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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5221

TITLE RANDALL LAMONT GRIFFITH, Petitioner V. KENTUCKY

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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RANDALL LAMONT GRIFFITH, :

Petitioner :

v. : No. 85-5221

KENTUCKY. :

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Washington, D.C.

Tuesday, October 14, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

J. VINCENT APRILE, II, ESQ., Frankfort, Ky.;
on behalf of Petitioner.

PAUL W. RICHWALSKY, ESQ., Frankfort, Ky.;
on behalf of 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 REHNQUIST: We will hear argument first this afternoon in No. 85-5221, Griffith against Kentucky. Mr. Aprile, we will hear from you first.

ORAL ARGUMENT OF

J. VINCENT APRILE, II, ESQ.

ON BEHALF OF PETITIONER

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

The case of Griffith versus Kentucky presents a single issue, and that is in cases pending on direct appeal should the holding in Batson versus Kentucky be given retroactive effect.

As a result of this Court's holding in Allen versus Hardy, there is no question before this Court that Batson will not be given retroactive effect in cases that were final when Batson was decided. You have ruled Batson will not apply retroactively to those cases.

So it is in this context that Griffith versus Kentucky and the following case, Brown versus United States, present you the opportunity to take one step further than you did in Shea versus Louisiana and embrace the rule that you had prior to Linkletter versus

Walker, and that is that you would return to decision that holds that all constitutional rules that are announced will be applied retroactively to all cases on direct appeal.

You have had 21 years of experimentation since Linkletter versus Walker and, as many of you have expressed in various opinions and past members of the Court have indicated, the difficulty with retroactivity that has been generated by the attempt to draw bright lines, particularly in the area of the question of direct review.

We would submit that the easiest solution and perhaps one that would accommodate factors you have utilized in other contexts would be to go back to the pre-Linkletter versus Walker situation and, even though not constitutionally mandated, embrace the concept that those cases that have raised the same issue that are not final would be entitled to the benefit of the new constitutional principle announced.

QUESTION: Well, Mr. Aprile, does your submission embrace what is referred to as Justice Harlan's view on the subject, where I believe he said that all cases on direct review not final should get the benefit of the new rule, but none on habeas corpus should get the benefit?

MR. APRILE: Well, Your Honor, it is obvious from the context of the situation we are put in by the ruling in Allen versus Hardy that takes away the question of collateral relief in the Batson case, I am obviously not in a position to strongly advocate, as someone who has a client who's involved in that situation, for the adoption of the second part of Justice Harlan's approach.

But I do feel that you have ideally set the situation and the table here to embrace it in the context of Batson. I think it's very interesting that if we look at what you decided in Shea versus Louisiana, in the footnote you pointed out that cases such as Brown versus the United States and Griffith versus Kentucky were not even decided on the basis of Shea versus Louisiana.

But those cases that were pending in this Court on writ of certiorari when Edwards versus United States came down were granted automatic remands. They were given retroactive application. And in your most recent case, Shea versus Louisiana, you only addressed the question of those that were really on direct review in state and federal courts and not pending before this Court.

It's very difficult to say that there has been

a good strong rationale for applying the different doctrines of retroactivity in cases on direct appeal. If I could perhaps subvert for a second, the two concepts that you've often used in the context of retroactivity, reliance and effect on the administration of criminal justice.

I submit to you that as you decide a case and announce a new constitutional rule and allow the question of retroactivity on direct appeal to swing and sway in the breeze, the lower courts then go on and make their decisions. Some will opt that the decision will be retroactive, some will opt that it will not be retroactive.

That generates much litigation by people on both sides of this podium, because if we lose we're going to come to you on petition for cert and ask that you hold that the case be retroactively applied. If it goes the other way, they will come and ask the opposite.

So as far as impact on the administration of criminal justice and reliance by the courts below, it would seem that a rule that went back to pre-Linkletter and said there will be a presumption that when the case is on direct review, it is not final, it will get the benefit of the constitutional ruling.

QUESTION: Well, what do you conceive the pre-Linkletter law, as you refer to it, to be with respect to cases that had become final and were on habeas corpus review or some sort of collateral attack?

MR. APRILE: Well, I may be wrong in this, but it was my basic understanding that in that regard, in that mode, that they oftentimes were granted complete retroactivity. I have no quibble with the need in instances in dealing with full and complete retroactivity focusing on final decisions that perhaps it would be good for you to utilize tests such as the reliance and impact.

QUESTION: Well, but you know, if you're talking about the desirability of a rule that everyone will know it's in effect the minute a decision comes down, isn't there also a good claim for a bright line rule in the collateral attack that it does not get retroactivity?

MR. APRILE: Again, Your Honor, obviously there are arguments that could be made for that purpose. I think that some of the exceptions that you have carved out on both sides of the scale would have application there.

For example, when a case -- when a decision announced by this Court significantly impacts on the

truth-finding process, it may very well be that that is the type of exception that you will provide full retroactive relief on collateral situations.

QUESTION: If you're getting into kind of the weighing of factors and so forth, certainly the reliance element militates against you here, it seems to me. Obviously, there were people who did rely on the validity of the Swain decision at the time cases were tried, even though they hadn't become final.

MR. APRILE: Well, I think that we can look at that in two ways. I think that the particular case that you have before you today is different from many of the cases that you have decided retroactivity on. Number one, the relief that you gave in Batson was not to reverse and grant a new trial, but it was remanded for a simple inquiry, an inquiry that involves, first of all, determining whether or not, usually from official court records, blacks were struck by the prosecutor in a large number; secondly, if that were true, the defendant showing he was a member of a cognizable racial group; and then putting the prosecutor to the test of stating trial-related reasons why he made those strikes as opposed to racially biased reasons; and the court then deciding whether or not the prosecutor had overcome a prima facie showing of discrimination made, as you

pointed out, could be now made under Batson.

What reliance was there in the past? The reliance not to hold a hearing is all that we had. As members of this Court pointed out in the Batson decision, certainly no prosecutor should have believed that he had the right to rely on Swain for the proposition that he could challenge people, blacks and other minorities, on the basis of race with no trial-related basis.

The only thing he had a right to rely on was that the courts probably were not going to utilize the evolving equal protection test in other contexts to require that the prosecutor respond to an allegation of racial prejudice in the context of one limited case.

Any prosecutor who had read even Swain would have thought to know that when this challenge was raised against him, the possibility that later he would be called on the carpet for his conduct in many cases and would have kept some sort of trial notebook, some sort of file, that would have allowed him to respond in these situations.

As this Court stated in Solem versus Stumes, unjustified reliance is no reliance at all. Now, if there is a price to be paid by conducting hearings after the fact on this limited issue, it is certainly a price

that we should pay for guaranteeing the right of participation of blacks in our jury system and secondly the right of a defendant not to have excluded from his particular jury people of his same race simply because the prosecution has a racially biased motive for excluding them.

So I think when we look at reliance, it's certainly -- if you want to go back to the other standards and tests that this Court has utilized in dealing with retroactivity, this client, this Petitioner, Mr. Griffith, is not afraid to be judged under those standards.

As we pointed out in the brief, we think we succeed. We do not think that this case is a clear break that mandates retroactivity. You have said in the context of Allen versus Hardy that it is an explicit and substantial break.

But indeed, in Allen versus Hardy you did not stop there. This Court did not say this is an explicit -- this is not a clearcut break. You did not use the magic language, so to speak. I find that not to be a conclusion of law finding by this Court.

But secondly, you went on and went through the reliance and the effect on the administration of justice analysis for collateral review. I think by the very

nature of the steps taken by this Court, it was clear that the majority opinion did not embrace the concept that this was a clear break in the law.

QUESTION: Well, that's only because we use a different test for collateral review. I mean, we went through those additional steps because those are the additional steps we use for collateral review. We don't use them for direct review.

MR. APRILE: Justice Scalia, I think that in all fairness -- and it's very difficult for me to anchor in, but I certainly can refer to other cases where in the course of this 21 years this Court has looked at things and said, if it is a clear break in the law, non-retroactivity will be mandated.

There are a number of cases in the last 21 years where this Court --

QUESTION: Going back 21 years, you can find a lot of different approaches, I'm sure. I'm talking about the approach that we were following at the time of Allen. We have followed one set of tests for collateral review and a different set for direct review.

MR. APRILE: Well, I would beg to differ with you in this regard, that if you look at a number of the retroactivity cases over that period of time there has often been the statement made that this Court sees no

distinction in this case between full and complete retroactivity or limited retroactivity to those cases on direct review.

I would hope, and I would like to agree with you, that if the decision in Solem versus Stumes and Shea versus Louisiana create two different standards and embraces Johnson from the Fourth Amendment and says, from now on on direct review this is what we do, if Shea versus Louisiana is the controlling precept, then I have no trouble accepting that and saying, fine. Then we will put aside that finding in Allen versus Hardy, as you wish to do, and say that you didn't have to reach that question because you used a different test of retroactivity on collateral review.

I'm willing to accept that, because I think if we use Shea versus Louisiana's test we are in much the same situation as Petitioner Shea was in, because again, while there was a change of rules, there was no clearcut break in precedent.

And in that situation, what you did in Shea versus Louisiana was to look at the Harlan approach. And when you looked at the Harlan approach, what did you say? You said, if we utilize application of retroactivity of the Edwards decision to cases on direct review, we will provide fairness to each litigant that

was before the Court on direct review, because each of them will be judged on the merits of their own case, not on the chance that their case was not the one selected to be the one in which you announced the rule.

It's ironic that I stand before you today asking for equal treatment for Griffith in this case, when his substantive complaint is that he was denied equal protection by the action of the prosecutor in this case.

I think it's ironic that I stand before you today and ask that you give him retroactive relief on direct review because of the chances that were involved. The same prosecutor that utilized his peremptory strikes in the way that he did in Batson versus Kentucky is the same prosecutor in this case. It occurred in the same circuit court.

The only difference is the division and some difference in time. As this Court has frequently pointed out, litigants such as Mr. Griffith usually have no control over the speed at which their case reaches this Court, and it was only chance --

QUESTION: And it was only one month between the convictions.

MR. APRILE: That's right, Your Honor. And it is very, very difficulty to go back and say, for

purposes of your equal protection claim, yours cannot be considered because yours was not the one selected at random.

That was Justice Harlan's entire point in looking particularly at direct review. How can we justify as a system of law built on precedent giving only prospective application, with one exception, and that is to the case which you select for the particular purpose of announcing a rule?

QUESTION: What is the justification for the exception having to do with a clear break in the past?

MR. APRILE: Your Honor, I really believe that the clear break rule is justified under the test of reliance and impact on the administration of justice when you carry it all the way out through the full and complete retroactivity that embraces not only those cases on direct review, but those cases which would be -- that have already become final and would be able to get relief only through collateral action.

QUESTION: Well, confining it to cases on direct review, what is the justification for the exception?

MR. APRILE: Well, the justification would be very simply that the people that administer whatever the particular rule was, in this case prosecutors and trial

judges, would have the right to rely on an existing precedent that so clearly spells out what their conduct should be.

I find it very interesting that both the state of Kentucky and the United States Government in Brown versus United States take the position that there are so many people that would be affected by this on direct, if you granted retroactivity on direct review.

QUESTION: Well, on that justification, then the case that is taken should be made prospective only and not affect that individual?

MR. APRILE: Your Honor, I certainly, as a person who represents individuals before a court, would hate to see that this Court would embrace as a general rule only prospective application of decisions.

QUESTION: Well, but I'm groping for the justification and I haven't really seen very much yet. I'm not blaming you for it.

MR. APRILE: I apologize for that.

QUESTION: No, I'm not blaming you. You're doing the best you can to justify the rule.

MR. APRILE: I think that your question does introduce a factor. Maybe I misunderstood your question.

QUESTION: You wouldn't mind doing away with

the exception, I take it?

MR. APRILE: No. In fact, I feel that, as was pointed out in the dissent in Shea versus Louisiana, the position you took in Shea versus Louisiana simply doesn't clarify the problem because we still have all the courts below you speculating on what is a clear break in the law.

I think that if you were asking -- and perhaps I'm --

QUESTION: You don't mind that in collateral review, though? You think that's fair game there? And there are probably, you know, more cases that come up through habeas that are going to raise the same issue than are on direct appeal. That confusion is acceptable in that context?

MR. APRILE: Well, I think that confusion is acceptable for the purpose that other people, Justices on this Court, have spoken to that issue in various contexts, both in dissents and in majority opinions, and have pointed out that there is some reason for embracing a line that is based on finality.

It's true in this case that finality, being that the time for petitioning the case to this Court for certiorary had elapsed, in that situation then we move over and talk about the question of clear break. Yes,

it will still work unequal application of the law in certain situations, and perhaps some of the exceptions that you have carved out in collateral review, such as impact on the truth-finding process, would help to make sure that that type of unequal application would not fall in situations such as where you dealt with in Hankerson versus North Carolina, the retroactivity of the --

QUESTION: You're missing my point. I think my point is the same as the Chief Justice's earlier. That is to say, that you're urging us to do is to adopt a bright line rule that will eliminate confusion in the law, but the rule you're proposing is one that will only eliminate confusion in the direct review situation.

And you're not willing to say, adopt a similar view in the collateral review situation. And the fact is that there are probably more cases that are going to be coming up on collateral review than on direct review.

MR. APRILE: I feel at a real loss to urge that position before this Court today. This Court by its action in Allen versus Hardy took that issue away in the context of Batson. It's very difficult for someone in my position to become an advocate for a rule that has no impact on his client or the class of client that he

would represent.

I am not in a position -- certainly I could say, yes, Your Honor, I want you to embrace that rule. But it would be sort of hypocritical, wouldn't it, under the circumstances? I am not representing anybody who will be benefited or harmed by that rule.

So what I am saying is, you granted the writ of cert under these circumstances and you decided that Batson would not be retroactive in Allen versus Hardy. I have no quibble with that, but it puts me in a position that that is now a moot question. I don't think I am the person to advocate with an interest for a client I don't have in that situation.

QUESTION: You're trying to sell us a new view. You're trying to sell us a new view.

MR. APRILE: I certainly am.

QUESTION: But you're not giving us a whole view. You're just giving us a half of it. And I'm saying it doesn't make any sense as a half.

MR. APRILE: Well, I think that it would be --

QUESTION: I don't think there's any hypocrisy about it. It's just --

MR. APRILE: I think that basically the answer to this is simply this, that under Justice Harlan's view, if you move it into the collateral area, he would

have a general principle or presumption that those cases -- that there would not be retroactive application to cases that were final, but he would leave certain exceptions.

I am not here to say that is a good rule or a bad rule. It's certainly something you could do. I wouldn't imagine you would do it in the context of this case. But I suspect that this case offers you the ideal opportunity to remove one aspect of this, and that is a bright line for direct appeals. In a following case, you could then deal with those cases where finality is involved, knowing that you had carved out a bright line in this situation.

I think it's very important that I point out to you that in looking at Allen versus Hardy I was concerned about the question of whether the impact of the process that's involved here, the new constitutional rule on the truth-finding process. I think that my case and Mr. Brown's case, the whole Batson concept, is more akin to the decision on retroactivity in Brown versus Louisiana applying Burch Louisiana, and I think it for this reason.

If we look at what happened in Burch versus Louisiana, this Court said that a six man jury had to be unanimous, and when it was a vote of five to one that

that was unconstitutional. And that you said when you addressed that question in retroactivity language in Brown versus Louisiana was how this impeded and impaired the truth-finding function of a trial.

And although it may not be immediately apparent, I think that what we have in Batson is a very similar situation. If you realize under the facts of the situation, each of the jurors who were struck by the prosecutor, those jurors who were black, under the rules of procedure in Kentucky had survived every test that could be put to them.

There was only one way that they would not serve on the jury, and that is if random selection eliminated them. In many ways, they were like the sixth juror in Burch versus Louisiana. They were going to be on that jury but for one of two things: the prosecutor's improper peremptory challenge or random selection.

So in fact, they were pulled away at the very last minute from being able to participate in that jury, in much the same way the Louisiana rule nullified the one vote by not having a non-unanimous verdict when you had a six-man jury.

QUESTION: Mr. Aprile, how widespread is this random selection business that you have? it's not in

effect in most states, I think.

MR. APRILE: Well, Your Honor, I'm not really in a position to say that. But normally I would say this, that in most instances -- and I've only tried cases in the military and in Kentucky, to be quite frank with you -- in most cases I would feel that peremptory challenges would only be exercised once you had reached the situation that people had gotten through all challenges for cause.

And whether or not there would be any requirement then of random selection or they would have just come up with the number to try the case, 12, 13, 14, depending on the number of alternates, the point is still the same. I used Kentucky because that's the facts of the case.

The only way those people were stopped from sitting on the jury if there was no random selection was by the action of the prosecutor. And he effectively deprived the defendants in those cases --

QUESTION: I know, that's the cleaner way of handling it. You don't have to explain.

MR. APRILE: And so the point that I'm trying to make here is very simply this: You locked in Brown versus Louisiana and said the integrity of the fact-finding process was so affected by what was done

there, and that was done by a racially neutral statute or rule. It didn't know which juror would be come the one vote who didn't get counted, who didn't have to be there for a unanimous verdict.

But here we have, at least on a prima facie showing we will have, that the action that deprived that juror of participating was done by a racially motivated action by a state emplcyee, a prosecutor, when he knew under the statement made by this Court in Swain versus Alabama that it would be improper to do that.

I say on that basis we make a very strong showing that what occurred in Batson versus Kentucky, the rule that you announced there, does have incredible impact on the truth-finding function. And cn that basis alone, we should be entitled to retroactive application of Batson to cases on direct review.

If we were to go to the Stovall criteria, the Linkletter versus Walker criteria, I believe that we can meet that, too. I believe we can meet that for showing this:

Number one, you have effectively removed a large number of cases that could cause impact on the judicial administrations of the state and federal ccurts by holding in Allen versus Hardy that this will not, Batson will nct have collateral retroactivity. Now we

are only dealing with the cases that are on direct review.

It stands to reason that the relief that you granted in Batson will require some going back, some jogging of old memories and looking at court records. But we have put not a clear-cut, finite time line on this, but we know that most of the cases that will be on direct review will be those within a reasonable amount of time.

So consequently, it doesn't appear that there will be a large number of cases, nothing like there would have been had you granted full retroactive application of Batson, particularly to those cases on collateral review.

And secondly, with regard to reliance, I think I've addressed that already by discussing, prosecutors and judges really didn't have a right to rely on Swain if it was to say prosecutors had the right to hide behind Swain in makin peremptory challenges based solely on race and not on trial-related conditions.

If there are no questions, I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Aprile.

We'll hear next from you, Mr. Richwalsky.

ORAL ARGUMENT OF

PAUL W. RICHWAISKI, JR., ESQ.

ON BEHALF OF RESPONDENT

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

In the 21 years and four months since Linkletter that Mr. Aprile referred to, there have been in our opinion or in our view two bodies or two schools of law that you have handed down with regard to the question, the very narrow question, of the retroactive application to cases on direct appeal. And we feel under either school of law or either body of thought the rule that you have handed down, the new rule of constitutional criminal procedure of April the 30th of this year in Batson versus Kentucky, requires prospective application only.

In the first instance, Batson was a clear break case. It was a classic clear break case. Obviously, on this point Petitioner and Respondent disagree.

The 1982 case of United States versus Johnson set out the standard test for clear break cases, and in effect you said that if there was a clear break case prospectivity is preordained. Batson meets two of the three criteria: It explicitly overruled a past

precedent; that being Swain versus Alabama; and it disapproved a practice which this Court arguably has sanctioned in the past.

Batson, we make this claim that it was a clear break because not only are there some similarities between Swain and Batson if you put them side by side, especially with regard to the dictates of this Court in the area of equal protection, but more importantly where we come with the clear break argument is that you effectively changed the nature of peremptory challenges, especially the use and purpose to which prosecutors or any litigant could avail himself in this particular case to the use of peremptory challenges in a particular case.

This Court specifically stated that, to the extent that Swain is inconsistent, it is overruled. Thus, we feel the argument can be made that Batson was precisely the type of clear break --

QUESTION: That's in a footnote, isn't it?

MR. RICHWALSKY: Yes, Your Honor.

QUESTION: I suppose that's of no significance, but it's in a footnote.

MR. RICHWALSKY: I believe it is in a footnote, Your Honor.

But again, when you look at the language in

Swain, Justice White went into great detail about the history and the system of peremptory challenges, that they would not be -- that the use of a peremptory challenge to strike a black individual in a particular case is not a denial of equal protection.

Batson, 20 years later, said it was, and that all of a sudden the unfettered, unchallenged right of a prosecutor to use a peremptory challenge, as handed down and as dictated by Swain, completely changed 180 degrees on April the 30th of this year, when now hearings have been indicated, reasons have to be propounded in order to justify such a use of a peremptory challenge.

So we believe that classically this was a clear break case.

Thirdly, as Mr. Aprile referred to, under Allen versus Hardy, two months to the day after Batson, this Court said Batson was an explicit and substantial break with prior precedent. Now, obviously you did not use the words or the magic words it was a clear break. But I would submit that it's a very fine line between a clear break and an explicit and substantial break. Again, the third point being that Batson was a clear break and deserves prospective application only.

As one attempts to study this body of law, an issue or an element that consistently comes up is the

question of whether or not it was foreshadowed. Was Batson, was the demise of Swain foreshadowed? It's interesting, I think, to point out that not even Batson himself attacked Swain as the basis for overturning his particular conviction or the error that he raised in his particular case.

No case on the basis of federal law claimed that Swain no longer controlled. In the states -- there are two states you asked about the effect, I believe, Justice Blackmunn, that this might have. There are 48 states similarly situated who rest on your decision on the retroactivity question of Griffith and Batson.

The two states that went their own way, if you will, cited the continued vitality of Swain and the continued application, and grounded their new approach on reasons particular to their own particular state constitution. The fact that Swain was criticized --

QUESTION: May I ask you about the 48 states? Aren't there some states, such as California, that had actually made this kind of decision before we decided Batson? So would they be among the 48?

MR. RICHWALSKY: No, Justice Stevens. Massachusetts and California are the two that have gone their own way, so they have -- and they founded that on reasons of their own constitution and they founded in on

fair cross-section and impartiality grounds.

QUESTION: But they weren't really retroactivity decisions. They just decided --

MR. RICHWALSKY: No.

QUESTION: -- the merits of the issue before we did.

MR. RICHWALSKY: Exactly. The point being that Swain wasn't foreshadowed, and everybody up until April the 30th of this year, every state and every federal, every trial and every appellate court in this country, recognized Swain to be the law and the tenets of Swain to be the law.

So again, the argument that I'm trying to proffer to the Court is that when Batson came out it was a clear break and a dramatic clear break.

QUESTION: What about New York and the McCray case? Did that have any impact there?

MR. RICHWALSKY: No, Your Honor, I do not believe that it does. And with all due respect to Justices Brennan and Marshall, who indicated their concern and who perhaps forecordained the demise of Swain, that is not enough, because up until actual precedent is overruled the authorities have every reason to rely upon that.

And I think the dissent in the McCray case --

QUESTION: I actually was referring to the Second Circuit opinion after it was here the first time.

MR. RICHWALSKY: That I'm not familiar with, Your Honor.

Even should a prosecutor have had reason to think that Swain was foreshadowed, there was no standard upon which he could rely in attempting to anticipate what this Court would require concerning the eventual demise of the Swain decision.

We believe for those reasons or for these reasons just articulated that again, that we think it's without question that Batson was a clear break case and is entitled to prospective application only. But if, for whatever reason, this Court does not feel that Batson was a clear break, then I would submit to you the traditional development of precedent that this Court has handed down under Stovall and we believe under that test as well Batson requires prospective application.

That test can be broken down, obviously, as questions have already been directed, to purpose, reliance, and effect. And as also some of the questioning has gone this afternoon, those cases which indicate that if it's an impact on truth-finding then retroactivity is called for, but if not then

prospectivity is the order of the day.

QUESTION: But your Kentucky courts didn't discuss any of that. They just said Swain is it. That's all it said.

MR. RICHWALSKY: Exactly, Your Honor, Justice Marshall.

QUESTION: All the rest of that is not in this case.

MR. RICHWALSKY: No, but I mean --

QUESTION: All we've got in this case is a prosecutor who was the same prosecutor in the Batson case, Swain is it, and the Supreme Court of Kentucky said, we agree, Swain is it, period. That's this case.

MR. RICHWALSKY: Exactly, and it proves a point of reliance, that no court wished to go beyond the tenets of this Court in what you said in Swain up until April the 30th.

And the fact that the prosecutor in this particular case was the same prosecutor in the Batson case I think is of no moment, because in theory it could have come from the same prosecutor's office. We have a lot of one-man prosecutor's offices in Kentucky, and it could have come from that jurisdiction itself.

QUESTION: But it didn't.

MR. RICHWALSKY: But it didn't. But again,

that prosecutor, regardless of who the prosecutor was, was still entitled to rely upon what the Court said in Swain, unchallenged, unfettered use of peremptory challenges, for whatever reason, in a particular case.

QUESTION: Do you think that that prosecutor was prejudiced?

MR. RICHWALSKY: No, Your Honor.

QUESTION: Did you read the record?

MR. RICHWALSKY: Yes, Your Honor. I hired that prosecutor. I was the district attorney in Louisville at the time.

QUESTION: I don't ask you to take the blame for it. I asked you to admit it, to admit the truth.

MR. RICHWALSKY: No, I do not believe that he was.

Under the traditional retroactivity principles when we get to purpose and the reason, if it can be anticipated why this Court handed down the Batson decision, I would make the analogy to what this Court has said in the Fourth Amendment type of cases and the development in that area.

You saw a wrong that after 20 years you decide to address specifically in the use of peremptory challenges. All the earlier cases talk about the governmental action in discrimination with regard to the

venire, with regard to jury service, with regard to actual participation on petit juries. And now finally again, why Batson was such a clean break is you address the right of a litigant, the right of the Government, to use that peremptory challenge.

And in effect what we hear you say is: Trial courts, prosecutors, we're going to change the rules, we're going to change the rules with regard to the use of peremptory challenges, and in the future go out and, if you will, sin no more; go out and follow our dictates in the future, just like you told the police officers in the sixties and in the seventies when a new embodiment of search and seizure law was handed down.

It didn't affect -- it wasn't retroactive to everybody else that was waiting in the wings, but you said, in the future go out and make this correction. We feel that was the purpose of the Swain -- or the Batson decision.

The truth-finding, again citing this Court in Allen versus Hardy, in June of this year you said there may be, or that Batson may have some impact on truth-finding. But you went on to say, as we believe and as we heard you, that this wasn't the sole purpose, and you talked about to ensure that the Government does not discriminate against citizens who are called for

jury service and to strengthen public confidence in our administration.

So the rule in Batson we submit serves multiple ends, and only the first of which may have some impact on truth-finding. Your cases, your decisions, have held that the impairment to truth-finding must be substantial and not merely incidental in order to be considered for retroactive application.

The other tests under the traditicnal rules of reliance and effect I think that we have attempted to cover, that the reliance was universally viewed and upheld. It's been great by every court.

And again, the thing to keep in mind, we would submit, is when you address us on this particular pcint you're not just talking to prosecutors; you're talking to trial and appellate courts, too, who took you at your word in Swain and what you held, and the reluctance that any of those courts had to overturn you until April the 30th.

The effect, we think, would be significant. It's impossible, very difficult to know how many cases are involved out there. I agree with Mr. Aprile that the reduction -- or your language in Allen versus Hardy with regard to the collateral matters, that effectively removed many from consideration. But we still feel that

the numbers are significant, and the difficulties and the burden on the courts that would be called into play should you hold Batson retroactive we would submit to you calls for prospective relief only.

So again, under either embodiment of law and principle as we interpret your decisions of the past 21 years, under the clear break test or under the traditional test, either application we feel calls for the prospective relief only of Batson versus Kentucky.

I'd be happy to attempt to answer any questions should the Court have any.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Richwalsky.

Do you have anything more, Mr. Aprile? You have four minutes.

REBUTTAL ARGUMENT OF

J. VINCENT APRILE, II, ESQ.,

ON BEHALF OF PETITIONER

MR. APRILE: Thank you, Your Honor.

I would like to begin by addressing the statement that was made by the attorney general, that being that only two states have dealt with this issue. it pages 34 and 35 of the brief for the Petitioner, we point out a large number of states that have dealt with this particular question under their state constitutions

or federal courts which have dealt with it under their supervisory power or, like the Sixth Circuit and the Second Circuit, dealing with it under a Sixth Amendment analysis.

All of those particular analyses would reduce the number of cases that direct -- retroactivity on direct review would approach. For example, the attorney general tells us that only, I believe it was, California and Massachusetts had addressed this under their state constitution. New Jersey and Florida have both addressed it and, for example, Florida held under their state constitution this type of situation to require retroactive relief to all cases on direct review.

But I won't burden you any longer with that, only to state that it substantially reduces the number of cases that would be affected by a grant of direct review retroactivity, because a lot of these cases have been decided in the state courts on different grounds and accomplished the same purpose. So they would not -- this would not be a problem for many of those states.

It seems to me as the proponent that if there will be a large impact on the administration of justice it is the obligation of the attorney general representing Kentucky to come forward and demonstrate to you this large number of cases. I believe it was in

Shea versus Louisiana you looked at it and said that there has not been any showing by anyone that there would be this severe impact.

I would also point out that the reliance that has been placed on this particular decision should always be construed in the light that a prosecutor knew that at any time some litigant could come forward and attempt to raise the question of the office's or that particular prosecutor's repeated use under Swain versus Alabama of peremptory challenges in case after case. It would seem to me that the prosecutors' like criminal defense attorneys, had an obligation also to keep aware of the changes in the law with regard to equal protection violations.

This Court in Batson emphasized that the standards of proof continued to change from Swain up until Batson in the context of other equal protection violations. What the representatives of the state of Kentucky say to you today is: We did not have any obligation to see the changes that were occurring with regard to equal protection violations in any other context; we had the right to rely solely upon what was said in Swain.

And yet, they did not wish to rely on the broad teaching, the actual bright rule of Swain that was

never changed, and that is that prosecutors could not use peremptory challenges in a way that would use race as a basis for disqualifying blacks from participating in juries.

So I don't believe that they have a good faith argument with regard to reliance.

I believe we have demonstrated the need for a clear bright line test on direct appeal for retroactive application. I believe that the experience of this Court up until 1965 demonstrates that that can be accomplished without significant harm to the administration of justice. And I think that in the right case, were you to find that you needed not to give retroactive application on direct review, it may be the case in which you would give solely prospective application.

And I would suggest that, even if we go to the Shea versus Louisiana test or the Stovall v. Denno test, that we have demonstrated that Mr. Griffith is entitled, because his case was on direct review, to have retroactive application of Batson.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Aprile.

The case is submitted.

(Whereupon, at 1:42 p.m., oral argument in the

above-entitled case was submitted.)

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BY Paul A. Richardson

(REPORTER)