OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-6263

TITLE JAMES KIRKLAND BATSON, Petitioner V. KENTUCKY

PLACE Washington, D. C.

DATE December 12, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES KIRKLAND BATSON, :

Petitioner, :

V. : No. 84-6263

KENTUCKY :

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Washington, D.C.

Thursday, December 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:05 o'clock p.m.

APPEARANCES:

J. DAVID NIEHAUS, ESQ., Louisville, Kentucky; on behalf of the petitioner.

RICKIE L. PEARSON, ESQ., Assistant Attorney General of Kentucky, Frankfort, Kentucky, on behalf of the respondent.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Batson against Kentucky.

Mr. Niehaus, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF J. DAVID NIEHAUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NIEHAUS: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court, the issue presented today arose out of a state criminal proceeding in Jefferson County, Kentucky, in which the prosecutor employed four of the six peremptory challenges that were alloted to him under court rule to remove all black persons on the panel of jurors.

These panel members had all survived the challenges for cause under the Kentucky system, which is called the blind strike system, and peremptory challenges are made at all -- at the close of all challenges for cause, and they are made by means of striking from identical lists simultaneously names of the jurors that either party wishes to have removed.

But before the jury was sworn, trial counsel for petitioner made a motion to discharge the panel on the ground that the removal of the four blacks by these peremptory challenges denied the right to trial by an

impartial jury under the Sixth and Fourteenth Amendments to the Constitution and also denied equal protection of the law.

QUESTION: Were you trial counsel?

MR. NIEHAUS: No, Your Honor. The petitioner asked for a hearing on his motion, but it was denied basically on the ground that anybody can strike anybody they want to. Those are the words of the trial judge in the case. The same issue was raised on appeal, on direct appeal to the Supreme Court of Kentucky, and that court also affirmed by stating that an allegation of lack of a fair cross section on a jury which does not concern systematic exclusion from the jury drum, which is the composition device for the jury list, does not rise to constitutional proportions, and therefore the court refused to adopt any law.

I think as the Court can see, neither of the trial court nor the Supreme Court of Kentucky was willing to consider any regulation of peremptory challenges, and I think both followed the conventional interpretation of Swain versus Alabama which this Court decided in 1965.

QUESTION: Well, the court could have, without regard to Swain, could have proceeded under state law to regulate.

MR. NIEHAUS: Your Honor, that was not raised in this particular case, although it certainly could. It was not argued, although it was mentioned, but there is no doubt that they could have proceeded on that basis. The conventional interpretation of Swain is that there can be no question of peremptory challenges and the way that they are exercised in any one particular case.

This has been the basis for decisions of the many state courts who have refused to consider the newer rules that have been advanced by the Supreme Court of California, the court in Massachusetts, and more recently by two federal appellate courts.

QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?

MR. NIEHAUS: Yes.

QUESTION: Your claim here is based solely on the Sixth Amendment?

MR. NIEHAUS: Yes.

QUESTION: Is that correct?

MR. NIEHAUS: That is what we are arguing, yes.

QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

QUESTION: Why do you fall short of a direct attack on Swain on equal protection?

MR. NIEHAUS: Swain within the conventional interpretation simply states that no attack can be made on the exercise in one particular case, and as the record in this case shows no more than what happened in this one particlar case.

QUESTION: But Swain preceded the time, did it not, when the amendment was made applicable to the states?

MR. NIEHAUS: Certainly. The Sixth Amendment?

QUESTION: Yes.

MR. NIEHAUS: Yes, Your Honor.

QUESTION: So I ask again, why don't you attack Swain head on?

MR. NIEHAUS: I believe that we will be attacking it in the course of our argument, Your Honor, because I think that the bases that underlie the proof standard in Swain have been eroded somewhat by a reexamination of the historical --

QUESTION: I thought you just answerd Justice O'Connor by saying, no, you weren't really attacking Swain except by implication.

MR. NIEHAUS: We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such. We have maintained that because the Sixth Amendment guarantees a right to a jury that is as representative of the community as possible, that the Court may proceed on that basis alone and may or may not have to alter its holding in Swain in order to achieve its desire.

QUESTION: Are you saying the Sixth Amendment right requires that the actual petit jury that tries the case must be representative, or have our cases talked about the panel?

MR. NIEHAUS: No case specifically holds what we are asking for today. The most apposite case, which of course is Taylor versus Louisiana, speaks only to the panels from which the petit jury is actually selected. We are asking for an extension.

QUESTION: I would suppose until peremptory challenges are just out entirely, you would have to just be talking about the panel, because even if you win this case, there are going to be a lot of peremptory

challenges exercised for other reasons that might well eliminate identifiable groups in the community.

MR. NIEHAUS: I think that that is quite so, and as long as these peremptory challenges are exercised for some reason related to the matter at hand, I think that the cause for objection is going to be removed. If the Court will recall the remedy that we have proposed in this case, which is based primarily on the Supreme Court of California's rules set out in Wheeler, if there is some reason that explains in the context of a particular case, and I would ask the Court to note that in the first section of Swain the Court also linked the exercise of peremptory challenges to the context of a particular case. If this explanation is satisfactory, then certainly groups will and probably should be removed, but it is the argument here that if they are being removed, as in this case, simply for reasons of race, this is a destruction of the representative nature of the jury without sufficient reason, and for that reason the peremptory challenges that are exercised must be regulated.

QUESTION: As I understand the California rule, it also applies to peremptories by defendants? Am I correct?

MR. NIEHAUS: Yes. Most of the courts have

adopted that --

QUESTION: And that would follow along with your argument?

MR. NIEHAUS: Your Honor, we have not put that argument forward simply because it is not necessary to obtain the relief we desire in this case.

QUESTION: Well, but I think at least speaking for myself I would like to know what the consequences, the logical consquences of adopting your rule are, and I take it if most state courts have adopted it and felt obliged to extend it to defendants, that might well be a logical consequence.

MR. NIEHAUS: Oh, I think that it could be, Your Honor, but the Court could also consider --

QUESTION: Well, how can you do that under a Sixth Amendment claim? I can understand how you could reach that result under an equal protection claim, which you aren't making, but I don't see how the Sixth Amendment does anything but speak to the defendant's own rights.

MR. NIEHAUS: This is quite right, Your Honor, but the courts that have addressed the matter and more recently the case in Booker versus Jade from the Sixth Circuit, which we have not had time to file with the Court, simply talks about fairness between the parties,

and that it does tend to diminish the perception of fairness in the eyes of the public, and those courts have perceived a -- I guess you would say a right emanating, although not specifically state, out of the Sixth Amendment, wherein the courts may impose the same rule on the defendant in order to bring out the confidence necessary for --

QUESTION: Well, it certainly is doctrinally difficult to justify under the Sixth Amendment, isn't it?

MR. NIEHAUS: Yes, Your Honor.

QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

QUESTION: Yes.

MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

QUESTION: That is a concession.

MR. NIEHAUS: Pardon?

QUESTION: I said, that is a concession.

MR. NIEHAUS: The Court has alwasy recognized that a jury must be representative of the community in

order to discharge its function.

QUESTION: Are you speaking now of a petit jury, the trial jury, or the grand jury, the array?

MR. NIEHAUS: The cases that have been decided by this Court in particular speak about the panel that is set up. No case that I have been able to find gets down directly to the petit jury.

QUESTION: And you must.

MR. NIEHAUS: Yes, Your Honor. But before speaking about the Court's cases, Beal or Glasser, there has always been this idea --

QUESTION: Well, I just should go back. Swain dealt with just a specific jury, but not in terms of the Sixth Amendment. Is that it?

MR. NIEHAUS: No, it was equal protection under the Fourteenth Amendment. But even before this Court's cases decided in the 1940's under the supervisory power, there has always been an idea that the jury must be representative of the community, and we have provided in our brief a compilation of some statements on this fact.

And the practical reason for this is to interpose a body of untrained citizens between the defendant and the forces of the prosecutor, so that when the prosecutor employs his challenges to remove a

cognizable group from the jury that is actually going to sit, he is destroying any chance that this jury is going to be as representative of the jury as is possible, given the fact that you must reduce the community to a panel and finally to a petit jury of 12 or 13.

When the prosecutor does this, he is attacking the democratic aspect of the jury wherein the community consents to the conviction. It is not left simply to the administrative officers in charge of the matter, but the community itself by its representatives' consent.

The federal courts of appeal have begun adopting a rule that basically follows the rule set out in Wheeler versus California, and these cases reject the convoluted and probably often poorly understood statistical analyses that are associated with the venire composition cases, and have instead returned to what I consider to be a more well known pattern of evidentiary inferences, and all of the cases that are listed in the briefs begin with the concept announced in Taylor versus Louisiana which talks about the federal right to jury trial, and that is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to trial by jury.

QUESTION: But of course you want us to go

further than that. You want something, you want a representative panel as opposed to just a representative venire.

MR. NIEHAUS: Yes, we want a representative petit jury if that is possible. We realize that because of the problem in reducing numbers, that that is not going to happen in every case, and I don't think that a criminal defendant can complain about that. But I think that if an agent of the state is employing a state-provided procedural device to make sure that the jury is not going to be representative and that there is no reason connected with the trial that this agent of the state is doing so, then the defendant does have a right to complain.

QUESTION: As a practical matter, how does the judge go about this? Must he have a census of the jurisdiction before him, or is it the whole state, or the immediate jurisdiction of the court, the district?

MR. NIEHAUS: I do not find any cases talking about that.

QUESTION: I am asking how you would ask the judge to go about it.

MR. NIEHAUS: I would ask the judge to take note of the persons in the jury, the actual panel who was brought from the pool to the room.

QUESTION: Are you asking him to take judicial notice of the composition of the state or the county or the district so that he knows? How is he going to make the judgment about the jury itself if he doesn't know the composition of the whole community?

MR. NIEHAUS: I think that he does not need to know those facts. He needs to know how many, to use the example in this case, how many black jurors are brought from the jury pool to his room. If they disappear, not through challenges for cause, but if they disappear through the exercise of peremptory challenges by the prosecutor, then I think that the judge has --

QUESTION: Is there any difference in the end result if they, to take your term, disappear or they are gone from the jury on challenges for cause than for peremptories?

MR. NIEHAUS: I think so, because if they are challenged for cause, that means that they have some reason that they have articulated --

QUESTION: But then your end result might not be representative.

MR. NIEHAUS: Certainly, but again, that is a question of securing an impartial jury. Now, it may be that the prosecutor by exercising his peremptory challenges is taking note that that juror has been

staring at my -- or staring at the police officer sitting next to me throughout the entire process, and under the Wheeler rule that we are urging, the trial judge or the prosecutor, rather, is entitled to point this out.

QUESTION: How do you give the judge a chance to correct this? When the jury is -- the selection is completed, but before the jury is sworn in, would you for the defendant be required to move that the whole panel be excused and that you start all over because it is not representative, and if so, what evidence would yc put in on a motion of that kind?

MR. NIEHAUS: I think that under the Kentucky system, that that is probably the way the relief must be done, because peremptory challenges are exercised all at once at the close of challenges for cause. In California and some other states it is an ongoing process, and a pattern can emerge as the challenges are exercised, but the evidence that I would point out to the Court is that provided for by Wheeler pointing out, first of all, that out of so many challenges that are available to the prosecutor, he has used X number to remove all members of this one particular group. Under the principles announced in Wheeler, this is sufficient in many cases.

QUESTION: Well, Mr. Niehaus, suppose he has six peremptories and he exercises four.

MR. NIEHAUS: Yes. I think that the --

QUESTION: And there are two others, blacks who are on the jury. Do you have a case now?

MR. NIEHAUS: Two are left on the jury?

QUESTION: Two are left, yes.

MR. NIEHAUS: I think probably so because of the --

QUESTION: Probably so what?

MR. NIEHAUS: Probably that there is reason for complaint because he has used a disproportionate number in order to --

QUESTION: Well, let me change the number then. He exercises three of the six, and three blacks are on the jury.

MR. NIEHAUS: Remain on? That is getting to be a closer situation, and it is something that --

QUESTION: All right. Two. Two.

MR. NIEHAUS: I believe that it is still a close situation. It depends on the other facts that are available to the trial judge.

QUESTION: Why?

MR. NIEHAUS: One, under the doctrine of chances that we have articulated in our brief, it gets

to be a very narrow matter, and perhaps you cannot make any inference from that as to noninnocent intent unless there are other --

QUESTION: You say perhaps you may not.

MR. NIEHAUS: It depends on whether there are other facts known. I think that the defense lawyer and the trial judge can take into account the history of this particular prosecutor.

QUESTION: How can a prosecutor answer your -- if you adopt a California rule or Massachusetts, how does a prosecutor answer your doctrine of chances? What can he say that would permit him to strike three out of six blacks?

MR. NIEHAUS: He can point out what it was about these particular juries that he did not like. He can say that one was staring at his police officer.

QUESTION: But it wouldn't turn it into a challenge for cause?

MR. NIEHAUS: I don't believe so, and I don't believe that has been the experience in the jurisdictions that have adopted this rule, that he must state some reason. It may be that, to give th Court an example --

QUESTION: Like this black is too well educated, or he works for the wrong company, or

something like that?

MR. NIEHAUS: Those are reasons that are not tied to the fact that this juror is simply a black. And so that these might be satisfactory answers under the rule.

QUESTION: Even though they wouldn't succeed as challenges for cause?

MR. NIEHAUS: True.

QUESTION: One thing he can't say, I suppose, is that this venire person is black, and the defendant is black, and therefore I would rather have a white juror than a black juror.

MR. NIEHAUS: I think so, because it is -- the fact that the prospective juror is a black rather than any reason why, any articulable reason why there is a specific suspected bias that is the motivating cause for removal of this juror.

QUESTION: How about the black defendant striking white jurors?

MR. NIEHAUS: I think that presents a different --

QUESTION: He could say, well, the history of the death penalty in this community is such that there is prejudice against blacks, there is prejudice against blacks especially if they kill a white, and so I think

that whites -- there is a reasonable possibility that whites on this jury will be prejudiced against this defendant, and that is why -- so I am going to strike all the whites I can strictly on a racial basis, assuming that -- not assuming, but I think that they will be prejudiced against my clients. Now, what about that?

MR. NIEHAUS: Well, the harm is there, perhaps, but maybe not as severe, because in most areas of the country I believe that even if a defendant exercises all of his challenges, he will not succeed in eradicating all white persons from the jury.

QUESTION: But nevertheless, as you answered Justice Brennan a while ago, you think it is the reason that is bad, the reason for striking, so that would be a racial reason for striking a white.

MR. NIEHAUS: Yes.

QUESTION: And you say, but that is permissible.

MR. NIEHAUS: I think that it is not as serious a problem.

QUESTION: That isn't what I asked you. Would that be constitutionally permissible, or not?

MR. NIEHAUS: Pardon?

QUESTION: Would that be constitutionally

permissible, to strike the whites because of the --

QUESTION: What would be the constitutional basis for the claim that it was not permissible? What restricts a defendant from striking anybody once, or saying I don't like blacks, or I don't like Jews, or whatever he wants to say? There is no state action involved here.

MR. NIEHAUS: I think that is exactly the point, that there is no state action involved where the defendant is exercising his peremptory challenge.

QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question, but the idea of the Bill of Rights is to afford protection to the specific defendant.

QUESTION: But if a prosecutor strikes whites because he is afraid that the whites -- let's say the principal witness for the prosecution is a black, although the defendant is white, and the prosecutor strikes whites because he is afraid they are less likely to believe the black witness than perhaps a substitute black juror.

Now, is that a violation of the Constitution?

MR. NIEHAUS: I think that it is because it is specific to the matter at hand. Of course, I believe there would have to be a few more facts known.

QUESTION: Well, that is all the facts you have.

MR. NIEHAUS: I think that that is specific enough to the proceeding at hand.

QUESTION: That whites as a class tend not to believe blacks as witnesses? That is a good enough reason?

MR. NIEHAUS: If that is all that is known, then I think not. It is hard to make a definite prediction in that specific instance, but probably not, because the idea is not -- is that the group itself is not the predicter of what the person is going to do, so that for that reason I think it would probably not be a sufficient reason.

QUESTION: Do you think peremptories by the defense are constitutionally required?

MR. NIEHAUS: By the defense? We have mentioned some considerations in our brief --

QUESTION: I know you have.

MR. NIEHAUS: -- that I believe that because they have been in existence for such a long time, that they may be, even though they were not specifically

incorporated into the document, they may be of such importance along an analysis like Williams versus Florida and --

QUESTION: But the prosecution is strictly statutory.

MR. NIEHAUS: Yes, Your Honor. And they are, I believe, of rather recent origin.

QUESTION: Or by practice.

MR. NIEHAUS: Yes.

QUESTION: You don't think there is any requirement that the number of peremptory challenges be the same for both?

MR. NIEHAUS: No, Your Honor.

QUESTION: In most states they are not. Isn't that so?

MR. NIEHAUS: As far as I have been able to tell, the defendant usually has anywhere from one to two to several more, depending on what the state has decided to provide. I believe the necessity for the change is shown by the large number of complaints that have been made in recent years concerning the practice of peremptory challenges used by the prosecutor to remove specific groups.

In the petition for certiorari that was filed on behalf of Batson we were able to list some 25

jurisdictions. Since that time I believe five or six more jurisdictions have considered the matter, and this has come to a point that the court must rethink its decision in Swain and look again at the two premises on which the Swain decision was predicated, that of the history of the peremptory challenge and also of the function.

I think in answer to Justice White's questions, we have spoken somewhat about the history and as our brief shows the peremptory challenge that is a peremptory challenge for the prosecutor has been in existence probably for only about 150 years. Before that time, as the cases show, the process of standing aside was under the control of the trial court, and if the prosecutor used too this device too much, against too many prospective jurors, the trial court could intervene, so that regulation was the norm before the middle part of the last century.

I think a more important reason is that at the time Swain was decided this Court had nothing to look at in terms of whether peremptory challenges could serve their function of removing jurors who might be biased but whom the parties could not show to be biased without interfering with that practice that now the practice can be regulated, and this is shown by the number of

jurisdictions that have adopted the rule.

I would point out to the Court that --

QUESTION: How many of them are there?

MR. NIEHAUS: I believe there are six now.

QUESTION: California --

MR. NIEHAUS: California, Massachusetts, New Jersey, Florida, New Mexico, and, I believe, Delaware, and two federal appellate circuits, the Second and the Sixth.

QUESTION: May I ask you one question about the theory of your case? You have indicated a lot of practical discussions here, and in response to Justice Brennan you weren't sure how you come out on different numbers of challenges, four, three, two, one. But I would like to know if you -- say there is only one challenge of a black as a peremptory challenge, and the judge asks, why did you challenge, as he just does, and he says, well, I don't have to tell you, but I will. The only reason I challenged him is because he is black, and I think a black is more likely to return a verdict of not guilty if the defendant is black. That is my only reason, and also, I am a little bit prejudiced against blacks.

Would there be a constitutional violation or not? Say he left several other blacks on the jury. In

your opinion.

MR. NIEHAUS: Several others are left on?

QUESTION: Yes. Would that be a constitutionally permissible thing for a prosecutor do if the reason for his action is right on the table?

MR. NIEHAUS: I think not, although I think not --

QUESTION: So you questions about the numbers then go to the difficulty of ascertaining whether that is true.

MR. NIEHAUS: Yes.

QUESTION: Not whether there is a constitutional violation or not.

MR. NIEHAUS: The use of numbers shows what the prosecutor is about, so that the more jurors that are removed, the greater the certainty is that he is doing so for some nonrelated reason.

QUESTION: What would be wrong with the judge's asking the prosecutor? Don't you have to assume the prosecutor would probably tell the truth?

MR. NIEHAUS: Yes, I think that the whole rule is premised on the fact that the lawyers involved will tell the court the truth.

QUESTION: There are five blacks, six blacks, and the prosecutor strikes these five of them on the

jury, and he doesn't strike the other one, or he does, he strikes the one, and why did you strike him, as Justice Stevens aske you? He says, just because he is black. I don't know anything about him. I just think blacks will vote for innocence here generally unless I know something about him. I know something about these other five, so I have left them on. Why wouldn't that be constitutional? He concedes that he is striking because of a stereotyped view of the way blacks behave.

MR. NIEHAUS: I think that it would be a violation, although perhaps not under the theory that we are advancing here today. The theory that we are advancing here today has to do with --

QUESTION: With a cross section.

MR. NIEHAUS: -- with what the jury is, and so as long as the jury is more or less representative of the community under this theory there are other means to attack.

QUESTION: You have to make an equal protection challenge to take care of the single strike in the example given by Justice Stevens, don't you?

MR. NIEHAUS: Yes. If I may just point, and I will try to reserve a moment or two for rebuttal, that the Court has the benefit of a brief filed on behalf of the Kings County district attorney's office in New York,

and this brief shows the experience of four years operating under the system of allowing questions of the peremptory challenges, and that office says there is no difficulty, and I would point that out to the Court, that because a peremptory challenge can be effective, and can also be questioned in certain instances, that there is no resaon not to adopt the rule that we are asking for today.

If I may reserve a few moments for rebuttal.

CHIEF JUSTICE BURGER: Mr. Pearson.

ORAL ARGUMENT OF RICKIE L. PEARSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. PEARSON: Mr. Chief Justice, and may it please the Court, the issue before this Court today is simply whether Swain versus Alabama should be reaffirmed. We believe that Swain --

QUESTION: Well, now, that isn't what the other side says at all. They say the issue is one of whether the Sixth Amendment should apply.

MR. PEARSON: We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.

Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.

We believe that it provides an objective approach to the problem. It is bright line with principles of law, sound constitutional reasoning based on the Fourteenth Amendment and not the Sixth Amendment. In the trial court under Swain petitioner had the burden of proving that his Fourteenth Amendment rights were violated, and he failed to prove it. As a matter of fact, he only made an attempt to get the prosecutor to acknowledge that the prosecutor had struck four blacks and two whites by utilizing peremptory challenges.

He never asked the prosecutor when, where, and under what circumstances he had struck blacks in the past.

QUESTION: May I interrupt, Mr. Pearson? Supposing he had asked the prosecutor, why did you strike the four blacks, and the prosecutor had said, because I believe blacks are unlikely to convict a black defendant, and I don't particularly like blacks. Would

that constitute a constitutionally impermissible exercise of state power?

MR. PEARSON: That would not be constitutionally impermissible because under Swain the petitioner would have had to show that the particular prosecutor had struck blacks over a period of time.

QUESTION: I understand it wouldn't have violated Swain. I just think -- I am asking you really if you think in today's jurisprudence that would be consistent with our present approach to both the right to an impartial jury and the intepretation of the Fourteenth Amendment.

MR. PEARSON: No, sir, I would not concede that that would have been a constitutional violation.

QUESTION: What if his answer was, I struck them because I always strike them in every case I try?

MR. PEARSON: I think under Swain that would have been permissible, because here we are talking about over a period of time, not in a particular case, and we have to realive that there are assorted reasons for exercising peremptory challenges.

So much might include that very attitude, or it could have struck blacks because they were inattentive, or one of the venire persons might have been too talkative. There could be a host of reasons.

But the problem with requiring an explanation is that it requires a subjective answer.

QUESTION: Well, all this long period of time, I assume -- well, how long would he have to be a prosecutor before he could have that protection?

MR. PEARSON: Justice Marshall, no one knows. I don't know how long he would have to be, but over a period of time. I think you would have to look at --

QUESTION: Well, what is over a period of time?

MR. PEARSON: This Court has never stated, and I dare not speak for the Court.

QUESTION: That is a good constitutional rule, isn't it, without any time at all.

MR. PEARSON: Absolutely. Yes, sir.

QUESTION: You think that is what Swain said?

MR. PEARSON: It says over a period of time, but it does not state what the period of time is. That is what Swain says. Petitioner has proposed two remedies. First, that peremptory challengs be totally eliminated for the prosecution. And in his brief he also states the Wheeler approach, which is that when the prosecution exercises peremptory challenges to strike all or most of a cognizable or identifiable group, that the prosecutor be required to explain the use of those

challenges.

As to the elinimination of challenges totally for the prosecution, we believe that it would create an imbalance in the selection process for juries. On one hand, the defendant is free or should be free from bias. And on the other hand, so should the prosecution. If on one hand the prosecution can only voir dire and exercise challenges for cause, the system is imbalanced.

Furthermore, I think that in the event peremptory challenges are totally eliminated for the prosecution, we are on the tread and may be moving more toward the choosing of a jury of a particular composition that the petitioner or defendant below --

QUESTION: -- denied peremptories to both sides?

MR. PEARSON: Well, Justice Marshall, in that case you might well move more toward a more balanced system, but when you propose the total elimination of peremptory challenges for the prosecution, you move more toward an imbalance.

QUESTION: I said both sides.

MR. PEARSON: Yes, sir, I understand. When you said --

QUESTION: That violates what section of the

Constitution?

MR. PEARSON: If I understand your question --

QUESTION: Would that violate the Constitution?

MR. PEARSON: If both sides could exercise peremptory challenges?

QUESTION: If both sides are denied peremptory challenges.

MR. PEARSON: No, sir, it would not violate the Constitution of the United States of America.

QUESTION: Perfectly all right?

MR. PEARSON: That would be all right. Yes, sir. Because there is no origin of peremptory challenges in the Constitution. Of course, there are some historical notions for their existence.

QUESTION: Well, it was a system prevailing at the time, was it not?

MR. PEARSON: It was, based on -- even in colonial times and -- to some extent and based on the common law. But if there were to be an eradication of peremptory challenge for both sides, there would be no constitutional violation. Both would stand equal before the eyes of the law.

We also believe that if peremptory challenges are eliminated totally for the prosecution, you are

going to undermine the unanimous verdict concept which Kentucky is a unanimous verdict jurisdiction, because it is going to push the selection of the jury toward a particular composition.

Petitioner has also proposed that the prosecution be required to explain the use of peremptory challenges under prescribed circumstances. First of all, we would state that that is not required by the Fourteenth Amendment, and surely we don't believe that is required by the Sixth Amendment, nor is it required by the state constitution of the Commonwealth of Kentucky nor its criminal rules of procedure.

To require an explanation of peremptory challenges would destroy, we believe, the historical nature and function of the device itself.

QUESTION: Mr. Pearson, really this is kind of an extra argument, because if the explanation couldn't harm the prosecutor anyway, it doesn't really make any difference whether it is required. If you are correcting your basic submission that it is perfectly all right for the prosecutor to challenge because he doesn't like that person's race, and it is the same as the race of the defendant, you don't have to convince us of anything else. There is no reason to ask for explanations. If you give that explanation, you still

win. Isn't that correct?

MR. PEARSON: If I understand, that's correct. Absolutely. And that is consistent with this historical development. It has always been unfettered and uncontrolled by the Court, unexplained, and that is the very nature of the device itself.

QUESTION: Let's examine that. What I think you are building on is that you can take a peremptory challenge without giving any reason.

MR. PEARSON: Yes.

QUESTION: And you uare building that that you can give it for a violation of the Constitution, and those are two different animals.

MR. PEARSON: No, sir, I --

QUESTION: If a state officer says I am using race in my enforcement of my law, doesn't that violate the Fourteenth Amendment?

MR. PEARSON: If the state does it over a period of time, yes, it does, but in a particular case --

QUESTION: I didn't say over a period of time.

MR. PEARSON: But in a particular case --

QUESTION: He does it once. Doesn't he violate the Constitution?

MR. PEARSON: We don't believe so.

QUESTION: Well, how many times?

MR. PEARSON: Well, I think there based upon how many times it has been done, it has to raise a reasonable inference that he is practicing invidious discrimination. I can't quantify a particular number.

QUESTION: Can you give me any case that says that a constitutional right has to be denied a number of times?

MR. PEARSON: As I understand your question, I don't know of a case to that point, but I do know that Swain says that --

QUESTION: Including Swain.

MR. PEARSON: Pardon?

QUESTION: Including Swain. Did Swain say that?

MR. PEARSON: No, sir, not as you put it. I will say --

QUESTION: What were you about to say that Swain provides? What was the point you were going to make?

MR. PEARSON: I was going to say that Swain provides that whenver peremptory challenges have been utilized over a period of time that the petitioner has or the defendant has to prove that they have been exercised for the purpose of excluding, like in this

particular case, blacks.

You can't look at the one isolated situation.

QUESTION: Counsel, what do you think -- under Swain, what if it is proved that over a period of time, whatever that is, the prosecutor just strikes all blacks? Doesn't that just raise an inference that he is doing it for racial reasons?

MR. PEARSON: I think it raises a reasonable inference that he is doing it for racial reasons.

QUESTION: And that he thinks that just all blacks -- there isn't any black that is qualified to sit on a jury. That is the inference, isn't it?

MR. PEARSON: I agree, it is the inference.

QUESTION: So what if the -- do you think under Swain that if that is proved, that the conviction would be set aside?

MR. PEARSON: I think if that is proved, that --

QUESTION: If striking people because of their racial characteristics, if that is a justifiable inference in the case, the judgment is going to be set aside, isn't it, under Swain?

MR. PEARSON: Under Swain it would.

QUESTION: Now, what if the prosecutor gets up and says, now, look, we don't have to wait for a period

of time to rely on some inference from statistics. I am striking these blacks because I don't think they can sit fairly in this case or any other case. Now, Swain didn't approve that, did it?

MR. PEARSON: Yes, sir, it did.

QUESTION: It did?

MR. PEARSON: Yes, sir.

QUESTION: What makes you think that?

MR. PEARSON: Because the test in Swain is that you must show that the prosecutor did it over a period of time.

QUESTION: No, it says that if you show that these strikes have taken place over a period of time, there is an inference of racial discrimination.

MR. PEARSON: Right.

QUESTION: What if there is another way of proving racial discrimination?

MR. PEARSON: Then of course --

QUESTION: And I just suggested to you, and my example is clear as a bell, the prosecutor can seize it. Don't wait for a couple more years. I will tell you now what the result will be.

MR. PEARSON: We will submit that over the period of time test, which is the one that carries the day, when you have -- petitioner has proposed a remedy

on the Wheeler which we believe to be a subjective test. When you have a serious allegation such as invidious or intentional or purposeful discrimination, the test proposed by petitioner under Wheeler versus California we believe to be nebulous and subjective.

Swain we believe to be objective, because it would be based upon verifiable evidence that it would be not be left as to whether or not the prosecutor answered, gave an explanation why he was clothed with a wardrobe of anticipated answers that he would give the trial judge. The trial judge then would have to determine whether or not he believed counsel and, of course, whether or not there was a strong likelihood that there had been discrimination purely based on numbers wherein a situation such that the prosecutor struck two blacks out of four. Whether or not that is a strong likelihood, reasonable judges across this country might differ. So, I think that Wheeler is a subjective test, that it is nebulous in its application, that it is not sounding in Fourteenth Amendment principles.

Another problem with utilizing the Wheeler approach is this. If the prosecution is required to explain the use of peremptory challenges, it may force or inhibit his exercise of peremptory challenges in that he might say, well, you know, I am not going to strike

all of the blacks or all of the Catholics or all of the females in this particular case because I might give rise to the issue, so what I will do is that I will just not strike all of them, and I will leave a jury with those individuals on it, although I know, my professional experience tells me that I should.

Now, by requiring an explanation, the prosecution can skirt the issue and in essence create what we would call an artificial quota on a jury or for that fact a token jury in which he would have absolutely little or no trust. That is the problem with Wheeler.

QUESTION: Well, counsel, a token black left on a jury isn't going to satisfy the theory of the other side, their statistical approach, as the exchange with Justice Brennan indicated. Isn't that right?

MR. PEARSON: The token, I think if you leave the token black on the jury, based on petitioner's theory, it probably wouldn't satisfy him, but I am thinking that that is a problem where you are headed if you adopt Wheeler. You are talking about an artificial quota because the prosecutor would feel inhibited from exercising peremptory challenges. Consequently that would make a fair and impartial trial secondary. The appearance of not discriminating would be the primary concern.

QUESTION: You have mentioned or referred to the difficulty of trying to find out what the pattern or practice is, but suppose there is a manual in the prosecutor's office and the section on selection of juries says categorically that you should always strike any minority representative from the panel with a peremptory challenge if the defendant is a member of some minority, whether Catholic or Jewish or Puerto Rican or whatever. What about that? Would you need to show a pattern of practice if the manual instructs the prosectors to do that?

MR. PEARSON: I don't think you would. I think that would be a constitutional violation in and of itself, for the simple --

QUESTION: In the instruction?

MR. PEARSON: Yes, sir. Yes.

QUESTION: I suppose you would need to show that there was at least some compliance with that manual.

MR. PEARSON: I think that would be most persuasive for a defendant. It really would. But I think that in and of itself would show that the office itself, not the particular prosecutor, but the office is indeed acting on invidious discrimiation grounds, and that would be a constitutional violation.

QUESTION: How do you distinguish the instruction in the manual from the hypothetical Justice White asked you earlier, namely, when the prosecutor in a given case says, I always do it, I don't want any blacks, I have a black defendant? How do you distinguish them?

MR. PEARSON: I think the difference would be that the manual would be policy, policy that would affect the entire office over a period of time. In the other scenario where you are dealing with the particular prosecutor, he is in that particular trial dealing with that particular venire, and may not be confronted with the venire of that type for a time to come. So I think the difference is that the policy of the office is dictating to all those for whom -- all the prosecutors who are working for the office that that is the attitude and the aprroach I think you should take always whenever.

QUESTION: Well, suppose the policy man wrote the book.

MR. PEARSON: If I understand your question, the policy man --

QUESTION: Wrote the manual that the Chief Justice is talking about.

MR. PEARSON: Right.

QUESTION: The same man that you said didn't do it right, he did it this time right. Tell me the difference.

MR. PEARSON: I think that -- well, I see the difference probably moving more toward --

QUESTION: Make me see.

MR. PEARSON: -- the difference moving more toward him being a discriminatory type individual, and that that is a basis --

QUESTION: Well, suppose a prosecutor reads a piece of paper saying that. Would that make it right?

MR. PEARSON: That wouldn't be a violation of the Fourteenth Amendment.

QUESTION: Does all policy have to be in writing?

MR. PEARSON: No, sir, all policy does not have to be in writing. In closing, we believe that by adopting the Wheeler approach, there would be a destruction of the presumption of the proper use of peremptory challenges by the prosecution, and as a result of that it might cause an erosion of professional as well as public trust, be it the prosecutor himself or the prosecution's office.

Because Wheeler is so subjective, and Swain is indeed objective, and based on verifiable facts in

evidence, we believe under those circumstances Swain should be reaffirmed.

In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

MR. WALLACE: Mr. Chief Justice, and may it please the Court, the theme of the brief we have filed in this case is that far from standing as an aberration in the law, Swain against Alabama fits into a consistent pattern with all of this Court's related jurisprudence. Swain was an equal protection case, but surely the opinion's careful analysis of the historic role and purposes of the peremptory challenge system is even more directly relevant to the meaning of the Sixth Amendment right to trial by an impartial jury.

The Court in Swain suggested that the peremptory challenge at least on the part of the defendant may well be a necessary part of that right,

although it also said that the Court had previously said the Constitution doesn't require it, but certainly the implications of the analysis in Swain is that the peremptory challenge system as we have known it is consistent with the Sixth Amendment right to trial by impartial jury.

Some of the briefs filed in this case suggest that history more firmly supports the right on the part of the defendant than on the part of the prosecution, but even if that is true, that does not in any way undermine the constitutionality of statute law or rules of courts such as the Federal Rules of Criminal Procedure which allow the use of the peremptory by the prosecution as well as a counterbalance to its use by the defendant so that the objective of the Sixth Amendment, trial by an impartial jury, is more effectively achieved by lopping off from the panel those who in the judgment of the litigants are somewhat less likely in their own speculative judgment to decide the case impartially on the basis of the evidence in the context of the particular case.

QUESTION: Mr. Wallace, if the challenge here were being made to Swain itself under the equal protection clause as opposed to the Sixth Amendment, would you be here and making the same argument?

MR. WALLACE: Oh, yes. Oh, yes. We think that Swain quite properly recognized that the equal protection clause protects agains systematic discrimination in the system that prejudices participation in the system but does not guarantee a particular defendant any particular constitution on his own jury so long as that jury is impartial.

QUESTION: Even if the prosecutor openly admits that he is striking all jurors of a particular race because of their race?

MR. WALLACE: Because of their race in the context of the case. What the prosecutor is supposed to be doing, and I think Swain makes this quite clear, is making a litigation judgment about how best to assure impartiality of a jury in the context of a particular case.

QUESTION: Mr. Wallace, wasn't Swain just a case that says what it takes to make out a prime facie case of racial discrimination?

MR. WALLACE: That is correct, Your Honor.

QUESTION: And over a period of time if you could prove that the prosecutor struck blacks because of their race, and there never could be a black, as far as he was concerned, who could sit, that makes out a prima facie case. Now, if he gets up and says, that is the

way I do it in this case and every other, I don't know why Swain would prevent overturning that conviction.

MR. WALLACE: It would not. It would allow the use of that conviction as a remedy for a systematic discrimination, although in one sense the particular defendant in the particular case wasn't discriminated against if he had an impartial jury.

QUESTION: Yes, but that has always been true of racial --

MR. WALLACE: That's correct.

QUESTION: -- discrimination on petit juries, panels.

MR. WALLACE: That's correct. And when there is something shown that is infecting the system, that case is allowed to be used as a device for correcting that infects the system.

QUESTION: Mr. Wallace, let me take you one step further. Supposing the prosecutor never tried a case before. It was his first case. There was only one black on the venire. He challenges him. The judge says, why did you challenge him? He says, because I don't think a black is qualified to sit on a jury as far as I'm concerned because I don't like blacks. Constitutional violation or no?

MR. WALLACE: Well, there probably would be in

that case, Your Honor, although --

QUESTION: Just probably?

MR. WALLACE: -- it is an inartful answer at best.

QUESTION: Well, let's take it one step further. He doesn't say that, but he says, the defendant is black, and I think blacks are more apt to vote to acquit blacks than white are, and for that reason I just don't want any blacks on this jury. Is that a constitutionally permissible reason for excluding a black from a jury?

MR. WALLACE: Swain says it is.

QUESTION: I don't care about Swain. What do you think the law is today?

MR. WALLACE: We take the position that that is a permissible basis for exercising peremptory challenges. It is not --

QUESTION: Would it be permissible for a judge to challenge a jury for cause on that ground?

MR. WALLACE: Oh, no, no.

QUESTION: The state can do it through the prosecutor, but not through the judge.

MR. WALLACE: Well, there is much virtue in the present system in the fact that judges are not asked to say aye or nay to the various reasons that counsel

hav as litigation decisions about why they want to exercise their peremptories they way they do.

QUESTION: Why wouldn't it be permissible for a judge do to that? He might say, yes, I agree with you, I think blacks are more apt to acquit blacks. Say he thought that. Why is that different from the prosecutor?

MR. WALLACE: Because that is a matter of litigation strategy in the particular case. The judge is not supposed to intrude into litigation decisions of that kind as long as he feels that the jury that is being impaneled is an impartial one that meets the requirements of the Sixth Amendment.

The very nature of the peremptory challenge is that probably in most cases, probably the great majority, it tends to reduce or eliminate the represntation of certain parts of the cross-section of the community from the particular jury.

QUESTION: Mr. Wallace, don't you think saying that I think there isn't any black who wouldn't be more likely to acquit, all blacks are more likely to acquit, so I am going to keep them all off the jury, is that really very much different from saying I am striking this man because he is a black? That is just another way of saying the same thing, is it not?

MR. WALLACE: If it is put that way rather than related to an affinity between these jurors and the particular defendant or the particular kind of crime it is about.

QUESTION: Well, all right, I say these black jurors are more likely to acquit black defendants, and therefore -- I am not sure that that is even very sound.

MR. WALLACE: Well, the experience of federal prosecutors is that they don't think in such broad brush stereotypes for the most part because there are many other --

QUESTION: Under Swain, say that over a period of time the prosecutor is proved to have struck all blacks off the juries, and the reason he constantly gives is blacks just won't acquit -- they are just more prone to acquit. That is just the way they are. Now, I thought Swain said that would probably make out a --

MR. WALLACE: And I agree with you. That is just entirey too undiscriminating. Swain has served as a catalyst to make people look beyond sterectypes of that kind. For one thing, subsequent decisions have assured that the venires themselves are more broadly constituted, and in the 20 years since Swain, the profile of many things has changed.

Prosecutors today are much more predominantly persons who in their own personal experiences have looked beyond stereotypes with various racial groups. They have gone to school with people of various groups, worked with them. A large percentage of prosecutors today in the U.S. Attorneys' Offices are minority or women. For example, there is increased diversity, as we stated in our brief, in both income levels and education levels in the black community and in other communities, but the nature of the peremptory challenge system is that the kind of case that is involved tends to influence the judgment of both litigants with respect to who is apt to be a better risk to be impartial in the case.

Obviously, in an immigration case, the prosecutor is more likely to strike members of certain ethnic groups in that particular kind of a case. If a white policeman is a defendant, he may be concerned about relations between the police and the black community.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Wallace.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case in the above-entitled matter is submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-6263 - JAMES KIRKLAND BATSON, Petitioner V. KENTUCKY

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BY Paul A. Richardson

(REPORTER)