OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GEORGIA, INC., Petitioner V. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM AND ELLA HAMPTON McCOLLUM

CASE NO: 91-372

PLACE: Washington, D.C.

DATE: February 26, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGIA, :

Petitioner :

v. : No. 91-372

THOMAS McCOLLUM, WILLIAM :

JOSEPH McCOLLUM AND ELLA :

HAMPTON McCOLLUM :

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Washington, D.C.

Wednesday, February 26, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

HARRISON W. KOHLER, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting the Petitioner.

ROBERT H. REVELL, JR., ESQ., Albany, Georgia, on behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 91-372, Georgia v. Thomas McCollum. Mr. Kohler.

ORAL ARGUMENT OF HARRISON W. KOHLER

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether the Constitution prohibits a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner. Respondents assert that under the facts of their case they have the right to use their peremptory strikes to excuse black jurors under the assumption that because these jurors are black they cannot be impartial in this case. The Georgia supreme court agreed, and held that the Constitution did not prohibit criminal defendants from racial discrimination in the exercise of peremptory strikes.

The State of Georgia submits that the Georgia supreme court is wrong. This Court has stated clearly that racial discrimination in the exercise of peremptory strikes violates the equal protection rights of the challenged jurors and harms the State's interest in

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maintaining public confidence in the fairness of judicial proceedings.

This Court has already held that prosecutors cannot exercise their peremptory strikes in a racially discriminatory manner. Civil litigants, neither plaintiffs nor defendants can do so. Criminal defendants should be similarly barred.

This Court has noted in a number of decisions that peremptory strikes are not of constitutional origin. They are creations of statute. If Georgia so chose it could summon jurors to the Court, conduct the voir dire to determine which of those jurors were partial, exclude those jurors, and require the State and the criminal defendant to go to trial without any peremptory strikes. I would submit that such a procedure would be constitutional.

Instead, Georgia has chosen to delegate to the criminal prosecutor and the criminal defendant significant State power to determine the composition of the jury. Under Georgia law in practically all felony trials 42 jurors are impaneled for jury service. The State has the right to exclude 10 jurors with peremptory strikes. Georgia has delegated to the criminal defendant power to exclude 20 jurors -- almost 50 percent of the jury panel.

QUESTION: That's in every criminal case, you

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get that number of peremptories in charges?

MR. KOHLER: Your Honor, in all felonies where the punishment is greater than 3 years, which includes almost every felony in Georgia, it is 20 and 10. As this Court has noted in Edmondson there is State action throughout the jury selection process.

In Georgia, county officials, jury commissioners compose the jury list, the Clerk's Office of the Superior Court sends out a summons directing the jurors to report in the courtroom, bailiffs who are deputy sheriffs of the Sheriff's Office escort the jurors to and from the assembly room to the courtroom, in the courtroom jurors in a criminal case are given up to three oaths -- these are all by Georgia statute -- and the second oath that is given to all 42 jurors on the panel is that they will truthfully answer the questions propounded to them, and then during the voir dire the judge requires that the jury answer those questions that are propounded to them by the attorneys in the case.

Once the voir dire has concluded, the peremptory strikes are exercised. After those strikes are exercised, it is the judge that directs the 12 jurors remaining these are the jurors you will serve in this case, you're directed to enter the jury box, and the other jurors are excused by the court generally to return to the jury

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assembly room.

QUESTION: So under Georgia law the attorneys can each voir dire each one of the jurors.

MR. KOHLER: Yes, Your Honor. There is a statutory right to individual voir dire of the jury. Now, the court does not have to sequester the other jurors separately from that. Generally the Court will empanel 12 jurors in the box but there is a statutory right to individual voir dire.

Jury selection in Georgia does go fairly fast. Not as quickly as the Federal courts, but in most cases a jury will be empaneled in two or three hours, even -- with the exception of a capital case. It is the State of Georgia's position that when a criminal defendant is exercising this State delegated power to exclude jurors from the jury, he is acting under color of State law. This is a right created by statute, and although the State may delegate this power to the defendant in the case, it is the position of Georgia that the State may not license the defendant to exercise these peremptory strikes in a racially discriminatory manner. It is also the position of the State of Georgia that the attorney general has standing to assert these equal protection rights on behalf of the jurors.

QUESTION: Mr. Kohler what do you do about our

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holding in Polk County v. Dodson that public defenders do not act under color of State law --

MR. KOHLER: Your Honor --

QUESTION: When they're representing a criminal defendant?

MR. KOHLER: Justice O'Connor, my reading of Polk County v. Dodson was that in the filing, or in that case the not filing of the notice of appeal the public defender was not acting under color of State law because he was performing a private act on behalf of the defendant.

It is our reading of Edmondson that when the criminal defendant or counsel is exercising that State-created power to exclude jurors, and the criminal defense attorney excludes them on the basis of race alone, that he is acting under color of State law. We are not asserting to the court that in every case defense counsel is acting under color of State law, but only in the exercise of the State-created power of peremptory strikes.

QUESTION: Well, that results in a rather peculiar distinction, don't you think?

MR. KOHLER: Your Honor, I would -- no, because I believe that what the State is asserting in this case is consistent with what the majority opinion in Edmondson. In that case, you had private litigants but this Court

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held that in the exercise I believe of three peremptory strikes they were acting under color of --

QUESTION: Well, of course, that wasn't my view, but I recognize that's the holding of the Court.

MR. KOHLER: Yes, ma'am, and we believe that the majority opinion does support the State of Georgia's position in this case.

QUESTION: Do you think if counsel in a criminal case excused a juror and the allegation was excusal was on the basis of race that there'd be a 1983 suit that could be brought against the counsel by the excluded jurors?

MR. KOHLER: Justice Kennedy, in theory, yes. As a practical matter, given the way jury selection works, I think it would be highly unlikely, but in theory yes, I believe the excluded juror would have the authority to bring a 1983 action against the counsel.

QUESTION: Absent the creation of some sort of privilege or immunity.

MR. KOHLER: Correct, if there were within the four corners of the courtroom that the defense counsel are immune from any damages, of course, in that case, that would prohibit it.

The attorney general is not representing a private party in the criminal prosecution, but the State has an interest in maintaining public confidence in

judicial proceedings. This interest is harmed when the public perceives that in a criminal case racial discrimination occurs in the exercise of peremptory strikes.

QUESTION: If counsel strikes -- if you win this case, counsel who is striking a black juror is going to have to give a reason.

MR. KOHLER: Yes.

QUESTION: And it's either going to be accepted or not.

MR. KOHLER: Yes, Your Honor.

QUESTION: And if it's not accepted, the juror's going to sit.

MR. KOHLER: Well, that's certainly one of the options that this Court --

QUESTION: Well, he's going to sit. I don't know -- you think a 198 -- either way, it seems to me it would be hard to bring a 1983 suit.

MR. KOHLER: Well, Your Honor, I certainly wasn't arguing for the practicality of it, and the obstacles might be daunting. Just as this Court pointed out in Powers, the ability or the obstacles to a juror's asserting his right is daunting, but yes, Your Honor, I would believe that if there were a prima facie case of racial discrimination, if the Court were to rule that the

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Georgia supreme court was incorrect, that the Court could require that defense counsel, just like he can the State, give a neutral nonrace-based reason for the exclusion of the black juror.

QUESTION: This trial here hasn't taken place, has it?

MR. KOHLER: No, Your Honor, it has not.

QUESTION: So that if you win the trial court when it does try the case would, as Justice White suggests I suppose, require that any challenge of a black juror by a defendant just as by the State be supported by a reason if the Batson test is met.

MR. KOHLER: Yes, Your Honor, that is our position exactly, that -- and again, the State has operated under the principles of Batson since 1986, and it has not prevented the State from empaneling impartial juries.

I would submit that two things have resulted from Batson from the prosecutorial point of view. One is I think a practical fact, as a matter of fact more black jurors serve on criminal juries.

The second is -- I think a practical result is that it has made prosecutors better at jury selection because it has forced us to make an individualized assessment of the jury as opposed to relying on some kind

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of racial stereotype as to the ideal State's juror or the ideal defendant's juror, so it's something that the prosecutor is able to accept. Civil litigants now have to do the same, and it's the State of Georgia's position --

QUESTION: Is there some feeling by prosecutors that Batson has generally hurt the prosecution --

MR. KOHLER: Your Honor, I --

QUESTION: Or do you know?

MR. KOHLER: I can't speak for myself. I've certainly talked with prosecutors about it. I certainly think there are some of us that feel that it is not, that as a matter of fact instead of making the assumption that the ideal prosecution juror in my part of the country is a white farmer who was in the Marine Corps, we would try to look at the specific juror and try to make an individualized assessment.

And I think in hindsight I can look back on my own jury selection in cases and I've tried a number of them where I feel I probably did not do a good job, and Batson has forced us to focus on what is significant in the case, and that is try to make as best we can an individualized assessment.

QUESTION: Do you get any substantial number of reversals on appeal because of claimed Batson violations?

MR. KOHLER: No, Your Honor, I can think of one

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case early. I don't recall that there are very many. I would like to think that that's because we comply with Batson. As a matter of fact, this is what you all say the law is, and we comply with it and therefore if we are in a case and strike a black juror and the court says what's your neutral reason then we give a neutral reason.

If not, there have been cases in Georgia, both at least one in Federal court and one in State court, I think, where the judge was not satisfied and put the juror or jurors back on the jury. Now, that has happened, too, but in those cases there was a conviction even though the court at least as to some jurors did not accept the neutral explanation.

QUESTION: Mr. Kohler, would you have any idea of how frequently there are appeals on the basis of disagreement with the reasons given and accepted by the court for -- under the Batson inquiry?

MR. KOHLER: There certainly -- it's not unusual, and there certainly are appeals on that issue.

I would like to say my own experience -- and I'm not up here saying to the Court that my experience is statistically significant, but there are cases that you try, interracial crimes, where there's no Batson challenge, and simply because there is an interracial crime does not necessarily mean that Batson will arise.

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We have had civil cases where the State was a party to the civil action where we have represented black defendants in State and Federal court going in expecting to make a challenge and find that we did not make any challenge. So I believe it is not true that in every case where we try one of these cases there is automatically a Batson challenge.

Your Honor, I would reserve the remainder of my time --

QUESTION: Before you do that --

MR. KOHLER: I'm sorry.

QUESTION: It seems to me you've been asked whether the State finds it oppressive. The State doesn't have a number of years in prison at stake. Don't you think it might be an important consideration for the defendant --

MR. KOHLER: Your Honor --

QUESTION: Especially -- not just in an interracial crime, but where the crime is alleged to have been racially motivated. Let's say a white defendant who's a member of the Ku Klux Klan, or a black defendant who's a member of some black racial group accused of murdering a white person out of racial animus. Don't you think that that person ought to -- would feel differently than you do about well, it makes no difference if I could

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strike every person on the basis of peremptory challenges?

MR. KOHLER: Your Honor, I would disagree with the Court, and may I explain. One is that the State is not saying if a juror is in fact biased that he should sit, or if there is a neutral reason, but there are other methods approved by the Court for determination of how to exercise peremptory strikes as appropriate voir dire. If the evidence in the case --

QUESTION: I'm not talking about bias. I'm just talking about -- you give the defendant peremptories. The whole purpose of peremptories is that you don't have to show bias.

You just think you'll get a fairer shake from a jury if you just out of suspicion can strike a certain number of people, and you're going to let the defendant strike postmen, you're going to let him strike people above a certain age, right -- all of those things not because he knows that they're biased, but because he thinks I think I'll get a better shake from an all-female jury or an all-male jury, or a jury without postmen, or a jury without ex-policemen, or whatever, right?

Except the one thing you can't do, even though this is a -- you know, an allegedly racially motivated crime, is use those peremptories with respect to people -- I think that's a real incursion upon the defendant's

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ability to assure a jury that he's satisfied what is fair.

MR. KOHLER: Your Honor, I would simply respectfully disagree, that the State of Georgia's position that simply striking a juror under the assumption that because a juror is of a particular race, whether white or black, that that is not sufficient, that if there's a prima facie case of racial discrimination, neutral reasons should have to be given.

QUESTION: Do you favor peremptories generally, or --

MR. KOHLER: Your Honor --

QUESTION: I mean, I would think that that position leads to the position that you shouldn't have peremptories.

MR. KOHLER: Your Honor, I believe a small number of peremptories are desirable. I do not believe they are essential.

I think one of the problems in Georgia is there are so many peremptories granted -- 10 and 20 -- that the potential for abuse is great because you do not simply eliminate that one or two jurors that you suspect in your heart as not being -- or will not be fair, but there is the encouragement to eliminate entire groups of people.

And one of the reasons that I raised in my motion to the trial court, even though Dougherty County has a

substantial black population -- about 43 percent -- potentially, if the defendant is of a mind to and the 42 jurors mirror the population, he can remove the entire group of people, not simply jurors that he might suspect might not be fair.

I would respectfully reserve the remainder of my time.

QUESTION: Thank you, Mr. Kohler. Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE PETITIONER

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

In our view, the Constitution bars the exercise of a racially motivated peremptory challenge by a criminal defendant. A State may not delegate to a defendant the power to deny a citizen the opportunity for jury service because of that person's race. That result is invidious and is attributable to the State, regardless of the party that initiates the challenge.

If defendants were permitted to exercise race-based strikes and exclude jurors solely because of assumptions about whether they could be fair, grounded in their race, it would undermine public confidence in the

criminal justice system.

QUESTION: But sex is all right --

MR. DREEBEN: Justice Scalia, the Government has taken --

QUESTION: Or age is all right, or employment is all right. You can discriminate on all those bases without undermining confidence. You can try to get an all-male jury or an all-female jury, or is that a problem, too?

MR. DREEBEN: In the Government's view that is not a problem. Those are consistent with what the peremptory challenge was designed to do originally, which is to allow jurors to improve the sense that -- to allow defendants to have an improved sense of confidence in the jury that will decide their case. That's why, in fact, the State gives defendants the right to participate in what would otherwise be an exclusively governmental function, but this Court has noted in many of its opinions that race is a particularly suspect and invidious ground on which to exercise governmental power, and that is exactly what is going on when a criminal defendant takes advantage of a State-provided right and chooses to exclude a juror from service.

The law does provide many specific means for testing the ability of jurors to be fair. What is at

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issue here is not whether a juror can serve in an unbiased capacity and decide a case. What is at issue here is whether the State can license a defendant to act out of pure racial bias and prejudice and deny a citizen the opportunity to serve as a juror regardless of whether he could be fair under the law.

QUESTION: Mr. Dreeben, you would not extend that same inquiry to peremptories exercised on the basis of gender, then?

MR. DREEBEN: We would not, Justice O'Connor. We believe --

QUESTION: I think that's rather hard to defend if the Court has, of course, under the very same provisions that protect against racial discrimination applied a form of heightened scrutiny to gender-based discrimination. How do you justify that position?

MR. DREEBEN: Well, the Court has applied a higher level of equal protection and scrutiny to race than it has to gender. It has recognized that there is a distinction in the experiences of this country --

QUESTION: Well, you don't think that the cases from this Court dealing with Batson and Edmondson have resorted to reliance on that difference in the level of scrutiny, do you?

MR. DREEBEN: No. I don't think the Court has

had occasion to determine how conventional equal protection jurisprudence fits in with the application of the Constitution for a peremptory challenge. It's a difficult process, because the peremptory challenge itself is grounded on the assumption that parties can use it whether or not it is rational. It is somewhat of an exception to the conventional analysis that equal protection requires a Government action.

The basis for it is that the State can make the assumption that it is rational to allow parties to remove people without giving a reason in order to improve confidence in the criminal justice system. I think that supports overriding the rights of postmen not to be excluded.

QUESTION: Well, Mr. Dreeben, you character this as not being -- the defendant doesn't have the right to strike somebody out of bias or prejudice. There's no bias. Why is there bias or prejudice involved, I mean, more than there is with striking a postmen? I have nothing against postmen. I just happen to think that postmen don't give judgments in my favor in this kind of a case. Why is that bias or prejudice?

MR. DREEBEN: Well, the claim is --

QUESTION: The same thing with striking -- a racial strike. I have nothing against the people of that

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race. I just think -- my calculation is I would do better with a jury of a different -- what is biased or prejudiced about that?

MR. DREEBEN: Well, the assumption is that a black juror cannot possibly be fair when a racial crime is involved.

QUESTION: That's not the assumption at all. The assumption is simply the probabilities are that a black juror would be more likely to vote against me, just as the probabilities are that a postman would or that a woman would, or whatever arbitrary class you pick. I don't see why it reflects bias or prejudice. It reflects a prediction of how that person is likely to vote in the case.

MR. DREEBEN: Well, I don't think it represents a prediction based on anything that can be identified, and therefore it is attributable to what is characterized as bias. That is the foundation of this Court's ruling in Batson, which applies precisely when a prosecutor makes the assumption without any evidence, any supporting facts, that a particular individual juror cannot vote fairly because of the color of his skin.

That is the entire underpinning of this Court's rule that it violates the Constitution for a prosecutor to remove jurors on grounds of race. The Government submits

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that the same rule applies equally when the defendant takes advantage of the State-created power of a peremptory challenge to a juror.

QUESTION: Well, I don't think you ought to be able to slander postmen that way either. If that's the kind of a judgment it reflects, I think it's terrible.

MR. DREEBEN: Well, I don't think it's a slander of postmen in any sense comparable to the invidious connotations that this Court has assigned to race-based classifications.

QUESTION: On the gender question you're not of course suggesting, I take it, that the stereotypical judgment based on sex has any more validity than the stereotypic judgment based on race.

MR. DREEBEN: No, Justice Kennedy. We're not suggesting that prosecutors should or do go out and make the assumption that women can't be fair jurors. What we do submit is that the Batson rule and the allowance of particularized challenges in individual cases marked a departure from Swain v. Alabama precisely because there have been a widespread, persistent problem with respect to the striking of black jurors.

There really is nothing in the system that leads to the conclusion that there's a similar problem with respect to gender, and so you have the task of balancing

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the additional costs for the system of justice in creating a Batson-type rule for gender --

QUESTION: Well, of course, we're just in the process of seeing many causes of action created to protect women, and I assume that you would have a number of cases in which an all-male or an all-female jury would be of advantage to one side or the other --

MR. DREEBEN: It can happen and it has happened in particular cases. We submit only that the problem is not so --

QUESTION: If you assume a stereotypic attitude.

MR. DREEBEN: That's correct. That's correct. It can happen. The Court is going to have to draw a line somewhere in the peremptory challenge area if the challenge is to be preserved at all, because it is exercised without reason, and if the peremptory challenge is to be held compatible with equal protection principles some classes will be excluded on grounds that would not otherwise justify Government action.

This case, of course, doesn't present that extension of Batson. What this case presents is a classic application of Batson in an area where the State has provided the mechanism for both parties to participate --

QUESTION: Well, it's a classic application of Batson after the Edmondson case.

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MR. DREEBEN: That's correct, Chief Justice Rehnquist. I think Edmondson clearly disposes of the question of whether State action is present when a criminal defendant acts on a peremptory challenge. The only remaining issue at all is whether Polk County v. Dodson suggests that a defendant cannot be a State actor in this situation. We submit that that case does not require the result that the defendant is not a State actor. Polk County considered the general actions of a defense lawyer who is employed by the State and concluded that despite his employment a criminal defense lawyer is not properly characterized as a State actor. Polk County, of course, had no occasion to consider the particular function of peremptory challenge, which differs in many respects from what a defense lawyer usually does. It's not a constitutional entitlement to remove jurors for no reason at all. It is something solely derived from the State's power, and it involves the defense lawyer just as it involves civil litigants in the task of selecting Government officials in such a way that discrimination should be fairly attributed to the State and should be forbidden under this Court's decisions.

If the Court has no further questions --

QUESTION: Thank you, Mr. Dreeben.

MR. DREEBEN: Thank you.

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QUESTION: Mr. Revell, we'll hear from you.

ORAL ARGUMENT OF ROBERT H. REVELL, JR.

ON BEHALF OF THE RESPONDENTS

MR. REVELL: Mr. Chief Justice and may it please the members of the Court:

To the defendant on trial in the State and Federal courts of this country, the only things that stand between that defendant and the power of the State to imprison him are his attorney and the jury, and we would submit to this Court that it is the ultimate private choice of that defense attorney and his client to exercise the peremptory challenge as the attorney and the defendant see fit based on the facts of each case.

QUESTION: Would you say that the only things that stand between them are the attorney, the jury, and the law?

MR. REVELL: Yes, Justice Kennedy, I would agree with that.

To that defendant, the ability to choose certain jurors over other jurors through peremptory challenges is in many cases one of the most significant and most meaningful tools that that defendant has in exercising his right to an impartial jury.

We would submit to the Court that in the context of a criminal trial there are significant differences

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between the criminal defendant and the civil litigants as in Edmondson. As this Court stated, Edmondson held in the ordinary context of a civil litigation in which the Government is not a party, the adversarial relationship which this Court defined in Polk County v. Dodson is paramount in this issue.

In that case, of course, the Court held that a Federal public defender is not a State actor in performing the traditional defense functions. In that case, the traditional defense function was a motion to withdraw from the case on the basis that the appeal was frivolous. We would submit to the Court that there is nothing more traditional in the trial of a case and the defense of a client than helping that client select an impartial jury.

QUESTION: Mr. Revell, what about the situation where say the State of Georgia had sued your client civilly, not criminally? Do you think your client then would be barred from excluding blacks from a jury under Batson?

MR. REVELL: Your Honor, I think the civil context -- the Court in Edmondson, as I read it, distinguished the situation in which the Government would be a party to an action. I think in the civil context between civil parties I am clearly bound by Edmondson. I don't think the question has been answered yet if the

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Government is one of those parties in the civil action.

QUESTION: You say your case is still different from that because you're defending against the Government in a criminal action.

MR. REVELL: My case is different than that because the Government is the very party that I am in opposition to in a case.

QUESTION: Well, that's true in a civil action brought by the Government, too.

MR. REVELL: But the posture of the parties is slightly different.

QUESTION: In what respect --

MR. REVELL: In the civil --

QUESTION: Other than the obvious, that in a criminal action the defendant faces the possibility of imprisonment. In a civil action it probably faces just the prospect of money damages.

MR. REVELL: Your Honor, in a civil action the parties are acting under the same rules and guidelines to achieve the end of a jury verdict or a judgment for money damages or property.

QUESTION: You mean they're operating under civil rules rather than criminal rules?

MR. REVELL: Yes, Your Honor.

QUESTION: Well, if you say they're both

operating under civil rules in a civil case, you would have to say they were both operating under criminal rules in a criminal case, would you not?

MR. REVELL: Your Honor, the distinction is the difference in which the posture of the criminal defendant is placed to that party. Our legislature and our Constitution recognized from the very beginning that that criminal defendant comes into that criminal trial as a distinct underdog against the awesome power of the State, and for that reason at least five constitutional amendments deal solely with the powers that the defendant has, the constitutional rights he has to defend himself, and the purpose for that, as I see it --

QUESTION: Are you thinking of the Georgia Constitution or the Federal Constitution?

MR. REVELL: I'm speaking primarily of the Federal Constitution in this instance, and the purpose --

QUESTION: One of those rights given by the Constitution is not the right to make peremptory challenges, is it?

MR. REVELL: No, Your Honor. This Court has held in Ross v. Oklahoma, of course, that the peremptory challenge is not of constitutional dimension, but in the same paragraph the Court has recognized that the peremptory challenge is a means to that constitutional

end, and how far a means has to go to become implied in that constitutional provision is yet to be decided.

Your Honor, we would submit that as this Court decided in West v. Adkins, the Court in West v. Adkins reviewed carefully the decision in Polk County. The decisions were different. The physician in West was held not to be a State actor, the public defender in Polk County was held to be a State actor, but the significant language to me was that the West case held that the decisive factor in Polk County is the adversarial relationship, recognizing that the criminal defendant is pitted totally against the State in that situation.

We would submit that you cannot separate the function of counsel in the sense to say that at one stage of the proceeding defending a client you're a State actor and at one stage you're not. The motion to withdraw, that's a result of either statutory or decisional law that's conferred upon the defendant.

Every single function that the defendant would undertake in his defense has some source in State law, and so we are troubled with the proposition that we can have one hat on while exercising a peremptory challenge and be called a State actor and take that hat off and in the very next function of the trial, whether it be subpoenaing the witness, whether it be motion in limine, whether it be

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cross-examination, that we could not be a State actor in one sense. We feel like --

QUESTION: Well, let's assume that's so. The judge is always a State actor, you agree with that.

MR. REVELL: Yes, Your Honor.

QUESTION: Isn't the judge the person who ultimately excuses the challenged juror, so that even if we accept your theory that the defense counsel can't change hats all the time the Court is still going to be engaged in State action, and if the Court does it at the behest of someone acting from racial animus the Court partakes of that animus, and doesn't that compel the same result?

MR. REVELL: With all due respect, Your Honor, we feel that the judge in the specific context of the peremptory challenge does nothing more than administratively acquiesce to the private decision the attorney has made under the law to exercise a choice, that the function of the judge is merely an acquiescence, that he takes no official action in regard to that juror, and in fact in many cases in Georgia the judge makes no comment whatsoever.

The juror stands, both parties are present when the peremptory challenge is exercised, and either side chooses to, when their turn comes, excuse the juror, and

the juror is excused and walks out of the courtroom. The juror knows clearly which party chose to exercise a peremptory challenge and exclude that juror, and the function of the judge in that case is not tantamount to an official proceeding or an official sanction of what happened.

We would submit that the action of the judge in ruling on objections is more participatory or more of a function of injecting himself into the trial than anything --

QUESTION: Well, what about the case in which there is objection to the exercise of the peremptory challenge because it's being exercised from racial animus? That takes care of your argument, doesn't it?

MR. REVELL: No, Your Honor, I'm not sure I follow the question.

QUESTION: Isn't -- let's assume that there's an objection to the peremptory challenge, and the objection is the challenge is being exercised out of racial animus. The judge rules on that. At that point, if the judge says yes, it is being exercised out of racial animus but that's no fault of mine, at that point even on your argument the judge is in fact actively engaging in the process.

MR. REVELL: In that case it would seem that the Court, as in Batson, has already determined and held that

that right to object exists. We're here arguing as strongly as we can against imposing that very State action upon the defendant, that very interference of the Court on the peremptory challenge.

QUESTION: You might even be willing to concede, mightn't you, as far as your case is concerned, that if it were demonstrated that the strike was made out of racial animus as far as you're concerned that'd be okay. You're not trying to strike people because you don't like the particular race. You just think that you're likely to get a better verdict from someone of a different race, isn't that right?

MR. REVELL: Yes, Your Honor. I am in somewhat of a predicament because I have not seen a jury, but yet I have been stereotyped and my clients have been stereotyped as the type of people who will excuse jurors based on racial animus. We don't intend --

QUESTION: Oh, but you're arguing for a right to do so, aren't you?

MR. REVELL: I am arguing for a right to choose, a right --

QUESTION: For any reason that seems acceptable to your client.

MR. REVELL: Or no reason, Your Honor.

QUESTION: Correct, including racial animus.

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MR. REVELL: That's correct. But in answer to your question, we don't intend to discriminate intentionally on anyone.

QUESTION: Would you be satisfied with a holding that said you can't strike a juror because of racial animus but you can use race as one of the probabilities in deciding what kind of a jury to pick?

MR. REVELL: Your Honor, I think this Court has implied that in its holding in Powers and also in a concurring opinion in Hernandez v. New York, in which the Court seems to indicate that there are -- there's a continuum where on one end the peremptory challenge is solely out of racial animus and on the -- somewhere moving down the continuum there are racial factors which influence the decision which are going to make it more and more acceptable to the trial judge when offered.

QUESTION: But our holdings to date, Edmondson and so forth, don't hinge upon animus at all, do they? They just say you cannot use race as a factor, right, whether it's animosity toward that race or not?

MR. REVELL: Absolutely.

QUESTION: Isn't the word animus somewhat ambiguous? Is it racial animus to challenge a person because the person is black, period? I like blacks very much but I just don't want blacks to serve on my jury. Is

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that racial animus?

MR. REVELL: It may very well be, Your Honor. It seemed clear to me in Batson that the evil that was sought to be prevented was the assumption that had been carried forward from Strauda v. West Virginia to date that black people as a race for various stereotypical reasons could not decide a case properly, not that there were factors involved in the case that would influence their decision or cause empathy or sympathy toward the defendant and concern him about whether he would be fairly tried, but that the decision was that they could not decide a case.

QUESTION: Well, suppose that in a case such as the one we have here on voir dire a black juror said to you I have to tell you that I'm very affronted by an assault against someone of my race and I don't think I could put my race out of my mind in deciding this case. That would be a very important factor for me in deciding the case. You don't think we would prevent you from disqualifying the juror on the grounds of bias, do you?

MR. REVELL: No, Your Honor. I think in that case the candor of the juror in responding to a voir dire question that way would be applauded, and the judge may very well excuse the juror because of that situation.

QUESTION: So that I've just demonstrated to

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you, and I think you agree, that race can be a factor in excusal of the juror if it indicates that the juror is -- is not impartial.

MR. REVELL: Yes, Your Honor. We are about to embark -- I read that there's a -- cert was granted in a court of appeals case in Texas in which two black jurors were excused in a civil case and the issue on appeal is whether the explanation which the trial judge approved was satisfactory, and we as a result of Edmondson, and if the court rules for the State of Georgia in this case, we will see a new body of law on whether the explanation is satisfactory or not.

QUESTION: Even if we rule against you here, you're going to be in better -- a criminal defendant is going to be in better shape than the prosecution insofar as appealing adverse rulings. I mean, after the trial is over, if the jury brings in a verdict of acquittal there's nothing the State can do to take up the question of whether perhaps some of your strikes should have been overruled because of Batson.

MR. REVELL: Yes, Your Honor, the State is going to have very little incentive in that situation to carry the case on, and the juror is likely going to have very little incentive in seeing a trial -- a case retried or reversed. Yes, sir, I would agree with that.

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In regard to the State action argument, it seems critical that throughout all of the cases in which this Court has examined private actors to determine whether State action exists, while the cases vary widely in their facts and circumstances, the common thread is that there is always found a cooperation between the private actor and the State in which the State -- in which they're acting together in concert, not in conflict with one another.

One thing that is troubling to the defense and is troubling because it seems to be a central focus of Edmondson is the proposition -- the holding -- that the private litigants have been delegated the responsibility of selecting a jury, and that that jury constitutes officials or employees of the Government, and therefore in selecting that jury it's tantamount to State action.

When we view the State as our bitter and staunch adversary and, under the Sixth Amendment right to an impartial trial, impartial jury, we view those very jurors as being employees or officials of the State, that's a proposition that is inconsistent and very troubling.

We would submit that while that may very well be the case in the civil situation, in which the jury has arguably been delegated the responsibility to arbitrate or decide the civil actions, the jury in the criminal case

cannot be considered an employee or official of the Government.

The jury is -- and the law and the defense attorney is what stands between that defendant and oppression, and the idea that the jury --

QUESTION: I really don't understand why the jury is any different from the trial judge in that respect. They both are, in a sense, agents of the State, making decisions that vitally affect your future. They may be for you or against you, but they're still -- aren't they spokesman for the sovereign when they act and return their verdict?

MR. REVELL: Your Honor, I would liken the jury more to a trustee of the people.

QUESTION: So's the judge in the same sense.

MR. REVELL: But the jury have the bond of trust to their peers, in which they have the ultimate fact-finding say-so to determine guilt or innocence, and for that reason --

QUESTION: They're surely not an agent of the defendant.

MR. REVELL: Absolutely not. They're an independent body, standing between the State on one hand and the defendant on the other.

QUESTION: Well, they're not wholly independent.

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They have to follow the law, too.

MR. REVELL: Absolutely. Although this Court has clearly held over and over again that the peremptory challenge is not of constitutional dimension, we would submit that between voir dire and the selection of the jury there has got to be some means implemented to secure the defendant's right to select an impartial jury. Voir dire is very limited in Federal cases.

The peremptory challenge was designed to operate in conjunction with the voir dire. We don't think in practice the voir dire effectively determines who may be biased, who may be prejudiced, who may have empathy, who may have sympathy. All of the briefs make reference to various studies, and one of the studies is that it is a human tendency not to respond intentionally or subconsciously that one is biased in answering voir dire questions.

On the one hand we've got a juror, as Justice Kennedy said, who candidly admits his bias. On the other hand, we've got a juror who is totally impartial. Most jurors fall somewhere in between, and because of the facts and circumstances of each case, they have empathies, sympathies, human experiences which affect their ability to decide the case. We have got to have some way to ferret out as best we can those human tendencies in order

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to secure the right to an impartial trial.

What we're really concerned about is that ultimately if this Court were to extend State action to private attorneys in exercise of peremptory challenges, would be the natural consequence that it would have to decide peremptory challenges based on gender, peremptory challenges based on ethnic issues, peremptory challenges based on all of the other stereotypes.

QUESTION: We're going to have to do that for the prosecution and for attorneys in private civil litigations as the law stands now, are we not?

MR. REVELL: Very probably so, Your Honor, but hopefully we won't have to do it for the defendant.

One of the ironies, and this is brought out by the NAACP Legal Defense Fund in their brief in support of petitioner, is that the evil which was sought to be prevented in Batson, the exclusion from the jury of the members of the defendant's race, may have come full circle so that a ruling prohibiting parties from any peremptory challenge based on whatever reason, including race, would have the effect of prohibiting the minority defendant, the underrepresented defendant, from being able to use the peremptory challenge to have members of his or her own group on the jury.

The underrepresented minority defendant would

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not be able to use his peremptory challenge to exclude majority members to enhance the opportunity for members of his own group to be on the jury, and they recognize this as a problem, and that's why in their brief they, in a simple manner of speaking, want to have it both ways. They want us to be excluded solely on the issue of black jurors, but they want the black juror to still have the freedom to exercise peremptory challenges in any way they see fit.

We believe that the exercise of the peremptory challenge by the defendant in a criminal case is the ultimate private choice and exercised by the defendant while performing a traditional function of defense counsel, and it should remain that way to preserve the adversarial system as we know it. To stretch the concept of State action to encompass the defense attorney will undermine the adversarial process. This Court must ensure the continued sanctity and right of a juror -- of a defendant to be tried by an impartial jury.

Thank you.

QUESTION: Thank you, Mr. Revell.

Mr. Kohler, you have 3 minutes remaining.

MR. KOHLER: Your Honor, unless the Court has questions I will waive the remainder of my time.

CHIEF JUSTICE REHNQUIST: Thank you. The case

is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)