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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LARRY JOE POWERS, Petitioner V. OHIO

CASE NO: 89-5011

PLACE: Washington, D.C.

DATE: October 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY JOE POWERS, :
Petitioner :
v. : No. 89-5011
OHIO :
----- X

Washington, D.C.

Tuesday, October 9, 1990

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

APPEARANCES:

ROBERT L. LANE, ESQ., Columbus, Ohio; appointed by this Court on behalf of the Petitioner.

ALAN CRAIG TRAVIS, ESQ., Assistant Prosecuting Attorney of Franklin County, Columbus, Ohio; on behalf of the Respondent.

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1 the jury. The defense objected to these peremptory
2 challenges and pointed out to the court that what the State
3 was trying to do was to remove all the blacks from the jury.
4 Neither the State nor the court refuted defense counsel's
5 statements. The court overruled the objections, and the
6 court failed to compel the State to put its reasons on the
7 record, even though defense counsel had requested such a
8 requirement.

9 Mr. Powers was ultimately found guilty, and he was
10 sentenced to 53 years to life in the Ohio penal system,
11 where he is today. Mr. Powers appealed his conviction to
12 the Franklin County, Ohio, court of appeals. In that appeal
13 he argued that both his rights and the rights of those
14 excluded jurors had been denied under this Court's decision
15 in Batson by the State's actions and by the court's actions.
16 The court of appeals rejected this claim and affirmed Mr.
17 Powers' conviction, finding that Mr. Powers could not make
18 a Batson claim because he was not the same race as those
19 jurors. Mr. Powers then raised the same issue in the Ohio
20 Supreme Court. That court denied him discretionary review,
21 finding that no substantial constitutional question existed
22 in this case.

23 For well over 100 years this Court has steadfastly
24 prohibited racial discrimination in the criminal justice
25 system. The Batson decision stands on three important

1 values, values that are important to all criminal defendants
2 regardless of their race. Among these values is the -- that
3 the Court has recognized, is the value that a democratic
4 society cannot survive unless the people in that society
5 have the faith and the confidence in the integrity of the
6 criminal justice system. Racial discrimination erodes that
7 faith and confidence.

8 QUESTION: On that basis anybody would have the
9 right to challenge it then, he wouldn't even have to be the
10 defendant. I guess everybody has standing on that theory,
11 right?

12 MR. LANE: Your Honor, the --

13 QUESTION: I mean any citizen.

14 MR. LANE: There are real impediments to someone
15 else coming in and making that challenge. Now, another
16 citizen could file an action under 1983, they could bring
17 a civil action, as the plaintiffs did in Carter v. Greene
18 County Commissioners, or there is the Federal statute. But
19 what we're talking about here is Mr. Powers' standing as a
20 criminal defendant.

21 QUESTION: You think a member of the public at
22 large, not a juror who has been excluded, but a member of
23 the public at large would have standing to challenge this?

24 MR. LANE: Under the criminal statute, if someone
25 was a witness to it they probably could file a complaint

1 against the prosecutor or the guilty party for a violation
2 of that criminal statute. And this Court has also
3 recognized, as in the Carter case, that aggrieved parties
4 could file civil action before so. The problem, Your Honor,
5 is that we're talking about peremptory challenges.

6 QUESTION: All right. I think you -- the first
7 ground that you mentioned, if it is a ground for giving
8 standing to your client, is also a ground for giving
9 standing to everybody. And you acknowledge that. You say
10 everybody would have standing. They might not sue, but they
11 would have standing.

12 MR. LANE: They would have to meet the
13 requirements that this Court has set down in Singleton v.
14 Wulff and other cases on standing, showing an injury in
15 fact, showing a substantial relationship, and so forth.
16 They would have to show those standing requirements, Your
17 Honor.

18 QUESTION: Okay, so you don't consider the
19 deprivation of that interest in having -- the whole
20 society's interest in having regular procedures. You don't
21 consider that to be injury in fact?

22 MR. LANE: The problem is, Your Honor, is that
23 we're talking about a situation that is not a problem that
24 arises before the trial. It arises during a trial, and it
25 would be very difficult for a party to say that in the

1 upcoming trial that this prosecutor is going to use his
2 peremptory challenges in a racially discriminatory manner.
3 Sometimes, the lawsuit would have to precede the injury, and
4 there may be a problem there.

5 This Court has recognized in prior decisions that
6 a criminal defendant is in the best position to vindicate
7 the rights of the community, the excluded jurors, and
8 himself. This Court has recognized that a reversal of
9 conviction is generally the best vehicle by way this racial
10 discrimination can be prohibited and vindicated.

11 QUESTION: What are the second and third interests
12 you were going to mention, which I presume one of which does
13 contain the injury in fact?

14 MR. LANE: Yes, Your Honor. The defendant has
15 suffered an injury in fact, and the jurors have an interest
16 in seeing that their rights have been protected. The jurors
17 have an equal protection right to participate in the
18 criminal justice system, and where they are denied that
19 right, their equal protection rights have been violated.

20 The harm to the community is the same regardless
21 of the defendant's race. Whether a defendant is white or
22 black, if he is denied the opportunity to sit before a jury
23 that has been chosen in the absence of racial
24 discrimination, the community is still going to see this as
25 a very serious problem with the criminal justice system.

1 This Court cannot tolerate racial discrimination simply
2 because the defendant is not of the same race as the jurors.

3 As Justice Kennedy stated in his opinion in
4 *Holland v. Illinois*, citizens cannot be denied the duty and
5 honor of jury service on the basis of race just because the
6 defendant is not of the same race as those jurors. *Batson*
7 is based on the need to preserve public confidence in the
8 criminal justice system. That need is the same regardless
9 of the defendant's race. The need is the same regardless
10 of the juror's race.

11 In the case of *Strauder v. West Virginia* this
12 Court recognized that racial discrimination in the criminal
13 justice system creates and further stimulates the kind of
14 racial discrimination, race prejudice, that forecloses
15 people from participating in the justice system.

16 QUESTION: Is the showing that's required to
17 elicit an explanation the same when a black venire person
18 is excluded as when a white venire person is excluded?
19 Assume that the defendant is white.

20 MR. LANE: Your Honor, if the defendant can make
21 a prima facie showing that that juror has been excluded --

22 QUESTION: How do you do that? How do you do
23 that? Suppose you have a prosecutor in a majority white
24 city in a case where the defendant is white, and he
25 challenges five white venire persons?

1 MR. LANE: That would have to be decided on a
2 case-by-case basis, Your Honor, and the defendant would have
3 the burden of showing what --

4 QUESTION: Suppose the opposing counsel stands up
5 and says I want an explanation. I think there is racial
6 motivation here.

7 MR. LANE: It would be up to the judge at that
8 point to decide whether a prima facie case has been --

9 QUESTION: How does he decide that?

10 MR. LANE: Well, it would be the factors of -- he
11 could look at the questions that the prosecutor --

12 QUESTION: A peremptory challenge. You are just
13 excused. I excuse Mr. Jones.

14 MR. LANE: This Court recognized that a court, in
15 determining that prima facie case, must look at the pattern
16 of questioning, can look at the type of questioning, it
17 could be the prosecutor's attitude in a specific case, it
18 could be the issues in the case. There are a lot of issues,
19 Your Honor.

20 QUESTION: The fact that the race of the defendant
21 and the race of the juror is the same or different, those
22 aren't relevant?

23 MR. LANE: This Court has recognized that where
24 the juror and the defendant are of the same race that the
25 discrimination may be more obvious. But it is not the only

1 question to be determined.

2 QUESTION: What's your position of why a defendant
3 who is of the same race as the excluded juror, why does he
4 have standing to raise that issue at all, even though he is
5 of the same race?

6 MR. LANE: Every defendant should have standing,
7 Your Honor, regardless of the race of the defendant --

8 QUESTION: But why does -- why does any of them
9 have standing?

10 MR. LANE: Because there is clearly --

11 QUESTION: You think it -- must he prove some
12 obvious injury to himself?

13 MR. LANE: In order to have standing there has to
14 be an injury in fact. There has to --

15 QUESTION: To him.

16 MR. LANE: To him, Your Honor.

17 QUESTION: What is it?

18 MR. LANE: The injury in this case is that Mr.
19 Powers, just as Mr. Batson, was denied a jury that meets
20 Fourteenth Amendment requirements. A jury stands to protect
21 a defendant from the oppressive and arbitrary powers of the
22 Government. The jury protects the defendant from --
23 protects his civil liberties. And wherever racial
24 discrimination arises in the selection of that jury, that
25 jury does not meet the definition in the Fourteenth

1 Amendment.

2 QUESTION: You think this -- that sounds like a
3 Sixth Amendment claim.

4 MR. LANE: No, Your Honor. It is not a Sixth
5 Amendment claim.

6 QUESTION: What is it?

7 MR. LANE: It's an equal protection claim, Your
8 Honor. Every --

9 QUESTION: You mean in -- who -- what other person
10 is treated better?

11 MR. LANE: In this situation a black defendant
12 would receive better treatment because he is granted
13 standing --

14 QUESTION: Yeah, but I'm talking about a black
15 defendant -- I'm talking about a black defendant challenging
16 the exclusion of a black. What is his injury in fact?

17 MR. LANE: He has been denied a jury that has been
18 chosen in the absence of racial discrimination.

19 QUESTION: And you says it's an equal protection
20 challenge?

21 MR. LANE: Yes, Your Honor.

22 QUESTION: As compared to whom is he being treated
23 worse?

24 MR. LANE: The defendant in that case, the black
25 defendant and the black juror, he has been denied this jury

1 that protects him, where this jury should come between him
2 and the powers of the Government, and where race enters into
3 that selection of the jury.

4 QUESTION: So you're -- you give the same answer
5 when you say, when you describe the standing of the white
6 defendant -- I mean the white plaintiff -- or the white
7 defendant challenging the exclusion of a black. He has been
8 denied the right kind of a jury --

9 MR. LANE: Yes, Your Honor.

10 QUESTION: Whereas some other people get it.

11 MR. LANE: Yes, Your Honor. Mr. Powers has the
12 same standing as Mr. Batson. All criminal defendants --

13 QUESTION: And you would say the same thing even
14 though there is no claim that the jury was not impartial?

15 MR. LANE: Your Honor, the -- there is a lack of
16 impartiality here in that in order for a jury to meet
17 Fourteenth Amendment impartiality standards there must not
18 be any racial discrimination in the selection of that jury.
19 This Court --

20 QUESTION: Aren't you confusing impartiality with
21 equal protection there? I mean, we have not -- we have
22 talked about jury impartiality in some cases quite
23 independently of equal protection.

24 MR. LANE: Your Honor, the equal protection
25 violation that is most succinct to Mr. Powers is that he has

1 been treated differently than a similarly situated black
2 defendant. And there is an equal protection violation
3 there. There is also --

4 QUESTION: Yes, but does that necessarily go to
5 the impartiality of the jury?

6 MR. LANE: Your Honor, this Court has recognized
7 that when racial discrimination enters into the jury
8 selection process, that that jury does not meet the
9 impartiality test of the Fourteenth Amendment, and a
10 criminal conviction should be reversed.

11 QUESTION: Mr. Lane, why do you say he is being
12 treated differently from a similarly situated black
13 defendant? I mean, I guess it depends on what you mean by
14 similarly situated.

15 MR. LANE: Their similar situation is that they
16 are criminal defendants.

17 QUESTION: Yes, but -- and the black defendant can
18 challenge the prosecutor's decision to strike all blacks
19 from the jury, and the white defendant presumably can
20 challenge the prosecutor's decision to strike all whites
21 from the jury. It seems to me that is very even handed.
22 Why is that not equal somehow?

23 MR. LANE: Under the decision of the Franklin
24 County, Ohio, court of appeals, the black, the white
25 defendant does not have that same opportunity. Larry Powers

1 was denied the opportunity to vindicate his rights, the
2 rights of the those jurors, and the rights of --

3 QUESTION: To challenge white defendants?

4 MR. LANE: No, I am sorry. Maybe I misunderstood
5 your question.

6 QUESTION: No, I am saying why is it a denial of
7 equal -- of equal protection if the black defendant can
8 challenge the prosecutor's intentional striking of all black
9 jury persons, and the white defendant can challenge the
10 prosecutor's intentionally striking white ones? Isn't that
11 even handed?

12 MR. LANE: Your Honor, the problem with that is
13 that the defendant does not have the opportunity to object
14 to the striking of black defendants -- the black jurors.

15 QUESTION: Well, neither does the black have the
16 opportunity to object to the striking of white jurors.

17 MR. LANE: They should, Your Honor.

18 QUESTION: Well, maybe they should, but not
19 because of equal protection. You've got to give me some
20 other reason. I mean, as far as the even-handedness goes,
21 it is quite even handed.

22 MR. LANE: It is not even handed when you draw
23 lines on racial criteria, Your Honor. When you say a white
24 defendant can do something that a black defendant cannot,
25 and in another case a black defendant can do something that

1 a white defendant cannot, that is drawing lines on a racial
2 criteria. That's the type of racial discrimination that
3 the Fourteenth Amendment was designed to eliminate. And
4 when a defendant is made to stand trial before a jury in the
5 selection of which there has been racial discrimination,
6 that defendant, regardless of his or her race, has been
7 denied equal protection.

8 QUESTION: Do you propose the same rule with
9 respect to gender?

10 MR. LANE: Your Honor, gender is a separate
11 question.

12 QUESTION: I know that isn't your case, but we
13 have to be concerned with the consequences of what we write
14 and the reason.

15 MR. LANE: Your Honor, if this Court has
16 determined that gender is a suspect class for equal
17 protection analysis, then I would say it would be proper to
18 do so. But in this case, on the facts of this case we are
19 dealing with racial discrimination.

20 QUESTION: Your opponent asked us to decide
21 whether the -- whether it is similarly unlawful for the
22 defense to strike on the basis of race. I'm not sure we
23 have to decide that, in fact, I can't imagine why we do.
24 But in deciding how to resolve this case, certainly we must
25 have that prospect before us, right?

1 MR. LANE: Yes, Your Honor, that is before the
2 Court.

3 QUESTION: It is possible that -- so it is really
4 quite possible to have all defendants precluded from
5 striking people of the opposite race, or the same race, or
6 women, or men, or what other categories? A criminal
7 defendant who wanted to strike all, I don't know,
8 fundamentalists, or whatever he thought might give him an
9 edge in the decision. That would be bad if we had to extend
10 that.

11 MR. LANE: The issue proffered by the State in the
12 second part of their brief is not properly before this
13 Court.

14 QUESTION: Yes, but how -- well, how we come out
15 on this case plays out quite differently depending on how
16 far we are prepared to go in extending the same right to the
17 defense, isn't it? Or the same obligation to the defense.

18 MR. LANE: It may have an impact, Your Honor, but
19 the fact remains that there are a lot of different issues
20 involved in trying to extend the Batson principles to a
21 defendant's use of peremptory challenges, a lot of issues
22 in addition to racial discrimination. When a juror has been
23 excluded from a criminal defense jury on the basis of his
24 or her race, that juror has been denied their equal
25 protection rights. They have been denied the right to

1 participate in the criminal justice system.

2 QUESTION: And the defendant, you think, has the
3 right to press their claims as well as his own, right?

4 MR. LANE: Absolutely, Your Honor, because to bar
5 that claim to the defendant would be to say that this Court
6 is going to condone or tolerate racial discrimination simply
7 because the defendant is not of the same race as the jurors.

8 QUESTION: Of course there is a criminal statute
9 on the books, 18 U.S.C. 243 --

10 MR. LANE: Yes, Your Honor.

11 QUESTION: I'm sure that is not often invoked,
12 but it is quite specific on this point.

13 MR. LANE: Your Honor, it is not very often
14 invoked, and I believe there is a footnote in Peters that
15 indicates that there have been very, very few convictions
16 under that, and very, very -- very few --

17 QUESTION: But if there is a criminal sanction,
18 it seems to me that maybe that would suffice and we don't
19 need the civil cause of action.

20 MR. LANE: Your Honor, that statute has been on
21 the books for over 100 years, and as this Court has noted,
22 racial discrimination has continued despite the existence
23 of that statute. The problem with that statute is you may
24 take a prosecutor or other guilty party and fine that person
25 \$5,000, but the community's faith and confidence in the

1 system is still going to be harmed. The jurors are still
2 denied their equal protection rights, and the defendant is
3 still convicted of criminal offenses. The criminal statute
4 which you could impose on a person guilty of racial
5 discrimination does not address the harm suffered by all the
6 parties.

7 QUESTION: May I just go back a second? In the
8 equal protection claim, is it clear to you that the
9 defendant is a member of the class that is being
10 discriminated against? I thought you defined the class as
11 black citizens who want to serve as jurors.

12 MR. LANE: Yes, Your Honor. The class --

13 QUESTION: The defendant isn't a member of that
14 class.

15 MR. LANE: Exactly. And there is, that
16 recognition is made in the Batson decision that the class
17 -- the defendant is not of the class of the jurors. He has
18 no interest in sitting on a jury.

19 QUESTION: So he has third party standing whether
20 he is black or white, and whether the -- whether the
21 challengers are black jurors or white jurors.

22 MR. LANE: Absolutely, Your Honor. He has
23 standing.

24 QUESTION: Well, but you -- whether he is raising
25 -- if he is -- even if he is raising the right, claiming the

1 rights of the jury, the excluded jurors, he has to have an
2 injury in fact himself, doesn't he?

3 MR. LANE: Yes, Your Honor.

4 QUESTION: And that's -- and the most you can say
5 to that is that he has just been -- that he is entitled to
6 a jury that is selected without discrimination.

7 MR. LANE: It's a very important injury, sir.
8 It's a very severe injury.

9 QUESTION: Well, all you can say, though, is the
10 same thing. His injury is not having that kind of a jury.

11 MR. LANE: This Court has recognized that, Your
12 Honor, where racial discrimination has existed in the
13 selection of --

14 QUESTION: Yes, you agree that all you can say is
15 to repeat yourself that he's entitled to that kind of a
16 jury, and if he doesn't get it that's -- he's been injured.

17 MR. LANE: This Court has recognized that, Your
18 Honor, in Vasquez v. Hillery, Rose v. Mitchell, in a lot of
19 other cases. This Court has determined that when racial
20 discrimination exists in the selection of a jury, a criminal
21 defendant's conviction should be reversed, even in the cases
22 where the racial discrimination occurred at the grand jury
23 stage and there was no allegation of discrimination in the
24 petit jury.

25 QUESTION: That's because he would -- there he had

1 an injury, and the injury was that he had been deprived of
2 an impartial jury, or of the opportunity to have an
3 impartial jury that was granted by the Sixth Amendment.
4 That is an injury.

5 MR. LANE: The impartiality springs from the
6 racial discrimination, Your Honor. The jury that is chosen
7 along racial criteria contravenes the very idea of the jury.

8 QUESTION: Well, I understand that, but this is
9 not a Sixth Amendment claim you are pressing here. It's
10 --

11 MR. LANE: That is true, Your Honor. It is not
12 a Sixth Amendment claim. It's an equal protection claim,
13 because everyone, regardless of their race, has a right to
14 that same jury, a right to a jury that has been chosen in
15 the absence of racial discrimination.

16 QUESTION: So the -- there are just lots of cases
17 that say if Negroes are kept out of the jury venire, the
18 defendant has got a good claim.

19 MR. LANE: If racial discrimination exists, Your
20 Honor, that defendant has been harmed. He has suffered the
21 injury in fact that is required.

22 QUESTION: But let's assume there is a Federal
23 statute that says, you know, all jury have to arrive at the
24 court house at 9:00, and the jury doesn't -- the jury in
25 this particular case doesn't arrive at 9:00, and you move

1 for dismissal of the case against your client because he's
2 entitled to a jury that arrives at the court house at 9:00.
3 Would you think that that motion should be granted?

4 MR. LANE: I don't see the analogy there --

5 QUESTION: Wouldn't you insist --

6 MR. LANE: -- with racial discrimination. This
7 Court has --

8 QUESTION: Well, wouldn't the judge insist how did
9 the jury not getting there at 9:00 hurt your client?

10 MR. LANE: It doesn't have that same imprimatur
11 of racial discrimination in impart -- in partiality.

12 QUESTION: Well, I agree it's nastier, but how
13 does it hurt your client? I mean, that's the point. It
14 isn't whether it is good or bad or nasty. We all agree it's
15 terrible. But how did it hurt your client?

16 MR. LANE: That he did not have a jury because the
17 jurors arrived late? Maybe I misunderstand your question,
18 Your Honor. I --

19 QUESTION: In this case it may well have been bad
20 to discriminate, but if that discrimination didn't hurt your
21 client in anyway, how -- how does he have standing?

22 MR. LANE: Mr. Powers --

23 QUESTION: It's the same thing with the jury
24 arriving at 9:00. They broke the law. But why does it hurt
25 your client?

1 MR. LANE: The jury must be chosen in the absence
2 of racial criteria. This Court has set forth that standard.
3 I don't -- I don't see the analogy between a jury arriving
4 late and invidious racial discrimination. This Court has
5 held that racial discrimination in the selection of a jury
6 makes that jury inadequate for Fourteenth Amendment
7 requirements. That defendant has been denied the jury that
8 the Fourteenth Amendment requires. And the only way that
9 that type of discrimination is going to be effectively
10 answered is if the criminal defendant can object to it and
11 raise it on appeal.

12 Mr. Powers --

13 QUESTION: To satisfy you, it would seem to me
14 that if you say that his injury in fact is proved by having
15 Negroes excluded from his jury, I would think you would say
16 that the only Negroes who may be excluded from the jury are
17 those who may be challenged for cause.

18 MR. LANE: No, Your Honor, because the peremptory
19 challenge is not the same as a challenge for cause, and the
20 injury in fact --

21 QUESTION: Well, I know, but I would think you
22 would argue that peremptory challenges certainly can't do
23 away with a defendant's right to have the kind of a jury
24 he's entitled to, can they?

25 MR. LANE: No, Your Honor, they can't. Peremptory

1 challenges cannot be used in a manner to --

2 QUESTION: I know, but you don't think they have
3 to be -- the peremptory challenge of a Negro has to be
4 justified by a cause, by technically that he is disqualified
5 for cause?

6 MR. LANE: The prosecutor has to have nonracial
7 reasons. They don't have to rise to the level of a
8 challenge for cause, but they have to be nonracial reasons,
9 and they cannot be based on the juror's race.

10 QUESTION: Uh-hum. You just say that I don't
11 think that person is -- I think that person is too well
12 educated to sit on a case like this; or that that person
13 isn't well enough educated to sit on a case like this?

14 MR. LANE: A juror must be chosen on his personal
15 qualifications and characteristics --

16 QUESTION: But you say that might be enough to
17 overcome this entitlement to a jury that -- from which
18 blacks aren't excluded?

19 MR. LANE: That a juror is not a -- not educated
20 enough? Your Honor, some lower courts have looked at those
21 type of responses and found them wanting, founding -- found
22 that they did not survive a Batson challenge. And that was,
23 would have to be a decision made by the --

24 QUESTION: I suppose there is a whole range of
25 acceptable excuses for a peremptory challenge short of a

1 challenge for cause.

2 MR. LANE: Yes, Your Honor.

3 QUESTION: Well, just imagine what one of those,
4 what they are, and then you would say that that overcomes
5 this entitlement to the kind of a jury you have been talking
6 about.

7 MR. LANE: It does, does not overcome it, Your
8 Honor, because this is a constitutional requirement. And
9 what Batson says is if the prosecution can show to the
10 court, can demonstrate to the court that the prosecution
11 used nonracial reasons, then it may survive a Batson
12 challenge.

13 QUESTION: Nonracial reasons for what is the
14 effect of peremptory strike.

15 MR. LANE: Yes, Your Honor, for mutual reasons,
16 reasons related to the juror's individual qualifications and
17 characteristics. Not related to race.

18 QUESTION: Which could be all over the lot, I
19 suppose. If lack of education was not found to be a proxy
20 for race, that would be a perfectly good basis for a
21 peremptory challenge, just as too much education might be
22 a perfectly good basis for a peremptory challenge.

23 MR. LANE: The trial court has the burden, Your
24 Honor, of looking at --

25 QUESTION: I'm asking you a question. If they

1 were not found to be a proxy for race, would either lack of
2 education or over education be an adequate basis for
3 justifying a peremptory challenge?

4 MR. LANE: If the court, or the trial court, or
5 the reviewing court felt that it was not --

6 QUESTION: No, I --

7 MR. LANE: -- a racial reason for a --

8 QUESTION: We stipulate it is not a proxy for
9 race.

10 MR. LANE: Okay. Then it would probably survive
11 the Batson challenge, Your Honor.

12 QUESTION: Well, you say probably. Why would it
13 not automatically survive it if it's not a proxy for race?

14 MR. LANE: Well, if we stipulate, as Your Honor
15 said, then it probably -- it would survive.

16 QUESTION: It would survive.

17 MR. LANE: I will use the rest of my time for
18 rebuttal. Thank you.

19 QUESTION: Very well, Mr. Lane.

20 We will hear now from Mr. Travis.

21 ORAL ARGUMENT OF ALAN CRAIG TRAVIS

22 ON BEHALF OF THE RESPONDENT

23 MR. TRAVIS: Thank you, Mr. Chief Justice, and may
24 it please the Court:

25 I think I would like to begin simply by addressing

1 some of the questions raised by the Court. I would note to
2 the Court that this is not a novel proposition. As Mr. Lane
3 has argued, and as this Court is fully aware, the use of
4 peremptory -- not peremptory, but the use of removal of
5 individuals from the criminal justice system based upon race
6 has been a violation of the Equal Protection Clause since
7 at least *Strauder, 110 years. Just as that is not a novel
8 proposition, I would suggest to this Court that Batson did
9 nothing more than change the evidentiary standard which is
10 required before an accused may make a challenge against the
11 prosecution's use of peremptories.

12 In this instance I think it is significant, and
13 this Court has found it significant, that much of the
14 argument presented by the petitioner in this case I think
15 sounds of a Sixth Amendment challenge. In this instance we
16 have a significantly different basis for the objections by
17 the defendant, if they are coming out of the Sixth versus
18 the Fourteenth Amendment.

19 The issue which has been discussed with Mr. Lane,
20 the necessity of a injury in fact to the defendant,
21 historically, and certainly nothing since Swain has changed
22 this, historically this Court has consistently and
23 continually stated in equal protection cases that in order
24 to show a violation of the equal protection rights of the
25 accused he must show that he is a member of the distinct

1 class, and that members of his class have been excluded from
2 the jury service.

3 QUESTION: What do you do about Peters v. Kiff,
4 and the statutory provision?

5 MR. TRAVIS: I would say simply to the Court that
6 if the statutory basis were brought, as the middle three
7 opinions of that case suggested, that might be a basis for
8 review or handling of this matter. But it was not brought
9 in this case, nor was a due process clause claim brought.
10 Mr. Justice Marshall's lead opinion suggests that the issue
11 involved due process and equal protection. But as I read
12 the opinion and as I believe the dissent points out, it was
13 resolved as far as the lead opinion goes on due process
14 grounds, and for the center three opinions, written by
15 Justice White, on statutory grounds. I think that is
16 significantly different. Certainly it is not what was
17 brought by this petitioner.

18 Just as in Holland, a petitioner brought a Sixth
19 Amendment claim, feeling he was foreclosed under Fourteenth
20 Amendment grounds, and this Court found that while he had
21 standing, he had no remedy. And the concurring opinion of
22 Justice Kennedy suggested the contrary would be true under
23 Fourteenth Amendment grounds. I think if it came up under
24 the criminal prosecution of 243, perhaps if it came up under
25 due process grounds, there might be a remedy. But it did

1 not, and we are taking the position that under the
2 traditional view that this Court has had for equal
3 protection cases, there is no injury in fact to this
4 defendant.

5 QUESTION: Batson is the law, I suppose --

6 MR. TRAVIS: Certainly.

7 QUESTION: And what do you understand to be the
8 black defendant's standing to challenge the exclusion of
9 black jurors? What is his injury in fact?

10 MR. TRAVIS: My understanding, Your Honor, is that
11 -- and Batson relied so heavily on Casteneda against
12 Partida, that the injury is that members of his race, his
13 cognizable group, have been excluded. And that is the
14 injury in fact.

15 QUESTION: Well, how does that hurt him?

16 MR. TRAVIS: I'm sorry?

17 QUESTION: How does that hurt him? I'm -- we're
18 talking about injury in fact.

19 MR. TRAVIS: The petitioner?

20 QUESTION: What is the in fact injury?

21 MR. TRAVIS: Well, of course the Court has changed
22 its position since Swain, where there was discussion of the
23 fact that the peremptory challenge was validly used for
24 certain purposes, including --

25 QUESTION: But even Swain said that there would

1 be standing to challenge it if they -- if you could show a
2 pattern in practice.

3 MR. TRAVIS: A pattern in practice, but to my
4 knowledge the Court has never suggested that pattern in
5 practice would have other than a correlation between the
6 defendant and the removed juror.

7 QUESTION: I agree, but I'm still wondering what
8 your notion is of the injury in fact.

9 MR. TRAVIS: Well, it's -- it is simply that, and
10 perhaps I'm in Mr. Lane's position on the other side of the
11 Court's question.

12 QUESTION: You don't agree that it's -- his injury
13 in fact is the fact he has been deprived of a juror -- jury
14 that has been --

15 MR. TRAVIS: This defendant?

16 QUESTION: -- that has not been chosen on
17 nondiscriminatory grounds?

18 MR. TRAVIS: I am sorry. Are we talking about
19 this defendant petitioner?

20 QUESTION: Well, and the Batson defendant, and the
21 Swain defendant.

22 MR. TRAVIS: No, I don't. I believe that the
23 injury in fact is that the defendant has been deprived of
24 members of his own race on the jury. That is my
25 understanding.

1 QUESTION: But is that -- can't you say generally
2 then that the defendant has been deprived of a jury that
3 hasn't been chosen on a nondiscriminatory basis?

4 MR. TRAVIS: But once again, I think that that
5 sounds more of a Sixth Amendment fair cross-section claim,
6 which this Court has rejected, than it does a true equal
7 protection claim.

8 QUESTION: Mr. Travis, I am curious to know how
9 far your argument takes. Assume a case in which the final
10 jury that is selected is proportional to the community, so
11 there is no Sixth Amendment claim. But a white defendant
12 finds out that the prosecutor has deliberately, during the
13 entire prior 6 months including the selection of his own
14 jury, followed a deliberate policy of taking as few blacks
15 as he could get away with. They had marked them separately
16 or they coded them or something. But he deliberately tried
17 to keep the number of blacks who get into the venires down.
18 Would the white defendant have any equal protection basis
19 for challenging that practice?

20 MR. TRAVIS: No, I would say not.

21 QUESTION: You'd say not. Yeah.

22 MR. TRAVIS: That would be our position.

23 QUESTION: Right.

24 MR. TRAVIS: Quite simply, we take the position
25 that the Equal Protection Clause does not grant standing to

1 this particular defendant, but even if it were to, even if
2 this Court were to conclude that those cases, that historic
3 line of cases which has seemingly required a correlation
4 between the defendant and the excluded juror, even if that
5 series of cases were not what it appears to be and what it
6 has appeared to be to so many lower courts, so many members
7 -- or so many members of the circuit courts, then I suggest,
8 as Justice Kennedy raised in his concurring opinion in
9 Holland, that in this case on this record it is not -- we
10 don't have a sufficient record in which to determine whether
11 there was a prima facie case advanced at all by the
12 defendant.

13 What the Court indicated, and what Justice
14 Kennedy, I should say, indicated in his concurring opinion
15 is that in Batson, and I think this is true from a reading
16 of the case, there is an inference of racial discrimination
17 when there is a showing that members of the defendant's race
18 have been removed from the jury. At some point we reach the
19 point where you can draw an inference of racial
20 discrimination. That inference is not present when you do
21 not have a correlation between the excused juror and the
22 class -- and the defendant's class.

23 If that correlation is not present, and if, as
24 this Court has continually said, it is the burden of the
25 defendant in this case, the movant, to establish from the

1 record a prima facie case, then we suggest that the record
2 is insufficient in this case, as we did in our Brief in
3 Opposition, to determine that there was even a prima facie
4 case made.

5 For example, if we were to assume for purposes of
6 argument that the venue of this case was in a or were in a
7 jurisdiction in which the members of the black race were
8 the overwhelming majority of the population, the mere fact
9 that 7 of 10 peremptory challenges, and I am now referring
10 to this record, were used to excuse citizens who happen to
11 be black would not have any meaning. It would be
12 meaningless without a review and a correlation between the
13 excusing of those jurors and the pool from which they came.

14 QUESTION: But isn't it correct that in this case
15 that determination was just not made at all, because the
16 holding was there was no standing? You may be dead right,
17 but isn't it still correct for us to send it back and let
18 the trial court or the court of appeals make that?

19 MR. TRAVIS: Well, Justice Stevens, that's an
20 alternative, but what I am suggesting to the Court is that
21 it is the movant's, the defendant's burden to establish a
22 record to prevail on appeal. At the time I think it was
23 clear that the Court read the language in Batson, Casteneda,
24 and so forth as requiring correlation between race. But
25 nonetheless, it is our position and we would urge to the

1 Court that it's the defendant's burden to establish a record
2 to support a prima facie showing.

3 QUESTION: That's right.

4 MR. TRAVIS: And if it has not been done, if he
5 has failed to establish that prima facie case, then there
6 is no basis to reverse.

7 QUESTION: You're saying if there is no prima
8 facie case we should not reach the standing issue, which
9 would normally be the anterior issue?

10 MR. TRAVIS: If that's not inconsistent.

11 QUESTION: Yeah.

12 QUESTION: Let's assume the defendant challenges
13 the elimination of a particular juror, or of all the black
14 jurors, and the court asks the -- asks the lawyer what his
15 reasons are and determines that they really are racial
16 reasons, that he really did -- throwing the Negroes off
17 because they are Negroes. Now, would the -- would the
18 Negroes who have been excluded have a case against him?

19 MR. TRAVIS: I think quite clearly they would.
20 They would apply their equal protection rights.

21 QUESTION: Uh- hum. And you don't think that the
22 white defendant has standing to press their rights?

23 MR. TRAVIS: I don't believe so. If we were to
24 say, as I think the defendant is suggesting in this case,
25 petitioner is suggesting that because he is a defendant he

1 is in the best position to raise the rights of others,
2 because he is opposed to the State by virtue of the fact
3 that he is the opposite party. If that were the case, this
4 Court's teachings on standing would have -- would be totally
5 cut adrift.

6 I realize it is not a trial issue, but I am
7 thinking of Salvuche, for example. There is a defendant who
8 with his, if not co-defendant, compatriot is caught
9 basically connected with drugs that are in someone else's
10 possession, and of course this Court said quite clearly no
11 standing to object to the violation of that person's Fourth
12 Amendment rights. I simply would argue to the Court that
13 merely because one is a defendant doesn't -- should not
14 grant one standing to object and raise the right violations
15 of everyone involved.

16 QUESTION: Well, but you don't take the position
17 -- I want to be sure. You don't take the position that an
18 equal protection challenge must always be made by a member
19 of the disfavored class? You have to be a member of the
20 class discriminated against? You don't make that claim, do
21 you?

22 MR. TRAVIS: I am sorry. If I understand you
23 correctly, Justice Stevens --

24 QUESTION: Well, take Craig against Boren, for
25 example, which was a case involving discrimination against

1 females, as I remember. The bartender, the owner of the
2 bar was able to raise the --

3 MR. TRAVIS: If there is a sufficient correlation,
4 and I recognize that that's petitioner's argument.

5 QUESTION: If there is an independent injury other
6 than the discrimination that justifies. And why isn't that
7 true here, when the defendant has the right to object to the
8 selection of the jury panel? He just thinks if there had
9 been a different panel he might have had a better chance of
10 acquittal. Why doesn't he have standing?

11 MR. TRAVIS: I think that's -- I may be giving a
12 fairly weak response to you, Your Honor, but I think that
13 is true in any case where the defendant objects.

14 QUESTION: Right.

15 MR. TRAVIS: People object, and I don't mean this
16 facetiously, to virtually anything that the opposing party
17 wants to do.

18 QUESTION: You have standing to make all sorts of
19 objections --

20 MR. TRAVIS: That's true.

21 QUESTION: -- and one of them is that you don't
22 like that jury panel because it is unconstitutionally -- it
23 was selected in an unconstitutional manner.

24 MR. TRAVIS: Which brings me back to, I believe,
25 the argument made earlier that I think that sounds more of

1 a Sixth Amendment fair cross-section analysis.

2 QUESTION: Well, but that's on the merits, it is,
3 yeah.

4 MR. TRAVIS: On the merits, yes.

5 QUESTION: Counsel, suppose there is a white and
6 an Afro-American charged together.

7 MR. TRAVIS: A what, Your Honor? I'm sorry.

8 QUESTION: An Afro-American.

9 MR. TRAVIS: Yes.

10 QUESTION: You don't know what that is?

11 MR. TRAVIS: No, I didn't hear the next word. The
12 next word I didn't hear.

13 QUESTION: Well, there's a white and an Afro-
14 American, two defendants --

15 MR. TRAVIS: Charged.

16 QUESTION: And the charge is made that Negroes
17 have been systematically excluded from the jury. You can't
18 try the Negro, right? But that same jury can try the white
19 man. Is that your position?

20 MR. TRAVIS: That is the position of one of the
21 circuits that we cited below, an en banc position --

22 QUESTION: Is that your position?

23 MR. TRAVIS: We take that position, difficult as
24 it is.

25 QUESTION: You don't think that -- go ahead,

1 sorry.

2 MR. TRAVIS: If I may, if I -- and perhaps I
3 misspoke myself or spoke too rapidly, I think when you have
4 a correlation with co-defendants you may have a very
5 different position. Excuse me, I think I did misspoke --
6 misspeak myself. I think you could have a situation where
7 if you have co-defendants, you might, as some of the
8 dissenters in that lower court decision suggested, have the
9 standing. It is not an easy position, I recognize, but that
10 is the, that was the indication of the lower court.

11 QUESTION: You might have (inaudible).

12 MR. TRAVIS: I have -- Your Honor, I have great
13 difficulty with this entire series of cases in dealing with
14 the difficult problem of racial discrimination, but at the
15 same time recognizing that merely because the defendant
16 accuses one of being racially discriminatory in a trial,
17 that the defendant has suddenly reached a prima facie case.
18 For example, in this case, whether he misunderstood Batson
19 or not, the very first peremptory challenge was challenged,
20 if you will, by the defendant, the petitioner, stating that
21 you simply cannot peremptorily challenge a member of a
22 minority without giving an explanation. That was the attack
23 made. That's the difficulty I think all of us have had with
24 dealing with Batson.

25 I note that the Court has today accepted Hernandez

1 on the question of whether or not removal of Latinos in a
2 case involving an interpreter, whether they would follow the
3 literal interpretation of the court -- the court interpreter
4 would be a valid reason to object, and it would be a
5 nonracial reason. It has been a very difficult time, I
6 think, for the lower courts. I think this Court will be
7 giving further guidance, but yes, I have difficulty with
8 that. If that answers your question.

9 QUESTION: Well, if you do have difficulty, I
10 would think you would have difficulty with Swain, too, even
11 saying that you can challenge a prosecutor's systematic and
12 -- practice over a series of cases of excluding all Negroes.

13 MR. TRAVIS: No, I would, no, I don't have -- I'm
14 saying that I think courts have had difficulty in knowing
15 what a prima facie case is in the context of Batson. Some
16 certainly have said if there is a strike and the jury pool
17 is of minimal number of Afro-Americans, if there's a minimal
18 number in the jury pool, then that might be a prima facie
19 case. Indeed it has been held a prima facie case. That's
20 why I say that in this case we don't have a sufficient
21 record for this Court to determine that issue.

22 QUESTION: So you think they ought to wait until
23 you know whether all of the jurors, or all of the blacks are
24 thrown off? Is that it?

25 MR. TRAVIS: No, I don't think that's the case,

1 Your Honor. I would not argue that. I think that at some
2 point, and I think this Court has made it clear that you
3 examine the totality of circumstances. I think I would
4 concede quite clearly that if you look at things such as the
5 prosecutors' or, in our position, defendants', use of the
6 peremptory, immediately, for example, without any particular
7 inquiry of the juror, the type of the questioning that is
8 done, so forth and so on. I think it is a totality of
9 circumstances, but I also argue strenuously to the Court
10 that in this case it is the burden on the defendant to make
11 that record, and he failed to do so.

12 QUESTION: You don't think it would be a prima
13 facie case if as soon as a black juror is -- he doesn't ask
14 him any questions, he just challenges him.

15 MR. TRAVIS: I think perhaps that would be the --
16 something that if I were sitting as trial judge I would, I
17 would perhaps ask. Yes. I think that very well could be.
18 But as I say, I think you have to look at the totality of
19 circumstances in determining whether such prima facie case
20 has been made.

21 We would argue that in this case there is a
22 significant difference between the Sixth Amendment fair
23 cross-section analysis and the equal protection analysis.
24 We have taken the position, as we indicate, that in this
25 case historically the Court has always required a

1 correlation which is not present. But even if this Court
2 were to determine, as was perhaps suggested in some of the
3 dissent and concurring opinions in Holland, that that
4 correlation is not necessary, I would also argue to this
5 Court very strenuously that there is a need for the
6 defendant to make his record, and it was not done in this
7 case.

8 On that basis, unless there are further questions,
9 I would conclude my argument.

10 QUESTION: Thank you, Mr. Travis.

11 Mr. Lane, you have 3 minutes remaining.

12 REBUTTAL ARGUMENT OF ROBERT L. LANE

13 ON BEHALF OF THE PETITIONER

14 MR. LANE: Your Honor, I would respectfully submit
15 to this Court that this record is actually stronger than the
16 record made by Mr. Batson. We have in this case 7
17 peremptory challenges out of 10 used to exclude blacks from
18 this jury. Defense counsel, without refutation by
19 prosecutor or by the court, said that what the State is
20 trying to do is to remove all blacks from this jury.

21 Second of all, addressing the criminal statute,
22 18 U.S.C. 243, that statute has its foundation, its basis
23 in the Equal Protection Clause. The statute was designed
24 to implement those goals of the elimination of racial
25 discrimination.

1 Thirdly, this Court --

2 QUESTION: Was that relied on here, in this case?

3 MR. LANE: It was not raised in the trial level,
4 Your Honor, and again I would submit to the Court that this
5 Court has recognized in *Rose v. Mitchell* that that is an
6 ineffective way of eliminating racial discrimination.

7 Now, we did cite that statute in our analysis of
8 *Peters v. Kiff*. We cited it in the lower courts, and we
9 talked about it here. But this Court has recognized that
10 that criminal statute will not eliminate racial
11 discrimination. That statute has been on the books for well
12 over 100 years, and as this Court has recognized, racial
13 discrimination still continues.

14 And I would submit to this Court that unless every
15 defendant, regardless of race, is granted standing to object
16 to the prosecution's use of racial discrimination in
17 selecting that defendant's jury, that racial discrimination
18 will continue in this country. And that is a situation that
19 this Court cannot condone nor tolerate.

20 Thank you.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lane.

22 The case is submitted.

23 (Whereupon, at 2:46 p.m., the case in the above-
24 entitled matter was submitted.)

25

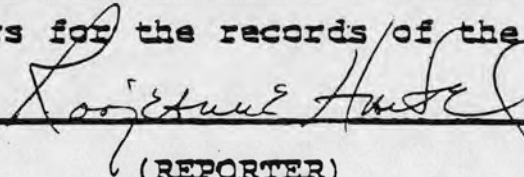
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