ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5454

TITLE DAVID RANDOLPH GRAY, Petitioner V. MISSISSIPPI

PLACE Washington, D. C.

DATE November 12, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID RANDOLPH GRAY, :

Petitioner :

v. : No. 85-5454

MISSISSIPPI :

- -x

Washington, D.C.

Wednesday, November 12, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

ANDRU H. VOLINSKY, ESQ., Manchester, N.H.;
on behalf of Petitioner.

MARVIN L. WHITE, JR., ESQ., Jackson, Miss.;
on behalf of Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: You may begin whenever you're ready, Mr. Volinsky.

ORAL ARGUMENT OF

ANDRU H. VOLINSKY, ESQ.

ON BEHALF OF PETITIONER

MR. VOLINSKY: Thank you, Mr. Chief Justice, and may it please the Court:

The Court's decision in this case, whether it be based on a legal error, a narrow constitutional holding, or a very broad constitutional holding, must be based on an understanding of the sequence of events of voir dire --

QUESTION: Let me ask you one question, Mr. Volinsky, just based on your first sentence, if I may.

MR. VOLINSKY: Right out of the box.

QUESTION: You say the Court's holding could be based on a legal error, on a narrow constitutional ground, or on a broad constitutional ground. Is there some non-constitutional ground on which we could reverse the Supreme Court of Mississippi here?

MR. VOLINSKY: That's in essence what I meant with the legal error. That ground -- if the Court will recall, the basis that the Mississippi Supreme Court had for finding this error harmless was that the Mississippi

Supreme Court said the trial judge had erred in previous rulings.

The Mississippi Supreme Court also went on to find that the trial judge had made his previous Witherspoon rulings based on the trial judge's belief that the jurors weren't being sincere with him when they said that they had scruples that would prevent their being seated in the case.

In finding that the trial judge didn't believe them and then going on to say, well, they shouldn't have been excused, the Mississippi Supreme Court misunderstood Witt. I think to make sense Witt has to be read to mean that jurors should only be excused if they honestly maintain scruples that prevent or substantially impair them.

QUESTION: Well, then if that is your example of legal error, which I believe was one of the things, that itself would be a constitutional ground, wouldn't it?

MR. VOLINSKY: I don't want to argue with the Court about whether it should be legal or constitutional. I think what Mississippi did is misunderstand Witt in that one respect, and I think without going into a very broad analysis of Davis this Court can say: You misunderstood Witt; if the trial

court did not believe those earlier jurors, he wasn't wrong, and therefore we don't even get to this offsetting penalties concept.

This Court also must recognize, in reaching its conclusion, the clear distinction between the jury function of fact finding in the guilt-innocence phase and the discretionary function involved in determining whether a particular community, a particular community, believes that the appropriate sentence in a particular case is death.

The voir dire in this case was an alternating type voir dire. It didn't alternate on each particular juror, but alternated on the panels. To start with, twelve jurors were seated, they were questioned by the prosecutor.

He exercised some peremptory challenges, one juror was excused for cause. They were replaced. The prosecutor stayed on his feet, questioned again until he was satisfied with the twelve in the box. They were then passed over to the defense lawyer.

QUESTION: Is that the standard Mississippi procedure?

MR. VOLINSKY: I believe it is, although my experience is --

QUESTION: You're from New Hampshire.

MR. VOLINSKY: I'm from New Hampshire, Your Honor. From my understanding, it is commonly followed.

The defense would then question. Then any replacement jurors would be requestioned by the prosecutor. The important thing is that the jurors were questioned in each other's presence. The jurors in the box, as well as the jurors waiting to be seated in the audience, could hear the questions, the answers, the motions, the rulings, and the ramifications of the rulings.

Each side in Mississippi had twelve peremptory challenges.

QUESTION: Well, can't counsel move that the waiting members of the panel be taken out of the courtroom?

MR. VOLINSKY: I believe they can. I believe there's also a motion for sequestered individual voir dire, where each juror is brought in singly. But that is discretionary.

QUESTION: No such motion was made here.

MR. VOLINSKY: I'm sorry?

QUESTION: No such motion was made here.

MR. VOLINSKY: No, Your Honor. And certainly, when the problems developed the prosecutor didn't ask in the middle of the proceedings to change the procedure.

There were ten motions made for cause by the prosecutor related to Witherspoon grounds. The first eight were denied. Each of those jurors were then struck by a peremptory challenge by the prosecutor.

The ninth cause challenge based on Witherspoon grounds was granted. It was against a juror named Schleh. This is at pages 503 to 506 of the transcript. It happens at a time when the prosecutor still has peremptory challenges remaining.

The tenth juror was Mrs. Bounds, who was excused over complaints by the defense counsel that she was qualified to sit. Mrs. Bounds' voir dire begins at 529 and 530 of the trial record, which is just a little bit before what you have in your joint appendix. It starts with the judge asking Mrs. Bounds two questions:

"Do you know of any reason you couldn't be a fair and impartial juror, Mrs. Bounds?" "No, sir."

"Do you think you meet all the tests to be a fair and impartial juror?" "I'll try."

We then go on to the prosecutor's questioning. He asked her a few questions about pretrial publicity, and then he goes on --

QUESTION: That's a little ambiguous, "I'll try."

MR. VOLINSKY: Well --

QUESTION: It's not quite a yes, is it?

MR. VOLINSKY: It's not quite a yes, but I think you'll see later on that she's been listening to this judge say, would you automatically vote against the death penalty regardless of the evidence. Her response to that is: "I will listen."

So I think in context, she's saying she'll do the best she can. Her answers --

QUESTION: That may not be good enough.

MR. VOLINSKY: Excuse me?

QUESTION: That may not be good enough.

MR. VOLINSKY: Well, any ambiguity on whether she can do the job or not, whether she's qualified or not, is cleared up later in the record, and I don't think there's a problem with that.

The prosecutor asks her: "Do you have any conscientious scruples against capital punishment when imposed by law?" Her response at the outset is: "I don't know."

"Well, I don't know either," says the prosecutor. He says he knows how he feels, and then he goes on and tells her he's trying to find twelve people without conscientious scruples to sit on the case. That may be a proper purpose for him. It wasn't a proper ground for excluding her.

The trial judge then intercedes on the prosecutor's request. He asks four or five different times, would you automatically vote against the imposition of the death penalty without regard to any evidence that might be developed in the trial of the case?

Mrs. Bounds at first says: "I would try to listen." And then later, when he says "No, answer it yes or no," she says: "No, I would not automatically vote against."

In the course of this questioning, I think it's appropriate to note the court makes a statement in the nature of a factual finding about Mrs. Bounds' credibility. He says: "No one's doubting your credibility" -- "No one's doubting your sincerity," excuse me, at page 18 of the joint appendix.

Later on, a couple pages later, he goes on and says: "Mrs. Bounds, you're honest and sincere." So he repeats the same finding.

After this series of questions, the prosecutor asks Mrs. Bounds: "What would you do in this case? Could you send this man here to the gas chamber?" And she says: "I don't think I could," which, if it ended there, would probably disqualify her.

But it doesn't end there. There's a motion to

strike for cause. The judge tells us what his assessment is of her ability to be seated at this point, and he tells us: "I don't know whether she could vote for it, I don't know whether she couldn't. She told me she could just a while ago." That's at page 20 of the joint appendix.

At this point the prosecutor has not carried his burden of proof as an adversary seeking excusal of a juror. The judge isn't convinced that she cannot properly sit. There's a brief exchange regarding the prosecutor's precarious position, some more questioning by the judge.

Mrs. Bounds says: "I think I could vote for the death penalty." The prosecutor then makes another motion. This time it's not a motion to strike, it's a motion to reverse some of those prior rulings that Your Honor had asked about.

There's a give and take at the bench and the trial court says: "Go ask her if she could vote guilty or not guilty. If she gets to equivocating on that, guilty or not guilty, I'm going to let her off as a person who can't make up her mind."

Well, the prosecutor goes out and asks her: "Could you reach a verdict?" "Yes, I could."

"If the verdict is guilty, could you vote for

the death penalty?" "Yes."

QUESTION: Well, Mr. Volinsky, I suppose the trial judge messed up the whole thing, didn't he? I guess we'll all agree to that.

MR. VOLINSKY: I certainly --

QUESTION: What do you think he should have done at the time this long exchange, which we're all familiar with, I might say, with Mrs. Bounds was concluded? Should he have started all over again, dismissed the panel and started all over again?

MR. VOLINSKY: That would have been a certain way out of this quagmire. I guess the Court's question presumes that this trial judge believed that he had erred five times previously.

QUESTION: Say it again, that this trial judge believed what?

MR. VOLINSKY: That he had indeed erred previously with respect to the five early jurors. I'm not so sure that that's the case. If indeed he felt that way, he could have reversed his earlier rulings and given this defense lawyer a chance to rehabilitate the jurors, which because of the nature of the way this voir dire happened, the defense lawyer never asked the excused jurors any questions.

But be that as it may, I think the easiest way

out of this would have been to throw the whole panel out -- they were all infected with the questioning and attempts to get off the jury -- and start anew.

QUESTION: Were you of counsel below?

MR. VOLINSKY: No, I was not.

All nine members of the Mississippi Supreme Court found that it was error to excuse Mrs. Bounds for cause. To paraphrase Adams, it does not appear in the record that Mrs. Bounds was so irrevocably opposed to capital punishment as to frustrate the state's legitimate effort to administer the death penalty.

She at the end very clearly said, I could reach a verdict and I could impose the death penalty.

One other thing I would point out, we do not have in this case the ping-pong effect that Mr. Justice Powell described in Patton. That's where the prosecutor gets up and asks a bunch of leading questions of an unprepared lay juror and smacks her in one direction, and then the defense lawyer does the same thing and smacks her back, and then the judge has to decide which set of leading responses is true.

Mr. Stegall, the defense lawyer at trial, never asked Mrs. Bounds any questions at all. So we have the prosecutor asking confusing and sometimes leading questions on the one hand, and then we have the

trial judge asking open-ended questions that get responses that qualify her to sit.

And at the very end, it's even the prosecutor who asks: "Can you reach a verdict?" "Yes." "Can you vote for the death penalty?" "Yes."

I think it's pretty clear that Mrs. Bounds was erroneously excused. Having found that, the majority of the Mississippi Supreme Court then went on to its rationale about why the error was harmless. The rationale used this offsetting penalties approach. That is, you erred against the state by denying their motions, therefore it's okay to err against the defense.

Jurors are certainly not fungible commodities where this kind of tit for tat approach is appropriate. Each juror brings something with him or with her.

QUESTION: Well, that isn't the theory. It isn't just a tit for tat. The theory was that if the prosecution had had another peremptory challenge, the prosecution would have exercised it as to this particular juror, and therefore the excusing of this juror is harmless.

MR. VOLINSKY: Number one, I'm not clear that the Mississippi Supreme Court quite spelled it out, but that was my impression, as is yours. But when I saw the

Respondent's brief, what you're describing is basically an unused peremptory's rendering an error harmless.

QUESTION: Right.

MR. VOLINSKY: The Respondent in this case in their brief at 25 seems to distinguish the instant matter from an unused peremptories issue by saying that they would have, if they could.

QUESTION: Of course, how do we know that they would have?

MR. VOLINSKY: I think that's the problem with the unused peremptories argument. I think when you consider how voir dire is conducted, you have a trial lawyer who's focused on a juror, getting at questions and answers, trying to determine demeanor, trying to determine how this juror will fit in with those, as well as individually, trying to figure out what the other side's going to do with this juror, and then trying to calculate what's going to happen behind him.

I think that, even not doubting a prosecutor's sincerity, the nature of the situation changes from moment to moment to moment.

QUESTION: You can't be 100 percent certain, but there can be no doctrine of harmless error, Mr. Volinsky, if you require 100 percent certainty. It's hard to imagine an error you can say was 100 percent

certain to have been harmless.

MR. VOLINSKY: I agree.

QUESTION: All you're saying here is that you can't say for sure that the prosecution would have challenged this juror had the prosecution had one more left, but gee, doesn't it seem very, very likely indeed. The prosecution is saying this juror is so bad that she should be excused automatically, and to think that if he had a peremptory left he wouldn't have used it, I find it difficult to believe that that could have happened on the facts of this case.

QUESTION: Well, I find it difficult to believe otherwise. It seems to me that she was fairly well rehabilitated, and that there is an element of distinct speculation as to whether that peremptory, if it existed, would have been exercised.

MR. VOLINSKY: I think the nature of her responses changed dramatically from the very front to the very end.

QUESTION: Why was the prosecutor asking to have some of his peremptories back, then, if he didn't intend to use them? Do you think if the judge had said, okay, you can have them back, the prosecution would say, thank you, Your Honor, I don't intend to use them, I want to use them on later witnesses -- on later people?

It's inconceivable, isn't it?

MR. VOLINSKY: Well, I'm not 100 percent sure that he would have used them there, and you've said that 100 percent sure --

QUESTION: He would have had one mad trial judge on his hands if he didn't, wouldn't he?

MR. VOLINSKY: You bet, you bet.

The other issue, the other way to look at this --

QUESTION: What are you assuming, that he gets one peremptory back or all five, when you're in this debate?

MR. VOLINSKY: I don't know how we tell. The trial judge clearly excused these people or clearly refused to excuse these people. I don't know how we parse out whether one comes back or five comes back. I think it's speculation on this record that the trial judge believes he committed an error. I don't think he quite believes that. So I can't tell.

QUESTION: Mr. Volinsky, if we had a case where all the other eleven jurors had been selected at the time a Mrs. Bounds was examined and the state still had ten peremptory challenges left and the trial judge is convinced from the testimony of the prosecutor that indeed the prosecutor would have used one of them on

Mrs. Bounds, could we have a harmless error inquiry?

MR. VOLINSKY: I think in that circumstance, Your Honor, you have to look at Judge Goldberg's concurrence, where he talks about not only the impact of the erroneous ruling as to juror X, but the impact of the erroneous ruling as to the rest of the panel.

I think that having a pocket full of peremptories, as opposed to a few --

QUESTION: Well, on the facts that I pose, in your view could we have a harmless error inquiry perhaps?

MR. VOLINSKY: I think there's a problem with it. The problem is -- and it happened here. This trial judge refused to excuse these jurors. Because of his ruling, the defense lawyer made no attempt to question the jurors, rehabilitate the jurors, or whatever.

If we were in a situation, as Your Honor poses, where we're down to the last person and the response from the juror is, I could vote for a death penalty, what's the defense lawyer supposed to ask her to make her position any more clear?

I think it presents problems in that procedural context.

QUESTION: I must confess, I really don't understand this part of the argument, because no matter

whether the trial judge was right or wrong, the state did elect to use its peremptories. If he did not believe the jurors and he thought they could have sat legitimately, the only way the prosecutor could get him off was by using a peremptory. So on that hypothesis they had to use the peremptory, right?

And on the other hand, if they were telling the truth they were qualified and the only way the prosecutor could get them off was to use a peremptory.

MR. VOLINSKY: Right.

QUESTION: So I don't understand how there's even an arguable basis for saying the prosecutor wouldn't have used his peremptories. He had to, no matter what your theory is.

MR. VOLINSKY: I think he would have used them. I think --

QUESTION: Well, he did use them and that's --

MR. VOLINSKY: Yes, I agree, I agree.

There is some discussion by the Respondent and the amici that this case is governed by Lockhart and that because of Lockhart jurors with scruples don't comprise a recognized group. Just very briefly, I think Lockhart makes it very clear that there is a special context for capital sentencing.

The jury's function in capital sentencing is not the very strictly channeled fact finding of guilt or innocence. I think it's discretionary. It involves representation of that community's beliefs, perhaps moral outrage, perhaps mercy.

It's based on the weighing of factors that an appellate court can't go back and say this weighing was appropriate. How can we compare age of a defendant versus the way the crime was committed? It simply isn't -- it isn't something that can be replicated or even viewed critically by an appellate court.

This court in the Bobby Caldwell case talked about the appellate court's inability to glean from the record the intangibles of a jury's decision to sentence to death or not to sentence to death. I think those comments are quite appropriate here in this case.

The only other point I would touch on is, there is some argument by the amici and the Respondent that this Court has already used a harmless error standard in death penalty cases in the context of Zant versus Stephens.

That case in part is completely distinguishable from this case; in part, it supports Petitioner's position. Very briefly, you have to look to the metaphor used by the Georgia Supreme Court, which

involved the pyramid and the narrowing effect of the jury selection, of the jury selection of who is eligible and then who deserves the death penalty.

The function of aggravating factors in Georgia was simply to see which defendants were death eligible. Therefore, the finding of one or ten aggravating factors was no different. Any one beyond the first was a redundancy.

In a case like this, in this instance, where Mississippi requires a unanimous verdict, a decision to improperly excuse one juror cannot be considered a redundancy. She could have been the juror that saved Mr. Gray's life. A failure to reach a unanimous verdict results in a life sentence.

The other point, just to go back to Mr. Justice Scalia's question about 100 percent versus very likely versus the harmless error, which is a reasonable possibility that it couldn't affect this verdict, I would submit that it's the prosecutor, the state, the Respondent, who must establish harmless error beyond a reasonable doubt in this kind of an error.

We're not dealing with something like defective assistance of counsel, where the prosecutor can't control what happens. Clearly, this prosecutor did control what happened. He did not need to -- he

didn't have to stand on his motion.

QUESTION: What more could he have done?

MR. VOLINSKY: This is distinguishable from the Strickland scenario, where the prosecutor can't prevent the error because he doesn't control what the defense lawyer does. In this situation, the prosecutor formed the questions, he made the motions. He didn't have to continue to press the trial judge to excuse this juror.

He could have said: Yes, she can vote for a guilty verdict; yes, she can vote for death. I withdraw my motion. It was within his power, is what I'm saying, as opposed to the ineffectiveness claim, where the defense properly bears the burden.

QUESTION: Well, but it wasn't realistically -- it wasn't realistically within his power to do anything otherwise unless, and not have this juror seated, unless he were given back one of the peremptories that had been taken away earlier.

MR. VOLINSKY: That presumes that he has a right not to have this juror seated.

QUESTION: That's right.

MR. VOLINSKY: He didn't have that right under these circumstances.

I didn't expect the Court not to have very

many questions. I'd like to reserve the portion of the remaining time if the Court doesn't have further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Volinsky.

MR. VOLINSKY: Thank you.

CHIEF JUSTICE REHNQUIST: We'll hear now from you, Mr. White.

ORAL ARGUMENT OF

MARVIN L. WHITE, JR., ESQ.,

ON BEHALF OF RESPONDENT

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

In this case the Mississippi Supreme Court held that the force and effect of the trial court's ruling in this case was to correct an error that he had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance. The court further held --

QUESTION: Of course, the trial court never made a finding to that effect, did he?

MR. WHITE: I think the trial court said that, in the paragraph where the trial court is talking about that, he said: I have cheated the state out of this.

And I think that is a finding. It says the court is of the opinion -- and that's on page 26 of the joint appendix:

"The court is of the opinion that it cheated the state by making him use -- by making the district attorney use his peremptory challenges in at least five instances, and I'm going to allow them in this particular case."

So I think the trial court is clearly recognizing his error there, that he has made a mess, as he said himself, and created this situation that we have a juror who, he says in his findings of fact, also that she can't make up her mind. He has a totally indecisive juror.

QUESTION: Then I'll ask you what I asked your opposing counsel: What should the trial judge have done in order to clean up this mess that he created?

MR. WHITE: I think he probably should have used the word "peremptory" instead of "cause" there, and I think that's probably what he meant to say. But he used the term "cause" and, if you read prior to that, in a couple of paragraphs prior to that, he got the terms "peremptory" and "cause" confused there. And I think the judge fully meant to use the word "peremptory" instead of "cause."

But we have this situation here where he used the word "cause" and things moved on.

QUESTION: Well now, it's not just inadvertent, because he says later: "I'm not going to add any to his challenges." I think you've got to admit he knew what he was doing, that he knew he was dismissing this juror for cause, rather than giving the prosecutor another peremptory.

MR. WHITE: He says, I'm not going to give you five more.

QUESTION: It would have been smarter, perhaps, to give the prosecutor another peremptory, but he didn't. He excused this juror for cause, and he knew what he was doing.

MR. WHITE: And I think he was backing off and excusing her because she was indecisive in her answers and he was not satisfied that she was in fact rehabilitated and everything else, and was saying there that he was going to excuse for cause.

The Mississippi Supreme Court, of course, looking at this situation, decided that this was a case in which they had to step in and define what the trial judge meant or decide what the trial judge meant. And we find there that they did. They said he properly did what he did, instead of dismissing this whole venire and

starting over again at this point.

QUESTION: Mr. White, let me ask you, too, about Mississippi procedures. Is this case typical of the jury selection procedure in Mississippi?

MR. WHITE: Pretty much typical. What we do in Mississippi, we put twelve people in the box and then the voir dire starts. And the challenges are exercised, and the state has to present the defense with twelve jurors in the box that we accept, and then the defense can voir dire them and then remove them.

QUESTION: Is that similar to Alabama and Louisiana, Tennessee?

MR. WHITE: I'm not familiar with their practice --

QUESTION: It seems very strange to me, an unusual kind of a way.

MR. WHITE: It's called the Stennis method of jury selection, and it's name after Senator Stennis. When he was circuit judge, it started then. And it has been approved in the federal courts in Gray v. Mississippi, the non sequestered voir dire. And there is no provision, and it has been consistently held that there is no entitlement to, a sequestered voir dire in this case. It's discretionary with the judge, of course.

So in looking at this, there are five jurors in this case that do not equivocate in the least in their opposition to the death penalty. And the judge -- something the defense counsel has skipped over here is when the judge talks about, and he says:

"We're in a precarious position by making the state use its challenges when we clearly have met the law in about six cases. Well, I think I had one or two that just used this to get off the jury, at least one person that I'm positive of."

That's on page 20 of the joint appendix. So the judge is not saying that all of these people were using this to just get off the jury. He said, I've got one or two, and one that I'm positive of. So it is not conclusive that he was removing these jurors just because he was thinking that they were just using it to get off the jury.

What he was doing was trying to insulate this case from Witherspoon error. So, because it is clear that if you use a peremptory that there is no question there is no Witherspoon problem.

And by forcing the state -- when he uses the first one, when he requires the state to use the peremptory on the first challenge, to Mr. Ruiz: "We would like to use one of our challenges at this time."

The judge says: "Well, I'm not going to excuse him for cause. You'll have to use one of your challenges."

In one of the others, he just -- "I guess," the judge says, "you're going to use one of your peremptories." He just tells the state when they move for cause. He says no, use a peremptory.

So the state was forced to use peremptories in those five cases. There are three jurors there that they used peremptories on that are in the joint appendix, and of course those are clearly jurors that that was the proper use of a peremptory, for the use of a peremptory.

So we have a trial record, of course, that is very confusing, and this confusion, we submit, is cleared up by the Mississippi Supreme Court in holding the trial court was correct in correcting the errors there from forcing them to use peremptory challenges.

QUESTION: General White, I was just reading over again the colloquy. It's really puzzling. But when the judge says "Oh, I think there are one or two that just used this to get off of the jury, at least one person that I'm positive of," do you think that's the equivalent of a finding of fact, that there was one of these that was excused that the state had to use a peremptory on that was guilty of perjury?

MR. WHITE: Well, I don't know. Maybe they did have some --

QUESTION: See, it's conceivable that they might have been very happy to get off the jury because of this, and they may have perhaps just emphasized, given more emphatic answers or something. I don't know just how to interpret that statement.

MR. WHITE: And I don't either. I mean, I think that that is one of those situations where you have -- and it happens in every jury -- somebody comes in, they've got someone sick in the family, and they just don't want to serve.

And the Mississippi Supreme Court addresses that in its opinion, saying that, you know, we are a busy society and people don't want to take the time out to do this, this duty of serving on a jury, and they think up every excuse in the world to get out. So this is a situation that we have to address, and we're going to look at here that this trial judge here was doing the best he could here to try to --

QUESTION: Doesn't it have to be part of your case that he says at least as with respect to one, because he says at least one person that I'm positive of, that that's pretty much the equivalent of saying I think that prospective juror was lying?

MR. WHITE: I think he probably does. He has that feeling that he's lying, maybe not absolute proof for that juror. And there's no way, I guess, that you could ever prove that that juror was perjuring himself, but he has that gut feeling, and that's what he's saying there.

QUESTION: Would that gut feeling be adequate to justify excusing him for cause without finding that he was not telling the truth?

MR. WHITE: I think that would be adequate reason if someone -- if the judge feels like he's lying in the voir dire. I think that would be adequate reason to remove him for cause.

QUESTION: You wouldn't remove him; you'd leave him on. You'd leave him on and make the state exercise its -- well, no. What would he do?

MR. WHITE: I think the judge could remove him on his own motion. If someone is not going to be honest in his answers on voir dire, then how can the judge be confident that this person is going to render an honest verdict. If he gets mad for staying on there, he may take it out on either party.

QUESTION: To remove him as a perjurer?

MR. WHITE: Right, or for whatever cause. I'm going to excuse you for my own cause. I don't think,

you know, if one side or the other didn't exercise a challenge there --

QUESTION: But that's not what he did. He did just the opposite.

MR. WHITE: Yes.

QUESTION: He left them on because they were lying.

MR. WHITE: Yes.

QUESTION: He said, these people who say that they can't vote against capital punishment, they're lying.

MR. WHITE: Yes, I see. I was looking at the overall picture, not this particular case.

QUESTION: Did the state, with respect -- and we don't know which juror this is. But with respect to any of these, before using its peremptory did the state support a motion to excuse for cause on the ground that this juror is not believable, I think he's just trying to get out of jury duty?

MR. WHITE: Well, are we talking about Juror Bounds now?

QUESTION: No, no, no. The earlier ones, the earlier ones, when the state was --

MR. WHITE: Not that I recall on the record, I don't think. I think the full voir dire --

QUESTION: So that the notion that the judge was too tough on the state and perhaps should have granted the motions for cause really arises during the colloquy about Mrs. Bounds for the first time?

MR. WHITE: Well, I think he took exception to that in the very -- with the Juror Ruiz, and he says --

QUESTION: What page are you on, Mr. White?

MR. WHITE: It's on the first. Page 3 right now I'm looking at. I think that's not the place where he objects to the judge making him use a strike.

(Pause.)

MR. WHITE: "All right, we intend to use." I don't find it right now, but in one of the cases where the judge required -- on one of these jurors, the state did take exception and -- oh, yes. I can't find it right now. In one of the jurors he did say that --

QUESTION: The top of page 4, possibly?

MR. WHITE: Yes. "And let the record show the state takes exception to the court's ruling that that, because we think" -- and the judge interrupts and says: "All right. This is a classic one for cause."

And so the state did preserve its objection to what the judge was doing in that case.

So we have a situation here that is ripe, I think and we contend, for the application of a harmless

error rule here, because as was stated in Rose v. Clark, per se errors are those errors that abort the basic trial process or deny it altogether. That was not done her.

The basic trial process was not aborted here. Mr. Gray received a fair trial. He does not make the contention that the jury that convicted and sentenced him wasn't impartial. He's saying that because we excused this one juror that we have a technical Witherspoon, Witt, Adams violation, and therefore the case should be reversed on the basis of Davis versus Georgia.

And we contend that this case is so factually different than Davis versus Georgia that the Court could leave undisturbed Davis versus Georgia if they chose.

QUESTION: Mr. White, if the state had no peremptory challenges left and there was no question that earlier jurors had been properly excused -- assume that it's not the facts that you are alleging here -- and the state had no peremptories left at the time that Mrs. Bounds or someone like her is erroneously excused for cause, would you still urge a harmless error inquiry?

MR. WHITE: If there had been no request for an additional peremptory -- I mean, that's within the

discretion of the trial judge, there, too -- I don't think we would be here, if we hadn't requested an extra peremptory, which he could have given to the other side.

QUESTION: But if we were to agree with you, what is to protect us from an assertion every time that there is a Davis versus Georgia error on the part of the trial court?

MR. WHITE: Davis versus Georgia --

QUESTION: What is to protect us from the prosecution coming in and saying: Well, yes, this juror shouldn't have been discharged, but nonetheless, but nonetheless the trial court made these five errors earlier in not allowing peremptories, and therefore we want you to review the disallowance of all of the peremptories?

Is that what we're letting ourselves in for by listening --

MR. WHITE: Well, as most harmless error cases must be, they must be looked at on a case by case basis. I mean, there's no broad firm and fast rule in a harmless error context. You've got to look at that error in that case.

And I think that we have to --

QUESTION: Well, at least here you've got a

finding by the State Supreme Court that there was an error in dismissing those earlier jurors.

MR. WHITE: That's true, we have. The State Supreme Court --

QUESTION: And also, that a subsequent juror was entitled to sit, except for.

But do you think that the Mississippi Supreme Court found harmless error?

MR. WHITE: Well, they did say in there that they could show no prejudice, the defendant could show no prejudice. They mentioned prejudice, and I don't really know that that really kicks in the whole harmless error thing, I mean, just by saying that there was no prejudice to Mr. Gray.

QUESTION: Well, normally wouldn't we remand to a state court to find harmless error if it hadn't found it?

MR. WHITE: That's what's been done, I think, in Rose v. Clark and Delaware versus Van Arsdale. They were sent back for --

QUESTION: Mr. Attorney General, about how much time would it be if the judge at that point had said, okay, there's nothing else I can do, I'll throw the whole jury out? How many days would have been lost?

MR. WHITE: It would have probably in this particular case, since this is one of the populous counties and they do have a term of court starting every other month, it could have been probably within a month, because in a capital case a special venire is drawn and it takes a couple of weeks to compile and draw and serve a special venire.

QUESTION: It would take about a month?

MR. WHITE: A month or two, if that's the situation there.

QUESTION: Mr. White, let me follow up on Justice Scalia's question. Is it Mississippi law that the trial judge in his discretion may go beyond the statute and allow as many additional peremptories to the state as he sees fit?

MR. WHITE: Well, I don't know that we've ever had a case --

QUESTION: You have no cases on that?

MR. WHITE: -- on that. It has been done in cases, but never been raised as an issue. I mean, I've seen cases where it's happened, but it's never been an issue that the court has spoken to.

So it's something that our court says the trial judge has very wide discretion in seating a jury, and it has said that --

QUESTION: One last question. Where is Harrison County? Is that Jackson?

MR. WHITE: No, it is not. It is on the Mississippi Gulf Coast, Gulf Port, Biloxi, where the Kiesler Air Force Base is, I think. This is where the victim --

QUESTION: Not a small rural county?

MR. WHITE: No, it is not. It's a very populous area.

QUESTION: Did you say there are actual cases where the trial judge has given more peremptories?

MR. WHITE: Yes, sir.

QUESTION: To both sides or just to the prosecution?

MR. WHITE: Well, it's usually been both, to both sides. You know, if you give to one you give to the other. Here this is not, of course, what the situation would have been. The state was saying, give us back one that you made us erroneously use, you erroneously made us use.

So, but there are cases where extra peremptories have been given. In fact, in one capital case we had that was on appeal, I believe, the trial court I believe gave an extra six to both sides. So it is just something within the --

QUESTION: Feeling good that day.

MR. WHITE: Yes, feeling good. I mean, I cannot explain that and we'll see what our court has to say about that maybe.

QUESTION: Was there a request for another peremptory here?

MR. WHITE: In this case?

QUESTION: Yes.

MR. WHITE: No, he said we're not asking for an extra one, we're just asking you to give us back the one that you erroneously made us use. We didn't ask for an extra one; we just said, correct your ruling on this earlier thing.

QUESTION: Can I ask you. I must confess this case confuses me. Every time I look at it I seem to see it differently. But on page 49 of the joint appendix, in the Mississippi Supreme Court's discussion of the case they point out that the trial judge refused to excuse there jurors and required the state to exercise peremptory challenges.

And it says: "It is abundantly clear from the record that his reason for doing so was because he believed that the jurors were simply claiming to have conscientious scruples against the death penalty," and so forth.

Should we -- what if we were to take that as a finding of fact that all of those, the judge correctly concluded that those jurors were shading their testimony or lying? If that were true, then would it not also follow that the trial judge correctly required the state to exercise its peremptories?

MR. WHITE: Well, that is one way to look at it, I think, that it could have been that. I think that what he's saying, what the court is saying here, though, is that what he believed at the time -- maybe they don't say that there, but that what he believed at the time that he was doing this. And that's why they go ahead and reach the conclusion they do.

I think that if it had been clear from the record that these people were in fact shading their testimony or whatever -- but I think that comment in there about the judge saying, I had one or two, I think that that throws a whole different light on it. You know, I just had one or two, not five but just one or two.

QUESTION: Well, but isn't the answer that the Supreme Court's opinion later makes it clear that the Supreme Court does not, does not think that there was a finding of fact that these jurors were lying? I mean, on page 52 they say:

"Although the route taken to Mrs. Bounds' dismissal was a circuitous one indeed," blah-blah-blah-blah, "the force and effect of the trial court's ruling was to correct an error he had committed."

So the Supreme Court acknowledged that the trial judge wrongly thought these people were dissembling.

MR. WHITE: Sure, and I think that's what it is. I think they're saying at that earlier point, just pointing out what he thought at the time when he did it, but he was in thinking that. And we're saying that when he finally came down by using the word "cheated" and all that, he's realized his error there.

QUESTION: Well, that's certainly how I understood it.

MR. WHITE: Yes. I mean, that's the way I interpret that.

So I think that this is the prime case for the application of a harmless error rule. I was saying that the fair cross-section argument that Petitioner makes, saying that Lockhart does us no help, gives us no help, is that he says that the fair cross-section somehow applies to the guilt phase, but does not apply to the sentence phase, which if I remember it all right the

whole purpose of Lockhart and Witherspoon and all this to remove these people from the jury was for the sentence phase.

So I don't think we get into a fair cross-section. He's saying that it just diminishes the fair cross-section argument.

The Court held, of course, in Batson -- I mean, in Lockhart -- that the fair cross-section argument does not apply to the petit jury, just to the box that the jury is drawn from, the venire is drawn from.

QUESTION: Mr. White, how clear is it that, assuming the mistakes hadn't been made and assuming they were mistakes concerning the earlier refusals to dismiss for cause -- assuming those mistakes had not been made, how do we know that the peremptory challenges that the state would thereby have had in its pocket wouldn't have been used up by the time this juror came around?

MR. WHITE: Well, as I said, in the method of choosing jurors, the jurors are numbered and they are put in there numerically. As they are -- as one is removed, the next one comes in. So you don't get any just random sampling. It's the next one of numbers that come in and take their place in the box.

So only the jurors that actually were in that

jury would have been the jurors there at the time that Mrs. Bounds was there. Am I making myself clear?

QUESTION: If that's in answer to my question, I don't understand it. What I'm concerned about is that the state, assuming that the trial judge had ruled correctly --

MR. WHITE: Okay.

QUESTION: -- initially and had not required the state to use its peremptory challenges, right, how do we know what those peremptory challenges wouldn't have been used up on some other juror before this juror, before Mrs. Couch? What was her name?

MR. WHITE: Because of -- Mrs. Bounds. Because those jurors in between, those stricken jurors --

QUESTION: Right.

MR. WHITE: -- and Mrs. Bounds are the same ones that are sitting there. They would have been the same ones sitting there. In other words, the error was not pointed out to the court again until Mrs. Bounds got there: You've made us use our peremptories.

QUESTION: Yes, but he might have used the peremptories if he had had them at hand.

MR. WHITE: But we have -- he did use some peremptories in the meantime and strike other jurors in

between those five and Mrs. Bounds.

QUESTION: When was the last one before Mrs. Bounds?

MR. WHITE: I'm not just sure.

QUESTION: What I'm saying is that if there were, you know, five people that came in before Mrs. Bounds, if he had had another three peremptories he might have used up those three.

MR. WHITE: Well, that's true. But the record shows that the jurors that came between the last strike and Mrs. Bounds were not stricken for peremptory challenges and, you know, there was no request at that time.

QUESTION: Of course they weren't. He had none.

MR. WHITE: Yes, but I mean he didn't ask for any, either. And he didn't become concerned about this until Mrs. Bounds got there. He found those jurors acceptable.

QUESTION: Well, maybe his concern was less with them than with Mrs. Bounds. But if he had had the peremptory he might have used it anyway.

MR. WHITE: He very well may have.

QUESTION: So it's all speculation that we're dealing with.

MR. WHITE: Well, I think that it's reasoned speculation, Your Honor. I think from looking at the record and seeing what those other jurors said, those jurors in between there did not equivocate at all. They didn't present a situation in which it can be reasonably discerned he would have had to use a strike.

I think we have a record, whereas in Davis versus Georgia we didn't have a record and they were trying to use peremptory challenges after the trial was over. Here everything went on at trial and is of record. We have a different situation here.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. White.

Mr. Volinsky, do you have something more? You have six minutes remaining.

REBUTTAL ARGUMENT OF

ANDRU H. VOLINSKY, ESQ.,

ON BEHALF OF PETITIONER

MR. VOLINSKY: Thank you, Your Honor.

Just very briefly, I'd like to go back to the point of whether or not the five jurors were erroneously stricken. Looking at the Mississippi Supreme Court opinion that deals with this issue, maybe I'll confuse it more, but I'll take my try.

Justice Dan Lee at 47 starts discussing the

problem with the excusal, and he goes through this dissertation about the twelve angy men and how jurors are often reluctant to serve, and really capsulizes the problem.

He then talks about how voir dire should have been done by the trial judge. And then on page 49 he discusses that it is abundantly clear from the record that the trial court refused to strike because he believed them insincere.

After that, there is never a finding that the trial court was wrong in believing them insincere.

QUESTION: He says: "There is no logical reason not to allow the trial court in this situation to correct its erroneous ruling."

MR. VOLINSKY: It's correct the erroneous ruling if you misunderstand Witt, and I think that's what happened with the Mississippi Supreme Court. If this trial judge didn't believe the attestations of the jurors, they shouldn't have been excused. And I think this court, this State Supreme Court, doesn't argue with the --

QUESTION: "Notions of judicial economy make it clear that the trial court should be allowed to recognize and correct its error early in the proceedings." I interpret that to mean its error, its

error in the dismissal of the other jurors, or refusing to --

MR. VOLINSKY: I guess my concern is that this record doesn't support your interpretation. This trial judge at the very end of the colloque that we've been talking about at the trial is given a very clear chance on a motion of the prosecutor to reverse the five earlier rulings.

And he says at the very, very end, he says, I am not going to do it, I'm not going to go back and give him five more. He refuses affirmatively, affirmatively refuses to go back and change his earlier rulings. This trial judge did not correct prior rulings because he didn't change them.

I would also argue that his excusal of Mrs. Schleh on cause grounds showed that he knew how to -- he knew what Witherspoon was about and could apply it when he thought the jurors were sincere and could refuse to apply it when the jurors were insincere.

Additionally, there are a number of places in the record where the trial judge and the prosecutor talk about jurors using this as an excuse to get off the jury. The prosecutor asked Mr. Lassabe: "Do you believe that or are you just telling me that to get off the jury?"

I think it was a clear problem, a problem that could have been corrected as soon as it raised its head by stopping, excusing everyone else, and going to an individual voir dire. But once we got to Mrs. Bounds, I think Justice Blackmunn is absolutely correct, the only way to fix the problem is to throw everyone out and start over again.

Just as a matter of record, this wasn't a special venire. This was the regular venire that was summoned here. The prosecutor -- the judge had talked the defense lawyer out of a special venire because you had to tell the jurors that they were being summoned for a capital case, State versus David Gray, and they all agreed that they didn't want jurors looking out for the David Gray publicity.

So this was just the regular venire of a couple hundred people.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Volinsky.

The case is submitted.

MR. VOLINSKY: Thank you, Your Honor.

(Whereupon, at 2:55 p.m., oral argument in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)