OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JAMES A. FORD. Petitioner

v. GEORGIA

CASE NO: 87-6796

PLACE: Washington, D.C.

DATE: November 6, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES A. FORD, :

4 Petitioner :

5 v. : No. 87-6796

6 GEORGIA :

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8 Washington, D.C.

9 Tuesday, November 6, 1990

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:02 a.m.

13 APPEARANCES:

14 CHARLES J. OGLETREE, JR., ESQ., Cambridge, Massachusetts;

15 on behalf of the Petitioner.

16 PAULA K. SMITH, ESQ., Assistant Attorney General of

17 Georgia, Atlanta, Georgia; on behalf of the

18 Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in No. 87-6796, James A. Ford v.

5 Georgia.

6 Mr. Ogletree.

7 ORAL ARGUMENT OF CHARLES J. OGLETREE, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. OGLETREE: Mr. Chief Justice, and may it

10 please the Court:

11 James A. Ford is here after the Georgia Supreme

12 Court, in light of this Supreme Court's ruling and remand,

13 failed, in our opinion, to apply an adequate and

14 independent state ground to justify the denial of his reef

15 -- relief, under Batson v. Kentucky. In this case Mr.

16 Ford, a black defendant, was tried in Coweta County,

17 Georgia, on a capital murder case.

18 At the time of this trial, Mr. Ford's lawyer

19 filed a motion specifically asking the court pretrial to

20 restrict the prosecutor from using its peremptory

21 challenges in a racially discriminatory manner that would

22 exclude members of the black race from the jury. In fact,

23 in the argument of that motion pretrial, Mr. Ford's lawyer

24 specifically asked the court to require the district

25 attorney if he does use his peremptory challenges to

1 exclude potential black jurors, to justify on the record
2 by his reasons for doing so. And he went on to say the
3 failure to do so would conclude, lead to the conclusion
4 that it was only done because those jurors were in fact
5 black.
6 At the time this motion was made the court and
7 the prosecutor was clear that Mr. Ford was asking for
8 relief, not only in terms of what Swain v. Alabama held,
9 but beyond that. He was asking for relief in his specific
10 case. In fact, he also had complied completely with the
11 uniform appellate procedure in Georgia. That procedure at
12 the time required counsel to pretrial file motions on all
13 issues so that the court could rule on them in a timely
14 and reasonable fashion.
15 Moreover, that procedure did not say anything
16 about specifically how peremptory challenges should be
17 handled, because in 1984, when this case was tried, there
18 were not procedures in Georgia specifically telling
19 counsel about the time and manner in which these arguments
20 could be made.
21 QUESTION: Can there be any quibble, counsel,
22 over whether or not it's clear that a Fourteenth Amendment
23 Swain claim was raised, as opposed to a Sixth Amendment
24 fair cross-section of the community? Is the record clear
25 on that point?

1 MR. OGLETREE: Justice Kennedy, the record is
2 unmistakably clear on that point. Counsel not only argued
3 it in his pretrial motion, he argued it at the time of the
4 motion. The prosecutor and court assumed it as that. In
5 his brief in direct appeal to the Georgia Supreme Court he
6 specifically raises the Fourteenth Amendment and Sixth
7 Amendment claims. He raised the Fourteenth Amendment
8 explicitly in his motion --
9 QUESTION: What, what about at the trial?
10 MR. OGLETREE: It was pretrial, we submit, that
11 on the -- in the pretrial motion it was clear that he was
12 raising a Fourteenth Amendment claim, as well as a Sixth
13 Amendment claim.
14 QUESTION: Because he mentioned the Swain case?
15 MR. OGLETREE: Because he mentioned the Swain
16 case, because what he was asking for in this particular
17 case was to restrict the prosecutor's ability to strike
18 black jurors without giving any reasons, and that he
19 should be required to give reasons. And we submit that on
20 the language and his motion, and the court's
21 interpretation of that, that he made a Fourteenth
22 Amendment claim.
23 QUESTION: Mr. Ogletree, is it your position
24 that all Swain claims are necessarily Batson claims as
25 well? Or do you rely on some particular facts specific to

1 the pretrial motion here?

2 MR. OGLETREE: Well, that has been a central

3 issue in this case, Justice O'Connor.

4 QUESTION: I just wonder what your position was

5 on that.

6 MR. OGLETREE: The position is that Swain claim

7 -- we submit that Swain claims and Batson claims are

8 similar in that Batson, in our interpretation of what this

9 Court did, was to relieve the enormous evidentiary burden

10 that Swain established, and to say if you raise a valid,

11 legitimate --

12 QUESTION: Well, so your answer to me is you say

13 that Swain -- all Swain claims necessarily include a

14 Batson claim?

15 MR. OGLETREE: Yes.

16 QUESTION: In effect. Okay.

17 MR. OGLETREE: We would submit on this record

18 that it's even more than that. Even though -- (inaudible)

19 a Swain claim had been properly preserved, counsel in this

20 case went beyond that, and in the specific case went on to

21 ask the court to require the prosecutor to give reasons

22 for his peremptory challenges. In fact, the prosecutor

23 said his reasons could be based on blue eyes, that there

24 was no reason. And in fact what counsel had at a pretrial

25 hearing was in effect a clear ruling by the judge that

1 there was no basis for him to challenge the way the
2 prosecutor would ultimately use the peremptory challenges.
3 QUESTION: Mr. Ogletree, will you take a look at
4 page 4 of the joint appendix, which has the fourth
5 paragraph, I believe, of the motion that you have been
6 referring to?
7 MR. OGLETREE: Yes.
8 QUESTION: And it -- there it says the exclusion
9 of members of the black race in the jury when a black
10 accused is being tried will receive ex -- or -- et cetera.
11 And then he cites McCray against New York, which is a
12 cert. denied, I think, in our Court --
13 MR. OGLETREE: That's correct.
14 QUESTION: -- and Taylor v. Louisiana. Now,
15 neither of those are in their -- by their terms Fourteenth
16 Amendment cases.
17 MR. OGLETREE: That is correct, Chief -- Mr.
18 Chief Justice. And in fact, if I understand your
19 question, as the case was actually presented for argument
20 in the pretrial motion, counsel renewed his motion, and I
21 think more explicitly, in his language to the court at the
22 pretrial motion said the prosecutor should be required to
23 give reasons for these action strikes. And we submit was
24 arguing not simply on the basis of Taylor and McCray at
25 that time --

1 QUESTION: Where -- where did, where did the --
2 where did the petitioner's lawyer in terms use the words
3 Fourteenth Amendment or Equal Protection Clause?
4 MR. OGLETREE: The counsel did not use those
5 terms explicitly. What he argued for in the particular
6 case was, and these particular facts, the prosecutor
7 having decided to strike all black, potential black
8 jurors, that he should be required to justify on the
9 record those strikes in his case, in this particular case.
10 QUESTION: And what, what law did he rely on?
11 What provision of the Constitution?
12 MR. OGLETREE: All he relied on in the pretrial
13 argument was what was existent then, both Swain --
14 QUESTION: Did he say Swain?
15 MR. OGLETREE: He did not, but in fact the
16 prosecutor did. The prosecutor said what counsel is
17 asking for is something under Swain. He hasn't met
18 Swain's burden. In the pretrial motion the prosecutor
19 expressly says Swain is what he is relying on.
20 QUESTION: He took it as a Swain -- the
21 prosecutor took it as a Swain claim.
22 MR. OGLETREE: Not only the prosecutor, but the
23 court did as well. The court went on to state his view of
24 how Georgia law had developed, and that prosecutors had
25 given various reasons. And they didn't have to state a

1 reason. In fact the court had in effect issue a
2 declaratory statement that in fact the prosecutor has to
3 give no reason in this case.
4 It is also significant that what the trial court
5 did in denying counsel's motion was not to say that he has
6 taken under advisement, or not to say that as a
7 preliminary ruling, but made a firm and flat ruling saying
8 there is nothing that Mr. Ford could do after I deny this
9 pretrial motion to further establish a Swain or Batson
10 claim. In fact, it is significant that in 1984, when this
11 was raised, counsel in effect was really arguing the
12 precursor to Batson by asking for application of Batson in
13 his case, and asking the prosecutor to give specific
14 reasons.
15 QUESTION: Well, certainly the lower courts all
16 took the issue up, didn't they?
17 MR. OGLETREE: That is correct, Your Honor. In
18 the first supreme court opinion in Georgia, the lower
19 court said that he had not established a Swain claim. It
20 said that the fact that he was able to show that 9 out of
21 10 black jurors had been struck was not enough to meet
22 Swain. The court cited Moore v. State there. The case
23 that underlies Moore v. State is Blackwell v. State, a
24 Fourteenth Amendment case by the State of Georgia,
25 specifically on the Swain claim and upholding the

1 Fourteenth Amendment grounds.

2 QUESTION: I hope you can get to the merits.

3 MR. OGLETREE: Pardon me?

4 QUESTION: I hope you can get to the merits.

5 MR. OGLETREE: In the --

6 QUESTION: Mr. Ogletree, before you do get to

7 the merits, what -- what -- what reliance upon Swain by

8 the prosecution are you referring to? Where is that in

9 the --

10 MR. OGLETREE: In the joint --

11 QUESTION: Are you referring to page 11 of the

12 joint appendix? I -- it is really --

13 MR. OGLETREE: That is correct, Justice Scalia.

14 QUESTION: -- sort of tangential. The

15 prosecutor relies on Swain to point out to the court that

16 the peremptory challenge system goes back to the common

17 law and that it would be an unreasonable burden. I don't

18 -- I don't take that one sentence as being an

19 acknowledgement by his, on his part that the motion was

20 based on Swain.

21 MR. OGLETREE: Well, Your Honor, I think it's

22 clear that both the nature of the motion, the way the

23 court understood it, the way the Georgia Supreme Court

24 understood it, the way the prosecutor responded here --

25 QUESTION: What about the trial court? Why do

1 you say the trial court understood it as a -- as a
2 Fourteenth Amendment motion?
3 MR. OGLETREE: The -- what the trial court did
4 in effect was to say that in light of what you have argued
5 I am taking into consideration among other things that
6 prosecutor should not be required to show that there
7 should be restrictions on the racial use of peremptory
8 challenges. The trial court makes that explicit in its
9 rulings.
10 QUESTION: On page 17 of the joint appendix, the
11 defense counsel -- seems to me to refer to the Sixth
12 Amendment. The defendant's right to an impartial jury
13 trial is guaranteed by the Sixth Amendment. And there is
14 no mention of the Fourteenth there. That's on page 17.
15 MR. OGLETREE: That's correct, Your Honor. But
16 if the Court will look at page 11, when the prosecutor in
17 effect cites Swain, the prosecutor goes on and says, in
18 explaining Swain, and explained this case. If this is the
19 particular reason he wants to do that today, the defense
20 counsel, I would oppose the motion. I must object to the
21 statement that was made, too. The prosecutor sees it as a
22 Swain claim, and in fact is telling the court I understand
23 it as a Swain claim, and under Swain I have the right to
24 do whatever I want to do to use my peremptory challenges.
25 So I don't think it's a question that the prosecutor

1 understood it, the defense counsel understood it, and the
2 trial court understood it at the time that it was raised.
3 QUESTION: Mr. Ogletree, at any time in these
4 proceedings, has either any Georgia judge or a Georgia
5 prosecutor taken the position that you waived the claim
6 because you only argued the Sixth Amendment?
7 MR. OGLETREE: No, Your Honor.
8 QUESTION: No, but this is just brand new up
9 here.
10 MR. OGLETREE: That is exactly right, Your
11 Honor. At the time that this case was litigated before
12 the Georgia Supreme Court, at the time in the new trial
13 motion, that issue was never raised. In fact, the
14 government concedes in its brief on the direct appeal to
15 the Georgia Supreme Court that Swain was the issue, the
16 Fourteenth issue -- Fourteenth Amendment issue had been
17 raised and was fairly presented. It is only after this
18 Court's remand, and without hearing from the parties, that
19 the Georgia Supreme Court for the first time says that
20 counsel has failed to make a record of this to survive a
21 Batson claim.
22 QUESTION: But even, even then they didn't rely
23 on the fact that it was a confusion between the Sixth and
24 Fourteenth Amendment.
25 MR. OGLETREE: That's exactly right. That's

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1 exactly right.

2 QUESTION: It was a procedural failure to make a

3 motion at the time they decided that it should have been

4 made.

5 MR. OGLETREE: That -- that's precisely right.

6 I think it's significant to note as well not only do we

7 submit that counsel made an adequate claim, but if you

8 look at what the Georgia Supreme Court did on remand, I

9 think it's particularly telling. While the Georgia

10 Supreme Court claims that there was an adequate

11 independent State ground and the Government argues that

12 today, it really is an unavailing argument. What the

13 Georgia Supreme Court says, particularly in Sparks v.

14 United States -- Sparks v. State, is three significant

15 points that I hope this Court would focus upon.

16 In Spark -- first of all, the Georgia Supreme

17 Court is clear in saying at the time Sparks was decided in

18 1987, that there had been no, and I repeat no, judicial

19 guidelines regarding the time and manner in which a claim

20 is to be presented and preserved under Batson. Sparks is

21 significant for another reason. In Sparks the court makes

22 clear and says it is perspective. The court in Sparks

23 says hereafter any claim under Batson should be raised

24 prior to the time the jurors selected to try the case are

25 sworn. That is 1987.

1 And finally, and most significantly, the Georgia
2 Supreme Court went on to say that Sparks, having failed to
3 comply -- Sparks is in a worse position, we submit, than
4 Ford. In Sparks there was no pretrial motion. The first
5 objection by Sparks did not come until after jury
6 selection, after the jury was sworn, and after evidence
7 was taken. And yet the Georgia Supreme Court decides that
8 Sparks would receive the benefit of this new rule. And
9 Mr. Ford, whose case was tried 30 months before Sparks was
10 decided, whose appeals were perfected 19 months before
11 Sparks was decided, the Supreme Court of Georgia says, has
12 no availing argument.
13 The lack of an adequate and independent state
14 ground, we submit, is another and clear basis for this
15 Court to disagree with the Georgia Supreme Court's ruling.
16 This Court has consistently said that these State
17 procedures must be firmly established and regularly
18 followed. In Sparks it is clear it's the first time that
19 any procedures were established, and it's clear it's the
20 first time that any procedures were followed, and they
21 were not in existence at the time Mr. Ford's case was
22 litigated.
23 Moreover, in Staub and the Court's most recent
24 pronouncement in Osborne and other cases, this course --
25 this Court has made clear that defense counsel should not

1 be forced to engage in an arid ritual, a meaningless
2 forum, and try to preserve these claims when in fact in
3 this case Mr. Ford, given the law that existed, given the
4 uniform appellate procedure in Georgia, and given his
5 understanding of what he had to do, made a claim. He also
6 had a firm ruling from the trial court in terms of what he
7 could do.
8 He also had a in-trial colloquy where in that
9 colloquy the court goes on to say, in fact, that 9 out of
10 10 black jurors had been struck. They weren't all struck,
11 but regardless of that, the trial court said it doesn't
12 matter now. I have ruled, I have denied Mr. Ford's
13 relief. There is nothing he could have done to preserve
14 his claim. In fact, as the dissenting opinion says in
15 Ford v. State the second time around, the dissent, I
16 think, is significant in noting that Mr. Ford, and the
17 Government seems to argue, could not have won this case.
18 He could not have preserved Batson even if he had objected
19 during that colloquy. The Government seems to argue that
20 he was given many opportunities.
21 In a case called Riley v. State, the Georgia
22 Supreme Court made it clear that once trial has commenced
23 and the jury has been sworn, that it would be
24 inappropriate for counsel to then rely on a Batson claim
25 to avail him of an opportunity to challenge the

1 prosecutor's use of peremptory challenges in a racially
2 discriminatory way. We submit that on the basis of all of
3 these facts, that the Government has not been able to
4 sustain its burden.
5 Moreover, no one has been treated like Ford in
6 Georgia. The Government refers to various cases decided
7 by the Georgia Supreme Court after Batson and before Mr.
8 Ford's case was decided. In all of those cases they are
9 distinguishable, as we submit, and more importantly, all
10 of those cases follow Mr. Ford's actual conviction. The
11 closest case that the Government cites is Child v. State,
12 decided by the Georgia Supreme Court, but Mr. Childs
13 raised the issue for the first time on appeal. He didn't
14 raise it in a pretrial motion. He didn't raise it after
15 the jury had been selected. And moreover, the reference
16 to Sparks, we submit, is unavailing.
17 Additionally, we would submit that this Court in
18 Griffith made clear and, for whatever reasons, decided
19 that when these cases are remanded, if it's on direct
20 review, that those parties who establish Batson's claims
21 should have the opportunity for redress in the lower
22 courts. And we submit that Griffith certainly supports
23 that proposition, and that this Court should consider
24 exactly what the Georgia Supreme Court did in denying
25 relief for Mr. Ford in this case before the Georgia

1 Supreme Court.

2 Finally, what we ask the Court to do as you

3 think about this case, Mr. Ford's case is unique for a

4 number of respects. The first is that Mr. Ford, unlike

5 any other case that we have been able to find, filed a

6 motion pretrial. It's clear that the Georgia Supreme

7 Court and the Georgia trial courts at that time could have

8 outlined procedures saying there are various reasons by

9 counsel should file these motions pretrial, as opposed to

10 during trial. One obvious reason would be if you file it

11 pretrial and you give notice to the prosecutor, you won't

12 be sandbagging him. And it's clear in this case there is

13 absolutely no argument to justify that the prosecutor, the

14 court, or anyone was sandbagged. If there is any

15 sandbagging, the sandbagging occurs when the Government

16 and the court -- the Georgia Supreme Court for the first

17 time announces a rule and applies it to Mr. Ford, when in

18 fact he had no opportunity to remedy it.

19 The second point, as equally significant, is

20 that the Georgia Supreme Court, if they had thought about

21 procedures, could very well have said don't raise these

22 issues pretrial, but raise them after the jury has been

23 selected, because we don't want to inject race into the

24 case until it's significant. That might have been a

25 procedure, whatever the Georgia Supreme Court might have

1 done, or whatever rules might have been existence. That
2 is fine. There were no clear rules in existence. To the
3 extent that they were, counsel complied with them. The
4 Georgia Supreme Court in ruling ignored its own precedent
5 and created a whole new ruling for counsel.
6 And we would submit that in light of these new
7 guidelines being applied to Mr. Ford in these
8 circumstances, that the Court should rule in Mr. Ford's
9 favor and remand this case to the Georgia Supreme Court,
10 instructing that court to ask the trial court to have a
11 hearing consistent with the requirements of Batson v.
12 Kentucky.
13 QUESTION: Mr. --
14 QUESTION: Well, counsel, if there is a State
15 procedural ground that's not an adequate bar, doesn't that
16 mean that we simply hear the claim here, rather than
17 remand it? Do you have any authority for us to say that
18 we -- tell the Georgia court that its State procedural
19 rule is inadequate and therefore that it must consider the
20 claim?
21 MR. OGLETREE: No, I -- I would just simply ask
22 the court to, in light of this record, to remand the case.
23 And then the Georgia Supreme Court could actually apply
24 Batson the way this Court intended it to be applied. But
25 not to --

1 QUESTION: But do you -- do you have any
2 authority for us to require the Georgia court to hear a
3 Federal substantive claim if it has a procedural bar rule
4 of its own? I had thought our cases taught that that
5 simply doesn't prevent us from reaching the issue.
6 MR. OGLETREE: That is right. Right.
7 QUESTION: Rather than requiring Georgia to --
8 MR. OGLETREE: For the purpose of requiring
9 Georgia to reach it. Yes, sir.
10 QUESTION: So this would be -- so this would be
11 an extension of our precedents?
12 MR. OGLETREE: I am not sure it would be an
13 extension under these circumstances, Justice Kennedy. I
14 would submit that on this record what you would actually
15 do, as we've argued before, is to simply, in light of the
16 failure of the Georgia Supreme Court to really follow your
17 remand, to create for the first time a claim that has an
18 adequate and independent State ground, to say that there
19 is no -- all you have to decide in this case is that there
20 really was no adequate and independent State ground in
21 existence.
22 QUESTION: And there, that there must be a
23 Batson hearing.
24 MR. OGLETREE: Pardon me?
25 QUESTION: And that there must be a Batson

1 hearing.

2 MR. OGLETREE: That's exactly right.

3 QUESTION: Which we certainly wouldn't

4 undertake.

5 MR. OGLETREE: Right.

6 QUESTION: Well, do we have enough in this

7 record to say that there was a Batson violation in not

8 asking the prosecutor to state the grounds?

9 MR. OGLETREE: I, I think -- I don't think you

10 have to reach that. I think you have enough in this

11 record. I think what you do have is the fact that counsel

12 had made an objection to the prosecutor's specific use,

13 that in fact the prosecutor on the record, without

14 dispute, used 9 out of 10 peremptory challenges to strike

15 black jurors.

16 QUESTION: Well, why isn't that sufficient for

17 us to do that right here? Just like in an erroneous

18 submission of evidence. We just say the evidence was

19 admissible or inadmissible. We just say the prosecutor

20 had to state his reasons.

21 MR. OGLETREE: I guess the question would be

22 whether or not the Court is asking, in light of what

23 Batson now requires, whether you can go and decide the

24 entire issue.

25 QUESTION: The prosecutor should have a chance

1 to --

2 MR. OGLETREE: To respond and rebut.

3 QUESTION: -- to explain what his strikes were

4 all about.

5 MR. OGLETREE: In fact, in this case the reason

6 that I think the record is so clear, that the record is

7 adequately preserved, the prosecutor at the time of the

8 colloquy during trial was prepared to give reasons, and

9 present to the court -- may I give reasons, do I need to

10 give reasons for my strikes. So it goes beyond that to

11 say that there was no sandbagging, there was no effort to

12 deny the prosecutor of making that claim. And in fact we

13 submit that, on this entire record, that this case could

14 be remanded and the appropriate Batson --

15 QUESTION: Mr. Ogletree, are you implicitly

16 arguing, this is kind of a follow-up on Justice Kennedy's

17 question, that when the record merely shows that 9 out of

18 10 eligible blacks were struck from the jury, that is

19 sufficient to raise a Batson issue which requires the

20 explanation?

21 MR. OGLETREE: I think it certainly is

22 sufficient to at least raise the issue, and certainly in

23 circumstances like this, Justice Stevens, where it is

24 clear that counsel, based on the court's earlier ruling,

25 was not allowed to object to it and make whatever

1 arguments and make the prosecutor explain. I think it's
2 significant that exactly what Mr. Ford's counsel
3 anticipated happen, happened.
4 QUESTION: But what I'm suggesting is, supposing
5 you made the same motion and all the rest, but the record
6 also showed that there were 10 blacks on the panel, and
7 they all got on the petit jury. We wouldn't send it back
8 then, I don't think.
9 MR. OGLETREE: That's true. That's true,
10 Justice Kennedy.
11 QUESTION: So I think inevitably we have to be
12 considering whether the fact that the record shows that 9
13 out of 10 eligible jurors were stricken and they are all
14 of the same race, that that at least raises enough for
15 further inquiry.
16 MR. OGLETREE: Right. And I -- it seems to me
17 that the Georgia Supreme Court on both instances does not
18 deny that that was enough for an inquiry, but said in fact
19 it was the way in which the claim was made, and it wasn't
20 preserved again after the pretrial motion.
21 QUESTION: Well, should we say here that there
22 was enough for an inquiry, and then remand it for such
23 further proceedings as may be consistent with that
24 finding?
25 MR. OGLETREE: That certainly is what I would

1 like to see happen, if this Court would entertain that,
2 particularly in light of this record. I can see the Court
3 not having to go that far, to remand it, but I certainly
4 would not oppose such a --
5 QUESTION: Mr. Ogletree, here's a problem, and I
6 think this is sort of related to Justice Kennedy's
7 question as to whether we should do it here or send it
8 back. Suppose Georgia wants to adopt a new procedural
9 rule, which you say they have done here, and our case law
10 says they can't pluck a new procedural rule out of the
11 air, impose it on your client, and thereby prevent Federal
12 review. But I don't know that our cases say that they
13 can't pluck a new procedural rule out of the air. That's
14 the way the courts make law. They pick some first case
15 and say well, we have never had this rule before, but you
16 know, this is our procedural rule, and you haven't
17 followed it.
18 MR. OGLETREE: I think --
19 QUESTION: Now, I can understand our saying
20 that's fine for Georgia, but you can't preclude Federal
21 review on the basis of that new rule. But do you want us
22 to say to Georgia you cannot impose that new rule?
23 MR. OGLETREE: I think this Court -- I think the
24 Georgia Supreme Court and the rules it outlined in Sparks
25 are totally appropriate, and it clearly was a clear rule,

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1 a new rule. The question was applying it to Mr. Ford.
2 It's not the rule. I have no quarrel with the rule. The
3 rule gives adequate notice, the procedures are crystal
4 clear, and any litigant after Sparks is clearly on notice.
5 But Mr. Ford is in a very different posture.
6 QUESTION: But Sparks was prospective, so you
7 are saying all the rules that Georgia makes have to be
8 prospective.
9 MR. OGLETREE: I think that -- no, no. I'm
10 saying the Georgia Supreme Court explicitly said that
11 Sparks would be prospective. I'm not saying that they
12 should all be prospective, but I'm saying the Georgia
13 Supreme Court, under its own State law, decided that this
14 rule should be applied prospectively. And for a good
15 reason. I think they had no other procedures in the past.
16 I think they were saying in light of what we have, in
17 light of what we've done, we have to treat this
18 differently, we have to treat it prospectively. And I
19 think that's the fair thing to do.
20 Georgia was attempting to do, I think, in Sparks
21 and Riley, what every other court has been trying to do
22 since Swain, that is interpret those cases, interpret
23 Batson, in a way that is fair to all litigants. And what
24 we have in this particular case is Georgia for the first
25 time trying to do that in a reasonable way, but when it

1 comes to Mr. Ford, ignoring his really, I think,
2 impressive efforts to make the point clearly on the record
3 below.
4 QUESTION: Mr. Ogletree, do you say that Sparks,
5 in his case he, the rule was not applied to him?
6 MR. OGLETREE: It was not applied to him,
7 Justice Stevens.
8 QUESTION: I see.
9 MR. OGLETREE: It's the most incredible set of
10 circumstances that not only was it not applied to him, the
11 court says it's prospective, it says that we had no
12 guidelines before, but Sparks gets the benefit of it. And
13 how in the world can Mr. Ford be denied that benefit in
14 light of the fact that he had done more than Sparks, and
15 had done more than many other cases cited by the
16 Government.
17 And we don't contend, and it's not central to
18 our argument, that Mr. Ford had to make additional
19 arguments, as we state in our brief. I concede now that
20 that is not central to this case, and it is not really
21 well preserved in this record, and the Georgia Supreme
22 Court decided against us on that issue.
23 But I think the point is that counsel objected
24 at the earliest opportunity. Counsel's objection was
25 clear. The Georgia Supreme Court treated us clear. The

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1 prosecutor and judge viewed it as clear. And now the
2 Georgia Supreme Court, for the first time, is saying
3 sorry, Mr. Ford, you lose. We think that is an
4 inappropriate result and we urge this Court to so find it.
5 I would like to reserve the rest of my time for
6 rebuttal if there are not additional questions.
7 QUESTION: Thank you, Mr. Ogletree.
8 Ms. Smith, we'll hear now from you.
9 ORAL ARGUMENT OF PAULA K. SMITH
10 ON BEHALF OF THE PETITIONER
11 MS. SMITH: Mr. Chief Justice, and may it please
12 the Court:
13 The case here today involves the validity of the
14 finding of the Supreme Court of Georgia that any Batson
15 claim was not preserved for review on the merits due to
16 the lack of an objection at trial when the conduct giving
17 rise to the claim had occurred. Petitioner contends that
18 the application of the procedural bar in this case does
19 not constitute an independent and adequate State ground,
20 because he contends the rule was allegedly novel and
21 allegedly announced after the fact. And he also contends
22 that this finding of lack of preservation is inconsistent
23 with Griffith.
24 The State submits that the facts of this case
25 will show that the bar as applied in this case is not

1 novel, but is at most a specific application of a general
2 procedural default rule which has been in place in Georgia
3 --
4 QUESTION: Ms. Smith, the Supreme Court of
5 Georgia did decide that the petitioner here had adequately
6 made a Swain claim.
7 MS. SMITH: That apparently is the treatment it
8 was given on the first direct appeal, Your Honor.
9 QUESTION: And they say in their opinion on
10 remand, too, I think, that he raised a Swain claim.
11 MS. SMITH: That is correct, Your Honor.
12 QUESTION: Now, is it your position that after
13 Batson people who simply had raised a Swain claim in the
14 lower courts are not entitled to, even though their
15 appeals had not become final, are not entitled to have
16 their case reconsidered under Batson?
17 MS. SMITH: That is our position, Your Honor,
18 because of the lack of objection in this case to the
19 manner in which the prosecutor used his strikes on the
20 petit jury. We submit that there was a factual
21 distinction between Batson and Swain. That factual
22 distinction is apparent in looking at the language of
23 Swain itself and discussing when the presumption of the
24 impartiality of the prosecutor strikes is overcome. Swain
25 discussed how it cannot be overcome by the use of strikes

1 in the case at hand.

2 QUESTION: Do you -- do you think your -- the

3 view you're expressing now is consistent with the Court's

4 opinion in Griffith, where it remanded cases to the

5 Supreme Court of Kentucky and to the Tenth Circuit?

6 MS. SMITH: We submit that it is, Your Honor.

7 Griffith himself objected. Batson had objected. Justice

8 Powell's opinion in Batson discusses objections. Brown

9 had objected. The third, the fifth, --

10 QUESTION: You think they had made actual

11 Batson-type objection rather than Swain-type objections?

12 MS. SMITH: From a reading of the opinions, Your

13 Honor, it is clear that after the jury had been selected

14 in their respective cases, some sort of objection or

15 motion evidencing dissatisfaction with the strikes used in

16 that case was made.

17 QUESTION: Well, but you can say the same here,

18 can't you? Certainly, if the petitioner raised a Swain

19 claim, it was dissatisfaction with the strikes used.

20 MS. SMITH: But it was before the strikes had

21 been utilized, Your Honor. We submit that the lack of

22 objection following those use of strikes is what is fatal

23 to petitioner's claim in this case.

24 QUESTION: Well, if the same objection that he

25 made before trial, literally, was made -- had been made

1 just before the jury was sworn, would you say that he had
2 made a Batson objection?
3 MS. SMITH: That is what the Georgia Supreme
4 Court held in this case, Your Honor, because he was -- we
5 feel that it was incumbent upon him to object when the
6 conduct occurred --
7 QUESTION: Yes, but suppose, suppose the -- just
8 before the jury was sworn in this case -- and I guess the
9 jury was all white except one?
10 MS. SMITH: That is what the record shows, Your
11 Honor.
12 QUESTION: And there had been 10 strikes at
13 blacks?
14 MS. SMITH: Nine by the prosecution, Your Honor.
15 QUESTION: Nine, yes. All right. And if he, if
16 he said exactly what he had said before trial, that please
17 make the prosecutor give his reasons for striking --
18 MS. SMITH: That is correct, Your Honor.
19 QUESTION: Now that would have been a Batson
20 objection, wouldn't it?
21 MS. SMITH: That would have been a Batson
22 objection. We're not --
23 QUESTION: And it would have -- and the fact of
24 striking nine blacks would have, would have been a
25 satisfactory basis for making the profit -- for making the

1 prosecutor say --

2 MS. SMITH: I can't go to the merits at this

3 point. I would not concede that would be a prima facie

4 case. But our point is he never objected when what he

5 sought to prevent occurred.

6 QUESTION: No, I understand, you say -- you say

7 that his pretrial objection was not sufficient.

8 MS. SMITH: It was not sufficient. It can

9 either be viewed as premature or incomplete.

10 QUESTION: Well, do I understand that you take

11 the position that because it was made pretrial, it was a

12 Swain claim, not a Batson claim? But if the same thing

13 had been presented after the strikes had occurred, it

14 would have been a Batson claim?

15 MS. SMITH: Well, Your Honor, I think that --

16 QUESTION: Do I understand that was your

17 response to Justice White?

18 MS. SMITH: In -- hypothetically speaking --

19 QUESTION: I thought it was.

20 MS. SMITH: -- yes, it is. But based upon the

21 motion filed in this case, petitioner sought to raise two

22 claims. Petitioner cites to the alleged systematic

23 exclusion of the prosecutor in the pretrial motion, but he

24 also sought to change the law. And in paragraphs 3 and 4

25 of his pretrial motion he cites McCray. He cites Taylor.

1 And we submit that this evidences an intent to focus the
2 inquiry upon the prosecutor's use of strikes upon the
3 petit jury in this case. He is anticipating a change in
4 the law. And we submit that when that conduct occurred,
5 that is when he should have objected to say, see, I told
6 you this was going to happen, and it did. I'm not happy.
7 QUESTION: Do you think the trial judge was
8 misled?
9 MS. SMITH: I don't think there's a question as
10 to that, Your Honor. I don't think there is anything in
11 the record as to whether he was --
12 QUESTION: Say that again?
13 MS. SMITH: I don't think that there is any
14 evidence that he was misled up until the motion for new
15 trial hearing, when it was asserted by new counsel that
16 the motion had been renewed and --
17 QUESTION: Well, isn't that the whole point of
18 procedural bars and things?
19 MS. SMITH: I think that there are various
20 purposes of procedural bars, Your Honor, and that is to
21 prevent --
22 QUESTION: Well, on this procedural bar.
23 MS. SMITH: I -- I --
24 QUESTION: The trial judge certainly was not
25 misled, was he?

1 MS. SMITH: I don't think that the judge was
2 misled, but we submit that that does not excuse the -- the
3 petitioner's conduct.
4 QUESTION: Well, this is a capital case, is it
5 not?
6 MS. SMITH: Yes, it is, Your Honor.
7 QUESTION: Ms. Smith, now the first time this
8 case went to the Georgia Supreme Court, it didn't find a
9 procedural bar, is that right?
10 MS. SMITH: It did not, Your Honor. It treated
11 only the Swain aspect of the claim. Although the Georgia
12 Supreme Court did not specifically cite Swain in its
13 opinion, it treated it as a systematic exclusion.
14 Although --
15 QUESTION: In 1988 the Georgia Supreme Court in
16 Cherry against Abbott appeared to say that Swain and
17 Batson claims raised the same issue.
18 MS. SMITH: They found that the failure to
19 object in Cherry was -- did not satisfy cause. This was
20 in a habeas corpus context. They -- the court found that
21 the failure to object could not be excused by novelty of
22 Swain, and in fact the author of the Cherry opinion was
23 the author of the dissent in this particular case.
24 QUESTION: Ms. Smith, wouldn't the same problem
25 of prematurity exist for a Swain claim as would exist for

1 a Batson claim? Can you -- can you object to a, you know,
2 a pattern of striking by race when that has not yet
3 occurred in your very case? It doesn't -- isn't it the
4 same problem for Swain as it is for Batson?
5 MS. SMITH: I don't think so, Your Honor.
6 QUESTION: Why?
7 MS. SMITH: Apparently the Georgia Supreme Court
8 had not focused upon that distinction because, as Swain
9 itself notes, that what occurs in the case at hand is not
10 sufficient --
11 QUESTION: Excuse me, excuse me. Could you
12 crank that up a bit? I am having trouble hearing you.
13 MS. SMITH: What occurs in the case at hand in
14 Swain is not sufficient to overcome the presumption. So
15 the matter -- the manner in which the prosecutor uses his
16 strikes in Swain would merely add, I would submit, to a
17 defendant's proof, but that a pretrial motion --
18 QUESTION: You would have a Swain claim even if
19 the prosection strikes no blacks, in your case?
20 MS. SMITH: It depends on whether or not he can
21 establish systematic exclusion.
22 QUESTION: No, it doesn't depend on that at all.
23 You clearly wouldn't, would you?
24 MS. SMITH: I don't think --
25 QUESTION: Which means that your Swain claim is

1 just as premature if you make it before the actual
2 empaneling of the jury as would be your Batson claim.
3 MS. SMITH: No, Your Honor. There, there are a
4 plethora of cases from States and circuits indicating that
5 a single case is not sufficient to establish Swain, and I
6 would submit that if you are able to establish a pattern
7 --
8 QUESTION: Not sufficient, but necessary, at
9 least.
10 MS. SMITH: I would think that that would be one
11 more element of the defendant's proof, but is not
12 dispositive either way.
13 QUESTION: Gee, I think it's extraordinary that
14 you, you have a claim -- a case in which the prosecutor
15 strikes no blacks from the jury at all, and you
16 nonetheless have a Swain claim. And therefore you can
17 make it before the empaneling of the jury occurs. It
18 seems to me that when your court said the Swain claim was
19 not premature, I don't know why it isn't bound to say the
20 Batson claim isn't as well.
21 MS. SMITH: I think had he attempted to
22 establish systematic exclusion at that point, Your Honor,
23 he might have prevailed on a Swain claim. Georgia had not
24 made that distinction in prior Swain cases.
25 We submit that the facts in this record is

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1 positive with the issues before the Court. I think the
2 parties agree that a pretrial motion was filed, that it
3 was raised in the amended motion for new trial by new
4 post-trial counsel who was not trial counsel, and it was
5 raised in the first appeal. But we strenuously disagree
6 as to whether any such unrecorded objection was made after
7 the jury was struck in this case, and that any renewed
8 motion gave rise to the colloquy on the second day of
9 trial when the trial court placed the composition of the
10 jury and the manner in which the strikes had been used on
11 the record.
12 Regarding the colloquy of -- in chambers, the
13 record itself does not show that this was placed on the
14 record at the petitioner's insistence. This is simply the
15 characterization which has been given this colloquy by
16 post-trial counsel drawn again at the motion for new trial
17 hearing. The trial transcript shows that when this
18 colloquy occurred it was on the second day of trial. The
19 State had presented eight witnesses who had given
20 testimony, and it was prior to resuming after lunch that
21 the trial court placed two matters on the record. One was
22 ascertaining the views of the parties on whether the
23 jurors could go vote in a local election, and then the
24 composition as to the jury and the use of strikes was
25 placed on the record by the trial court.

1 We further submit that at this -- it was at this
2 colloquy where petitioner merely agreed with the numbers
3 as stated by the trial court, but did not renew his motion
4 specifically on this record. When the prosecutor
5 volunteered to give his reasons, counsel for petitioner
6 stood mute. We submit --
7 QUESTION: May I ask this question? One of the
8 things we are always concerned about in procedural bar is
9 to be sure the judge -- I think perhaps this is what
10 Justice Blackmun had in mind, to give the judge a fair
11 opportunity to avoid the possible error. And on pages 11
12 and 12 of the joint appendix, the judge explained rather
13 carefully why he denied the motion, that he was familiar
14 with other trials where blacks had not been stricken, and
15 the like. He apparently felt there was inability to prove
16 a pattern of this kind of strike.
17 It would seem to me that had the motion been
18 made when you say it should have been made, those same
19 reasons would have compelled him to come to the same
20 conclusion. Are you suggesting that he might have ruled
21 differently if the motion had been made a second time?
22 MS. SMITH: I will state, Your Honor, that we
23 simply cannot know, because it was not made. And this
24 Court has recognized in other procedural default cases
25 that perceived futility does not excuse a failure to

1 object. And we submit that due to the nature of a Batson
2 claim itself, it was incumbent upon counsel to complete
3 his claim by saying at the earliest possible moment when
4 this conduct in fact occurred, we are not happy with the
5 jury. A fair reading of the Georgia Supreme Court opinion
6 shows that it was not petitioner's failure to articulate a
7 specific motion, use talismanic words, it was his total
8 lack of objection.
9 In looking at Sparks itself, the -- Sparks made
10 a motion for mistrial after the jury had been sworn, but
11 before the state had begun presenting any testimony in the
12 case. And the court said it was made relatively promptly
13 in Sparks, given the fact that Batson had not been
14 announced at the time of his trial, but it was before
15 jeopardy had attached and before the State had developed
16 any evidence.
17 QUESTION: Well, Ms. Smith, what about the
18 prosecutor recognizing Swain? The prosecutor recognized
19 Swain, didn't he?
20 MS. SMITH: Yes, he did, Your Honor.
21 QUESTION: Well, what's your answer to that?
22 MS. SMITH: We submit that Swain, as a question
23 of fact, is not the same as Batson. That --
24 QUESTION: And what is the difference?
25 MS. SMITH: Swain allows a defendant to try to

1 establish a systematic pattern of exclusion by the
2 prosecutor in case after case, no matter the defendant.
3 Batson narrows that relevant universe to the defendant's
4 trial itself. We submit that that is why it was incumbent
5 upon this petitioner to object at this trial.
6 QUESTION: If we should disagree with you, you
7 lose.
8 MS. SMITH: Apparently so, Your Honor.
9 QUESTION: Thank you.
10 QUESTION: What do you say specifically would
11 have given the defendant here notice that -- that if he
12 wanted to object to blacks being stricken, he had to
13 object not at -- not pretrial, but when, before the jury
14 was sworn?
15 MS. SMITH: We submit --
16 QUESTION: I mean at the time -- at the time he
17 was tried, what was -- where do you find the rule?
18 MS. SMITH: We cited in our brief both the
19 unified appeal procedure, which was followed in this case
20 and which the court itself cites in the first appeal of
21 this case regarding failure to preserve issues for lack of
22 objection. We also cited a 1982 amendment to Georgia's
23 habeas corpus statute, which is in Georgia in effect our
24 state contemporaneous objection rule in its strictest
25 form.

1 QUESTION: Well, the trial court certainly
2 didn't say that his pretrial motion was premature. It
3 ruled on it.
4 MS. SMITH: Under Swain, and that is not
5 inconsistent with Georgia law on this point, Your Honor.
6 QUESTION: So the trial court shouldn't have
7 ruled on it? It should have said premature?
8 MS. SMITH: I think for a Swain claim it didn't
9 -- that distinction was not in existence in Georgia law.
10 The only timeliness cases that --
11 QUESTION: For a Swain claim you could have made
12 it pretrial?
13 MS. SMITH: Apparently under Georgia law you
14 could, Your Honor. The one case in which it was --
15 QUESTION: Well, if you -- and if the Swain
16 claim is enough to raise an equal protection claim, which
17 it is, and if it's enough to raise a Batson claim, how was
18 he supposed to know that he was -- that he was to renew
19 his Swain claim before the jury was sworn?
20 MS. SMITH: Because he was raising both Swain
21 and a Sixth Amendment claim, Your Honor, and we submit
22 that it is his raising of the Sixth Amendment claim that
23 evidenced his intent to focus upon the petit jury that
24 required him to --
25 QUESTION: So if his motion had just cited Swain

1 and the equal protection clause, that would have been
2 consistent with Georgia law at the time? Pretrial.
3 MS. SMITH: I -- yes, Your Honor.
4 QUESTION: And he would not have had to renew it
5 before the jury was sworn?
6 MS. SMITH: Georgia law has not made that
7 distinction.
8 QUESTION: And yet the Supreme Court of Georgia
9 in its opinion, I believe both the first opinion and the
10 opinion on remand, said that he did raise a Swain claim.
11 MS. SMITH: It, it -- looking at -- there are
12 four paragraphs in the motion, and looking at, he alleges
13 in paragraph 2, he alleges systematic exclusion without
14 citing Swain, and in paragraph 4 of the motion he also
15 cites McCray and Taylor and Sixth Amendment as well.
16 QUESTION: Well, but can't we regard the Supreme
17 Court of Georgia saying that he raised a Swain claim and
18 indicating not that there was any procedural bar in
19 connection with the Swain claim, as the final word on
20 Georgia law that he did properly raise a Swain claim?
21 MS. SMITH: Yes, Your Honor. We submit that you
22 can. We submit that merely looking at Sparks in the
23 context of Georgia law at the time, not only do we have
24 the unified appeal procedure, the 1982 amendment, you have
25 statutes governing jury selection in this case. There is

1 a specific statute which indicates when you must object to
2 a juror being sworn for cause. We submit that
3 petitioner's reliance upon McCray, in which Justice
4 Marshall in his dissent discussed how a Sixth Amendment
5 claim was raised in California. His reliance upon other
6 jurisdictions indicates that he was aware that other
7 people were perceiving this claim and were making
8 objections or motions for mistrial, or evidencing some
9 sort of dissatisfaction after the conduct complained of
10 occurred. And we submit that the claim in this case is
11 not so novel that he could not have had notice to have
12 objected.
13 QUESTION: So, you are not urging that the --
14 that the -- that the rule laid down in Sparks -- is that
15 it? In Sparks?
16 MS. SMITH: Yes, Your Honor.
17 QUESTION: Is applicable in this case?
18 MS. SMITH: We submit that they merely relied
19 upon Sparks because they had already decided in Sparks
20 itself when a claim would or would not be timely. It was
21 not a mechanistic application of Sparks in this case that
22 yielded the result. It was the lack of an objection by
23 petitioner in this case that the opinion of the Georgia
24 Supreme Court --
25 QUESTION: And that the court would have come

1 out the same way if that had never -- had never decided
2 Sparks?
3 MS. SMITH: I submit that it would have, Your
4 Honor. I think Sparks simply announced prospectively this
5 is the latest point at which you can make a challenge and
6 preserve a Batson claim.
7 QUESTION: Ms. Smith, I didn't realize this
8 before, but your opponent says that Sparks was not
9 procedurally defaulted. Is that right?
10 MS. SMITH: That is correct, Your Honor.
11 QUESTION: Now, what did he do that this, this
12 litigant did not do?
13 MS. SMITH: He made a motion for mistrial after
14 the prosecutor used his strikes in this case. The jury
15 had been sworn, but the State had not begun presenting any
16 evidence.
17 QUESTION: I see. It's the motion for mistrial
18 that preserved it for him.
19 MS. SMITH: It was the motion for mistrial. And
20 in the Mincey case, which we cited in our brief, the
21 Batson claim was preserved by making a motion for
22 continuance. So, again, we submit this evidences the
23 rationale of the Georgia Supreme Court in finding that it
24 was not that he didn't comply with Sparks, but that he
25 made no objection whatsoever at trial to the manner in

1 which this jury was selected that was fatal to his claim.
2 And in answer to one of your earlier questions,
3 Justice Stevens, Georgia does not apply a procedural
4 default rule, a waiver of the waiver by the State rule.
5 If the trial court has reached the merits, that does not
6 bind the Supreme Court of Georgia. By the same token, if
7 the State did not assert procedural default or if the
8 trial court rejected procedural default, that does not bar
9 the Supreme Court of Georgia from applying procedural
10 default.
11 We submit that the crux of the case is what this
12 Court meant by the remand order in Griffith, and we submit
13 that there's a distinction between retroactivity and
14 preservation of a claim. Under the principles of
15 retroactivity an examination is undertaken to see if a
16 rule is in fact applicable.
17 Under preservation of the claim one assumes the
18 applicability of the claim, but merely looks to see if the
19 claim itself is preserved. And we submit that that is all
20 the Supreme Court of Georgia did here in this case, and
21 found that petitioner's conduct did not fall in line with
22 those persons in Batson, Griffith, and Brown, who had not
23 had the benefit of this Court's decision telling them to
24 object, but perceived the claim as being based upon the
25 challenge of strikes in their trial, and evidenced some

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1 sort of timely dissatisfaction through objection, motion
2 for mistrial, or whatever form.
3 And we submit that the decision of the Supreme
4 Court of Georgia in this case is not inconsistent with
5 Griffith. And we would urge this Court to conclude that
6 the decision was proper, that it rests upon an independent
7 and adequate State ground.
8 QUESTION: Thank you, Ms. Smith.
9 Mr. Ogletree, do you have rebuttal?
10 REBUTTAL ARGUMENT OF CHARLES J. OGLETREE, JR.
11 ON BEHALF OF THE PETITIONER
12 MR. OGLETREE: Mr. Chief Justice. There are
13 only three points I wish to make. In this particular
14 case, when this case was presented to the Georgia Supreme
15 Court, the Georgia Supreme Court clearly concluded that a
16 proper Swain claim had been made. At page 51 of the joint
17 appendix the Georgia Supreme Court and the remand
18 characterizes the motion as properly made under Swain, and
19 in fact, at page 55 of the joint appendix, when the
20 Georgia Supreme Court had the remand, makes clear that
21 Swain's motion -- that Ford's motion under Swain, having
22 been decided adversely to him on appeal, cannot be
23 reviewed in this proceeding.
24 I think first of all it establishes that Swain
25 had been made properly. And more importantly, it seems

1 the Georgia Supreme Court is ignoring that -- this Court's
2 remand. It is saying in effect we are not going to review
3 this case in light of what the Court requested that we do.
4 Sparks, again, we say is significant in that
5 Sparks could not have complied and did not comply with the
6 procedure announced in Sparks. Sparks' objection did not
7 occur until after the jury was selected, sworn, the judge
8 had given preliminary instructions to the jury. So in
9 terms of the rule, he would not have made it. And in fact
10 the government at this point is contending that Sparks
11 adequately made a showing, and we submit that he did not.
12 Moreover, this Court, we submit, can say that
13 the prosecutor's exercise of 9 out of 10 peremptory
14 strikes to strike the black jurors is a prima facie case,
15 and without rebuttal by the State in this case, that it
16 would be an adequate basis for Mr. Ford to prevail.
17 Finally, we would submit that, on this record,
18 that it shows that this Court, looking at Ford, has yet
19 another opportunity to correct much of the injustice that
20 has occurred and the whole line of racial discrimination
21 in jury selection procedures. From Strauder through Swain
22 and Batson and Griffith, this Court has consistently tried
23 to prevent any form of discrimination preventing
24 defendants from having fair trials, and preventing
25 prosecutors from excluding -- excusing citizens from their

1 right to serve as jurors. That principle was clearly
2 stated in Strauder. It is just as clear in Batson. And
3 we submit that Mr. Ford, in his unique circumstances,
4 should not be denied the opportunity to submit to this
5 Court an argument that Batson should be applied.
6 And we urge the Court, in light of this record
7 and in light of the arguments today, to find as Mr. Ford
8 has urged in his brief.
9 Thank you.
10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Ogletree.
12 The case is submitted.
13 (Whereupon, at 10:50 a.m., the case in the
14 above-entitled matter was submitted.)
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CERTIFICATION

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#87-6796 - JAMES A. FORD, Petitioner v. GEORGIA

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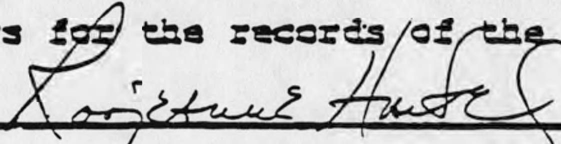

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