NO. 84-6263

IN THE

Supreme Court of the United States

October Term, 1984

JAMES KIRKLAND BATSON,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether a black defendant's sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by a state trial court by swearing in an all white jury, over the defendant's objection, after the prosecution exercised four of six peremptory challenges to strike all black veniremen from the panel.

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This brief is filed in accordance with Rule 36 of the Supreme Court Rules. Letters of consent to file a brief *amicus curiae* by the National District Attorneys Association have been obtained from David L. Armstrong, Attorney General of the Commonwealth of Kentucky, counsel for the Respondent, and J. David Niehaus, Deputy Appellate Defender of the Louisville-Jefferson County Public Defender Corporation, counsel for the Petitioner, and they have been filed with the United States Supreme Court Clerk.

INTEREST OF AMICUS

The National District Attorneys Association, Inc., is a non-profit corporation and the only national organization representing state and local prosecuting attorneys in the United States. Its publications, training and educational programs and *amicus curiae* activities and pursuits have as their objective reforms of the criminal justice system for the benefit of all our citizens, the defense bar and prosecutors, and the trial courts of the several jurisdictions.

The Association and its membership are cognizant of recent developments in several state and federal appellate court decisions regarding the constitutional propriety of the prosecutorial exercise of peremptory challenges which results in the exclusion from a particular case of all members of a defendant's race.

The issue upon which certiorari was apparently granted in the case *sub judice*, i.e.,

> Whether a black defendant's sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by a state trial court by swearing in an all white jury, over the defendant's objection, after the prosecution exercised four of six peremptory challenges to strike all black veniremen from the panel,

is of particular concern to the National District Attorneys Association. The interest of the Association is predicated on the substantial and far-reaching effect that any decision will have on the jury selection process in the several jurisdictions. The National District Attorneys Association is also concerned that this Court, if it is inclined to change or modify prior decisions of this Court regarding the exercise of peremptory challenges, should endeavor to apply such changes equally to both parties to criminal trial proceedings.

STATEMENT

In its unpublished memorandum opinion of December 20, 1984, *Batson v Commonwealth*, No. 82-CR-0010 at pp. 4, 5 thereof, the Kentucky Supreme Court refused to join the decision in the states of California (*People v Wheeler*, 538 P 2d 748 (1978)) and Massachusetts (*Commonwealth v Soares*, 387 NE 2d 499 (1979)) which essentially stand for the proposition under their respective states' constitutions that peremptory challenges against minority groups are unconstitutional where there is a demonstrated pattern of challenges against jurors from a discrete group and there is a likelihood that the prosecutorial challenges were based solely on group membership. The Court, rather, affirmed the petitioner's conviction under authority of another Kentucky case, *Commonwealth v McFerron*, 680 SW 2d 924 (1984), relying on this Court's decision in *Swain v Alabama*, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965) as authority for the proposition that a mere allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions. (*Batson* slip op. at p. 5)

The National District Attorneys Association is in accord with the arguments advanced by the Attorney General of the Commonwealth of Kentucky in urging that this Honorable Court deny the petitioner's request for reversal of petitioner Batson's state court convictions for second degree burglary and receiving stolen property over $100.00.

The National District Attorneys Association additionally urges that this Court reaffirm its longstanding decision in *Swain v Alabama, supra,* finding it fully applicable to the case *sub judice*. *Amicus* further urges that in the event there is to be any modification of *Swain*, for the reasons more fully set forth in the argument portion of this brief any guideposts for jury selection and the exercise of peremptory challenges apply equally to the prosecution and the defendant.

SUMMARY OF ARGUMENT

Prosecutorial peremptory juror challenge to remove from a petit jury all members of a defendant's race is not violative of a defendant's right to be tried by an impartial jury drawn from a fair cross-section of the community under the sixth amendment of the United States Constitution. While peremptory challenges are generally the creation of a legislature and not constitutionally required, the ability to exercise them by trial counsel is one of the most significant rights available to the parties of a lawsuit. Permitting judicial inquiry into the reasons for such challenge is inconsistent with the peremptory challenge aspect of juror selection under historic and contemporary trial practice in America. Since the question of the propriety of peremptory challenges of prospective jurors is an issue of major significance to criminal defendants and the prosecution, *amicus* maintains that their use should be continued and should not be interferred with by a trial court. In the event that this Honorable Court decides to permit judicial inquiry into the reasons for exercising peremptory challenges, *amicus* would ask that any rules that might be developed in this regard be made applicable to counsel for all parties.

ARGUMENT

This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in *Swain v Alabama*.

That the courts of the several states and the United States have been vexed by a rash of appeals and post-conviction petitions concerning the constitutional propriety of the prosecutorial exercise of peremptory challenges to remove certain jurors from the trial of a criminal defendant, needs no elaboration. That there are differences of opinion with respect to the resolution of such claims existing at every level of the judicial system is equally apparent. Notwithstanding several years of debate, dozens of individual cases and the demand for appellate court relief from jury-based convictions where prosecutors have caused to be removed from jury panels by way of peremptory challenge, members of a particular defendant's race, religion, etc., this Court, until the granting of certiorari in the case *sub judice*, has consistently declined to review the issue that this case now presents for resolution.

Petitioner Batson, a black defendant, claims that his sixth amendment right to an impartial jury and right to a jury representing a fair cross-section of the community was violated by the Kentucky trial court by swearing in an all white jury, over his objection, after the prosecutor exercised four of his six peremptory challenges to strike all black veniremen from the panel.

This Court has recently said that one touchstone of a fair trial is an impartial trier of fact. More specifically, "a jury capable and willing to decide the case solely on the evidence before it." *Smith v Phillips*, 455 US 209, 217, 71 L Ed 2d 78, 102 S Ct 940 (1982).

Some 20 years ago in *Swain v Alabama*, 380 US 202, 85 S Ct 824, 13 L Ed 2d 759 (1965), this Court reviewed an issue which is very similar to that raised by petitioner Batson in this case. In *Swain* the Court ruled that to prove a violation of the fourteenth amendment equal protection clause the defendant was required to show that black jurors had been systematically excluded from juries over a long time span. The Court, however, refused to require that a trial court examine the prosecutor's reasons for the exercise of peremptory challenges in any given case. (380 US at 222, 85 S Ct at 837, 13 L Ed 2d at p. 773.) Moreover, permitting such inquiry would be at odds with the purpose of the peremptory challenge, which has as its purpose to permit the respective parties to remove venireman "without a reason stated, without inquiry and without being subject to the court's control." (380 US at 222, 85 S Ct at 836, 13 L Ed 2d at p. 772)

Petitioner Batson makes no persuasive argument here concerning systematic exclusion of blacks from jury panels in Kentucky. His claim is that it was improper for the Kentucky prosecutor to exercise four of his six peremptory challenges, and that the trial court was in error in not requiring the prosecutor to explain his reasons for peremptorily excusing such jurors, thus leaving the defendant to be tried by an all white jury. Batson essentially argues that the *Swain* decision does not reasonably or effectively address his sixth amendment right to be tried by a jury representing a fair cross-section of the community.

Petitioner Batson also argues that in order to properly resolve his claim, this Court should adopt an approach similar to that set forth in California, *People v Wheeler*, 22 Cal 3d 258, 148 Cal Rptr 890, 583 P 2d 748 (1978).

Prior to the *Wheeler* decision, the courts of the several states unanimously followed this Court's decision in *Swain*. See generally Anno. 79 ALR 3d 14 (1977). While the *Swain* decision has been the subject of criticism as not being

responsive to the issue that cases such as the case *sub judice* present for review, it is submitted that this Court should conclude otherwise. See, e.g., Comments, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges*, 3 Detroit College of Law Rev. 703, Fall '84, p 704 fn 6 citing Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. Cin. L. Rev. 554 (1977); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662 (1974); Comment, *Swain v Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L. Rev. 1157 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977); Note, *The Jury: A Reflection of the Prejudice of the Community*, 20 Hastings L.J. 1417 (1969); Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 Miss L.J. 157 (1967); Note, *Fair Jury Selection Procedures*, 75 Yale L.J. 322 (1965); Recent Developments, *Racial Discrimination in Jury Selection*, 41 Alb. L. Rev. 623 (1977); Note, *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 103, 135-39 (1964).

The dissenting opinion of Judge Garwood in *United States v Leslie*, 759 F 2d 381 (CA 5 1985), presents a fresh scholarly analysis of *Swain v Alabama* and sets forth a respectable rationale for retaining *Swain* in its present form.

Judge Garwood correctly points out that *Swain* distinguished between and dealt separately with two types of juror challenges:

> . . . first, those made for the purpose of the particular case being tried . . .; second, those made "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." (759 F 2d at p 381)

Judge Garwood then points out:

> . . . The distinction between the two categories of racially based peremptory challenges is likewise reflected in the description of the second type as being the kind the prosecution would make "whatever the circumstances, whatever the crime and whoever the defendant or the victim may be." id. at 837. In Swain part II, the Court held that racially based peremptory challenges of the first kind were a proper and a traditional part of the jury system as known to the common law and American jurisprudence. In its part III, the Swain Court strongly intimated that racially based peremptory challenges of the second kind were improper, but did not expressly rule that they were since it held that no sufficient showing had been made that the challenges in question were of that kind. (759 F 2d at pp. 383, 384)

In this case of *Batson*, the record shows that there were four black jurors on the panel and that the State prosecutor exercised his peremptory strikes to exclude them from the jury. The trial Court found that the State exercise of its peremptory strikes was proper. The prosecutor during the colloquy with defense counsel and the Court indicated that he had done so in this "particular case". (Petitioner's brief at p. 3) It thus appears that the prosecutorial peremptory strikes were of the first type which are proper and a traditional part of American jurisprudence. Judge Garwood also specifically points out that his view and understanding of *Swain* is supported by the scholarly commentary of Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. R. 337, 345 (1982) where it is said:

> The Swain Court thus recognized two possible motives for exercising challenges against black jurors. The first—the use of race as a proxy by which to identify probable prejudice in a particular case—was explicitly approved by all justices, except Justice Black

who concurred in the result without opinion. The Court emphasized the importance of protecting the inviolability of the peremptory strike, concluding that a court should not scrutinize a prosecutor's motive for challenging blacks in a particular case. The second—the use of challenges to keep blacks off juries—was not approved. (759 F 2d at p 384 fn 5)

Amicus submits the use of peremptory strikes on the grounds of racial or other group-related characteristics, as opposed to individual characteristics should be retained. The jurisprudential significance of the peremptory is well stated in *Swain:*

> It (the peremptory challenge) is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire*, by both prosecutor and accused . . . . This Court has held that the fairness of trial by jury requires no less . . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.
>
> . . . In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory.

> . . . The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Id. at 836-37 (footnotes omitted)

As recently as 1984 this court in *McDonough Power Equipment v Greenwood*, _____ US _____, 78 L Ed 2d 663, 104 S Ct _____ (1984), although not a sixth amendment case, said:

> . . . Voir dire examination serves to protect the right (of a fair trial) by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in responses to questions on voir dire may result in a juror being excused for cause, hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges . . . . (78 L Ed 2d at p 670)

Recent state appellate court decisions restricting the use of peremptory challenges have been mostly based on state law. *People v Wheeler*, 22 Cal 3d 258, 148 Cal Rptr 890, 583 P 2d 748 (1978); *Commonwealth v Soares*, 377 Mass 461, 387 NE 2d 499, cert denied, 444 US 881, 100 S Ct 170, 62 L Ed 2d 110 (1979); *People v Kagan*, 101 Misc. 2d 274, 429 NYS 2d 987 (1979); *State v Neil*, 457 So 2d 481, 486 (1984); *State v Crespin*, 94 NM 486, 612 P 2d 716, 718 (N.M. Ct. App. (1980)).

The Arizona Supreme Court decision in *State v Wiley*, 698 P 2d 1244 (1985), represents one of the most recent cases to reject a sixth amendment challenge to the State prosecutor's peremptory strikes to eliminate black veniremen from a criminal jury. The Court also rejected the defendant's invitation to adopt the procedures employed in

California *(Wheeler)*, Florida *(Neil)* and Massachusetts *(Soares)*, to restrict the use of peremptory challenges. The Court points out that the *Wheeler* case and its following have not been immune from attack, citing Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md L Rev 337 (1983); Note Criminal Procedure Law, 55 St. John's L Rev 789 (1981) and *People v Smith*, 622 P 2d 90 (Colo. App. 1980) and *Commonwelath v Henderson*, 497 Pa 23, 438 A 2d 951 (1981).

A significant critical analysis of the impact of *Wheeler* and *Soares* on the criminal law is set forth in the Saltzburg and Powers article where they say:

> These decisions differ from *Swain* in several important respects. First, they assume that the peremptory challenge is intended to be used only to eliminiate specific bias from the jury. This assumption signals a significant departure from the traditional understanding of the challenge as one exercised for any reason or for no reason. Second, they assume that a jury from which some ranges of presumed bias have been excluded is no longer impartial, while *Swain* assumed that permitting unrestricted peremptory challenges furthered impartiality. Third, they presume that the peremptory challenge can be subject to judicial control without compromising its essential purpose — a proposition that *Swain* has rejected. (Saltzburg and Powers, *supra*, note 24, at p 353)

In Wisconsin, the Court in *State v Grady*, 286 NW 2d 60 (Wis. Ct. App 1979) rejected the *Wheeler* approach:

> We refuse to adopt Wheeler on the ground that the test proposed by the California court is vague and uncertain, and severely limits the scope of peremptory challenges. If peremptory strikes can only be exercised in a certain way, dependent on circumstances, and subject to judicial scrutiny, they will no longer be peremptory. We

refuse to undertake such an alteration of the very nature of the peremptory system.

Although *Swain* has been criticized by several jurists and legal scholars, it still remains the most widely accepted authoritative decision on the issue this case presents for reconsideration in this Court. See Anno. 79 ALR 3d 14 (1977)

While *Taylor v Louisiana*, 419 U.S. 522, 530 (1975), is authority for the proposition that a fair cross-section of the community must be represented on a jury venire, it is submitted that the fair cross-section requirement is not as broad as some would urge. Justice White quite properly qualified this requirement where he said:

> . . . (i)t should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. . . . (id at p 538 and citations)

It has also been stated that the *Wheeler* and *Soares* cases, while decided on state constitutional grounds, were both wrongly decided because the authors of those respective decisions failed to properly interpret this Court's decision in *Taylor v Louisiana*. In Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 Yale L.J. 1177 (1980), the commentator says:

> . . . the principal of jury representation should be understood to mean that certain characteristics of society that profoundly affect a jury's verdict should not be distorted in the jury selection process. The crucial aspect of the community that must be represented is not the subgroup proportion, but the community's mean verdict impact — the mean tendency of its members to influence a verdict toward conviction or acquittal.

While no one will gainsay that the peremptory challenge issue has generated considerable appellate court consternation and substantial scholarly debate since this Court's denial of certiorari in several recent cases, see, e.g., *Gilliard v Mississippi*, _____ U.S. _____, 104 S Ct 40, 78 L Ed 2d 179 (1983), *amicus* respectfully submits that the best juridical thought and better legal commentaries are persuasive that the *Swain* decision should remain the controlling law with respect to complaints of this nature.

Although petitioner Batson complains of the impossible burden imposed by *Swain* and urges that the *Wheeler* approach be adopted by this Court, the National District Attorneys Association maintains that this Court should reject the petitioner's complaint of the *Swain* burden as well as his urging of the adoption of the *Wheeler-Soares* undercutting of the peremptory challenge system.

Mr. Justice Flaherty of the Pennsylvania Supreme Court, in *Commonwealth v Henderson, supra,* sets forth cogent reasons for rejecting the *Wheeler-Soares* approach:

> We emphatically assert that this Court does not subscribe to any theory concerning the likelihood that one racial group will be biased against another in litigation involving members of both groups. In fact, we strongly suspect that all such theories are no more than mere speculation. But what this Court believes about the viability of theories of racial bias is irrelevant to an analysis of the problem of the proper use of peremptory challenges. (438 A 2d at p 954)

Justice Flaherty upon close scrutiny of both *Wheeler* and *Soares* expressed the Court's reason for not including them in the jurisprudence of his state:

> . . . we decline to follow the approach taken by California and Massachusetts because the protections they have devised against abuse of the exercise of peremptory challenges are illusory.

The Court further found that the judicially outlined procedures in those cases are for all practical purposes "unworkable". (438 A 2d at pp 955, 956). See also, Comments, *Is There a Place for the Challenge of Racially-Based Peremptory Challenges?*, Detroit College of Law Rev. 703, Fall, '84.

While the debate continues, and will undoubtedly continue long past decision in this case, *amicus* submits that this Court, on balance, should not be persuaded to change a historically sound criminal trial mechanism that has so well served our judicial system.

There has been some suggestion that the abuse of the peremptory challenge can be remedied by eliminating peremptories by the prosecution and retaining them for the defense. Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law,* University of Pittsburgh Law Review, Vol 44:673. While it is said that the prosecution has no sixth amendment right to a fair trial (p 700) *amicus* submits that such an approach is totally unacceptable in American criminal law jurisprudence. Although the prosecution has no sixth amendment right to a fair trial, the State most assuredly is as entitled to the exercise of peremptories as a criminal defendant. This court should thus not forget the *Hayes v State of Missouri,* 120 U.S. 68, 70, 7 S Ct 350, 351, 30 L Ed 578 (1887) statement on the subject:

> The view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'

Moreover, those jurisdictions that have litigated the matter and have prohibited the State from specifically challenging a juror on the basis of cognizable group affiliation have also held that defendants must also be similarly prohibited. Judge Garwood, in the *Leslie* case, *supra,* at p 402, after

citing the *Wheeler* case, 583 P 2d at p 765, fn 29 summarizes the pertinent decisions as follows:

> . . . "(T)he People no less than individual defendants are entitled to a trial by an impartial jury drawn from a representative cross-section. . . . (W)hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating. . . . (T)hat interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks. . . ."; *Soares*, 387 N.E. 2d at 517 n. 35 (same; also stating that prohibition would, if properly raised, apply in that case to the "attempt of the defendants . . . to strike all veniremen of Italian descent"); *Commonwealth v DiMatteo*, 12 Mass. App. 547, 427 N.E.2d 754 (1982) (white defendant's attempted peremptory challenge of sole black on venire properly rejected where trial judge was not convinced by defense counsel's questionable nonracial explanation; the crime was apparently not interracial, but the prosecutor was black; *State v Neil*, 457 So. 2d at 487 ((B)oth the state and the defense may challenge the allegedly improper use of peremptories. The state, no less than a defendant, is entitled to an impartial jury" (footnote omitted).) *See also United States v Clark*, 737 F 2d 679, 682 (7th Cir. 1984) ("It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges. . . . (T)he prosecutor would be allowed to object to the defendant's making racial peremptory challenges if the defendant could object to the prosecutor's doing so.")

In view of the above-cited persuasive authorities *amicus* submits that in the event this Court renders any decision changing or modifying the exercise of peremptory challenges, this Court should apply those changes equally to the defense and the prosecution.

CONCLUSION

Amicus maintains the *Swain* rule should not be changed by any decision reached by this Court. This case presents the opportunity after several years of debate and judicial decisions to reaffirm without exception the unquestioned use of the peremptory challenge in criminal trials. Accordingly, the National District Attorneys Association respectfully requests that this Honorable Court will affirm the decision of the Supreme Court of the *Commonwealth* of *Kentucky* and thus uphold the convictions of petitioner Batson.

Respectfully submitted,

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