the -- in this very
21 narrow category, Your Honor.

22 JUSTICE SCALIA: Well, you call it an ex
23 post facto violation, but I -- I -- I rather agree with
24 the government; it's a due process violation.

25 MR. FAHRINGER: Well --

1 JUSTICE SCALIA: -- what happened is
2 improper evidence was admitted, because it concerned pre-
3 -- pre-statute conduct. But it might have been evidence
4 that was -- that was irrelevant for some other reason.
5 That would be just as much of a -- a due process violation.

6 What is special about the fact that the
7 reason the evidence before the jury was incorrect was
8 that it -- the conduct occurred before the -- before the
9 statute?

10 MR. FAHRINGER: Your Honor, as I know, you
11 are aware of the Marks case. They held that the ex post
12 facto concept applied to judicial precedent as well, and
13 that was repeated in the Harris case in -- as well. But
14 I think, Your Honor, certainly the whole strength and --
15 and weight of the ex post facto law is present here.
16 The Second Circuit said that it certainly involves ex
17 post facto implications. What you are doing is, you're
18 taking conduct that violates no law before the law is
19 passed, and you're taking --

20 JUSTICE SCALIA: And when a State court
21 allows pre-law conduct to uphold a conviction, that is an
22 ex post facto violation, and we would reverse the State
23 court judgment. But that's not what occurred here.
24 What occurred here is that the trial court let the jury
25 consider evidence, as evidence bearing upon conviction,

1 which it should not have let the jury consider.

2 And there's a lot of evidence that a court
3 should not have let the jury consider. I don't see
4 anything particularly special about fact that the reason
5 this evidence shouldn't have been before the jury was
6 that it occurred before the statute.

7 JUSTICE STEVENS: But it not only allowed
8 the evidence before the jury, but it also told the jury
9 it was sufficient to convict.

10 MR. FAHRINGER: Your Honor, that's right.
11 It -- it -- what is special about it is -- I think it's an
12 extremely rare and irregular case that would allow 2
13 years of conduct to come into a case --

14 JUSTICE ALITO: What if the -- what if the
15 period -- the -- the period that was charged started 1
16 day before the statute took effect?

17 MR. FAHRINGER: Well, if it was -- Your
18 Honor, my stand --

19 JUSTICE ALITO: Would -- would the test
20 be different? Now, if you have 1 day of pre-enactment
21 conduct, it's possible that the jury could convict based
22 on that -- the evidence relating to that 1 day, isn't
23 it? And so, therefore, if the test is any possibility,
24 the result is automatic new trial in that situation.
25 Is -- is that where your argument leads?

1 MR. FAHRINGER: My argument is, Your Honor,
2 that no person in this country under our Constitution
3 should be tried for 1 day on conduct that did not
4 violate a law. I -- I --

5 JUSTICE BREYER: That's true. And also no
6 person should be convicted with a confession that was
7 coerced. And no person should be convicted with
8 evidence given under torture. And no person should be
9 convicted with evidence unlawfully seized by the police.

10 Now, for all those latter things, every
11 court apparently uses the normal standard. So why would
12 we in this case use a special standard?

13 MR. FAHRINGER: Well, it's different, Your
14 Honor. In all of those cases, there was a law, at least
15 giving the court jurisdiction, that was violated. There's
16 a very serious question here whether there was
17 jurisdiction when they came in. Jurisdiction is derived
18 solely through statutes that are violated in the
19 criminal field.

20 There were no statutes. So there's a
21 serious question of whether there was even jurisdiction.
22 But -- but what's different is it seems to me if you
23 have a law, a mail fraud law, and then there is some sort
24 of a violation and a -- a suppression of evidence or
25 whatever other arguments you're going to make,

1 that's -- that's light years away from a situation where
2 there's absolutely no law to -- to violate. And the
3 conduct --

4 JUSTICE SCALIA: And -- and,
5 therefore, no violation of the Ex Post Facto Clause.

6 MR. FAHRINGER: I beg your pardon.

7 JUSTICE SCALIA: There's also no violation
8 of the Ex Post Facto Clause, which is in Article I of
9 the Constitution and which says no ex post facto Law
10 shall be passed.

11 MR. FAHRINGER: But, Your Honor --

12 JUSTICE SCALIA: You don't have -- you don't
13 have an ex post facto law that was passed here.

14 You have an incorrect jury charge. You have
15 the judge telling the jury that you could convict on the
16 basis of this prior conduct when, in fact, you couldn't.
17 That is not an ex post facto law.

18 MR. FAHRINGER: But, Your Honor, I -- I --
19 in all due respect, I invite your attention to your
20 case in Marks and -- and the Harris case where they have
21 said that we have extended ex post facto to obviously
22 a -- a whole host of cases now that involve judicial
23 precedent and -- and the actions of prosecutors
24 and what not.

25 This, I can't imagine in a way in terms of

1 the concept of ex post facto to put in 2 years of
2 conduct that is not in violation of any law, that
3 certainly fits within the presiding spirit of the ex
4 post facto concept that people shouldn't -- you know, if
5 you want to go back to our very basics, and that's what
6 unique about this case, the entitlement to notice of
7 what conduct is to be avoided, a statute that tells you
8 what conduct you have to avoid, and all those --

9 JUSTICE SCALIA: I'm looking for Marks, where
10 is that in -- is that in your brief somewhere?

11 MR. FAHRINGER: Beg your pardon, Your Honor.

12 JUSTICE SCALIA: You have mentioned several
13 times the Marks case. What case is --

14 MR. FAHRINGER: M-A-R-K-S.

15 JUSTICE SCALIA: Where is that?

16 MR. FAHRINGER: That's in -- in our --

17 JUSTICE SCALIA: Is it in your brief?

18 MR. FAHRINGER: I -- I believe it was cited
19 in our brief, Your Honor. I will give you that in just
20 a moment, if I may. But -- but I'm under the
21 impression, Your Honor, from our research that there
22 were a number of cases --

23 JUSTICE SCALIA: I mean, see, I don't know
24 what that case is. If it was a case in which we
25 reversed a State supreme court because the State supreme

1 court upheld the State statute that -- you know, that
2 made prior conduct unlawful, then I -- I think I could
3 say that was an ex post facto violation through the
4 Fourteenth Amendment.

5 MR. FAHRINGER: I think this comment is
6 relevant to what you just said. Our forefathers in --
7 in imposing an Ex Post Facto Clause -- it's one of the
8 few that they imposed on the States as well as the
9 Federal Government, and I think that lends it force in a
10 sense that the States have an Ex Post Facto Clause as
11 does the Federal Government.

12 But we feel, under all those circumstances
13 here, what -- all roads lead back to one very, very
14 critical fact, and that is the enormity of the error
15 here at being a -- a constitutional error, and we
16 certainly think a structural error, structural error in
17 the sense that it ran from the beginning of the case. The
18 grand jury should not have indicted on conduct that
19 violated no law. He should not have been arraigned. He
20 should not have been tried. He should not have
21 convicted. He should not have been considered. All of
22 this --

23 JUSTICE GINSBURG: What is your position
24 that two concurring judges said that evidence should not
25 have been -- not that it shouldn't have come in, but the

1 jury should have been told you can convict only on
2 post -- whatever the date was? But they also pointed
3 out that one of the most severe incidents fell in the
4 post-enactment period. It was in April of 2001. It
5 was -- and that was vivid evidence properly --
6 properly used by the jury to determine guilt or
7 innocence.

8 MR. FAHRINGER: I -- I understand that, and
9 I think I know what you are referring to, Your Honor.
10 I find much of the evidence in this case extremely
11 distasteful, but we are operating under a land of laws
12 and Constitution. And it seems to me his rights are as
13 important -- I know this Court appreciates that -- as
14 any other person's.

15 And the truth of the matter is that much of
16 this very unattractive evidence came in before the law
17 was ever enacted. And I think what happens is -- and this
18 is a reality psychologically -- it all blends together, it
19 all comes together. And without any kind of
20 instruction. I -- my view would be, under ex post facto
21 principles, it would have ordinarily been excluded. It
22 wouldn't have been brought in.

23 JUSTICE SCALIA: Okay. This -- this
24 evidence was improper because if the legislature had
25 made that action punishable when it occurred before the

1 statute was enacted, that would have been a violation of
2 the Ex Post Facto Clause. Now, in fact, the legislature
3 didn't do that, and, therefore, we have no real violation
4 of the Ex Post Facto Clause. But we do have the
5 admission of evidence that shouldn't have been admitted,
6 which is no different from evidence that should have not
7 been admitted for some other reason.

8 For example, where the -- where the court
9 gives an instruction that permits evidence to be
10 considered as evidence of the crime which, in fact, is
11 irrelevant to the crime. And the jury says you can
12 find him guilty if you find that he held two fingers up
13 in the air, when, in fact, that has nothing to do with
14 the crime.

15 Why is this any different from that? It's
16 just evidence that the jury should not have been allowed
17 to use for conviction. I don't see why there is
18 anything special about the fact that the reason it
19 shouldn't be used for conviction --

20 MR. FAHRINGER: In all due --

21 JUSTICE SCALIA: -- is because it occurred
22 pre-statute.

23 MR. FAHRINGER: In all due respect, Your
24 Honor, I believe the cases and Supreme Court cases have
25 held that the ex post facto law has been extended to

1 judicial precedent. And we cite those cases, Your
2 Honor, in our brief.

3 JUSTICE KENNEDY: Well, I -- I thought
4 what we have said that it's just a violation of due
5 process to convict someone for conduct that was not
6 criminal when the conduct was -- was made. It's --
7 it's -- it's just a due process -- it's a due process
8 violation. It just -- it's a serious due process
9 violation.

10 MR. FAHRINGER: I think you're right, Your
11 Honor, in the sense that it's an ex post facto law being
12 applied through the Due Process Clause. But the impact and
13 the force of that, I think, is still just as great and
14 just as powerful. And -- and -- and the error here
15 factually is -- is absolutely enormous.

16 And -- and what I think the very least a
17 defendant in his position is entitled to is -- he's
18 suffering under a 9-year sentence. I think he is
19 entitled to have another trial where he is only confronted
20 with the evidence that came after the statute. And if
21 they're going to put in evidence that goes before that,
22 they would have to justify that under one of a number of
23 different concepts, Rule 404(b) or one of the others.

24 And we would argue in that context -- none of
25 this was ever done in court -- under 403, if it was too

1 extensive, the prejudice outweighs the probative value.
2 And I think that many judges would be sympathetic to
3 that, for putting in a whole 2 years of conduct. Some
4 might come in --

5 JUSTICE SCALIA: Courtesy -- courtesy of
6 Justice Kennedy, I have -- I have before me the Marks
7 case. And the -- the summary of the case at the
8 beginning says: "Petitioners were convicted of
9 transporting obscene materials in violation of the
10 Federal statute." "Held: The Due Process Clause of the
11 Fifth Amendment precludes retroactive application to
12 petitioners of the Miller standards."

13 It was a due process case.

14 MR. FAHRINGER: And the only thing that I would
15 think of immediately of that is, is the statute here. He
16 was -- there's no question the -- the -- the conduct
17 was forbidden by statutes in -- in time, but was applied
18 in advance of those statutes, before --

19 JUSTICE SCALIA: And, therefore, the Due
20 Process Clause was violated when the court let that in.

21 MR. FAHRINGER: I don't have a quarrel with
22 you on that.

23 JUSTICE SCALIA: So you -- you have to
24 persuade us that there is something special about a
25 violation of the Due Process Clause that lets in

1 evidence which is pre-statute, as opposed to violations
2 that let in other evidence that should not properly be
3 used to convict the defendant. And I frankly don't --
4 don't see why it's so special.

5 MR. FAHRINGER: Your Honor, I'm endeavoring
6 to pursue it, but somewhat unsuccessfully.

7 This is not an evidentiary error. It is in
8 every sense a due -- an ex post facto error, but it is
9 through the Due Process Clause. I think that there we
10 meet on common ground. It's through the Due Process
11 Clause that the Ex Post Facto Clause is made -- made
12 effective in trial. But the truth of the matter is -- I
13 mean, the indictment here, which you start with, charged
14 these crimes going all the way back to January of 1999,
15 when the Act didn't come -- didn't become effective
16 until October of 2000.

17 JUSTICE ALITO: Well, what if the conduct
18 that -- we didn't have -- what if we did not
19 have pre-enactment conduct? What if we -- if this
20 statute applies only within the United States, as I
21 assume that it does, and all of the conduct that's now
22 pre-enactment was conduct that took place outside the
23 United States? Would that -- would the case be
24 different for these purposes?

25 MR. FAHRINGER: If all the conduct that was

1 proven at the --

2 JUSTICE ALITO: Instead of having
3 pre-enactment conduct, you have conduct in Canada,
4 Mexico, someplace else.

5 MR. FAHRINGER: I -- I think it would --

6 JUSTICE STEVENS: And the jury was
7 instructed that he could be convicted on the basis of
8 what had happened in Canada. That would be the same?

9 MR. FAHRINGER: Yes, that's right. And I --
10 all I'm suggesting is, wherever the evidence comes from,
11 it shouldn't be admitted except under one of the very
12 narrow exceptions, such as Rule 404(b). And we would
13 argue, under 403, it should be excluded, wherever the
14 evidence came from. And a judge would -- as I
15 understand it, a judge would instruct the jury: You
16 cannot convict Mr. Marcus on any of this evidence
17 whatsoever that is pre-enactment.

18 JUSTICE ALITO: No, of course, but the
19 question is whether the mere possibility standard would
20 apply in that case as well, or whether you think this
21 mere possibility standard applies only in the case of
22 pre-enactment conduct?

23 MR. FAHRINGER: I think the possibility
24 standard only applies to ex post facto statute
25 cases and pre-enactment conduct. That's my view, Your

1 Honor. I think it's a very narrow holding. And I'm
2 not urging that this would be the standard for other --
3 other than ex post facto cases, and I'm not urging this
4 would be the standard in ex post facto cases where --
5 what this does, Your Honor, if you stop and think about
6 it, it is, in a sense, a bright-line rule.

7 What has gone on in the past is we have to
8 measure. We have to take, on the one hand, the post-
9 enactment conduct, and we take, on the other hand, the
10 pre-enactment conduct, and we go through this, what I
11 -- I'm of a generation -- I remember *Betts v. Brady* before
12 *Gideon* came down, and it was always a constant citing in
13 that context whether a person got able representation
14 until you decided the *Gideon* case, *Gideon v. Wainwright*.

15 Aren't we in the same position here?
16 Wouldn't it be better to have a rule that said, where
17 clearly you shouldn't be bringing in pre-enactment
18 conduct anyway, if you bring in pre-enactment conduct
19 and there is any possibility that the jury convicted on
20 that, there will be a new trial? It seems that's going
21 to avoid all of that balancing and weighing and
22 perennial -- perennial appellate review. That's what I
23 think is -- is commendable about the Second Circuit's
24 decision. I think that's where there is a great deal of
25 sense behind it.

1 JUSTICE GINSBURG: So your position is,
2 essentially, plain error doesn't apply in this area;
3 it's just error because it involved evidence
4 pre-enactment? That error is enough; it doesn't have to
5 meet --

6 MR. FAHRINGER: I'm sorry, Your Honor.

7 JUSTICE GINSBURG: It doesn't have to meet
8 the standard for plain error?

9 MR. FAHRINGER: Yes, absolutely. And this
10 doesn't affect that whatsoever. I mean, I think there's
11 a misconception among some people. We -- the Second
12 Circuit took the four Olano factors and applied
13 them, one, two, three, four. They didn't touch them.
14 They didn't in any way alter them.

15 What they did is, on the concept and the
16 rule governing ex post facto adjudications, that was
17 purely substantive, but the any possibility doesn't
18 apply to plain error. Those four prongs have been left
19 intact. And so they haven't disturbed that in any way
20 whatsoever. They set those four prongs out in the
21 preamble of their opinion. Obviously, what they found
22 was, when you have a case of this magnitude of
23 pre-enactment conduct of 2 years, they felt that that
24 certainly affected the fairness and the integrity of the
25 trial and the judicial reputation.

1 I say it myself. It appeared on the front
2 page of The New York Times: Man convicted for 2 years
3 of conduct where there was no law. That, I would guess,
4 would have an adverse effect on the reputation of our
5 judicial process, whereas a ruling where a court held
6 this man should go back and get a new trial on the
7 conduct that violated the statute, and not on conduct
8 that violated no law, would enhance the reputation of
9 the courts.

10 So applying that factor, we feel strongly
11 and powerfully that the correct disposition here is to
12 affirm the Court of Appeals for the Second Circuit. And
13 we will go back and we will have a retrial on the conduct
14 that violated the statute.

15 If you have no other questions, I -- I thank
16 you for your attention.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Fahringer.

19 Mr. Miller, you have 16 minutes.

20 REBUTTAL ARGUMENT OF ERIC D. MILLER

21 ON BEHALF OF THE PETITIONER

22 MR. MILLER: Just very brief -- excuse me --
23 very briefly, I'd like to make two points.

24 The first is that, essentially, the error in
25 this case was the failure to give a limiting instruction

1 relating to the use of pre-enactment evidence, and
2 that's the same sort of instructional or evidentiary
3 error that can be considered in a case-specific analysis
4 under prong four and should have been considered
5 through that analysis.

6 The second is that Respondent suggested
7 there was a lack of jurisdiction in this case. That
8 argument rests on an understanding of jurisdiction that
9 this Court rejected in Cotton, and we discussed that at
10 pages 9 to 11 of our reply brief.

11 If the Court has no further questions, we
12 ask that the judgment be reversed and the case remanded.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:49 a.m., the case in the
16 above-entitled matter was submitted.)

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A	<p>13:20 38:3,5 answer 21:15 answered 7:18 anybody 19:19 anyway 35:18 apart 8:24 apparently 19:3 25:11 appeals 3:10 4:2 4:9 5:21 6:6 9:3 11:21 37:12 APPEARAN... 1:14 appeared 37:1 appellate 35:22 applicable 6:10 9:4 application 9:19 32:11 applied 12:19 22:3 23:12 31:12 32:17 36:12 applies 14:14 33:20 34:21,24 apply 5:22 7:25 34:20 36:2,18 applying 4:3,9 9:9 21:18 37:10 appreciates 29:13 appropriate 3:11 10:1 April 29:4 area 36:2 argue 21:4 31:24 34:13 argument 1:12 2:2,7 3:4,6 10:2 11:11 15:6 16:12 19:2,3 24:25 25:1 37:20 38:8 arguments 25:25 arraigned 28:19 Article 26:8</p>	<p>asked 17:8 asserting 3:16 assessment 5:9 6:5 Assistant 1:15 assume 19:1 33:21 assuming 5:18 5:19 attach 13:22 17:7 attention 26:19 37:16 authority 8:5 automatic 4:23 5:8 24:24 automatically 5:2 15:11 avoid 27:8 35:21 avoided 27:7 aware 10:13 23:11 awful 16:12 21:14 a.m 1:13 3:2 38:15</p>	B	<p>back 9:10 18:7 19:19 20:20 27:5 28:13 33:14 37:6,13 background 15:18 18:8,18 balancing 35:21 based 3:13 21:22 24:21 basic 4:22 15:11 basics 27:5 basis 4:18 5:22 7:15 10:8 11:21 13:10 14:18,25 26:16 34:7 bearing 23:25 bears 18:20 beg 26:6 27:11 beginning 28:17</p>	<p>32:8 behalf 1:17,19 2:4,6,9 3:7 15:7 37:21 believe 10:25 15:10 27:18 30:24 better 35:16 Betts 35:11 beyond 8:16,20 biased 12:25 bigger 21:7 bit 12:8 blends 29:18 Brady 35:11 BREYER 19:1,7 19:13,17,23 20:12 21:3 25:5 brief 27:10,17,19 31:2 37:22 38:10 briefly 37:23 bright-line 35:6 bring 35:18 bringing 35:17 brought 29:22 brutally 11:4 building 17:11</p>	C	<p>C 2:1 3:1 call 4:22 22:22 calls 3:23 Canada 34:3,8 carefully 16:8 20:23 carrying 11:4,5 carve 6:9 case 3:4,19 5:23 6:1,7,20,24 7:2 8:24 9:1 10:2 11:1 12:5 13:8 13:25 14:12 17:18 18:19 19:4 20:7 22:9 22:17 23:11,13</p>	<p>24:12,13 25:12 26:20,20 27:6 27:13,13,24,24 28:17 29:10 32:7,7,13 33:23 34:20,21 35:14 36:22 37:25 38:7,12,14,15 cases 4:3 6:23 7:19 9:10 15:15 19:14 22:3,13 22:18,18 25:14 26:22 27:22 30:24,24 31:1 34:25 35:3,4 case-specific 3:23 4:6 6:5 8:13 38:3 category 22:18 22:21 cause 10:24 certainly 11:6 12:12 15:12 16:23 19:25 23:14,16 27:3 28:16 36:24 certificate 7:4 character 12:4 16:20 charge 5:11 26:14 charged 17:25 24:15 33:13 chemist 7:14 Chief 3:3,8 15:4 15:8 37:17 38:13 choose 20:23 circuit 9:9 13:4 19:4,9 20:15 22:9 23:16 36:12 37:12 circuits 19:8 22:4 Circuit's 35:23 circumstance</p>
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