OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DANIEL HOLLAND, Petitioner V. ILLINOIS

CASE NO: 88-5050

PLACE: WASHINGTON, D.C.

DATE: October 11, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL HOLLAND, :

Petitioner :

v. : No. 88-5050

ILLINOIS :

Washington, D.C.

Wednesday, October 11, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

DONALD S. HONCHELL, ESQ., Chicago, Illinois; on behalf of Petitioner.

INGE FRYKLUND, ESQ., Assistant Attorney of Cook County, Illinois, Chicago, Illinois; on behalf of Respondent.

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P R O C E E D I N G S

2:00 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-5050, Daniel Holland v. Illinois.

Mr. Honchell, you may proceed whenever you're ready.

ORAL ARGUMENT OF DONALD S. HONCHELL

ON BEHALF OF PETITIONER

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

Daniel Holland in this cause faced criminal charges in the Circuit Court of Cook County, Illinois, and he elected trial by a jury, as assured by the Sixth Amendment to the United States Constitution. However, in the process used to select that jury, the state used its peremptory challenges to exclude both of the eligible blacks from service on the jury.

This case, therefore, involves the need to provide white defendants with a remedy to challenge such a process. A process in which black prospective jurors are removed by a peremptory challenge on the unjustified false assumption that as blacks they are unqualified to serve, endangers recognized essential values of jury trial, as contemplated by this Court under the Sixth Amendment.

This Court now prohibits the unfair selection of the venire based on the false assumption as to disqualifications of blacks due to group membership, and the Petitioner simply

asks that this court equally prohibit the unfair process in the voir dire selection.

This Court has barred the state from interfering with the fair possibility that the cross-section reaches the petit jury at the outset of the jury selection process in the formulation of the jury roles and the jury rosters. This Court has assumed that with the random selection the fair possibility will reach the venire from which the petit jury will be selected. And this Court simply cannot allow the Prosecutor to do in a single trial what the government is barred from doing on the basis of the decisions of this Court.

QUESTION: Well, would you say a prosecutor could challenge two black jurors out of six black jurors? Say there is a 12-man -- 12-person jury and six of the -- six of the jurors drawn from the -- six of the petit jurors drawn are black, could the prosecutor strike two of them as long as the resulting jury represented a cross -- a fair cross-section?

MR. HONCHELL: The issue in the case is protecting the process of selecting the jury, and in that situation, where individuals are removed by peremptory challenge on the basis of their race on the false assumption that they are unqualified, that is injury to the process and --

QUESTION: No. That's not a fair cross-section argument. That's an equal protection argument of some kind, isn't it?

MR. HONCHELL: The fair cross-section argument has to be

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understood in a -- in a very broad perspective.

QUESTION: But what if the prosecutor says, I'm interested in having a fair cross-section jury? All the -- all the -- suppose just by chance the jury turned out to be all black? I want a fair cross-section jury. Could he do that or not? I guess not, on your thesis.

MR. HONCHELL: Yes. He would be barred from using peremptory challenges to remove otherwise qualified jurors, black jurors, on the false assumption that because of their race they're not qualified to serve.

QUESTION: Well, how does that give you a fair cross-section jury if -- if --Justice White's hypothesis is that out of 12 there are 12 blacks?

MR. HONCHELL: If the -- if the prosecutor is allowed to use his peremptory challenges simply on the basis of his false assumptions and his biases, it is a severe injury to the selection process. And that is the key to -- QUESTION: But the selection process need not result in a fair cross-section in your view?

MR. HONCHELL: Well, that is -- that is true. Yes. The -- the -- issue is the prohibition against misusing peremptory challenges to remove the fair possibility of a cross-section on the jury.

Now, a defendant would have the obligation to demonstrate that the prosecutor's removal was based on the membership and

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therefore was based on the prohibited false assumptions. And it may -- in possible situations he would be unable to make that demonstration from all the facts and circumstances that the challenges were based on race.

QUESTION: You're not making a claim here, I take it, that there is some systematic exclusion of black jurors throughout the county?

MR. HONCHELL: That -- that --that's correct. There is no evidence in -- in the record on this -- on this -- in this case. The --

QUESTION: That claim would be open to you under existing precedence, presumably, if the facts warranted it?

MR. HONCHELL: Yes. The --

QUESTION: With respect to the venire.

MR. HONCHELL: Yes. The issue in this case is the process of -- of choosing from the venire those jurors who are going to serve as the truly representative voice of the community. And it's an essential, given this Court's emphasis on what a jury must do, the function that a jury serves, and the process of selecting that jury.

QUESTION: Does this objection apply only to racial distinctions?

MR. HONCHELL: The -- the issue of -- of what groups it -- it --it -- it would apply to is -- is an open question. It's -- it's -- it's difficult, as this Court recognized in

Lockhart v. McCree, to specify what groups qualify for examination. And we think that it's a -- it's -- it's an analysis that has to be limited.

QUESTION: Of course, one way -- one easy way of limiting it is to -- automatically is to say that only blacks --

MR. HONCHELL: Yes.

QUESTION: -- can object to the elimination of blacks. That -- that -- that you know --

MR. HONCHELL: Well, yes, that's been done, and -- and --

QUESTION: That eliminates a lot of problems, doesn't it? But you're saying anybody can object to the elimination of any group, right?

MR. HONCHELL: We're saying in this case that whites have the authority to object to blacks.

QUESTION: Right. And I suppose rich people could object to the exclusion of rich people. Not only the -- I mean, could object -not only to the exclusion of rich people, but even to the exclusion of poor people.

MR. HONCHELL: If rich people and poor people are -- are distinctive groups for purposes of determining damage to the system from its removal on the basis of that characteristic, and whether there is a showing that they were removed on the basis of that characteristic.

So the quest is really twofold. First of all, are we

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dealing with the distinctive group whose removal should be of concern, and, secondly, is there a demonstration that the removal was based on that membership?

QUESTION: How do we go about deciding the first question?

MR. HONCHELL: I'd -- I would refer the Court to Lockhart which is a -- which is an indication that it's difficult because this Court never said in Lockhart what groups or what distinctive --

QUESTION: Well, there's also rather strong in Lockhart, isn't there, that the fair cross-section applies only to the venire and not to the panel?

MR. HONCHELL: Yes. Yes. That is a -- there is a discussion there, but we would argue that that has -- has misconstrued what we contend is a fair cross-section requirement because that seems to suggest that there is a mandatory affirmative duty to include, which is unworkable and unsound to apply to the petit jury. And we're certainly not asking that that concept be used.

What we propose as a fair cross-section requirement is that assuming that there is the affirmative obligation at the outset, that there remain the fair possibility thereafter that what this Court has considered worthy of inclusion last throughout the system and actually sits on the jury.

So, we would argue that the fair cross-section

requirement is prohibitory, that the prosecutors are prohibited from removing cognizable groups or distinctive groups on false assumptions because it minimizes the fair possibility of serving on the -- on the jury.

But going to the assumption that there is such a fair cross-section argument, the Court in Lockhart did decide, attempted to decide and define what a distinctive group was. The Court --

QUESTION: Excuse me. What are -- what are false assumptions? You say false assumptions. When you're talking about a venire, I -- I suppose you can say there are false assumptions when you're talking about any group. You -- the only basis for excluding is you think that they're -- they're too biased or too stupid or something else, to be jurors at all.

But when you're down to a particular case, what is wrong with a prosecutor striking a particular people because they're rich? I mean, the prosecutor says, these are rich defendants; I think I'd stand a better chance of getting a -- getting a conviction if I excluded rich people, if I had a poor-person jury. The prosecutors make judgments like that all the time.

MR. HONCHELL: Yes, but the -- the false assumption is --

QUESTION: So it's not a false assumption then.

MR. HONCHELL: There is a false assumption that all rich people are necessarily biased and will be biased in this case

and, therefore, I may --I may exclude a person simply because he --

QUESTION: He doesn't exclude that at all -- that isn't his assumption at all. His assumption is the chances are better than even. It's not at all -- the chances are better than even that a -- that a rich person will be more sympathetic to a rich defendant and he therefore wants to strike the person. Isn't that exactly what -- what peremptory challenges are all about?

MR. HONCHELL: That's -- that's -- that's correct, but the question becomes is that a constitutional peremptory challenge as this Court has come to define it most especially in the Batson case. The assumption in Batson was, well, the black defendant is unqualified to serve; he'll -- he'll be more partial to a black defendant. Therefore, I can properly use a peremptory to strike a black.

And this Court has said, no, we -- we cannot allow prosecutors to make generalizations and generalities simply on this distinctive qualification.

QUESTION: If you're really -- if you're really honest about your principle, peremptory challenges in general -- the whole notion of a peremptory challenge is contrary to having a fair cross-section, isn't it, because the whole purpose of it is to eliminate a fair cross-section and somehow load the jury in such a way that it's more likely to be in your favor.

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Isn't that exactly what a peremptory challenge is for?

MR. HONCHELL: The -- the proper use of peremptory challenge is -- is to supplement challenges for cause in order to remove those who are for particular reasons that the prosecutor simply cannot articulate, or, more importantly, cannot convince the judge -- renders this person unqualified to serve.

QUESTION: But those reasons are very often generalizations about -- you -- you -- you can't know the person individually so you make generalizations, often on the basis of race, religion, appearance, you know, manner of dress, job. And, you know, it may be a false assumption, but the whole system is built on generalization.

MR. HONCHELL: Yes, and this is the tension between peremptory challenges and the fair selection of the jury. And this Court must integrate those two opposing concerns.

There is a recognition from this Court when the peremptories are used against blacks that the defendant is entitled to demonstrate that the decision to exclude was based on a false assumption that just because the person was black -- and for no other reason -- nothing having to do with his income, which his status, with his marital state -- with absolutely no other evaluations whatsoever you decided that this person cannot serve on the jury because he's black.

This Court said, well, that's not a constitutional

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peremptory challenge because there are limitations that are presented by this use of the peremptory challenge. There are dangers, there are limitations and frustrations that are introduced which this court must correct.

And under that analysis and under that assumption this Court simply should not allow peremptory challenges to overrule, to override the commitment of this Court to a selection process which is designed to assure the fair possibility that the cross-section will actually serve on the jury.

QUESTION: Incidentally, in your hypothetical I noticed you used martial status and wealth as being permitted grounds for disqualification.

MR. HONCHELL: I certainly didn't mean those to be decisive or necessary -

QUESTION: It certainly could be argued that those are cognizable groups that come within the rule that you seek --

MR. HONCHELL: Yes.

QUESTION: -- to have the Court adopt --

MR. HONCHELL: Yes.

QUESTION: -- is it not?

MR. HONCHELL: Yes. And the -- this Court need only decide the cognizable group of blacks. But I simply meant to illustrate that in order to use the peremptory --

QUESTION: Well, how can we do that? What principle

could you recommend to us or propose that allows us to say that only blacks are protected by the fair cross-section requirement?

MR. HONCHELL: It would be based on this Court's recognition that the removal of blacks by peremptory challenge suggests that prosecutors are misusing the challenges to remove on grounds of rights. There has been --

QUESTION: Well, that gets back to Justice White's original question, that this isn't the fair cross-section argument you're making at all. It's simply an equal protection argument.

MR. HONCHELL: The argument has elements of equal protection analysis to it because there is the concern for the excluded jurors.

But there's also concerns beyond the equal protection analysis that benefits the jurors. The concern for the defendant's right to have his guilt or innocence judged by a common sense interplay of all the values and perspectives of groups in the community, the value of the system in having it operate in a -- in a manner which enhances its dignity. The concern of other members of society that they are able to look at this process of jury selection and have confidence in the system, give it support, allow it to function with the full community backing.

So, there are these factors which -- in addition to the

concerns for the feelings and attitudes of the excluded jurors.

QUESTION: I suppose you would apply this same approach to civil trials in the federal courts?

MR. HONCHELL: If this Court could determine that the Sixth Amendment applied in the civil context, that in fact the Sixth Amendment was applicable to civil -

QUESTION: How about the Seventh Amendment?

MR. HONCHELL: The Seventh Amendment demonstrates that there is a --

QUESTION: Certainly there is a right to a jury trial.

MR. HONCHELL: -- a right to a jury trial, yes.

QUESTION: In the federal courts.

MR. HONCHELL: The difficulty -- the difficulty, unfortunately, is that the Sixth Amendment -- or not so unfortunately -- but the difficulty is that the violation under the Sixth Amendment comes from the governmental interference, whereas under the Seventh Amendment there would be interference by a second private counsel or an opposing litigant as --

QUESTION: Well, I know. But your rationale would surely apply. Nobody should be able to take a person off the jury on some -- just because he figures any member of this group is incompetent.

MR. HONCHELL: The argument we present is that certainly

the government is not entitled to do so. And there is certainly a value to applying this to the civil -- civil branch. It's certainly not an issue that's been developed in this case and it may need to await analysis and argument in civil courts.

QUESTION: Counsel, what do you do with Negroes who are passing for white? How do you get to them?

MR. HONCHELL: It puts the burden on the defendant to demonstrate that this is a member of the -- of the Black race. And, in addition, he's being excluded on grounds of membership in that race.

If the defendant can't demonstrate that these individuals are members of what he argues to be and persuades the court to be a distinctive group, then there's no analysis on their removal.

So, it would depend on the local judges who are able to determine from all the facts and circumstances whether these are members of the congnizable group or the distinctive group.

QUESTION: It's a fast way to get an all-white jury, isn't it?

MR. HONCHELL: The concern is not what kind of jury is gotten. The concern is the process in getting the jury itself. And we're advocating that this Court simply protect the process of selecting the petit jury from a venire which is already protected by this Court's decisions selected from the

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jury roles, which is also protected by this Court's decision.

So we've certainly discovered the weak link in this process of jury selection, because this Court has insisted that the system function to assure an eventual jury which will protect the defendant as a hedge against the prosecutors and the government, against arbitrary power by ensuring the common-sense views of the community, by assuring that the system functions and does so with respect.

And yet, the prosecutor, despite this Court's commitment to that kind of a jury selection system, can simply use a peremptory challenge and thereby evade at the petit jury at the voir dire stage what this Court has demanded as a ban at earlier stages of the jury process.

QUESTION: That stretches what we've said so far. I mean, it certainly would be a rational system to say that you have to have a fair cross-section for the venire simply to make sure that both sides enter into this lottery that is peremptory challenges on a fair basis, a level playing field.

You start off with a venire that is a fair cross-section. After that, each side gets its peremptories. We're not insisting that a fair cross-section come out of the thing. That's very unlikely with only 12 people on the jury anyway.

MR. HONCHELL: Yes.

QUESTION: But you've got to start off with a venire of a fair cross section and then each side can then use its

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peremptories the way peremptories are always used on generalized group bases. I mean, that's how peremptories are used. Why isn't that a perfectly rational system?

I mean, it doesn't logically follow that just because we say the venire has to be a fair cross-section the jury has to be.

MR. HONCHELL: The Court should conclude that the purpose of putting them on the venire is not simply for the symbolic value of saying that now they've reached the -- that stage in the case and, therefore, we're free to remove them thereafter.

QUESTION: No. The purpose is to make sure that both sides start off on a level playing field.

MR. HONCHELL: Yes.

QUESTION: After which they can both take their peremptories --

MR. HONCHELL: Yes.

QUESTION: -- anyway they want.

MR. HONCHELL: Then the question becomes how peremptories can be constitutionally used. If they can be used, or if they are used, or if the argument is that they are being used to remove blacks in this case simply on the grounds of race, this Court should conclude that that is an unconstitutional use of the peremptory challenge in the trial of a white defendant, just as it's an unconstitutional use of a peremptory challenge in the trial of a black defendant because it defeats the

possibility that the fair cross-section which is sitting on the venire waiting to serve actually reaches the petit jury where it will have value.

There is more than symbolic value to having members of mixed races on the petit jury. It's a significant benefit to the defendant in protecting himself against the prosecutors and the arbitrary judges. But, moreover, the process of selecting that jury has a value that must be protected. It's a way to enhance the jury system so that it functions in the community so that the community has confidence in the government for which it must -- with which it must live.

QUESTION: What do you think the theory in Batson is that permits the black defendant to challenge the use of peremptories against blacks? Is that an equal protection argument?

MR. HONCHELL: Yes, your Honor. Because of the happenstance of that case with a black defendant and a black juror, this Court determined that that was a valid --

QUESTION: The denial of equal protection to the defendant?

MR. HONCHELL: Yes, by -- well, no, the Court focused in on the equal protection of the black juror, which the defendant was given standing because he was a member of the same race, to raise as an argument to overturn the conviction. And, therefore, it --

QUESTION: Well, why shouldn't -- why shouldn't a -- why shouldn't a white defendant have that same privilege and without even getting to the fair cross-section argument?

MR. HONCHELL: The difficulty, of course, is that he lacks the traditional standing aspect because he's not a member of the same race.

QUESTION: Well, I know, but he's -- he's a defendant and that's all you're really saying about the black, is that he's a defendant and you're giving him standing to remedy this denial of equal protection to the juror.

MR. HONCHELL: Yes.

QUESTION: If that's your -- that's your theory?

MR. HONCHELL: That's -- that's one possible outcome. But this Court would have to overlook the standing element or find that nevertheless, despite the standing --

QUESTION: It sounds to me that that might be an easier argument than the --

MR. HONCHELL: Undoubtedly.

QUESTION: You're driving uphill in this case.

MR. HONCHELL: Well, we're certainly not precluding the equal protection argument as being persuasive in this case because in effect there's that argument and there's more, because there are Sixth Amendment --

QUESTION: Was your case tried after Batson came down?

MR. HONCHELL: No. No. The trial did not apply to

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Batson, although the case was on direct appeal at the time of Batson. And the issue that was raised in the lower court was the denial of Sixth Amendment on the basis of Taylor versus Louisiana.

QUESTION: Well, was a Batson claim raised in the lower courts?

MR. HONCHELL: No. No. The issue was Sixth Amendment. Because, of course, the defendant relied on Commonwealth versus Soares and People versus Wheeler, the local state cases that had utilized a Sixth Amendment claim because they couldn't rely on Fourteenth Amendment under Swain. So, it was presented as Sixth Amendment.

And it's -- it's an appropriate Sixth Amendment case because it presents all of the harm that the equal protection cases condemn, plus additional harm that the Sixth Amendment cases protect. Therefore, this -- this Court can utilize the Sixth Amendment to demonstrate that white defendants are entitled to complain if they have evidence that they offer that members of the black community, the distinctive group of blacks, are being removed on the grounds of race.

And, again, if the defendant is unable to succeed in either of those points, then he would not prevail. So this is simply giving the defendant the remedy to deal with an issue that he is now powerless to raise.

In the Lockhart case, the Court assumed that the

defendant was able to point to a particular group, that the particular group had certain immutable characteristics of race, of gender, of ethnic background. It cited blacks, women and Mexican-Americans. So, those are indications of the types of groups that this Court would protect.

QUESTION: Well, didn't the Illinois Supreme Court in this case say that Batson did not apply in this situation?

MR. HONCHELL: Yes, because the defendant was white.

QUESTION: Yes. So, the Batson issue was raised and decided in the Illinois Supreme Court.

MR. HONCHELL: In the Illinois Supreme Court. It was not raised in the trial court.

QUESTION: Well, I know, but it's raised --

MR. HONCHELL: Yes.

QUESTION: -- and it was decided.

MR. HONCHELL: Yes.

QUESTION: Are you relying on it here?

MR. HONCHELL: No. We didn't pursue the Batson argument because we -- we have concluded that we lacked the standing. But that shouldn't prevail -- that hopefully will not dissuade the Court if it prefers to use an equal protection result.

QUESTION: We very rarely do that if the lawyer is unwilling even to say he relies on it.

MR. HONCHELL: Well, we didn't --

QUESTION: You haven't argued it yet.

MR. HONCHELL: We haven't argued it. No. But the -- but we've argued that the essence of the objection, or of the problem in the case is an equal protection. But we've put it in the context of a Sixth Amendment right.

So, the issue of a denial of equal protection has been presented because blacks are being removed on grounds of race. But we've presented as a remedy, a Sixth Amendment contention because that harms the jury selection system which the defendant does have standing to raise.

So, the difficulty also, of course, is that this Court decided Batson --

QUESTION: The standing issue is really quite interesting because, as Justice White points out, Batson wasn't a member of the class that was at issue in the case. He happened to be of the same race, but the class was prospective jurors.

MR. HONCHELL: Yes.

QUESTION: And I don't know whether you're assuming that he had standing because he was of the same race or because he was a defendant who objected to the adverse consequences upon him of a violation of the Equal Protection Clause against others.

MR. HONCHELL: Well, the impact on the defendant of a violation of the Equal Protection Clause would be a Sixth Amendment violation because he has an interest in his jury serving as the conscience of the community which is denied if

the fair possibility of the cross-section is frustrated. And the equal protection argument would concentrate on the interests of the juror, which being of the same race, he had the authority to -- to contend or to challenge.

So, this is a broader issue because there are broader interests at stake of a defendant to have his jury chosen and serve in a fair system. So, because of the emphasis that this Court has put on the process of choosing the jurors, that this Court must have equal concern with the process of choosing the petit jurors. That if this Court means to make meaningful its emphasis on the fair selection process, it must do as well on the petit jury because that's the only jury that counts as far as the defendant is concerned.

So we do ask your Honors then to recognize the right whenever a defendant, whatever his race, demonstrates that members of the black community are being removed on grounds of their membership on the false assumption that because they're black they're unqualified to serve in a case, that he be able to make an objection, attain a hearing, and prevail on his grounds.I would request the rest of my time be reserved for rebuttal, but we do ask your Honors for the relief sought.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Honchell.

Ms. Fryklund, we'll hear from you now.

ORAL ARGUMENT OF INGE FRYKLUND, ESQ.

ON BEHALF OF PETITIONER

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MS. FRYKLUND: Mr. Chief Justice, and may it please the Court, the question presented today is whether the Sixth Amendment regulates the use of peremptory challenges during voir dire. Our position is that it does not.

The Sixth Amendment guarantees the right to trial by jury, which as this Court has said in numerous decisions, the fundamental purpose of trial by jury is to prevent oppression by the government. And, furthermore, we're guaranteed not only this trial by jury, but trial specifically by an impartial jury. So, I believe the focus of the Sixth Amendment is on this end result of an impartial jury.

Counsel suggested in the course of his argument today that the outcome of the composition of the jury is somehow less important than the process and that this Court should be focusing primarily on process. I think that that is absolutely incorrect. We must always be looking at the touchstone of the Sixth Amendment, which is the impartial jury.

The Sixth Amendment purposes of achieving an impartial jury are achieved in practice by a sequence of stages that begins with the broadly-based jury pool which must be drawn from a cross-section of the community. And the process ends sometime later in an individual courtroom in which a prosecutor and an individual defendant and his attorney -- two adversaries -- are mutually engaged in the process of picking

an impartial jury of six, or, as in Illinois, 12 jurors. And the choices at all stages of the process are, of course, constrained by the Equal Protection Clause.

Now, the broad -- we believe that the very broad mix of all the distinctive groups on the jury pool is directly and casually related to the overriding purpose of preventing oppression by the government.

Given that it's the government which by definition is a party to every criminal case, which is solely in control of all the mechanisms of jury summoning and recruitment, it is vital that the government not be able to manipulate or gerrymander the jury pool.

Thus, at the time the government is making its decision to indict, which usually comes some weeks or even months ahead of the actual trial date, the government is constrained in making its charging decision by the knowledge that it has no control over who is going to be able to appear on the venire, and potentially any member of the community could appear to try the case.

I think this is why even if the particular defendant ultimately opts for a bench trial this broadly-based jury pool has served a very vital function for keeping the government honest.

As Justice Scalia pointed out earlier, if the jury pool is broadly-based with nobody in particular eliminated, at the

time the two parties reach the final stage of voir dire, they're both on a level playing field. Neither has been able to bias the direction of the venire.

Then, when the trial date for an individual case arrives and the two individual parties enter the courtroom, the government is no longer in control of the process. The government has switched hats. Now the government is one party in a particular case. And at this stage the judge exercises -- or, removes jurors for cause, and the two parties -- and in Illinois the two parties have the same number of peremptory challenges, it's now seven -- the two parties jointly act to pick a jury.

And they do this by each side acts to remove the individual people whom it suspects are going to be least favorable to consideration of its own side.

It is our position that at this stage, in the midst of voir dire, that the demographic composition of the jury which is ultimately chosen, or the composition of the array of people who have been excused, is absolutely irrelevant to any purpose which is protected by the Sixth Amendment.

Therefore, whether petitioner is talking about having a quota of some representatives of the community on his petit jury or, as he spoke in his brief, about a fair possibility that some particular distribution would obtain, or whether, as he emphasized in argument today, that we have to look to

someone's motivation for particular choices -- however it is he phrases, we believe that under the Sixth Amendment his claim fails at the very threshold because the group membership of individual impartial people is absolutely irrelevant to anything and should not be the basis for a cognizable claim.

In fact, since this goal of impartiality is logically independent of the race, socioeconomic class, ethnic origin, or any other personal characteristic of the individual jurors, any sort of rule of selection or any prohibition on what the government can do in selection that's based on anything other than impartiality is bound to go counter to the expressed values of the Sixth Amendment which is the goal of impartiality.

So, our position is the only time at which a defendant is entitled to a fair cross-section of the community is the point at which the names go into the box for selecting the venires. That's the end of it.

Now, coming back to this overriding purpose of achieving impartiality. Petitioner Holland here has never contended that there was anything wrong about the way the Cook County jury pool was selected, and he has never contended that there was anything impartial about the jury of 12 that actually convicted him.

In fact, in this case, given that he had five peremptory challenges left over at the time his jury was sworn, we know

with certainty that he was perfectly satisfied with the impartiality of his jury. What he is telling us now is that he wants not just impartiality, but impartiality plus. Now, plus race, ethnic origin, whatever. And I submit that there is nothing in the Sixth Amendment that entitles him to impartiality --

QUESTION: Well, he's not really saying that. He's saying plus the inclusion of all those races that he wants included. He's not been willing to extend this principle to the defendant, or at least leaves that an open question. He just wants us to hold that the prosecutor can't exclude certain groups on the basis of their group characteristics although the defendant still can, as far as his case goes.

MS. FRYKLUND: Well, he's certainly saying that he wants to restrict this to defendants. I mean -- sorry -- just to the prosecutors. But, as Justice White's questions earlier pointed out, logically if this can apply in a civil case in which both sides are private citizens, that same rationale should certainly apply to the defendant here.

In fact, it would be rather strange to have a procedure which constrained the government in a way which was on some basis other than impartiality and yet did not in a comparable way constrain the defense. Almost by definition we would end up with something which was less impartial than before. And it seems very inconsistent for this Court to require something

that's guaranteed to reduce impartiality.

QUESTION: Supposing you had a state -- that's probably very improbable, but just to get a point across -- in which -- a trial court in which the judge followed a practice of always excluding black jurors from an otherwise, you know, cross-section panel and the resulting jury was nevertheless composed of 12 people who were found to be impartial, would the defendant have any basis for -- constitutional basis for objecting to such a procedure? A white defendant?

MS. FRYKLUND: That sounds like Virginia versus -- ex parte Virginia from back in 1879 when in that case a particular district judge refused to call any black jurors for the jury pool. I think the same rationale would hold here. If --

QUESTION: But I'm assuming they're in the jury pool. Now, they're in the jury pool and in the venire and you say that's -- if your position is that that's the end of the ball game, I take it there would be no remedy if a judge did it at the -- during the selection of the petit jury -- just refused to seat any blacks.

MS. FRYKLUND: No, because the Equal Protection Clause applies at all stages and a trial judge --

QUESTION: But could a white -- could a white defendant object to that?

MS. FRYKLUND: I think a white defendant would not be

able to object to that.

QUESTION: So that such a practice would be permissible in all cases where the defendant is not black?

MS. FRYKLUND: This would not be the means for attacking the problem.

QUESTION: Then what would --

MS. FRYKLUND: The remedy would not be found --

QUESTION: What would be -- the means would be by passing a law to get them to stop?

MS. FRYKLUND: Well, that would be in violation of federal and probably state law right now. The excluded jurors, as a class, could easily bring a suit.

QUESTION: Well, I suppose it might be a due process violation if the judge did such an aberrational thing. Clearly not authorized under state or federal law for the judge to do that.

MS. FRYKLUND: I think there certainly would be a cause of action that the excluded class of black jurors, which, by hypothesis, there must be a large number --

QUESTION: My question is whether a white defendant could object.

MS. FRYKLUND: I do not think -- the Sixth Amendment would not reach it, and I do not think that a white defendant in a particular trial, if he was getting an impartial jury, would have standing -- he would not have equal protection

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standing.QUESTION: Why, then, would a black defendant have standing because he would also not be a member of the class?

MS. FRYKLUND: Well, in the previous decisions of this Court, class has always referred to race, and the defendant in Batson did have the same race standing. He was the same race as the excluded jurors, which is a fairly traditional basis for third party standing -- that he is not only similar and can stand in the shoes of the excluded jurors, but he also suffers, I think, some injury in fact to himself as he, a black defendant, is standing there watching members of his race being shown the door. That also provides a signal to the impanelled white jurors that this person -- people like the excused jurors, black people, are not terribly important in the eyes of the legal system.

So, he has an injury which is personal to him as well as third party standing. A white defendant has no such interest.

So, our position here is that Petitioner Holland got exactly what the Sixth Amendment promises him. This is why we think that even though he has denominated this claim as a Sixth Amendment claim, he really is not making a Sixth Amendment claim at all, as Justice White suggested earlier. What Petitioner Holland appears to be doing is attacking by the back door the standing requirement of the Equal Protection Clause.

In fact, as he specifically asks at page 6 of his brief,

--

QUESTION: Supposing he is and suppose we accept that -- even this back door approach, then what's your answer to the argument that the white defendant should have standing to attack the discriminatory exclusion of the black juror just on the ground that blacks are incompetent?

MS. FRYKLUND: If nothing else, if petitioner were to approach the problem through the Equal Protection Clause, jurisprudentially it's cleaner than what he is trying under the Sixth Amendment.

I think the reason it should fail on the merits is because that would amount to saying everybody has standing to complain about everything, and that is going to involve overturning an awful lot of standing jurisprudence of this court.

Other contexts such as --

QUESTION: It might even go farther than the Sixth Amendment approach.

MS. FRYKLUND: Well, consider the Fourth Amendment, search and seizure, that it's always been held that a criminal defendant who wants to have something suppressed is going to have to assert an interest in either the thing that's been seized or the premises that were searched. If we --

QUESTION: What do you think the theory of Batson was? Is it the -- is it that the defendant has been denied equal

protection?

MS. FRYKLUND: I think that's what the theory was. That there was some --

QUESTION: Namely that -- that -- that blacks were excluded and that's going to hurt him because blacks might favor him, or what?

MS. FRYKLUND: Whether he might have thought that blacks were going to favor him or not, I mean, I think that thus far has not been an interest this court has been willing to protect. I think it's more the stigma of the system telling black jurors that they don't quality and telling --

QUESTION: Well, what difference does it make what -- what defendant raises that issue?

MS. FRYKLUND: Because in the situation involving a black defendant there is not only third-party standing on behalf of the excluded people but he has his own injury. And in general --

QUESTION: Which is -- which is what? What is his own injury?

MS. FRYKLUND: The -- I think the injury is the signal to him that the -- that the system does not value him too highly if it removes all members of his raise, and the possibility of conveying the idea to the impanelled jurors that maybe they shouldn't take this black defendant too seriously.

Thought it should be noted that in the Batson case I

think there was also no claim that the actual jury that tried him was not impartial. So, the Equal Protection Clause is dealing with something other than impartiality.

Unless petitioner would urge this court to go the equal protecting -- the equal protection standing route, what he has left us with under a Sixth Amendment analysis is something which would be extremely difficult to put into practice, as well as totally unnecessary.

When he talks about, as he does in his brief, about how he would settle for merely a fair possibility of a fair cross-section actually appearing on his petit jury, the question is how to operationalize that so that any attorney -- whether defense attorney or prosecutor -- and the trial judge will know when a fair possibility has been violated or hasn't.At the level of the jury pool, we know that by definition there is a fair possibility if in fact no distinctive group has been excluded. And we test that by looking over some period of time to see if the composition of the jury pools matches the composition of the community. But petitioner is apparently looking for something in addition that would be enforceable right on the petit jury.

Now, I would think the -- perhaps the logical way to approach that would be to look at the composition of petit juries over time. That, over a period of six months, looking to see if the jurors who actually serve somehow match the

demographic distribution in the county -- that is something that would be possible to do. In effect, that's recreating the Swain rule, but under the Sixth Amendment. But it does have the advantage of the certain logic that it's a way of testing what he says he's looking for.

If he doesn't go to some such long-term Swain type rule or switch to a Batson type rule where he substitutes the invidious intent of the Equal Protection Clause for disparity in numbers, we end up with something which is unintelligible and unenforceable. In this particular case there were two black jurors excused. That's all we can say looking at it. There is -- there is no theoretical content to that.Cook County, which is approximately 26 percent black on the voter lists -- this should mean that in a Cook County jury the ideal would be three black people on it. And suppose in a particular voir dire the state excused two blacks, as in this case, and impanelled two, how would we ever know which of those two choices was wrongful? What would the the trial judge do in order to manage voir dire?

So, anything which does not require actual impaling of a full cross-section on the petit jury is left in complete limbo. Nobody knows whether the choice has violated the Sixth Amendment or it doesn't. The prosecutor can go home every night wondering if he has violated the Sixth Amendment.

An additional problem with the analysis that petitioner

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is suggesting here is that I assume that this would be in effect at the same time the Batson rule is in effect. Batson can be claimed by a black defendant. The Sixth Amendment claim must be one which could be claimed by anybody, and I can foresee a lot of times when there would be a tension between what the Equal Protection Clause, as effectuated by the Batson rule, requires, and what a Sixth Amendment rule would require.

For example, in this case it would be possible for the trial judge to conclude, even if this was a black defendant here, that there was no violation of the Equal Protection Clause, that there were some race-neutral reasons. But, at the same time, this petition kept urging back in 1981 at the time of his trial that these were the -- quote -- "only two available black people." So, an argument could be made that we would have to impanel these two.

There is also a very different standard under the Equal Protection Clause in the Sixth Amendment. The Equal Protection --

QUESTION: I must confess I'm a little puzzled by that argument. Who is making -- you only have one defendant who is objecting to the -- to what the prosecutor does.

MS. FRYKLUND: Uh-huh.

QUESTION: He can't both insist that they seat these two people and object to their seating.

MS. FRYKLUND: If he were a --

QUESTION: Whatever he is.

MS. FRYKLUND: -- black defendant, he could ask the particular people not be excused under Batson.

QUESTION: Yes. As he objects to the prosecutor's use of the peremptories. But he couldn't also then turn around and say, I'd like to have them seated.

MS. FRYKLUND: Or maybe he could plead in the alternative.

(Laughter.)

MS. FRYKLUND: Or do we allow a defendant to --

QUESTION: I really don't think that's a very realistic problem. I think either he's going to object or he isn't going to object.

MS. FRYKLUND: Or another possibility is if, suppose it happens to be a venire which is predominantly black, as sometimes happens by the luck of the draw in Cook County. We could end up with six black people on the venire. The prosecutor who then excused three of them in an effort to obtain a distribution that more closely approximated Cook County, would be excusing people specifically on the basis of race which presumably would violate Batson. But it might be absolutely necessary to avoid too many of some -- too few of some other category. And it might be required under the Sixth Amendment.

I think there are a number of situations in which there

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would be attention between the two.

QUESTION: Well, I take it the argument is not that there is an obligation to excuse in order to get a fair cross-section. It's simply that the state violates the Sixth Amendment because it, by its racially-based challenges, destroys the possibility that the laws of probability are going to work to -- to produce a fair cross-section.

That's all the petitioner is saying here.

MS. FRYKLUND: Well, unless --

QUESTION: The petitioner is not saying that there is an obligation in every case to use peremptory challenges to secure a fair cross-section, simply that the state cannot by interference prevent the laws of probability from -- from operating.

MS. FRYKLUND: Well, unless what petitioner is making is a heads I win, tails you lose, sort of argument that if there are six black potential jurors who appear, if there are that many, we are obligated to keep them, we can't reduce the number. But if we are thinking seriously about a fair cross-section in which every distinctive group in the community has -- should have a fair possibility of being there, I think that a prosecutor under a Sixth Amendment constraint would be entitled to try to produce something the closest to the community that he could.

And it seems that when petitioner is just talking about

how we can't -- perhaps what he's saying is simply that we can't alter whatever it is that comes in the door. For that proposition, I see no support in either the Equal Protection Clause or the Sixth Amendment. In fact, that would be saying that whatever distribution by the luck of the draw is sent from the jury room today -- those 40 people -- I can't use a choice which is going to alter that distribution, whatever it happens to be.

QUESTION: Well, you -- that isn't right. Surely there would be some case-related reasons that could be used in exercising your peremptories without any challenge to them. It's just you couldn't alter the luck of the draw by striking people for unacceptable reasons like race or like gender or something like that.

MS. FRYKLUND: Again, those are equal protection ideas. If what we're talking about is a consistent Sixth Amendment position in which we have whatever comes in the door, if we are exercising peremptory challenges for proper reasons to --

QUESTION: Yeah, but all you get -- all you're entitled to under the Sixth Amendment is a chance of the draw and -- so the draw comes out. Here it is. It may not even remotely resemble a fair cross-section. But that's the luck of the draw and you're stuck with it except to the extent that you can exercise your peremptories for decent reasons.

MS. FRYKLUND: Well, we think --

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QUESTION: That's a Sixth Amendment argument.

MS. FRYKLUND: We think the Sixth Amendment cross-sectional principle is fully satisfied at the time the jury pool is fairly drawn and the venire is fairly dispatched --

QUESTION: Right.

MS. FRYKLUND: -- from the jury room. And that that's the end of it. Beyond that --

QUESTION: Well, let me -- I'm sorry. Did you finish your answer? I didn't --

MS. FRYKLUND: Beyond that, peremptory challenges should be exercised and I think constrained only by the Equal Protection Clause by the two adversary parties doing their best to impanel a jury that's going to give favorable consideration to their position.

QUESTION: Let me give you another example. In Illinois you pick your juries by panels of four, if I remember correctly, that come in in sequence.

MS. FRYKLUND: Usually we do it that way, yes.

QUESTION: And usually the ones who get in earliest have the greatest likelihood of being selected. Supposing they had a system where all the men went first and then the women went later? Would that raise any Sixth Amendment concerns? You have a fair venire but then you have this procedure between venire and petit jury that the men go first.

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MS. FRYKLUND: I think that would probably raise a due process concern.

QUESTION: You don't think it would raise an equal protection -- I mean, a Sixth Amendment concern?

MS. FRYKLUND: I don't think so. No.

QUESTION: Just a fair trial --

MS. FRYKLUND: A fair trial --

QUESTION: -- if all the men were on the jury or all --

MS. FRYKLUND: What defendant is entitled to and what Petitioner Holland got here is a fair trial.

QUESTION: Yeah.

MS. FRYKLUND: That is everything that he is entitled to. While petitioner is asking for an elaborate remedy which has some base and some combination of the Equal Protection Clause and the Sixth Amendment, we believe there is no necessity of this at all.

And given that this Court cannot impose new procedures or constraints on the states unless we're in violation of the Federal Constitution, and petitioner here has failed to demonstrate how the Sixth Amendment is violated by this, the State of Illinois asks that this Court affirm the judgment of the Supreme Court of the State of Illinois.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Fryklund.

Mr. Honchell, you have two minutes remaining.

REBUTTAL ARGUMENT OF DONALD S. HONCHELL, ESQ.

ON BEHALF OF PETITIONER

MR. HONCHELL: Thank you, your Honor. I believe the right of the defendant, or the expectation of the defendant has been well-expressed during respondent's argument, but this Court must assure that whatever the luck of the draw, the defendant has the right to a fair process which permits the fair cross-section as much as humanly and legally possible to reach the issue -- to reach the jury.

This Court has never focused merely on the end result. It has looked to the process involved because that's valuable. This Court has never merely assumed the Sixth Amendment is satisfied by an impartial jury or a fair trial because that doesn't assure that there's a fair system involved.

All we're asking is a system that, as with blacks, allows white defendants to complain of the arbitrary exclusion of blacks on grounds of race. It's a very simple system, it's been used in Batson. The courts are familiar with it. It can be used throughout the system. And, in fact, if there is both a black defendant and a white defendant, it solves the nagging question of how the prosecutors can proceed in that case.

So, it does permit the -- the last possibility of any prosecutor being in control of the system. And the state seems to think that as long as all the members of the community are placed at the outset, then the government is no longer in control of the system. In fact, they do remain in

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control over the system because they have that unconstitutional peremptory challenge. That wild card that they can use to totally frustrate the rights of the defendant which he has standing to object to under the Sixth Amendment, and the will of this court that the processes assure the fair possibility that the cross-section will reach the petit jury.

Many of the concerns of the state that they admit today exist in trials of black defendants. Well, here is a demonstration that a black is unfit to serve, and this has impact on blacks, and it has impact on whites.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Honchell. Your time has expired.

MR. HONCHELL: Thank you, your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 2:57 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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Daniel Holland, Petitioner V. Illinois

Case No. 88-5050

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BY Judy Freilicher

(REPORTER)