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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRANK DEAN TEAGUE, Petitioner v.
MICHAEL LANE, DIRECTOR, ILLINOIS
DEPARTMENT OF CORRECTIONS, ET AL.

CASE NO: 87-5259

PLACE: WASHINGTON, D.C.

DATE: October 4, 1988

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APPEARANCES:

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Chicago, Illinois,

on behalf of the Petitioner

DAVID E. BINDI,

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Chicago, Illinois,

on behalf of the Respondents

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1 (1.54 p.m.)

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

3 CHIEF JUSTICE REHNQUIST: We'll hear evidence
4 next in Number 87-5259, Frank Dean Teague against
5 Michael Lane.

6 You may proceed whenever you're ready, Ms.
7 Unsinn.

8 ORAL ARGUMENT OF PATRICIA UNSINN
9 ON BEHALF OF THE PETITIONER;

10 MS. UNSINN: Mr. Chief Justice, and may it
11 please the Court, the petitioner in this case was tried
12 before a jury from which all black representation was
13 removed by use of the peremptory challenge. Although 11
14 of the 32 Jurors who withstood challenges for cause were
15 black, the prosecutor exercised all 10 of the peremptory
16 challenges allotted to him by statute to remove 10 black
17 jurors from that panel.

18 The defense exercised one of its challenges
19 against the remaining black juror -- she was married to
20 a police officer, and his client was charged with
21 attempted murder of a police officer.

22 The result was that the petitioner was tried
23 before a jury which was not representative of the
24 community which was 25 percent black.

25 This case thus presents the question of whether the

1 Sixth Amendment bars the prosecutor's use of the
2 peremptory challenge to defeat the possibility that the
3 petit jury will be representative of a fair cross
4 section of the community.

5 QUESTION: Ms. Unsinn, may I interrupt you
6 there to inquire whether -- if this Court were to adopt
7 the other part of Justice Harlan's view of retroactivity
8 on collateral review, whether we would be able to reach
9 your Sixth Amendment argument at all?

10 MS. UNSINN: Yes, Judge, I believe you would
11 because --

12 QUESTION: Why? This comes to us on Federal
13 habeas, right?

14 MS. UNSINN: Yes, Judge, but --

15 QUESTION: And under Justice Harlan's view,
16 any new right recognized wouldn't be retroactive. And
17 wouldn't we just be rendering an advisory opinion, then,
18 on the Sixth Amendment question if we were to adopt that
19 view?

20 MS. UNSINN: No, Justice O'Connor, we don't
21 believe that we're proposing any new rule in our Sixth
22 Amendment argument. We're merely asking this Court to
23 apply its precedents to a different factual situation
24 than it has previously addressed.

25 QUESTION: Well, suppose we continue to follow

1 our holding in Allen against Hardy, rather than your
2 view of when that rule was adopted.

3 MS. UNSINN: Judge, my answer remains the
4 same. We're not proposing a new or a different rule.

5 The Respondents -- this Court is taking great
6 care to ensure that the jury pool from which the petit
7 jury is selected is representative of the community.
8 It's the Respondent's position, and they find support
9 for this position in language of this Court in Lockhart
10 v. McCree, that extension of the fair cross section
11 requirement to the petit jury would be unworkable and
12 unsound. That so long as all distinctive groups in the
13 community are represented on the jury pool -- the Sixth
14 Amendment imposes no limitation on the ability of the
15 prosecutor to remove those same distinctive groups from
16 the petit jury.

17 We suggest that accepting this argument would
18 make the fair cross section requirement meaningless. It
19 would allow the --

20 QUESTION: It was accepted in Lockhart v.
21 McCree, wasn't it?

22 MS. UNSINN: The fair cross section
23 requirement?

24 QUESTION: Extended to a petit jury?

25 MS. UNSINN: Well, Judge, as I said, there was

1 language in the opinion suggesting that this was correct.

2 QUESTION: Well, you think that that does not
3 mean that that was accepted, if it was simply language
4 in the opinion, as you refer to it?

5 MS. UNSINN: Well, Judge, it was certainly a
6 conclusion --

7 QUESTION: Yes, I'm the Chief Justice, I'm not
8 a Judge.

9 MS. UNSINN: Pardon me, Justice Rehnquist.
10 Our position is that the language in the
11 opinion suggesting that the Sixth Amendment doesn't
12 extend to the petit jury was unnecessary to the result
13 reached in that case, and thereby doesn't necessarily
14 bind this Court in the decision in this case.

15 As I was saying, acceptance of that argument
16 would result in the State of Louisiana, for instance, in
17 response to this Court's decision in Taylor, rather than
18 providing that women would be excluded from the jury
19 pool by use of a statutory exemption, could provide that
20 women are entitled to be included in the jury pool, but
21 that the parties can exercise challenges for cause
22 against women, once they are represented on the jury
23 pool, on the assumption that their family
24 responsibilities would cause them to be inattentive
25 jurors, and therefore unfair.

1 This, of course, I think would be an absurd
2 result. It would allow the prosecution to achieve the
3 same result which this Court found to be offensive in
4 Taylor.

5 The fair cross section requirement has no
6 meaning or purpose unless its importance is recognized
7 to extend beyond selection of the jury pool. The jury
8 pool itself is not a deliberative body. It is the petit
9 jury which provides the defendant with the benefit of
10 the common sense judgement of the community.

11 The defendant has no interest in a jury pool which
12 is representative of the community separate from the
13 impact that that jury pool, the representative character
14 of that jury pool could have on the petit jury before
15 which he is tried.

16 The representative jury pool is not an end in
17 itself. It merely provides the means and the
18 possibility that the petit jury will be similarly
19 representative of the community. The exclusion of
20 cognizable groups from the jury pool violates the Sixth
21 Amendment only because it serves to exclude those same
22 jurors from the jury -- from the petit jury.

23 We are not asking that this Court impose any
24 requirement that the petit jury be of any particular
25 composition. We are not asking that any quotas be

1 imposed, we're not asking that any affirmative action be
2 taken to achieve a certain result.

3 All we're saying is that the statistical
4 impossibility that each and every petit jury will mirror
5 the community should not excuse a deliberate perversion
6 of the process to achieve an unrepresentative jury.

7 QUESTION: Do you think that forcing parties to a
8 lawsuit to accept jurors of a certain racial composition
9 -- Italian background, or Hispanic in certain parts of
10 the country, or whatever it might be -- on the basis of
11 their race or their religion at the petit jury level
12 might work at cross purposes with the goal of giving
13 parties through the peremptory challenge the right to
14 obtain a degree of impartiality, in effect?

15 MS. UNSINN: Judge -- Justice O'Connor, it's
16 our position that there's nothing inconsistent with our
17 argument and the achievement of a fair and impartial
18 jury.

19 Our argument is that disallowing peremptory
20 challenges to allow the petit jury the possibility of
21 being representative in fact furthers the goal of a fair
22 and impartial jury. The prosecutor would not be
23 disallowed from using his peremptory challenges to
24 exclude members of a group if he has a reasoned basis to
25 question the bias of the jury, of the juror.

1 The only thing that he's going to be prevented
2 from doing -- and he's not going to be required to
3 accept jurors merely because they're members of a
4 certain group. All that he's going to be prevented from
5 doing is making assumptions about the partiality of the
6 juror based on their group identity.

7 I think if you look at the facts of this case,
8 it well demonstrates our argument. The trial
9 prosecutors never contended --

10 QUESTION: Excuse me, you made some
11 assumptions based on group identify. You struck a woman
12 from the jury on no basis, other than the fact that she
13 belonged to the group of wives of policemen. Isn't that
14 the way peremptory challenges are always used, making
15 generalizations about groups which may well be wrong,
16 but you play the odds, and that's the basis on which you
17 use them. Isn't that done all the time?

18 MS. UNSINN: It may be done all the time. Our
19 position, though, is whether or not that is done
20 consistently with the Sixth Amendment. I think there's
21 a difference between excusing the woman juror in this
22 instance because of fear that her close relationship
23 with a police officer is going to cause her to be
24 sympathetic with the victims in this case than making
25 the assumption merely on the basis of one's group

1 icentity that they cannot be fair.

2 QUESTION: Well, what about, let's say, a
3 trial concerning a killing that has become a racial
4 incident in the community in question, and let's assume
5 that it's a group of young white men who have caused the
6 death of a black man.

7 And the defense, or the prosecution, attempts
8 to strike from the jury all whites, if possible,
9 thinking that the racial tensions in the community would
10 make them tend to vote against his client. Is that no
11 good? Or it's only okay because the defense does it?

12 MS. UNSINN: No, Judge, our position --
13 although this case doesn't present that question -- we
14 would be willing to concede that any rule that this
15 Court would adopt should apply equally to the defense as
16 well as the prosecution.

17 Certainly the defense would not be prevented
18 from excusing white jurors if it had some basis, some
19 individual basis to question the --

20 QUESTION: No individual basis, it just knows
21 that this matter in the newspapers and elsewhere has
22 just polarized the races in the community -- just to be
23 sure, if I can, I would like to keep as many whites as
24 possible off the jury. You're saying I wouldn't be able
25 to do that?

1 MS. UNSINN: No. But that doesn't -- that
2 would not be consistent with our argument, no.

3 The prosecutors in this case had no basis, and
4 articulated no basis on which they questioned the bias
5 of the black jurors who were excluded.

6 QUESTION: Well, Ms. Unsinn, under -- if your
7 client were being tried today, by virtue of Batson
8 against Kentucky, this situation that you're complaining
9 about couldn't occur, I assume.

10 MS. UNSINN: Under the facts of this
11 particular case, my client would succeed under either an
12 Equal Protection analysis --

13 QUESTION: And would succeed under our
14 holding, this Court's holding in Batson.

15 The problem is that we did not apply Batson
16 retroactively to cases that were final when it was
17 handed down, and your client's case was final, was it
18 not?

19 MS. UNSINN: Yes, that's correct.

20 QUESTION: Well, Batson -- what did it rest on?

21 MS. UNSINN: The Equal Protection Clause.

22 QUESTION: And it's a racial case?

23 MS. UNSINN: Batson itself involved a black
24 defendant.

25 QUESTION: Yes, yes.

1 MS. UNSINN: I don't know that there were any
2 --

3 QUESTION: And your argument would go beyond
4 Batson because it would apply to any distinctive group
5 in the community.

6 MS. UNSINN: Yes. There would be --

7 QUESTION: And furthermore, there are some
8 people who say that Batson only applies in favor of the
9 member of the group excluded.

10 MS. UNSINN: This is correct.

11 QUESTION: So your rule, if established, has a
12 considerably broader impact than Batson?

13 MS. UNSINN: In some respects it would.

14 There would be -- under the Equal Protection
15 analysis, the defendant has to be a member of the
16 excluded group, in order to have standing to raise a
17 claim of discrimination. Under the Sixth Amendment, the
18 defendant who has a --

19 QUESTION: Do you think -- who do you think
20 could win on an Equal Protection basis, other than
21 racial claimants?

22 MS. UNSINN: Perhaps a woman --

23 QUESTION: Religious?

24 MS. UNSINN: A woman defendant who complains
25 about exclusion of women jurors.

1 QUESTION: On an Equal Protection basis?
2 MS. UNSINN: On an Equal Protection basis.
3 QUESTION: Who else?
4 MS. UNSINN: Judge, I don't know.
5 QUESTION: But Batson would not automatically
6 apply to them, I don't suppose?
7 MS. UNSINN: Pardon me, Justice?
8 QUESTION: Batson wouldn't automatically apply
9 to them?
10 MS. UNSINN: To every distinctive group in the
11 community? Well, the only groups that this Court has to
12 date recognized as being distinctive groups in the
13 community are Blacks, women, and Mexican-Americans.
14 QUESTION: Lower courts have gone considerably
15 further in identifying other groups, I take it.
16 MS. UNSINN: I am not aware of any widespread
17 recognition of other groups, and I think that as I --
18 QUESTION: I thought I had spotted a number in
19 the cases around the country.
20 MS. UNSINN: As the opinion in Taylor makes
21 clear --
22 QUESTION: Pretty much limitless, actually.
23 This Court has previously refused to take this
24 step, and extend the fair cross section requirement to
25 the petit jury, has it not?

1 MS. UNSINN: There is that language in
2 Lockhart v. McCree, although unnecessary to the result
3 reached there, it suggests that the Court would be
4 unwilling to do so.

5 QUESTION: But I take it, under your Sixth
6 Amendment theory, you want a jury that's representative
7 of the community at large, which would include
8 representative numbers of race, gender, I take it wealth?

9 MS. UNSINN: We're asking for the possibility
10 that the jury be representative, yes.

11 QUESTION: At what point do you test whether
12 or not this jury has been selected? There are 12
13 jurors in the box, and there is on peremptory challenge,
14 and it happens to be a wealthy woman. Do we immediately
15 begin looking at the composition of the community, or do
16 we have to wait until the jury has been selected?

17 MS. UNSINN: The test that we've proposed
18 would require that the ultimate composition of the jury
19 be unrepresentative of the community, so I don't know
20 that after --

21 QUESTION: So you have to wait until all of
22 the peremptory challenges have been exercised before you
23 can determine whether the Constitution has been in
24 violation?

25 MS. UNSINN: In many instances, I believe that

1 would be so. There may be some instances --

2 QUESTION: And at that point, you'd simply
3 have to select an entirely new jury, I take it?

4 MS. UNSINN: I think that that's an open
5 question. In Batson, this Court stated that it expressed
6 no opinion whether the remedy would be to disallow the
7 use of the peremptory challenges, or to require that a
8 new jury be selected.

9 I imagine this Court could take the same
10 position with respect to this issue.

11 QUESTION: So you're proposing a standard
12 where the Judge could not make rulings on a challenge by
13 challenge basis?

14 MS. UNSINN: No more so than I think he would
15 be able to do in the Batson case.

16 QUESTION: I would think that anybody
17 exercising a peremptory challenge is doing so at his
18 peril unless he gives a reason for it, and would say I
19 don't know whether this person is a member of a
20 representative or a distinctive group or not, but if he
21 or she is, here's why I'm throwing her or him off. And
22 then the judge said, "Well, that isn't good enough," so
23 he has to leave him on, I guess?

24 In other words, you need cause for peremptory
25 challenges. Peremptory challenges for cause would be

1 the only kind that would stand.

2 MS. UNSINN: No, we're not saying that he
3 needs cause. We're saying that if, in fact, the
4 defendant were able to sustain this burden of proving
5 that the prosecutor's use of the peremptory challenge
6 has resulted in an unrepresentative jury, then the
7 prosecutor would have to justify that by showing
8 existence of a significant state interest which would --

9 QUESTION: At what point during the trial, Ms.
10 Unsinn, does that happen? You say the defendant has to
11 make some sort of a showing. At what point in the trial
12 does that kind of thing happen? This is perhaps the
13 follow up of Justice Kennedy's question.

14 MS. UNSINN: I would imagine whenever it
15 became evident that the representative nature of,
16 character of the jury was being impaired.

17 QUESTION: And how would one know when that
18 had happened?

19 MS. UNSINN: Whenever the -- I would imagine
20 it would be in the later stages of jury selection, when
21 the parties are --

22 QUESTION: Well, it only takes two or three
23 weeks, or maybe a couple of months to get 12 jurors
24 seated now in the State courts, sometimes. If you have
25 to start over, it would be very interesting.

1 MS. UNSINN: I think the example of two or
2 three weeks is probably an extreme situation and is not
3 the case in the majority of situations.

4 Certainly the Batson remedy would require the
5 same kind, you know, of loss of time. You know, the
6 question is, which is the more important interest? Not
7 -- and also, the question is, to whom is that loss of
8 time attributable to? It's certainly not attributable
9 to the defendant, who's trying to exercise, to vindicate
10 his right under the Sixth Amendment. It's attributable
11 to the prosecutor, who is the person who's violated the
12 dictates of --

13 QUESTION: What rule of law would a prosecutor
14 invoke if he wanted to challenge the peremptories
15 exercised by a defendant?

16 MS. UNSINN: Judge, I --

17 QUESTION: Bad cross section?

18 MS. UNSINN: No, I don't believe so. I think
19 that he could look -- this Court could look to language
20 that suggests that there must be a balancing of the
21 scales between the defendant and the State.

22 QUESTION: Is that a Federal, Constitutional
23 requirement?

24 MS. UNSINN: No.

25 QUESTION: Well, so you're saying there would

1 be no Federal Constitutional basis for the prosecutor
2 making, challenging peremptories of a defendant.

3 MS. UNSINN: No, but the Court could allow the
4 state to exercise --

5 QUESTION: which? This Court?

6 MS. UNSINN: This Court, or a State court.

7 QUESTION: Well, we can't do anything except
8 to a State court, except based on the Constitution.

9 MS. UNSINN: Then State courts could allow
10 prosecutors to question the basis on which the defense
11 counsel are making use of their challenges.

12 I also think perhaps we're overstating some of
13 the problems that this rule might entail. Every
14 possible group that exists in the community is not
15 necessarily going to be a distinctive group in the
16 community.

17 As I said earlier, there are only three groups
18 that this Court has recognized to be distinctive groups
19 in the community for fair cross section purposes. I
20 don't know that the conclusion would necessarily be
21 drawn that because a juror is in a certain income
22 bracket, and another juror is in another income bracket
23 that those jurors are separate and distinct groups in
24 the community such that the prosecutor would be
25 prevented from excluding any one of them.

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QUESTION: How about age groups?

MS. UNSINN: Justice, that would depend upon whether or not the defendant was able to persuade the trial judge that an age group would be a distinctive group in the community. I don't know that these questions can be resolved in this case. They're not really presented, and they're probably better decided in cases which really have fully developed the record as to why an age group should be a distinctive --

QUESTION: But even if a defendant doesn't persuade the trial judge, if he persuades the appellate court, he gets the same result, doesn't he?

MS. UNSINN: Yes.

QUESTION: Well, counsel, if we rule on this on the basis of Teague being a Negro, why did they have to get into all these other groups?

MS. UNSINN: We don't.

QUESTION: Well, why are you arguing, then?

MS. UNSINN: I'm just trying to remind the Court that this -- adoption of this rule isn't going to lead to some horrendous consequence.

I agree that it's only necessary for this Court to recognize, as it has already done, that Blacks are a representative group in the community, a distinctive group in the community, such that a

1 prosecutor shouldn't be allowed to interfere with the
2 possibility that those jurors can sit on the jury.

3 As I was saying, the prosecutors in this case
4 never questioned the partiality of the Black jurors.
5 The explanation that they gave was that they were
6 attempting to achieve a balance of men and women and age
7 groups. The Court of Appeals' panel opinion found that
8 that explanation was pretextual. The Respondents have
9 never questioned the validity of that panel opinion
10 judgement.

11 QUESTION: Have you been involved in the
12 criminal trials that have occurred since Batson?

13 MS. UNSINN: No, Justice White, I have not.
14 I've --

15 QUESTION: I was just wondering how the Batson
16 rule is working out in practice then. How do they --
17 when are questions raised, and when does the defendant
18 attempt to prove the peremptories have been
19 discriminatorily exercised?

20 MS. UNSINN: Well, I think this case itself
21 demonstrates when a defendant would attempt to make the
22 complaint. The complaint here was made --

23 QUESTION: On Federal habeas corpus.

24 MS. UNSINN: No, I'm speaking about when the
25 complaint was made in the trial court.

1 I think it was probably a little -- halfway
2 through voir dire of the jurors, of the 32 jurors. So
3 certainly there was substantial proceedings that
4 occurred before a complaint was made.

5 Based on my experience in pre-Batson cases, it
6 was not unusual for a defense counselor to make the
7 complaint towards the later stages of jury selection,
8 when it became apparent that there was a discriminatory
9 inference to be concluded from the manner in which the
10 prosecutor was exercising its challenges.

11 Certainly under Batson this Court recognizes
12 that disproportionate exclusion is one of the kinds of
13 evidence that can be looked to to determine whether or
14 not a prosecutor is discriminating, and certainly that
15 is not going to be apparent until the later stages of
16 jury selection.

17 Unless there are any questions, I would like
18 to reserve my remaining time.

19 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
20 Unsinn.

21 We'll hear now from you, Mr. Bindi.

22 ORAL ARGUMENT OF DAVID E. BINDI

23 ON BEHALF OF THE RESPONDENT

24 MR. BINDI: Mr. Chief Justice, and may it
25 please the Court, your Honors, the Petitioner invokes

1 the Sixth Amendment as the Constitutional basis for the
2 relief he seeks in this case.

3 The core guarantee of the Sixth Amendment is
4 the right to an impartial jury, but the petitioner does
5 not contend that he did not get an impartial jury in
6 this case. What he does contend is that he did not get
7 a jury which was representative of a cross section of
8 the community because the peremptory challenge was used
9 with the result that one distinctive group within the
10 community did not ultimately participate in the jury's
11 deliberations.

12 Your Honors, the Petitioner's argument blurs
13 the distinction between cross sectionalism and
14 impartiality, and it is absolutely crucial to remember
15 that they are not the same thing. In *Lockhart v.*
16 *McCree*, this Court defined impartiality, for purposes of
17 analysis of a jury, in terms of a jury consisting of
18 individuals, each of whom was willing to consider the
19 case fairly and to render a decision based on the
20 evidence, and not on extraneous or irrelevant influences.

21 The Court also specifically rejected the
22 notion that jury impartiality can be determined with
23 reference to some hypothetical mix of viewpoints from
24 within the community on the petit jury itself.

25 I don't mean for any of this to imply that the

1 Respondents are denigrating the cross section principle.
2 The cross section principle does serve a very valuable
3 purpose in the jury trial system. But it must be
4 remembered that the cross section principle is a
5 protective measure, and it was designed to enhance the
6 fairness of jury trials.

7 But the peremptory challenge does that too.
8 The peremptory challenge serves as a backstop to the
9 process of voir dire examination and challenge for
10 cause, and it also serves to ensure that the jury which
11 is ultimately selected is one that is composed of
12 individuals that both parties are able to agree upon as
13 being the fairest and most able to render a just verdict
14 from the choices available.

15 Having a cross section of the community
16 represented in a petit jury would be a good thing if we
17 could get it on a regular basis. But a cross section of
18 biased and partial people does not serve the ends of
19 justice. The peremptory challenge may result in some
20 juries which are less cross sectional, but its purpose
21 is to ensure that while a jury may be less cross
22 sectional, it is nevertheless more fair and satisfactory
23 to both sides.

24 The argument has been made that if the cross
25 sectional principle is not extended to the petit jury,

1 that the beneficial effects of the holding in Taylor v.
2 Louisiana --

3 QUESTION: Well, let's say that in a
4 post-Batson trial a defendant challenges a prosecutor's
5 use of his peremptories, and the judge asks the
6 prosecutor to justify striking all these women, or all
7 these Blacks, and the prosecutor says well, I just don't
8 think any Black or any woman sitting in this case can be
9 an impartial juror.

10 Would that be a decent response?

11 MR. BINDI: Your Honor, in a post-Batson
12 situation, that would not be a satisfactory reply.

13 QUESTION: Why wouldn't it?

14 MR. BINDI: Well, because Batson stands for
15 the proposition that the Equal Protection Clause does
16 not permit the peremptory challenges to be exercised on
17 the basis of a stereotypical notion that jurors of a
18 particular race will, in all cases, be favorable or more
19 partial to, a defendant who is also a member of that
20 same race.

21 QUESTION: But you say that in a fair cross
22 section case, the prosecutor should have complete
23 freedom to exercise those sort of stereotypical views by
24 striking all members of a particular group?

25 MR. BINDI: Your Honor, yes, I contend that

1 that's permissible. The reason is that the Equal
2 Protection Clause protects entirely different interests
3 than the Sixth Amendment.

4 As I said before, the core guarantee of the
5 Sixth Amendment is impartiality, and it is not the
6 purpose of the Sixth Amendment to address problems of
7 discrimination. That is the function of the Equal
8 Protection Clause.

9 QUESTION: So you say Batson's got nothing to
10 do with the rights of a defendant or just with potential
11 jurors?

12 MR. BINDI: No, your Honor, I agree that
13 Batson v. Kentucky has to do not only -- and the
14 language in the opinion indicates this -- that it has
15 not only to do with the interests of the jurors, but
16 with the interests of the defendants. So there are
17 Equal Protection concerns in both situations in Batson.

18 QUESTION: The interest the defendant can have
19 is the interest in impartiality, I would assume, isn't
20 it?

21 MR. BINDI: If that were in fact the case,
22 your Honor, it would be difficult to explain Batson as
23 an Equal Protection holding, because it was not a case
24 that was brought by individual jurors who had been
25 excused, but rather by a criminal defendant.

1 Had impartiality been the Court's core concern
2 in *Batson v. Kentucky*, then I think it would be
3 difficult to explain it on an Equal Protection ground.

4 Moreover, I would also point out that in *Alan*
5 *v. Hardy*, which held that *Batson* was not retroactive to
6 cases which were final at the time it was decided --
7 there is language in that opinion that indicates that
8 the decision in *Batson* had multiple purposes, one of
9 which may have had some impact on the truth finding
10 function of a jury trial, but that that was not the main
11 thrust of the opinion.

12 QUESTION: I suppose that our jury size case
13 --was it *Ballew v. Georgia*, did rely in part on the fair
14 cross section concept in saying you can't reduce the
15 petit jury size beyond a certain level.

16 MR. BINDI: That's true, your Honor. The case
17 in *Ballew v. Georgia*, the Court held that a jury of five
18 would be unconstitutional, and it did rely in part on --

19 QUESTION: So apparently there is some
20 concern, then, with fair cross section at the petit jury
21 level?

22 MR. BINDI: Absolutely, your Honor. I would
23 not contest the fact that cross-sectionalism has some
24 implication for impartiality.

25 The point to remember, though, is that while

1 there is a connection between the two, it is not a
2 direct connection. That is to say that cross
3 sectionalism at the petit jury level is not the litmus
4 test of impartiality. If it were, then what the
5 Petitioner is asking the Court to do is in fact not
6 enough.

7 If it were the litmus test of impartiality,
8 then we would have to fill juries by quota.

9 QUESTION: If you have a case of a white civil
10 rights worker who's been beaten and he is the victim,
11 and whites are being tried, can blacks be stricken from
12 the jury?

13 MR. BINDI: Consistent with the cross section
14 requirement --

15 QUESTION: Consistent with Batson and
16 consistent with the Sixth Amendment.

17 MR. BINDI: First of all, it would not be
18 inconsistent under the Sixth Amendment to strike jurors
19 on that basis on that factual situation.

20 As to whether that would violate the Equal
21 Protection Clause, this Court's opinion in Batson
22 appears to read that the defendant challenging the use
23 of peremptories by the prosecution must be of the same
24 racial group as the stricken jurors.

25 I'm aware of some lower court cases that tend

1 to drift away from that sort of standing requirement
2 that Batson appears to impose, but nevertheless, your
3 Honor, the essential point here is that to the extent
4 that that is a problem, it is a problem for Equal
5 Protection purposes, not for fair cross section purposes.

6 Because to equate jury impartiality, which
7 once again is what the Sixth Amendment is all about,
8 with some sort of mix on the jury or representative
9 viewpoints being included on the petit jury is to take a
10 dangerous step toward the process of actually being
11 required, or enforcing a requirement, that juries be
12 filled by quota.

13 Now, the argument has been made that if the
14 cross section requirement is not extended to the petit
15 jury, then Taylor v. Louisiana will be rendered a
16 nullity. It's simply wrong to say that, your Honors.
17 The fact that Taylor requires that the jury pool be
18 all-inclusive means that if, in a situation where
19 previously an entire group was either drastically
20 underrepresented or completely excluded, a litigant would
21 be able, in a situation such as that, to direct his or
22 her peremptory challenges against the next most
23 disfavored individuals or groups.

24 But when you have a pool which is
25 all-inclusive, then the peremptory challenge is going to

1 be exercised in a different way by the litigants, and it
2 means that people who previously might have been
3 peremptorily challenged will now in fact sit on juries
4 that they wouldn't have been on before. And that has
5 the function of shifting the spectrum of attitude which
6 actually appears on the petit jury.

7 So it is a mistake to say that Taylor would
8 have no effect whatsoever on the law if --

9 QUESTION: What about -- I just wanted to
10 avoid all this wrangling about fair cross section, and
11 Batson. And I just said, the only challenges that are
12 going to occur in criminal trials are challenges for
13 cause. That would be Constitutional, wouldn't it?

14 MR. BINDI: There would be nothing at all
15 un-Constitutional about that. The Court has frequently
16 stated that peremptory challenges are not
17 Constitutionally required.

18 QUESTION: And so a State could just do away
19 with them?

20 MR. BINDI: That's true, your Honor.

21 When I say, however, that the peremptory
22 challenge serves a valuable purpose for purposes of
23 selecting a fair and impartial jury, I do not mean to
24 suggest that it should thereby be accorded some
25 Constitutional status. I'm merely pointing out to the

1 Court, as the Court itself has frequently recognized,
2 that the peremptory challenge does serve a valuable
3 purpose.

4 QUESTION: What is that?

5 MR. BINDI: The purpose the peremptory
6 challenge serves, your Honor --

7 QUESTION: Appearance or actuality?

8 MR. BINDI: Pardon me?

9 QUESTION: You say that -- you say that it
10 really wouldn't affect the impartiality of a jury if
11 peremptories were eliminated. At least there would be
12 no Constitutional basis for questioning that.

13 MR. BINDI: That's correct, your Honor. But
14 nevertheless, to say that we have a procedural device
15 which is designed to further a goal, but that that
16 device does not have Constitutional status, is not to
17 say that to do away with the device would be
18 un-Constitutional.

19 QUESTION: Are you saying that some impartial
20 juries are more impartial than others?

21 MR. BINDI: No, your Honor, I don't --

22 QUESTION: That's what you're saying.

23 MR. BINDI: I don't believe that that's what
24 our position leads to.

25 QUESTION: Well, unless that's true, the

1 peremptory challenge doesn't have any purpose at all, or
2 any purpose that serves the society.

3 MR. BINDI: Well, again, the purpose the
4 peremptory challenge serves is first of all, because the
5 process of voir dire examination and cause challenge has
6 its limitations, the peremptory serves as a backstop.
7 We all recognize that voir dire examination, as it's
8 currently conducted, is not a tremendously extensive
9 thing, and we also recognize that Jurors, even those
10 Jurors who admit to some sort of bias, but swear under
11 oath that they could lay it aside for purposes of
12 deciding this case, are not subject to challenge for
13 cause in most States.

14 So the peremptory challenge serves --

15 QUESTION: Enables you to get a really
16 impartial jury? Not just impartial, but really
17 impartial, right?

18 MR. BINDI: Well, your Honor, I don't believe
19 it's necessary to go that far. But if --

20 QUESTION: (Inaudible) unless that's it?

21 MR. BINDI: Well, even assuming that to be the
22 case, your Honor, the fact that a peremptory challenge
23 serves, or works to produce impartial juries or better
24 juries is in fact not inconsistent with the Respondents'
25 position. In fact, that is part of what the

1 Respondents' position is.

2 We also agree that the cross section
3 requirement serves to enhance impartiality. So what
4 we're faced with here is really a situation where we
5 have two procedural devices which are directed at
6 enhancing the same ultimate goal. The Petitioner's
7 position is that when the two come into conflict, the
8 one which is recognized as Constitutionally grounded
9 must overcome the one that is not.

10 However, I think that that argument begs the
11 question, because we still haven't recognized that the
12 cross section requirement as applied to the petit jury
13 is something that's Constitutionally necessary --

14 QUESTION: May I ask you a question here?

15 Do you think the rule of the Batson case,
16 which in essence says that the prosecutor may not
17 exclude a racial category of jurors by exercising
18 peremptory challenge -- do you think that rule serves
19 the interest in impartiality?

20 MR. BINDI: Well, your Honor, I think that to
21 some extent, it does. But I do not believe that that
22 was the main thrust of the Court's --

23 QUESTION: Well, if it does even to a little
24 extent, why doesn't that -- if you just look at the
25 language of the Sixth Amendment -- mean that it serves

1 the purpose of the Sixth Amendment, to get an impartial
2 jury?

3 MR. BINDI: To have --

4 QUESTION: The rule of Batson furthers the
5 purpose, at least, of the Sixth Amendment, which seeks
6 to have defendants tried by impartial juries. And if
7 this rule that we announced in Batson serves the same
8 purpose, why isn't it therefore partially grounded on
9 the Sixth Amendment?

10 MR. BINDI: Well, the Court's opinion
11 certainly didn't lean that way, your Honor, and in fact,
12 although the Sixth Amendment was the Constitutional
13 framework urged by the defendant in Batson on the Court,
14 the Court nevertheless selected the Equal Protection
15 Clause as providing the more appropriate Constitutional
16 basis for doing the job that the Court felt had to be
17 done.

18 Part of the rationale of Batson for not
19 relying explicitly on a Sixth Amendment basis is that
20 the concept of applying some sort of theory of
21 proportional representation at the petit jury stage is
22 completely impractical. In fact, it would be a
23 impossible to accomplish.

24 QUESTION: Well, it may be that the cross
25 section requirement would be impractical, and all that.

1 But I'm not asking about cross sectional. I'm
2 just asking about the language of the Sixth Amendment,
3 which does require that the jury be impartial. And it
4 seems to me that the rule of the Batson case serves
5 precisely the same interests.

6 It might not apply to serve that interest if
7 it was extended to all these other groups that we've
8 talked about.

9 MR. BINDI: Your Honor, I don't think that
10 there is a solid, theoretical basis for saying that a
11 rule which encourages one group participation in a jury
12 trial fosters impartiality, but other -- a different
13 rule encouraging participation by other, equally
14 distinctive and recognized groups in the community would
15 not.

16 QUESTION: Well, except for the fact that
17 there has been a history of concern about the problem of
18 excluding Blacks entirely from trials -- we have an
19 all-white jury trying a Black defendant. We haven't had
20 the same kind of concern about women complaining about
21 all-male jurors, or -- the problem just isn't replicated
22 in these other areas.

23 MR. BINDI: Well, I think that --

24 QUESTION: And I think we've agreed that the
25 rule of Batson does serve our interest in impartiality.

1 MR. BINDI: Well, I don't disagree with that,
2 your honor. I agree that -- but again it's important to
3 note the language in *Allen v. Hardy*, which indicates
4 that while the rule of *Batson* has an incidental or
5 residual effect on jury impartiality, it was not that --
6 that idea was not the main thrust of the *Batson* opinion,
7 and was not the main goal that the Court was seeking to
8 promote.

9 *Batson*, I think, also recognizes the fact that
10 applying a concept of proportional representation at the
11 petit jury level is a virtual impossibility. *Batson*
12 indicates that it would be impossible to get any trial
13 jury to proportionally reflect all of the various and
14 distinctive groups from within the community, because of
15 the heterogeneous nature of our society.

16 Now, this leads -- if the Petitioner's
17 position were to be adopted, this would lead to two very
18 immediate and very serious problems.

19 The first problem would be defining what
20 groups are cognizable. The Petitioner has indicated
21 this afternoon, and I agree, that this Court's previous
22 cases have held that groups defined by race, gender and
23 ethnic origin are cognizable groups -- but this Court's
24 opinions have suggested, and many lower courts have
25 found, that groups defined also by economic or political

1 or occupational status are cognizable. That groups
2 defined by religion or age or geographic location are
3 all cognizable.

4 The point is that whether or not a group would
5 be cognizable for purposes of a cross section analysis
6 is a question of fact. To determine that question,
7 trial courts would be required to hold evidentiary
8 hearings at which demographic and sociological studies
9 would have to be produced. And this of course would
10 impose a tremendous burden on our already overburdened
11 trial courts.

12 Furthermore, the results of any such hearings
13 would be transient, because the population is transient.
14 A ruling today that some group is or is not cognizable
15 in a certain time and a certain location in a certain
16 community might not be a valid opinion five years from
17 now, so this would be a recurring, a constantly
18 recurring thing that the trial courts would have to
19 engage in.

20 Moreover, since it is impossible to get a
21 literal cross section of the community on any one trial
22 jury, a defendant could almost always object to the
23 composition of a jury on the basis of the absence or
24 underrepresentation of one group or another, following
25 jury selection.

1 QUESTION: What if you limited his right to
2 object to juries which appeared by reason of the
3 particular exclusion, appeared to be partial? In other
4 words, if you exclude all the Blacks, and you end up
5 with a white jury, one could argue that is a danger that
6 looks impartial.

7 But these other examples wouldn't fit that,
8 would they?

9 MR. BINDI: I don't believe that any example
10 would fit that, your Honor. Again --

11 QUESTION: But you would admit a racial
12 example would fit it, wouldn't you, that sometimes one
13 is concerned that in the trial of a Black by an
14 all-white jury, there is a concern that that jury may
15 not look impartial -- may not appear to the public to be
16 impartial?

17 MR. BINDI: Well, except again, your Honor,
18 that the Court has defined impartiality in terms other
19 than that, and has indicated that impartiality is not to
20 be considered a function of group interaction or --
21 maybe that's going too far. It's not to be considered a
22 function of getting a mix of particular kinds of
23 viewpoints on the jury.

24 Even in *Batson v. Kentucky*, the Court
25 acknowledged that trial of a Black defendant by an

1 all-white Jury does not necessary result in a violation
2 of the Equal Protection Clause. Concomitantly, I would
3 say that it certainly doesn't necessarily violate the
4 right to a trial by an impartial jury.

5 QUESTION: There are also cases where
6 all-Black Juries have convicted Black people.

7 MR. BINDI: I have no doubt that that's the
8 case, your honor, although I'm not --

9 QUESTION: I suppose you could explain Batson
10 without reference to an impartiality objection by just
11 saying that a person is entitled to whatever partiality
12 would be created by the inclusion of members of his race
13 on the jury, if the society at large has that proportion?

14 MR. BINDI: That's entirely --

15 QUESTION: That would make it purely an Equal
16 Protection decision, having nothing to do with
17 impartiality. You're entitled even to the benefit of
18 somewhat partial juries, who happen to share your race
19 or whatever other characteristic.

20 MR. BINDI: I'm not sure I understand the
21 question, your honor.

22 QUESTION: Well.

23 MR. BINDI: Both sides agree, your honors,
24 that if the extension of this principle to the petit
25 jury is necessary, that the defendant should be limited

1 as well as the prosecution.

2 Now, if that would not outright destroy the
3 value of the peremptory challenge, it would at least
4 destroy the peremptory of, or strip the peremptory of
5 any beneficial effect that it's intended to have on jury
6 trials. It would hinder both sides in their ability to
7 remove whatever bias is not excluded during the process
8 of voir dire examination and cause challenge. It would
9 undermine the confidence of the parties in the fairness
10 of the jury that they have to try their case, and it
11 would do all this without necessarily having any
12 promotional impact on the impartiality of the jury trial
13 system.

14 Finally, your Honors, I would point out that
15 the impracticality of implementing some form of
16 proportional representation at the petit jury stage is,
17 I believe, excellently illustrated by the fact that
18 there is a tremendous divergence of opinion as to
19 exactly what purpose the cross section principle ought
20 to have at the petit jury stage, and how such a
21 principle ought to be implemented there.

22 Prior to the grant of certiorari in this case,
23 there was a body of case law that had been developing
24 over the past 10 years in the State courts and in two
25 Federal circuits purporting to apply cross section

1 principles to the petit jury selection stage. The
2 Petitioner relies on none of that case law, and our
3 brief demonstrates why that --

4 QUESTION: I suppose carried to its logical
5 conclusion, even if there were no peremptories exercised
6 by either side, if the jury that was drawn from a
7 representative panel just happened to exclude a
8 distinctive group in the community, it should be
9 reconstituted.

10 MR. BINDI: If you accept the proposition that
11 if not cross sectionalism, at least representation by
12 some particular group in the context of a particular
13 case is an absolute essential component of impartiality,
14 then yes, your Honor, that's absolutely correct. You
15 would have to fill a certain number of seats on that
16 jury by quota.

17 your Honors, for all these reasons, and for
18 those contained in our brief, we would respectfully
19 request that the Court affirm the judgement of the Court
20 of Appeals.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bindi.

23 Ms. Unsinn, you have five minutes remaining.

24 REBUTTAL ARGUMENT OF PATRICIA UNSINN

25 MS. UNSINN: Thank you.

1 The Respondents contend that we have made no
2 complaint that the jury before which Petitioner was
3 tried was not an impartial jury. That is precisely what
4 our complaint is. Our complaint is that because the
5 prosecutor took affirmative action to destroy the
6 representative character of that jury, that we did not
7 in fact get the kind of fair and impartial jury that the
8 Sixth Amendment guarantees.

9 The Respondent --

10 QUESTION: One last question. If it just so
11 happens that the jury, the petit jury that's drawn
12 doesn't include a Negro, although there are Negroes on
13 the (inaudible), the defendant just isn't getting the
14 kind of fair trial that the Sixth Amendment requires?

15 MS. UNSINN: No, Justice White, that has never
16 been our position.

17 QUESTION: Well, you just said it was.

18 MS. UNSINN: No, I think there's a distinction

19 -- QUESTION: If you don't get a fair cross
20 section, you don't have the kind of a fair and impartial
21 jury. That's what I thought you said.

22 MS. UNSINN: No, our position is that we're
23 entitled to the possibility of a fair cross section on
24 our jury, and that's the reason that the Sixth Amendment
25 requires that all distinctive groups in the community be

1 Included on the Jury pool.

2 Our position is that there's a fair cross
3 section violation only when there is some interference
4 with --

5 QUESTION: With the law of chance?

6 MS. UNSINN: With the law of chance, which is
7 not directly related to the ability of the individual
8 jurors to be fair and impartial.

9 QUESTION: The Government doesn't have an
10 obligation to provide an impartial jury? All it has an
11 obligation to is not affirmatively to cause a less than
12 impartial jury?

13 MS. UNSINN: That is correct. That is our --

14 QUESTION: Gee, I thought it had an obligation
15 to provide an impartial jury.

16 MS. UNSINN: It provides the possibility of a
17 cross sectional jury whenever it includes all
18 distinctive groups in the community in the pool. It's
19 obviously statistically impossible for every single jury
20 that's selected in a community to accurately mirror that
21 community in every respect.

22 QUESTION: Well, it says here that in all
23 criminal prosecutions, the accused shall enjoy the right
24 to a speedy and public trial by an impartial jury. Not
25 by what might have been, or what there was a possibility

1 of being an impartial jury.

2 Ard as I read that, If a cross section is
3 necessary for impartiality, then it isn't enough that
4 the State merely refrain from causing impartiality, less
5 than impartiality. The State has a positive obligation
6 to ensure a cross section. Doesn't that follow?

7 MS. UNSINN: No --

8 QUESTION: If cross section is necessary for
9 impartial, then the State must produce a cross section.
10 Period.

11 MS. UNSINN: No, I don't agree with that.

12 All we're saying is that the jury as an
13 institution serves the purpose that it was intended to
14 serve, so long as the State provides the possibility of
15 a representational jury, and only if there's some
16 affirmative interference with that possibility is the
17 Sixth Amendment violated.

18 If there's no affirmative interference, then
19 the defendant's been given the kind of fair and
20 impartial jury that he's entitled to. There's been no
21 interference, there's been no violation of the
22 democratic ideal. Every juror has equal opportunity to
23 participate in the jury. There's no -- public confidence
24 in the jury is maintained. Every -- there has been no
25 spectacle witnessed by the public of an intentional

1 intrusion into the representative character of the jury,
2 and there has been no action taken to dilute the quality
3 of community judgement that's represented by the jury.

4 The defendant's been given the benefit of the
5 possibility that his jury will be representative.

6 The Respondents say that if they are not
7 allowed to use their peremptory challenges to produce a
8 fair jury, that they will be denied the use of
9 peremptory challenges, for instance, in those instances
10 where a juror admits to bias but then says "I can be
11 fair and impartial" and thereby withstands a challenge
12 for cause.

13 Our argument concedes that if the prosecutor
14 has that kind of reasoned basis to question the
15 partiality of the jury, then the Sixth Amendment would
16 not interfere with his ability to peremptorily challenge
17 that jury. It's only when he's making group-based
18 assumptions about jurors' partiality that Sixth
19 Amendment violation occurs.

20 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
21 Unsinn.

22 The case is submitted.

23 (Whereupon, at 2:44 o'clock p.m., the case in
24 the above-titled matter was submitted.)

CERTIFICATION

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

#87-FRANK DEAN TEAGUE, Petitioner V. MICHAEL LANE, DIRECTOR, DEPARTMENT OF

CORRECTIONS, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

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