OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: THADDEUS DONALD EDMONSON, Petitioner V.

LEESVILLE CONCRETE COMPANY, INC.

CASE NO: 89-7743

PLACE: Washington, D.C.

DATE: January 15, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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THADDEUS DONALD EDMONSON, :

Petitioner :

v. : No. 89-7743

LEESVILLE CONCRETE COMPANY, :

INC. :

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Washington, D.C.

Tuesday, January 15, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JAMES B. DOYLE, ESQ., Lafayette, Louisiana; on behalf of the Petitioner.

JOHN S. BAKER, JR., ESQ., Baton Rouge, Louisiana; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-7743, Thaddeus Donald Edmonson v. Leesville Concrete Company, Inc.

Mr. Doyle.

ORAL ARGUMENT OF JAMES B. DOYLE

ON BEHALF OF THE PETITIONER

MR. DOYLE: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether Batson v. Kentucky applies in civil cases in the United States district courts. More specifically, the question before you today is whether, in a case in which a black man is a litigant, counsel for his opponent can use his statutorily granted peremptory challenges to remove blacks from the jury panel without any question or without any interference from the court. We contend that he cannot, and we suggest three reasons why such a practice is inconsistent with the dictates of this Court.

One is constitutional based upon an equal protection analysis. The other two are nonconstitutional issues, one statutory and one based upon the supervisory power of this Court.

At the outset, this Court should note the

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conflict among the circuit courts of appeals which now exists. As recently as last month, the Seventh Circuit Court of Appeals, in a case called Dunham v. Frank's Nursery and Crafts, which is cited in the reply brief, ruled in a case on all fours with the case before you today that Batson does apply in civil cases.

Prior to that ruling, the Eleventh Circuit had reached the same result in a case in which certiorari was denied by this Court. The Eighth Circuit has ruled that with respect to a governmental litigant the Batson rule does apply and does extend to civil cases. That case now awaits action by this Court on a petition.

In this particular case, the plaintiff filed suit as a result of injuries that he sustained while he was working on a United States Army base. The case was tried to a jury selected from a venire compiled in accordance with Federal law. The panel of 12 was ultimately chosen from 18 who were selected to sit in the box. Of that number -- of the 18, that is -- 3 were members of the black race.

Voir dire was conducted by the trial judge, and at its conclusion, the judge and counsel retired to the judge's chambers to exercise their peremptory challenges. At that point, counsel for the respondent exercised two of his three challenges against black jurors. And --

QUESTION: Is that the way it's done in that State, you go to the judge's chambers to exercise the peremptory?

MR. DOYLE: That was the practice of this particular Federal district judge, Justice Kennedy. He -- and they are done in writing. You will be given a sheet of paper and on that sheet of paper you will list by name the jurors that you are challenging and submit that to the court, who will then read the challenges on the record in chambers.

QUESTION: And the challenges for cause have been exhausted in open court?

MR. DOYLE: The challenges -- there was one challenge for cause in this case, and it was done in open court. That would be the routine that this judge did employ. Challenges for cause --

QUESTION: The routine he employed was that the challenges for cause were in open court?

MR. DOYLE: Yes.

QUESTION: And then the peremptory challenges were in chambers?

MR. DOYLE: Well, the peremptory challenges were made known in chambers. The effect of the challenges, that is, the excuse to the jury, was done in open court after the court reconvened.

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At the point at which the challenges were exercised by the respondent, I did object and cited the court to Batson v. Kentucky and argued that in that particular case, since there was a black litigant and since counsel for the respondent had exercise two of his statutorily granted strikes against members of the black race, that the equal protection basis of Batson was implicated.

The judge overruled my objection, refused to allow -- or refused to require, rather, the counsel for the respondent to voice a racially neutral reason for the objections or for the challenges that he had made and the case went back into the courtroom.

At that stage, the judge then called the jury back in the box, announced which jurors were being excused. Those jurors left the courtroom. The objection was once again raised to the court in open court, outside the jury's presence. It was once again overruled, and the case proceeded to trial.

We believe that Batson made clear -- this Court's opinion in Batson made clear that the Constitution prohibits all forms of purposeful racial discrimination in jury selection. The first panel, hearing this challenge in the court of appeals for the Fifth Circuit, agreed and ruled 2 to 1 for that proposition, extending Batson to

this particular civil case. But on en banc rehearing, that decision was reversed and the court ruled that equal protection was not implicated because of the absence of State action.

We contend that the fundamental error that the trial court made and the fundamental error made by the court of appeals sitting en banc was in not recognizing that Batson was -- should be extended to civil cases, and in refusing to require the judge to conduct the hearing which Batson would mandate. The fact that that hearing was not conducted in this case requires a reversal and a remand so that the hearing can be conducted to determine whether the challenges were racially exercised or exercised for some other reason.

The first argument that we will address the Court's attention to is the constitutional argument. Any trial in a Federal courtroom is a public function, whether it's civil or criminal. It takes place on Government property, presided over by a Federal officer in the case of jury trials by using citizens who are pulled compulsory -- with the compulsory process of the Federal courts in to the courtroom, who are sworn as officers of the court, for that purpose to render a decision in the dispute among the parties.

Those jurors are selected in accordance with

Federal statute. They are summoned by having their names first placed on a jury wheel, which is made up by Federal officials. They are paid with Government funds. And they're protected by the same statute from force and intimidation which applies to the Federal judge who sits on the case.

QUESTION: This is essentially Judge Rubin's approach --

MR. DOYLE: Yes, sir.

QUESTION: -- in a panel decision anyway, isn't it?

MR. DOYLE: That's correct, Justice Blackmun. It is.

QUESTION: Mr. Doyle, I suppose if it's a constitutional argument you're making, you would apply equally to state courts?

MR. DOYLE: Yes, sir.

QUESTION: So if a State court did its business in a different way than a Federal court, that wouldn't make any difference?

MR. DOYLE: The State court would be bound by the same equal protection considerations. If Batson applies in State courts, it would apply the same way that it does not in State criminal prosecutions.

QUESTION: I also assume it wouldn't -- would it

just apply to racial discrimination? Wouldn't it apply to discrimination on any other grounds?

MR. DOYLE: We take the position, Justice Scalia, that Batson should be adopted as Batson now exists. If Batson is later extended to groups other than race, then it would be extended likewise into the civil area.

QUESTION: Um-hum, um-hum.

MR. DOYLE: The first question we submit that should be addressed is whether those who participate in an inherently governmental function, that is, selecting a jury that is going to try and hear a case in a Federal courtroom, engage in governmental action during this process. We believe clearly that they do. The only distinction that can be drawn between persons who compile and select the names for the jury wheel and the lawyer who ultimately makes the decision of who he's going to sit on the jury by the exercise of peremptory challenges is who pays them their salary. The private lawyer is paid by his client; the governmental official is paid by the Government. But their decisions have impact on who ultimately sits on the jury in the same fashion.

We believe that the participation of a private lawyer, utilizing the authority granted to him by Federal statute, is just as much a public function as any other

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such authority granted to a private individual to intervene in governmental processes. We believe it's not materially different from a decision, if one were given to a private person, from hiring a bailiff or a clerk who would work on the same court's staff.

QUESTION: What about the decision not to have a jury at all? I mean, you have an option to have a jury -- you waive your right to a jury trial. Is that the Government -- is that the Government depriving the other side of a jury in terms --

MR. DOYLE: No, that's a joint decision made by two private parties.

QUESTION: Why -- how do you shift back and forth? I mean, if the lawyer is in effect the Government whenever -- whenever he's making a decision involving the jury, it seems to me he's always the Government when he's making that decision.

MR. DOYLE: I think, Justice Scalia, that the decision that he makes when he selects a jury is different from the decision that he makes in other aspects of the trial. And it's different for this reason. It's inherently governmental, because it involves the selection of governmental officials. Jurors are, for all intents and purposes once they're seated to try a case, governmental officials.

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QUESTION: So he decides I want my client tried by a judge instead of by a jury?

MR. DOYLE: That's right.

QUESTION: He's selecting the official.

MR. DOYLE: Well -

QUESTION: He's acting as a -- as the Government then. That's a Government decision?

MR. DOYLE: I don't think that would be a Government decision in the same way, because he can't pick the judge. The judge is there.

QUESTION: Well, but he can pick either judge or jury.

MR. DOYLE: That's correct. He can make that decision, but I see it --

QUESTION: And you say that's the Government -- he's making that as a governmental decision then?

MR. DOYLE: Not when he picks the judge -- not when he decides not to have a jury. I think that the --

QUESTION: So it would be okay for him to say, well, in this district I think the jury is likely to be black and I know we have a white judge on the docket, and therefore, I'll waive the jury trial. That's okay, because that's not a governmental decision.

MR. DOYLE: What I'm suggesting to you is if he makes that decision, he not discriminating against black

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jurors --

QUESTION: So it's okay?

MR. DOYLE: It's okay, because it's not -- it doesn't address the same point that's addressed in Batson. It doesn't have the same dynamics. It doesn't have the same parties who are harmed. It doesn't have the exclusion of jurors, which is one of the focuses of Batson, and also this Court in Holland v. Illinois.

QUESTION: I think it excludes every one of them -- every one of the jurors -- every one of them.

MR. DOYLE: But if there's no jury trial, they haven't yet been called. They haven't been called into the courtroom and said, well, we see who you are. We see that you're all black, so we're going to waive the jury and we're going to proceed without you.

QUESTION: What if they had been called into the courtroom, and the plaintiff at the last minute waives a jury trial as having looked at the veniremen, so to speak?

MR. DOYLE: I still don't think at that point it would be the same as in Batson, Mr. Chief Justice, because at that point, the stigma which applies to the individual jurors of the minority race is not yet attached. The jury in its entirety is being waived at that point. The jury in its entirety is being discharged. That doesn't connote the same racial distinction in the analysis which would be

made under a Batson rule.

QUESTION: Mr. Doyle --

MR. DOYLE: Yes?

QUESTION: -- in California the -- each party is entitled to recuse the judge -- you can made that motion only at one point -- in the State superior courts. Suppose that a judge was recused because of his or her race? What result?

MR. DOYLE: I believe that would have the same effect constitutionally, because it would still be the selection of a governmental official. So following that analysis, I would have to agree that that would be prohibited by the equal protection analysis of the Constitution -- if it were made for solely that reason.

I don't want to get beyond the narrow focus of this case. I'm not suggesting, Justice Kennedy, that there is never a circumstance where a white litigant could not successfully challenge a black juror. The only reason he can't challenge him, in this case we offer for your consideration, is for a racial reason. So the same analysis would apply equally to the judge it seems to me. If that right is given to the lawyer in the California courts, then it would be given in no different fashion than the passing over to the litigant -- to the lawyers representing the litigants, the right to pick the

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governmental officials in a jury trial.

I want to address, if I might just a moment, the questions which are presented by two cases this Court has decided on the issue of State action, Lugar v. Edmonson Oil and Tulsa Professional Collection Services v. Pope. Those cases set forth a two-prong test to determine whether State action exists. Judge Rubin, in analyzing it for the original panel opinion, believed that that test was met. The en banc majority's decision that it -- that Batson would not be extended -- turned on their analysis that the test was not met. All parties concede, however, that the first prong is clearly here, because the exercise that the peremptory challenge is an exercise made pursuant to a governmental grant of authority.

It's the second part of the test which needs to be addressed by this Court in this analysis and was addressed below. That is whether the otherwise private actor, the lawyer involved, acted with the significant assistance of public officers and officials.

Lugar particularly speaks of joint participation of private parties and governmental officials in an equal protection, due process context. Here the private counsel was performing his inherently governmental function, selecting the jury, together with the marshal, the jury officer who selected the jury wheel, the judge, and the

bailiff. Picking a jury then is a series -- is not a series of isolated procedures, but it's a continuum, and any stage in the process can lead to a result not allowed by law.

QUESTION: Well, Mr. Doyle, is your identification of the private lawyer as a part of a Government operation consistent with our decision in Dodson against Polk County?

MR. DOYLE: I think it's a different case from Dodson, Mr. Chief Justice, because in the Polk County v. Dodson case, the only issue reached was whether the public defender acted under color of State law in section 1983. And as Justice White pointed out in the Lugar case, the issues of equal protection were never addressed in Polk County. And it did not foreclose the possibility that that --

QUESTION: Do you think it's different -- that the Government action can be different for one constitutional provision than for another?

MR. DOYLE: No, sir. I think, Mr. Chief Justice, that the -- that whether governmental action is present is different depending upon what the person who is asserted to be a State actor is doing. I think that some of the functions that the public defender could have performed in Dodson would be inherently governmental and

some not. So I think that's the distinction.

QUESTION: Like picking the jury?

MR. DOYLE: Picking the jury if it -- if you accept as a hypothetical premise that the Batson equal protection analysis would apply to a public defender in a defense context, and I'm not reaching that point. But if you do accept that, then certainly, if that public defender engaged in a discriminatory jury strike, she would have been engaging in State action.

QUESTION: Mr. Doyle, under your view, in a private, civil action on behalf of, let's say, a plaintiff who was black, would the plaintiff's exercise of peremptory challenges against white perspective jurors be similarly suspect and open to challenge under the Equal Protection Clause?

MR. DOYLE: Clearly it would under the Equal Protection Clause if that is the limited focus of the analysis. If another provision -- the equal protection analysis is the broadest sweep of the argument that I'm making, Justice O'Connor.

To jump ahead just a moment, if, for example, the Court were to determine --

QUESTION: But on your argument then, your client's own peremptory challenges would be open to the same attack?

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MR. DOYLE: Certainly, if they met --

QUESTION: In this case?

MR. DOYLE: Certainly, they would have been, if they met the same Batson analysis. If they met the same Batson burdens of proof, they would have been open to challenge and I would have been required to voice a racially neutral reason for striking the white jurors.

QUESTION: Mr. Doyle, it would also -- it would also follow, would it not, if we accept your equal protection argument that even the peremptory challenges of a defendant in a criminal case. Let's assume you're being prosecuted for a crime that has allegedly a racial motivation and as the defendant you seek to strike people of the -- what you consider the antagonistic race from the jury. That would be no good either in a criminal case.

MR. DOYLE: Well, if the sole focus of the argument is equal protection, yes, that's true. But the criminal defendant may have other avenues available to him, Justice Scalia, with which I am not particularly familiar which might arise under other constitutional provisions. But if the analysis is solely limited to equal protection, it would certainly be correct.

QUESTION: So that even if, let's say, a black defendant thinks that he's -- whether he thinks it rightly or wrongly -- he's not going to get a fair shake from

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white jurors in a particular county, he can't strike them just because they're white?

MR. DOYLE: Well, I think that's clearly the result under an equal protection analysis, and it's no different from that which was reached by the -- by the New York courts in People v. Kern, a case which is cited in our brief, the Howard Beach case. It's the reverse. It was a white defendant striking black jurors, but it was the same result.

QUESTION: The same result with male and female?

MR. DOYLE: Batson's not reached that issue. It would depend on whether Batson goes that far or not.

QUESTION: Should it?

MR. DOYLE: Well, I think there are certainly every -- there is certainly every valid reason to suspect that at least in particular kinds of cases the exercise of peremptory strikes on gender-based discrimination would be just as invidious as the exercise of strikes based on race discrimination, particularly -- let's take, for example, the sexual harassment suit. It would not be consistent with what this Court has said about the enforcement of the civil rights of individuals to allow a woman to go to trial in a sexual harassment suit, but yet allow her opponent to be able to strike every woman from the jury if that were available. So, I would suspect that it would,

although this Court's never reached that point.

QUESTION: What if all the litigants in a civil case such as -- were white? Is there still a Batson objection to the striking of a black venireman from the jury?

MR. DOYLE: Under the rulings of this Court, not yet. At least I don't think that it would be. I don't think that it's been extended that far. In an equal protection context I suppose the question would always arise, Mr. Chief Justice, whether the inherent right to a jury selected using race-blind criteria, overrides other considerations such as standing. But I think in such a circumstance the white defendant would certainly have to show some injury in fact which resulted to him.

Continue with the analysis of Lugar v. Edmonson, I should point out that one part of it I think is particularly appropriate here. The analysis which was made of what the underlying court of appeal had done there contained this phrase which this Court believed was a more restrictive test. A private party acts under color of State law when there is a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer has been compromised to a significant degree. Now, that more restrictive view was not adopted by the Court in Lugar, but it's particularly

appropriate to look at here because if the judge is the enforcing officer of the right, it's hard to imagine more restrictions that could be placed on him than to say, as the respondent in the en banc majority did, that he has no discretion, that he can do nothing else but excuse the juror.

QUESTION: Are you -- do you say that the defendant is raising the rights of the jury not to be stricken or is it his own equal protection --

MR. DOYLE: I'm sorry, Mr. Justice White. Do you mean my client in this case, the plaintiff? The plaintiff in this case has cited in Batson v. Kentucky and meets the test first met under Batson. He's a black litigant; black jurors were stricken. Along the way it has to be recognized that Batson does include within the zone of protection, the black jurors. If you're asking me whether I specifically made that objection, no I did not.

QUESTION: You haven't answered my question yet.

MR. DOYLE: I'm sorry.

QUESTION: What is your view of whose equal protection rights are at issue in this case?

MR. DOYLE: I think my client's.

QUESTION: I mean some of the jurors or the -- your client?

MR. DOYLE: I think my client's equal protection

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rights are at issue in this case?

QUESTION: How is he being denied equal protection?

MR. DOYLE: Because peremptory strikes were used to challenge and remove from the jury members of his race --

QUESTION: And why does that --

MR. DOYLE: -- and effectively in this --

QUESTION: Why does that deny him equal protection?

MR. DOYLE: Well, effectively in this case -- well, they denied him the right to an impartial jury in the same fashion --

QUESTION: Well --

MR. DOYLE: -- that the Batson defendant was denied.

QUESTION: Well, then you shouldn't have qualified your answer to Justice Kennedy about the white fellow.

MR. DOYLE: I see your point. I think the injury in fact here, though, is that Mr. Edmonson, a black plaintiff -- a black litigant, was deprived of a chance to have a jury that contained black members effectively.

QUESTION: Well, now why does that deny him equal protection?

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MR. DOYLE: Well, ever since --

QUESTION: Is there some notion that they might favor him in it?

MR. DOYLE: Well, I think that no --

QUESTION: That just because they're black they'd favor him?

MR. DOYLE: I think the notion is, Justice White, the same as announced in Peters v. Kiff and in Strauder.

QUESTION: Well, you tell me what it is.

MR. DOYLE: I think the notion is very specifically that a jury selected using racially discriminatory criteria is not an impartial jury or at least the inferences are that it is not an impartial jury.

QUESTION: Okay, that hasn't got anything to do with whether the person who's been rejected is white or black.

MR. DOYLE: Well, that --

QUESTION: If -- as long as it's on the basis of race.

MR. DOYLE: That's right. That would not have that -- have that cache I suppose.

QUESTION: When you talk about an impartial jury, that sounds more like the Sixth Amendment rather --

MR. DOYLE: Seventh -- or Seventh, yes, sir.

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QUESTION: Seventh Amendment.

MR. DOYLE: And we're not making that argument.

QUESTION: Yes.

MR. DOYLE: But I think --

QUESTION: Well, you just did. I thought you just did.

(Laughter.)

MR. DOYLE: Oh, I'm sorry. Well, what I'm suggesting is that I believe that the cases, particularly Peters v. Kiff and Justice Marshall's opinion, are directed towards the method of selection of the jury.

QUESTION: So that was just a plurality, wasn't it?

MR. DOYLE: Yes, sir, it was.

If I could move on just briefly to my other two?

QUESTION: I'm still interested in where you finally settle down as to whose equal protection rights are at issue here. Is it that -- is it your client's?

MR. DOYLE: I think they both are at issue. I didn't mean to give you --

QUESTION: Well, is it -- but including your client?

MR. DOYLE: But including my client.

QUESTION: And still -- now tell me, again, what equal protection right of his is denied.

MR. DOYLE: The right to have a jury selected using race-blind criteria.

QUESTION: And why is that a denial of equal protection?

MR. DOYLE: Well, because --

QUESTION: Because it -- because otherwise he's denied a right to have Negroes on the jury because they might favor him or --

MR. DOYLE: Well, I think that perhaps the converse of that is correct. As this Court said in one occasion, a Negro who confronts a jury, upon which no Negro is allowed to sit, might very well conclude that the system which discriminates against Negroes would discriminate against him. And I think that's the equal protection right -- the right of fairness, the right of evenhandedness, if you will.

QUESTION: Why don't you just say you could -- he's -- that your client's entitled to press the equal protection rights of the jurors?

MR. DOYLE: Oh, he is. I didn't mean to indicate to you that I didn't think he was. I think that is a part of Batson. What I suggested to you is that I did not specifically invoke that necessarily at the trial level, although I did quote the portion of Batson which speaks about injury to the community at large and to the

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system of justice.

QUESTION: You're not relying on any notion based on the proper cross-section of the community?

MR. DOYLE: No, sir.

QUESTION: Why?

MR. DOYLE: Because this Court has never extended the cross-section requirement to the petit jury, and we have not pursued that in this case.

QUESTION: What do you say about excluding members of the defendant's race or the plaintiff's race is the same for a lot of other things. I mean, he could come to the conclusion -- let's assume he's a -- the plaintiff is a postman and the defendant strikes all postmen from the venire, he's going -- I guess he could make the same statement. Any system that discriminates against postmen is going to discriminate against me, cause I'm a postman.

MR. DOYLE: Well --

QUESTION: Or almost anything else, right?

MR. DOYLE: Well, he might, but not every kind of discrimination, Justice Scalia, is reachable by the dictates of the Constitution. Racial discrimination --

QUESTION: By the Equal Protection Clause, certainly.

MR. DOYLE: Well, in the jury selection context, in the narrow confines of this case, the Batson --

QUESTION: Can I treat postmen differently for purposes of the Equal Protection Clause?

MR. DOYLE: Well, I --

QUESTION: Postmen don't get any -- postmen pay higher taxes?

MR. DOYLE: I cannot concede, Justice Scalia, that any decision based on the line of cases which I have cited to you here would involve anyone other than a discrete and insular minority, the quotation from the old civil case. I think that it has to be a discrimination which is going to be characterized as invidious. I'm not sure that a postman or other employment-based discrimination might be. As a matter of fact, Thiel is a pretty good example of that, because in Thiel no constitutional provision was ever implicated. The supervisory authority of the Court was used to invalidate the jury selection process.

QUESTION: But there's nothing any more invidious about striking a member of my race on the theory that he's more likely to vote for me, which is probably the basis on which it's done if that was the motive, than there is striking somebody from my occupation --

MR. DOYLE: Well, in this case --

QUESTION: -- a professor or a judge or anything else. What -- why would anyone in his right mind think

that's invidious?

MR. DOYLE: Well, I can only answer and respond, Justice Scalia, by saying I think race is treated differently, and I think these cases all spell it out. Racial discrimination is what should be prohibited and eradicated from the jury selection process. The same has not been said about postmen or other occupational areas.

If I might in closing just say one final thing in conclusion, Mr. Chief Justice. This case is not just about my client, Thaddeus Edmonson, or about Mr. Baker's --

QUESTION: Before you say that, may I just ask this one question?

MR. DOYLE: Yes, sir.

QUESTION: You've devoted your entire argument to State action.

MR. DOYLE: Yes, sir.

QUESTION: Is State action essential in your view to prevailing on either the statutory ground or the supervisory power ground?

MR. DOYLE: No, sir.

QUESTION: It isn't.

MR. DOYLE: As a matter of fact, specifically --

QUESTION: But you think we should address the constitutional ground before we address the other two, is

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that --

MR. DOYLE: No, sir. I didn't have time to get to it, Justice Stevens, and I apologize for that.

QUESTION: You didn't get time to get to the first argument -- your first two arguments?

MR. DOYLE: But I do believe that this Court should follow its prudential practice. The narrowest decision the Court could make would be one based on the statutory analysis, including section -- the 1866 Civil Rights Act, which is solely based on race. The supervisory authority would also be very narrowly exercised because it would only apply to the Federal courts, and the broadest would be the equal protection balances.

And in conclusion, Mr. Chief Justice, as I was saying, this case is not just about the right of my client, Mr. Edmonson, or about Mr. Baker's Leesville Concrete Company. This appeal also concerns two men who are not represented by counsel and are not here today, Willie Combs and Wilton Simmons. They are the two black jurors who were excused from jury service by Judge Vera. We don't know much about Mr. Combs and Mr. Simmons. We don't know much about them because respondent's trial counsel saw no need to ask any questions before he challenged them as jurors. We don't know where Combs and

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Simmons were born. We don't know where they were educated. We don't know whether they would have been fair. We don't know whether they would have been partial. But we can be sure that July 27th, 1987, the day that jury selection took place, was a special one in their lives.

For many people in this room, jury selection would be an inconvenience. But for a black man or woman in Louisiana the right to serve as a juror is as new and a -- as great an honor as the right to vote. Mr. Combs' parents and his grandparents could not have served on the jury in Louisiana, not because they weren't fit or qualified or competent to do it, but because they would not be allowed to do so because of the color of their skin.

On that July day in 1987, Willie Combs and Wilton Simmons entered the Federal courthouse in Lake Charles, Louisiana, believing that times had changed. They were confident that justice in a Federal courtroom would be guided by the promise made in this city 25 years ago, that they would be judged not by the color of their skin, but by the content of their character. And we urge this Court to keep that promise.

I'd reserve the remaining time for rebuttal.

QUESTION: Very well, Mr. Doyle.

Mr. Baker, we'll hear now from you.

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ORAL ARGUMENT OF JOHN S. BAKER, JR.

ON BEHALF OF THE RESPONDENT

MR. BAKER: Mr. Chief Justice, and may it please the Court:

This Court should affirm the en banc decision of the Fifth Circuit basically for two reasons. First of all, there has been no showing of State action in this case which is absolutely essential for any equal protection claim. And secondly, unless the congressional statute is unconstitutional, it should be given effect as written.

Mr. Doyle has raised, but not been able to argue, other issues that are non-constitutional in origin. These issues were not raised in the lower courts, and I suggested before and I think I should emphasize again that the reason these issues are being raised now is because of the difficulty of the hurdle of State action in this case. And while Mr. Doyle has said that he was not raising a cross-section challenge or he was not raising a Seventh Amendment argument, the fact of the matter is that his argument runs together the issues under the Equal Protection Clause and the issues that have been raised previously and rejected by this Court under other amendments to the Constitution.

Under State action, few would normally think

that the actions of a private attorney in the course of litigation within the courtroom constitutes State action. In this case, however, there has been the development of the argument that the actions of the attorney constitute State action. But the extent to which there is the expansion of State action as a concept, I think is reflected by Mr. Doyle's discussion of jurors as governmental actors.

There is, as we know, the potential within some of the State action cases to expand it to the point where virtually anything and everything is State action. It is true that an attorney is an officer of the court. But as previously mentioned, Polk County, involving a public defender, was fairly clear that normally the actions of a public defender within the courtroom do not constitute State action. So insofar as we are looking at the private attorney in the courtroom, you wouldn't normally find State action.

And I think it was the weakness in that argument --

QUESTION: Not that the county didn't involve the selection of a jury?

MR. BAKER: That's true. It didn't, Your Honor. And that's why we have to focus on exactly what the issue is here and that's where I was going to next, where we

have the invocation, especially in the Eleventh Circuit opinion by Judge Wisdom, which focuses not on the action of the attorney but focuses on the action of the judge.

That is because of the inherent weakness of focusing on the attorney as the sole point for identifying State action.

QUESTION: In Terry v. Adams, the white primary case, we focused on the actions of the members who were voting in the straw poll, did we not?

MR. BAKER: Yes, but they --

QUESTION: Initially?

MR. BAKER: Sure, but we --

QUESTION: And we then said that if this straw poll is, as a matter of custom and practice, simply a necessary predicate to State action, that we were going to treat it as a State action. It seems to me there's a very close parallel between that case and a case where, as a matter of custom and practice and State law, and in this case Federal law, peremptory challenges are used by the attorneys who are, quote, "in a private capacity" in order to make a determination that has official consequences.

MR. BAKER: I think that in all of the State action cases, Your Honor, there is always this problem of identifying what the actual actor is actually doing.

Now, in a number of cases where the action is

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one that is itself is normally conducted by the State, which is assigned, delegated, controlled, dictated, or anything else, where there is some kind of a relationship between the State and the actor, not merely by way of physical connection, but by way of something that is intentional. And if you're conducting a function of a sate -- of the state that is otherwise conducted in an election -- if you are conducting a function that is delegated by statute, that is coerced, that is directed, then the cases have in fact attributed that kind of action to the State.

Now, that's not the situation here when the judges -- when the judge in his capacity is involved in the --

QUESTION: (Inaudible). In this case, unlike Terry v. Adams, the State has acted in order to cull the jurors. The State has, from a chronological standpoint, begun its formal processes even before the attorney's peremptory challenge is exercised. So this in a way is even an easier case than Terry v. Adams, isn't it?

MR. BAKER: Well, I don't think it is in the context of your own decisions regarding the whole line of cases on jury discrimination. First of all, until Batson, there was a very clear line between the venire cases and the petit jury case.

Now, Batson changes that line, certainly at least as to the prosecutor. And we are talking about prosecutorial action within the petit jury. But the Court came back in Holland v. Illinois and made it very clear that the standards that control, generally in the venire cases, do not, therefore, necessarily carry over to bring the cross-section standards and other things into the jury. So we have to focus on exactly what is being done here by the judge.

The judge is, at this point -- what is he doing? The judge is a State actor. There's no doubt about it. But it's not his action that's in question. The action in question is the decision by the attorney. The judge is not telling the attorney what to do. The attorney is acting under a statute -- a Federal statute -- which is neutral on its face. The Federal statute gives the trial judge no discretion in regard to the exercise at least of the three peremptories. The judge is not involved in making any kind of a judgment here. The attorneys are not acting on his direction or anything else.

What is really at stake -- what the real quarrel is with is not with the judge. It is with the system. It is with allowing the peremptories. But there hasn't really been a direct frontal attack on the statute itself. If you look at Judge Rubin's dissent for instance in the

en banc opinion, he says, nevertheless, if not constrained by Batson, the rules governing peremptory strikes vest absolute discretion in the parties. The State thereby guarantees the effect of an objection to seating an otherwise eligible juror by allowing no other to object.

QUESTION: Counsel --

MR. BAKER: That's a quarrel with the statute. Excuse me, Your Honor.

QUESTION: Where did the peremptory come from?

MR. BAKER: It comes from Congress, Your Honor.

QUESTION: And at -- Louisiana enforces it?

MR. BAKER: This is a Federal statute, Your Honor. We're talking about in a Federal district court.

QUESTION: Yeah, I know. But the peremptory is in Louisiana and the State courts, too, isn't it?

MR. BAKER: Yes, Your Honor.

QUESTION: And there's a difference (inaudible) between the two.

MR. BAKER: But --

QUESTION: So if you say that it's State and not Federal, you're still stuck, aren't you?

MR. BAKER: Well, Your Honor, if this case is decided on constitutional grounds, it certainly has application to the State. But as Justice Rehnquist, I think, pointed out, procedures may vary between a State

and a Federal court. And in fact they would between a Federal court in Louisiana and a State court.

QUESTION: Are you going to get to Shelley and Kraemer?

MR. BAKER: I'll be happy to address Shelley and Kraemer. I think that that -- Shelley and Kraemer is a very different situation. The judge is a State actor and a State action was attributed to him. But, Your Honor, in that case what you argued, there was in the restrictive covenant on the face of it, before the court, all the evidence of the discrimination, one. And two, the restrictive covenant had no force of law until it was enforced by the court. And in fact, when it enforced it, it was denying the right to property that was already in existence, because we had a willing buyer and a willing seller in that case.

QUESTION: That was the law before Shelley.

MR. BAKER: I'm sorry, Your Honor?

QUESTION: That was the law before Shelley. That was the District of Columbia case, Butler.

MR. BAKER: Yes, Your Honor.

QUESTION: But Shelley destroyed that, didn't it?

MR. BAKER: Yes, Your Honor.

QUESTION: Did Shelley say the judge was enough?

MR. BAKER: Yes, Your Honor. But White had said --

QUESTION: And we have a judge here.

MR. BAKER: Yes, but the judge --

QUESTION: And why isn't that enough?

MR. BAKER: It wasn't just the judge was enough, Your Honor. The judge was acting and enforcing --

QUESTION: Well, who could enforce this other than the judge?

MR. BAKER: Your Honor, in a State court you wouldn't need the judge to enforce it.

QUESTION: Who else would try to enforce it?

MR. BAKER: Your Honor, the judge is there and presides over the trial, and to that extent, he governs everything in the trial. There is no question about that.

QUESTION: But that --

MR. BAKER: We're asking, Your Honor, about the action to make the choice. The choice of who is challenged peremptorily is not the choice of the judge. That is the choice --

QUESTION: That's right.

MR. BAKER: -- of the attorney.

QUESTION: But the judge enforces it.

MR. BAKER: The judge is enforcing the statute. The judge in no way is involved --

QUESTION: He enforces the statute, the Federal statute.

MR. BAKER: He enforces the Federal statute. There is no challenge here to the constitutionality of the Federal statute. That may be where the real quarrel is. But unless the Federal statute is itself unconstitutional, it ought to be implemented. But there has been no, at least direct, challenge on the constitutionality --

QUESTION: May ask on the question of the judge's participation, the Seventh Circuit opinion, as I understand it, makes the argument that the judge does have an input into the preemptive challenge process, because he can decide which side challenges first, whether there shall be a writing done simultaneously. He has control over the size of the panel from which they're made. So he does have some impact on the way in which the peremptory challenge is exercised. Do you have any comment on that?

MR. BAKER: Well, Your Honor, the peremptory is part of the overall process in which the decision on voir dire, whether it is to be done by the judge or whether it's to be done by the jury. On certain matters the judge has discretion, Your Honor. And in those matters he is making a choice. But if we're going to look at the specific action that is challenged, that is the choice on who is to be stricken. The judge does not make that

choice, Your Honor. The statute doesn't give him that choice. And the nature of a peremptory challenge is that he doesn't and can't make that choice. We have to focus on whose action is --

QUESTION: He can influence -- of course, he can influence that choice in some ways by the way he rules on challenges for cause. If he takes a very strict view, he may require the parties to use more peremptories and that sort of thing. I mean, he does have a part in that decision-making process, even though you're absolutely right, he does not make the decision.

MR. BAKER: But, Your Honor, the judge has -- courts have influence on all kinds of things that we don't attribute State action to or governmental action to because of the decisions of courts.

QUESTION: What about our case involving the probate court? Do you remember --

MR. BAKER: The Tulsa case.

QUESTION: Yes.

MR. BAKER: You were very clear in that case, Your Honor, that you had a State statute that didn't give notice except through a private party. The function of notice was one that the State had to give. The person giving notice in that case was fulfilling a clear State function, and it had been delegated. Moreover, there was,

under the facts of the case, quite extensive -- the Court said pervasive -- involvement between that private actor and the State court itself. And if you read the language in the case, it seems to me that the Court did not back away at all from this prior distinction that the court itself has to control the actions.

Your Honor, if you take this idea that anything a court does to influence or allow is State action, then take the situation that this Court incidentally dealt with on First Amendment grounds, back from Skokie, Illinois, when you had a Nazi organization that wanted to march. And a court enforced the First Amendment and allowed them to march. Do you mean to tell me that that court is somehow endorsing what they did, because they allowed them to march?

I think you have to distinguish between --

QUESTION: It's endorsing their right to march --

MR. BAKER: Exactly.

QUESTION: -- which is preserved under the First Amendment.

MR. BAKER: That's right, but not the content. And right here --

QUESTION: Yes, but that was State action.

MR. BAKER: -- the judge is endorsing the

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congressionally created right to exercise a peremptory, not what is done in the peremptory.

QUESTION: Well, but the question is whether or not that consists with the Fourteenth Amendment, which is a constitutional clause which gives the juror an equal right. You don't contest for a minute, do you, but that the juror has a right to be seated without reference to his race?

MR. BAKER: If he has an equal protection right not to be discriminated against by a State actor. And if there is no State actor that has discriminated against him, he does not have a particular right to sit on a particular jury. He has rights to sit on juries under other provisions and in addition to the equal protection statute.

Moreover, Congress has gone much further and protected the rights of all citizens under the Jury Selection Act. In there -- in that act, they preserve the peremptory. Moreover, the peremptory in civil cases, as I noted in my argument, was created in Federal courts by the reconstruction Congress only a few years after the adoption of the Fourteenth Amendment. And what little legislative history we have on it, shows that the reason it was adopted was because of its concern about discrimination in the jury.

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Now, one can disagree as a policy matter whether the use of peremptories is a good idea or a bad idea, and it may be that Congress could or should change peremptories, eliminate peremptories. But unless the statute itself is unconstitutional, unless there is an equal protection violation, then there is no reason not to implement the statute as actually written.

The quarrel is --

QUESTION: Mr. Baker, I suppose the judge tells witnesses to step down, too. What if a counsel decides that a witness he's put on is antagonizing the jury because he sees it's a jury that seems to have racial biases. So, in order to increase his chances of winning the case, he tells the witness, after a first few questions, you may step down. And I suppose the judge tells the witness down. That would be quite analogous to this case, wouldn't it?

MR. BAKER: Your Honor --

QUESTION: The independent decision taken by a private individual on racial grounds but the judge enforcing it in the course of the trial.

MR. BAKER: Okay, but do we know that -- in your hypothet I didn't -- it wasn't clear. Is it clear to the judge, has it been announced to the judge by the attorney what his purpose is?

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QUESTION: No, no more than it is in a peremptory strike. He just says, you know, I'm done with this witness.

MR. BAKER: Well, there's no reason why he can't do that.

QUESTION: Even though the private party is -- the reason the private party is getting this witness off the stand is racial?

MR. BAKER: The judge doesn't know what the reason is. If an attorney says, I'm done with a witness, there's no reason not to excuse the witness.

QUESTION: Do you think it would be different if he said, Your Honor -- or he said to the witness, I think you're antagonizing this all-white jury and I'd rather not have you go on? I'm done.

MR. BAKER: Well, Your Honor --

QUESTION: Then could the judge -- the judge would have to say, no, you shall continue to cross examine or --

MR. BAKER: Well, what would he do if he told him to continue? I mean, he can't force the attorney to sit there and ask question, unless the judge is himself going to conduct the examination.

The --

QUESTION: That's why I'm not sure the

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distinction you draw between whether the judge knows about the racial reason or not is very satisfying one. I don't really think it makes too much difference whether he knows or doesn't know. The judge is either -- the lawyer who sets the thing in motion is either a State actor or he's not. I don't see how the judge's knowledge of his racial motivation can make a difference.

MR. BAKER: Well, Your Honor --

QUESTION: The effective actor is either the lawyer or the judge. If it's the judge, then the game's over, whether or not the judge knows of the racial motivation.

MR. BAKER: Judge, I think -- Your Honor, I think what is being alluded to in some of the other questions, however, on our -- the prior cases in terms of State action. I do think that apart from the courtroom situation by itself, if you look at the series of cases, that intentionality is often an element in this Court's past decisions in deciding whether there has been or has not been State action.

QUESTION: Well, you'd draw a distinction if -- let's assume you're in a State that has 15 peremptories and every single peremptory is used by the plaintiff to strike a black juror. Now, you need a pretty stupid judge not to figure out what's going on. In that situation

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then, you think the plaintiff here would be right?

MR. BAKER: Your Honor, in that situation if you had a statute that allowed that, you might have a claim against the statute. And that's been my point all along, Your Honor, is that I'm focusing on the statute insofar as an argument has been made about State action. If you're looking for State action, the one place to look is at the statute, and here there is not sufficient basis on the statute. There might be a way to construct an argument, Your Honor, regarding a statute that's so distorted the possibilities, that as applied it in a different case, you might argue that the combination constitute a State action. That's a different case, and I'm trying to distinguish it. All I'm trying to do at this point is to get and make very clear that this is not State action and those elements from a few cases that suggest that a judge's minor involvement constitutes State action, require, it seems to me, a distinction between the judge and what the judge is actually doing on -- at a particular moment and whether that action is, quote, "fairly attributable" to him, as we say under the standard in Lugar. And I don't think it is.

And the difference between this kind of a situation and the prosecutor, it seems to me, is great. The -- fundamentally, when you are talking about the

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prosecutor, who is clearly a State actor, and therefore, this Court didn't have to address that problem in Batson, you have someone who, historically, as shown in a series of cases, an effect that this Court took judicial notice of, had engaged in a course of conduct. And as Justice White said concurring in Batson, prosecutors didn't get the message. And the Court in Batson, therefore, came back against prosecutors.

Now, prosecutors stand in a very different position than the ordinary private attorney. The prosecutor is representing the public, and that's why we have both the issue as to the prosecutor of excluding the equal protection argument, both as to the defendant and as to the members of the jury. He isn't like a private attorney, whose primary obligation is to his client. He has a much broader obligation than that.

QUESTION: Would it make any difference if, in this civil litigation, the State were a party?

MR. BAKER: Your Honor, we have carefully distinguished the issue in this case by focusing on nongovernmental. That is, in this case, there is no --

QUESTION: I know you have, and I'm asking the question.

MR. BAKER: Your Honor, there are clearly other arguments that can be made. And the Eighth Circuit

focused only on governmental and distinguished their extension of Batson only to governmental.

Your Honor, I'm not in any way conceding that Batson applies in the case of a Government attorney. All I'm saying is that that is a different case involving more circumstances in which one might argue that there is a State actor. And as this Court has said over and over again, the issue of whether one is a State actor is a fact-bound determination. And those are different facts, that at least give a greater argument that you have a State actor than that we have in this case.

The statute that was enacted by Congress that is really the basis for the allowance of peremptory challenges is neutral on its face. As alluded to before as between the parties, it provides equal --

QUESTION: Mr. Baker, you've mentioned that statute. What about the earlier statute, though, that says in so many words, no citizen shall be excluded from service on a jury on account of race? If it were not for the peremptory challenge statute, which was enacted a few years later, would you agree that covered this case?

MR. BAKER: Well, Your Honor, in our brief, I think I went through and related the several statutes and how each related to the other, and I think you have reference to the -- do you have reference to the inclusion

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of the particular provisions of the jury selection statute?

QUESTION: 18 -- section 1862, yes.

MR. BAKER: No citizen shall be excluded from jury service as a grand or petit juror in the district court.

QUESTION: On account of race.

MR. BAKER: On account of race, yes, Your Honor.

QUESTION: Now, why doesn't that apply?

MR. BAKER: It seems to me that Congress has specifically set out the Jury Selection and Service Act that more specifically tells us how those principles apply. And Congress could have adopted the position that peremptory challenges are open to the possibility of discrimination, and therefore, could have eliminated them. Congress did not do so. Congress chose to preserve it. It's part of that act, and that act, it seems to me, implements that particular provision, because it provides for the inclusion.

In fact, that act goes far beyond anything this Court had done up until the enactment, because it provided for a much broader pool in the venire than this Court had required. By providing randomness in the venire, you increase the possibility that the attorneys will not be able to distort randomness or the cross-section as much.

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Because prior to the Jury Selection Act of 1968, Federal courts themselves were not a model, even in the venire, of the kind of cross-section that we have today, Your Honor.

So I think you have to look at it all in that context.

QUESTION: I'm not -- I must say I'm not quite clear I understand what the answer is to the -- to the text of the statute.

MR. BAKER: The State's not excluding anyone, Your Honor.

QUESTION: It doesn't say the State. That's the point of this. That's the reason I refer to the statute. It doesn't say it shall -- it doesn't say, shall be excluded by the State. It says, no citizen shall be excluded, I interpolate, by anyone from service as a grand or petit juror on account of race.

MR. BAKER: They're not excluded from service, Your Honor.

QUESTION: You mean if you're stricken in the peremptory, you're not excluded from service?

MR. BAKER: In that particular case, but you're not stricken from the venire. You come up for service again and again.

QUESTION: I see. Just service in that case. What it means is you'll not be excluded -- totally

excluded from all service as a jury -- juror.

MR. BAKER: I think if you read it in the context of its history and the other statutes, Your Honor, I think that that is in fact the case that's always been interpreted. I don't think before Batson that anyone would have thought that that applied to the notion of the peremptory challenges.

QUESTION: And indeed if you did apply it on a case-by-case basis, you wouldn't be able to strike rich people from the jury or -- which certainly happens quite frequently, I would think.

MR. BAKER: Your Honors, while peremptory challenges are not constitutionally required, they are a congressionally created right. They may not -- they may or may not be the best policy, but unless the statute itself is unconstitutional or unless there is a clear case of State action that involves, therefore, the Equal Protection Clause, the statute should be implemented as written. Because when Congress implemented this, it was doing it to protect the right of jury trial, and in Congress' judgment, it was the best way for the parties to ensure a fair trial.

Thank you, Your Honor.

QUESTION: Before you sit down, do you have any comment about supervisory power?

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MR. BAKER: Your Honor, again, that was not at all addressed below. The supervisory power is something that the Court has power to do, but again, I think you run into the issue of a congressional statute. We're not talking about the Federal rules, for instance, on the criminal side that are -- that come through the court and then go to Congress. We're talking about a statute that was passed by Congress, and it seems to me that supervisory jurisdiction would be inappropriate in this case because of a very clear congressional statute.

QUESTION: Would be inappropriate?

MR. BAKER: Yes, Your Honor.

QUESTION: So Congress can cut us off in that respect?

MR. BAKER: Your Honor, if there is a cut --

QUESTION: That's what you're saying.

MR. BAKER: Normally, congressional statutes are implemented unless they're unconstitutional, Your Honor.

QUESTION: Thank you, Mr. Baker.

Mr. Doyle, do you have rebuttal? You have 3 minutes remaining.

REBUTTAL ARGUMENT OF JAMES B. DOYLE

ON BEHALF OF THE PETITIONER

MR. DOYLE: Mr. Chief Justice, and my it please the Court:

I believe the supervisory authority argument was raised below, although not in great detail. We did cite Thiel v. Southern Pacific, and Mr. Baker's brief cited United States v. Leslie in the Fifth Circuit cases.

I want to make sure that my argument is clear. We're not suggesting that anything the judge does is State action. What we're proposing to you is a very narrow rule that says when a lawyer, with a significant assistance of a State official, racially discriminates in jury selection, he is engaging in State action. The judge is assisting him in that. It's unconstitutional per Batson and going back further than that, per Strauder and the cases.

QUESTION: Well, why is the judge assisting him in that any more than when he -- the judge tells a witness to step down?

MR. DOYLE: Because the selection of the person who is going to sit on the jury is a more material decision which is made. It's more inherently governmental --

QUESTION: Well --

MR. DOYLE: -- than who testifies in the case.

QUESTION: But that doesn't say why the judge is assisting him any more than in the other case. The degree of assistance is just the same. You may say it's a

different --

MR. DOYLE: Well, I suppose that's true, Justice Scalia, except that the lawyer can always say, I have no further questions, and then the witness gets off the witness stand, perhaps without the judge opening his mouth. Here, the juror is not free to depart until the judge gives effect to the peremptory challenge which is exercised by the litigant. So to the extent I think his power is more necessary.

QUESTION: If a lawyer makes an argument to a judge, asking for the judge's cooperation and the judge agrees with him, and that judge is later reversed and then the lawyer is sued. Has he been -- is he a State actor?

MR. DOYLE: No, sir. I -- again, I think that's a distinction --

QUESTION: Well, the judge is giving him an awful lot more cooperation and help than he is in this case.

MR. DOYLE: Well, I suppose that's true, Justice White, but I have a hard time conceiving how that can be a violation of either equal protection or due process, unless there's something --

QUESTION: (Inaudible) the question. Is he a State actor?

MR. DOYLE: Is he a State actor? No, he's not a

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State actor.

QUESTION: Well, why isn't he?

MR. DOYLE: Because --

QUESTION: On your approach in this case.

MR. DOYLE: Because I'm suggesting to you that not everything the lawyer does to ply his trade in court is going to be State action. Only those functions which are inherently governmental, such as selecting a jury, are going to be State action, which he can only do with the significant assistance of the sovereign. In your hypothetical example, he is plying his trade as a lawyer. He's not doing anything that has a constitutional implication, because he's not engaging in inherently governmental activity.

QUESTION: Well, here's a State-provided system to settle disputes in court rather than by force and that's -- if you want to collect some money from somebody, you don't beat him up. You come to court.

MR. DOYLE: Yes, sir. But the manipulation of the system, under due process guidelines, is, I submit, not the same thing.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Doyle.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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BY Rodney Hunter

(REPORTER)