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# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5731

TITLE WILLIE DAVID BROWN, AKA WILL BROWN, Petitioner V. UNITED STATES

PLACE Washington, D. C.

DATE October 14, 1986

PAGES 1 thru 29

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE DAVIS BROWN, AKA WILL BROWN, :

Petitioner, :

V. : No. 85-5731

UNITED STATES :

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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 1:43 o'clock p.m.

APPEARANCES:

FRED HADDAD, ESQ., Fort Lauderdale, Florida; on behalf of the petitioner.

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.



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## P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-5731, Willie Davis Brown, AKA Will Brown, Petitioner, versus the United States.

You may begin whenever you are ready, Mr. Haddad.

ORAL ARGUMENT OF FRED HADDAD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HADDAD: Thank you, Mr. Chief Justice, and may it please the Court, if I may, the Court has already heard argument somewhat on this issue. I would like to address the facts momentarily in the case in that I think it may have a bearing on what I would argue in response to what Justice Blackmun asked at the initial opening argument in Griffith.

In this case the defendant, a black man, was charged with a co-defendant, another black man, with violations of the conspiracy narcotics laws, and was put to trial in the United States District Court for the Western District of Oklahoma.

Five black people were called for the jury, three of which were excused for cause by the court, two of whom were excused by the prosecutor peremptorily, and there was an objection made, and the defendants or petitioner sought to -- a request of the trial judge for

the -- and a couple of additional challenges in an effort to seek some black members of the venire that were still available as well as an objection to the prosecutor's employment of his challenges to exclude black people who responded on voir dire in a manner sufficient to indicate that they could be fair in the case.

As it turned out during the second day of jury deliberation counsel were made aware that during a break between the first venire and the second venire the United States Attorney or Assistant United States Attorney, Mr. Richardson, had made a telephone call to the jury clerk asking her the composition of those who would be calling or coming and asking her not to bring any jurors, as he recalled it, or don't get any blacks on the jury, as she recalled it.

A hearing was then had during the -- excuse me. We had a hearing while the jury was deliberating, and at that hearing Mr. Richardson attested to the fact that he took into consideration that the defendants were black and that their lawyer was black, and that their lawyer was a prominent black member of the Oklahoma State Senate, and he intended to strike from the jury panel any person who indicated whether or not they -- whether they knew Mr. Porter, who was my co-counsel at

the time, and that was -- I asked the question, did not that person that you excluded admit that she would be fair, not influenced by Senator Porter and so forth, and the answer was yes.

That brings us, I think, to the question that Justice Blackmun asked regarding the clear break. I would suggest to the Court that in my review of discrimination cases the only persons who have ever been afforded a presumption of validity on their conduct has been attorneys.

I think the Court offered to prosecutors both of the United States Government and of the state court that they, being lawyers, and being sworn to uphold the Constitution, would not employ their peremptory challenges in a manner that was different that that which was set out in Swain versus Alabama. That is that any peremptory challenge would be directed to matters related to trial as opposed to race.

And I think that is a distinction in this case that takes it out of the ambit of the rest of the retroactivity cases. I would note in many of these retroactivity cases the good faith of the persons involved comes to mind, particularly in United States against Peltier or Peltier.

The fact that the law may have not been -- may

have been overruled and Alameda Sanchez may not have been the proper law, people relied upon this law in good faith. I think what Batson recognizes is that in Swain versus Alabama the Court recognized, the lawyers, people who are sworn, and I don't mean to be melodramatic, to uphold the Constitution would in fact act in conformance with their oath.

After 20 years or 21 years of the evolution of trials, I think the Court in Batson realized that perhaps this is not the case in certain circumstances. The Court in Batson just said, if the appearance is there, we are not saying grant a new trial, we are not saying to anyone that you have to indulge in all these acts. What we are saying is, if the appearance of impropriety is there by articulable reasons offered by the defense counsel which the trial judge as the listener to voir dire can take unto himself, then he can request that the prosecutor offer a neutral basis or a monochromatic basis for the exercise of his challenges.

I think that was a decision that surely ought to have effect to cases pending on direct appeal. I don't think it was -- granted, it was a break in the rules, it was a clear break more than likely, but I think it was bottomed on a conception that that which should be right would have been done, and I think the

facts in the case before the Court in Brown illustrate that at least in times it has not been done.

The arguments in support of retroactivity as in the Harlan approach have been offered to the Court already. I don't want to repeat them and just unduly talk too much, but they have been set forth, and I think and I would suggest to the Court that the Harlan approach is the approach that ought to be taken as Chief Justice Rehnquist did in Shea, and just draw a bright line and say, cases pending on direct appeal receive the benefit of the case -- of the law at the time the case is decided.

QUESTION: The problem with getting the Court to ever adopt the Harlan approach is that we seldom have a case here in which both sides of the thing are involved.

That is, it would take an opinion of the Court, say, a holding in the technical sense that on habeas corpus there is no retroactivity perhaps with minor exceptions; on direct review there is always retroactivity. But we tend to get our cases, it is either a direct review or a habeas corpus, and so it is hard to get the court to coalesce around a proposition that would apply to both situations.

MR. HADDAD: I understand that, Your Honor. I

would think that, as Justice Harlan said, taking the scope of the great writ, as he called it, it is to determine if a person is lawfully in custody by those factors or those rules in effect at the time conviction became final, with certain limited exceptions. One would think of matters that go to jurisdiction, double jeopardy or as the Court has applied Gideon versus Wainwright and those cases.

QUESTION: Why would double jeopardy be an exception?

MR. HADDAD: For a writ?

QUESTION: Yes.

MR. HADDAD: Waller versus -- Robinson versus Neil held -- it wasn't Waller, and I am just trying to give the Court an example. If a person -- I don't think we have that any more after Waller and Ash versus Swenson, but trying to give the Court an idea of what -- a response to your question.

QUESTION: But Robinson against Neil was an application of the Stovall against Denno test, not an application of Justice Harlan's test.

MR. HADDAD: Yes, sir. I agree, but I am just trying to give it as an example of what I am talking about. When you are talking about --

QUESTION: Well, I think it is a very poor

example of what you are talking about, is what I am trying to say. But you are entitled, obviously, to convince my eight colleagues that you are right.

MR. HADDAD: It is just that that is the example that I think I could give, where it went to the essence of the truthfinding factor on collateral review or something where the Court has previously held that it was of such a critical nature that it ought to be applied retroactively on collateral review.

QUESTION: Mr. Haddad, may I ask you, do you think a Batson claim and a trial that arises in the future, say someone is tried tomorrow and a Batson claim is made and it is denied on direct review, that that claim could be raised on collateral review?

MR. HADDAD: I would think so. Yes, sir. would think it would be a failure to follow the law in existence at the time. It would be -- and I hope, Mr. Chief Justice, this isn't a bad example again, but I would think it would be in the nature of a failure to afford a full and fair hearing under Stone versus Powell and the Fourth Amendment issue.

QUESTION: No, I am assuming that they had a full and fair hearing in the state system that would satisfy Stone against Powell and that it was appealed but just was denied on the merits, but there was, you

know, an arguable basis for the claim. Under those facts do you think it would be raisable on collateral review?

MR. HADDAD: Yes, sir. Yes, sir, I do, so that I just say that in conformance and conjunction with -- yes, sir?

QUESTION: (Inaudible.) I think you or at least others have cited Stovall. Do you recall when the Stoval opinion, which was, of course, a collateral case, where retroactivity was involved, we held that the rules should not be made -- those were the Wade and Gilbert rules --

MR. HADDAD: Yes, sir.

QUESTION: -- should not be made retro.

MR. HADDAD: Yes, sir.

QUESTION: But then we went on to say, "We also conclude for these purposes no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of alliance and burden and the administration of justice as entitled to such overriding significance as to make that distinction unsupportable," and then went on to say that it is just too bad for the -- that only those whose cases were actually taken had the constitutional

question decided in their favor, this on the ground that "we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

Do you think that is still law?

MR. HADDAD: Do I still think it is still law?

QUESTION: Do you think what I have read you is still law?

MR. HADDAD: I think the Court has gotten away from that. I think Justice Harlan, and I hope the Macke decision came afterwards, said that those cases came along because of this Court's many --

QUESTION: (Inaudible.)

MR. HADDAD: I am sorry? This Court's decisions --

QUESTION: Justice Harlan's view was usually expressed either in dissent or in concurrence.

MR. HADDAD: I am sorry. I meant dissenting opinion in Macke or concurring opinion in Macke dissenting and the cases with it noted, I believe, that this Court had taken this almost as a policy approach because of its numerous decisions in the criminal law field, and that the Court was taking certain cases and holding them one way on collateral and one way on direct

and then not of benefit to anybody, as in Morrissey versus Brewer, or certain chance beneficiaries, and that is what brought about his decision, I think, or his opinion.

QUESTION: Well, this opinion went on to recognize that inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process but raise the same issue.

MR. HADDAD: Yes, sir.

QUESTION: Nevertheless what we said there was that there is no retroactivity.

MR. HADDAD: I think Justice Brennan wrote that, too.

QUESTION: Hm?

MR. HADDAD: I think Your Honor wrote that, too, as I recall.

QUESTION: That's right.

QUESTION: Why else do you think he is reading it?

MR. HADDAD: I understand that, Justice --

QUESTION: I just wondered. Is that no longer law?

MR. HADDAD: I think there has been a break

away from that with Johnson and Shea. Let me say that. I think there has been a trend away from it with Johnson and Shea.

QUESTION: It would bode ill for your case if the language that Justice Brennan just read to you were controlling in this case in view of our decision last spring in Allen against Hardy.

MR. HADDAD: It certainly would, sir, yes. I don't deny that. If I may, if I have any other time left, I would like to reserve it. Thank you very much.

QUESTION: Thank you, Mr. Haddad. We will hear next from you, Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Thank you. Mr. Chief Justice, and may it please the Court, I would like to summarize briefly what our position is in this case. It has been laid out well, I think, by the attorney general from Kentucky, but in essence what it is is simply this, that Batson was a clear break with the past.

That the Johnson case, while holding that ordinarily case new decisions will be given retroactive effect on direct appeal, made an exception for cases that it referred to as clear break cases, and that in Allen against Hardy this Court found that the Stovall

against Denno factors cut against full retroactivity for Batson.

We put those three propositions together and we submit that that compels a finding that Batson should not be held retroactive on direct appeal in this case.

Now, Justice Blackmun asked a question, I believe, in the first argument about whether this clear break exception to the Johnson rule should be preserved, whether it has any justification, and that ties in, I think, with the question of what the status of Stovall is with respect to direct appeal cases at this point.

As we read the Court's opinion in Johnson, what the Court was saying was, yes, we are adopting to an extent Justice Harlan's rule that the new decisions would be applied retroactively on direct appeal, but we are not willing to go so far as to overturn settled precedent in this area, particularly with respect to that area of settled precedent in which the Stovall against Denno factors are the most compelling, and that is the definition of the clear break area.

Now, in the clear break area, as this Court recognized in Johnson, that is the very area where the Stovall against Denno factors operate very strongly, particularly the factors of reliance by prosecutors, trial courts, and courts of appeals, and the

administration of justice, because in that area, that is the area in which, because decisions are clear breaks from the past, clear breaks from prior precedent, and particularly when they constitute square overrulings of prior precedent, that is the area in which it is the least likely that lower courts and law enforcement officers and prosecutors will have anticipated a change in the law, and as a result that is the area in which you will have the most number of cases which will be affected by the change and in which you will have had reliance, justifiable reliance by people who read the law and attempt to follow it.

So, I think what the Court has done in Johnson is essentially to reach a compromise between Stovall against Denno and Justice Harlan's views as expressed in the number of dissents. The Court has preserved that area of the Stovall analysis that is the area in which it is the most telling, and has otherwise adopted Justice Harlan's views.

Now, we have argued in the past for a straight application of Stovall against Denno to not only collateral attack but also direct review, but if the Court is not prepared to go back to the Stovall against Denno across the board rationale, then we submit that Johnson --

QUESTION: Well, I gather, Mr. Bryson, you don't think that what I read earlier from Stovall controls this case without more?

MR. BRYSON: Well, I think in light of Johnson, Your Honor, we would say that it does control this case to the extent that the Court concludes that this is a clear break case. Now, of course, if the Court concludes that it is not a clear break case, then Stovall under the analysis of Johnson doesn't have any applicability, and the Court would then go to the Harlan rule which would be simply flat-out applicable -- retroactivity as applied to direct review.

So the answer is yes, but it is yes because we believe this is a clear break case, and that is a condition precedent for Stovall applying as we read Johnson. Now, that brings me to the question, is this a clear break case, and there is a lot of argument in the briefs, and there has been argument this morning about whether it is.

We would rely, of course, very heavily on both Johnson, in which a clear break was defined as either a straight overruling or the Court disapproving a well established prior practice, we rely on that; we would also rely on Allen against Hardy, in which the Court specifically said this was an explicit, that was an

explicit and substantial break with the past.

Now, I don't, as I think General Richwalsky said before, I don't see any difference between a clear break and an explicit and substantial break. I cannot imagine that the Court had in mind to draw a line between those two concepts, but in any event between Johnson and Allen against Hardy it is clear to us that this was a sufficiently new rule that it is one that would fall within the Court's characterization of clear break cases.

Now, the petitioner and amicus in this case have provided two proposed answers for the argument that this is a clear break case. One, they say, well, yes, it was a break but it was a break with respect to burden of proof question only, not with respect to the underlying standard of conduct, and second, they say, well, it is really no break, or to the extent that it was a break it was a break that was so completely foreshadowed by prior events that no one had the right to rely on it.

Now, as to the first, first, again, going back to Allen against Hardy, the Court in Allen pointed out that the question of whether this was a break with regard to burden of proof or whether this was a break with regard to standards of conduct is of no moment in

determining whether it is a clear break case for the simple reason that courts, prosecutors, and appellate courts were relying on the entire rule, not just the standards of conduct that were prescribed in Swain, but also the principles of reviewability in Swain.

That is why in case after case prosecutors declined and trial courts did not require them to make a record as to the reasons for their peremptory strike simply because Swain did not require such a record be kept. That is the reason that this reliance by the prosecutors in trial courts and appellate courts would be so expensive to overturn, because you would be sending cases back for determination on hearings in case after case for determination of whether the prosecutor had had a particular intention with respect to strikes as to which almost certainly he or she would have no recollection, and almost certainly --

QUESTION: Mr. Bryson, could I interrupt you for a minute, because there are two aspects about this case I would like you to comment on. First, as I remember it, this is a case in which the clerk testified that the prosecutor had requested that as few blacks as possible be put on the venire, and apparently the Court of Appeals accepted that testimony and thought the conduct was reprehensible but it didn't affect the

outcome, and so it didn't matter.

And the question I am wondering about is, if you have facts which seem clearer than they are on some records there may have been a deliberate intent to minimize the number of blacks on the jury just for racial reasons alone, is it as clear in this case as it may be in some of the others that the prosecutor was justified in assuming that his or her conduct was entirely proper, and should we not, since it is a federal case rather than a state case, do we not have some obligation to consider our supervisory power with respect to the conduct of federal prosecutors in federal trials? Is it precisely the same issue as in the other case, in other words?

I think the Court could conceivably view this case differently from the typical case, and it is really not just because of the telephone call, as a matter of fact. There are two features to this case that I think frankly distinguish it from the average case in which -- such as Griffith, in which the prosecutor simply says, I don't have to give an explanation, Swain does not require me to give an explanation. It is not just the telephone call. It is also that in fact the prosecutor did give an explanation on the record in this case.

Now, there was no finding by the trial court

as to whether that explanation was candid or correct, but he said that, yes, I struck two blacks, and the reason I struck them is because the defense lawyer for the co-defendant is a very imposing and impressive lawyer who has in my view a very substantial effect on black jurors.

Now, with respect to the telephone call first, there is no question that the call was completely improper. It was a deplorable incident, and we are obviously not defending it on the merits. However, to the extent that anything in mitigation can be said, and I think something can be said, the telephone call, as the prosecutor explained, was intended to find out information about how many blacks were coming, and he did not intend to direct the jury clerk to strike sub silentio the blacks who were on that incoming panel.

Now, she remembered the conversation as giving her the impression that he was asking her to strike them. His impression of what he said was, we are looking for a jury which does not have many blacks on it, that is to say, I am hoping not to have many blacks on this jury, not, please, Ms. Jury Clerk, take those black jurors off this jury.

Now, in other words, my point is that however unwise his conduct in making the call, it did not

reflect an intent to skew the jury in an improper way. At most it reflects something that he admitted later, which was that in this particular case he was looking for a jury that had as few black members as possible.

That brings me to the second point. What is the legitimacy of his having struck jurors on the ground that he claimed that he did? Well, that goes right back to Swain, and what Swain said.

Swain in fact had a passage which it seems to me is very pertinent here, and that is that a place in which Swain quoted the prosecutor as having said that he struck differently depending on the race of the defendant and the race of the victim, and the Court said, well, that is all right because that shows that he was not striking blacks in every case.

And in this case this prosecutor indicated on the record he did not strike blacks in every case. In fact, he had no objection to having blacks on his jury. But in this particular case, with this particular lawyer who in his view had such an impressive -- had such a way of speaking effectively to black members of the jury, he feared, having black members on the jury, he feared frankly that he was going to be beaten.

Now, in answer to your question, I think that the supervisory power would not be appropriate here

principally because the jury clerk, as she testified, was not in any way affected by the telephone call. It didn't affect her conduct, and the telephone call was, while improper, was not designed to have an effect on her conduct. The most it does is, it reflects that which he had already indicated he was going to do, which is to strike the black jurors, and the second part of the answer is that under Swain we submit that however wrong the Court may now think that to have been, it was permissible under Swain, as we read Swain.

QUESTION: Just to add on other thought, do you think that the federal government should be judged by precisely the same standards as states when evaluating the significance of reliance on Swain and the prior rule?

MR. BRYSON: Well, in Williams this Court said precisely that. The Williams case, one of the series of retroactivity cases, the Court said that there is no basis for drawing a line between the federal government and the state governments. Now, that is, I think, only a partial answer to your question because I think you are asking more about whether the federal government has a greater burden to anticipate a change in an equal protection subject such as this one.

I think there were a number of offices,

frankly, in which Swain was in a sense anticipated -- I mean the overruling of Swain was anticipated because I think prosecutors stopped using strikes on blacks for race related reasons but --

QUESTION: I don't understand that. Why is this? Federal officers are smarter than state officers?

MR. BRYSON: No, I am just --

QUESTION: They take a different oath to support the Federal Constitution?

MR. BRYSON: Not at all. Not at all.

QUESTION: Well, then, what is the basis for treating the one different from the other?

MR. BRYSON: I don't think --

QUESTION: I mean, if it was apparent to Federal prosecutors, it should have been apparent to state prosecutors.

MR. BRYSON: I don't think there is any basis for treating them differently. I am simply saying that the number of cases may be smaller. There may be a lesser effect on the administration of justice, in part because there may have been -- it is conceivable that there may have been more anticipation of the overruling of Swain.

On the other hand, unlike in the state system,

there was no Federal court at the time this case was tried, no Federal court at all which had questioned the validity of Swain, continuing validity of Swain. The two Court of Appeals decisions which came down after this case was tried in this area did question the validity of Swain in a sense, but those were after this case was tried. There were some state court cases, I think, four of them. Four states had held that Swain would not be applied under state law. I see no real distinction between the two except, one could argue, in the extent that there is a smaller number of Federal cases for a variety of reasons.

Now, the second question is one which I have already touched on, which is the degree to which the overruling of Swain was foreshadowed, and therefore any reliance on Swain was unjustified. First of all, as I have noted, there was very little contrary law prior to Batson. This Court had in the dissents from denial in the McCray case and two subsequent cases had indicated that Swain might be subject to reconsideration, but other than that there were only the two Court of Appeals cases going off on different grounds, on Sixth Amendment grounds, and a handful of state cases going off principally on state law grounds.

But even if -- I would add this case is not

like a case such as the Brown case, the Brown against Louisiana, which held the Burch decision retroactive, in which there was no case out there to be overruled, and in which this Court's own decisions, prior decisions had given a clear indication that the Burch decision was on the way. This case is one in which there would have to be an overruling of Swain and in which there were no prior decisions of this Court that gave any indication that an overruling of Swain was coming.

But beyond that a mere foreshadowing, this Court has held, is not enough to undercut reliance or render a case not a clear break with the past. In the Desist case, this Court dealt with the question of whether the Katz overruling of Olmstead should be given retroactive effect, and the Court said no even though there has probably been no case in the -- no constitutional case in the history of this Court in which the overruling of the prior decision was as clearly foreshadowed as it was in the case of Olmstead.

Similarly, in the Williams case, the same result. This Court said that Chimell should not be applied retroactively even though Chimell was clearly foreshadowed by developments in this Court and in the lower courts, and perhaps most pointedly, the case which we think supports us most directly -- excuse me -- is

the Daniels case, which held that Taylor against Louisiana should not be applied retroactively.

In Taylor the Court had held that the exclusion of women from juries was a violation of the Sixth Amendment. Nonetheless, even though the Court said the judgment may appear a foregone conclusion from the pattern of this Court's cases over the past 30 years, and even though the unmistakable import of this Court's opinions since 1940 suggested the result that the Court was about to reach in Taylor, nonetheless the Court said the Taylor opinion would not be applied retroactively either on direct review or on collateral attack because it was necessary to reverse a prior decision which had approved the practice.

At minimum, at worst this case falls within the pattern of Taylor, and we submit that it in fact is a much less extreme case than Taylor, and therefore calls for the application of the clear break test.

Now, the Court has already dealt with, in Allen against Hardy, the question of the application of the Stovall factors to this case, and I will not go through them at length except to point out very briefly that as far as the most important of the Stovall factors, which is the effect on the truthfinding process, the Court acknowledged in Allen that, yes, the

Batson case does have some effect on the truthfinding process, some effect, but that it serves multiple purposes, and it is not like those cases in which the new rule has had a direct and emphatic effect on the truthfinding process.

The language that the Court has used in this area it seems to me is very instructive. The Court has said, for example, that a case affects truthfinding if there is a clear danger of convicting the innocent, a serious risk that guilt or innocence was not reliably determined. It is likely that many trial results are factually inaccurate.

That's the kind of language that is simply inapplicable here because in this case, while the new rule serves important and laudable purposes of reducing discrimination and increasing the confidence of the public in the administration of justice, it does not have a substantial impact on the truthfinding process because what is going on when you say that prosecutors cannot strike blacks on the ground of race is that -- not that you are allowing on to a jury someone who is biased, as is the case, for example, in a case such as Turner against Murray, but it it simply saying that you are removing from the jury someone who is unbiased, the black juror, and you are replacing that juror with

someone else who is presumably also unbiased.

Now, it may be entirely an offensive practice. It may be -- it has been declared by this Court to be an illegal practice, but what it does not do is to substantially impact on the truthfinding process because of the nature of the replacement that occurs. Now, as to reliance, I have already spoken at some length on the reliance factor, and I would only point out that to the extent that the -- to the extent that the courts and commentators have construed Swain on the question of whether it constituted a change in burden of proof or whether it constituted a change in the nature of the rule affecting substantive conduct.

QUESTION: You mean Batson?

MR. BRYSON: I am sorry. What I meant was that --

QUESTION: Whether Batson constituted a change?

MR. BRYSON: Yes, whether Batson constituted a change in what Swain had said. That's right. The courts and commentators talking about Swain have repeatedly held and repeatedly said that the Swain rule permitted the use of race in making peremptory challenges. The petitioners and the amici say that, well, no, Swain didn't really permit that, but

regardless of whether Swain permitted it or not, virtually every commentator and virtually every Court that has analyzed Swain has come to that conclusion, and therefore even if the reliance by the Courts and by the prosecutors and by the appellate courts has been in retrospect incorrect, it was certainly not unreasonable.

Based on that reasonable reliance, the lack of effect on the truthfinding function and the continuing effect of a change in the administration of justice we suggest that the Court should follow the Johnson case and hold that this is a clear break case which should not be given retroactive effect on direct appeal. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

Mr. Haddad, do you have something further? You have 17 minutes left.

MR. HADDAD: I don't think so, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 2:19 p.m., the case in the above-entitled matter was submitted.)

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

731 - WILLIE BROWN, AKA WILL BROWN, Petitioner V.

UNITED STATES

these attached pages constitutes the original pt of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)