SUPREME COURT
OF THE UNITED STATES

In the Matter of:)
)
) No. 87-5277
TONY B. AMADEO,)
)
Petitioner,)
)
v.)
)
RALPH KEMP, WARDEN)
)

Pages: 1 through 61

Place: Washington, D.C.

Date: March 28, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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TONY B. AMADEO,

Petitioner,

v. : No. 87-5277

RALPH KEMP, WARDEN

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Washington, D.C.

Monday, March 28, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 p.m.

APPEARANCES:

STEPHEN B. BRIGHT, ESQ., Atlanta, Georgia; on behalf of the petitioner.

SUSAN V. BOLEYN, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the respondent.

I N D E X

P R O C E E D I N G S

(1:59 P.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 87-5277, Tony B. Amadeo versus Ralph Kemp.

Mr. Bright, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN B. BRIGHT, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. BRIGHT: Thank you very much.

Mr. Chief Justice, and may it please the Court, the matter which is before the Court now is a habeas corpus case that is on certiorari from the Court of Appeals for the Eleventh Circuit. My client, Tony Amadeo, is a death sentence petitioner. He was sentenced to death in Georgia, in Putman County, Georgia, in November of 1977, some two months after the incident for which he was charged with, he and his two co-defendants were charged with the crime.

QUESTION: Where is Putnam County, what part of Georgia?

MR. BRIGHT: It is not far from Macon, Georgia, in the center of the --

QUESTION: More or less south then?

MR. BRIGHT: More in the central part of the state, Your Honor.

QUESTION: Below the Nat Line?

MR. BRIGHT: Right about on the Nat Line, Your Honor. And at the start of the penalty phase of Mr. Amadeo's trial, the prosecutor, the district attorney said that you probably couldn't find a fair jury anywhere in the State of Georgia than you could find in Putman County. Of course, he was the only one who knew at the time he made that statement that he had earlier that same year directed the jury commissioners in Putnam County to underrepresent black people and women in the master jury lists from which Tony Amadeo's grand jury and trial juries were chosen.

It was unknown that at that time he had put forward this plan, these instructions to the jury commission for the purpose of making it appear that racial discrimination had been eliminated while actually perpetuating racial discrimination and discrimination on the basis of gender and insulating it from judicial review.

Ten months after Mr. Amadeo's trial this scheme came to light when another lawyer in another case inadvertently came across it. He attempted to raise it to the Supreme Court of Georgia. That Court rejected his claim, saying it came too late. He later presented it to the District Court below, and that court granted habeas corpus relief, finding cause that the claim was not reasonably available to Mr. Amadeo and his lawyers at the time because it was concealed and unknown to them because of the district

attorney's deception.

QUESTION: Mr. Bright, the District Court here concluded that petitioner's counsel at the time -- that wasn't you, I guess.

MR. BRIGHT: No, Your Honor.

QUESTION: Did not deliberately bypass the constitutional challenge to the composition of the master jury list.

MR. BRIGHT: Yes, Your Honor.

QUESTION: Now, what evidence is there in the record to support that finding in the face of what appears to be defense counsel's testimony to the effect that defense counsel considered challenging the jury list, thought they could win such a challenge, but chose not to raise it in order to preserve what they thought was a favorable jury?

MR. BRIGHT: Your Honor, that was one of two factual determinations that the District Court made which the Eleventh Circuit rejected. Basically the District Court, if you look at the one lawyer's testimony that is highlighted throughout the state's brief, it gives a view of this case of a tactical decision that was made. The District Court --

QUESTION: And he was only one of -- more than one counsel, was he not?

MR. BRIGHT: He was one of two counsel, right, and they were appointed to represent both Mr. Amadeo and the two

co-defendants in all three of these cases, but the District Court looked at the totality of the circumstances and clearly did not credit that testimony, because the District --

QUESTION: Well, tell me, please, where we look in the record to find something to support the District Court's contrary view.

MR. BRIGHT: Yes, Your Honor. The District Court's finding, of course, was that the lawyers would have brought the claim had they known about the district attorney's involvement in this scheme to eliminate or to limit black people and women on the jury.

QUESTION: Right, and you had explicit testimony by the lawyer saying that we like this jury, we didn't think we could get a bettery jury. We liked it because it had, what, nine, eight or nine women, which they thought was highly desirable.

MR. BRIGHT: The ultimate jury. Now, of course, the lawyers said that what they did was, they got the venue list, that is, the people chosen from the master list for the petit jury in that trial, and they looked at that before trial, and saw that there were women and black people represented there.

Of course, that's exactly what the district attorney's scheme was designed to accomplish.

QUESTION: I think you are being whipsaw. You

are getting several questions -- I think you were in the process of answering Justice O'Connor's question, which was about where in the record do we look to find evidence that the District Court could have based a finding on.

MR. BRIGHT: Yes, and there are a number of sources of that that they would have brought the challenge, and let me go through those, if I may.

QUESTION: Would you go with pages to the record?

MR. BRIGHT: Yes, Your Honor. I will be happy to. First of all, the lawyer's testimony which we were talking about there and relates to this point is that they liked that particular jury. What the District Court had that directly contradicted that was all the contemporaneous evidence, the first thing being, Your Honor, the fact that the lawyers filed a motion to continue this case October the 27th and filed an affidavit saying that there was so much prejudice against Mr. Amadeo and his co-defendants that the trial should not be held until the next term of court, which would have been before a different jury.

In addition, the lawyers filed a motion for a change of venue which was litigated right through the jury selection process, and they argued in that motion that a large portion of the jurors had an opinion about the guilt of Mr. Amadeo and therefore that they should not try the case before that particular jury.

These lawyers only filed three motions prior to trial. Those were two of the three motions, which were to get another jury at another time. In their brief to the Georgia Supreme Court, and this is in the Joint Appendix, and I would point the court to Pages 16 to 18, and I might mention to respond to the Chief Justice on the page cites --

QUESTION: Excuse me. Before you go on, all of those motions would have produced not just a different jury here and now, but a different jury elsewhere, right, or a different jury at a different time?

MR. BRIGHT: The continuance motion would have produced a different jury but in the same county. The venue motion, of course, would have moved the case out of Putnam County in a completely different venue. Both of these contradict this testimony that the lawyers -- of course, this was -- when they testified, this one lawyer that has been alluded to, ten years after the fact the claim of ineffective assistance of counsel, when this allegation was made that we really liked this jury so much, we would have done anything to keep it, even forfeit a constitutional claim.

In addition, and I was going to say, both --

QUESTION: There was that testimony by one of the defense lawyers?

MR. BRIGHT: Well, of course, they didn't know they

had this claim. All they said was --

QUESTION: Right, but there was testimony, I thought, by at least one of them to the effect that we considered a constitutional challenge to the master list, thought we might have won it, but we bypassed it because we thought we had a favorable actual jury. Is that right? We can find that in the record.

MR. BRIGHT: Yes, you can find that he said this. He didn't actually know that there was a factual basis for the claim. His testimony was, we thought there was so much discrimination that went on in that part of Georgia that if we had probably looked we probably would have found something, and we didn't look. That's what he testified to. Of course, that's much different, knowing that you might undertake in the two months you have to prepare three capital trials --

QUESTION: Okay. All right. Now tell me, please, where we find in the record something contrary to that statement on which the District Court might have made its finding.

MR. BRIGHT: All right. I think the District Court made its finding based upon the contradiction based upon what I've already talked about, the brief that those lawyers filed in the Georgia Supreme Court --

QUESTION: That was after they had lost the trial.

MR. BRIGHT: Yes.

QUESTION: I mean, that is quite a different context to say then, sure, you are going to do anything you can to upset the verdict, but their testimony was of this guy's opinion before the trial, wasn't it?

MR. BRIGHT: No, Your Honor. Well, yes.

QUESTION: He was testifying afterwards, but he was giving his point of view before the trial.

MR. BRIGHT: That's what he testified to.

QUESTION: Well, yes, that is all we are saying, is that that's what he testified to.

MR. BRIGHT: Right.

QUESTION: So testifying different, taking a different position after you've lost the trial really is not a contradiction.

MR. BRIGHT: Well, if it's a different position, the fact that it was taken after the trial may be an explanation for it, but it is a contradiction. It was one of those contradictions that the District Court had to resolve in making its factfinding.

I'm not saying that there's not a plausible view of the evidence that can be taken in the state's brief or in the Eleventh Circuit opinion, but the District Court is entrusted with the factfinding responsibility under Rule 2, and the District Court not only considering the things that I've talked about but also considering the testimony of the

lawyers at the time they found out, ten months later after this trial when this district attorney's involvement in limiting the black people and women on the juries first came to light, the testimony of the two lawyers then of the shock, the statements that the claim would have been brought had it been known, and the fact that --

QUESTION: Was that the testimony of the lawyers or some other lawyers?

QUESTION: Where are those statements?

MR. BRIGHT: One of those statements, Mr. Coates, when he told Mr. Lambert about it, "I wish we had known, we would have raised that issue," is in the Joint Appendix at Page 47. Mr. Jernigan testified that when he spoke to Mr. Lambert about it he recalled Mr. Lambert saying they would have raised it. That's at Page 59 and 60. If you look at the brief that was filed in the Georgia Supreme --

QUESTION: That is not one of the lawyers, that is somebody who said he was talking to one of the lawyers. Right?

MR. BRIGHT: Right.

QUESTION: And he said that that lawyer said -- what were the exact words? How did he say it?

MR. BRIGHT: I'm not sure if I have the exact words, but I believe that --

QUESTION: Well, I think it's -- here.

MR. BRIGHT: -- Mr. Jernigan was asked if he recalled Mr. Lambert saying, had they known about this claim, would they have raised it, and Mr. Lambert said that they would have, and that's at the bottom of Page 59, the top of Page 60 of the Joint Appendix.

QUESTION: Well, it says -- is it the quote that says, "Well, I can't say specifically. I don't think he told me what he would have done. I think he just said that it was" --

QUESTION: No, it's the one that says, "If I had known about this jury issue prior to trial I would have raised it."

QUESTION: I can't find it. Where is it?

MR. BRIGHT: The quote is, and this is at the bottom, Justice Scalia, of Page 59, "Mr. Jernigan, do you recall Mr. Lambert ever saying, if I had known about this jury issue prior to trial I would have raised it," and then on the next page, "Yes, I recall that. He said it would have been a great issue, I would have raised it if I'd known about it."

And again, the Eleventh Circuit in Footnote 9 of its opinion acknowledged a direct conflict in the testimony here. What the District Court under Rule 52(a) was required to do was to look at the totality of the circumstances, not just what one lawyer testified to ten years after the fact,

but to look at the totality of the circumstances. The contemporaneous evidence, I would submit, indicates support for the District Court's finding.

QUESTION: Mr. Bright, let me ask, wasn't Mr. Jernigan speaking about statistical disparity when he made that statement?

MR. BRIGHT: No, he was speaking when he made that statment that I just quoted, Justice Blackmun, he was talking about the prosecutor's memorandum that indicated that he had designed a plan to limit blacks and women and avoid a prima facie case by --

QUESTION: I'm trying to help you out, but I guess I'm not doing it.

MR. BRIGHT: I'm sorry.

QUESTION: I thought he was speaking of the statistical disparity, and that that was what he shied away from, which to me is very different --

MR. BRIGHT: Yes.

QUESTION: -- than allegations of a challenge of an intentional discrimination.

MR. BRIGHT: Exactly. I'm sorry. I did misunderstand, and that's the point, of course, the dissent makes in the Eleventh Circuit, that whatever the lawyers might have been thinking about at the time of the trial, because the facts had been withheld from them, was not the claim which was

here, that their adversary, the district attorney, who under Georgia law has no responsibility to interact with the jury commission at all. The jury commission is to receive its instructions from the Superior Court judge and only from the Superior Court judge.

QUESTION: If this is true, I think it utterly destroys this talk about what Jernigan said as being something that there is no answer to. I think there is a complete answer to it in the record.

MR. BRIGHT: Yes, Your Honor. And I would point as well as another basis for the District Court's finding, without going through each part of it, the brief that was filed in the Georgia Supreme Court at pages 16 to 18 of the Joint Appendix, with regard to how this claim was first found and what the lawyer did upon finding it, and with regard, Justice O'Connor, to the question about deliberate bypass, I think, as the District Court found, the evidence in this case was that once this was discovered, once the prosecutor's actions here were discovered, it was immediately presented to the state courts as promptly as it could possibly have been presented, and the Georgia Supreme Court declined to entertain the claim, but that these lawyers basically did all that they could possibly do.

I would point out that when the District Court heard this it took into account the briefs and the

continuance motion which were marked and made a part of the evidence, all of that was part of the factfinding process, and I would suggest that under Anderson versus Bessemer City, Pullman-Standard, and the other cases that this Court has decided, that the Eleventh Circuit could not reject that factfinding without making a finding that it was clearly erroneous, and I would point out --

QUESTION: Do you interpret the District Court's opinion as finding that the trial lawyers were not credible?

MR. BRIGHT: I think he resolved conflicting evidence to come to the conclusion that they would have raised the claim had they known of this constitutional violation, that the district attorney was engaged basically in a criminal conspiracy with the jury commissioners to limit the participation of blacks and whites.

QUESTION: So that their statement that they made a deliberate, knowing waiver of the jury challenge is not credible?

MR. BRIGHT: Well, two points on that. First of all, whatever -- and I think the District Court considered this because he asked them something about the nature of that challenge. Whatever it was they decided was not the claim that is presented here, because they didn't know about it. They did not make a knowing tactical decision based on all the available information, because the information was hidden

from them.

In fact, the whole nature of this plan was to deceive them into thinking that there was sufficient representation of women and blacks, that this really wasn't worth wasting the time on to try to raise a challenge like this.

But secondly, I think, given the passage of time and all the other factors that the District Court could take into consideration, looking at the totality of the circumstances, it did resolve this conflict in the testimony by finding that they would have raised the claim. And I would suggest that based upon all the points that I have gone through, that finding is supported by the record.

And again, I think the question under Rule 52(a), is that a plausible reading of the record, are the District Court's factfindings plausible, and I would submit that they certainly are, and that they are not clearly erroneous, and that the Eleventh Circuit, the key errors that the Eleventh Circuit made here was in rejecting the finding that it was clearly erroneous -- excuse me, rejecting it without making the finding that it was clearly erroneous, and of course since it is supported by the record, it can't be done, and I would point out as well that nowhere has the state in either the Eleventh Circuit or before this Court argued that the factfindings of the District Court are clearly erroneous.

And I think besides the one which we have touched upon or talked about, the tactical decision argument that the state has made based upon that selective use of Mr. Pryor's testimony, two other factfindings are critical, one, the discriminatory purpose of the plan, which really had not been contested until we got to this Court, and then second the concealment point, and I would like to just talk briefly about each of those, if I may.

For the first time in this Court the state says these are target figures, and at one point in their brief they even say there is no evidence as to the author, the purpose, or to whom this plan was submitted, and I just want to make it clear the evidence is uncontradicted.

The clerk of the court, Mr. Dennis, testified that he received the note from the district attorney to the jury commissioners for the purpose of telling them how many blacks, women, and young people were to be put on the master jury lists. He as secretary of the commission communicated this knowledge to the chairman, and the testimony was that they followed it.

And indeed in the District Court the state conceded, and I quote, "intentional discrimination on the uncontroverted evidence that was produced in Bailey versus Vining," which was the case in which this scheme first came to light, and of course the District Court findings in both

the Bailey case and the District Court findings below in this case are that it was a plan to bring about intentional discrimination with the purpose of avoiding a prima facie case to set the level of discrimination at just such a place that it would insulate it from judicial review, and therefore deny litigants the opportunity to challenge it and be successful.

Really, the fundamental question, it seems, on this case, is who put this case in the posture that it is in today? Why is this claim brought to the District Court after the pretrial hearings and after the trial in state court? And the answer to that has to be the district attorney in this case.

There is a lot of argument about whether the lawyers -- what they wanted to do or should have looked have looked for a needle in a haystack over at the clerk's office, but the fact of the matter is, the district attorney knew exactly what had happened. He could have stood up at arraignment and said, I just want to put on the record I have instructed the jury commission to underrepresent black people and women in the master list, and once everyone recovered from the shock, you would assume that the same thing would have happened there that happened when this came out in Bailey versus Vining before the District Court, and the District Court said, stop trying people for criminal cases

until you revise your jury list there, because what you are doing is patently unconstitutional.

With regard to the concealment point, again, using this Court's language in the --

QUESTION: Mr. Bright, this was a white defendant, right?

MR. BRIGHT: Yes, Your Honor.

QUESTION: So it is not at all implausible that the composition of the jury -- what was the percentage of blacks on it?

MR. BRIGHT: On the ultimate jury that was chosen?

QUESTION: Yes, the ultimate jury.

MR. BRIGHT: Was six black and six white.

QUESTION: Six and six. And eight or nine women?

MR. BRIGHT: Yes, Your Honor.

QUESTION: Do we know which? We don't know. It was either eight or nine.

MR. BRIGHT: Yes, Your Honor.

QUESTION: It is not at all implausible that that was indeed quite satisfactory to this white defendant.

MR. BRIGHT: Well, it's not implausible, but I think what we know now which we didn't know at the time is that this basically was a jury selected through a clearly

unconstitutional and illegal scheme.

QUESTION: There was some evidence, was there not, of prior offenses that this individual had committed against blacks which might indeed cause him to prefer a jury with fewer blacks rather than more?

MR. BRIGHT: That was one consideration put forward by one of the lawyers. Yes, Your Honor.

QUESTION: And you had the express statement by his lawyer that they made the tactical decision not to challenge it, even though they thought that had they challenged it, they might well have won.

MR. BRIGHT: Yes, and of course we have --

QUESTION: And the only explicit statement you set up against that is somebody's recollection that he said it'd been a great issue if I'd known about it. That isn't even a categorical statement that I would have raised it if I had known about it. It would have been a great issue.

MR. BRIGHT: Oh, no, but that is not the only thing, Justice Scalia, that contradicts that. Their testimony was, we wanted this jury, but they filed a continuance motion in which they indicated they did not want that jury. They filed a motion for a venue in which they said there was so much prejudice in that jury that they didn't want to be tried before that jury.

So there is direct contradiction, as the Eleventh

Circuit noted in Footnote 9, between those two versions, and that was for the District Court to resolve.

QUESTION: The latter motion was just to -- was to change the county, however, right?

MR. BRIGHT: To change the venue, yes, to another --

QUESTION: Which means a different county altogether.

MR. BRIGHT: Yes, which would have meant that it wouldn't be before this jury, which contradicts certainly the testimony --

QUESTION: But that doesn't contradict the idea that this might have been the best jury they could have had in that county.

MR. BRIGHT: Well, maybe the venue question does not, although I would submit that counsel's affidavit saying that the jury was so prejudiced against them certainly contradicts the testimony that the jury was so good that they would forego some other challenge, but again, I think the challenge that they thought they were foregoing is a completely different question than what the claim that they actually had in this particular case.

They thought they might spend that month before trial trying to put together some sort of statistical challenge. That is completely different from knowing that

your adversary is involved with the jury commissioners in manipulating the list to keep people off.

QUESTION: Is the setup in Georgia by counties or by circuits?

MR. BRIGHT: By county.

QUESTION: So every county has its own jury?

MR. BRIGHT: Yes, jury commissioners. Right.

QUESTION: Can you tell me one detail of the procedure of selecting the jury? How did the persons in the clerk's office, whoever did it, who selected the juries know which jurors were black and which were white?

MR. BRIGHT: They maintained the lists separately by race. The District Court makes that finding in one of its orders, and of course here the numbers were very explicit. He told him to put 101 black people on the grand jury, and I can't remember the number, but he told them an exact number of how many blacks were to go on the traverse jury, and even figured out the percentages to make sure that they were, you know, that he would avoid a Swain challenge based on a prima facie case.

QUESTION: What is basic constitutional challenge --

MR. BRIGHT: Casseel versus Texas, that people were excluded, and I suppose as well, Your Honor, Peters versus Kiff and Your Honor's concurring opinion in that case

that here basically in violation of the Constitution as well as 18 U.S. Code 243, people were excluded from jury service based on race and gender intentionally.

QUESTION: It isn't a fair cross-section claim, is it?

MR. BRIGHT: Well, it would have been at the trial phase, it would have been both, both a cross-section claim and a discrimination claim.

QUESTION: How would it have been a clear cross-section claim?

MR. BRIGHT: Excuse me?

QUESTION: How would it --

MR. BRIGHT: Well --

QUESTION: Why would it have been a clear cross-section --

MR. BRIGHT: Very well. I will back off of that and just say it would have been a discrimination claim because there was intentional discrimination. Yes, Your Honor.

QUESTION: An equal protection claim?

MR. BRIGHT: Yes, Your Honor.

QUESTION: This is a grand jury, not a petit jury?

MR. BRIGHT: No, it was both, Your Honor.

QUESTION: Both.

MR. BRIGHT: Both. The whole jury -- there are two separate master lists that are maintained, one for the grand jury and one for the petit jury.

QUESTION: And this memorandum applied to both?

MR. BRIGHT: Applied to both. He set out in one position how many blacks to put on the grand jury, and in another part of that same little note how many to put on the traverse, and the same thing for women, right to the very number.

And with regard -- I just -- there has been some question raised about whether this was -- this memorandum, which was nothing but just a yellow sheet from a legal pad type thing that had just been torn out, and if you just look at it -- it is set out in the Joint Appendix on about Page 3 or 4, it is nothing but a collection of numbers and initials and a few words, and it really has no legal significance, just to look at it.

The District Court, of course, found that this had been concealed. There is no reason for lawyers to know about it. The Eleventh Circuit again rejected that factfinding, made its own factfinding that this crumbled sheet of yellow paper was readily discoverable, and I would point out the support for the District Court's finding first of all and most fundamentally is in Georgia law. All the proceedings of a jury commission in Georgia are secret. The jury

commissioners take an oath not to disclose anything. The only thing that is available after the jury commission meets is a certified copy of the master list.

QUESTION: Was this authenticated in some way --

MR. BRIGHT: Yes.

QUESTION: -- so we know someone testified that he did write it?

MR. BRIGHT: The clerk of the court testified that he received this from the district attorney's office for the -- and he was the secretary to the jury commission -- for the purpose of giving it to the commission, and he gave it to the chairman, and they followed it to the letter, and the District Court made that finding, that it was followed to the letter.

The way in which it all was found --

QUESTION: Did I mishear you? Did you say that this was easily discoverable?

MR. BRIGHT: No, I said the Eleventh Circuit erroneously rejected the finding that it was concealed and found that it was readily discoverable, and I was about to say why it was not.

QUESTION: Yes, would you, please, because it was in the stack of the papers that was voluntarily delivered, and the clerk testified exactly what it was.

MR. BRIGHT: Right. Of course --

QUESTION: Is that the universe of things? It is either concealed or readily discoverable? The opposite of concealed is readily discoverable? I can think of things that are not concealed but may not be readily discoverable. Doesn't concealed require some affirmative action on somebody's part?

MR. BRIGHT: Yes, and of course what the District Court found here was the whole purpose of the scheme was deception, but the Eleventh Circuit juxtaposed those two terms in terms of its finding and the District Court's finding.

QUESTION: Well, there is no finding that the memorandum was hidden. In fact, just the opposite, isn't it? The memorandum was delivered promptly when anybody requested it. At the first request they got the stack of papers and it included the memorandum.

MR. BRIGHT: I think what the record clearly shows, though, is that the way in which this memorandum came out was totally fortuity and inadvertent. Somebody went who was working on a claim that the at large voting procedures in the county violated the Constitution, was looking for a history of discrimination, went through 30 years of jury lists, and the state indicates in there that this memorandum was with this master jury list. There is absolutely no support in the record for that. He said somewhere in 30 years of documents

this yellow sheet is there. Obviously somebody in the clerk's office didn't realize that this wasn't for public consumption, but the fact that somebody's not very good at hiding the plan does not mean that it is readily discoverable.

First of all, Mr. Amadeo's lawyers had no earthly reason to go over there and look for it. The work product of the jury commission under Georgia law is secret. It is not available. The only thing you can get is the list.

Secondly, there was no basis for them to know that the district attorney in that case was not complying with Georgia law, federal law, the United States Constitution, the ethics of prosecutors, which say that he is to have no role at all in telling the jury commission how to go about its work, but certainly no role in telling them how to limit the participation of cognizable groups on the jury.

So there was no reason for them to go to the clerk's office and look for this needle in a haystack because they had no reason to know that it existed in the first place.

And finally, again, as I was pointing out earlier, just the nature of the plan itself was such that obviously, if you publish the fact that you are about discriminating on purpose, that plan is not going to survive for very long. The whole nature of the plan was to discriminate, hide the discrimination from public view, insulate the discrimination from judicial review, and deny defendants any chance to

challenge it. That couldn't possibly be accomplished if it was public knowledge.

If there are no other questions, I will reserve the rest of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bright.

Ms. Boleyn, we will hear from you now.

ORAL ARGUMENT OF SUSAN V. BOLEYN, ESQUIRE

ON BEHALF OF THE RESPONDENT

MS. BOLEYN: Mr. Chief Justice, and may it please the Court, the existence of the memo which has been the subject of great discussion before this Court and the lower courts is only relevant in the context of this particular case if the memorandum played some part in the strategy decision that petitioner's trial attorneys made, so the pivotal inquiry for this Court to make is what the attorneys knew, when they knew it, and what important factors they knew about the grand jury that called them to make the decision to forego the challenge.

The overall strategy of the trial attorneys was to attempt to avoid the imposition of the death penalty on Mr. Amadeo. Mr. Amadeo had confessed, and they had him dead to rights. The only thing they could do would try to be to obtain a sympathetic jury who would not impose the death penalty.

In order to do this, of course, under Georgia law

the only thing they really needed to try to concentrate on was to get one sympathetic person, because the death penalty has to be unanimous in Georgia, so their whole trial strategy throughout the entire proceeding was to attempt to avoid the dealth penalty.

They didn't just blindly try to do this, though. They went and investigated the actual traverse jury list to determine if there were people on that list who would be beneficial to them for the purpose of avoiding the death penalty. They went to local attorney Dallas Veal, who had practiced in this particular county for a very long time, and they went over name by name the people on the list to determine their characteristics and, as Mr. Lambert said, any significant factor that these particular jurors might have with reference to trying to avoid the death penalty.

They went over the fact of their age, their sex, any job that they might have, and of course tried to determine their church preference based on some other particular factors they were trying to get. One of the major reasons they believed and relied upon the jury as being beneficial to Mr. Amadeo is the fact that there was an active religious charismatic group in Putnam County that had a very large following, and in fact some of the members of that church had actually visited the petitioner in jail prior to his trial, and of course because of their conscientious objection to the

death penalty and because of their sympathy toward the defendant, the attorneys both said that they wanted these people to be on the actual jury that would be drawn for the trial jury.

Another consideration that they had, of course, was that the district attorney had served notice prior to trial that they would introduce other crimes, and the victims of the other crimes in Alabama were black persons. There was violence against black persons. there was a beating and a murder and a robbery of these black persons, and the attorneys feared that a jury which contained numerous black people might be unsympathetic to the 19-year-old white defendant.

Not only this, they wanted to select jurors for the traverse array who might have children the same age as the petitioner or who might be mothers. They felt they would be more lenient.

Having looked at this 120 people name by name with another local attorney, both Mr. Lambert and Mr. Pryor said, and I quote, "We feel very comfortable with the jury. We felt like we had a very good jury."

QUESTION: Ms. Boleyn, do you think that defense counsel were actually aware of the basis by which they could have challenged the master jury list for this statistical discrepancy?

MS. BOLEYN: Your Honor, they made a reasonable assumption that the jury was challengeable and could be challenged successfully. They did not go and --

QUESTION: Do you think they made an assumption that it could have been challenged because of the intentional discrimination in the statistical makeup?

MS. BOLEYN: They assumed the statistics would establish the intentional nature of the discrimination. They assumed the statistics would be sufficient to show that. That was an assumption that they made.

QUESTION: Of course, they were wrong on that, weren't they?

MS. BOLEYN: Yes, they were. In effect --

QUESTION: So they didn't know the real basis for a valid challenge.

MS. BOLEYN: Right, but the crucial thing, of course, is that the memorandum didn't cause them not to make the challenge. If they had gone and looked at the numbers and said, it's a close case, maybe we shouldn't file it because it's a close case, then you might have some interference between the memo and the attorneys' decision, but what they did was, saying, we're assuming that we can successfully challenge both the grand and traverse jury lists, and of course the only thing they could gain from that was not an acquittal of the defendant, and not an attempt to

avoid the death penalty. The only thing they could gain was delay.

QUESTION: Which is one of the things they sought unsuccessfully, was delay, wasn't it?

MS. BOLEYN: Your Honor, I believe --

QUESTION: They did file a motion that would have resulted in delay.

MS. BOLEYN: They fild a motion for continuance, but the basis of that motion was not to --

QUESTION: I understand, but one of the things as a matter of tactics they wanted was delay.

MS. BOLEYN: Yes, Your Honor. I think what it is, they filed numerous motions to protect themselves on various fronts.

QUESTION: Three motions, wasn't it?

MS. BOLEYN: Yes, sir. They filed a motion for change of venue, and they filed a motion for the continuance, but there were numerous reasons cited therein, and of course it is not unfamiliar for trial attorneys --

QUESTION: And is it not clear that had they known of this defect in the grand jury selection they clearly could have obtained a continuance?

MR. BOLEYN: If they had known of the defect they could have obtained the continuance?

QUESTION: Yes.

MS. BOLEYN: Yes, but they never said they wanted a continuance. In their testimony in the District Court they never said that they needed more time for any purpose.

QUESTION: I thought you agreed they did file a motion for a continuance.

MS. BOLEYN: Yes, Your Honor. I am making reference to their testimony before the District Court. They never said that the motion for continuance deprived them of any time or facilities or resources to make any other challenges they wanted to. It wasn't necessary. It was just part of a list of motions that they filed to try to protect his rights.

QUESTION: They must have wanted -- you just don't file a motion for continuance without a reason for it. Didn't they give a reason for the -- why did they want the continuance?

MS. BOLEYN: Yes, they did, Your Honor. What they said in the continunace motion was, they wanted more time to wait until the psychiatric report came back from Central State Hospital, that they wanted to interview people out of state because these three defendants were from out of state --

QUESTION: So the assumption that that was just a motion to get time for time's sake is not valid, and just because they wanted a continuance for that purpose doesn't

mean that they would seize upon any device to give them more time. Presumably they wanted the continuance for a valid reason.

MS. BOLEYN: Yes, Your Honor. My point is, I think, that they're not incompatible. The filing for the motion for continuance and the decision not to challenge the array are not incompatible. I mean, trial attorneys often file numerous motions to protect various rights that they may need as the time goes by, and of course the essential point is on the motion for change of venue is that the motion for change of venue was not ruled on until after voir dire was completed.

So what they were essentially doing was hedging their bets and seeing if the beneficial jury they believed that they had had any fixed opinions, they'd still be able to take them off based on a motion for change of venue or exclusion on the peremptory challenges. So they carried through with their actual strategy of trying to obtain a beneficial jury both in the way that they conducted voir dire and the way that they preserved all their motions until after the voir dire had been completed.

QUESTION: If the motion for continuance had been granted, is counsel for the state correct that there would necessarily have been a new jury array?

MS. BOLEYN: There would not have been. They

probably would have had to specially empanel a new jury if it went beyond the term of court, but that would not inevitably result, Your Honor.

QUESTION: Do we know the dates of the expiration of the jury?

MS. BOLEYN: I don't believe that's in the record, Your Honor. I think it would have been -- they could have tried him within the same term, because they only asked for a three-week continuance, is my recollection.

QUESTION: So a three-week continuance, you are representing, would not necessarily result in a new jury array?

MS. BOLEYN: Let me correct myself, Your Honor. I believe they asked for a continuance until March, and he was tried in November. I believe I stand corrected on that. I believe the continuance was from --

QUESTION: Do the juries run on a calendar year, do you know?

MS. BOLEYN: I think there are three juries per year in that county, as I recall, three.

QUESTION: How long does the average term in Putnam County last?

MS. BOLEYN: I think it's four months, each for four months is what I believe it is, but I'm not certain of that.

QUESTION: And you fill a calendar for four months, keep a judge there for four months?

MS. BOLEYN: I think what they do is rotate the different judges within the circuit to the particular county where you have it. Some of them, I believe --

QUESTION: Got a lot of business then in Putnam County?

MS. BOLEYN: Excuse me, Your Honor?

QUESTION: I say they have a lot of business in Putnam County.

MS. BOLEYN: Yes, sir.

QUESTION: Ms. Boleyn, did the District Court issue any opinion on this subject other than the order and memorandum decision that is contained from Page 90 to 93 of the appendix?

MS. BOLEYN: They had the first order prior to the time the trial attorneys testified, Your Honor, and then, of course, they entered the oral or if you will after the remand had taken place.

QUESTION: Yes, and that is the one at Page 90 to 93.

MS. BOLEYN: Yes, Your Honor.

QUESTION: Thank you.

MS. BOLEYN: The attorneys carried out their trial strategy to try to get a beneficial array by voir diring

the jury about the various factors that I have mentioned. They asked them, did they go to church, what church they went to. They asked them, did they have children the same age as the defendant, and they asked them, of course, about any predilection that they had for the death penalty.

QUESTION: Did they exercise any peremptories?

MS. BOLEYN: Yes, they exercised all but two of their ten peremptories.

QUESTION: But they didn't exhaust them?

MS. BOLEYN: No, they didn't, but they required that the District Attorney exhaust all 20 of his. Excuse me. I am correcting myself. They exhausted all but two of their peremptories. The district attorney exhausted all of his.

QUESTION: Ms. Boleyn, would you help me? You responded to the Chief Justice by saying the only opinion of the Disrict Court was at 90 and 93. Isn't this material at 67 to 81 the District Court's opinion, or 71 to 81? That was a written opinion where he found --

MS. BOLEYN: Yes, Your Honor, perhaps I wasn't clear. I said the only other order was the one before the remand, and that is the one at --

QUESTION: Which is a full explanation of cause and prejudice, that written opinion.

MS. BOLEYN: Yes, Your Honor, that's correct.

The attorneys went through a weighing process in

deciding whether or not to challenge the master grand and traverse jury lists. What they did was weigh the advantages they could gain, which were solely delay, versus the advantage they could gain if they stay with the beneficial jury that they have.

Essentially what they did was say that a bird in the hand was worth two in the bush, and of course they were operating on the assumption that they would win. As Mr. Pryor testified, we will gain delay if we win. On the other hand, we had already been through these juries that we had, jurors that we had one at a time. We balanced these two factors and decided not to.

He also indicated that he was afraid we would "wind up in worse shape than we were," so he made the strategic decision that the most beneficial jury to this particular defendant could be obtained from the list that had already been drawn up and from the actual list that he had been provided.

QUESTION: I thought the District Court found otherwise. Why was that clearly erroneous?

MS. BOLEYN: Your Honor, the bases for the District Court's opinion were these. First, they found it was reasonable for the attorneys not to have known of the memorandum, and that, of course, was not a clearly erroneous assumption of fact.

But the major clearly erroneous fact that the District Court found in finding cause was that there was concealment and that the concealment played a part in the tactical decision that the attorney made. The Eleventh Circuit overturned that finding as being clearly errneousn and found that the memorandum was readily discoverable, and because it was discoverable the attorneys chose not to go and look for it, and chose to rely on their assumption that the challenge would be successful, that there really was essentially no nexus between the memorandum and its concealment or nonconealment and the attorneys' decision not to

QUESTION: So you agree that we couldn't uphold setting aside the District Court's decision unless we agreed that it was clearly erroneous that there had been concealment. You acknowledge that as far as the other points are concerned the District Court's decision was not clearly erroneous, specifically on whether they would have used this information had they known about it.

MS. BOLEYN: Your Honor, in the first order of the District Court we contend the filing findings are clearly erroneous. At Joint Appendix Page 79, Judge Owen says the failure to assert the issue at trial was not deliberate. We contend that that is clearly erroneous.

The second finding on JA79 of the first order is that he said the attorneys were justified in assuming that

the attack upon the jury would be futile. In fact, they did not believe it would be futile. They believed it would be successful, and that finding is clearly erroneous.

Finally, on JA80 the court said that it was a miscarriage of justice to overlook the intentional act of underrepresentation based solely on the rule of procedure, and of course that is a mixed question of fact and law that we say is clearly erroneous.

With respect to the second order of the District Court, the District Court said from a cause standpoint it was reasonable for Lambert and Pryor at the time they were appointed to not challenge the list. Of course, the reasons why it was reasonable are our assertions.

We disagree with the District Court on what the reasons for not challenging it were, but we don't contest the reasonableness of their decision overall.

The other two findings that we contend were clearly erroneous is Judge Owen's finding on JA92 that if they had known of the memorandum they would have challenged the box. We contend that --

QUESTION: Wasn't that based on the testimony of Jernigan?

MS. BOLEYN: Yes, it was, Your Honor.

QUESTION: Which was hearsay testimony, no quite as reliable as Lambert's own testimony, but that is for the

trial judge, isn't it?

MS. BOLEYN: Your Honor, what you had was, you had the two trial attorneys at the time, of course, present before the District Court, and they didn't testify that if they had had the memorandum they would have known it, but yet two other people talking to them recollected that back in 1978 they thought that that's what they had said, so you are balancing hearsay testimony --

QUESTION: But that's for the trial judge, isn't it?

MS. BOLEYN: Yes, Your Honor, that's what it is. The only thing is, he is not able to credit -- hearsay testimony has no probative value, so he is unable to credit --

QUESTION: Well, was the hearsay objected to?

MS. BOLEYN: The hearsay of Mr. Jernigan? No, it was not, Your Honor.

QUESTION: It is in the record, then, isn't it?

MS. BOLEYN: Yes, it is. He should not have credited hearsay testimony over the testimony of --

QUESTION: Well, now, that's -- is there a rule that you cannot credit hearsay testimony over direct testimony, especially when the person testifying on direct has an interest in the testimony, namely, these attorneys' interest in not being sued for malpractice?

MS. BOLEYN: Your Honor, a fact can be clearly erroneous even if there is some evidence to support it. The only evidence to support the District Court's finding was hearsay testimony. We say that that is clearly erroneous in the light of the attorney's direct testimony, which did not include the statement that if they had known about the memo that they would have raised it, so that finding is clearly erroneous. Even if it is supported, allegedly supported by hearsay testimony, that is still a clearly erroneous finding by the District Court.

QUESTION: Ms. Boleyn, I think that's a close call. If indeed you had hearsay testimony that said they would have raised it -- do you have hearsay testimony that said they would have raised it?

MS. BOLEYN: Only that portion that the Court noted before of Mr. Jernigan's testimony.

QUESTION: It doesn't say they would have raised it. In fact, Jernigan had been asked earlier, what did Taylor say about his prior knowledge, and what he would have done, and Jernigan answers, well, I can't say specifically. I don't think he told me what he would have done.

MS. BOLEYN: Yes.

QUESTION: I think he just said it was a great issue.

MS. BOLEYN: Yes.

QUESTION: I don't know where it is in the appendix. I am looking at the record. It is on 59 of the record. I am not sure it is in the appendix. Maybe it is.

MS. BOLEYN: What they rely upon, Your Honor, what they have always relied upon is JA60, where they ask Mr. Jernigan after he has first said, I don't remember what he said, then they ask him again, on cross said, asked him the leading question, "Do you recall Mr. Lambert ever saying to you, if I had known about this jury issue prior to trial I would have raised it." He says, "Yeah, I recall that. It'd have been a great issue if I'd known about it."

QUESTION: The "Yeah, I recall that" might be taken to mean, I recall his saying he would have raised it but for the fact that he had said earlier specifically, I don't think he told me what he would have done. I think he just said that it was a great issue, I wish I'd known it. So there is not even any hearsay that explicitly says he would have raised it.

MS. BOLEYN: Yes, Your Honor. What they did was misconstrue his recollection as a specific recollection that that is exactly what he said, and that is what the District Court relied on as clearly erroneous, so I was just giving it the best premise possible, and still say even at best it is just hearsay.

QUESTION: Well, you don't want to do that.

(General laughter.)

MS. BOLEYN: I think our bottom line position on this, Your Honor, is that the memo has no relevance in this case because it was not a basis for the trial attorneys' deliberate decision, and this is borne out in the manner in which they finally did raise their challenge.

Both Mr. Pryor and Mr. Lambert testified that they raised the jury issue on direct appeal to the Georgia Supreme Court solely because they said we had lost in Mr. Amadeo's case and we wanted to raise every issue we could raise, and of course at that time, you know, the trial was over and we were reaching for straws and doing everything we could to try to follow through, so they had had an unsuccessful trial strategy that they thought --

QUESTION: Well, do you think this issue is just a straw issue? Isn't this a rather serious issue? I mean, let's be candid about that.

MS. BOLEYN: I think the allegations and the nature of the memo are very serious, but the question is --

QUESTION: And the facts are serious.

MS. BOLEYN: Yes.

QUESTION: This actually happened. This isn't just -- you know, often we get complaints alleging things and we assume them for purposes of trial. This is a case in which the evidence discloses an intentional program of

rigging the jury by the prosecutor's office.

MS. BOLEYN: And that is a very serious contention.

QUESTION: And they even used jury lists that were segregated by race.

MS. BOLEYN: That is a very serious --

QUESTION: And was that commonly known, that that was being done?

MS. BOLEYN: The jury boxes were kept separately?

QUESTION: Yes.

MS. BOLEYN: I don't know, Your Honor. I know that that evidence came out in Bailey v. Vining, but I don't know whether it was a matter of common knowledge, whether they were separately kept as to voting purposes. I don't know. But the --

QUESTION: So that by and large they would not have been charged with notice that this was going on, so even if the memorandum were not concealed, the plan was concealed, was it not?

MS. BOLEYN: That is what we contest.

QUESTION: You contest that the plan was concealed?

MS. BOLEYN: Yes.

QUESTION: How was anyone to find out about that if they didn't bump into this memorandum and ask a lot of questions?

MS. BOLEYN: It was in the relevant public record, Your Honor, along with --

QUESTION: In a stack of papers.

MS. BOLEYN: In the master jury list, not just in a stack of papers but in the master jury list.

QUESTION: How so? What do you mean, it was in the record?

MS. BOLEYN: It was in -- the clerk testified -- well, excuse me. Mr. Coates testified that when he went and asked the clerk for relevant materials to challenge the master jury list for a period of time, the clerk directed him to where the master jury lists were kept. He gave him the actual document that consisted of the master jury list, and in going through that he found the memorandum. Interestingly --

QUESTION: Well, you take the position that this yellow pad sheet --

MS. BOLEYN: Yes.

QUESTION: -- could reasonably have been discovered.

MS. BOLEYN: Yes. By the trial attorneys, had they looked at the master jury list, but of course they didn't.

QUESTION: I just wonder how -- you know, I looked at it on Page 3, and I think if I had seen it I wouldn't have known what I was looking at. Do you think somebody

reasonably would have known?

MS. BOLEYN: Yes, Your Honor. In light of Mr. Coates' testimony, the person that found it, the question was specifically put to him whether he thought he would have recognized it if he wasn't making a broad-based attack on the jury discrimination system. He said, yes, I think I would have known about it anyway. He only had one year experience at the time that he found it. Mr. Pryor and Mr. Lambert had 25 years of experience. So he did recognize what the memo had of signficance, even though he happened to be making a review of it in the broad sense.

I think to an attorney examining the master jury list, the relevant document for purposes of challenge, they would have recognized the significance of it. If it had been contained in an irrelevant public source, then that might be a whole different question. They didn't have to subpoena the records. The clerk voluntarily gave them, pointed him to it, and he even said, Mr. Coates testified that when he went and took the memorandum to Mr. Dennis, the clerk, that the clerk said, yes, that's what it is. He confirmed that it came from the solicitor's office to the jury commissioners, to Mr. Coates.

So not only was there no state interference with it, but they in fact confirmed what it was. If they had really wanted to conceal the document they should have left

it in the district attorney's office under lock and key, but instead it is with the relevant public document, so that any attorney making any kind of challenge to the jury in Putnam County has access to that document as well as any other person.

QUESTION: But do you seriously think that the district attorney's office wanted that document to be found?

MS. BOLEYN: No.

QUESTION: So that if they knew where it was, they surely would have recaptured it, wouldn't they?

MS. BOLEYN: There is no evidence --

QUESTION: So you can't say -- maybe the clerk certainly testified truthfully and all, but you can't say the prosecutor's office wasn't guilty of concealment. The whole plan was to conceal.

MS. BOLEYN: No. Of course not. Of course not. You can't say that. The clerk said he placed it in the public record, the clerk did.

QUESTION: Correct.

MS. BOLEYN: So it's the clerk's action, not the prosecutor's action, that caused it to be in the public record.

QUESTION: But the prosecutor is the adversary of the petitioner in this case.

MS. BOLEYN: Your Honor --

QUESTION: It's not the clerk we are concerned about here.

MS. BOLEYN: I think the point to be made about that is first of all that the record is not as complete as the petitioner says that it is. What the record shows is that the memorandum came, was sent from the solicitor's office to Mr. Dennis, who was the clerk of the jury commissioner, and it was given to the jury commission itself by the clerk, and Mr. Dennis did say that the members of the jury commission to his knowledge attempted to comply with the numbers placed on that memorandum.

QUESTION: May I interrupt? Is the solicitor also the prosecutor?

MS. BOLEYN: That is the previous name for the district attorney, the solicitor's office.

QUESTION: And the solicitor is the prosecutor?

MS. BOLEYN: Yes, they are the same thing. Solicitor and district attorney are the same thing. What is not in the record and what Mr. Coates and Mr. Wright and Mr. Jernigan all say is, these theories -- they even characterize them as theories, as to what this meant. There was an attempt to make it look good but not really be truly representative. All that is inference and speculation because there is no direct evidence in the record on that. We know where it came from. We know --

QUESTION: No, but the percentages do fit, don't they?

MS. BOLEYN: Yes, they do.

QUESTION: And the District Judge was persuaded by that.

MS. BOLEYN: And it of course resulted in minimal disparities, Your Honor, 10 percent for one and 5.1 percent for the other, which of course is very minimal even if you are trying to discriminate.

QUESTION: Just a little bit pregnant.

(General laughter.)

QUESTION: No, Your Honor, I think it is more than that, because if you are going to infer deliberate, malicious intent of the prosecutor to underrepresent black people on the jury, it doesn't make sense to say, try to get as close as he could to what was truly representative and only be 5 percent off. So I think the percentages are relevant if you are going to infer all these malicious, deliberate, intentional decisions on the part of the prosecutor --

QUESTION: Why do you suppose they --

MS. BOLEYN: Why do I suppose -- what is my speculation?

QUESTION: Is that all it is, speculation?

MS. BOLEYN: The same as theirs is, Your Honor.

The same as theirs.

QUESTION: He sent it, though, didn't he?

MS. BOLEYN: The prosecutor never testified. We don't know if he sent it. All the clerk said is, it came from his office. And there's no evidence in Bailey v. Vining that he sent it. There is no evidence in this case that he sent it.

QUESTION: Well, it just didn't create itself.

MS. BOLEYN: That's right.

QUESTION: So it came from the prosecutor's office.

MS. BOLEYN: That's right, Your Honor.

QUESTION: And so it came from a person in the prosecutor's office.

MS. BOLEYN: Yes, sir, that's what we know.

QUESTION: What do you suppose that person had in mind?

MS. BOLEYN: We don't know, Your Honor. We don't know. Providing them with some numbers about how to reconstitute the list, but for what purpose, that's what the speculation and the innuendo is. Whether it was concealment, whether it was a covert scheme, whether it was with all this malicious intent, that is the speculation of all the attorneys that represented the state or -- yes, the state in Bailey v. Vining and represented the petitioner here.

QUESTION: I thought that that was determined in another trial. I mean, as an abstract matter I suppose you could argue that the numbers were to make sure that the number of -- that the proportion of blacks did not go below these numbers, so that they wouldn't be subject to a court challenge and he couldn't care less if they went well above those numbers. I suppose you could create that speculation. But I thought that this had been determined in an earlier case that it was indeed malicious.

MS. BOLEYN: Your Honor, I am not contesting that that memorandum came from the solicitor's office. That has been previously determined. What I am contesting has never been decided either in Bailey v. Vining, the separate civil action, or in this case are the motives of the prosecution, whether it was pursuant to a scheme, and whether it was a deliberate intent to underrepresent black people. Yes, it had that effect. That's what Bailey v. Vining says. And we are stuck with it for whatever it is worth.

But all the deliberate nature of this prosecutor is what has never been proven and has always been inferred.

QUESTION: There has never been an action against the prosecutor?

MS. BOLEYN: No, Your Honor. The action in Bailey v. Vining was against -- originally against the electoral representatives, and then against the jury

commissioners themselves.

QUESTION: Is that solicitor still solicitor?

MS. BOLEYN: Yes, he is, Your Honor.

QUESTION: What is the basis for your saying that the trial court was wrong in finding that the petitioner's counsel were justified in assuming that an attack upon the jury would be futile?

MS. BOLEYN: Because they at all times assumed it would be successful, Your Honor.

QUESTION: Because they --

MS. BOLEYN: Because they at all times assumed it would be successful. They never -- they never thought it would be futile. They never --

QUESTION: And what did they base that assumption on?

MS. BOLEYN: They said general knowledge in the legal community, that it statistically wasn't right, and also general knowledge that if you went far back enough in Georgia that you were going to find an underrepresentation of blacks in the grand and traverse juries.

QUESTION: In other words, the statistics on their face show about the same disproportion that were shown in the memo?

MS. BOLEYN: They never went and looked at the statistics. They just assumed that they would be

challengeable and they would show intent themselves. They didn't actually go and make a determination of what the statistics were. They just assumed that they would be corrected based on their general legal knowledge of the community.

QUESTION: Were those statistics easily demonstrable other than from the memo?

MS. BOLEYN: Yes, they were, Your Honor, because that's how Mr. Coates got them, was going to the clerk's office himself and doing the tabulations, and then he presented those in Bailey v. Vining.

Our position is that there has never been a sufficient showing of cause by the petitioner in this case, that the attorneys made an intentional, deliberate strategical decision, albeit one that failed, to go with an advantageous jury array and not to file what they believed would be a successful challenge to the grand and traverse juries which would only buy them delay and would not keep the death penalty from being imposed upon the petitioner.

QUESTION: May I ask you another question? Supposing they made the strategic decision this was the best jury they could get, and afterwards they found out that one of them had been bribed to return a guilty verdict. But they didn't know it, but they made a strategic decision. Would that be cause?

MS. BOLEYN: It could be, Your Honor. It depends on how --

QUESTION: Why would that be different, because they thought they had a good jury.

MS. BOLEYN: Because I think, Your Honor, first of all you have to look at what they assume. If the attorneys in your hypothetical assumed that they could successfully challenge it without the bribe?

QUESTION: Yes.

MS. BOLEYN: Then that would be a reasonable strategic decision, the fact that they didn't-- they thought that they had an element of proof. They didn't think they needed it.

QUESTION: And they later on found there was a bribe. Would they be barred from raising that then?

MS. BOLEYN: It depends on whether the reasonableness, you know, whether there was ineffectiveness for not knowing about the bribe or something like that.

QUESTION: They just didn't look at the memo that said, we bribed this juror that was hiding over, you know, was in the clerk's office.

(General laughter.)

MS. BOLEYN: If they assumed -- if they assumed --

QUESTION: They just didn't know about it, and

they could have found it out if they had really been diligent and careful, but they didn't, and they thought they had the best jury they could get. They just, you know, they had one bad juror.

MS. BOLEYN: If they also assumed that they could challenge --

QUESTION: Yes, they assumed -- they made all those assumptions and decided, well, let's just go ahead with this jury.

MS. BOLEYN: It would still be a reasonable strategic decision that would not be caused, as long as they assume that they can be successful --

QUESTION: They'd be stuck with that jury.

MS. BOLEYN: The decision would be --

QUESTION: Are you saying that they assumed that -- they assumed that one of the jurors had been bribed.

QUESTION: No, no, no.

QUESTION: Well, why isn't that what would be parallel to this case.

MS. BOLEYN: That is what I thought I was saying, Your Honor.

QUESTION: Well, I didn't understand you to be saying that.

MS. BOLEYN: No, perhaps I was --

QUESTION: But that would be the parallel.

They say, yes, I figure pretty well one of these jurors is bribed, but this looks like a pretty good jury to me, let's go with it.

MS. BOLEYN: And the key inquiry whether if they think they need an element of proof that they don't have for whatever they are trying to show, then there you would have the nexus. You'd have the cause and effect between the lack of knowing about the bribery, in this case the lack of knowing about the challengeability of the jury and the decision, but the key part comes in, of course, when you assume that you have all the elements of proof you needed, and they assumed they would have the evidence of intentional discrimination based on statistics if they looked at them.

QUESTION: Their assumption of the bribery would just be based on the notion, we know we've got a crooked prosecutor here who probably bribes people. We probably can't prove it, but maybe we could. That would still -- they would still be --

MS. BOLEYN: Your Honor, but they had more to base their assumption on in this case.

QUESTION: But they didn't. The statistics here would have not supported a challenge. There was nothing. There was just an assumption they had a general notion they might be able to prevail.

MS. BOLEYN: No, Your Honor. They said that if

you went back far enough in Georgia, in any county in Georgia where there was not a prior jury challenge, you were going to find underrepresentation of blacks on the jury, so it was more than just some general statistical legal technician sort of notion. It was, they were sure. They had practiced law there for 25 years and known there was never a previous challenge, and figured if you go back far enough you are going to be able to find that underrepresentation of blacks on the jury probably in statistics high enough to show the intent without the necessity of any memo or anything else showing the element of --

QUESTION: But that is past juries, not this jury.

MS. BOLEYN: Well, that's, of course, the way you look at it. The way you show discrimination in this one is to show systematic exclusion over a significant period of time, so that's the same sort of analysis you'd have to go in to try to attack the individual jury.

The Eleventh Circuit did not reach prejudice, but let me just state that we have never conceded that there was sufficient prejudice under the cause and prejudice standard. What we did concede is that the Bailey v. Vining order established underrepresentation of blacks. There was nothing we could do about that, but whether or not that constitutes prejudice should this Court reach that question is still

open for the decision.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Boleyn.

Mr. Bright, you have two minutes remaining

ORAL ARGUMENT OF STEPHEN B. BRIGHT, ESQUIRE

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BRIGHT: Very well. I would just point to the record very quickly on the prejudice question. The state said, the same attorney general, that prejudice has been conceded by the state throughout the proceedings because of the intentional discrimination and the uncontroverted evidence in Bailey.

The other point I want to make is just what has been said repeatedly in both the briefs and the arguments, that this is speculation and inference by myself or in our brief or witnesses, these are findings of a United States District Court. The District Court found discrimination, and it found at Page 79 of the Joint Appendix that it was done for the purpose of avoiding a prima facie case.

This is not anybody's speculation. These were findings that a District Court could make based upon all the evidence, and I would just point out as well with regard to what the lawyers would have done that when Mr. Coates testified at Page 47 of the record he talked about this was a death penalty case, we had a hard case, and I wish we had

known, because we were looking for every issue to raise, when he testified, so it wasn't just the testimony of Mr. Jernigan.

QUESTION: Can you tell us why the prosecutor wasn't called as a witness?

MR. BRIGHT: I think the evidence was established at least from -- in the Bailey case by the testimony of Mr. Dennis, the clerk of the court and secretary to the jury commission. He said, I got this from the District Attorney's office, I communicated it, they followed it to the letter, and the District Court made those findings. Why the state didn't call the prosecutor, I have no idea. Of course, he did have a valid Fifth Amendment privilege, but I don't know if that's the reason.

QUESTION: Amadeo didn't need him.

MR. BRIGHT: Excuse me?

QUESTION: Amadeo didn't need the prosecutor.

MR. BRIGHT: We certainly did not need the prosecutor in this particular case.

And finally, with regard to the motions, I want to make clear there were three motions filed prior to trial. Two more were filed on the day of trial, but there were three filed prior, but with regard to that continuance motion, one of the reasons that it was filed was that, and the lawyers didn't just file a motion. They filed an affidavit, and they

swore to this statement that there was so much passion and prejudice in the community that they needed to continue the case to the next term of court so that the passions in that particular jury could die down, and if they had gone to the March term it would have been a new term of court.

For all these reasons, we would ask the Court to reverse the Eleventh Circuit and reinstate the District Court. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bright. The case is submitted.

(Whereupon, at 2:59 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 87-5277

CASE TITLE: Amadeo v. Kemp

HEARING DATE: March 28, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 4/1/88

Margaret Daly

Official Reporter

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