No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, AND THE AMERICAN JEWISH CONGRESS

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Question Presented

Whether a prosecutor's use of peremptory challenges to exclude Blacks from jury service because of their race violates the Sixth and Fourteenth Amendments to the Constitution of the United States?

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On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN JEWISH COMMITTEE, AND THE AMERICAN JEWISH CONGRESS

Interest of the Amici*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

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*Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of the exclusion of Blacks from service on juries. Thus, it has

raised jury discrimination claims in appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices,[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can

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[1] E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

[2] Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, religion, sex or national origin. The American Jewish Committee believes that the exclusion of Blacks from juries through the use of peremptory challenges is a grievous deprivation based on race which violates the Sixth and Fourteenth Amendments to the Constitution.

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of all Americans. Since its creation it has vigorously opposed racial and religious discrimination in all areas of American life, including the administration of justice. The American Jewish

Congress believes that the use of peremptory challenges by prosecutors to exclude persons from juries solely on the basis of their race or religion is in violation of the United States Constitution.

SUMMARY OF ARGUMENT

I.

The misuse of peremptory challenges to exclude Blacks from juries is a pervasive and pernicious practice. Its use has supplemented earlier and more obvious devices for preventing minorities from participating in this most fundamental of democratic institutions. The practice violates both the Sixth and Fourteenth Amendments to the Constitution and must be ended to make the promise of Strauder v. West Virginia at last a reality.

II.

Historically, the prosecution did not have the right to challenge jurors peremptorily. Under the common law, peremptory challenges were given to the defense for the purpose of enforcing the defendant's underlying right to a fair and impartial jury of his peers. The right was extended to the prosecution by statute only in the mid-nineteenth century. Nothing in the history of the exercise of peremptory challenges by the prosecution suggests any reason for permitting them to be exercised in a way that is inconsistent with the Sixth and Fourteenth Amendments.

III.

The intentional exclusion of a black potential juror from actual service on a

jury violates the Fourteenth Amendment's guarantee of equal protection. Swain v. Alabama has been consistently misinterpreted by the lower courts as permitting a successful objection to the racially discriminatory exercise of peremptory challenges in only an unduly limited and virtually unprovable set of circumstances. Trial courts should be no less free to infer intentional discrimination by prosecutors in a variety of factual contexts than they are in a wide range of other cases involving proof of intentional discrimination.

IV.

For a prosecutor to strike black jurors from a venire so as to render it unrepresentative of the community violates the Sixth Amendment. Although there is no

right to a jury that mirrors the community, the Constitution prohibits the use of devices which affirmatively defeat a fair opportunity to be tried by a jury that reflects a fair cross-section of that community.

V.

There are a variety of remedies to correct the unconstitutional use of peremptory challenges. Although any method that is selected must realistically promise effectively to guard against discrimination, the states should be given some leeway to experiment with solutions that are consistent with their particular jury selection procedures.

ARGUMENT

I.

INTRODUCTION

One hundred and five years ago this Court held that "the very fact" that black people were prevented from serving on juries:

> . . . because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Strauder v. West Virginia, 100 U.S. 303, 308 (1880). More than a century later, the promise of Strauder -- that all discriminatory acts directed towards black

citizens in the administration of justice will be ended -- remains unfulfilled.

Until the 1970's, the primary device for excluding Blacks from jury service was simply to keep them off of the jury rolls. Since Blacks never appeared on venires to begin with, the use of the peremptory challenge to get rid of them was rarely required. When 100 years of decisions of this Court reversing convictions for jury discrimination,[3] injunctions issued by federal district courts,[4] and the reform

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[3] Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880); see cases cited in Alexander v. Louisiana, 405 U.S. at 628-29, 632 (1972).

[4] E.g., Carter v. Jury Commission, supra; Turner v. Fouche, supra; Broadway v. Culpepper, 439 F.2d 1253 (5th Cir. 1971).

of federal and state jury selection laws[5] made total exclusion impractical, the use of peremptory challenges to exclude those Blacks who were placed on venires became the method of choice to achieve the same historic goal of preventing Black citizens from participating in the criminal justice system. Although the means used to exclude Blacks has changed, the same pernicious consequence continues: black citizens do not have their rightful voice in an institution that is at the heart of a free and democratic society.

The exclusion of Blacks from juries not only stigmatizes them and deprives them of their right meaningfully to participate in the criminal justice system. It "destroys the appearance of

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[5] E.g., The Federal Jury Selection and Service Act, 28 U.S.C. §§ 1861 et seq.; Uniform Jury Selection and Service Act, National Conference of Commissioners on Uniform State Laws, 1971.

justice and thereby casts doubt on the integrity of the judicial process . . ., impair[ing] the confidence of the public in the administration of justice." Rose v. Mitchell, 443 U.S. 545, 555-56 (1979); accord Hobby v. United States, ___ U.S. ___, 82 L.Ed.2d 260, 277 (1984) (Stevens, J., dissenting). Nothing could be more destructive to public confidence in the legitimacy of criminal justice than the specter of a prosecutor deliberately manipulating the process to exclude identifiable segments of the community on the basis of race, in contravention of "deeply and widely accepted views of elementary justice . . . ." Bob Jones University v. United States, ___ U.S. ___, 76 L.Ed.2d 157, 174 (1983).

The proliferation of cases raising

the issue of this misuse of peremptory challenges demonstrates that the practice is nationwide, arising in states from California to New York and Massachusetts to Florida.[6] Thus, the Illinois Supreme Court has reviewed "at least 33 cases in which criminal defendants have alleged prosecutorial misuse of peremptory

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[6] See, e.g., People v. Wheeler, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); State v. Neil, 457 So.2d 482 (Fla. 1984); People v. Payne, 106 Ill. App. 3d 1034, 62 Ill. Dec. 744, 436 N.E.2d 1046 (Ill. Ct. App. 1982), rev'd, 9 Ill. 2d 135, 457 N.E.2d 1202 (1983); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 1 881 (1979); State v. Crespin, 94 N.M. 2d 486, 612 P.2d 716 (1980); People v. Kagan, 420 N.Y.S.2d 987 (N.Y. Sup. Ct. App. Div. 1979); People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (N.Y. Sup. Ct. App. Div. 1981); People v. Boone, 107 Misc. 2d 301, 433 N.Y.S.2d 955 (Sup. Ct. 1980); People v. McCray, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982); United States v. Newman, 549 F.2d 240 (2nd Cir. 1977); United States v. McDaniels, 379 F. Supp. 1243 (E.D. La. 1974); United States v. Childress, 715 F.2d 1313 (8th Cir. 1983); United States v. Whitfield, 715 F.2d 145 (4th Cir. 1983); United States v. Clark, 737 F.2d 679 (7th Cir. 1984); Wheathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983).

challenges to exclude Negro jurors."[7] The Eighth Circuit has noted "the frequency with which we have been called upon to examine the prosecutor's practices in this regard in the Western District of Missouri." United States v. Jackson, 696 F.2d 578, 592 (8th Cir. 1982).[8] And the Louisiana Supreme Court reviewed 9 cases in 7 years from the same parish, 5 of which involved the same prosecutor. State v. Brown, 371 So.2d 751 (La. 1979).

In addition to the many reported decisions, our experience and that of our cooperating attorneys has convinced us that the practice is common and flagrant.

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[7] See Williams v. Illinois, 104 S. Ct. 2364, 2365 (1984) (denial of cert.) (Marshall, J., dissenting).

[8] See also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis L.J. 662, 676-77 (1974), citing to studies finding that local prosecutors struck 83% and 67% of black jurors respectively in one year.

Indeed, prosecutors have publicly admitted that they seek to keep Blacks from sitting on criminal trials as a matter of course because they are afraid that Blacks will be too sympathetic to a defendant. Thus, an instruction book used by the prosecutor's office in Dallas County, Texas, the site of Hill v. Texas,[9] Akins v. Texas,[10] and Cassell v. Texas,[11] advised prosecutors that they did not want a "member of a minority group" on a jury because he will "almost always empathize with the accused."[12] See also, State v.

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[9] 316 U.S. 400 (1942).

[10] 325 U.S. 398 (1945).

[11] 339 U.S. 282 (1950).

[12] The book states:

> "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

Washington, 375 So.2d 1162, 1163 (La. 1979), where the prosecutor testified that he routinely struck Blacks because of his perception that they favored the accused.[13]

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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 emphathize with the 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).

[13] See also, New Orleans Times-Picayune, April 7, 1985, p. A-16, and the Jackson, Mississippi, Clarion Ledger, July 15, 1983, p. 1A, quoting an Orleans Parish and a Hinds County prosecutor, respectively, to similar effect.

Our position is simple. The exclusion of a single juror because of his or her race or national origin violates the Fourteenth Amendment's guarantee of equal protection. The issue in Swain, we submit, was not whether the exclusion of a single juror because of race violates the constitution, but rather how one proves the discriminatory motive of such a single exclusion. The lower courts have confused the two issues and have improperly read Swain as limiting the finding of a constitutional violation to those rare circumstances where it can be shown that prosecutors in case after case, over a long period of time, have used peremptory challenges to exclude Blacks. The continued misinterpretation of Swain that allows the decision to be used as a cover

for a discriminatory practice should be repudiated.

We would also urge that the exclusion of Blacks from juries through the use of peremptory challenges violates the right to a jury representative of a fair cross-section of the community, by destroying the opportunity of having a representative jury seated. The lower courts have misconstrued holdings of this Court that there is no requirement that a particular jury mirror the community. These decisions do not hold that nothing can be done to end a practice which affirmatively prevents a representative jury from being seated.

In this brief we will discuss the Fourteenth and Sixth Amendments and will suggest remedies to end the misuse of

peremptory challenges that will not interfere with their proper use. First, however, we will briefly discuss the history of the peremptory challenge, and particularly its use by the prosecution. In this way the interest involved in the prosecutor's right to peremptorily challenge jurors, on the one hand, and the interest in ensuring that the criminal justice system is free from any taint of racial discrimination, on the other, will be put into proper perspective.

II.

THE HISTORY OF THE PEREMPTORY CHALLENGE

At common law, the prosecutor did not have the right to excuse peremptorily

potential jurors. Rather, that right derives solely from statute, and gained wide acceptance only in the last one hundred years -- around the time that the post-Civil War constitutional amendments were ratified and this Court began to apply the Fourteenth Amendment's guarantee of equal protection to the wholesale exclusion of blacks from the jury and grand jury systems.[14]

In early English law, jurors functioned essentially as witnesses -- as fact-givers rather than fact-finders. The Crown therefore initially exercised complete control over their selection; any unacceptable juror could be removed by the prosecution.[15] Parliament enacted the

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[14] See, op. cite supra n. 12, at 195.

[15] Op. cite supra, n. 12, at 194; Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of The All-White Jury, 52 Va. L. Rev. 1157, 1170-71 (1966)

Ordinance of Inquests in 1305,[16] which limited the Crown to challenging jurors for "cause certain." On the other hand, by the time of the American Revolution, the peremptory challenge was firmly rooted in the common law as one of a defendant's greatest protections -- in the words of Blackstone, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous."[17]

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[16] 33 Edw. 1. c.2 (1305).

[17] 4 W. Blackstone, Commentaries 353.

In reaction to the Ordinance of Inquests the English courts did fashion the practice of "standing aside" jurors. The prosecution can require a juror to whom it objects to "stand aside" until all other potential jurors have been called; after the defendant has exercised all his challenges, if there are too few veniremen remaining to compose a jury, only then is the juror "stood aside" allowed to sit, unless the Crown can show cause why he should not be. As one court has noted, however,

> The procedure of having a juror stand aside is not a peremptory challenge because, even when the procedure is employed by the Crown, which is seldom, the

The peremptory challenge for the defendant was thus a part of the common law received by the American states, while the grant of a similar privilege to the prosecution was not.[18] Extension of that privilege to the prosecution was strongly resisted in early state histories, and was slow in gaining legislative acceptance.[19] Thus, while one early decision of this Court asserted that the English practice of standing jurors aside was part of this

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juror who has been stood aside may be actually seated as a juror after the defendant has exercised his challenges. Specifically, 26 Halsbury's Laws of England, par. 624 (4th ed. 1579) states: "The Crown has no right to make peremptory challenges."

People v. Payne, 105 Ill. App. 3d 1034, 1039 n. 4 (Ill. Ct. App. 1982).

[18] See op. cit. supra note 12, at 194.

[19] For a review of this history, see op. cit. supra note 15, at 1170-73.

country's common law heritage,[20] the Court correctly held in 1856 that the prosecutor's right to stand jurors aside was not part of American common law, and therefore only applied in federal court if the state in which the federal court was sitting extended that right to prosecutors.[21] Although defendants in federal prosecutions were guaranteed the peremptory challenge by statute in 1790,[22] it was not extended to all federal prosecutors until 1865.[23]

In short, the peremptory challenge was not recognized in the Colonies and new States as a right of the prosecution.

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[20] United States v. Marchant, 25 U.S. 480, 483 (1827).

[21] United States v. Shackleford, 59 U.S. 588, 590 (1856).

[22] 1 Stat. 119 (1790).

[23] Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500.

Rather, it was given to the defense as a means of assuring the underlying right to a fair and impartial jury guaranteed by the Bill of Rights. It was a protection of the people against governmental overreaching. The use of peremptory challenges by the prosecution to undermine the right to a jury representative of the community stands history on its head. As we show below, it is at odds with the Constitution.

III.

THE EXCLUSION OF BLACKS FROM JURY SERVICE THROUGH THE USE OF PEREMPTORY CHALLENGES VIOLATES THE FOURTEENTH AMENDMENT.

In order to illustrate our argument that the use of the peremptory challenge to exclude Blacks is a denial of equal protection, we will use the following

hypothetical. By random selection from a truly representative jury wheel, a single Black is selected for the venire. The prosecutor uses a peremptory challenge to strike the sole Black juror, and announces that he has done so for the specific purpose of excluding any Blacks from sitting on the jury.[24] Finally, the prosecutor confesses that it is his experience that black jurors tend to favor defendants, and therefore he believes it is to his advantage not to have them sit on the jury.

We submit that this hypothetical set of facts would establish a clear violation of the Equal Protection Clause of the Fourteenth Amendment. Indeed, the hypothetical prosecutor's action is of the type most clearly contemplated to be in

[24] See State v. Washington, 375 So.2d 1162 (La. 1979).

violation of the Equal Protection Clause, whose "central purpose . . . is the prevention of official conduct discriminatory on the basis of race." Washington v. Davis, 426 U.S. 229, 239 (1976). Not only is it an adverse action deliberately taken on the basis of race, and therefore presumptively illegal under many decisions of this Court,[25] but it is based on notions of racial characteristics which are anathema to the most fundamental principles that the equal protection clause seeks to protect.[26]

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[25] Palmore v. Sidoti, ___ U. S. ___, 80 L.Ed.2d 421, 425 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[26] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946). (1943); People v. Johnson, 22 Cal. 3d 296, 299, 583 P.2d 774, 775, 148 Cal. Rptr. 914, 916 (1978).

The problem presented by the misuse of peremptory challenges arises only because it will be the rare case in which a prosecutor admits that the reason for his action was race. In Swain, this Court hypothesized another set of facts in which a violation could be proven by a statistical showing that over a long period of time, in case after case, the prosecutor consistently struck Blacks from juries.[27] However, the hypothetical facts set out in Swain were taken by lower courts to be the only circumstances in which a constitutional violation could be found,[28] and the difficulty of assembling such a showing

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[27] 380 U.S. at 223.

[28] Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477, 485 (1984), and cases there cited.

made it virtually impossible to prevail regardless of the actual discriminatory practice.[29]

There are a number of reasons why, in the twenty years since Swain, there have been virtually no cases in which a defendant has been able to demonstrate that prosecutors have stricken Blacks in case after case over a long period of time. First, courts do not routinely record voir dires, the race of jurors that are excused, or the grounds of excusal. Second, even where there are any records, such as transcripts of voir dires, there is no ready means to determine in which

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[29] See, e.g., United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971); United States v. Childress, 715 F.2d 1313, 1317 (8th Cir. 1983), en banc. Of all the cases cited in the Appendix, in only two, have defendants been able to meet the Swain burden of proof, and both involved the same prosecutor, who had admitted under oath that he customarily struck all black jurors. State v. Brown, 371 So.2d 751 (La. 1979); State v. Washington, 375 So.2d 1162, 1163-64 (La. 1979).

cases they have been made or kept. Third, most criminal defendants lack the resources to conduct an investigation adequate to assemble the necessary data. Fourth, the issue will usually arise in the middle of voir dire when Blacks are struck; there will simply not be enough time to conduct an inquiry unless a lengthy continuance of the trial is granted, with the accompanying disruption of the orderly course of justice. Fifth, for all of the above reasons, the only evidence available as a practical matter will be the testimony of presiding judges, court clerks, and members of the bar as to their recollection of events that occurred in years past. Finally, unlike an ordinary challenge to the make-up of the jury rolls, it is also totally impractical to raise the peremptory challenge issue in an affirmative injunctive action. In

addition to the impossibility of assembling the proof, an order prohibiting the prosecutor from striking Blacks because of their race would be unenforcible without proof that that was his intent in a specific case.

The restrictive reading of Swain by lower courts is inconsistent with other decisions of this Court. In every other context, the Court has recognized the ability of a trial judge to infer discrimination from a wide variety of circumstances.[30] Thus, the misinterpretation of Swain has resulted in anomalous results in comparison to every other area of discrimination. In one federal case,

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[30] E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (employment); United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983) (employment); Rogers v. Lodge, 458 U.S. 613 (1982) (voting); Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) (school desegregation); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) (governmental action).

for example, the defendants challenged the make-up of the jury rolls as unlawfully excluding Blacks. The district court rejected the claim, holding that, although it was a close question, the under-representation of Blacks was not enough to establish a violation. The prosecutor then proceeded to strike all the Blacks from the venire when the actual jury was assembled. Despite the mutually confirming discriminatory practices, the district court held that because of the absence of a Swain showing of a long history of striking Blacks, there was not a constitutional violation under Swain.[31]

[31] United States v. McDaniels, 379 F. Supp. 1243 (D. La. 1974). The court did order a new trial, however, "in the interests of justice" pursuant to Fed. R. Crim. P. 33. See also United States v. Leslie, 759 F.2d 366 (5th Cir. 1985), rehearing en banc granted, May 14, 1985.

Under ordinary rules for adjudication of a claim of intentional discrimination, however, these circumstances would have allowed the court to draw the inference that the prosecutor had a discriminatory motive. Similarly, when a prosecutor with a limited number of peremptories uses all of them to exclude the few Blacks on the panel, as occurred in petitioner Batson's case, a court should be permitted to infer a discriminatory motive sufficient to cast upon the prosecutor the burden of coming forward with a "legitimate, non-discriminatory reason"[32] for his action.[33]

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[32] McDonnell Douglas v. Green, 411 U.S. 792, 803 (1974).

[33] In the present case the trial court did not make such a judgment because he specifically declined to make any factual inquiry on an erroneous legal theory. The court took the view that, as a matter of law, the constitutional cross-section requirement was limited to "the whole, entire panel and the selection process," and that "[a]ny body can strike anybody they want to" without constitutional restraint. (Appendix to Petition for Certiorari, at p. 16.) This

Other inquiries would permit a judge to infer discrimination. Did the prosecutor strike all the Blacks called to the jury box, or only some of them? How many Blacks, absolutely or in comparison to whites, were struck? What proportion of peremptories were use to strike Blacks? Were Blacks questioned on voir dire, and, if so, in the same way or as extensively as the whites whom the prosecution struck? What was the demeanor of the prosecutor and the black potential jurors during their exchanges? Did they appear to be fair and impartial jurors? Did the white jurors who were struck have common attributes, visibly adverse reactions to

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rule of law was expressly endorsed by the Kentucky Supreme Court as the basis for affirming Batson's conviction on appeal: "an allegation of the lack of a fair cross section which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions." (Id., at p. 5)]

the prosecutor, or obvious drawbacks from a prosecutorial perspective? Did the Blacks? Conversely, did the prosecutor retain whites who had the same attributes as the Blacks that were struck? Did the prosecutor attempt to purge the jury of Blacks by other means, e.g., did he challenge Blacks for cause while passing up equally available for-cause challenges to whites? Did the prosecutor use his last peremptory challenge to get rid of a Black, in contravention of the well-recognized tactic of trial lawyers not to run the risk of getting a worse replacement?

In short, trial court judges should be given the freedom to infer intentional discrimination from the totality of the circumstances in the particular case before them[34] in the same way they may

[34] United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

infer such discrimination in a variety of other types of cases decided since Swain. Thus, as this Court noted in Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n. 14 (1977),

> . . . [A] consistent pattern of official racial discrimination is [not] a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory governmental act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.

In jury discrimination cases this Court has also found a violation of the Fourteenth Amendment by a showing that eligible Blacks had been eliminated "at each stage of the selection process until ultimately an all-white grand jury was selected to indict him" in the particular case of the defendant. Alexander v.

Louisiana, 405 U.S. 625, 629 (1972).[35]

In sum, the Fourteenth Amendment is violated whenever the State denies equal protection of the laws, even in a single instance. Repeated denials of equal protection need not be shown in order to trigger the Amendment's protection in an individual case.

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[35] The Court noted that Alexander was not a case where the systematic exclusion of Blacks over a period of years had been shown. Rather, the proof went only to the selection process for the particular venire and jury. Id. See also Whitus v. Georgia, 385 U.S. 545, 549-50 (1967): it is "the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race." (Emphasis added.)

IV.

THE EXCLUSION OF BLACK JURORS VIOLATES THE RIGHT TO HAVE A JURY REPRESENTATIVE OF THE COMMUNITY.

A number of lower courts have held that Swain should be reexamined in light of subsequent decisions[36] that have held the Sixth Amendment guaranty of a representative jury[37] applicable to the states. The question is: since the use of peremptory challenges to exclude Blacks results in unrepresentative juries, is the practice unconstitutional?

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[36] Duncan v. Louisiana, 391 U.S. 145 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975).

[37] McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984), reh. en banc denied, 756 F.2d 177 (1985). People v. Wheeler, 22 Cal.3d 258, 148 Cal. Rptr. 890, 593 P.2d 748 (1978); State v. Neil, 457 So.2d 482 (Fla. 1948); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980).

Taylor v. Louisiana, 419 U.S. 522 (1975), held that "[t]he unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. In Smith v. Texas, 311 U.S. 128, 130 (1940), the Court declared that exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." Ballard v. United States, 329 U.S. 187 (1946), reversed a conviction by a jury from which women had been excluded, relying on a federal statutory "design to make the jury a 'cross-section of the community.'" In Brown v. Allen, 344 U.S. 443, 474 (1953),

the Court asserted that the source of jury lists must "reasonably reflect . . . a cross-section of the population suitable in character and intelligence for that civic duty."

In Taylor the Court also relied on its decision in the six-person jury case, which had stated that a jury should "be large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). On the basis of this precedent, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the

> exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Taylor v. Louisiana, 419 U.S. at 530-31.

The requirement of a fair cross-section theory in jury selection has also been adopted by statute as "the policy of the United States."[38] Taylor quoted approvingly from the House Report on the Federal Jury Selection and Service Act:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross

[38] Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq. Section 1862 provides that:

> No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Section 2 of the Uniform Jury Selection and Service Act (National Conference of Commissioners on Uniform State laws, 1970), and Md. Ann. Code § 8-1-13. The Uniform Act has been substantially adopted by eight states. Colo. Rev. St. §§ 13-71-107 to 13-71-121 (1971); Idaho Code §§ 2-201 to 2-221 (1971); Hawaii Rev. Stat. §§ 612-1 to 612-26 (1973); Indiana Code §§ 33-4-5.5-1 to 33-4-5.5-22 (1973); 14 Maine Rev. St. §§ 1211 et seq. (1971); Minn. Stat. Ann. §§ 593-31 to 593-50 (1977); Miss. Code 1972, §§ 13-5-2 et seq. (1974); No. Dakota Code §§ 17-09.1-01 to 27-09.1-22 (1971).

> sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

419 U.S. at 26 n. 37.

The argument based on the Sixth Amendment is not inconsistent with decisions of this Court which hold that the defendant has no right to have his particular jury represent the community with precision.[39] Thus, for example, in a community in which one third of the persons eligible for jury service are Black there is no right to have a jury with four Blacks out of the 12 jurors.

Although this proposition is correct, it does not negate the conclusion that the

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[39] Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion); Fay v. New York, 332 U.S. 261, 284 (1947).

affirmative use of peremptory challenges to produce an unrepresentative jury violates the Sixth Amendment. What the Court has held is that, assuming a system of jury selection which results in jury lists that are representative of the community, the use of a neutral device to select particular juries does not violate the Fourteenth Amendment just because in a particular case the jury may not precisely mirror that community.[40] Put another way, although there is an affirmative obligation to have a process by which a representative jury can be chosen, there is not an affirmative obligation to achieve the result of juries that are precisely representative.

[40] See, e.g., Taylor v. Louisiana, 419 U.S. at 538.

But the converse must also be true: there is a right not to have selection methods that result in unrepresentative juries. The protections of the Sixth and Fourteenth Amendments cannot stop with the composition of the jury roll (or "drum" in this case), but extend to the selection of the specific jury itself. See Ballew v. Georgia, 435 U.S. 223 (1978); Alexander v. Louisiana, 405 U.S. 625 (1972). Thus, a defendant has the right to a fair opportunity for a jury on which are represented the various groups that make up the community in which he is tried. To allow the unscrutinized use of peremptory challenges on the basis of race biases the process as surely as the exclusion of Blacks from the jury lists or drum.

The right to a fair cross-section is

not based on the notion that individuals vote to convict or acquit because of the racial group to which they belong; rather, it derives from the principle that juries should contain representatives of the various groups in the community so that their opinions, voices, points of view, and perceptions come to bear on the deliberative process. When a prosecutor removes Blacks from the jury the result is a jury which is insulated from one of those viewpoints and voices.[41]

The question of whether the use of peremptory challenges has violated the cross-section requirement will, after all, only arise in a particular case when a fair system has produced a panel of potential jurors that includes Blacks.

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[41] Peters v. Kiff, 407 U.S. 493, 503-04 (1972); see op. cit. supra n. 28, for an example of the impact on a jury's deliberations of the experiences of a black juror.

Unless the prosecutor strikes them, a representative jury will sit. If then the prosecutor makes the jury unrepresentative by striking some or all of the Blacks, his abuse of the peremptory challenge violates the Sixth Amendment.[42]

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[42] To illustrate, one may assume a county that is 20% black and that has a jury roll that is also 20% black. In trial #1, 20 potential jurors are randomly selected, one of whom is black, a result well within the range of probability. That single Black is excused for a valid, racially-neutral reason, and an all-white jury sits. That result does <u>not</u> violate the Sixth Amendment.

In trial #2, twenty potential jurors are randomly selected, 4 of whom, or 20%, are black. Through neutral selection criteria 2 of the 12 jurors to sit will be black, or almost 20%. The prosecutor then affirmatively creates a non-representative jury by striking the two Blacks. That result <u>does</u> violate the Sixth Amendment.

V.

EFFECTIVE, MINIMALLY INTRUSIVE MEANS EXIST TO REMEDY THE UNCONSTITUTIONAL MISUSE OF PEREMPTORY CHALLENGES

Amici believe that it is clear that the exclusion of Blacks from juries through the use of peremptory challenges violates both the Sixth and Fourteenth Amendments to the Constitution. There are numerous ways in which these violations can be remedied. They will of necessity vary from locality to locality depending on the particular jury selection practices in use. The appropriate remedy may also vary with the nature of the constitutional violation, depending on the amendments invoked. Amici therefore suggest that the lower state and federal courts be given

leeway to develop appropriate remedies in light of local practices and conditions.

In the first analysis, however, the prophylactice effect of a pronouncement by this Court that the misuse of peremptory challenges violates both the Sixth and Fourteenth Amendments cannot be over-estimated. At present, prosecutors can and do indulge the same misinterpretation of Swain that prevails in the lower courts. They think that the "case after case" language in the Swain opinion defines a substantive principle of constitutional law rather than a principle relating to the sufficiency of factual proof based on statistics (see page 27, supra). Thus, the prosecutor who is conscientious in his desire to obey the Constitution never-

theless sees nothing unconstitutional about peremptorily challenging blacks qua blacks in particular cases, so long as he does not do it in all cases. Told that this is indeed unconstitutional, the conscientious prosecutor will stop doing it.

To the extent that prosecutors do not stop misusing peremptory challenges, the primary agency for enforcing the Constitution will be the trial judge, in proceedings prior to the attachment of jeopardy. As this Court has recognized in other contexts,[43] trial judges are experienced and discerning in the interpretation and understanding of what is being conveyed by the demeanor and interaction of the participants during the

[43] See, Rosales-Lopez v. United States, 451 U.S. 182 (1982); Patton v. Yount, ___ U.S. ___, 81 L.Ed.2d 847 (1984); Wainwright v. Witt, ___ U.S. ___, 83 L.Ed.2d 841 (1985).

process of jury selection. They are fully capable both of recognizing a prima facie case of racially discriminatory peremptory challenges by the totality of the circumstances of the case before them, and of taking effective action to remedy the abuse.

The first thing that a trial judge faced with an apparent prosecutorial misuse of peremptories may do is to ask the prosecutor for an explanation. This alone will often suffice to warn the prosecutor that his behavior is under scrutiny, and make him change his ways. If his explanation for his past behavior is unsatisfactory, or if his behavior persists under circumstances that render the explanation hollow, the trial judge then has numerous options to correct the

problem. He can disallow a peremptory, dismiss the partially-selected jury and bring in a new panel, or take other pretrial corrective action.

For example, there exists a simple, direct, and highly effective way both to correct the exclusion of Blacks and to leave undisturbed the proper use of peremptory challenges. A state need only adopt a practice that would permit defense counsel to object upon the exclusion of a member of a racial or national origin minority group member. From that point on, if a black, Hispanic, etc., juror were excluded by use of a peremptory challenge, he or she would be replaced by a member of the same group. This would be directly responsive to the nature of the violation, insuring a representative cross-section of

the community on the jury. At the same time, it allows the prosecution to strike a juror for any reason other than race.

Such a rule would also have the great advantage of not requiring the prosecutor to explain the reasons for any challenge. Moreover, the mere existence of the rule would do much to end any discriminatory practice since prosecutors would know ahead of time that they would be unable, as a practical matter, to use challenges to exclude all Blacks from juries.[44]

Another possibility is the highly successful remedy that has been working for more than six years in California and

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[44] Although this particular rule would be a race-conscious remedy, it would not adversely affect the rights of a person who was not a member of the minority group, since that person would simply be selected later and would not lose his or her right to jury service.

Massachusetts[45] without impeding the efficient administration of justice, or infringing significantly upon the wide discretion that has been traditionally accorded to prosecutors in the exercise of their peremptory challenges.

Briefly stated, the system developed by California and Massachusetts requires that the defendant demonstrate a prima facie case of discriminatory intent before the trial judge will look beyond the traditional presumption that the prosecutor is using his peremptory challenges in a permissible manner. If the judge finds that a prima facie case has been made, the prosecutor is given the opportunity to

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[45] See People v. Wheeler, 583 P.2d 748, 148 Cal. Rptr. 890 (1978) (Mosk, J.); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979). This model has been adopted elsewhere. See State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980); State v. Neil, 457 So.2d 481 (Fla. 1984), and State v. Gilmore, No. A-870-82 T4 (N.J. Super. Ct. App. Div., March 8, 1985).

show that his challenges are not predicated on group bias. The reasons for the challenges do not have to be sufficient to sustain a challenge for cause, but could relate to any of the many legitimate reasons for peremptory challenges.[46] The judge will examine the prosecutor's reasons and will dismiss the venire or panel[47] or disallow the particular challenge[48] only if the prosecutor fails

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[46] See People v. Hall, 672 P.2d 854, 859, 197 Cal. Rptr. 71 (1983); People v. Wheeler, 583 P.2d at 760, 148 Cal. Rptr. 890. See, e.g., Commonwealth v. Kelly, 10 Mass. App. 847, 406 N.E.2d 1327, 1328 (Mass. App. Ct. 1980) (accepting prosecutor's challenge based on the prospective juror's "demeanor, manner and the 'smirk on her face'"); People v. Walker, 157 Cal. App. 3d 1060, 205 Cal. Rptr. 278, 280 (Ct. App. 1984) (trial court accepts prosecutor's explanation that a prospective juror "stood out as 'a comic'").

[47] People v. Wheeler, 583 P.2d at 765. Whether the venire as a whole or only the panel drawn for the particular case would be dismissed, could depend on the procedures used in the jurisdiction and the practicality of assembling a new venire without delay.

[48] Commonwealth v. Perry, 15 Mass. App. 932, 444 N.E.2d 1298, 1300, (Mass. App. Ct. 1983), further appellate review denied, 388 Mass. 1104, 448 N.E.2d 766 (1983);

to persuade the court that the challenges were exercised for nondiscriminatory reasons.

This remedy for the discriminatory use of peremptory challenges leaves the jury selection process unaffected in the vast majority of cases.[49] In order to precipitate such an inquiry, the defendant[50] must demonstrate a "strong likeli-

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Commonwealth v. Reid, 384 Mass. 247, 424 N.E.2d 495, 500 (Mass. 1981).

[49] Amici have examined all of the reported cases in California and Massachusetts involving claims by criminal defendants of racial discrimination under Wheeler and Soares. There have been a total of 15 such cases in California (an average of barely more than 2 a year.) In Massachusetts, where the Soares case has been in effect for six years, there have been 13 such cases. (In New Mexico, which adopted the Wheeler-Soares approach five years ago, there has been only one reported case involving a claim under the rule.)

[50] In Massachuetts, judges occasionally investigate the discriminatory use of peremptory challenges on their own initiative. See Commonwealth v. Joyce, 18 Mass. App. 417, 467 N.E.2d 214, 218 (Mass. App. Ct.1984), further appellate review denied, 470 N.E.2d 798 (1984).

hood" that Blacks "are being challenged because of their group association rather than because of any specific bias". This showing may be on the basis of evidence such as that suggested at pp. 30-34, supra,[51] the nature of the questioning, the demeanor of the potential jurors or the prosecutor, cf. Patton v. Yount, ___ U.S. ___, 81 L.Ed.2d 847 (1984), or any other of a number of factors that ordinarily permit a trier of fact to infer bias.

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[51] People v. Wheeler, 583 P.2d at 764. The California court listed some of the factors the defendant might rely upon in demonstrating discriminatory uses of challenges. These were (1) that the prosecutor had struck most or all of the members of the identified group from the venire or (2) that he had used a disproportionate number of his peremptory challenges against members of the group or (3) that the jurors in question have only their group identification in common and that they otherwise are as heterogeneous as the community as a whole. 583 P.2d at 764, 148 Cal. Rptr. 890. Courts will also consider the race of the defendant and the victim and whether the prosecutor's questioning of the excluded jurors was "desultory." Id.

One trial judge, disagreeing with his own Circuit Court of Appeals, has argued that providing a remedy for the misuse of peremptory challenges will necessitate "twelve mini-trials" in every case. See Roman v. Abrams, No. 85 Civ. 0763-CLB, slip. op. at 20 (S.D.N.Y. May 15, 1985). The record in California and Massachusetts, the two states with the longest experience with this remedy, refutes this charge. The California Supreme Court has recently found no empirical evidence to support a claim that this remedy has proved "unworkable" in the trial courts. People v. Hall, 672 P.2d 854, 859, 197 Cal. Rptr. 71 (1983) (en banc).

Even though minimally intrusive, the Wheeler-Soares remedy has been effective in reducing the intentionally discrimi-

natory use of peremptory challenges, as the recent reported decisions in California and Massachusetts attest. None of these cases involves a fact pattern showing as blatant a misuse of peremptory challenges as occurred before Wheeler and Soares were decided.[52] Compare, e.g., People v. Cobb, 97 Ill. 2d 465, 455 N.E.2d 31 (1983). The experience in California and Massachusetts demonstrates that the discriminatory use of peremptory challenges is not only reprehensible but also remediable.[53]

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[52] In Soares itself, the prosecution used peremptory challenges to eliminate twelve of the thirteen black venirepersons. 387 N.E.2d at 508. In Wheeler, the state excluded all of the blacks in the venire (approximately seven) by using peremptory challenges. 583 P.2d at 752-54.

[53] There are, of course, other possible remedies, including abolishing peremptory challenges or limiting them to the defense as under the common law. A state may want to provide for additional voir dire, so that the prosecutor (and defense counsel) will have a more informed basis for exercising their challenges. Indeed, the California Supreme Court has

None of the potential available remedies impedes the vigorous and effective prosecution of crime; none delays trials more than momentarily or encumbers them significantly. Indeed, administration of the rule would involve less disruption of trials than the "case-after-case" rule currently applied: under the prevailing misinterpretation of Swain jury selection must be suspended pending an evidentiary hearing into the prosecutor's record in past cases.

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recently expanded the scope of voir dire by holding that counsel may ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges even if such questions may not uncover grounds sufficient to sustain a challenge for cause. People v. Williams, 628 P.2d 869, 174 Cal. Rptr. 317 (Cal. 1981) (en banc). Thus, prosecutors are given an opportunity to uncover evidence of specific bias and to exercise their peremptory challenges in a constitutional manner. Id. at 875.

Conclusion

No one can "deny that, [more than 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life. . . ." Rose v. Mitchell, 443 U.S. at 558. The final cutting off of all means to perpetuate the practices first condemned in Strauder is not only overdue, but essential to ensure both the reality and the appearance of justice in our society.

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted

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