

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 THOMAS JOE MILLER-EL, :

4 Petitioner :

5 v. : No. 01-7662

6 JANIE COCKRELL, DIRECTOR, :

7 TEXAS DEPARTMENT OF CRIMINAL :

8 JUSTICE, INSTITUTIONAL :

9 DIVISION. :

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11 Washington, D. C.

12 Wednesday, October 16, 2002

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:03 a.m.

16 APPEARANCES:

17 SETH P. WAXMAN, ESQ., Washington, D. C.; on behalf of the
18 Petitioner.

19 GENA A. BUNN, ESQ., Chief, Capital Litigation Division,
20 Assistant Attorney General, Austin, Texas; on behalf
21 of the Respondent.

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

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 01-7662, Thomas Joe Miller-El v. Janie
5 Cockrell.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 Hernandez v. New York described a hypothetical
12 case, a case in which the evidence of racial
13 discrimination during jury selection was so strong that,
14 quote, "a finding of no discrimination is simply too
15 incredible to be accepted." This is truly that
16 exceptional case, and therefore the Court should use it as
17 a model, a model of the weight of evidence sufficient to
18 render objectively unreasonable a trial judge's rejection
19 of a Batson challenge. Indeed, whatever --

20 QUESTION: Well, now you -- you -- Mr. -- Mr.
21 Waxman, you've got two presumptions going against you
22 here: the -- the first, the Hernandez presumption that
23 the trial court has to be deferred to, and then the AEDPA
24 presumption. So I -- I hope you'll take those into
25 account.

1 MR. WAXMAN: I want to embrace them, Mr. Chief
2 Justice.

3 (Laughter.)

4 MR. WAXMAN: I fully recognize, as an officer of
5 this Court and somebody who has followed this
6 jurisprudence, that even on direct -- that the deference
7 that is paid to a trial judge in a Batson hearing is so
8 strong that even in Hernandez, this case said on direct
9 review -- and Hernandez made reference to the high
10 standards of proof in habeas -- even on direct review, we
11 are going to require proof that a trial court's finding of
12 fact in a Batson hearing is erroneous by clear and
13 convincing evidence.

14 And to that, AEDPA enacted subsection
15 2254(d)(2), which says that you -- a writ may not issue
16 unless the State court adjudication resulted in a decision
17 that was based on an unreasonable determination of the
18 facts in light of the evidence presented.

19 There are very good reasons to provide these
20 dual levels of deference to the trial judge. The trial
21 judge in the case, of course, is the finder of fact, and
22 in Hernandez this Court has made clear that the ultimate
23 finding in this case, the finding of whether or not the
24 trial prosecutor engaged in intentional discrimination in
25 making race the tipping factor, a but-for factor with

1 respect to the strike of any peremptory -- of any juror
2 under a peremptory challenge -- is a factual
3 determination.

4 But (d)(2) and the clear and convincing evidence
5 standard are there for a reason. They are there for the
6 truly exceptional case in which there are reasons to
7 believe that the trial judge's findings are deluded, and
8 there are reasons to believe that the evidence suggesting
9 that the trial judge's finding was unreasonable are
10 overwhelming.

11 And I'd like to address the first first and the
12 second second, because I think it is entirely clear that
13 given the facts of this case and the way in which the --
14 the trial judge in this case conducted the hearing, that
15 whatever this Court decides, this case is going to stand
16 as a benchmark, either that these facts represent an
17 extreme that cannot be tolerated or that even these
18 extreme facts are tolerable under Batson.

19 Now, let me speak first to the trial judge.

20 The trial judge was conscientious and he was, of
21 course, to some extent disabled by the fact that the trial
22 in this case immediately preceded this Court's decision in
23 Batson. That is, this is one of these few cases where the
24 trial occurred before Batson, but the case was pending on
25 direct appeal when Batson was decided.

1 And so we have in this case a trial judge who
2 conducted the Batson hearing over 2 years after the jurors
3 testified and after the trial prosecutors gave their
4 reasons for all but two of the jurors. And therefore, the
5 one hallmark of deference, which is that the trial judge
6 is a percipient witness of the res gestae, if you will,
7 did not exist in this case. The -- the decided cases
8 under the Texas Court of Criminal Appeals reflect
9 significantly more than a dozen cases decided by this
10 judge in that 2-year interim period. He saw thousands of
11 venire members and undoubtedly heard hundreds, if not
12 thousands, of Batson explanations.

13 And moreover, whereas it is true that the trial
14 judge observes the demeanor of the witnesses and a
15 prosecutor can certainly use as a race-neutral reason
16 questions raised about a juror's fitness or suitability
17 based on demeanor, the objections in this case, with one
18 limited exception, the prosecutor said nothing about the
19 demeanor. The prosecutor's stated objections to the 10 of
20 the 11 African Americans who were struck were substantive
21 reasons there on the record.

22 In addition, the trial judge in this case did
23 not --

24 QUESTION: Well, but certainly demeanor could
25 play a part in that even though you don't -- you don't say

1 it.

2 MR. WAXMAN: I --

3 QUESTION: You say he's -- he's prejudiced
4 against the Government and, you know, perhaps the way he
5 answered questions may give you a reason to think that,
6 that the transcript doesn't.

7 MR. WAXMAN: I can -- I -- I embrace that, Mr.
8 Chief Justice. For many years before I entered this line
9 of work, I was a trial lawyer and I can remember
10 exercising peremptory strikes just because of hesitation.

11 My only limited point here is that unlike many
12 voir dire hearings -- and I've now reviewed many -- there
13 was only one single isolated instance in which the
14 prosecutor, in giving his reasons either at the time or in
15 the Batson hearing, said he hesitated or his demeanor led
16 me to question it. And so in that one respect, I -- again
17 I think this case is more susceptible to meaningful
18 appellate review.

19 But I have two more points I think it's very
20 important for the Court to consider about the way this
21 trial judge conducted this unusual case.

22 QUESTION: At -- at what stage, Mr. Waxman? You
23 say this was 2 years after the actual trial? There was a
24 -- a State habeas proceeding or something?

25 MR. WAXMAN: Oh, no. It was direct appeal. The

1 case was tried. There was an immediate appeal taken.
2 During the -- right after -- I think a month after the
3 case was tried, Batson was decided, and 2 years later, the
4 Texas Court of Criminal Appeals abated -- the Texas Court
5 of Criminal Appeals said 10 of 11 African Americans were
6 struck. That raises an inference of discrimination under
7 Batson. Remand it for a Batson hearing. And it was at
8 that hearing that the judge made the findings of fact and
9 conclusions of law that are reflected in the -- in the
10 joint appendix.

11 There was a subsequent habeas proceeding in the
12 State courts, but the habeas proceeding didn't deal with
13 the Batson issue because it had been fully exhausted.

14 The trial judge, in evaluating Batson, did not
15 look at the very substantial evidence of pattern and
16 practice evidence with respect to what was going on in
17 Dallas County at this time, evidence that the magistrate
18 deemed appalling. He was told by the State not to look at
19 it. He did not consider what the State acknowledges to be
20 racially disparate -- disparate questioning of the jurors
21 in venire on the question -- their ability to impose a
22 minimum sentence --

23 QUESTION: How do we know -- how do we know he
24 didn't look at that?

25 MR. WAXMAN: We -- we don't know to a certainty

1 that he didn't. He was told by the State that all of that
2 evidence was irrelevant. Indeed, the State took the
3 position that a -- that comparative evidence between white
4 jurors and black jurors was irrelevant. That was the
5 ground on which they urged this Court to deny the petition
6 for certiorari on direct appeal. All I can say is it's
7 nowhere reflected in the district judge's opinion. The --
8 the trial judge's opinion addresses only the six jurors in
9 question that my predecessor claimed were struck in
10 violation of Batson.

11 QUESTION: But he did say, didn't he, when he
12 admitted the -- as you pointed out, when he admitted the
13 -- the newspaper article, that he'd take it for what it
14 was worth?

15 MR. WAXMAN: He did. And there's an ambiguity,
16 and that's why we think, interestingly, that this case is
17 a (d)(2) case rather than a (d)(1) case. In this Court,
18 as opposed to in the State courts, the State of Texas is
19 here before you saying the judge considered everything.
20 The Texas Court of Criminal Appeals considered everything.
21 They don't have to discuss everything that they
22 considered, and therefore, there is no legal error that
23 was committed. And our submission to you is I don't know
24 if that's right or not. It doesn't appear to be right,
25 but whether it's right or not, the result that they

1 reached, the conclusion that they made that there was no
2 -- that -- that race was not a but for factor with respect
3 to not one, not two, but six of these people.

4 Under the record of this case and in light of
5 the way they conducted the jury shuffle in this case,
6 which cannot be justified on non-racial grounds --

7 QUESTION: Before you get to the jury shuffle,
8 how long before the -- the voir dire in this case had the
9 newspaper article surfaced? And there were, I guess, two
10 sitting judges who had once been prosecutors and they
11 said, well, we had a manual that we work with. Could
12 there be an argument that that -- that the last indication
13 that the manual was being used was 5 years before this
14 trial? Or is there evidence that it was being used right
15 up to the time of the voir dire? Could you tell me about
16 that?

17 MR. WAXMAN: I'll address the newspaper articles
18 first, I guess you were asking about, and also the manual.

19 QUESTION: Yes.

20 MR. WAXMAN: The newspaper articles -- there
21 were two series of newspaper articles. There were three
22 articles that came out in the first or second week of
23 March which was either just as the 4 or 5 weeks of jury
24 selection was closing or after it, but it was before the
25 trial began. And those articles precipitated the -- what

1 was called a Swain challenge but it -- what became a
2 Swain-Batson challenge.

3 There were -- there were other articles that
4 were subsequently issued after the -- after the trial in
5 the case but before the direct appeal and the Batson
6 remand that looked at the racial percentages in capital
7 cases which mirrored the -- in many ways the -- the March
8 9th article that examined jury selection in 100 felony
9 cases.

10 Now, the manual. There were two manuals in the
11 case. One of them, the earlier, more explicit 1963
12 manual, was not offered. It is discussed in the March 9th
13 Dallas Morning News article which was admitted in evidence
14 at the Batson hearing.

15 The other manual, the John Sparling manual --
16 Mr. Sparling testified. There was testimony in the case
17 by Judge Baraka and one other witness -- and it may have
18 been Mr. Sparling -- that they were not sure when the
19 manual ceased to be used. The Texas Court of Criminal
20 Appeals in a case called Halliburton concluded that the
21 manual was in use at least through the early 1980's I
22 think or in -- by 1980 or something like --

23 QUESTION: And this trial was '85?

24 MR. WAXMAN: This trial was '86 I believe.

25 But one of the things that's most striking in

1 the case is -- there's -- there -- it is clear that at
2 least one of the two prosecutors in this case was trained
3 by this office at a time when the manual was concededly in
4 use. The other one may have been.

5 But one of the things that I found striking,
6 just going through the juror information cards yesterday
7 actually in preparing for the oral argument, which appear
8 in the joint lodging at pages 54 to 108 -- these are the
9 juror cards that people get, the prosecutors and trial
10 lawyers get, before voir dire begins. If you look at what
11 is noted there, the race and the gender and religion and
12 beards and things like that, there is a remarkable
13 coincidence with the issues and factors that are
14 specifically addressed in the Sparling training manual.
15 It's not our submission that it's proof they were trained
16 by it. It's not our submission that they adhered to it or
17 they used it. We're using this pattern and practice
18 evidence just as a --

19 QUESTION: Mr. Waxman, could I just interrupt to
20 ask one question? When were those notations put on those
21 cards, do you know?

22 MR. WAXMAN: The answer must be that they were
23 put on at different times. If you look at the notations
24 that say -- the race and the gender notations, each one
25 has it.

1 QUESTION: Now, these are --

2 MR. WAXMAN: Those had to have been put on
3 before any questioning occurred because there -- they are
4 on those cards for jurors that were never reached or were
5 never questioned. There are other notations about answers
6 that appear to be in different handwriting, and I don't
7 think the record shows it at all, but you can infer that
8 they were noted at the same time that the prosecution made
9 notes on the jury questionnaires which are also in the --
10 in the joint lodging.

11 But the -- the other point I just want to make
12 about the trial judge is the -- we know -- there's not a
13 question about whether the trial judge's findings are
14 unreasonable in light of the evidence. Finding number 6,
15 the trial judge said there was no disparate examination of
16 any venire member.

17 Well, in this Court, the State has totally
18 disavowed that. The State acknowledges that when jurors
19 were questioned about their ability to impose the minimum
20 punishment for the lesser included offense of murder, they
21 used two different scripts. And when they talked about
22 the means of execution, they used a graphic script that
23 went on in detail to explain how somebody is executed in
24 Texas, and a regular script that just said, how do you
25 feel about the death penalty? Now, they --

1 QUESTION: If we agree -- if we agree with your
2 analysis of number 6, does that suffice to vitiate number
3 2?

4 MR. WAXMAN: I --

5 QUESTION: That the -- that the court finds that
6 the explanations given by the prosecutors in each --
7 prosecutor in each case were completely credible.

8 MR. WAXMAN: I think it does. The one that
9 we're -- that -- that you have to focus most directly on
10 is number 10 --

11 QUESTION: That's the conclusion.

12 MR. WAXMAN: -- which is the -- the finding,
13 which is the ultimate finding.

14 But my point is that there are a number of
15 findings that this judge made that are at the very least
16 suspect and one in which the State has completely walked
17 away from

18 And I want -- I want to spend, if I can, just a
19 few minutes talking about the jury shuffle and the
20 disparate questioning because I've been a trial lawyer for
21 many years, but never tried a case in this system, and it
22 was sort of a little bit confusing to me.

23 But with respect to the disparate questioning,
24 each of the prospective jurors was questioned about
25 whether they could impose the minimum punishment if they

1 found that the offense was murder and not capital murder,
2 and the minimum punishment being 5 years. And they were
3 also asked about their views about capital punishment.

4 Now, some of those people who were asked about
5 their views about capital punishment were first treated to
6 a graphic description of how that punishment occurs. And
7 some of the people who were questioned about minimum
8 punishment were told in advance the range is 5 years to 99
9 years. Could you do either? And many of them were just
10 asked, what do you think the minimum penalty is that you
11 would impose for willful, deliberate, intentional, cold-
12 blooded murder where there was no robbery?

13 And our submission in our principal brief and
14 below was that the State used those disparities in a
15 racially discriminatory manner and that bears tremendously
16 on the intent of the prosecutor in executing the
17 peremptory strikes. And their --

18 QUESTION: Are you saying -- are you saying that
19 the prosecutor on voir dire must ask, when he gets to the
20 question of, you know, how do you feel about -- must ask
21 the same questions to every juror?

22 MR. WAXMAN: Not at all. They don't have to ask
23 the same questions. They don't have to ask them in the
24 same way. All that we're saying is that when they do ask
25 the same questions and they ask them in a way which is

1 acknowledged to be different and they acknowledge that
2 they --

3 QUESTION: Well now, wait a minute. You say
4 when they do ask the same questions and they ask them in a
5 way that's acknowledged to be different, that seems like a
6 contradiction just starting out.

7 MR. WAXMAN: I think I -- I managed to confuse
8 even myself.

9 QUESTION: Good.

10 (Laughter.)

11 MR. WAXMAN: The prosecution -- I believe that
12 Ms. Bunn will confirm. The prosecution said we had two
13 different ways of questioning about these two subjects,
14 and we used them deliberately at -- with different jurors
15 and we did it in order to remove jurors that we thought
16 were weak on the death penalty. That is the reason that
17 they give and that's the reason against which their
18 justification must be judged, and it is --

19 QUESTION: You would concede that would be
20 legitimate, that that --

21 MR. WAXMAN: Sure, if you -- I -- if you --
22 somebody says, look, I -- there's no way I can impose the
23 death penalty, and -- as a -- as a prosecutor I don't want
24 -- I don't know if I can use a for cause strike, I don't
25 want to use a peremptory, let me see if I can't get them

1 to say something that will allow the judge to knock them
2 out for cause, that's entirely legitimate.

3 The question is why did they do it. Because it
4 would be illegitimate if they were doing it deliberately
5 disproportionately against black jurors because they were
6 black and it would be legitimate if they were saying,
7 okay, you know, people who expressed hesitation about the
8 death penalty -- we're going to do everything we can to
9 try and get rid of these people for cause.

10 And let's just look at the State's own
11 statistics. This is their statistics from their brief at
12 pages 17 and 18 and notes 38 and 39.

13 With respect to minimum punishment, seven of the
14 eight African American jurors who were questioned about
15 minimum punishment were not told in advance that the
16 minimum punishment was 5 years. And when they were asked
17 what they thought minimum punishment was, they said 20
18 years, life. One person said that he thought the death
19 penalty was the minimum -- minimum -- punishment.

20 For the whites, 36 white jurors were questioned.
21 Two -- only two were not told that it was 5 years in
22 advance. Now, they say that's not fair because you only
23 need to compare those jurors who had expressed hesitation
24 about the death penalty because that was our factor. And
25 they identify in their brief 10 white jurors and 10 black

1 jurors who expressed hesitation.

2 Well, two things. Okay, we'll use your numbers.
3 That means that of the 10 black jurors who expressed
4 hesitation, 7 were given this trick questioning and 2 --

5 QUESTION: What was the -- what was the purpose
6 of the prosecution in asking about what they thought the
7 minimum penalty --

8 MR. WAXMAN: Under Texas -- Mr. Chief Justice,
9 under Texas law, that is grounds for disqualification for
10 cause and the prosecution did seek --

11 QUESTION: What is -- what is --

12 MR. WAXMAN: The inability to impose the minimum
13 punishment -- to consider the minimum punishment that the
14 law allows. And they did try and strike two black jurors
15 for inability to impose minimum punishment, however odd
16 that seems given the role of the prosecution in a case.

17 They say there were 10 of each and even taking
18 -- 10 hesitant jurors, and even taking their numbers at --
19 at their word, that means, nonetheless, that a black
20 hesitant juror was three-and-a-half times more likely than
21 a white to be struck. And it doesn't account for the fact
22 that their 10 white jurors wildly understates the number
23 of white jurors who expressed hesitation about the death
24 penalty. It doesn't even include a white juror that they
25 struck for cause for inability to impose the death

1 penalty, Mr. Sohner. And there are at least 8 or 9 other
2 jurors that we identify in our papers that are not in
3 their list of 10. So even if you take their universe at
4 its will, blacks were three-and-a-half times more likely
5 to be tricked by this minimum punishment ploy than whites.

6 Now, on the graphic script about the death
7 penalty, they said, you bet, there were some people that
8 we went through all the gory details of how execution
9 occurs because we were trying to get those people off the
10 jury because they were hesitant about the death penalty,
11 but we did it with hesitant white jurors and we did it
12 with hesitant black jurors.

13 Let's look at their numbers. Eight of the 15
14 African American jurors were given the graphic script, 53
15 percent. Three of the 49 white jurors were given the
16 graphic script.

17 QUESTION: But might it not be a justification
18 there that more black jurors showed hesitancy about the
19 death penalty than the white jurors?

20 MR. WAXMAN: Well, it might -- it might be, but
21 if couldn't be on this record because there were only 15
22 black jurors. So out of the whole -- I'm using the entire
23 universe of everyone who was questioned.

24 Let's then go to their explanation. They say it
25 only applied to jurors who expressed hesitation about the

1 death penalty. Let's just look at that universe. There
2 was 10 of -- there were 10 of each. Okay. That means
3 that 7 of the 10 black jurors that they say expressed
4 hesitation were given this graphic script, and of the 10
5 white jurors that say expressed hesitation, 2 were given
6 this. And that to us is evidence of conduct that occurred
7 during voir dire that admits of only a racial explanation
8 just as their conduct of the jury shuffle, which is a
9 ubiquitous and unique Texas practice that exists only in
10 the State of Texas.

11 And we go through in our brief -- perhaps in as
12 not as much detail as -- as would be appropriate but,
13 nonetheless, given the page limits -- and show that the
14 State on at least three occasions used the -- its
15 prerogative to shuffle the jury for the obvious purpose of
16 moving African American jurors who were in the front of
17 the venire where they would be questioned to the back of
18 the venire each week where they would not.

19 And here it's important to understand something
20 about the procedure in this case. There was a different
21 venire called every week. Jury selection extended over 5
22 weeks. Each week either 40 or 50 new venire members were
23 brought into the courtroom, and they were seated in order.
24 And as soon as they sat down, the record reflects, the
25 judge asked the State first and then the defense whether

1 they wanted to, quote, shuffle the jury.

2 QUESTION: What does that mean?

3 QUESTION: What does it mean?

4 QUESTION: Would you tell us?

5 MR. WAXMAN: I will try to tell you and I would
6 respectfully refer you, in case I fail, to the Texas Bar
7 Journal article that we cited in our reply brief by a
8 professor at, I think, the University of Houston which
9 explains this practice.

10 But in Texas, jurors of course are -- venires
11 are required to be chosen randomly, but there has always
12 been a practice -- and it's now codified by statute --
13 that allows the -- the lawyers in the case -- this is in
14 civil and criminal cases -- to look at the venire as it's
15 arrayed in order and based on what Judge Holcomb explained
16 for the Texas Court of Criminal Appeals, based on, quote,
17 visual preference, because they haven't questioned these
18 jurors at all, the State and then the defense can say we
19 want to reshuffle the order. We don't like the order.
20 And it is well understood in Texas that the principal
21 reason for doing that is race and gender.

22 QUESTION: What are the consequences of, quote,
23 reshuffling the order?

24 MR. WAXMAN: What happens is you take the -- the
25 juror cards and it's either done in the central jury room

1 or in the courtroom, and they are shuffled either by the
2 clerk shuffling the way you would shuffle a deck or, in
3 this case, they were apparently, according to the record,
4 put into a metal basket and the lawyer would sort of run
5 his hands around and they'd pick them out, and they would
6 then be in a new order. And after the State exercised its
7 shuffle or declined to exercise its shuffle, the defense
8 could choose whether to shuffle or not.

9 QUESTION: Are the jurors actually then reseated
10 or are they just called in --

11 MR. WAXMAN: No. They are reseated so that --

12 QUESTION: Everybody gets up and moves and the
13 back people get in the front, the front people get in the
14 back.

15 MR. WAXMAN: Indeed. Indeed, and it can be done
16 not once, but twice. And it's particularly critical here
17 because what the judge --

18 QUESTION: What's the consequence? I --

19 MR. WAXMAN: Here's the -- here's the
20 consequence. The way the jury was picked here, they
21 questioned -- they questioned between 15 and -- generally
22 between 15 and 20. One week they got to 30 jurors because
23 they were doing individual voir dire. And so if you were
24 not in the first 15 out of the 50 or certainly in the
25 first 30 out of the 50, you weren't going to be questioned

1 at all. In fact, the judge told them at the outset, that
2 if they were -- when the order was finally set, if they
3 were in the last two rows, they could just go home that
4 day and never come back.

5 And so the consequence of shuffling in this case
6 wasn't the consequence you'd have if you had 50 jurors
7 picked -- this is a capital case. We're going to ask all
8 of you -- all of you -- questions, and it's just not that
9 consequential what order you're in. But here the order
10 meant everything. If you could get -- if the -- if the
11 prosecution could get the black jurors out of the first 15
12 or 20 and into the back, they wouldn't have to worry about
13 the disparate questioning or exercising peremptory
14 challenges. And the -- the record in this case I think --
15 it doesn't involve an admission but it is very, very
16 strong evidence.

17 I -- I just want to say, before sitting down for
18 rebuttal, a point that may be obvious, but it is
19 surpassingly important for this Court to decide the merits
20 of the Batson challenge. There are many areas in the law
21 in which -- in which this Court delineates the contours of
22 constitutional doctrine by demonstrating what result a
23 given set of facts yields. And so too Batson's abstract
24 rules, its doctrines about the burden of proof and the
25 quantum of proof, can also only be demonstrated and

1 meaningfully elucidated by a model. This is the kind of
2 area like voluntariness, ineffective assistance of
3 counsel, First Amendment actual malice in which this Court
4 can and, I submit, under (d)(2) must model a case for the
5 State courts and the lower Federal courts to show what
6 quantum of evidence is sufficient to require a conclusion
7 that a trial court's acceptance of a prosecutor as
8 Batson's avowed reasons are objectively unreasonable.

9 And I'll please reserve the balance of my time.

10 QUESTION: Very well, Mr. Waxman.

11 MS. Bunn, we'll hear from you.

12 ORAL ARGUMENT OF GENA A. BUNN

13 ON BEHALF OF THE RESPONDENT

14 MS. BUNN: Mr. Chief Justice, and may it please
15 the Court:

16 Prosecutors in this case exercised their
17 peremptory challenges to remove prospective jurors whom
18 they believed were biased against the State, a belief
19 based not on stereotypical assumptions but on the views
20 actually expressed by these jurors during voir dire.

21 The trial judge, who observed firsthand the
22 entire voir dire process, credited the prosecutors' race-
23 neutral, case-related reasons for the strikes. The
24 judge's findings of no purposeful discrimination are fully
25 supported by the record and they are entitled to deference

1 in this Court.

2 QUESTION: Suppose you have a case in which 10
3 jurors are excused because of their expressed views on the
4 death penalty, excused by the State. Five of those jurors
5 are white and five of those jurors are black. But with
6 the five black jurors, the questioning was qualitatively
7 and quantitatively different. It went on much longer with
8 much more searching, a different script. What result
9 then?

10 MS. BUNN: Well, Your Honor, I would say that is
11 circumstantial evidence of some kind of disparate
12 treatment. If those are the facts, if these jurors had --
13 had expressed very similar or equivalent views on the
14 death penalty in their juror questionnaires and then were
15 treated differently by the prosecutors, that would be
16 circumstantial evidence of disparate treatment. It is
17 evidence that is not in existence in this case, however.

18 First, petitioner's attempts to make comparisons
19 with white jurors are not supported by the record. They
20 do not have equivalent views, and in any event, to the
21 extent that disparate questioning happened, it was
22 certainly based on the -- the -- either in the case of the
23 graphic script questioning based on the jurors' responses
24 to questions on the questionnaires or in the case of the
25 minimum punishment question -- questioning on a

1 combination of the responses in the questionnaires and the
2 responses to questioning in the voir dire. So that would
3 be circumstantial evidence, but it is not present in this
4 case.

5 QUESTION: But may I ask on that -- that
6 question that if the different script was based on concern
7 about the person's attitude toward the death penalty,
8 would it not be true, because the script is -- comes very
9 early in the examination, that the doubt about the death
10 penalty must either have been shown in the written
11 response questionnaire or something said right before that
12 script took -- took place?

13 MS. BUNN: Yes, Your Honor, that's true and
14 that's supported by the record in this case.

15 QUESTION: You think it is, yes.

16 MS. BUNN: Yes, Your Honor. Every prospective
17 juror who was questioned -- with -- with the exception of
18 one white juror, every juror questioned in -- with the
19 graphic script at the outset of the questioning had
20 expressed some level of opposition to the death penalty in
21 their juror questionnaire.

22 QUESTION: Ms. Bunn, how do you define --

23 QUESTION: Now, the one -- may I just follow
24 with one question? Now, the one juror who said there were
25 four categories of death penalty and he said he was

1 somewhere between one and two, would that have been
2 sufficient to justify that kind of script?

3 MS. BUNN: Well, perhaps following up with it.
4 Now, that particular juror -- I believe you're referring
5 to Edwin Rand -- had no -- there was no indication on his
6 questionnaire of opposition to the death penalty. That's
7 why the prosecutor did not lead off with the graphic
8 script for Mr. Rand. However, after responses like that
9 and then the response of Mr. Rand that he didn't know if
10 he could -- maybe today he could impose the death penalty,
11 but tomorrow maybe he couldn't, after that kind of
12 questioning, then the prosecutor did lead up further along
13 in the examination with a semi-graphic script, but
14 certainly not at the outset.

15 QUESTION: Thank you.

16 QUESTION: There is -- I think on your numbers
17 there were 10 white venire members and 10 black who
18 expressed, on the questionnaire, hesitancy about the death
19 penalty. But of those, there were only two of the white
20 jurors who got the graphic script and there were I think
21 eight of the blacks.

22 MS. BUNN: Well, Your Honor, first off, that's
23 not -- that's not precisely true according to the record.
24 We did list in a footnote 10 white jurors who had, at some
25 point, expressed hesitancy about the death penalty.

1 However, unfortunately, we do not in a sense have a
2 complete record because the juror questionnaires of the
3 white jurors are not in the record in this case. Defense
4 counsel at trial only presented -- offered into the record
5 the juror questionnaires of the African American jurors.

6 QUESTION: But you did say that there were that
7 number 10 --

8 MS. BUNN: Who at some point --

9 QUESTION: -- of the whites who expressed
10 hesitancy.

11 MS. BUNN: Yes, Justice Ginsburg. Who at some
12 point in their examination expressed hesitancy about the
13 death penalty. But we don't know of those jurors who had
14 expressed hesitation about the death penalty in their
15 initial questionnaire. By example --

16 QUESTION: Well, which is something you could
17 have put in I presume, the State could have put in, if --
18 if it had thought it had relevant evidence at that point,
19 and it didn't. So don't we have to, in effect, make our
20 judgment based on the figures that Justice Ginsburg has
21 just mentioned?

22 MS. BUNN: Well, Your Honor, the -- for one
23 thing, defense counsel never raised a disparate
24 questioning argument before the trial judge, and that's
25 where the State would have put that -- that evidence in.

1 And if -- if defense counsel felt like there were a
2 disparate questioning argument, it would have been defense
3 counsel, given that he had the burden --

4 QUESTION: The graphic script and the minimum
5 punishment. That never came up before the trial judge?

6 MS. BUNN: The defense counsel did not argue at
7 all the issue of -- of disparate questioning. The State
8 -- the prosecution brought it up as a factor to consider
9 and -- and argued, as we have argued here, that the State
10 certainly did use different lines of questioning from
11 different jurors based on their views but not on race.

12 QUESTION: But if the -- if the prosecution
13 brought it up, it's -- I assume it's there for us to get
14 into it, and we've got to get into it on the record that
15 was made. And if the prosecution didn't make a further
16 record on that, it's -- it's, it seems to me, appropriate
17 for us to -- to look into the issue on the record that we
18 have. And if we do, we come back to Justice Ginsburg's
19 numbers.

20 MS. BUNN: Well, again, Your Honor, the -- the
21 record in this case doesn't support those numbers also
22 because we can look to an -- as analogy to the African
23 American jurors, several of whom did not express
24 hesitation about the death penalty in their initial juror
25 questionnaire but who came back later on in their

1 examinations and did make comments --

2 QUESTION: All right. But those --

3 QUESTION: I'm getting confused. I thought the
4 numbers we were talking about were your numbers, 10 of
5 each.

6 MS. BUNN: They were -- they were numbers that
7 we set forth in talking about -- in discussing the
8 disparate questioning, jurors -- white jurors who had at
9 some point expressed hesitancy about the death penalty.
10 However, to infer from those numbers that it was that
11 universe of jurors who the -- who the prosecutors had to
12 consider their juror questionnaires in determining whether
13 at the outset to -- to use the graphic script, that is not
14 -- that is not how we intended the footnote.

15 QUESTION: I see. You mean some of that
16 reservation of the death penalty may come later in the --
17 in the questioning.

18 MS. BUNN: Yes, Your Honor.

19 QUESTION: Well, why couldn't the prosecutor
20 have then used the graphic script, or it would have been
21 too late?

22 MS. BUNN: Well, in some instances the
23 prosecutor did both with African American and white
24 jurors, jurors who initially in their juror questionnaires
25 did not indicate any opposition to the death penalty, but

1 into their question -- into their voir dire examination
2 did, and there are instances where the prosecutor did go
3 into the graphic script later on in the examination. But
4 that is not what the petitioner is relying on here. He --

5 QUESTION: Why --

6 QUESTION: Isn't the fact that we are having
7 this colloquy with you about the significance of the
8 numbers a pretty good argument for the proposition that at
9 least reasonable jurists might disagree about the
10 significance of it, and therefore there should have been a
11 -- a certificate of appeal issued here?

12 MS. BUNN: Well, Your Honor, given the level of
13 deference that the trial judge's findings were entitled to
14 in this case, we do not think that it -- it presents that
15 kind of case regardless of the --

16 QUESTION: Well, it seems to me your argument on
17 -- I'm not talking now about the -- the ultimate
18 resolution of it which Mr. Waxman addressed. I'm just
19 addressing the -- kind of the threshold question of
20 whether there should have been a COA here. And it sounds
21 to me as though your argument is saying that unless the
22 defense has got just a slam dunk Batson argument at the
23 end of the day, there shouldn't be a COA, which -- which
24 perhaps reflects what the -- the court below was doing
25 when it seemed to -- to say that there wasn't going to be

1 a COA because at the end of the day, the -- the Batson
2 claim was not meritorious.

3 MS. BUNN: Well, Your Honor, it is our position
4 that the court -- the court below correctly determined
5 that no COA should issue in this case given the multiple
6 levels of deference that the trial judge's findings were
7 entitled to, not only the Hernandez standard --

8 QUESTION: But isn't -- isn't the degree of
9 deference and the significance of that degree of deference
10 with respect to specific claims something that is worthy
11 of being determined in the appellate process rather than
12 something that ought to be determined at the threshold
13 before the appellate argument has even been made?

14 MS. BUNN: Petitioner has -- has never argued
15 that he was not able to make any level of detailed
16 argument in this case in the court below.

17 QUESTION: Well, regardless of what the
18 petitioner may have said, what's the answer to my
19 question? I mean, aren't you -- aren't we making out a
20 pretty good case again by our colloquy here for the fact
21 that there was something for the court of appeals to
22 consider here on the -- on the -- the reasonable
23 disagreement among jurists standard?

24 MS. BUNN: If the issue were looked at de novo,
25 the issue alone of Batson, then yes, it presents

1 compelling evidence both ways. However, in -- viewed to
2 the scheme of 2254(d), it is, as you referred to, a slam
3 dunk case. And petitioner did not meet the COA burden,
4 and that is -- our position is that the court -- court
5 below correctly denied COA given the deference entitled --
6 that -- that the trial judge's findings were entitled to
7 in this case.

8 And getting back to the trial judge's findings,
9 just a few things that we disagree with the petitioner
10 about in characterizing the trial judge's handling of this
11 case.

12 First, the fact that technically the Batson
13 hearing was conducted 2 years after the trial, that is
14 true. However, when you look at the record of voir dire
15 in this case, though it was pre-Batson, when defense
16 counsel raised an objection to the strike of an African
17 American juror, the prosecution came forward with his
18 race-neutral reasons immediately, contemporaneous --

19 QUESTION: But that's not true in every case.

20 MS. BUNN: Every case where defense counsel
21 objected to the strike of that particular juror. And that
22 is true with every juror challenged here with the
23 exception of Mr. Joe Warren.

24 QUESTION: Well, for example, the -- Joe
25 Warren's case was most interesting to me because the

1 prosecutor just exercised the peremptory without any
2 explanation whatsoever. And then the judge made quite a
3 speech to the juror about how he had been a very fine
4 juror, and that was sort of the end of it. And then later
5 on, we find out that he was -- he was not a very fine
6 juror.

7 MS. BUNN: Again, Your Honor, the -- the trial
8 judge -- the trial judge's comments to the juror don't --
9 certainly don't vitiate the prosecutor's reasons for
10 striking him. But nonetheless, defense counsel --

11 QUESTION: The prosecutor did not give a reason
12 for striking that juror.

13 MS. BUNN: Defense counsel didn't object to the
14 striking -- the prosecutor's striking of that juror.
15 Certainly there was nothing even --

16 QUESTION: Well, as I understand it, the defense
17 counsel had a kind of a running objection and made clear
18 in each record when a black juror was stricken. The
19 record -- he made it -- that be made part of the record.
20 But he didn't object on a juror-by-juror basis. He didn't
21 have any standing to do that.

22 MS. BUNN: He objected --

23 QUESTION: Because this was a Swain hearing
24 rather than a Batson hearing at the time.

25 MS. BUNN: That is true. But he did in this

1 case -- defense counsel did in this case object to the
2 striking of every single African American juror with the
3 exception of Joe Warren and Paul Bailey. So he was not
4 using a running objection kind of conduct. He -- he
5 specifically objected to 8 of the 10 African American
6 jurors struck. And for whatever reason, he did not object
7 to the prosecutor striking Joe Warren. While this doesn't
8 give rise to a procedural default, it could, in fact, be
9 an indication that defense counsel thought there were
10 legitimate reasons for the prosecutor's strike of Joe
11 Warren.

12 QUESTION: You were -- you were on the -- the
13 theme of saying that the hearing was conducted properly 2
14 years later, and I don't want to get you off of -- of
15 that. But at -- at some point just answer this question,
16 and maybe it's consistent with the two -- the hearing
17 you're about to describe.

18 Mr. Waxman told us -- and -- and he's fair about
19 these things -- that -- that you've walked away from
20 number 6, that there was no disparate prosecutorial
21 examination. But you started your argument by -- by
22 indicating that the answers were -- were sufficient to --
23 to support that. Are you saying that there was disparate
24 examination but that it was justified?

25 MS. BUNN: Yes, Your Honor, that's what we're

1 saying, and that is --

2 QUESTION: Because of the answers that they gave
3 on the questionnaire and -- and answers that they gave
4 just before the script was used.

5 MS. BUNN: Yes, Your Honor. It's the State's
6 position now --

7 QUESTION: So you would say then that you
8 haven't walked away from finding number 6?

9 MS. BUNN: No, Your Honor, we have not. It --
10 it's the State's position now. It was the State's
11 position at the time of the Batson hearing that any
12 disparate questioning was a legitimate means to deal with
13 jurors who had expressed different views on different
14 issues but was not based on race. And that is consistent
15 with the trial judge's finding.

16 QUESTION: So you think that the trial judge,
17 therefore, considered the issue of disparate questioning.

18 MS. BUNN: Yes, Your Honor.

19 QUESTION: All right. Now, then the question
20 is, if they considered it, did he reach a reasonable
21 conclusion?

22 What about Justice Ginsburg's mentioning there
23 were at least eight white jurors who also expressed
24 reservations who were not given this graphic description
25 of what the death penalty involves, but instead were just

1 asked could you find against a person if that meant the
2 death penalty? What about those eight people?

3 MS. BUNN: Well, again, disparate questioning,
4 like many other pieces of evidence that petitioner is
5 relying on in this case, are circumstantial evidence of --
6 of discriminatory motive or can be in a given case.
7 Assuming that there -- that there was some level of -- of
8 disparateness, even within those jurors who had expressed
9 views about the death penalty --

10 QUESTION: No. The particular thing is what she
11 asked and you say right now, I think correctly, that the
12 trial judge did consider disparate questioning. You also
13 agree that I guess it was -- the number was approximately
14 8 of the 11 black jurors who expressed doubts about the
15 death penalty were asked this very graphic question, could
16 you find a person guilty and give him the death penalty
17 where that meant taking him in the gurney, et cetera.
18 Only two white jurors were asked that question. Yet, I
19 take it that you concede that there were at least eight
20 other white jurors who also expressed doubts about the
21 death penalty who were not asked that question.

22 MS. BUNN: Well, I do not concede that to the
23 extent that it is identifying those jurors as being jurors
24 who expressed doubts about the death penalty in their
25 juror questionnaires, and that is the information that the

1 prosecutor had to go by.

2 QUESTION: All right. So you say there weren't
3 eight such people. Fine.

4 MS. BUNN: Yes.

5 QUESTION: Okay. That's your answer.

6 MS. BUNN: Yes, Your Honor.

7 QUESTION: And I have another question which I
8 think is to me more important, which is that these
9 ambiguous answers, a difficult question about what the
10 motive was of the prosecutor in peremptorily striking when
11 he has a legitimate reason, to decide whether it's
12 legitimate or not, I would have thought history, in terms
13 of how the county has behaved in general, would be highly
14 relevant to characterize and decide a difficult question
15 like that.

16 But on page 911 of this record, the magistrate
17 makes pretty clear that he thought history was not
18 relevant in reviewing that third part of Batson, reviewing
19 what the State did.

20 And the State court judge himself said on page
21 844 I guess whether or not I will give it -- I mean such
22 evidence -- any weight is another question, and never
23 referred to it again.

24 So in respect to that, what is your view?

25 MS. BUNN: The State's view is that while the

1 Federal magistrate -- first I'll address the Federal
2 magistrate's handling of the issue. It is the State's
3 position that the Federal magistrate did err in its
4 elucidation of the standard of -- its holding basically
5 that historical evidence is irrelevant at Batson's third
6 step. However, certainly an error by a Federal magistrate
7 does not entitle a petitioner to habeas corpus relief.
8 And -- and any error as well was cured when the Fifth
9 Circuit considered independently all of the evidence that
10 petitioner had presented in his petition.

11 Moving on to the trial judge, however, there is
12 nothing in the record --

13 QUESTION: Well, but -- but why -- why isn't
14 this -- you're candid to say that you may have erred on
15 this one regard, but why -- why isn't this a -- a very
16 significant fact to which we must give great weight,
17 especially you indicated the evidence was circumstantial.
18 A little bit odd for a prosecutor to -- to say that
19 circumstantial evidence isn't important. This is all we
20 have in -- in these cases when we're trying to infer
21 motive, and best evidence is often circumstantial. And
22 why isn't the historical evidence here overwhelming
23 circumstantial evidence and good evidence?

24 MS. BUNN: Justice Kennedy, it is evidence. It
25 is circumstantial evidence. But the trial judge's inquiry

1 and certainly an appellate court's inquiry must begin,
2 must key in on the reasons that the prosecutors struck
3 these jurors and the record in this case. And in this
4 case, prosecutors struck prospective jurors for
5 legitimate, case-related, race-neutral reasons. That's
6 where the trial judge's analysis began and ended, and it
7 overruled the State's objections to the pattern and
8 practice evidence on relevancy grounds.

9 QUESTION: Ms. Bunn, if -- if it begins and ends
10 with the prosecutor's neutral reasons, then you would
11 never have a successful Batson challenge because the
12 prosecutor could always give a neutral reason. And the
13 question that is troubling me is what in the end did the
14 court consider and look -- and the -- and the State trial
15 court said, well, he would take that so-called Swain
16 evidence for what it was worth. He never told us. He
17 never said how he resolved the question. And the -- the
18 fact finding seemed to be going at these jurors, the black
19 jurors, against whom peremptories were exercised, one by
20 one and saying as to each one, there was a neutral reason
21 given and that's it. We don't know how anything else
22 figured in this package. We don't know whether the judge
23 said, well, I'll take it -- take the Swain evidence for
24 what it's worth -- did he say he thought it was worthless?
25 He doesn't tell us. We don't -- we just can't tell from

1 this record what went on at that stage three.

2 MS. BUNN: Well, respectfully I disagree. The
3 trial judge found the prosecutor's reasons to be credible,
4 and in making that credibility determination and having
5 overruled the State's objections to this pattern and
6 practice evidence and stating candidly that he didn't know
7 what weight he was going to give it, given that while it
8 is circumstantial evidence, he's got a -- he's got a
9 record here where the prosecutor's reasons are supported.

10 QUESTION: He --

11 QUESTION: Well, but the credibility finding,
12 which is number 2, doesn't prevent us and -- and really
13 shouldn't prevent a court from determining whether that
14 credibility finding has a foundation. And if you have
15 this very persuasive historical evidence, the different
16 script, that all bears on whether the credibility finding
17 can -- can withstand scrutiny. You can't just say, well,
18 he concluded credibility and that's always for the trial
19 judge and then walk away or, as Justice Ginsburg said,
20 you'll never have a Batson challenge.

21 MS. BUNN: We are not --

22 QUESTION: Absent a finding that the -- the
23 prosecutor is dissembling based on demeanor.

24 MS. BUNN: We are certainly not arguing that a
25 -- a Batson finding from a trial judge is completely

1 insulated from appellate review. However, in a case such
2 as this where the reasons credited by the trial judge are
3 supported by the record, there -- there is no basis to
4 overrule the trial judge's credibility determination.

5 QUESTION: Well, but that's not true as to
6 finding 6, because he didn't find there was no -- there
7 was justification for disparate questioning. He found
8 there was no disparate questioning. And the record is
9 perfectly clear that there was disparate questioning.

10 MS. BUNN: However, in the context of the Batson
11 hearing that he was resolving, that finding is reasonably
12 understood as a finding that there was no disparate
13 questioning based on race.

14 QUESTION: But if read literally, it's -- if
15 read literally, it's clearly incorrect.

16 And of course, as to the findings on
17 credibility, there's no finding as to any particular
18 juror. He just made a -- a gross finding that everybody
19 -- I believe everything the prosecutor said. Basically
20 that's what he found.

21 MS. BUNN: The finding regarding disparate
22 questioning I believe is phrased as disparate questioning
23 of the challenged jurors. So given that, I would say
24 that, yes, that supports the interpretation certainly that
25 it was made within the context of the Batson challenge and

1 that the finding was limited to based on race. There was
2 no disparate questioning based on race.

3 QUESTION: May -- may I ask one question about
4 the procedure? Were the juror information cards that have
5 the notations about sex and -- and race noted on it --
6 when do you think those notations were made?

7 MS. BUNN: I would --

8 QUESTION: Because I find it significant there
9 are no notations or very few as to attitude toward the
10 death penalty, which is your -- your key to everything.
11 There doesn't seem to be any card on which the prosecutor
12 said soft on death or hard on death or anything like that.

13 MS. BUNN: I believe that those sorts of
14 notations were made on the juror questionnaires rather
15 than the juror information cards. And I -- I would agree
16 with Mr. Waxman that the record does indicate that those
17 notations were made toward the beginning of the process,
18 prior to any individual questioning.

19 QUESTION: So that it would be fair to infer
20 that the prosecutor on each juror noted race and sex, but
21 did not note attitude toward death penalty.

22 MS. BUNN: Not on the juror -- the juror
23 information cards. That sort of --

24 QUESTION: Which -- which were cards prepared
25 before the voir dire examination began.

1 MS. BUNN: That -- that was all they had to go
2 on during the preliminary phases. When they received the
3 -- after the -- the panel was finally seated, when the
4 jurors were given the questionnaires, then that's what the
5 parties worked from in making more notes in determining
6 which to challenge for cause and which to strike.

7 So, again, what can be inferred from that I -- I
8 think is -- really, it's -- it's -- there's just not a
9 whole lot --

10 QUESTION: Well, if --

11 QUESTION: Well, one thing that's clear is they
12 did note the race of every juror before they questioned
13 them. That much is clear.

14 MS. BUNN: Yes, Your Honor.

15 QUESTION: All right. So we have -- in essence,
16 we still have a group of three busy judges who are
17 reviewing a magistrate reviewing a record. The record is
18 controversial at best. The magistrate uses the wrong
19 standard concededly. And they don't even issue a
20 certificate of appealability. Well, shouldn't they at
21 least have done that?

22 MS. BUNN: Well, Your Honor, again it is our
23 position that on this record a certificate of
24 appealability was not warranted. Again, given the
25 multiple levels of deference, the trial judge's clear

1 findings in this case, and the fact that they are
2 supported by the record. And again --

3 QUESTION: But there's some absences in the
4 finding, and let me go back to the -- the judge saying,
5 I'll reserve the question whether to give that pattern and
6 practice evidence any weight. And then we haven't got a
7 clue how he resolved that question.

8 MS. BUNN: Well, again --

9 QUESTION: Or if he ever even came back to it.

10 MS. BUNN: Yes, Your Honor. However, it was
11 clearly before the trial judge. The -- there's nothing in
12 the record to indicate that the trial judge did not
13 consider the evidence, nothing besides the mere absence --

14 QUESTION: But he -- he said he was going to
15 decide whether he was going to give it any weight. Maybe
16 he made a decision that he shouldn't give it any weight,
17 and maybe that was wrong or right. But we just don't
18 know.

19 MS. BUNN: Perhaps he did, but as the fact
20 finder, that was his prerogative, and the -- the record in
21 this case -- again, there's nothing to indicate that he
22 didn't consider the evidence. It was before him and his
23 findings, however, properly do focus on the record in this
24 case, the reasons that the prosecutor came forward with,
25 and were credited by the trial judge. And again, the --

1 the record in this case clearly supports those -- those
2 findings.

3 And these jurors were jurors who the State --
4 both -- both white jurors and African American jurors who
5 the State struck were jurors who had expressed views that
6 the State was uncomfortable with.

7 And again, to get a feel for what the
8 prosecutor's job was in this case, they -- they looked at
9 ultimately 108 jurors, individually questioned 65 jurors,
10 and the prosecutor had to view that -- to view those
11 jurors as not even just looking at do you believe in the
12 death penalty, yes or no, but where does this particular
13 juror fall in the spectrum. How likely are they to be
14 able to consider the full range of punishment in a capital
15 murder case? That was what the prosecutor was charged
16 with in this case.

17 And if you look at the record in this case, it
18 supports the trial -- the prosecutor's reasons for the
19 legitimate strikes in this case. They were supported by
20 the record. They were case-related. And they were simply
21 not based on race. There is ample support for the trial
22 judge's findings and simply no basis to -- to overrule
23 those findings.

24 Unless there are any more questions.

25 QUESTION: Thank you, Ms. Bunn.

1 Mr. Waxman, you have 2 minutes remaining.

2 REBUTTAL ARGUMENT OF SETH P. WAXMAN

3 ON BEHALF OF THE PETITIONER

4 MR. WAXMAN: Thank you. I just have six short
5 rebuttal points to correct the record.

6 The -- while the graphic script was given at the
7 beginning of the voir dire and therefore based only on the
8 questionnaires, the minimum punishment ploy -- that is,
9 trying to trick jurors about minimum punishment -- was
10 done at the very end, after they had all of the evidence.
11 And therefore, the relevant universe of whites who
12 expressed hesitation is not 10, as the State says, but 19.
13 And in any event, even with 10, they are three-and-a-half
14 times as likely.

15 With -- also, we did -- the trial -- the defense
16 lawyers in this case objected over and over and over again
17 to trying to trick these black jurors by asking them what
18 minimum punishment they would give without expressing the
19 number. The voir dire is replete with this.

20 With respect to the graphic script, which did
21 come at the beginning, well, the State now says, well, we
22 don't have the questionnaires for all the people, so we
23 don't really know how many there were. We know that we
24 used the graphic script with three of them. Okay. The
25 three that they used that they identified are jurors 27,

1 59, and 68. Two were excused by agreement, and one,
2 number 68, was seated.

3 But we do know what the juror questionnaires
4 were -- I'm just doing a -- sort of a quick list on the
5 back of my note card here -- for Mr. Vickery, Ms. Mazza,
6 Mr. Gutierrez, Mr. Hearn, and Mr. Duke. Mazza, who is --
7 who features prominently here and who is not included in
8 their 10, said in her questionnaire, it depends on the
9 crime.

10 QUESTION: Thank you, Mr. --

11 MR. WAXMAN: It is that --

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman.

13 The case is submitted.

14 (Whereupon, at 12:01 p.m., the case in the
15 above-entitled matter was submitted.)

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