

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: J.E.B., Petitioner v. T.B.
CASE NO: 92-1239
PLACE: Washington, D.C.
DATE: Tuesday, November 2, 1993
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3 J.E.B., :

4 Petitioner :

5 v. : No. 92-1239

6 T.B. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 2, 1993

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 JOHN F. PORTER, III, ESQ., Scottsboro, Alabama; on behalf
15 of the Petitioner.

16 MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington D.C.; as
18 amicus curiae, supporting the Petitioner.

19 LOIS N. BRASFIELD, ESQ., Assistant Attorney General of
20 Alabama, Montgomery, Alabama; on behalf of the
21 Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 92-1239, J.E.B. v. T.B.

5 Mr. Porter.

6 ORAL ARGUMENT OF JOHN F. PORTER, III

7 ON BEHALF OF THE PETITIONER

8 MR. PORTER: Mr. Chief Justice, and may it
9 please the Court:

10 A ruling which the petitioner requests in this
11 case is a determination that gender-based peremptory jury
12 challenges are prohibited under the heightened scrutiny of
13 the Fourteenth Amendment such that the procedures
14 established in Batson v. Kentucky would apply in that
15 context also.

16 The facts which are relevant to the review of
17 this case reveal that from a panel of 33 potential jurors,
18 the State of Alabama in this cause struck 9 -- used 9 of
19 its strikes to strike men from the jury and used 1 of its
20 strikes to strike a female. The petitioner used a
21 peremptory strike to strike a male from the jury,
22 resulting in an all-female panel to try this case, which
23 resulted in a determination in favor of the state of
24 paternity in this action.

25 The position of the petitioner in this case is

1 based upon three factors. The first is that the same
2 principle which prohibits gender-based exclusion from the
3 jury venire also excludes gender-based elimination or
4 peremptory strikes in the formation of a petit jury.

5 Secondly, under the heightened scrutiny of the
6 Equal Protection Clause applicable to gender
7 discrimination, the State's interest in limiting further
8 restrictions on the exercise of peremptory challenges is
9 not significant enough to overcome the invidious harm
10 caused by gender-based peremptory challenges.

11 And finally, the harm to the petitioner, the
12 excluded jurors, and society as a whole is substantially
13 similar in the use of gender-based peremptory challenges
14 as that we find from race-based peremptory challenges.

15 The fact that this panel ended up being all
16 female simply highlights the injury to the entire
17 community when a group, such as males or females, were
18 eliminated from the jury panel because of group bias or
19 unwarranted stereotyping, and when those -- that
20 stereotyping becomes the basis for the exclusion of
21 otherwise qualified jurors from the judicial process.

22 QUESTION: Well, do you think that men at large
23 in this particular community really felt bad because male
24 jurors had been stricken from this panel?

25 MR. PORTER: Mr. Chief Justice, I think at the

1 time, obviously, the community as a whole was not
2 cognizant of the problem. The excluded jurors certainly
3 felt excluded, because there were only 10 of them to start
4 with.

5 QUESTION: Well, supposing that the local
6 newspaper had run a story saying that these male jurors
7 had been excluded, do you think the community at large or
8 the community of men would have felt very badly about it?

9 MR. PORTER: Mr. Chief Justice, I believe that
10 there would have been a perception that this was not fair,
11 for a panel of all one gender, whether it be female or
12 male, to try any particular case. I think that would have
13 been the perception in the community, not necessarily that
14 men would have felt bad, but the community would have felt
15 that the system was not necessarily fair.

16 QUESTION: So the community would have felt
17 differently than men would have felt about it, is that
18 your answer?

19 MR. PORTER: I think men -- I would agree that
20 men would have felt excluded in this particular case. And
21 I think in any particular case, if they were excluded
22 simply because they were males.

23 QUESTION: But men, as a class, historically
24 have not been excluded from jury service, so why should an
25 equal protection plea on behalf of men succeed?

1 MR. PORTER: Justice Ginsburg, men have not -- I
2 agree that men have not been excluded from jury service.
3 But men have become -- under the Equal Protection Clause,
4 have been a classification which have received protection
5 from gender-based discrimination. So our position is that
6 the same principle which applies to gender-based
7 discrimination in general should apply to males, and to
8 females, in this particular context.

9 QUESTION: Well, why couldn't this be regarded
10 as a kind of affirmative action for women to make up for
11 all the years when Alabama totally excluded them from jury
12 service?

13 MR. PORTER: I'm not saying that that at some --
14 for some reason could not be. But in this context, it is
15 certainly not an affirmative action because it would also
16 apply to females. It is a -- in this case men were
17 excluded. The same invidious harm would have occurred if
18 women had been excluded from the jury panel. So therefore
19 it is not an affirmative action type of process which is
20 allowed by the State of Alabama.

21 QUESTION: Mr. Porter, you speak of unwarranted
22 stereotyping.

23 MR. PORTER: Yes, sir.

24 QUESTION: I take that to mean that there is
25 nothing to the notion that you're -- if you're a defendant

1 in a rape case, you're likely to be worse off with an
2 all-female jury and you're -- if you're a defendant in a
3 paternity case, you're not likely to be worse off with an
4 all-female jury? You don't -- is that warranted
5 stereotyping or unwarranted stereotyping, or is it simply
6 not true?

7 MR. PORTER: Justice Scalia, I would say that it
8 is unwarranted because that while men and women are not
9 the same, obviously, and do not have necessarily the same
10 outlooks, but they do have the same ability to be
11 unbiased, to become unbiased jurors in a particular case.

12 QUESTION: The same ability -- they can both
13 fight against it to the same degree, as every human being
14 has to, but they begin from different standing points on
15 certain issues such as those two, don't you think? Are
16 you telling me that a defense counsel is unreasonable in
17 attempting to strike women in cases of those type, in
18 thinking that his client would be better off with a male
19 juror?

20 MR. PORTER: Justice Scalia, my response is
21 that, and our position is that simply because -- a woman
22 is excluded from a jury because of her gender should be
23 unwarranted and unreasonable. Now, if it goes further
24 than that --

25 QUESTION: Now, I don't understand. Say it

1 again?

2 MR. PORTER: Our position is that the --

3 QUESTION: Are you saying that there's nothing
4 to the fact that a woman juror and a man juror, at least
5 in certain type of cases, may have a different outlook and
6 hence be more likely to tend towards the defense or the
7 prosecution side? You -- are you saying there is nothing
8 to that?

9 MR. PORTER: Justice Scalia, I'm not saying
10 there's nothing to that. However, the --

11 QUESTION: You're saying there is something to
12 it, but counsel shouldn't be able to take that into
13 account in their peremptories?

14 MR. PORTER: I think that you can consider that.
15 I don't think that -- our position is that you should not
16 be able to exclude a male or a female simply because of
17 their gender. There are studies that goes both ways, that
18 females are --

19 QUESTION: Mr. Porter, isn't it clear that
20 there's something to most stereotypes, that most
21 stereotypes are, indeed, accurate for a good part of the
22 class?

23 MR. PORTER: Justice Ginsburg, stereotypes are
24 stereotypes, and they may, in fact, be applicable to a
25 certain percentage of a particular group, such as 60

1 percent of the women may feel one way about a subject.
2 But there are 40 percent that do not feel the same way,
3 and if you allow gender-based peremptory challenges, that
4 40 percent may be excluded simply because of the overall
5 perception that women feel a certain way.

6 QUESTION: But that's what peremptory challenges
7 are all about. It's a playing of the odds. It's always a
8 playing of the odds. No counsel who exercises a
9 peremptory challenge thinks that every woman or every male
10 man or every person of whatever classification that he
11 eliminates is going to have a certain view, but he's
12 playing the odds. Isn't that what peremptory challenges
13 are about?

14 MR. PORTER: Peremptory challenges traditionally
15 have been allowed and become a part of our judicial system
16 because of counsel. Trial counsel decides at the moment,
17 during the trial, that a certain juror may or may not be
18 biased in this particular case, and says -- therefore
19 peremptories are allowed. It is our position that it is
20 the preconceived notion, the preconceived stereotyping
21 that all women feel a certain way and so therefore they
22 should be excluded because all women feel a certain way
23 from a jury.

24 QUESTION: Isn't your argument that certain
25 stereotyping, whatever its historical basis in fact may

1 be, simply should not be recognized as tolerable under the
2 Equal Protection Clause? Don't you have a principle
3 argument as opposed to a merely fact argument?

4 MR. PORTER: Yes, sir, Justice Souter, we do.
5 And that is in its -- probably its finest form, or the
6 simplest form, our argument; that stereotyping for the
7 exclusion of jurors should not be allowed.

8 QUESTION: Your argument is that you want a
9 precedent that applies to race to be extended to sex. How
10 far do you carry it? What other groups? And if -- you're
11 saying if race, then sex. Well, how about age, religion,
12 national origin?

13 MR. PORTER: Justice Ginsburg, in this
14 particular case I think the Court need only go as far as
15 gender. However, I think it would be rational to apply
16 the same principles to heightened scrutiny under the
17 Fourteenth Amendment, which would apply, then, to
18 religion, national origin, and illegitimacy. The examples
19 you gave of age and maybe other classifications which have
20 not risen --

21 QUESTION: But does one inquire of each juror
22 about the legitimacy of the juror's birth?

23 MR. PORTER: Practically not. I have never seen
24 -- in 15 years of practice I've never seen anyone inquire
25 of someone's legitimacy. However, if that were --

1 QUESTION: Or, indeed, national origin?

2 MR. PORTER: No, ma'am. I've never seen anybody
3 inquire of national origin. However --

4 QUESTION: It is perhaps the difference that in
5 race and sexes, you don't have to ask.

6 MR. PORTER: Correct. It is clear from looking
7 at a person their race and their sex, and so therefore
8 there is that connection, so that it is something that you
9 can readily observe.

10 QUESTION: Counsel, suppose an attorney were
11 faced with a jury of all one gender, all male or all
12 female, could the attorney then strike in order to
13 increase diversity?

14 MR. PORTER: Justice Kennedy, in the race arena
15 where counsel have in the past stricken for that cause, it
16 has not been allowed. It has been determined that that is
17 a race-based peremptory challenge and has not been
18 allowed. I would apply the same principle in this
19 instance, so that in order -- that use of peremptory
20 challenges to obtain a better mix, I suppose, of a jury
21 should not be allowed in that case.

22 QUESTION: Mr. Porter --

23 QUESTION: So the stereotype applies to the
24 challenge but not to the evaluation of the jury as it's
25 composed?

1 MR. PORTER: The -- I would agree that the --
2 the objection would be to the individual challenge of the
3 juror.

4 QUESTION: But your -- isn't it your assumption,
5 in answering Justice Kennedy's question, that there is no
6 reason to infer that there was stereotyping or exclusion
7 based on stereotyping in composing the panel from which
8 his all-male jury or all-female jury was picked? Isn't
9 that your assumption?

10 MR. PORTER: Yes, sir. That would be a part of
11 it, before you would ever get to --

12 QUESTION: Which is, in fact, I presume, an
13 unrealistic assumption.

14 MR. PORTER: Yes, sir.

15 QUESTION: Or would be in those cases.

16 MR. PORTER: It would be, yes, sir. But before
17 you would get to that point, you would have the
18 opportunity to make the challenge.

19 QUESTION: Mr. Porter, the male and female
20 classes are roughly the same size, I guess.

21 MR. PORTER: Yes.

22 QUESTION: That's not always true in the racial
23 or other contexts. Why isn't it an adequate protection if
24 one side thinks the male is a more favorable juror and the
25 other thinks the female, give them each the same number of

1 peremptories and they'll cancel each other out?

2 MR. PORTER: Justice Stevens, as to that panel,
3 that -- or as to the group of the jurors and the ability
4 of counsel to obtain the correct mix, that may be the
5 right answer, the way to resolve it. But as to the
6 individual juror who is excluded, or to the community as a
7 whole, the allowance of gender-based peremptories damages,
8 as the Court found in --

9 QUESTION: Yeah, but what's the damage if one
10 side thinks they don't like men and the other side thinks
11 they don't like women? Doesn't that cancel it out? I
12 mean neither group is being treated less favorably than
13 the other group under that hypothesis.

14 MR. PORTER: Justice Stevens, the entire group,
15 I would agree, would not be --

16 QUESTION: Both men and women would be insulted
17 because they're not of the opposite sex.

18 MR. PORTER: Right. And so it would be the
19 insulting of that particular juror, or the exclusion,
20 which would be objectionable.

21 QUESTION: Although you have standing because of
22 the client that you represent, which you're asserting,
23 then, is the equal protection right of the juror, not the
24 party.

25 MR. PORTER: In part. I think under Batson and

1 the cases that followed, certainly my client would have
2 the standing to raise the objection of the excluded
3 jurors. I think that would be correct.

4 QUESTION: Well, isn't that the heart of your
5 argument?

6 MR. PORTER: It is. I think that's the overall,
7 the more broad argument. And the more important,
8 probably, harm is the harm to the community and to society
9 and to the excluded jurors who basically do not have the
10 opportunity to raise the objection themselves.

11 QUESTION: Could I ask, Mr. Porter, what -- is
12 that the total list of categories that you want this
13 applied to? What is it, now, sex, religion, what else?

14 MR. PORTER: National origin and --

15 QUESTION: National origin.

16 MR. PORTER: Yes, sir.

17 QUESTION: Sexual preference?

18 MR. PORTER: No, sir.

19 QUESTION: Not -- no, not that. Why not?

20 MR. PORTER: Because sexual preference, like age
21 and disability, have not been raised by this Court to the
22 heightened level of scrutiny under the Fourteenth
23 Amendment.

24 QUESTION: Oh. But we could do that, though.

25 MR. PORTER: If the Court chose to at some point

1 in time, then you could --

2 QUESTION: Sure.

3 (Laughter.)

4 MR. PORTER: You certainly could.

5 QUESTION: But Mr. Porter, are you going to, in
6 your system where we have these groups, allow the
7 preliminary questioning of the potential jurors. In the
8 colloquy that we just had, you observed that there's
9 something about race and sex that's not like any other
10 class. You don't have to ask.

11 MR. PORTER: Correct.

12 QUESTION: But in the suggestions that you're
13 now making, the notion that religion is not written on
14 someone's forehead so we would first have to quiz the
15 potential jurors about that.

16 MR. PORTER: Yes, ma'am.

17 QUESTION: Same thing with national origin.

18 MR. PORTER: Yes, ma'am.

19 QUESTION: Does that -- does not -- isn't that
20 just a disturbing thought?

21 MR. PORTER: It is a somewhat invasion of their
22 privacy. But trial counsel every day inquires of jurors
23 on personal matters. It is important in some cases to
24 make those inquiries. Go back, as far back as Lewis, the
25 U.S. v. Lewis. The Court there explained how important

1 the use of the voir dire was.

2 QUESTION: So if you're the defendant in a
3 drunken driving case, you can strike jurors for -- I
4 guess, because you don't like the color of their hair, but
5 you could not strike a juror because he's a Methodist and
6 therefore a teetotaler. You would have to accept, if it
7 turned out that way, a jury of 12 Methodists in a drunken
8 driving case, right?

9 MR. PORTER: No, sir.

10 QUESTION: You would not.

11 MR. PORTER: Not necessarily. My point is that
12 you could not strike him simply because he was a
13 Methodist. If he was a --

14 QUESTION: Well, that's why I'm striking him.

15 MR. PORTER: I understand.

16 QUESTION: I think this fellow probably has very
17 strong views against drinking, and is more likely to come
18 down hard on someone who's accused of drunken driving than
19 some other juror. That's precisely why I want to strike
20 him.

21 MR. PORTER: It is --

22 QUESTION: And you're saying that's no good.

23 MR. PORTER: It is the probably that gives me a
24 problem with that.

25 QUESTION: But all peremptories are based on

1 probably.

2 MR. PORTER: Our position would be that if that
3 Methodist professed to be a teetotaler, and so therefore
4 had an individual conviction against the consumption of
5 alcohol, that would be a proper peremptory strike.

6 QUESTION: But a teetotaler is just a person who
7 doesn't himself drink alcohol.

8 MR. PORTER: Correct.

9 QUESTION: He doesn't necessarily believe that
10 it's morally wrong for himself and others to do it.

11 MR. PORTER: If --

12 QUESTION: But, anyway, you just would not let
13 him -- not let him strike methodists, right? But what
14 could he strike, people with blonde hair, postmen?

15 MR. PORTER: If a postman had -- there would be
16 nothing wrong with striking postmen as a class.

17 QUESTION: He'll be happy to hear that.

18 MR. PORTER: Yes, sir.

19 (Laughter.)

20 QUESTION: Mr. Porter, as a litigator, do you
21 believe in the peremptory challenge system?

22 MR. PORTER: Justice Blackmun, I believe, as a
23 litigator, that the peremptory challenge system certainly
24 has a place within our jury selection process. It is --
25 but it must be bound by certain constitutional provisions,

1 and we think one of those is the Fourteenth Amendment.

2 QUESTION: Do you think Batson was wrong?

3 MR. PORTER: No, sir, I do not. I think it --
4 it achieved the purpose for which it was rendered.

5 QUESTION: Well, Mr. Porter, since Batson, which
6 I guess was 7 years ago.

7 MR. PORTER: Yes, sir.

8 QUESTION: We've seen a number of cases here in
9 which Batson issues have been raised because of the
10 peremptories directed at minorities, of blacks or
11 hispanics. Under -- if your view prevails, a person
12 making any sort of a peremptory challenge in a proceeding
13 is just really running a great risk. Because the
14 peremptory challenge is going to be even to a man or to a
15 woman, and therefore arguable on appeal that this -- this
16 violated the Equal Protection Clause.

17 MR. PORTER: Mr. Chief Justice, in any situation
18 the first step the trial counsel is going to have to show
19 is making out a prima facie case that the gender has been
20 used intentionally to strike.

21 QUESTION: But if you're talking -- I mean, if
22 you're talking about minority members of a jury panel.

23 MR. PORTER: Yes, sir.

24 QUESTION: I should think it would be much
25 easier to make out a case like that because there are not

1 apt to be many of them on the panel. Whereas in the case
2 of women or men members, they're probably going to be
3 50/50.

4 MR. PORTER: By and large, there will be.
5 However, there are many counties in Alabama, and probably
6 in other counties across the Nation, in which the racial
7 mix is 50/50, or 60/40, very close. So those -- the
8 Batson still applies in those cases.

9 QUESTION: Even if we accepted your argument
10 that sex should be treated like race, wouldn't it be
11 appropriate in this case to follow another precedent that
12 was set 27 years in Alabama, and that is not to make
13 this -- this dramatic change retroactive. Do you remember
14 the old case of White against Crook when the Alabama
15 Legislature was given till the next session to put women
16 on juries?

17 MR. PORTER: I think the problem with that
18 approach would be that the harm in this case -- in this
19 particular case, the harm, the men who were eliminated
20 have already been damaged. And therefore other men with
21 cases --

22 QUESTION: Well, that was certainly so in the
23 days when the Alabama laws was -- that the jury role would
24 include the names of all male citizens of the county.

25 MR. PORTER: Yes, ma'am.

1 QUESTION: And yet that was made prospective
2 only. The relief was made prospective only. Why isn't
3 that appropriate here?

4 MR. PORTER: Because the damage has occurred
5 already and it needs to be remedied. And it will continue
6 to cause damage until it is remedied.

7 QUESTION: Thank you, Mr. Porter.

8 MR. PORTER: Thank you, Mr. Chief Justice.

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

10 ORAL ARGUMENT OF MICHAEL R. DREEBEN
11 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE
12 SUPPORTING THE PETITIONER

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

15 For nearly 2 decades the Court has held that
16 Government action taken on the basis of gender is subject
17 to heightened constitutional scrutiny. In light of that
18 heightened scrutiny, the discriminatory use of peremptory
19 challenges to remove a juror on the basis of gender
20 violates the Constitution.

21 The line of cases beginning with this Court's
22 decision in Batson has made it clear that the use of
23 peremptory challenges for racially invidious purposes is
24 unconstitutional. Such challenges harm not only the
25 parties, but also the excluded jurors and the community as

1 a whole.

2 The same is true with respect to gender-based
3 strikes. The individual juror removed on the basis of
4 gender is frequently the victim of an outmoded stereotype.
5 Jury manuals, for example, have instructed litigants to
6 remove women because of a belief that they are too
7 sympathetic or are governed by emotion, and the case law
8 reflects that this has happened.

9 QUESTION: And you know better, so you want to
10 protect defense counsel from himself, right?

11 MR. DREEBEN: No. I believe, Justice Scalia,
12 that --

13 QUESTION: It seems to me he has his client's
14 interest more to heart than the Government does. And if
15 he thinks that what you call unwarranted stereotypes are,
16 indeed, warranted, why not let him take the chance?

17 MR. DREEBEN: Well, the same argument could be
18 made --

19 QUESTION: And if it's unwarranted, it'll be its
20 own punishment.

21 MR. DREEBEN: I think the same argument could be
22 made about racially based stereotypes or ethnically based
23 stereotypes, or stereotypes based on a person's religion
24 and nothing more. Now, the reason --

25 QUESTION: There's a Thirteenth Amendment and a

1 Fourteenth Amendment that can account for our view of
2 racially based stereotypes. We're not allowed to
3 stereotype for that. There's no such -- no such amendment
4 changing historical practices with respect to strikes on
5 the basis of sex or on the basis of a lot of other
6 characteristics.

7 MR. DREEBEN: Well, this Court has determined
8 that the Equal Protection Clause not only applies to
9 sex-based classifications, but that they are entitled to
10 heightened scrutiny because there has been a history of
11 discrimination and a history that reflects the misuse of
12 gender-based stereotypes as a basis for Government action.
13 And it's that Court's determination in the general
14 mainstream of equal protection law that we rely on in
15 urging the extension of Batson from race-based challenges
16 to gender-based challenges.

17 QUESTION: Well, Mr. Dreeben, if you -- if you
18 prevail here, if the petitioner prevails, and not only
19 gender-based peremptory strikes but those based on ethnic
20 origin, religion and so forth, are similarly barred,
21 what's left of the peremptory challenge system, if
22 anything?

23 MR. DREEBEN: I think what's left of it, Justice
24 O'Connor --

25 QUESTION: Besides the postmen.

1 (Laughter.)

2 MR. DREEBEN: It is the important class of
3 postmen, and in addition classes that are based similarly
4 on occupation, and all classes that really have not been
5 elevated --

6 QUESTION: Well --

7 MR. DREEBEN: To heightened review.

8 QUESTION: -- It strikes me that before you even
9 get to that, you're going to be accused -- as a lawyer, a
10 trial lawyer exercising peremptories which, of necessity,
11 have to be exercised against either women or men -- of
12 having made a sex-based peremptory strike. How do you
13 think, as a practical matter, the trial judge should deal
14 with it? Suppose the lawyer strikes -- has five
15 peremptory strikes and uses three of them to strike women.
16 Now, is that open to challenge and is the trial judge
17 going to have to resolve that?

18 MR. DREEBEN: The trial judge will have the
19 discretion to determine whether there's a prima facie
20 case. The lower courts have held, in the context of
21 Batson, that simply an argument from numbers alone does
22 not necessarily establish a prime facie case. There may
23 be other factors that give rise --

24 QUESTION: But it might.

25 MR. DREEBEN: It might. And if it does, the

1 litigant who has exercised the strikes will be called upon
2 to give a gender-neutral explanation for the strikes, just
3 as he or she has to give a race-neutral explanation. And
4 this procedure, though it may have seemed cumbersome at
5 the time that Batson was adopted to those who opposed the
6 rule, has proved to be perfectly workable in the Federal
7 system in terms of race. And in those jurisdictions --

8 QUESTION: Well, but, of course, what do you
9 have there? You have a much smaller pool of minority
10 jurors against which this can operate, so it strikes me
11 that it's much easier to establish some kind of a misuse.
12 But when you have equal numbers of men and women, it seems
13 that it might be, as a practical matter, very difficult to
14 administer this for the trial judge.

15 MR. DREEBEN: There may be some cases that call
16 for difficult determinations at the margins. I don't
17 think that, across the board, it has proven difficult.

18 QUESTION: Mr. Dreeben, are we talking entirely
19 hypothetically? Is it not so that Batson is the rule with
20 respect to sex in some Federal jurisdictions?

21 MR. DREEBEN: Yes, Justice Ginsburg. The Ninth
22 Circuit has adopted a gender-based Batson rule, as have
23 the States of New York and California and Massachusetts,
24 and, as well, six other States. And those are large State
25 systems, as well as the Ninth Circuit, which is a major

1 Federal system, and it has not proven to be
2 administratively burdensome or difficult to implement.

3 QUESTION: Well, but --

4 QUESTION: Mr. Dreeben --

5 QUESTION: -- Unless you extend it to the other
6 logical categories which it ought to be extend to, if it
7 extends to -- if it extends to sex.

8 I guess there's nothing to worry about if you
9 can find a postman who is neither male, female, has no
10 religion, and no ethnic background. Then you would not
11 have to worry about a challenge; you could go ahead and
12 strike.

13 MR. DREEBEN: So long as the litigant relies on
14 a basis for the challenge which is not in a category
15 that's protected by heightened scrutiny, and in which we
16 are particularly concerned about the invidious use of
17 stereotypes, in which the jurors rights would be violated
18 were he subject to exclusion.

19 QUESTION: Is it just the jurors' rights? Is
20 the integrity of the fact-finding process, the accuracy of
21 the jury's determination enhanced or retarded by your
22 position, in your view?

23 MR. DREEBEN: I'm not sure that the actual
24 accuracy of the fact-finding process is necessarily
25 affected one way or the other, so long as impartial jurors

1 are actually seated. What is affected is the community's
2 perception and confidence in the integrity of the process.

3 QUESTION: Well, do you think the stereotypes
4 may, then, enhance the accuracy of the jury?

5 MR. DREEBEN: No, I don't think that the
6 stereotypes would in any way enhance it. I think that
7 once you have reduced the --

8 QUESTION: But you wouldn't go so far as to say
9 they retard it?

10 MR. DREEBEN: Not necessarily. But I do think
11 that the community itself loses confidence in the
12 integrity of the process when biased selection procedures
13 have been used to empanel the factfinder. And I don't
14 believe that that's different depending on whether the
15 bias that's used in the selection process is racial bias,
16 ethnic bias, or gender bias.

17 QUESTION: Well, this goes back to Justice
18 Souter's question to the previous counsel as to what the
19 real evil is here. If stereotypes have some value for the
20 trial practitioner in selecting the jury, then maybe we
21 should draw the line here and allow those peremptory
22 challenges.

23 MR. DREEBEN: I think the line should be drawn,
24 Justice Kennedy, where this Court has drawn it in other
25 equal protection contexts where stereotyping was used to

1 justify laws. Where the stereotype is one based on gender
2 such as to invoke heightened constitutional scrutiny
3 because of suspicion about historical misuse, it's
4 appropriate to ban that use of stereotyping from the
5 courtroom.

6 Where there has been much less concern about the
7 invidious use of stereotyping or grouped-based
8 assumptions, such as strikes based on occupation,
9 residence, age, or a variety of other factors that this
10 Court has been quite deferential to --

11 QUESTION: But isn't the purpose of abolishing
12 the stereotype from the courtroom in order to confirm the
13 duty of the individual juror to set aside his or her own
14 preconceptions?

15 MR. DREEBEN: That is certainly part of it, but
16 there is a balancing going on here, and the peremptory
17 challenge system has been thought to serve other purposes
18 in the jury selection process. And the States may have
19 some leeway to make determinations that group-based
20 exclusions are permissible where there is no particular
21 reason to be suspicious about the nature of those
22 exclusions.

23 But in this context, where gender-based
24 stereotyping has been subject to heightened review because
25 of suspicion about misuse, where the community is injured

1 and where the excluded juror also would find it to be
2 insulting to be removed solely on the basis of a
3 stereotyped assumption, then in those situations the Equal
4 Protection Clause does mandate the eradication of this
5 form of discrimination.

6 The ruling in this case, Justice Ginsburg,
7 should be applied retroactively, just as this Court
8 applied the rulings in Batson and the successor Batson
9 cases retroactively. There is no reason to depart from
10 the determination made in that line of cases that the
11 ruling should apply both to the parties in the case --

12 QUESTION: But by retroactive you mean the cases
13 pending?

14 MR. DREEBEN: -- to cases pending, that's
15 precisely correct, Justice Stevens. I was going to add
16 that point.

17 We do not believe, in answer to Justice
18 Rehnquist -- Chief Justice Rehnquist's question, that the
19 Court should make an exception to a gender-based rule that
20 would permit strikes when a party is attempting to even up
21 or balance the jury. First of all, we think that that
22 rule would be susceptible to a great deal of misuse. It
23 would become extremely --

24 Thank you.

25 QUESTION: Thank you, Mr. Dreeben.

1 Ms. Brasfield, we'll hear from you.

2 ORAL ARGUMENT OF LOIS N. BRASFIELD

3 ON BEHALF OF THE RESPONDENT

4 MS. BRASFIELD: Mr. Chief Justice, and may it
5 please the Court:

6 The solution that the defendant -- the
7 petitioner has offered in this case I think causes a great
8 many more problems than it actually fixes. In this
9 particular case there -- it was a very unusual venire.
10 And under the circumstances, I do not think it can be said
11 that either the defendant, the individual jurors, or the
12 community at large was harmed.

13 Usually, you will have a fairly well divided
14 venire, and in this particular case there were 23 women
15 and 10 men for whom -- that had to be brought down to a
16 12-person jury. The defendant had 11 strikes, the State
17 had 10. The jury --

18 QUESTION: That's what Alabama allows in a
19 criminal case, or is this a civil case?

20 MS. BRASFIELD: This is a civil case completely,
21 Your Honor.

22 QUESTION: And you're allowed 10 or 11 strikes
23 in a civil case?

24 MS. BRASFIELD: They use a struck jury method
25 which is 24 -- a minimum of 24 are required from which to

1 start the striking down to the number of jurors that are
2 going to be needed.

3 QUESTION: Well, if you start with 24 and one
4 side has 10 and the other side has 11 --

5 MS. BRASFIELD: No, no, no. You have however
6 many it takes to reduce the venire to the number of jurors
7 who are actually needed for the trial. That will be --

8 QUESTION: And would that be 12 in this case?

9 MS. BRASFIELD: In this case it was 12. There
10 were no alternates needed for this case. So it just
11 happened that there were a large number of strikes to be
12 used in this case.

13 The defendant used his first strike against a
14 woman; the State used its first strike against a man.
15 This --

16 QUESTION: Well, let me inquire once more into
17 the mechanics. The venire was 33 people?

18 MS. BRASFIELD: Yes, sir. And --

19 QUESTION: And you -- where did the number 24
20 come from?

21 MS. BRASFIELD: The statute requires that a
22 minimum of 24 be available. Usually more than that are
23 called because there -- there's never any way of knowing
24 how many will be struck for cause prior to the striking of
25 the actual jury.

1 QUESTION: Thank you.

2 MS. BRASFIELD: The State used its fourth strike
3 to strike a woman, but the defendant continued to use his
4 strikes -- I mean to strike a man, but the defendant
5 continued to use her to strike women. The actual numbers
6 struck were 11 women and 10 men.

7 Those jurors who were struck, those 11 women and
8 10 men, did not leave the courtroom thinking that they had
9 been excluded from the jury system or that they could
10 never sit on a jury. Both men and women regularly sit on
11 juries throughout this country. And part of that is the
12 very fact that men and women are not minorities; they are
13 both fairly equal in numbers.

14 So that if your panel is drawn randomly, usually
15 you will have a jury panel that is fairly equal in
16 numbers. If there is some reason why the litigants feel
17 like it's to their advantage to strike one gender rather
18 than the other one, then just in this case the other
19 juror -- other litigant is probably going to be striking
20 the other gender.

21 This was a rare but totally random drawing that
22 produced an unbalanced venire. But in most cases this
23 would not happen. In -- and the fact is that they could
24 have just as well been two men to every woman. It just
25 happened that it was two women to every man in this case.

1 In addition --

2 QUESTION: Are you suggesting that there was not
3 proof that the elimination was, indeed, gender based?

4 MS. BRASFIELD: I'm not suggesting that there
5 would not have been a prima facie case which would have
6 caused a challenge if Batson had been applied to this
7 case.

8 QUESTION: That's -- I thought that that was a
9 given for us at this level.

10 MS. BRASFIELD: Yes. I think at this point the
11 fact that there would be a prima facie case if either side
12 had decided to challenge. The State had as much of a
13 challenge against the defendant for having stricken 10
14 women with his 11 strikes.

15 QUESTION: Ms. Brasle -- Brasfield, my question
16 to you -- we've been talking about stereotyping and how
17 they are often true for most people in the class, but it
18 was my impression that the evil or mischief that has
19 underlied every decision of this Court in the sex
20 discrimination/equal protection field is just that
21 stereotyping, the notion that women are this way and men
22 are that way. Is that not so?

23 MS. BRASFIELD: In my position, I think that
24 that is correct. That is what Batson was based on. But
25 Batson has been held to be uniquely a result of the racial

1 situation that was existing in this country, where blacks
2 were still being kept off of juries in case after case
3 after case, and the Swain test that was in place was
4 unworkable to prove that this was happening. It's our
5 position that it's --

6 QUESTION: How long were women kept off juries
7 in Alabama?

8 MS. BRASFIELD: Until 1966, they were. Under
9 the statute, a jury was made up of all males. But at this
10 point, they are not being kept off of juries. The venire
11 lists are drawn from the driver's license registration
12 lists, and are drawn at random.

13 QUESTION: But you're arguing that there's
14 nothing wrong with a counsel that's continuing to exclude
15 them solely on the basis of their gender?

16 MS. BRASFIELD: I'm not saying that that's right
17 or wrong. I'm saying --

18 QUESTION: No. Yes, you are. You're saying
19 it's perfectly constitutional.

20 MS. BRASFIELD: I'm saying -- I'm not -- well,
21 that's what I mean. I think it is constitutional. I do
22 not think that it is necessarily to either party's
23 advantage. I think they may very well be wrong, just as
24 they may be wrong in thinking that the postman is going to
25 be less likely to decide on their case. But --

1 QUESTION: Are you asking that Batson be
2 overruled?

3 MS. BRASFIELD: Not at all, sir. I think there
4 was a very --

5 QUESTION: You accept -- you accept Batson?

6 MS. BRASFIELD: Yes. But I think that Batson is
7 unique to race and the situation that was continuing to
8 exist in that blacks were being kept out of the system,
9 which is not happening to men in particular in this case,
10 or women.

11 QUESTION: Well, Ms. Brasfield, I guess the
12 Court has painted itself into a bit of a corner on this
13 matter, because it has held that the Batson rule applies
14 because of the right of the juror. That it is the juror's
15 own rights that are at stake here, and that the attorney
16 for the litigant can raise that challenge in the case.
17 Now, if that's so, then how -- how would you not apply
18 that rule to a gender-based strike?

19 MS. BRASFIELD: I don't think --

20 QUESTION: I think what's really at stake is the
21 right of the juror. If the Court's theory had been
22 different, your argument might be easier.

23 MS. BRASFIELD: Well --

24 QUESTION: But how can you make a reasonable
25 argument in light of the Court's jurisprudence here?

1 MS. BRASFIELD: Well, I think that no particular
2 juror has a right to sit on any particular case. And in
3 this situation there were 12 women who sat on the jury,
4 but there were 11 women who didn't. And they were
5 struck -- as I said, there would have been a prima facie
6 against that at the time too.

7 QUESTION: Yes, but a particular juror has a
8 right to have the State not act to exclude them on the
9 basis of their gender, right?

10 MS. BRASFIELD: That has not been said by this
11 Court up until now. All of the applications of Batson, at
12 this point, have been to race.

13 QUESTION: Yes. But based on the right of the
14 juror?

15 MS. BRASFIELD: Then I think you would have to
16 come also to the right of the postman and the right of
17 anybody else not to be struck. And if we are going to
18 reach this, I think this is one of the problems that
19 extending Batson beyond the area of race would cause, and
20 that --

21 QUESTION: It's not a right not to be a struck.
22 It's a right not to be stricken according to your race or,
23 in this case the argument is gender. No one's contending
24 that you have a right not be subjected to a challenge.

25 MS. BRASFIELD: But is it --

1 QUESTION: It's the reason for the challenge
2 that's the point of -- the point of the inquiry here.

3 MS. BRASFIELD: But I think that the same
4 argument, if that is going to be used to extend Batson,
5 would also apply to any other stereotypical reason for --

6 QUESTION: Ms. Brasfield, isn't it true that
7 there's no other group in the history of this country that
8 was excluded from jury service as long as women? Not even
9 the racial classifications lasted into -- in fact, it was
10 1967 in Alabama; the decision was '66, but the change was
11 '67,

12 MS. BRASFIELD: Justice Ginsburg, it is true
13 that only blacks and women have, been under the law,
14 denied the right, and that actually black men were allowed
15 to sit on juries prior to women in Alabama.

16 QUESTION: So wouldn't we be putting the
17 peremptory challenge back where it was in the days when it
18 was never exercised on the basis of either race or sex
19 because there weren't any women or any minorities in the
20 pool to begin with? So all this talk about how you're
21 shrinking the peremptories, you're just putting it back
22 the way it was in the bad old days.

23 MS. BRASFIELD: But they are there, and they are
24 there in fairly equal numbers. And since we're in the
25 position of applying it to both men and women, there is

1 always the chance that -- and particularly where you have
2 a large black population too, the problem is extended and
3 made more necessary, that you have a reason for every
4 strike in the event that you inadvertently fall into a
5 situation that makes you subject to a challenge.

6 QUESTION: Ms. Brasfield, I suppose that every
7 citizen has a right not only not to be -- if we follow
8 this logic, not only not to be stricken for that citizen's
9 race, religion, sex, and whatever, but also has a right
10 not to be stricken for any irrational reason, I suppose,
11 if that logic is correct? Wouldn't that be so?

12 MS. BRASFIELD: I think that --

13 QUESTION: So I guess that every erroneous basis
14 for exercising peremptories would be unconstitutional.
15 Like if -- in fact, postmen are, surprisingly, no
16 different from everybody else. Striking a postman because
17 he's a postman would be unconstitutional, right?

18 MS. BRASFIELD: I think that that argument could
19 be extended in that direction, yes.

20 QUESTION: Or just striking a juror because you
21 don't like the look in his eye. That would be
22 unconstitutional.

23 MS. BRASFIELD: I think that we would certainly
24 be in a position where we couldn't use -- striking a jury
25 because we don't like the look in his eye as our

1 nonracial, non-gender-based reason --

2 QUESTION: Well, you could --

3 MS. BRASFIELD: Because it would be considered a
4 sham.

5 QUESTION: Well, you could draw the line short
6 of that, surely, because the Court has held the Equal
7 Protection Clause requires if not strict scrutiny, at
8 least heightened scrutiny, intermediate scrutiny based on
9 differences between men and women. And it has never said
10 the same about people who had a certain look in their eye.

11 (Laughter.)

12 MS. BRASFIELD: That's correct, Your Honor.

13 But --

14 QUESTION: Or about letter carriers.

15 MS. BRASFIELD: That is also correct. And while
16 in Alabama if you were having a Batson challenge and you
17 were trying to justify your strike for a nonracial reason,
18 or a non-gender-based reason, I think that saying, Your
19 Honor, I didn't like the look in his eye would not pass
20 muster. I think that you would have to show a better
21 reason than that, or it would be considered a sham. You
22 could say that about every person you had struck.

23 So I think that you would be required to extend
24 your voir dire and spend much more time. Now, I think
25 that the judicial system would be loaded up with time

1 spent questioning jurors to be sure that you'd be able to
2 give a -- an acceptable reason if you were called upon to
3 do so. I think --

4 QUESTION: Ms. Brasfield, is the question I
5 asked earlier to Mr. Dreeben, I think -- Batson is in
6 effect with respect to sex in the Ninth Circuit and in
7 some States. Is there any evidence of -- you said you
8 think -- do we -- is there any evidence that there has, in
9 fact, been these intractable problems?

10 MS. BRASFIELD: I am not familiar with whether
11 those problems have been found. The -- Mr. Dreeben has
12 said that there is no evidence that there are problems.
13 I'm not -- also not sure that there are not -- there are
14 any studies showing there are not problems.

15 But, now, in Alabama, although Alabama has
16 heartily endorsed -- all of its courts have endorsed
17 Batson as it applies to race, and in each of its
18 extensions to civil litigation and against defendants as
19 well as plaintiffs. But at the same time, there were over
20 40 appellate opinions issued by the Alabama Court of
21 Criminal Appeals last year that had to address Batson
22 issues that were raised on appeal.

23 QUESTION: Well, and I also think that the Ninth
24 Circuit adopted its rule, as I understand it, only in
25 1992, last year, so it might be too soon to decide whether

1 there've been any problems or not.

2 MS. BRASFIELD: Chief Justice Rehnquist, I agree
3 with that. I also think that if Batson were extended to
4 gender, there is a clear indication that it would cause
5 problems in Alabama and in many States. I can't believe
6 that Alabama is unique in struggling with the practical
7 application of Batson even as it applies to race, as --
8 and I think that having it to apply to gender also would
9 increase the problems tremendously.

10 In paternity cases, for instance, which is what
11 I see regularly, Alabama adjudicated 8,000 paternities
12 last year. Most of these trials take no more than half a
13 day, even when you're selecting a jury. They're quickly
14 handled. They have -- usually they have some expert
15 testimony and some HLA or DNA tests, and they are fairly
16 rapidly decided.

17 You can -- it can be envisioned that you'd spend
18 twice as long on the voir dire and jury selection as you
19 would actually trying the cases. In addition, I think
20 there would be a lot greater chance for an allegation of
21 error in those cases, so that the appeals system would be
22 overloaded as well with Batson issues.

23 QUESTION: Well, may I ask you, in the trial of
24 those cases is the fact pattern that we've seen in this
25 case characteristic of most of them?

1 MS. BRASFIELD: The fact pattern in this case --

2 QUESTION: I mean, defense counsel will strike
3 all of one sex and the State's counsel strike all of the
4 other sex?

5 MS. BRASFIELD: This is the first case that I
6 have seen where that type of striking has been apparent.

7 QUESTION: So this isn't necessarily a problem
8 here for --

9 MS. BRASFIELD: So this is not necessarily. It
10 is certainly not something that has been advised by the
11 State. It was apparently this particular litigator's --
12 the two litigators' choices.

13 QUESTION: But that sort of undercuts the reason
14 for your fear that if we -- if we decide in the
15 petitioner's favor here, that your prosecution of these
16 cases is going to be made unmanageable?

17 MS. BRASFIELD: The only thing that would make
18 it unmanageable is that the -- if you reduced either side.
19 It's not a question of whether there is all of one panel
20 or all of another, or if all of the strikes are used,
21 because this Court and the State's court -- State courts
22 have held that if even one strike appears to be based on
23 gender or can show a prima facie case --

24 QUESTION: If it appears to be. But, I mean,
25 isn't that the -- doesn't that raise a question about the

1 nature of the prima facie case. As so members -- so many
2 members of the Court have pointed out, you can't strike
3 anybody without striking someone of one gender or another,
4 and therefore you've got to have something more than that
5 to make a prima facie case.

6 You had a prima facie case, we are all agreed, I
7 guess, here, but it doesn't follow that one strike of one
8 person is going to appear prima facie to be motivated by
9 gender, does it?

10 MS. BRASFIELD: No, not that one strike of one
11 person would. But if you have six or eight strikes, or
12 five or nine strikes --

13 QUESTION: And they were all of the same gender.

14 MS. BRASFIELD: They are one --

15 QUESTION: Then you've got one.

16 MS. BRASFIELD: You know, at what point would
17 you decide you've crossed the line? If you're using, say,
18 two more strike against one gender than the other in
19 Alabama, the State courts have held that if you reduce a
20 racial ratio in the venire significantly when reaching the
21 petit jury, that that, in itself, can be a prima facie
22 case. So that you're really in a position where you might
23 have to have a proportional jury in order to avoid a
24 Batson challenge, or you would have to be prepared to give
25 a reason for each one of your strikes if you didn't have a

1 proportional jury.

2 QUESTION: May I ask you a question about your
3 procedure in Alabama, this alternate striking? Is it
4 correct that -- I gather a lot of these are peremptory
5 strikes, but is it also -- and it must be true also that
6 you can have strikes for cause as you go down the line,
7 and not have those counted against you, is that right?

8 MS. BRASFIELD: Yes, Justice Stevens. In this
9 case there were 36 on the original panel; three of them
10 were struck for cause by the court.

11 QUESTION: I see. And the person just doesn't
12 lose -- and then he gets another strike if the judge
13 agrees with him on the strike for cause.

14 MS. BRASFIELD: That's right. That doesn't
15 enter into it. The actual peremptory strikes begin after
16 the removal of the people who are struck for cause.

17 QUESTION: I see.

18 QUESTION: As -- would you describe again what
19 test in Batson cases the Alabama courts are now using?
20 Because, I mean, it seems to me that one of the
21 consequences of adopting the rule that the petitioners
22 want here, would be to compel Alabama to be less rigorous
23 in its application of Batson. I'm not sure that we have
24 required Alabama to apply such a rigorous rule. What is
25 the rule they now use?

1 MS. BRASFIELD: The proportion of minorities to
2 the majority race on the venire is considered as one of
3 the elements. It's not the only one; in individual cases
4 they might consider other matters.

5 But there have been cases in which the very fact
6 that either more strikes were used against the minority
7 than against the majority or that the result was that --
8 for instance, if you had eight strikes and you used two of
9 them against blacks, but there were only two blacks in the
10 panel, and so -- or three blacks in the panel -- so that
11 you reduced the proportion considerably, that would be one
12 of the things they would look at in determining a prima
13 facie case. That, in itself, could be considered a prima
14 facie case.

15 QUESTION: And one could hardly afford to apply
16 that rigorous a rule to another category of strikes, or at
17 least another major one as sizeable as sex discrimination.

18 MS. BRASFIELD: I think that that is true. I
19 think that there would have to be some other way to handle
20 it, and I am not prepared to say what that could be as far
21 as -- as applying Batson, how that could be done. Now,
22 there are other situations that have been done.

23 One thing I want to mention is that as well as
24 the community at large not being harmed, because men and
25 women both sit on the juries, and because these particular

1 men and women did not feel excluded from the system
2 because, they probably sat on another jury during the same
3 term of court, and because they were actually struck in
4 fairly equal numbers, the fact is that under the facts of
5 this case and the overwhelming evidence that was there, it
6 is very hard to see how the defendant could be harmed.

7 Because I don't think he was found to be the
8 father of this child because of a biased all-female jury;
9 I think he was found to be the father of this child
10 because of the overwhelming evidence that he is.

11 QUESTION: Justice O'Connor explained that
12 the -- one of the problems from your point of view is that
13 the right is being asserted by the defendant, but the
14 constitutional protection is afforded to the potential
15 juror. So every time you're talking about, well, the
16 defendant is or is not likely to be affected, it's the --
17 it's the harm to the potential juror as a result of
18 stereotyping because of one's birth status, that's the
19 constitutional injury that's at stake here.

20 MS. BRASFIELD: Yes, Your Honor. I understand
21 what you're saying, I think, but I feel that in this
22 particular case, in the first place they are struck by
23 number and the jurors don't know what their number is. If
24 one side is striking men and the other side is striking
25 women and then are reduced in equal numbers, then I do not

1 see how they can be harmed by that knowledge.

2 I think that part of our problem in Alabama may
3 be contributed to by the fact that we use the struck jury
4 method, which gives us this basically unlimited number of
5 strikes, limited only by the number that's on the panel to
6 begin with. The State of Alabama Bar Association has
7 already recognized that Alabama is having problems and is
8 having too many appeals on this issue, and they have
9 appointed a panel of -- a committee of judges and lawyers
10 to examine Alabama's jury system and see if going to a
11 different or a revised peremptory strike method, such as
12 is used in the Federal courts or some other court, might
13 alleviate a lot of the problem.

14 I think that there are other States who don't
15 seem to be having particular problems with Batson or with
16 gender strikes, and have been able to work this out.

17 QUESTION: So if there is a constitutional
18 injury and it's a problem of the mechanics of the State
19 system that could be fixed, as seems to be your --

20 MS. BRASFIELD: Then I think Alabama deserves an
21 opportunity to try to fix that, if that is what is
22 happening.

23 QUESTION: Well, certainly, there would be an
24 impetus to fix it if the Court said that Batson applies to
25 gender.

1 (Laughter.)

2 MS. BRASFIELD: I think there would be an
3 impetus to go to proportional juries or do away with the
4 peremptory strike. I think it could come -- become so
5 complicated that --

6 QUESTION: I'm sorry, I wasn't -- perhaps I
7 didn't understand you correctly. You said in places that
8 have -- don't have this struck jury system, like the
9 Federal courts, they weren't having the problems with
10 implementing Batson, either for sex or for race, the way
11 Alabama is because it's got this unusual struck juror
12 system.

13 MS. BRASFIELD: Uh --

14 QUESTION: So that if you -- if you fixed the
15 way your -- you strike jurors, then you might not have any
16 difficulty administering Batson for race or for sex.

17 MS. BRASFIELD: But I --

18 QUESTION: I thought that's what you had said.

19 MS. BRASFIELD: Yes, that is what I said, but I
20 do think that because it is already the -- the problem of
21 gender strikes in Alabama is not a pervasive problem, that
22 the State should have the opportunity to try to correct it
23 on its own.

24 And Mr. Dreeben seems to think that there is a
25 problem in the Federal system, also. If that is true, I

1 think that this Court's supervisory powers could well
2 allow this Court to cure that system without reaching the
3 States in your level.

4 I think that applying Batson to gender in the
5 situation that Alabama has at this point would cause great
6 slowdown of the cases moving through the courts, and would
7 raise more problems than it could possibly cure.

8 If there are no further questions.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
10 Brasfield.

11 The case is submitted.

12 (Whereupon, at 11:02 p.m., the case in the
13 above-entitled matter was submitted.)

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CERTIFICATION

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

The United States in the Matter of:

J.E.B. V. T.B.

CASE 92-1239

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

BY Ann Mari Federico

(REPORTER)

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