IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 08-1341

v. :

GLENN MARCUS :

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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.

C O N T E N T S

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

affected the outcome.

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

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

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

MR. MILLER: This Court has reserved the

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Under three.

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

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

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

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

JUSTICE KENNEDY: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Mr. Miller, can I ask you

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conduct that doesn't violate a statute.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fahringer.

ORAL ARGUMENT OF HERALD PRICE FAHRINGER

ON BEHALF OF THE RESPONDENT

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

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

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

MR. FAHRINGER: That's --

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

evidence would have come in with the proper limiting instruction.

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

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

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

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

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

trial that is really quite extraordinary and terribly dynamic.

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

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

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

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

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

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

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

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

(Laughter.)

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

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

JUSTICE ALITO: Does the --

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

MR. FAHRINGER: Well --

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

MR. FAHRINGER: Well --

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

MR. FAHRINGER: Yes.

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

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

JUSTICE BREYER: What's your response to that?

MR. FAHRINGER: It's certainly welcome, and

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

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

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

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

MR. FAHRINGER: Oh, I'm sorry.

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

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

there was any possibility that the jury relied exclusively --

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

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

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

JUSTICE STEVENS: Mr. -- may I ask this

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

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

JUSTICE STEVENS: Yes.

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

JUSTICE STEVENS: Were those ex post --

MR. FAHRINGER: -- Georgia being one.

JUSTICE STEVENS: -- ex post facto cases?

MR. FAHRINGER: Yes. Yes, Your Honor. And --

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

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

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

MR. FAHRINGER: Well --

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

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

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

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

which it should not have let the jury consider.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FAHRINGER: I beg your pardon.

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

MR. FAHRINGER: But, Your Honor --

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

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

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

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

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

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

MR. FAHRINGER: Beg your pardon, Your Honor.

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

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

JUSTICE SCALIA: Where is that?

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

JUSTICE SCALIA: Is it in your brief?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FAHRINGER: In all due --

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

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

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

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

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

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

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

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

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

It was a due process case.

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

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

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

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

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

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

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

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

MR. FAHRINGER: If all the conduct that was

proven at the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fahringer.

Mr. Miller, you have 16 minutes.

REBUTTAL ARGUMENT OF ERIC D. MILLER

ON BEHALF OF THE PETITIONER

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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