SUPREME COURT OF THE UNITED STATES

No. 91–372

GEORGIA, PETITIONER *v.* THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM AND ELLA HAMPTON MCCOLLUM

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[June 18, 1992]

JUSTICE THOMAS, concurring in the judgment.

As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and THE CHIEF JUSTICE that our decision last term in *Edmonson* v. *Leesville Concrete Co.,* 500 U. S. ––– (1991), governs this case and requires the opposite conclusion. Because the respondents do not question *Edmonson,* I believe that we must accept its consequences. I therefore concur in the judgment reversing the Georgia Supreme Court.

I write separately to express my general dissatisfaction with our continuing attempts to use the Constitution to regulate peremptory challenges. See, *e.g.*, *Batson* v. *Kentucky,* 476 U. S. 79 (1986); *Powers* v. *Ohio,* 499 U. S. ––– (1991); *Edmonson, supra.* In my view, by restricting a criminal defendant's use of such challenges, this case takes us further from the reasoning and the result of *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). I doubt that this departure will produce favorable consequences. On the contrary, I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes.

In *Strauder,* as the Court notes, we invalidated a state law that prohibited blacks from serving on juries. In the course of the decision, we observed that the racial composition of a jury may affect the outcome of a criminal case. We explained: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.,* at 309. We thus recognized, over a century ago, the precise point that JUSTICE O'CONNOR makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. *Post,* at 7.

I do not think that this basic premise of *Strauder* has become obsolete. The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases.[1] Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

In *Batson,* however, this Court began to depart from *Strauder* by holding that, without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy. We said, in particular, that a prosecutor could not justify peremptory strikes "by stating merely that he

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[1]A computer search, for instance, reveals that the phrase "all white jury" has appeared over two hundred times in the past five years in the New York Times, Chicago Tribune, and Los Angeles Times.

challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." 476 U. S., at 97. As noted, however, our decision in *Strauder* rested on precisely such an "assumption" or "intuition." We reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly.

Our departure from *Strauder* has two negative consequences. First, it produces a serious misordering of our priorities. In *Strauder,* we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during *voir dire,* defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. Cf. Fed. Rule Evid. 606(b) (generally excluding juror testimony after trial to impeach the verdict). In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause.

Second, our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen.[2] See, *e.g.,*

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[2]The NAACP has submitted a brief arguing, in all sincerity, that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors." Brief for NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 3–4. Although I suppose that this issue technically remains open, it is difficult to

State v. *Carr,* 261 Ga. 845, 413 S.E. 2d 192 (1992). Next will come the question whether defendants may exercise peremptories on the basis of sex. See, *e.g., United States* v. *De Gross,* 960 F. 2d 1433 (CA9 1992). The consequences for defendants of our decision and of these future cases remain to be seen. But whatever the benefits were that this Court perceived in a criminal defendant's having members of his class on the jury, see *Strauder,* 100 U. S., at 309–310, they have evaporated.

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see how the result could be different if the defendants here were black.