

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1295

TITLE ESCAMBIA COUNTY, FLORIDA, ET AL., Appellants v.
HENRY T. McMILLAN, ET AL.

PLACE Washington, D. C.

DATE January 10, 1984

PAGES 1 thru 54



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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ESCAMBIA COUNTY, FLORIDA, ET :
4 AL., :
5 Appellants, :
6 v. : No. 82-1295
7 HENRY T. MC MILLAN, ET AL. :
8 - - - - -x
9 Washington, D.C.
10 Tuesday, January 10, 1984
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:19 o'clock p.m.
14 APPEARANCES:
15 CHARLES S. RHYNE, ESQ., Washington, D.C.; on behalf of
16 the Appellants.
17 LARRY T. MENESEE, ESQ., Mobile, Alabama; on behalf of
18 the Appellees.
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Escambia County against McMillan.

Mr. Rhyne, before you open your argument, and before we start charging you for the time at the moment, we have before us a motion to dismiss this case by a majority of the present board. We deferred action on that until today. I would assume that you are not going to argue in support of that motion.

ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,
ON BEHALF OF THE APPELLANTS

MR. RHYNE: That is true.

CHIEF JUSTICE BURGER: And is it proposed that anyone present that motion in oral argument?

MR. RHYNE: Mr. Santuri, who is the county counsel for Escambia County, is here, and I suppose if he wants to present it, he will be here to present it.

CHIEF JUSTICE BURGER: Very well. Then you may proceed with your argument, and we will determine later whether we will hear him.

MR. RHYNE: Thank you.

QUESTION: Mr. Rhyne, in the same connection, there was a remedial order for which we granted certiorari to review. That has now been withdrawn, hasn't it?

1 MR. RHYNE: Has what?
2 QUESTION: Been withdrawn.
3 MR. RHYNE: Well --
4 QUESTION: Isn't there a new plan that the
5 District Court ordered?
6 MR. RHYNE: Yes. They have changed it.
7 QUESTION: What is before us then of the order
8 that we --
9 MR. RHYNE: The merits of the case.
10 QUESTION: How can it be if the order is not
11 here?
12 MR. RHYNE: Well, I think the merits of the
13 case and the order are both before you, but the Court
14 went right ahead --
15 QUESTION: Well, how can it be --
16 MR. RHYNE: -- since we didn't have a stay --
17 QUESTION: If the order is not here that we
18 agreed to review, how are we going to review it?
19 MR. RHYNE: Well, the order that you agreed to
20 review was the merits of at large elections under the
21 Florida constitution, and that is what I intend to
22 present my argument and address it to now, Mr. Justice
23 Brennan.
24 QUESTION: Well, I have to say for myself it
25 strikes me that the whole thing is moot, or at least

1 certainly premature.

2 MR. RHYNE: Well, I would say that that order
3 is illegal, null and void because the court that issued
4 it had no jurisdiction to issue is.

5 Now, Mr. Chief Justice, and may it please the
6 Court, in this case the appellee's claim is based upon a
7 complaint that they have been denied access to the --
8 full and complete access to the at large election system
9 provided by the Florida constitution, and to the
10 political process leading to the nominations and
11 elections in the county commission of Escambia County.

12 I should have said that Escambia County is
13 adjacent to Pensacola. It had 205,000 people in it in
14 1970, 233,000 in 1980; 19.7 of those are black. In
15 1970, 16.2 percent of them were eligible voters. In
16 1980, 17.2 were eligible voters. Of the eligible
17 voters, 66.9 of the blacks are registered; 69.7 of the
18 whites are registered. So, there is -- on registration
19 and on really participation in the electoral process
20 that way they are pretty equal.

21 Now, first of all, in the second sentence of
22 their brief, they say that they do not contend in this
23 case that any statute or any part of the constitution
24 has been invalidated, and so I address myself to
25 jurisdiction. We are concerned here with the state

1 constitution of Florida over which Escambia has no
2 control whatever. The state constitution requires at
3 large elections in non-charter counties, of which there
4 are 62 and of which Escambia is one.

5 In connection with that constitutional
6 provision, they have also adopted an election system
7 which is about an inch thick to carry out these
8 elections, and so the requirement of at large elections
9 and the requirements for carrying it out are entirely
10 state action, and so we raise the question as to whether
11 or not the requirements of Article 3, Clause 2, or
12 Section 2, Clause 1, of the constitution has been met,
13 because the real controversy here is not between
14 Escambia and these people who claim they have been
15 harmed by the at large elections which are put in,
16 maintained, operated entirely by the state of Florida.

17 QUESTION: Mr. Rhyne, I noticed that argument
18 in your reply brief. I wonder, supposing Florida had a
19 statute that said no one except whites can vote, and
20 somebody, a black citizen wanted to vote in Escambia,
21 and they didn't let him, and he sued the local
22 officials. Couldn't he do that?

23 MR. RHYNE: Well, they once did have such a --

24 QUESTION: Would they have standing to
25 challenge a statewide statute if the local officials

1 just said, we're not going to let you vote because the
2 state law prohibits?

3 MR. RHYNE: Well, I think that --

4 QUESTION: Isn't that your argument?

5 MR. RHYNE: -- that kind of a statute, Your
6 Honor --

7 QUESTION: That would be unconstitutional.

8 Well, they contend this is. Maybe they are wrong, but
9 your argument is that they must sue the Governor and
10 the --

11 MR. RHYNE: They must sue -- well --

12 QUESTION: Why in this case and not the one I
13 hypothesize?

14 MR. RHYNE: The -- What we have here is, the
15 controlling constitutional provision and statutes are
16 all those of the state of Florida, and under the
17 decisions of this Court, you have got to prove that the
18 injury that you claim can fairly be traced to the
19 challenged action of the defendant, and not traced to
20 independent action by some other party.

21 Now, you have independent action of some other
22 party, the state of Florida here, that controls these at
23 large elections entirely. The county has absolutely
24 nothing to do with them. The state prescribes them.
25 The state carries them out.

1 QUESTION: Well, Mr. Rhyne, supposing that the
2 state of Florida had a one-year duration of residence
3 requirement in order to vote, which this Court has held
4 is unconstitutional, and someone went to Escambia County
5 and registered to vote without having qualified for the
6 one year and was told he couldn't register. Couldn't he
7 sue the registrar in Escambia County claiming a denial
8 of equal protection or whatever it is, right to travel,
9 without joining the Governor of Florida?

10 MR. RHYNE: I think you would have to join the
11 state of Florida, Justice Rehnquist, because it is a
12 Florida statute that is doing them the harm. Escambia
13 is not doing anything to them.

14 QUESTION: I think a lot of our cases
15 involving county officials where they have been
16 defendants and charged with violating people's
17 constitutional rights have involved them administering
18 state statutes where the state was --

19 QUESTION: It has involved them for this
20 reason. Say like in Rogers versus Lodge, you had
21 special state statutes applicable only to Bert County,
22 but this is a statewide constitutional provision.

23 QUESTION: Well, let's go to another case,
24 white primary case. Smith against Alright was against
25 two local county precinct judges, and it involves a

1 primary law of the state of Texas, and nobody has ever
2 questioned the jurisdiction until this day.

3 MR. RHYNE: Well, Justice Marshall, they
4 didn't administer the state statute. The state does.

5 QUESTION: The precinct men were named -- and
6 the other one was named Alright, and they ended up by
7 paying awards -- I mean fined \$5 apiece.

8 MR. RHYNE: Well --

9 QUESTION: But there was a state law which was
10 declared unconstitutional in that case, and the
11 government not only was not a party, but when it came up
12 here, the Attorney General didn't even want to defend
13 it.

14 MR. RHYNE: Now, there is a federal statute,
15 Justice Marshall, that requires that any judge before
16 whom the constitutionality of a state statute or the
17 constitution is drawn in question, 2403(b), must notify
18 the state Attorney General --

19 QUESTION: But they did in that case.

20 MR. RHYNE: -- that this is true so that he
21 can be called -- come and defend it.

22 QUESTION: He was notified, and he said he
23 didn't want to come, and this Court says come, and he
24 did come.

25 MR. RHYNE: I think that it is still a state

1 statute.

2 QUESTION: But I mean it was a state statute
3 that was involved, and it was a state statute that was
4 declared unconstitutional.

5 MR. RHYNE: Well, if the state closes --

6 QUESTION: And the precinct judges were found
7 in pari delicto and fined \$5 apiece.

8 QUESTION: Mr. Rhyme, suppose we -- say we
9 study this out very carefully, based on your brief, and
10 I am very interested in listening to the merits of the
11 case.

12 MR. RHYNE: Well, I think also, Your Honor,
13 this statement that no state statute or constitutional
14 provision has been invalidated by the judgment below,
15 which is the second sentence in their brief, is a
16 statement that is very hard to defend, since the --

17 QUESTION: Your central point, though, doesn't
18 turn on this, does it?

19 MR. RHYNE: The Court of Appeals in about the
20 third line of its decision says that the lower court
21 declared this constitution and statute unconstitutional,
22 and then they affirmed it, so that statement is wrong.
23 Now, the appellees throughout their brief have
24 constantly claimed that it is Florida's constitution, it
25 is at large constitution that has caused the damage, and

1 statement after statement do they make in support of
2 that claim.

3 For example, two years after this case was
4 filed, in their pretrial statement, they say that they
5 are going to prove their case. Plaintiffs contend the
6 evidence will show intentional invidious racial
7 discrimination by the state of Florida, not by Escambia,
8 its officers and subdivisions, according to the
9 following alternative standards.

10 QUESTION: Mr. Rhyne?

11 MR. RHYNE: Yes?

12 QUESTION: This argument, as I understand the
13 response, goes only to whether this is a proper appeal
14 or whether instead it is a certiorari. Again, it
15 doesn't touch the merits of the case. I think all of us
16 hope you will get to the merits pretty soon.

17 MR. RHYNE: All right. I will merely end my
18 statement here about the constitutionality question and
19 go to the merits. The aforesaid at large election
20 system carry forward and perpetuate the effects of past
21 and potential devices employed by the state to
22 discriminate against blacks. And so we say under those
23 circumstances, under those conditions, this is Florida's
24 constitution, this is Florida's statutes, and not
25 Escambia's constitution, not Escambia's statute, and

1 that under Article 3, Section 2, Clause 1, the federal
2 courts have no jurisdiction.

3 With respect to the merits, I would first of
4 all address myself to something that they make a lot of
5 in connection with the so-called referendum. I assume,
6 Mr. Justice Brennan, that is what you have in mind.
7 Now, the referendums were not suggested by the blacks or
8 because there was any discrimination against them. They
9 had had a referendum on whether or not to consolidate
10 Pensacola and Escambia. That had been voted down. And
11 so the commissioners of the city of Escambia sought ways
12 and means of reforming and bringing up to date this
13 whole area that is simply bursting at the seams. You
14 have an enormous port there, the largest Naval air
15 station in the world, and they needed to reform their
16 government.

17 So, they appointed a charter study committee
18 of five, one of whom was a black, to draw up a new
19 charter for the county of Escambia, as they have a right
20 to do. And this charter committee worked for two years,
21 and on the 20th of January, 1977, they reported that
22 they were divided three to two. They reported, the
23 majority, a plan of five commissioners being elected
24 within districts and two at large, and in particular all
25 the powers that all of these various local officers have

1 to have. I have written a lot of these charters myself.
2 You have seen a lot of them.

3 Now, this charter by the majority was rejected
4 by the minority on two major grounds. Number One, they
5 said, we don't need a charter. It's too costly and too
6 complex. We don't need seven commissioners. Five is
7 enough. They ought to be non-partisan, elected within
8 the districts.

9 And so the commissioners then appointed
10 another study committee of five, and that committee
11 tried to put together the ideas of the two dissenters
12 and the three who were for this charter, and so they
13 worked for three or four months and came up with a new
14 charter, and they recommended five elected in
15 districts. They put in there -- the main thing they put
16 in there is that this could never be used to consolidate
17 Pensacola and Escambia. That seemed to be the major
18 thing that bothered the people there then, and they also
19 revised throughout the charter.

20 And when they finished that revision, they
21 called in their staff and had them go over it, and
22 finally, by August, they were ready to go public, so to
23 speak, with the results of the work on the charter, and
24 so they announced that they were going to release a
25 draft of this charter, and publish it -- they published

1 it in the newspaper. They gave out 15,000 copies to
2 various clubs, study clubs, and things like that, and
3 they would then have eight public hearings.

4 Now, let me stop here to say the big
5 difference between this charter study committee and a
6 charter commission under Florida law is, a charter
7 commission, you are required to have eleven to fifteen
8 members. They are supposed to work for 18 months and
9 produce a charter unless the time is extended, and then
10 when -- they hold three public hearings, and they turn a
11 charter in. The commissioners can't do anything about
12 it. They can't change it at all.

13 The commissioners here made tremendous changes
14 in this charter, and one of them was to keep the five
15 elected at large. Now, the other side pretends this was
16 the big thing that was before the people in connection
17 with the referendum which they announced would take
18 place on November 8th. They held these eight hearings.
19 They were shocked at the fact that only 15 or 20 people
20 came out to the various hearings. At one of these
21 hearings, three blacks did appear and say they wanted
22 single member districts, that blacks would get a fairer
23 deal if they had single member districts than if they
24 had elections at large.

25 And so after discussion and advertising and

1 all that kind of thing, they finally adopted on the 14th
2 of September a final draft which was published in the
3 newspapers, and was given to anybody who wanted to study
4 it, and that draft was voted on then in November and
5 defeated, and so then we were into 1978, and we come to
6 the pretrial statement of the appellees here, and again,
7 as in the complaint, the referendum wasn't mentioned in
8 the complaint, or the possibility of having it. It
9 wasn't mentioned in their pretrial statement. The
10 pretrial statement was just the one that I just read
11 you. It was all aimed at the state of Florida.

12 And so, at the hearing before Judge Arno, they
13 asked each one of the commissioners and they each
14 testified as to why they favored at large rather than
15 single member districts, and the general purport of it
16 was the problems are at large, and so therefore the cure
17 must be at large, and they --

18 QUESTION: The District Court found expressly
19 to the contrary.

20 MR. RHYNE: Pardon?

21 QUESTION: The District Court said that wasn't
22 so, that that was inconsistent with the manner in which
23 the county commission actually operates.

24 MR. RHYNE: Well, now --

25 QUESTION: Whose word are we supposed to take?

1 MR. RHYNE: -- what he -- that one
2 commissioner, Commissioner Beck, testified that he went
3 out and selected roads to be fixed and all that kind of
4 thing. Chairman Kelson and Deece and the others said
5 they operated countywide, and even Beck said he operated
6 countywide, so that is picking out one statement that
7 the one of the commissioners made, and the --

8 QUESTION: But the District Court did say, and
9 I quote them, that "this position," your position, "does
10 not stand foursquare with the present operation of the
11 commission and its business." That's what the District
12 Court said.

13 MR. RHYNE: I'm sorry. I didn't hear you.

14 QUESTION: They said, this explanation for at
15 large elections, the District Court said, "does not
16 stand foursquare with the present operation of the
17 commission and its business."

18 MR. RHYNE: Well, I think that is an erroneous
19 statement --

20 QUESTION: We have to do something with that
21 finding.

22 MR. RHYNE: That is an erroneous statement by
23 the District Court. So then we go to the -- he held
24 that on the consideration of the charter, that the
25 commissioners had all testified that they kept five for

1 good government reasons, and he also pointed out that
2 they filed a post-trial memorandum in which they said
3 that they wanted to keep the five to protect the
4 incumbency.

5 The Court of Appeals, when they got to that,
6 they said they had read the entire testimony. They
7 found no evidence whatever of racial motivation on the
8 part of the commissioners, and that protecting one's
9 incumbency didn't mean blacks qua blacks, and so
10 therefore reversed. They did grant a rehearing. They
11 did grant comments on the Rogers versus Lodge, and not a
12 rehearing at all.

13 And in doing so, they decided that the Rogers
14 versus Lodge was different from White versus Register
15 and Whitcomb versus Chavis, and the other cases like
16 Mobile versus Boulden, and therefore it had given them a
17 broader way to uphold -- give greater deference to the
18 findings of District Courts.

19 And they said, we are not taking back our
20 statement about the incumbency, and they didn't take
21 back their statement about having read all the evidence
22 and found no racial motivation. They said they
23 considered a broader range of evidence.

24 The broader range of evidence was all of this
25 discriminatory action by the state over the past 100

1 years. Their brief over and over again talks about the
2 discrimination, the black crow laws, the poll tax laws,
3 the white supremacy primaries and all those things,
4 Justice Marshall, for the past 100 years, the
5 discrimination of blacks throughout Florida, and they
6 didn't tie that into Escambia at all, and so --

7 QUESTION: Mr. Rhyne, may I interrupt with a
8 question? What do you understand the constitutional
9 issue to be? Is it --

10 MR. RHYNE: The constitutional issue is
11 equality. Are the voters --

12 QUESTION: No, but I mean -- Let me put it a
13 little differently.

14 MR. RHYNE: -- treated equally in the
15 electorate.

16 QUESTION: I understand that. What do you
17 suppose the case turns on? Does it turn on whether one
18 or more members of the commission had the wrong kind of
19 motivation? Is that the whole case?

20 MR. RHYNE: I don't think so. I think that
21 the --

22 QUESTION: What do they have to prove to win
23 in your view?

24 MR. RHYNE: I think that we had to prove that
25 people --

1 QUESTION: No, what do they have to prove to
2 win?

3 MR. RHYNE: Oh, they had to prove that they
4 were discriminated against, that they did get a full and
5 fair opportunity at the polls. Now, as I say, there
6 were 66 percent --

7 QUESTION: Well, you think they just had to
8 prove adverse effect, adverse effect on their voting --

9 MR. RHYNE: Yes. Point 9 --

10 QUESTION: That's all they had to prove?

11 MR. RHYNE: -- of them were registered, so
12 there were --

13 QUESTION: Well, I understand.

14 MR. RHYNE: Pardon? There was no
15 impediment --

16 QUESTION: I am trying to understand the
17 theory of the case, is what I am trying to --

18 MR. RHYNE: Yes.

19 QUESTION: And I am trying to first of all
20 understand what you understand their burden to be. What
21 did they have to prove in order to win?

22 MR. RHYNE: They had to prove that there was
23 some racial reasons to keep them from the polls and from
24 them having equality.

25 QUESTION: Now, racial reasons held by whom?

1 You say, I take it, the state's racial reasons would be
2 irrelevant.

3 MR. RHYNE: Well, I think they had to prove
4 held by the people in Escambia.

5 QUESTION: By that do you mean the five
6 commissioners or the voters?

7 MR. RHYNE: The five commissioners and the
8 state itself, since everything was run by the state.

9 QUESTION: You say that they had to prove that
10 there was discriminatory animus on the part of the state
11 and all five commissioners, three commissioners, or one
12 commissioner?

13 MR. RHYNE: Well --

14 QUESTION: What is your view?

15 MR. RHYNE: There were only four of them at
16 the time this came along, so --

17 QUESTION: Well, what do you think they had to
18 prove? That is what I am trying to find out.

19 MR. RHYNE: Well, they had to prove some
20 racial discrimination against them that prevent them
21 from having an equal vote, that they didn't have equal
22 access to the nominating and election proceedings, and
23 the --

24 QUESTION: We know what the voting was. Does
25 the subjective state of mind of anybody make any

1 difference?

2 MR. RHYNE: The projected state of mind?

3 QUESTION: Subjective. Subjective. The actual
4 motivation of any individuals. Does that make any
5 difference in the outcome of the case?

6 MR. RHYNE: Well, I would say they did. I
7 think the -- to show the one difference, at least, the
8 legislative committee came along and proposed a new
9 referendum which --

10 QUESTION: Well, I understand it is your
11 position that there was no adverse -- no wrongful
12 motivation.

13 MR. RHYNE: That is right.

14 QUESTION: I am just trying to understand what
15 your legal theory is as respects what they had to prove
16 in order to prevail.

17 MR. RHYNE: They had to prove that the state
18 itself, which put this system in, maintained it, and
19 operated it, did so for racial discrimination purposes
20 in Escambia.

21 QUESTION: And if they prove that, are they
22 entitled to prevail?

23 MR. RHYNE: Yes.

24 QUESTION: That means we don't have to examine
25 the motivation of the county commissioners, if I

1 understand you.

2 MR. RHYNE: Well, I think that's a part of it,
3 but you don't have any racial discrimination in Escambia
4 at all, and so I think that they had to show that that
5 statement --

6 QUESTION: But I understand you to be
7 conceding they don't have to prove any in Escambia,
8 either.

9 MR. RHYNE: Pardon? Yes, they do. Yes. They
10 have to prove that the --

11 QUESTION: It seems to me you are giving me
12 two or three different answers to -- Do they or do they
13 not have to prove that members of the county commission
14 were prejudiced against black citizens?

15 MR. RHYNE: Yes.

16 QUESTION: They do have to prove that?

17 MR. RHYNE: Yes.

18 QUESTION: And how many commissioners do they
19 have to prove had that kind of motivation?

20 MR. RHYNE: Well, I would say they had to
21 prove that a majority of them, and I think, though, that
22 this case, and I hope when the Court thinks about it,
23 really turns on the jurisdictional point that the state
24 controlled everything, and that the Escambians had
25 nothing to say about it. There was no complaint from

1 anybody about the polls and about voting, no impediments
2 whatever, no complaints about the services rendered, no
3 complaints about access. All the complaints were
4 related to the state.

5 CHIEF JUSTICE BURGER: Mr. Menefee.

6 ORAL ARGUMENT OF LARRY T. MENELEE, ESQ.,

7 ON BEHALF OF THE APPELLEES

8 MR. MENELEE: Mr. Chief Justice, and may it
9 please the Court, I would like to discuss the merits of
10 the case. There are two substantive issues, one
11 involving a decision on liability, and the second
12 involving a decision on the remedy.

13 First, concerning the decision on liability,
14 we contend that the judgment should be affirmed under
15 the doctrine of Pullman Standard v. Swint and Rule 52 of
16 the Federal Rules of Civil Procedure. The District
17 Court made an intensely local appraisal, and the
18 district judge lived in the community, and on the basis
19 of that concluded that the at large election system had
20 both the purpose and effect of diluting black voting
21 strength, and the Court of Appeals affirmed.

22 The District Court had before it substantial
23 evidence which in summary showed the following. First,
24 historically the election structure had been manipulated
25 at every opportunity to minimize black participation.

1 Second, the two charter study committees in 1975 and
2 '77, which has been referred to in Mr. Rhyne's
3 statement, had both made recommendations for single
4 member districts, and the rejection of those
5 recommendations was taken for the purpose of continuing
6 the dilution of black voting strength. Third --

7 QUESTION: When you say rejection, Mr.
8 Menefee, rejection by whom?

9 MR. MENEFE: The county commission rejected
10 the recommendations of the charter study commissions.

11 QUESTION: And you say that the record
12 supports a finding that the reason for their rejecting
13 this recommendation was racially motivated?

14 MR. MENEFE: We believe that -- yes. The
15 district judge's conclusion that that motivation was
16 infected with discriminatory animus is supported. Yes,
17 sir.

18 QUESTION: May I ask you the same question I
19 asked your opponent?

20 MR. MENEFE: Yes, sir.

21 QUESTION: How many people voted against the
22 -- participated in this decision on the commission?

23 MR. MENEFE: It is my understanding that both
24 times it was a unanimous decision by the county
25 commission.

1 QUESTION: And would it be sufficient to
2 establish your case to prove that two people had the
3 wrong kind of motivation?

4 MR. MENEFEE: Your Honor, I don't think it
5 is --

6 QUESTION: What if one of them came in and
7 frankly testified that he wanted to preserve white
8 supremacy in the county? Would that be enough?

9 MR. MENEFEE: I believe under existing case
10 law, that's correct.

11 QUESTION: That it would be enough?

12 MR. MENEFEE: Yes, sir.

13 QUESTION: Do you interpret the District Court
14 as having found anything more than that?

15 MR. MENEFEE: More than one person?

16 QUESTION: Yes.

17 MR. MENEFEE: I don't believe the District
18 Court is clear how many. I don't believe it identified
19 the number of actors. I believe it did identify the
20 actors, and I believe it did it in a contextual sense of
21 a long history of similar decisions being made in regard
22 to county government in particular and other
23 contemporary events. The district judge lived in that
24 community and saw with regard to the city government
25 change and to the school board change that also took

1 place at the same time.

2 QUESTION: You contend, if I understand your
3 brief correctly, that even if none of the five had the
4 wrong kind of motive, still the state practices were
5 sufficient to condemn the plan. Is that correct?

6 MR. MENEFEE: Yes, sir, I believe so. I
7 believe it would be. And if I have misunderstood your
8 question from the beginning, I felt the question was
9 what was shown, and I believe it was shown --

10 QUESTION: Well, very frankly, I think it is
11 important to know, when we say there is an invidious
12 purpose, whose purpose we are talking about, and how
13 much, how many people we have to --

14 MR. MENEFEE: Whose purpose and how much
15 purpose.

16 QUESTION: I think the law is unclear, and I
17 am trying to find out what the record in this case is
18 and what the parties are contending. That is all.

19 MR. MENEFEE: Yes, sir.

20 QUESTION: Mr. Menefee --

21 MR. MENEFEE: Yes, ma'am.

22 QUESTION: -- if the District Court only found
23 that the commissioners failed to recommend a single
24 member district plan to the voters, why should the
25 remedy by the court be anything other than telling them

1 to submit it to the voters?

2 MR. MENEFEE: It is a continued maintenance of
3 the at large election system. It was not merely a
4 failure. It was indeed a rejection or overturning, if
5 you will. That would be the way I would prefer to cast
6 the --

7 QUESTION: Well, if the offense was simply not
8 submitting to the voters, I don't know why the remedy
9 wouldn't flow from that.

10 MR. MENEFEE: Justice O'Connor, I think that
11 what it shows, and put in this long historical record
12 that is in this case, and I don't believe has been in
13 another case before this Court, every time the elections
14 -- there was an opportunity for blacks to participate in
15 the election system, the system changed to minimize
16 their participation. This is the most recent example.

17 Put in that context, this was a continued
18 maintenance of the discriminatory system.

19 QUESTION: What happened in the most recent
20 election under the new plan? Was a black elected?

21 MR. MENEFEE: Yes, and for -- a black was
22 elected for the first time in recorded history. Six
23 black candidates sought election, 150 percent more than
24 had ever sought election to the Escambia County
25 commission in all of history. It was a significantly

1 different election. The black voter turnout was
2 substantial.

3 QUESTION: Is the case now moot because of the
4 withdrawal of the District Court order, in your view?

5 MR. MENEFEE: I believe the remedy issue is
6 probably moot. I am a little concerned about using the
7 precise term. I believe the remedy issue is moot. I
8 believe the liability issue is alive, with the exception
9 of the pending motion for dismissal. I don't believe
10 the Court has addressed that question.

11 QUESTION: Mr. Menefee, may I ask, do I
12 correctly read the District Court as resting its
13 conclusion of law upon a violation of amended Section 2
14 of the Civil Rights Act?

15 MR. MENEFEE: No, Your Honor. I am sorry.
16 The District Court --

17 QUESTION: May I ask -- What I am looking at
18 is that 101(a) of the appendix, "With respect to 42 USC
19 1973, the Court concludes that the plaintiffs have
20 established claims for relief under this section." Was
21 that the finding of liability? Not on the
22 constitutional ground, but on that?

23 MR. MENEFEE: The District Court found
24 liability under the unamended Section 2 --

25 QUESTION: Yes.

1 MR. MENEFEE: -- and under the Fourteenth and
2 Fifteenth Amendments.

3 QUESTION: Under both.

4 MR. MENEFEE: Yes. The Court of Appeals --

5 QUESTION: Never addressed the statutory.

6 MR. MENEFEE: -- never addressed the
7 statutory, and only found on the Fourteenth Amendment.

8 QUESTION: Ordinarily I think courts address
9 statutory grounds before they address the constitutional
10 ones.

11 MR. MENEFEE: The election -- Well, there is a
12 long footnote in the Court of Appeals opinion about why
13 they would not ask for further briefs to address the
14 recently amended Section 2 claim, and quite candidly,
15 this case is perhaps in some way almost a dinosaur. I
16 mean, the amended Section 2 is not here. I really
17 believe that what this Court is going to see in the
18 future will be cases coming under the amended Section
19 2. I don't believe --

20 QUESTION: Well, don't you rest on the amended
21 Section 2?

22 MR. MENEFEE: Your Honor, yes. We believe the
23 Court could reach that. We have not briefed it. And we
24 filed our complaint under Section 2, and we believe the
25 amended Section 2 --

1 QUESTION: Is a fortiori?

2 MR. MENEFE: Yes. It is -- we can prevail on
3 that whether this Court wants to consider it or whether,
4 if you want further briefing, and you send it back to
5 the Court of Appeals to address that issue --

6 QUESTION: So you talk about the liabilities.
7 What do you mean by that? Did you sue for damages?

8 MR. MENEFE: No, sir, I just meant the --

9 QUESTION: Well, what is the liability that is
10 still open?

11 MR. MENEFE: I don't believe -- no, in my
12 opening statement I only meant to address a violation or
13 not of the Fourteenth Amendment.

14 QUESTION: Well, then, I ask you, what is now
15 open?

16 MR. MENEFE: Before this --

17 QUESTION: Before us.

18 MR. MENEFE: Before this Court is that
19 question of --

20 QUESTION: What question?

21 MR. MENEFE: The question of whether or not
22 the Fourteenth Amendment was violated, whether or not
23 the at large election system denies equal protection of
24 the law. We believe the remedy issue is moot.

25 QUESTION: Well, are you talking about the

1 order that has been withdrawn? What order is now
2 denying your people any rights?

3 MR. MENEFE: The order that I understand is
4 before the Court is the judgment from the Court of
5 Appeals that reached both the liability and remedy. We
6 think subsequent events have mooted the remedy question.
7 We think the remedy issue -- the liability issue is
8 still before the Court.

9 QUESTION: What remedy do you want?

10 MR. MENEFE: We want affirmance from and
11 continuation --

12 QUESTION: Affirmance of what?

13 MR. MENEFE: Of the District Court's remedial
14 order. The District Court's judgment.

15 QUESTION: Is that the one that has been
16 withdrawn?

17 MR. MENEFE: We are affirming -- I am sorry. --
18 We are affirming the Court of Appeals, the judgment of
19 the Court of Appeals, is where we stand.

20 QUESTION: But what --

21 MR. MENEFE: Excuse my confusion.

22 QUESTION: Why do you think the remedy order
23 is moot?

24 MR. MENEFE: Because of the subsequent -- I
25 hate to use -- the term "mootness" may be slightly more

1 technical than I am willing to go.

2 QUESTION: Did the District Court withdraw its
3 order?

4 MR. MENEFEE: No, Your Honor, it did not
5 withdraw its order. It wasn't even before the District
6 Court to withdraw in that sense. The 1980 Census came
7 out. A new districting plan had to be fashioned. The
8 county commissioners submitted another plan. The new
9 plan had different boundaries, was considered and
10 rejected. The 5-2 plan was rejected for different
11 reasons than the reasons that are before the Court for
12 this, and it is presently pending before the Court of
13 Appeals for the Eleventh Circuit.

14 QUESTION: And why do you think there is
15 anything left in the case? I mean, I am not just
16 talking about the remedy.

17 MR. MENEFEE: I am only cautious, perhaps. On
18 the remedy issue, I don't --

19 QUESTION: Well, what about -- you say
20 liability. Why is there anything left of that?

21 MR. MENEFEE: I think -- Well, I think this
22 Court could determine -- I think this Court could
23 determine that the decision below is erroneous, as they
24 have accepted all of the arguments, and vacate all the
25 orders below and order re-establishment of the at large

1 election system. That does not reach the question of
2 whether the appeal can be maintained --

3 QUESTION: I see.

4 MR. MENEFEE: -- by the two minority members
5 of the commission.

6 QUESTION: If we disagreed with the Court of
7 Appeals and said there was no intentional
8 discrimination, there never should have been
9 disestablishment of the at large election system, the
10 new election would be beside the point.

11 MR. MENEFEE: That's correct. The Section 2
12 issue would still remain.

13 QUESTION: I agree with you.

14 MR. MENEFEE: In the 1980 redistricting, and
15 the adoption of the single member districts under the
16 1980 plan, was under somewhat of the force of the
17 District Court's order in this case.

18 MR. MENEFEE: That's correct. After the Court
19 of Appeals issued its opinion on the mandate issue, the
20 District Court asked for new plans in light of the 1980
21 Census, and for a schedule of elections.

22 QUESTION: And by the same token, the three
23 new Commissioners are a product of what is claimed to
24 have been an illegal election. Or an illegal system.

25 MR. MENEFEE: Yes, sir. Without quibbling

1 over the illegality term, yes, sir. I guess that would
2 be their position. I don't want to argue his case for
3 him.

4 QUESTION: Mr. Menefee, you just said the
5 Section 2 issue would remain. Since the Court of
6 Appeals never addressed the Section 2 issue -- Am I
7 correct, it did not?

8 MR. MENELEE: Yes, that's correct.

9 QUESTION: It went to the constitutional
10 issue.

11 MR. MENELEE: That's correct.

12 QUESTION: Why don't we follow what quite
13 often we would do when we tell Courts of Appeals they
14 ought to address statutory before they reach
15 constitutional issues? Why don't we send it back and
16 tell them, you said the Section 2 issue, at least, is
17 still in the case, and let them decide?

18 MR. MENELEE: We believe the case is so
19 strong, we would be glad for you to go ahead and rule in
20 our favor on the constitutional issue, but certainly
21 that is, I understand, a common practice of the Court.

22 QUESTION: We can ask the Court of Appeals to
23 issue an advisory opinion? What else is there other
24 than the advisory opinion?

25 MR. MENELEE: Well, because of the, I

1 understand --

2 QUESTION: If we can't issue advisory
3 opinions, I don't see how we can tell the Court of
4 Appeals to.

5 MR. MENEFEE: Because of the established
6 practice of desiring a decision on statutory rather than
7 constitutional grounds, that may warrant that practice.

8 The other principal evidentiary facts --

9 QUESTION: But you want the single member
10 district system to stay in place.

11 MR. MENEFEE: Yes, sir.

12 QUESTION: And if you lose this case, it may
13 not stay in place.

14 MR. MENEFEE: That's correct.

15 QUESTION: If we reverse the Court of
16 Appeals.

17 MR. MENEFEE: If you reversed on
18 constitutional or some way reached the statutory --

19 QUESTION: Then you are back to Square One.
20 You are back to Square One when you started this
21 lawsuit.

22 MR. MENEFEE: That's right.

23 Continuing with the list of the evidentiary
24 factors that are in this record, there is a massive
25 record of racially polarized voting. It is my best

1 judgment that over 200,000 groups of data were entered
2 into the computer for the 168 regression analysis. No
3 black has ever won election in Escambia County until the
4 elections this past fall under the single member
5 district plan. There is substantial evidence of
6 socioeconomic disparity between black and white
7 citizens. There is evidence of significant barriers to
8 black candidate recruitment, black voter turnout, and
9 black political participation.

10 Also, this system features numbered place and
11 majority vote requirements which have no rational basis
12 other than to protect the entrenched majority.

13 To briefly address the --

14 QUESTION: Well, now, when you say protect the
15 entrenched majority, I think the Court of Appeals spent
16 some time with this, that several of the commissioners
17 voted against the new plan because of their desire to
18 preserve their incumbency. I didn't see that that was
19 necessarily a racial factor at all. I mean, they might
20 well have wanted to preserve their incumbency against
21 blacks or whites.

22 MR. MENEFEE: I don't think that factor
23 standing as -- I agree with you to that extent, Justice
24 Rehnquist. That statement of I want to protect my
25 incumbency, I can't say that that is racially motivated,

1 but I think the problem the District Court found is that
2 the statements were inconsistent, they did not stand
3 foursquare with the operation of the county. It wasn't
4 a very credible performance. So that was -- Their
5 proffered reasons were disbelieved. The District Court
6 had not only the testimony of those four commissioners.
7 Members of those charter government study committees
8 testified. Transcripts of public hearings were before
9 the district judge, and the final reports of those study
10 committees were there.

11 QUESTION: I thought either the District Court
12 or the Court of Appeals, and I can't remember which, put
13 some weight in putting together this discriminatory
14 calculus on the fact that they thought the commissioners
15 were against the plan for single member districts
16 because the commissioners wanted to hang onto their
17 jobs.

18 MR. MENEFEE: Well, that factor is discussed,
19 I believe, in both opinions, prominently also in the
20 District Court opinion, but no, I don't believe -- I do
21 not -- I don't think either of the courts equated the
22 desire to maintain incumbency with that direct to
23 racial. It is not a straight linear equation, if you
24 will, with the racial animus.

25 It is a contextual thing of the incredible

1 testimony or lack of credible testimony that the
2 commissioners gave, the testimony from the other
3 witnesses that took the stand that served on this
4 committee, the written reports, the public transcripts,
5 the actions taking place in the city and the school
6 board near the same time, the long historical evidence,
7 and then the whole line of indicia that the Court
8 considered in Rogers v. Lodge, the line of indicia that
9 has come down from White v. Register through Rogers v.
10 Lodge, the polarized voting, lack of black candidates,
11 socioeconomic disparity, and that sort of thing, and all
12 of that is in this record, plus this historical both, if
13 you will, ancient historical and contemporary evidence
14 of intent.

15 QUESTION: May I ask, just to refresh my
16 recollection, is there a residency requirement in the
17 five commissioners, or just the numbered polls?

18 MR. MENEFE: Oh, yes, I see. Yes, there was
19 a residency -- there is a residency requirement attached
20 with the at large system. They had five residency
21 subdistricts.

22 QUESTION: There is sort of an inconsistency
23 between running government as, say, a community-wide
24 thing, and also a local district. Is there any
25 explanation of why they have that specific combination?

1 MR. MENEFEE: Not in the record. The only
2 explanation I have ever heard is, as has been referred
3 to in opinions, so everybody can't live on the same
4 block, but that is the very inconsistency that the
5 district judge focused on when he heard these
6 commissioners talk about how they would go back into
7 their district, and they called it their district, and
8 see about their neighbor's road, repair this bridge, or
9 what have you, and then run at large and take an oath
10 under the Florida constitution to represent the entire
11 county.

12 QUESTION: When the -- during the period that
13 the white primary was enforced, the primary voting, was
14 that by district or at large?

15 MR. MENEFEE: That, as the District Court
16 called it, anomalous situation. From approximately the
17 turn of the century, after all of the -- most of the
18 disenfranchising devices had taken effect, blacks were
19 removed from the electorate, then they went to the
20 situation where the all-white Democratic primary was
21 conducted from single member districts, but the general
22 election, which in my part of the country didn't mean a
23 whole heck of a lot back then, was conducted at large.
24 They let black folks vote in the general election, but
25 not in the single member district Democratic primary,

1 which was the effective -- the election that really
2 counted.

3 There are three principal historical errors,
4 if you will. From the Civil War to the turn of the
5 century, blacks were allowed to vote. They were
6 registered, and in some north Florida counties
7 constituted a majority of the voters. The fear of
8 perhaps a black getting elected and holding a county
9 commission or school board office, they didn't even hold
10 elections then. They had them by gubernatorial
11 appointment, because the state of Florida was majority
12 white.

13 Then, once blacks were disenfranchised, at the
14 turn of the century, they went to this anomalous system
15 of single member district primary elections and at large
16 general elections. Then, World War Two, veterans
17 returned, black veterans returned, and want to
18 participate in government. Smith v. Alright strikes
19 down the all white Democratic primary, and the rules of
20 the game are changed again.

21 This time, they abolish the single member
22 district Democratic primaries, and go to the at large
23 Democratic primaries. So those there major historical
24 shifts put in the context with the manipulation, if you
25 will, of these charter government study committee

1 reports, the very specific contemporary evidence of a
2 similar change in the city of Pensacola government in
3 1959 and the school board of Escambia County in 1976,
4 that's the contextual arena that the district judge had
5 to -- made this finding of intent.

6 And that doesn't even touch the polarized
7 voting and lack of black candidates, no blacks ever
8 having been elected, the other factors that this Court
9 has referred to in other opinions.

10 I would note some of the other evidence in the
11 record. I mentioned the substantial record on polarized
12 voting, approximately 168 regression analyses. Not only
13 did this measure the polarized voting and produce
14 scatter diagrams for all of those elections. We also
15 ran a test to measure voter turnout. This was confirmed
16 by other studies, and it showed that blacks turned out
17 at a rate of approximately half that of white voters.

18 And this, we think, is a significant measure
19 of black political participation. It is one thing to
20 have a voter registration drive and urge people to go
21 down and get their names at the polls, but the degree
22 that people are hooked into the political system, the
23 degree that they vote and participate, political
24 scientists call it political socialization.

25 I grew up in a house where my parents sat

1 around the table and we would talk politics, and you had
2 a duty to go vote. That has essentially been an
3 institution that has not been present -- as present in
4 the black community, and it hasn't been present because
5 blacks haven't been seeking office or candidates who
6 address the interests of black citizens haven't been
7 seeking office.

8 And we did run tests on some white candidates
9 who had -- generally they were Presidential candidates
10 or outside of Escambia County jurisdiction, and the same
11 phenomena occurs. In many cases black voters will go to
12 the poll, and if there is a candidate that has addressed
13 their interests, they will vote in that race, but
14 contrary to the behavior of most white voters, they will
15 not pull the lever on all those other races that are on
16 the ballot, and that is what the social scientists are
17 talking about in terms of political socialization. How --
18 are involved are you in the system? Have you had the
19 opportunity to work on a campaign or get involved with
20 -- see that your interests are at stake?

21 It is like, I believe, Justice Marshal
22 referred to in Boulden v. City of Mobile, casting
23 meaningless ballots. I am afraid that that is the way
24 most of the black voters in Escambia County, Florida,
25 view their situation under the at large system.

1 QUESTION: Mr. Menefee, it is not your
2 position, I take it, that at large elections are per se
3 invalid.

4 MR. MENEFE: Absolutely not. Absolutely not.

5 QUESTION: Tell me this. I have never been to
6 your county. In some counties in Florida you have very
7 substantial Spanish American citizens. Do you have
8 those in your county?

9 MR. MENEFE: I don't know the exact figure,
10 but no, it is a small portion of the population, I think
11 less than 1 or 2 percent.

12 QUESTION: If you had the same percentage of
13 Mexican -- of Spanish American citizens, would they be
14 entitled to a separate district?

15 MR. MENEFE: I think there are a number of
16 problems with the disclaimer. That is not part of our
17 case. But proceeding beyond that to address it, yes,
18 sir. Certainly Mexican American citizens, like all
19 citizens, can assert a claim under the Fourteenth
20 Amendment. In formulating a remedy, I think this Court
21 has wisely adopted a policy favoring single member
22 districts.

23 It is a simple, straightforward method. If
24 there are residential concentrations, if it has been
25 shown that Mexican Americans have been excluded from the

1 political process over a period of time, a substantial
2 period of time -- we are not talking about an episodic
3 event that occurs once, we are not talking about --
4 then, yes, and if they have stated a claim, I mean, if
5 they have come forward and joined in the litigation. I
6 am not sure of the full range of your hypothetical,
7 Justice Powell.

8 QUESTION: Well, I know that Section 2 of the
9 Voting Rights Act is not here, but as I understand that
10 section -- we have never interpreted it, but my
11 understanding of it is that discriminatory intent is
12 irrelevant. What counts is the effect, so that the
13 effect would be the same under that section.

14 MR. MENEFEE: Section 2 has --

15 QUESTION: So if you had, just to carry it a
16 little farther -- What puzzles me about this whole area
17 of the law is how far it may be carried. The majority
18 voting in the United States has always been the norm.
19 Suppose you had 19 percent of Orientals, and so on down
20 the road. Are we going to fractionate indefinitely the
21 population to that extent?

22 MR. MENEFEE: Those are difficult questions,
23 and I don't believe that they have to be addressed --

24 QUESTION: They don't have to be answered
25 today.

1 MR. MENEFEE: -- today. Thank goodness.
2 Section 2 does have either purpose or effect. So you
3 can prevail under either standard under the amended
4 Section 2. But I think the fundamental question is fair
5 and effective representation, and as this Court has had
6 to deal with since Baker versus Carr and Reynolds versus
7 Simms, fair and effective representation has in those
8 cases focused on a numerical figure of maximum deviation
9 from an ideal district.

10 Every citizen has a right to that, and it is
11 just as possible to gerrymander districts by having one
12 giant district, having five smaller districts, or even
13 as one plan that was submitted and I think later
14 withdrawn early in this litigation by the county -- we
15 called it the Bantustan plan -- proposed having one
16 district in the middle of the county that would be black
17 and the other four commissioners would be elected at
18 large from the rest of the county. That plan was
19 withdrawn perhaps after we named it the Bantustan plan
20 after the South African homelands.

21 But these systems can all be manipulated. It
22 is as much a political decision to have an at large
23 system as it is to have district system and as much a
24 political decision as to have the district lines
25 withdrawn.

1 So we have had -- This Court has developed a
2 long line of cases from the one person, one vote
3 concept, and has had a rather easily manageable, rather
4 easily manageable standard, judicially manageable
5 standard of numerical equality, but black citizens have
6 a strong claim for protection under the Fourteenth
7 Amendment, and what this case shows is that at large
8 election systems can have and has had in this case for
9 many, many, many years, far more than a dicennial
10 Census, the opportunity to dilute the vote of a
11 minority, to deny it equal protection under the laws.

12 If there are no further questions, thank
13 you.

14 CHIEF JUSTICE BURGER: Do you have anything
15 further, Mr. Rhyne? You have only one minute
16 remaining.

17 ORAL ARGUMENT OF CHARLES S. RHYNE, ESQ.,
18 ON BEHALF OF THE APPELLANTS - REBUTTAL

19 MR. RHYNE: In that one minute, I want to say
20 that all of the matters that he was referring to of
21 discrimination were state action and not action by
22 Escambia County.

23 CHIEF JUSTICE BURGER: Mr. Santuri, are you
24 prepared? Does your constituency wish to be heard on
25 the oral argument to dismiss, on an oral argument to

1 dismiss the case?

2 ORAL ARGUMENT OF MR. SANTURI, ESQ.,

3 ON MOTION TO DISMISS

4 MR. SANTURI: Mr. Chief Justice, I am prepared
5 to address the motion to dismiss.

6 Mr. Chief Justice and Members of the Court,
7 may it please the Court, Florida law is clear that a
8 county has no voice, can take no act except as directed
9 by the board of county commissioners. In this
10 particular instance an election was held. The
11 composition of the board of county commissioners has
12 changed. What had previously been a unanimous decision
13 to carry forward the appeal on this matter has now
14 changed. A majority of the board of county
15 commissioners voted in a legal meeting to dismiss this
16 appeal.

17 QUESTION: The present majority owes its
18 office to the fact that the court imposed the single
19 member district plan, does it not?

20 MR. SANTURI: Mr. Justice Rehnquist, that is a
21 yes, but it is a qualified yes. The former members,
22 that is, all five members of the board of county
23 commissioners -- we have a five-member system in
24 Escambia County -- they were only in office but for the
25 fact that the elections had been stayed. Those

1 elections probably would have been heard or would have
2 been had well before 1983, but for --

3 QUESTION: But on an at large basis.

4 QUESTION: On an at large basis.

5 MR. SANTURI: On an at large basis, yes. And
6 I might point this out to the Court, that all the
7 incumbents ran on a platform that was constituted of or
8 consisted of saying that they intended to maintain this
9 lawsuit, and all except for one was defeated. The three
10 of the majority members, they made it a very strong
11 point that they had had enough of this lawsuit, and they
12 thought Escambia County had, and they wanted to withdraw
13 it.

14 Now, I did mention that a majority of the
15 board of county commissioners voted. Florida does not
16 recognize majority, minority positions on its board of
17 county commissioners. There is one position of the
18 board of county commissioners.

19 QUESTION: The majority must decide that
20 position, must it not?

21 MR. SANTURI: That is correct, Mr. Chief
22 Justice, the majority must, but the board --

23 QUESTION: So there is a position of the
24 county commissioners before the Court now, today.

25 MR. SANTURI: That is correct.

1 QUESTION: That position is to dismiss the
2 appeal.

3 MR. SANTURI: Yes, sir, to dismiss the
4 appeal. Florida law is clear that an individual member
5 of the board of county commissioners has no authority.

6 QUESTION: Well, what you say would make a
7 great deal more sense to me if you were talking about an
8 orthodox appeal where the county, say, had a money
9 judgment against it, and do we appeal from the District
10 Court to the Eleventh Circuit, do we appeal to the
11 Supreme Court of Florida, and a new group of
12 commissioners is elected. They say, this lawsuit just
13 isn't worth what it is costing us. Let's give up the
14 appeal. Surely the county ought to have the final say
15 in that.

16 But here, in effect, if the principle you are
17 contending for is correct, the District Court could
18 impose a perfectly outrageous redistricting plan on
19 Escambia County, put it into effect. The new
20 commissioners all come into office by virtue of that
21 plan. When they get in, they vote to abandon the
22 appeal. So that in effect the District Court's judgment
23 is never reviewable.

24 MR. SANTURI: Justice Rehnquist, I think it
25 is. There is a vehicle, there is a legal means by which

1 this election can be attacked, but in this particular
2 case, the position we are at now with all the parties
3 being realigned or misaligned, I don't think the correct
4 pleadings are before this Court.

5 QUESTION: Is it your position really that the
6 case is moot?

7 MR. SANTURI: As Mr. Menefee said, I hate to
8 go into the -- to use that term, "mootness." I am just
9 concerned about the underlying court decisions and what
10 effect it may have if this Court, or if we were to urge
11 that it be dismissed as moot.

12 QUESTION: Well, I think if you are going to
13 say it is moot, why, we would vacate the judgment of the
14 Court of Appeals, direct the Court of Appeals to remand
15 it to the District Court with instructions to dismiss
16 the entire case, and if the case isn't moot, I don't
17 know what business we've got dismissing it.

18 MR. SANTURI: What I would suggest is that the
19 persons that are attempting to maintain the suit do not
20 have the requisite interest in this particular case.

21 QUESTION: Aren't there two -- Didn't the
22 District Court -- Aren't the individual -- The
23 individual commissioners, old commissioners, were
24 parties to the suit.

25 MR. SANTURI: That is correct.

1 QUESTION: And it was maintained in their
2 individual capacity, not just their official capacity.
3 Those two are still members of this -- still parties to
4 this lawsuit, aren't they? Aren't they?

5 MR. SANTURI: Justice White, that is correct.
6 That is correct. But as you well know --

7 QUESTION: All right. So apparently somebody
8 like the district judge thought they had an interest in
9 their individual capacity, wholly aside from their
10 position as commissioners.

11 MR. SANTURI: Well, I am bound by what the
12 judge found and what is in the record, and as you
13 probably noted, when the supplemental brief was filed by
14 the appellees there was an excerpt from Judge Arno's
15 order, and he stated that his only reason for keeping
16 them in there was not for any liability that they faced
17 as far as costs, attorney's fees, or any individual
18 liability. He only left them in in order that he could
19 enforce his injunctions against them personally in the
20 event that the board of county commissioners was to take
21 a position contrary to his supporters.

22 QUESTION: Well, haven't those two got some
23 interest in having the injunction, if it is outstanding
24 against them, lifted? I would. I would think you
25 wouldn't like to be under some injunction if it were

1 illegal, would you?

2 MR. SANTURI: That is correct. However --

3 QUESTION: Well, why is the case moot then?

4 If you want to say it is moot, you ought to say it is
5 moot. Then we can really get rid of these judgments.

6 MR. SANTURI: I do believe the mootness issue
7 was addressed in the appellee's brief.

8 QUESTION: Well, your position, as I
9 understand it, isn't that it is moot. It is that you
10 are the party that at one time -- you represent the
11 party that sought to challenge the Court of Appeals for
12 the Eleventh Circuit's judgment. Your client has now
13 changed its mind. It no longer wants to challenge the
14 Court of Appeals' judgment.

15 MR. SANTURI: That is correct.

16 QUESTION: That doesn't mean it is moot. It
17 just means you want to give up the petition.

18 MR. SANTURI: We are tired of the lawsuit, in
19 other words, and we want to withdraw.

20 QUESTION: All you want is to dismiss the
21 appeal of this Court, period.

22 MR. SANTURI: That's correct. I don't want to
23 go --

24 QUESTION: And let stand everything that
25 happened below.

1 MR. SANTURI: That is correct, Your Honor.

2 QUESTION: The only thing is, you don't happen
3 to represent the two individual commissioners.

4 MR. SANTURI: I represent the board of county
5 commissioners.

6 QUESTION: Yes. Well, they have two
7 individual commissioners who are parties in their own
8 right.

9 MR. SANTURI: But we are saying that they do
10 not have the requisite interest in this particular case
11 to force the county to keep pursuing the appeal.

12 QUESTION: Well, to pass on the issue that you
13 have raised, the Court would have to decide whether
14 these two have any interest to preserve.

15 MR. SANTURI: I believe that's correct, Mr.
16 Chief Justice.

17 QUESTION: Of course, it would be a nice thing -
18 -- if that is really an issue, I suppose we could remand
19 this to the Court of Appeals for two or three reasons,
20 one, to consider your point first; secondly, if there is
21 still a live case, to consider -- reconsider the matter
22 under Section 2 of the Voting Rights Act.

23 MR. SANTURI: Remand may be the correct
24 vehicle in order to -- There are some factual assertions
25 that have been made through the supplemental briefs, and

1 that may be the appropriate vehicle.

2 QUESTION: And it may be that the Court of
3 Appeals couldn't solve it. It would have to remand it
4 to the District Court.

5 MR. SANTURI: That is correct, Justice White.

6 QUESTION: May I ask, in your opinion, whom
7 does Mr. Rhyne represent?

8 MR. SANTURI: Justice Stevens, I believe that
9 he has named Commissioner Dickson, Commissioner Kelsey,
10 and he represents also certain former members of the
11 board of county commissioners.

12 QUESTION: He has certainly made it clear he
13 thinks there is something he wants to fight about.

14 MR. SANTURI: I believe he did state that
15 position, Mr. Justice Stevens.

16 CHIEF JUSTICE BURGER: Thank you, counsel.

17 MR. SANTURI: Thank you, Chief Justice.

18 CHIEF JUSTICE BURGER: Thank you, gentlemen.
19 The case is submitted.

20 (Whereupon, at 2:22 o'clock p.m., the case in
21 the above-entitled matter was submitted.)
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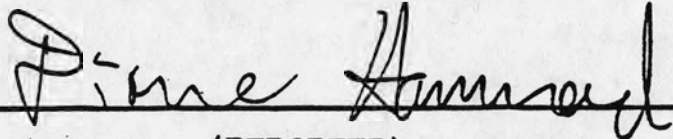
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1295 - ESCAMBIA COUNTY, FLORIDA, ET AL., Appellants v.
HENRY T. McMILLAN, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsaid", written over a horizontal line.

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