No. 84-6263

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON,

*Petitioner,*

—v.—

COMMONWEALTH OF KENTUCKY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

## AMICUS CURIAE BRIEF FOR ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK

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## QUESTIONS PRESENTED

1. Whether the sixth and fourteenth amendments prohibit the use of the peremptory challenge to exclude prospective jurors solely on the basis of race.

2. Whether the ban on the use of the peremptory challenge to discriminate because of race should extend to defense counsel as well as to prosecutors.

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## AUTHORITY TO FILE BRIEF AMICUS CURIAE

Elizabeth Holtzman, District Attorney of Kings County, New York, files this brief *amicus curiae* with consent of the attorneys for the petitioner and the respondent, pursuant to Rule 42(1). Moreover, she is the authorized law officer of a political subdivision of a state, and therefore also files this brief *amicus curiae* pursuant to Rule 42(4).

## STATEMENT OF INTEREST OF AMICUS CURIAE

Elizabeth Holtzman is the District Attorney of Kings County, New York. For nearly four years, criminal prosecutions in that county have been subject to a judicially imposed ban on the use of the peremptory challenge to exclude potential jurors on the basis of race. That judicial rule was first imposed, in a Kings County case, as a matter of state constitutional law, in *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.2d 739 (2d Dep't. 1981). The District Attorney declined to appeal that decision, and promulgated an office policy prohibiting the use of the peremptory challenge to exclude jurors on the basis of race, sex, religion, or national origin. Nearly two years later, in another Kings County case, the New York Court of Appeals overruled that decision over the objection of the District Attorney. *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). At that time, the District Attorney reaffirmed her office policy prohibiting such discrimination.

One year later, the legal ban was reestablished, this time as a matter of federal constitutional law, in *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). In that federal *habeas corpus* proceeding, the District Attorney represented the New York State Attorney General, pursuant to an agreement with that office. The District Attorney continued to urge the adoption of a constitutional ban on race discrimination in the use of the peremptory challenge, contesting only the claim that discrimination had occurred in that particular case. The United States Court of Appeals affirmed the determination that the Constitution prohibits such discrimination, and remanded for an evidentiary hearing. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984). The District Attorney filed a petition for *certiorari*, on behalf of respondent Attorney General Abrams, to resolve the conflict between the state and federal courts, to review the procedural mechanism for enforcing the constitutional rule, and to urge the extension of the ban to defense counsel. That petition is still pending in this Court, *Abrams v. McCray*, No. 84-1426, filed Mar. 4, 1985.

Thus, *amicus* has had almost four years of experience with both judicial and internal administrative prohibitions on the use of the peremptory challenge to exclude potential jurors on the basis of race. Based on that experience, *amicus* has found that the ban is consistent with both effective law enforcement and efficient judicial administration, and urges this Court to adopt it. Moreover, *amicus* has observed that defense counsel as well as prosecutors frequently use the peremptory challenge to exclude potential jurors on the basis of race. Such discrimination by defense counsel is equally widespread, equally threatening to constitutional values, and equally amenable to judicial control. For these reasons, *amicus* urges the court to hold that the ban applies not only to prosecutors, but also to defense counsel.

## SUMMARY OF ARGUMENT

Intentional race discrimination in jury selection undermines both the integrity of the judicial system, and public confidence in the fairness of jury trials. It violates the sixth and fourteenth amendment rights of defendants, of excluded jurors, and of the community.

In an unbroken line of decisions, this Court has condemned such unconstitutional discrimination. The question presented by this case is whether courts have the power to remedy race discrimination when it occurs not at the earlier stages of jury selection already addressed by this Court, but rather at the stage when individual jurors are excluded by the exercise of peremptory challenges.

Twenty years ago, in *Swain v. Alabama*, 380 U.S. 202 (1965), this Court held that courts could not, under the equal protection clause, enforce a ban on race discrimination in the use of the peremptory challenge unless such discrimination occurred systematically, in case after case, over a period of time. *Swain* never authorized race discrimination in the use of peremptory challenges, even in an individual case; it merely placed the isolated case of discrimination beyond the scope of

judicial review because of a presumption of prosecutorial good faith and a prudential concern for orderly judicial administration. The remedial approach of *Swain* was based on several premises which have been refuted by the experience of the past twenty years.

First, *Swain* was decided on the erroneous assumption that genuine invidious race discrimination in jury selection could be controlled by the limited remedy announced in that case. The experience of *amicus* and the reported cases show to the contrary, however, that both prosecutors and defense counsel frequently and openly engage in the practice of invidious race discrimination, to the detriment of potential jurors, defendants, witnesses, and the public at large. Thus, *Swain*'s presumption of good faith in the use of peremptory challenges is no longer tenable, and the remedy it created has failed to accomplish its purpose.

Second, *Swain* was decided on the erroneous assumption that a rule permitting inquiry into the reasons for peremptory challenges would destroy the peremptory challenge altogether, and disrupt the expeditious conduct of trials. The experience of California, Massachusetts, Florida, and New York, however, proves that fear unfounded. In each of these jurisdictions, courts have found in the state constitution a ban on the race-based use of the peremptory challenge. The peremptory challenge has survived the ban on its discriminatory use, and the rule has proven both effective and consistent with the orderly administration of justice.

Third, this Court decided *Swain* without addressing the constitutional significance of a jury drawn from a fair cross-section of the community, or the equal protection rights of jurors who are excluded by reason of their race. Several years after the decision in *Swain*, this Court held the fair cross-section requirement of the sixth amendment applicable to the states, *Duncan v. Louisiana*, 391 U.S. 145 (1968), and made clear that the ban on race discrimination in jury selection is part of due process as well, *Peters v. Kiff*, 407 U.S. 493 (1972). Moreover, in 1970, the Court recognized that not only defendants, but also excluded jurors and the community at large,

have a legally cognizable right against discrimination in jury selection. *Carter v. Jury Commission*, 396 U.S. 320 (1970). If this jurisprudence had existed in 1965, when *Swain* was decided, the result might well have been different.

It is time for this Court to rid the judicial system of intentional discrimination in jury selection. This Court should hold that both the sixth amendment and the equal protection clause bar race discrimination by all parties to the jury selection process, at every stage of that process. The Court should set forth a reasonable procedure for enforcing that prohibition, should hold that the ban applies to defense counsel as well as to prosecutors, and should remand the instant case to the state courts for reconsideration in light of its holding.

## POINT I

## RACE DISCRIMINATION IN JURY SELECTION OCCURS FREQUENTLY AND OPENLY, AND VIOLATES THE CONSTITUTIONAL RIGHTS OF DEFENDANTS, EXCLUDED JURORS, AND THE PUBLIC.

Invidious race discrimination deserves protection in no area of society, least of all in the administration of justice. The Constitution cannot permit an attorney to stand in the doorway of the jury room to block potential jurors because of the color of their skin. Historically, this Court has played a key role in striking down pernicious and unfair classifications which interfere with each individual's fullest participation in American society. Faced now with a claim of intentional race discrimination within the judicial system itself, this Court should forbid the abuse of peremptory challenges to bar jurors simply because of their race.[1]

Race discrimination in jury selection denies the defendant and the state a fair trial by a representative jury, and under-

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1 Discrimination based on religion, sex, or ethnic origin is as offensive as discrimination because of race. The same logic and concerns mandating a constitutional ban on race-based discrimination in jury selection apply to these other pernicious classifications. Because *Batson* presents a claim of race discrimination, this brief focuses on that issue alone.

mines public confidence that justice is done. Shaping a jury by excluding individuals solely on the basis of race destroys its "diffused impartiality" and representative spirit. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), *citing Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). As a result, the jury is deprived of "a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

"[T]he jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." *Taylor*, 419 U.S. at 529 n.7. Juries "play a political function in the administration of the law;" when parties are permitted to challenge arbitrarily members of disfavored groups, biased juries are the result—"biased in the sense that they reflect a slanted view of the community they are supposed to represent." *Id.* When people see racism, not blind justice, in the courts, the judgments and judicial processes lose their legitimacy and moral power.

Race discrimination in jury selection also violates the fundamental constitutional principle that people may not be judged by the color of their skin. "[P]ersons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation." *Peters*, 407 U.S. at 507 (Burger, C.J., dissenting). "Jury competence is an individual matter rather than a group or class matter . . . [and to] disregard [that fact] open[s] the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel*, 328 U.S. at 220. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Swain v. Alabama*, 380 U.S. 202, 204 (1965). It is time for this Court to enforce its injunctions against intentional race discrimination in the administration of justice by curtailing the perversion of the peremptory challenge.

### A. *Swain* Has Been Misconstrued as a License to Use Peremptory Challenges to Exclude Jurors on the Basis of Race.

In *Swain*, this Court recognized the historical roots of peremptory challenges, but nevertheless reaffirmed that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." [2] 380 U.S. at 204. Concerned with the preservation of peremptory challenges as a tool for justice, the Court concluded that, as a matter of procedure, the use of peremptory challenges in any particular case must be presumed valid. The *Swain* court conceded, however, that circumstances might arise where "the purposes of the peremptory challenge are being perverted." 380 U.S. at 224; *see McCray v. New York*, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting from denial of *certiorari*). Thus, nothing in *Swain*, not even its presumption of prosecutorial good faith, could have been intended as a license to discriminate on the pernicious and condemned basis of race.[3]

Nevertheless, courts, attorneys, and commentators have construed *Swain* to permit and even encourage the use of racial stereotypes in picking or striking jurors. Judges have explicitly

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2 The *Swain* court did not address the sixth amendment's prohibition of race-based discrimination in jury selection because that amendment was not held binding upon the states until three years later, in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See McCray*, 750 F.2d at 1124. In any event, even were this Court's decision in *Swain* deemed to embrace sixth amendment analysis, *see, e.g., McCray*, 750 F.2d at 1136 (Meskill, dissenting), nothing in *Swain* was meant to authorize discrimination against jurors because of their race, under either the sixth or fourteenth amendments.

3 The Ninth Circuit recognized in *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), that *Swain* limited only the remedy, and not the right against discrimination, to cases of systematic discrimination in case after case. In *Weathersby*, the prosecutor had voluntarily given his reasons for exercising peremptory challenges against black potential jurors. The court held that *Swain*'s presumption of good faith had no place in such circumstances, and that instead the court should evaluate those reasons to determine whether or not the prosecutor had engaged in unconstitutional race discrimination.

remarked that the *Swain* presumption of validity "was definitely unrealistic [and that this] Court probably intended only to state a principle but never meant for the principle to be implemented." *E.g.*, Comment, *A Case Study of Peremptory Challenges: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis L.J. 662, 680 (1974) (quoting a state trial judge). Some judges have interpreted *Swain* to confer upon an attorney "not only a right but an obligation to challenge a prospective juror" on the basis of race or other "broad generalization[s] which may not in fact be true." *See, e.g.*, *McCray v. Abrams*, 750 F.2d 1113, 1138 (2d Cir. 1984) (Meskill, J., dissenting).

This misinterpretation of *Swain* has led lower courts to adhere to the irrebuttable presumption of valid peremptory challenges, even when the premises of such a presumption have been undercut by evidence of widespread discrimination, and when the need for it has been undercut by the development of a workable procedure for curtailing such abuse without destroying the peremptory challenge.[4] *See, e.g.*, authorities collected in *McCray*, 750 F.2d at 1128 n.6; *see also* cases cited in *Gilliard v. Mississippi*, 104 S. Ct. 40, 42 (1983) (Marshall, J., dissenting from denial of *certiorari*); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 744 (1984). *Swain* has come to stand for the proposition it began by expressly refuting, that in the courts of this country, jurors may be chosen or rejected by color.

Attorneys and commentators, too, have misinterpreted *Swain* as a license to discriminate against jurors merely on the basis of their race. *See, e.g.*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 343 (1982). "The time-honored rule of thumb in jury selection is nothing more than racist or sexist generalizations [including such] stereotypical and fallacious [theories as]: 'All Scandinavians are pro-police,

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4 Two federal circuits and several state courts have developed effective and efficient procedures to bar the use of race-based peremptory challenges. See discussion in Point II.

all Jews are kind-hearted . . . all blacks will vote to acquit blacks no matter how strong the evidence.' " Ciolli, *Indicting the Process of Selecting Juries*, Newsday, Mar. 8, 1983, Part II, p.2 (quoting Professor Jon Waltz). Professor Irving Younger has noted that a "prospective juror's race" is "at or near the top" of the list of factors influencing a lawyer's juror selection. Younger, *Unlawful Peremptory Challenges*, 21 The Judges' Journal 27, 28 (Winter 1982). Many experts in trial litigation publicly recommend that attorneys exercise their peremptory challenges on the basis of race.[5]

*Amicus* has spoken with many prosecutors who believe they are entitled to use the peremptory challenge to strike potential jurors on the basis of race, and would do so to the extent this Court permits the practice. Moreover, in the experience of *amicus*, defense counsel frequently exclude jurors on the basis of race, and they do so without inhibition in New York, where the courts have not extended the ban to defense counsel. Because prosecutors and defense counsel have misconstrued *Swain* as a license to challenge jurors on the basis of race, *Swain*'s effort to deal with the problem of discrimination has become part of the problem itself.

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5 For example, one "checklist for voir dire" advises attorneys to develop "prototypes" and consider excluding people first on the basis of their racial origin and second, on the basis of their religious or national origin. Kelner, *Jury Selection: The Prejudice Syndrome*, N.Y. State Bar J., Feb. 1984, at 35-38. An instruction book for new prosecutors prepared by the Dallas County, Texas, District Attorney's office contained this advice on juror selection:

> III. What to look for in a juror.
>
> A. Attitudes
>
> 1. You are not looking for a fair juror but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.
> 2. You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with accused.
> 3. You are not looking for free-thinkers and flower children.

Brown, McGuire, and Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse?*, 14 New Eng. L. Rev. 192, 224 (1978).

The proponents of racial exclusion in jury selection contend that race is an accurate predictor of bias or sympathy, and that for this reason an attorney must be permitted to use peremptory challenges to exclude potential jurors on the basis of race. *See, e.g., McCray*, 750 F.2d at 1138 (Meskill, J., dissenting); Saltzburg & Powers, 41 Md. L. Rev. 337. That argument is fatally flawed for two reasons.

First, it is simply false. "[I]t is fallacious to assume that all persons sharing an attribute of skin color, or of gender or ethnic origin, etc., will *ipso facto* be partial to others sharing that attribute." *McCray*, 750 F.2d at 1121. All whites do not view matters in the same way, nor do all members of any racial minority.

While this truth should be self-evident, empirical support for the proposition is also available. This Court has recognized social science evidence that while some members of minority groups may be sympathetic to members of their own group, others may "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority," *Casteneda v. Partida*, 430 U.S. 482, 503 (1977) (Marshall, J., concurring). *See also* Babcock, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 Stan. L. Rev. 545, 553, 553 n.30 (1975); *see also* Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection*, 74 Yale L.J. 919, 922-23 (1965). People are more than white or black, and the views and abilities of any individual cannot be accurately foretold by a look at his or her face.

"[As] early as 1880, [this] Court recognized that blacks as a class are no less qualified to sit on juries than whites," *Duren v. Missouri*, 439 U.S. 357, 371 n.* (1979) (Rehnquist, J., dissenting) (citing *Strauder v. West Virginia*, 100 U.S. 303 [1880]), because this Court knew that individual blacks, like individual whites, are capable of the objectivity and fairness that are the prerequisites of a good juror. As the Second Circuit observed:

> Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case

> warrants it. All of the members of this Court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

*United States v. Newman*, 549 F.2d 240, 250 n.8 (2d Cir. 1977).

Clearly, no racial group is inherently more biased or incapable of objectivity than any other. Thus, "[a]ny notion that white persons can be objective in viewing a case on its merits and that blacks *qua* blacks cannot, is particularly objectionable." *McCray*, 750 F.2d at 1131. Race is simply not an accurate predictor of a juror's impartiality or an individual's attitudes and capacities.

Second, even if there were some loose association between race and bias or sympathy, the Constitution would prohibit its use in jury selection. Race is "constitutionally an irrelevance," *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring), and generalizations based upon race or other suspect classifications have no place in the judicial process.

Because of the evil which stigmatizing classifications such as race wreak on American society and individual citizens, this Court has refused to permit their use. This Court has correctly discerned in the Constitution a "limiting principle" which forbids certain suspect ways of grouping individuals regardless of "statistically measured but loose-fitting generalities." *Craig*

*v. Boren*, 429 U.S. 190, 208 n.22, 209 (1976);[6] *see also Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). Simply put, some classifications are so pernicious, so susceptible to misinterpretation and misuse, so ill-founded, and so antithetical to the American conception of fairness and the dignity of the individual, that they have no place under the Constitution.

The Constitution "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation" and particularly those "presumptively invidious . . . classifications that disadvantage a 'suspect class'." *Plyler v. Doe*, 457 U.S. 202, 213 (1982). Even if there were some minimal support for race-based prognostications of a juror's potential bias, the tenuous benefits of challenges based on such stigmatizing and harmful classifications cannot outweigh the costs to society in skewed juries, offended jurors, and judicially sanctioned racism.

Those who would interpret *Swain* to authorize the exclusion of jurors on the basis of race-based stereotypes are simply wrong. This Court has never sanctioned the use of peremptory challenges on the basis of racial classifications. Because such discrimination strikes at the heart of the jury system itself, it is important now to restate the message lost in *Swain*, profiting from the experience developed in the state courts and from the

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6 *Craig* involved a challenge to gender-based discrimination arguably supported by empirical data. In that case, Oklahoma had established different drinking ages for men and women based on statistics tending to show a quantifiable disparity in the incidence of driving while intoxicated. This Court observed that "[e]ven were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here." 429 U.S. at 201. The *Craig* court demonstrated the intolerability of classing people by religion, sex, or race even in light of certain statistical information, commenting that

> if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that states could freely favor Jews and Italian Catholics at the expense of all Americans, since available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking [sources omitted] . . . .

*Id.* at 208 n.22.

developments in sixth and fourteenth amendment jurisprudence over the last twenty years.

### B. The Race-Based Use of Peremptory Challenges Violates the Sixth and Fourteenth Amendment Rights of Defendants, Jurors, and the Public.

The race-based use of peremptory challenges violates the rights of at least three different groups of people under two distinct constitutional provisions. It violates the rights of defendants, jurors, and the public at large to freedom from invidious discrimination under the equal protection clause, and to trials by juries drawn from a fair cross-section of the community under the sixth amendment. Each of these groups suffers a distinct injury, and each injury is cognizable under the well-established constitutional precedents of this Court.

*Defendants*

This Court held in 1880 that a defendant is denied equal protection of the law when tried by a jury from which members of defendant's own group are excluded by reason of race. *Strauder*, 100 U.S. 303. In *Swain*, the Court recognized that the equal protection clause is violated even when the racial exclusion is accomplished by means of the peremptory challenge, so long as the presumption of good faith is overcome by a showing of systematic exclusion in case after case. This Court should abandon *Swain*'s requirement of systematic exclusion, and provide a remedy to any defendant who is the victim of intentional race discrimination in jury selection. *Swain*'s remedy must be extended for two reasons: first, evidence of widespread discrimination shows that *Swain*'s irrebuttable presumption of good faith is not warranted; and second, the equal protection clause prohibits isolated acts of racism as well as systematic race discrimination.

When a defendant is tried by a jury from which a group is systematically excluded, the defendant is also denied the sixth amendment "right to a speedy and public trial by an impartial jury."In *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), this Court declared "that the American concept of a jury trial contemplates a jury drawn from a fair cross-section of the

community."[7] Thus, the sixth amendment forbids any unreasonable interference with the "fair and undistorted chance" that the jury represent the community. *McCray*, 750 F.2d at 1129. The peremptory challenge may not be used as a means of skewing a jury or stilling the voice of individual jurors solely because of race.

Although *Taylor* dealt with the selection of the venire, clearly the logic and concerns that prompted its injunction against interference with the cross-section extend to the final, critical step of selecting the actual petit jury. *McCray*, 750 F.2d at 1128-29; *see also Childress*, 715 F.2d at 1319 ("The extension of *Taylor v. Louisiana* from the venire to the petit jury has much logical and practical appeal."). Courts that have held otherwise rely on the dictum at the end of *Taylor*, noting that there is obviously "no requirement that petit juries actually chosen must mirror the community," *id.* at 538. *See, e.g.*, cases cited in *McCray*, 750 F.2d at 1128 n.6. But that observation simply recognizes that the Constitution regulates the jury selection process, and not the composition of the jury itself. While an actual cross-section is not required, the Constitution prohibits any selection process that unfairly restricts the possibility of drawing the jury from a fair cross-section of the community.

"[I]n given factual instances, the sixth amendment requirement of cross-sectional representation has been held applicable

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7 *Taylor* followed a long line of cases in which this Court had affirmed the importance of a fair, representative cross-section. *See, e.g., Glasser v. United States*, 315 U.S. 60, 86 (1945) ("[t]he proper functioning of the jury system and indeed, our democracy itself, requires that the jury be 'a body truly representative of the community' and not the organ of any special group or class"); *Ballard v. United States*, 329 U.S. 187, 193-94 (1946); *Thiel*, 328 U.S. at 220 ("prospective jurors [must] be selected by court officials without systematic and intentional exclusion of [racial and other] groups"); *Peters*, 407 U.S. at 503-04. In *Peters*, even the dissenters "completely agree[d] that juries should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' . . . is surely enriched when all voices can be heard." *Id.* at 510-11 (Burger, C.J., dissenting).

to the petit jury." *Grigsby v. Mabry*, 758 F.2d 226, 230 (8th Cir. 1985), *citing Adams v. Texas*, 448 U.S. 38, 50 (1980); *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978) (five-person jury too small to permit representative cross-section); *Witherspoon v. Illinois*, 391 U.S. 510, 518-23 (1968) (exclusion for cause of jurors opposed to death penalty undermines representativeness). In *Ballew*, this Court refused to permit the state "to deal with the valid venire in a way that . . . limited the possibility that a fair cross-section might be drawn." *McCray*, 750 F.2d at 1129. *Witherspoon* dealt specifically with the challenge stage of the proceedings, and thus indicated this Court's concern with the petit jury itself as well as the venire. 391 U.S. at 518-23.

Were this Court to tolerate the use of any stage in the selection process to decimate systematically and intentionally the representative venire promised in *Taylor*, it would countenance an exception that swallows the rule and eviscerates the significance of the guarantee.[8] While there is no requirement that the "representative character of the venire be carried over to the petit jury," the parties cannot be permitted baselessly or invidiously to eliminate "the possibility of such a carry-over." *McCray*, 750 F.2d at 1129.

The fair cross-section requirement assures that the jury reflects the broad range of human experience and preserves the "subtle interplay of influence" by which diversity leads to the truth. *Taylor*, 419 U.S. at 530. The multiplicity of insights brought by a representative jury promotes a "diffused impartiality" that fulfills the sixth amendment's objective. *Id.* Conversely,

> [w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to

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8 "When the prosecution employs its peremptory challenges to remove from jury participation all Negro jurors, the right guaranteed [in *Taylor*] is denied just as effectively as it would be had Negroes not been included on the jury rolls in the first place." *Harris v. Texas*, 104 S.Ct. 3556, 3557 (1984) (Marshall, J., dissenting from denial of *certiorari*).

> assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Peters*, 407 U.S. at 503-04. Overall impartiality is achieved by allowing the interaction of the diverse beliefs and values jurors bring from their own experiences.

Jurors evaluate evidence in light of their own individual experiences, including the experience of membership in a particular group. While it is impossible to predict the specific impact of that experience on their views, the wholesale exclusion of a group from jury service eliminates an important perspective and permits the jury to become "dominated by the conscious or unconscious prejudices of the majority."[9] *People v. Wheeler*, 22 Cal.3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rep. 890, 902, (1978).

*The Public*

Not only defendants, but also victims, witnesses, and the general public are harmed by the race-based use of the peremptory challenge. They have an interest equal to that of the defendant in freedom from intentional race discrimination. *See Strauder*, 100 U.S. 303. They likewise have a strong sixth amendment interest in the diffused impartiality of juries which is essential to fair trials. *See Singer v. United States*, 380 U.S. 24 (1965). These rights of the public are discussed more fully below.[10] The important point here is that discrimination in jury selection inflicts real and substantial injury not only on defendants, but on all members of society.

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9 While it offends the equal protection clause and the sixth amendment to strike any group on the basis of race, it is particularly offensive to strike minority jurors, because it is often possible by this means to eliminate a minority group altogether, *see, e.g., People v. McCray*, 57 N.Y.2d at 555 (Meyer, J., dissenting); *Commonwealth v. Soares*, 377 Mass. 461, 487-88, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 881 (1979). The majority group, by contrast, cannot ordinarily be eliminated even by a constitutionally offensive effort to do so. *See, e.g., Roman v. Abrams*, No. 85-Civ-0673-CLB (S.D.N.Y. May 15, 1985), discussed below at 23.

10 See discussion in Point III.

The judicial system must not only be fair, it must appear fair. This nation will not soon forget the spectacle of all-white juries acquitting the accused murderers of civil rights workers, whether in the 1960's or the 1980's. When the public perceives the judicial system as tainted by race prejudice, its confidence in that system is destroyed, and the system itself is injured.

Regardless of who does it, "restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor*, 419 U.S. at 530.[11] As this Court stated long ago in considering another instance of unfair exclusion from jury service, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). Trial by jury has a unique civic function; it empowers individuals over their officials, educates the citizenry, and reinforces this nation's democratic heritage.[12] In an institution so important and immediate to the people, race prejudice should find no shelter.

*Excluded Jurors*

"People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970). No citizen of the United States

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11 Because of these sixth amendment fair trial concerns and fourteenth amendment equal protection concerns under the analogous provisions of their respective state constitutions, courts in California, Massachusetts, and Florida have prohibited both parties from excluding jurors on the ground of race. *Wheeler*, 22 Cal.3d at 283 n. 29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35; *State v. Neil*, 457 So.2d 481 (Fla. 1984); see discussion in Point III.

12 Distinguished commentators as well as the courts have observed the significant educational role which trial by jury plays in the American polity. *See, e.g.*, De Tocqueville, *Democracy in America*, Vol. I, ch. XVI at 291-98 (Vintage 1954) ("The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well."); *see also* Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5 n.13, 5-7 (1966).

may be told that, because of race, he or she is unqualified to exercise the civic duty to try cases impartially. Such an exclusion is precisely the kind of classification forbidden by the fourteenth amendment's guarantee of equal protection of the law. "[F]or racial discrimination to result in the exclusion of otherwise qualified groups not only violates our Constitution . . . but is at war with our basic concepts of a democratic society." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

In *Carter*, this Court reaffirmed its adherence to one of the earliest, landmark equal protection cases, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), noting that "[t]he exclusion of Negroes from jury service is 'practically a brand upon them . . . , an assertion of their inferiority. . . .' " 396 U.S. at 329. The *Strauder* court had reasoned that racial exclusion denies a class of potential jurors the "privilege of participating equally . . . in the administration of justice" and stigmatizes the members of the public excluded by declaring them unfit for jury service. *Id.* at 308.

Citizens are equally stigmatized as unfit to serve whether they are excluded from jury service on the basis of race by statute, *e.g.*, *Strauder*, by commissioners who summon the *voir dire*, *e.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935), or by the lawyers who finally select the jury. The equal protection clause protects each citizen against race discrimination at every stage of the jury selection process.

It is plain that potential jurors perceive racial exclusion from jury service as stigmatizing. In a case in Kings County, New York, where a Hispanic defendant was charged with killing a black victim, the defense counsel systematically struck all black potential jurors. One excluded black juror sent a letter to the District Attorney complaining bitterly of the exclusion and seeking some way to purge the court system of this kind of discrimination.[13]

The Constitution abhors the reduction of an individual to a racial stereotype, and demands, in the name of impartiality and legitimacy, a jury selection system that preserves the possibility of a representative cross-section on each jury. This

13 The text of the letter is attached as an appendix.

Court should not countenance the distortion of its standards for a fair trial, or immunize jury selection from the demands of the equal protection clause, by permitting the abuse of the peremptory challenge to strike jurors on the basis of race.

## POINT II

## THE SAFEGUARDS SET FORTH IN *SWAIN* FOR DETECTING AND RECTIFYING UNLAWFUL DISCRIMINATION IN THE USE OF THE PEREMPTORY CHALLENGE HAVE PROVEN INEFFECTIVE AND UNWORKABLE. BY CONTRAST, THE *WHEELER* PROCEDURE EFFECTIVELY PRESERVES THE PEREMPTORY CHALLENGE AS A MEANS OF STRIKING BIASED JURORS WHILE PREVENTING THEIR UNCONSTITUTIONAL USE TO ELIMINATE PEOPLE SOLELY BECAUSE OF RACE.

A concern for the orderly administration of justice provides no reason to permit the racially discriminatory use of peremptory challenges. It does, however, make desirable the creation of procedures to avoid unduly burdensome inquiry while eliminating demonstrated abuses. In *Swain*, this Court sought to satisfy both of these goals by creating a procedure which requires a defendant alleging unlawful use of the peremptory challenge in a particular case to establish that the prosecutor was engaging in a systematic pattern of discrimination in "case after case." 380 U.S at 223-24. The experience of the lower state and federal courts under this rule shows that it has encouraged discrimination rather than controlled it, see discussion at 7-9, and that the burden of meeting the *Swain* test is nearly insurmountable. *See* authorities collected in *McCray v. New York*, 461 U.S. 961, 965-66, (Marshall, J., dissenting from denial of *certiorari*).

Nevertheless, some people are opposed to overruling the irrebuttable presumption of *Swain*, contending that it would create unduly burdensome procedural problems during the course of criminal trials, and would irreparably dismantle the

peremptory challenge system. *See, e.g., Swain*, 380 U.S. at 221-22; *People v. Davis*, 95 Ill.2d 1, 447 N.E.2d 353, *cert. denied*, 104 S. Ct. 507 (1983); *People v. McCray*, 57 N.Y.2d at 547-49, 457 N.Y.S.2d at 443-45; Saltzburg & Powers, 41 Md. L. Rev. 337; Younger, 21 Judges' J. at 55-56. Neither of these arguments is correct.

Since *Swain*, several state courts, and two federal circuits, have adopted more workable and fairer approaches to the problem of discrimination in the last stage of jury selection. *See McCray*, 750 F.2d 1113 (2d Cir. 1984); *United States v. Leslie*, 759 F.2d 366 (5th Cir. 1985), *reh'g en banc granted*, No. 83-3719 (May 14, 1985); *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *State v. Crespin*, 94 N.M. 486, 612 F.2d 716 (Ct. App. 1980); *State v. Neil*, 457 So.2d 481 (Fla. 1984); *New Jersey v. Gilmore*, No. A-870-82T4 (Super. Ct. Mar. 8, 1985); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't. 1981), *overruled*, *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983).[14] The experience of these jurisdictions shows that judicial evaluation of the reasons for suspect peremptory challenges can be accomplished through workable procedures which do not impose a substantial burden on the orderly administration of justice.

Under the rule first adopted by the California courts in *Wheeler*, and substantially followed by other jurisdictions which ban discrimination in jury selection, a party who believes his opponent is using peremptory challenges to strike jurors on the basis of race is required to raise the point in a

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14 The *McCray* court relied on the sixth amendment for its ban on discriminatory jury selection. In *Wheeler*, *Soares*, *Crespin*, *Neil*, *Thompson*, and *Gilmore*, the courts all rested their decisions on their respective state constitutions. In *Leslie*, the court exercised its supervisory powers in addressing the issue. The Eighth Circuit has also encouraged its trial courts to use their supervisory powers to prevent the abuse of peremptory challenges to exclude jurors because of race. *Childress*, 715 F.2d at 1321; *see also United States v. Jackson*, 696 F.2d 578 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983).

timely fashion, make a complete record to support the claim, and make a *prima facie* case of such discrimination to the satisfaction of the trial court. That court should begin with a strong presumption that the party exercising a peremptory challenge is doing so on a constitutionally permissible ground. This presumption gives deference to the legislative decision to permit and encourage such challenges, and gives respect to counsel as officers of the court.

In considering whether there is a *prima facie* case of discrimination, a court might find persuasive some or all of the following: counsel has eliminated or nearly eliminated members of one race from the venire; counsel has used a disproportionate number of peremptory challenges against members of one race; counsel has struck jurors that have in common only their race and nothing else; counsel has asked no questions of challenged jurors on *voir dire* and has obtained no information, other than appearance, on which to base a challenge; the defendant and the victim are of different races, and counsel appears to be excluding members of the opponent's race.

The primary responsibility for evaluating this evidence should rest with the trial court. The trial court should consider the evidence in light of its observations of counsel in the particular case, and its general knowledge of local conditions and local counsel. The trial court may find no *prima facie* case, and reject the claim of discrimination.

In the alternative, if the court finds a *prima facie* case, that does not end the matter. At that point, the burden of coming forward with evidence shifts, although not the ultimate burden of persuasion. Opposing counsel may be asked to explain his or her peremptory challenges, giving reasons that rebut the *prima facie* case of discrimination. The reasons need not justify a challenge for cause, but need only be plausible reasons, sufficient to satisfy the court that no discrimination was present. The trial court, of course, has the responsibility of assessing the genuineness of the proffered explanations, and should reject those which are clearly pretextual.

The ultimate burden of proof remains on the litigant who claims discrimination. If that party proves the claim, and

opposing counsel fails to justify the challenges to the satisfaction of the court, then all jurors must be dismissed, the venire must be quashed, and the jury selection must begin anew. This procedure follows the thoughtful analysis of this Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The *Wheeler* approach has proven an effective and efficient ban on discrimination. "Since the *Wheeler* decision, complaints about the racial composition of trial juries have been virtually eliminated in California." Letter from Justice Stanley Mosk, Sup. Ct. of Calif. to New York *Times*, A24, col. 3 (June 24, 1983). Moreover, the rule has posed no practical problems whatsoever. *See, e.g., People v. Hall*, 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (observing that the People had not produced or cited any empirical evidence in support of their criticism of *Wheeler*, and that there is, in fact, a "dearth" of such evidence). The *Hall* court remarked:

> In particular, the assumption underlying some articles critical of *Wheeler* [these sources omitted], and echoed by the People, that restricting the exercise of peremptory challenges to proscribe those prompted by group bias may eliminate the 'hunch challenge' is without demonstrable merit. A prosecutor may act freely on the basis of 'hunches', unless and until these acts create a *prima facie* case of group bias, and even then he may rebut the inference.

35 Cal.3d at 170. Because the *Wheeler* approach requires a genuine *prima facie* showing of discrimination before any judicial inquiry may occur, the rule has not led to the numerous or protracted mid-trial hearings predicted by defenders of *Swain*.

The experience in Massachusetts under *Soares* has been equally positive. In 1984, a federal district court in that state ordered and conducted "an evidentiary hearing [to consider] testimony to be offered on the impact of *Soares* on criminal trial practice." *Simpson v. Commonwealth*, No. 81-1193-S, slip op. at 14 (D. Mass. July 20, 1984). Although the hearing dates were spread over a two-month period, not one state

prosecutor and not a single defense counsel expressed any criticism of the rule.

In Florida, a ban on race discrimination in jury selection has existed since 1984. *State v. Neil*, 457 So.2d 481 (Fla. 1984). There is absolutely no evidence that the rule has imposed any undue burden on attorneys or the courts.

In New York, a similar rule against discriminatory peremptory challenges was the law of the Second Judicial Department for almost two years, as a result of *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981), *overruled*, *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 461 U.S. 961 (1983). During that period, it created no difficulties, as *amicus* has consistently maintained based on the experience of her office and conversations with other attorneys and judges. *See McCray*, 750 F.2d at 1118.

Under the Second Circuit's version of the rule in *McCray*, 750 F.2d 1113, there has been at least one hearing to consider allegations of improper peremptory challenges. *Roman v. Abrams*, No.-85-Civ. 0673-CLB (S.D.N.Y. May 15, 1985).[15] Despite the dislike for the rule of the particular judge presiding at that trial, reflected in the tone of his opinion, and his failure to require a *prima facie* showing prior to obliging the prosecutor to rebut the challenge, the hearing actually served its purpose with a minimum of difficulty. Having considered the evidence, the court concluded that "the prosecutor used his peremptory challenges deliberately, insofar as possible, to effect the invidious purpose of eliminating or reducing the number of white jurors who would try Roman's case." *Id.*, slip op. at 15. A new trial was ordered, and the perceived injustice rectified.

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15 *Roman* involved a claim by a white defendant that a prosecutor had used ten of his eleven peremptory challenges to exclude white and other "light-skinned" jurors. Slip op. at 7. An additional peremptory challenge was made against a white juror and then withdrawn when the court asked the prosecutor to explain his reasons. At the hearing, the prosecutor offered reasons for these challenges, but the court rejected them as pretextual because he had failed to strike other jurors of different races who had met the same criteria. *Amicus* takes no position on the accuracy of the court's factual finding, but merely notes that it was accomplished without substantial burden on counsel or the court system.

Once this Court eliminates the ambiguity that has followed in the wake of *Swain*, and makes clear that the Constitution prohibits jury selection based on race, most lawyers will adjust their practices and obey this Court's command. The *Wheeler* rule provides an efficient and effective enforcement mechanism to deal with those who do not. Trial judges are fully capable of distinguishing between bona fide justifications and sham excuses for discriminatory conduct.[16]

California and other jurisdictions have provided a procedural model for curtailing the impermissible use of peremptory challenges. This Court should extend to citizens in the other states the same protection for their constitutional rights.

## POINT III

## THE BAN ON RACE DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES MUST EXTEND TO DEFENSE COUNSEL AS WELL AS TO PROSECUTORS.

The ban on race discrimination in jury selection must extend to defense counsel as well as to prosecutors if constitutional rights are to be adequately protected. Sixth and fourteenth amendment interests are equally offended regardless of who skews the jury and discriminates against jurors on the basis of race. Such discrimination is pervasive among defense counsel as well as prosecutors. As the California, Massachusetts, and Florida courts have recognized, the prohibition must extend to defense counsel in order to guarantee that potential jurors are not excluded and stigmatized in violation of their rights, and to preserve the impartiality, representativeness, and appearance of

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16 The Second Circuit has rightly observed that the

> process of identifying discriminatory conduct and pretextual explanations is performed daily in the course of litigation under Title VII of the Civil Rights Act of 1964 and a host of other statutes.

*McCray*, 750 F.2d at 1132. Moreover, the need for such an evaluation does not even arise unless an aggrieved litigant has made out a *prima facie* case.

fairness in the criminal jury trial system. *Wheeler*, 22 Cal.3d at 283 n.29, 583 P.2d at 765 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35; *Neil*, 457 So.2d 481.

The defendant's rights are not the only ones implicated in the sixth amendment's guarantee of a fair trial. This Court has affirmed the state's interest in prosecutions "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965); *see also Gannett Co. v. De Pasquale*, 443 U.S. 368, 382-83 (1979) ("independent public interest in the enforcement of Sixth Amendment guarantees"). Thus, the public is equally entitled to a representative jury, fairly drawn from a cross-section of the community unimpaired by a defendant's improper exercise of peremptory challenges.

A one-sided rule would unbalance the jury selection process and undermine the possibility of a cross-section essential to fairness and representativeness. The risk is real and substantial because the practice of striking jurors on the basis of race is widespread among defense counsel as well as prosecutors. *See, e.g., Commonwealth v. Little*, 384 Mass. 262, 424 N.E.2d 504 (1981); *Commonwealth v. Perry*, 15 Mass. App. Ct. 932, 444 N.E.2d 1298, *appeal denied*, 388 Mass. 1105, 448 N.E.2d 766 (1983); *Commonwealth v. DiMatteo*, 12 Mass App. Ct. 547, 427 N.E.2d. 754 (1981), *appeal denied*, 385 Mass. 1101, 440 N.E.2d 1173 (1982).[17] Because the diversity of the community contributes to impartiality, that possibility of a cross-section must be preserved against illicit encroachment by either litigant.

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17 Prosecutors charged with engaging in the practice frequently respond by pointing to similar behavior by defense counsel. *See, e.g., People v. Fuller*, 136 Cal. App.3d 403, 417, 186 Cal. Rptr. 283, 291 (1982); *Soares*, 377 Mass. at 489 n.35, 389 N.E.2d at 517 n.35; *Commonwealth v. Brown*, 11 Mass App. Ct. 288, 416 N.E.2d 218 (1981). Of course, discrimination by defense counsel does not justify discrimination by the prosecutor. It does, however, demonstrate the need for a rule that prohibits discrimination by both parties.

Moreover, a balanced rule serves to protect minority groups in the community.

> For example, when a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in [the fair possibility of] participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

*Wheeler*, 22 Cal.3d at 282 n.29, 148 Cal. Rptr. at 907 n.29, 583 P.2d at 765 n.29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35. Minorities are particularly vulnerable to race-based exclusion and the unfairness that results. See discussion at 16n.9.

The consequences of permitting unrestrained use of peremptory challenges by defense counsel were demonstrated in Miami in 1980. White police officers were tried on charges that they had beaten to death a black insurance executive. After the defendants exercised their peremptory challenges to remove all blacks from the panel, the all-white jury acquitted the defendants. The verdict touched off rioting in which fourteen people were killed and $200 million was lost in property damage, inventory losses, lost wages, and lost tourist dollars. The Florida governor's report on the disturbance specifically identified the practice of excluding blacks from juries in racially sensitive cases as a cause of the riots and a reason why blacks in Dade County distrust the criminal justice system. *See Andrews v. State*, 438 So.2d 480, 482 n.4 (Fla. Dist. Ct. App. 1983) (Ferguson, J., dissenting), quoting Miami *Times*, June 23, 1983, p. 1, col. 1.

Again, in 1984, violence and outrage followed the acquittal of four Miami police officers acccused of killing black men. In each of the cases, defense lawyers had used their peremptory challenges to strike all blacks from the juries. New York *Times*, Mar. 18, 1984, p. 23, cols. 1, 4. The exclusion of qualified jurors solely on the basis of race outraged the community and undermined the legitimacy of the judicial process. American

society cannot afford the loss of public confidence in the fairness and integrity of this nation's system of justice. *See Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *Ballard*, 329 U.S. at 195.

Because impartiality, representativeness, and also the appearance of fairness are essential interests of society as well as the defendant, these sixth amendment interests do not belong to the defendant alone, and the Constitution does not permit the defendant to abandon or defeat them. The Constitution would nct permit a defendant to elect to go to trial before a five-person jury, *see Ballew*, or to waive the state's constitutional burden of proving guilt beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358 (1970).[18] Neither does the Constitution leave the important interests of a fair trial solely at the mercy of either party to the judicial proceeding.

Moreover, when defense attorneys exclude jurors on the basis of race, just as when prosecutors do, they violate the rights of those citizens to equal treatment irrespective of race. Such an exclusion improperly denies the challenged, qualified jurors their protected opportunity to participate in a fundamental governmental process. *Carter*, 396 U.S. 320; *Strauder*, 100 U.S. at 308. Furthermore, it stigmatizes them in their own eyes and in those of any observers of the trial, which is, of course, a public event. *Id.*

Thus, under the sixth and fourteenth amendments, a defendant's race-based use of the peremptory challenge violates the rights of both the jurors and the public, even though the discrimination is perpetrated by an ostensibly private actor. A state cannot avoid its obligation to maintain a nondiscriminatory jury selection system by delegating part of the selection process to private parties. A state's jury selection system is the mechanism by which citizens are selected to participate in the

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18 The existence of a constitutional right does not necessarily create a coextensive power to waive that right. For example, in *Faretta v. California*, 422 U.S. 806 (1975), this Court rejected the notion that a defendant's right to counsel gave him an automatic right to represent himself at trial. Instead, such right had to be "independently found in the structure and history of the constitutional text." *Id.* at 819 n.15.

judicial process. In selecting a jury, defense counsel is performing a governmental function, and therefore counsel is bound by the constitutional constraints by which all state actors must abide.[19]

The state action issue posed here is analogous to that posed in one of the White Primary Cases, *Nixon v. Herndon*, 273 U.S. 536 (1927). In *Herndon*, the Supreme Court held that Alabama could not exclude blacks from voting by delegating to a private political party the task of determining qualifications for primary voters, and permitting that party to bar blacks from the party primary. Similarly, the state may not exclude blacks or any racial groups from jury service by delegating the task of jury selection in part to a private attorney, and permitting that attorney to exclude a class of jurors through discriminatory exercise of the peremptory challenge.

Moreover, defense counsel's challenges would have no effect unless they were enforced by the court, and the Constitution prohibits the courts from enforcing an exclusion of jurors solely on the basis of race. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1 (1948).[20] If a state's peremptory challenge statute were interpreted so as to authorize race discrimination, it would be unconstitutional. The state simply may not maintain a discriminatory jury selection system whether the discrimination is practiced by government officials or private individuals.

Defendants have claimed that the prohibition cannot apply to them because any restriction on their exercise of the peremptory challenge inhibits their ability to obtain an impartial jury

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19 A contrary conclusion is not required by *Polk County v. Dodson*, 454 U.S. 312 (1981), which held that a public defender does not ordinarily act under color of state law for purposes of suit under 42 U.S.C. § 1983. In fact, *Polk County* recognized that a public defender may act under color of state law for some purposes. 454 U.S. at 324-25.

20 In *Shelley*, the Court held that the judicial enforcement of a racially restrictive real estate covenant violates the fourteenth amendment. Similarly, the Constitution prohibits the courts from serving as defendant's instrument of discrimination on the basis of race.

and fair trial. The state courts have rightly rejected this claim. *See, e.g., Little*, 384 Mass. 262, 424 N.E.2d 504; *Commonwealth v. Reid*, 384 Mass. 247, 424 N.E.2d 495 (1981). While a defendant is entitled to an unbiased jury, a defendant has no constitutional right to peremptory challenges, which are exercised only after biased jurors have been struck for cause. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 n.6 (1981); *Swain*, 380 U.S. at 224. The right to an impartial jury can be protected without granting a defendant the right to remove unbiased jurors solely on the basis of race. *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948); *Stilson v. United States*, 250 U.S. 583, 586 (1919).

Critics of the *Wheeler* rule maintain that because genuine individual bias is difficult to reveal during *voir dire*, defendants cannot obtain an impartial jury without relying on the assumption that certain groups of people characteristically harbor certain biases. *See, e.g., People v. McCray*, 57 N.Y.2d at 547-548, 457 N.Y.S.2d at 443-445. This assertion is no more valid for defendants than for prosecutors, and rests on an invidious fallacy about the correlation between race and individual bias. Because it is unfounded and unfair, this Court should reject it.

Moreover, the claim that individuals can properly be considered and dismissed by class would defeat all antidiscrimination laws. Opponents of such laws frequently say they cannot select employees, or students, or tenants without relying on assumptions about group characteristics. The Constitution and the laws of this nation do not permit that response. As discrimination has been outlawed in various aspects of life, people have learned how to get the specific information about individuals they need in order to make the choices formerly made on the basis of impermissible group affiliations. Encouraging defense counsel and prosecutors to do what the rest of society must is mandated by "the strong policy the Court has consistently recognized of combating racial discrimination in the administration of justice." *Rose*, 443 U.S. at 558.

## CONCLUSION

The courts of this country have taken great strides in eliminating race discrimination in education, in employment, in access to public accommodations, and in many other areas. Surely it is time for this Court to rid the judicial system of intentional race discrimination. Trial by jury is the heart of the judicial system, and one of its most important functions is to command the confidence of the community in the justice of its results. Any selection process which permits either party to exclude jurors solely on the basis of race cannot hope to command that confidence. In order to vindicate the constitutional rights of defendants, jurors, and the public, this Court should adopt the procedure urged by *amicus* and should purge the jury selection process of intentional discrimination based on race.

Respectfully submitted,

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June 28, 1985

# APPENDIX

## APPENDIX

11/21/84

Elizabeth Holtzman
District Attorney
210 Jorelmon Street
Brooklyn, N.Y.

Dear Mrs. Holtzman:

I am not sure that I am writing to the right person, if not possible you will be able to put this bit of information in the right place.

I am writing concerning the New York (Brooklyn) Judicial system. Which has turned out to be one big joke, a waste of time and the tax payers money.

I am a common laborer not professing to know law, but I do have common sense and understanding. I was summon to Supreme Court 11/15/84 to serve as a possible Trial Juror. After walking about for four days, I was finally called and sent to court room 574 part II, 11/21/84. Presiding Judge Leone, defendant Mr. Rosada. There were a least sixty or seventy people sent to room 574 to pick a jury of twelve plus two alternates. The majority of the groups sent were Blacks. Mr. Rosado is being tried for Murder 11/23/84.

After telling us what the law expected of us as possible Jurors, which as the Judge stated was common sense and a promise from each of us to be fair and impartial then the selection began; it made no difference to the Judge the District Attorney or the defendants Lawyer that the majority of the prospective Jurors were Black. They manage to pick thirteen (13) whites and one black *second* alternate making sure of an all white Jury.

We were also reminded that we if selected as a Juror, were not suppose to take Sympathy into the founding of a Verdict. But Mrs. Rosado was in the court room while the selection was being made she is about seven months pregnant. She was seated right a long with the prospective Jurors and if that isn't a sympathy pitch I've never seen one. Some of us do have common sense.

And so I ask you Mrs. Holtzman if we Blacks don't have common sense and don't know how to be fair and impartial, why send these Summons to us? why are we subject to finds of 250.00 if we dont appear and told it's our civic duty if we ask to be excused. Why bother to call us down to these courts and then over look us like a bunch of niave or better yet ignorant children. We could be on our jobs or in schools trying to help our selves instead of in court house Halls being Made fools of.

I will not sign my name because I am a little person and will surely get the short end of the stick. I just thought it was time for some one to Know about the Judicial system and if there is anything that can be done or anyone who wants to do it, the matter will be taken care of. A Copy of this letter will be sent to Eye Witness News.

Thanking You