COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. IS A TRIAL COURT REQUIRED BY THE UNITED STATES CONSTITUTION TO RESTRICT THE USE OF PEREMPTORY CHALLENGES BY THE PROSECUTION IN A PARTICULAR CASE TO INSURE THAT A MEMBER (MEMBERS) OF THE DEFENDANT'S RACE IS NOT ELIMINATED FROM SERVING ON THE PETIT JURY SOLELY BECAUSE HE IS OF THE SAME RACE AS THE DEFENDANT?

II. IS THE ELIMINATION OF ALL MEMBERS OF THE DEFENDANT'S RACE FROM THE PETIT JURY BY PEREMPTORY CHALLENGE IN A PARTICULAR CASE PRIMA FACIE PROOF THAT THE DEFENDANT WAS DEPRIVE OF IMPARTIAL JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY?

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REASONS WHY THE WRIT SHOULD NOT BE ISSUED

I.

AN ATTACK ON THE USE OF PEREMPTORY CHALLENGES TO THE VENIRE IN A CRIMINAL CASE AMOUNTS TO AN ATTACK ON THE JURY SYSTEM PER SE AS GUARANTED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

By definition a peremptory challenge to a member of the venire is the striking of the member from sitting on the jury at the uncontrolled discretion of a party in the case.

> "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subjected to the court's control." (Citations omitted). Swain v. Alabama, 380 U.S. 202, 220 (1965).
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> "For it is, as Blackstone says, an arbitary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose. Lewis v. United States, 146 U.S. 370, 378, 36 L.Ed. 1011, 1014, 13 S.Ct. 136 Id. 380 U.S. 219.

The Constitution does not require the granting of peremptory strikes in a jury trial and, consequently, the practice can be eliminated by either legislation or court rule. Peremptory challenges could be taken away from the prosecution and be left only to the defendant or the tradition could be otherwise altered as the court sees fit. However, such action would be a radical departure from the procedure which has prevailed since the time of the common law.

> "The persistence of peremptories and their extensive use demostrates the long and widely held belief that peremptory challenge is a necessary part of trial by jury." Swain v. Alabama, supra at 380 U.S. 219.
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> "Although historically the incidents of the prosecutor's challenge has differed from

> that of the accused, the view in this country has been that the systems 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'. Hayes v. Missouri, 120 U.S. 68, 70, 30 L.Ed. 578, 580, 7 S.Ct. 350." Id. 380 U.S. 220.
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> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. 380 U.S. 222.

II.

THERE HAS BEEN NO SUBSTANTIAL JUDICATORY CHALLENGE TO SWAIN V. ALABAMA IN THE TWENTY YEARS SINCE IT WAS DECIDED.

The Petitioner has been hard put to find any substantial judicial dissatifaction with the opinion of the court in Swain. He has found two state court decisions, People v. Wheeler, 148 Cal.Rep. 890, 583 P.2d 748 (1978) and Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979). There is also the opinion of a lower appellate court in Illinois, People v. Payne, 106 Ill.App.3d 1034, 436 N.E.2d 1046 (1st Dist. 1982). [See PEOPLE V. PAYNE AND THE PROSECUTIONS PEREMPTORY CHALLENGES: WILL THEY BE PREMPTED? 32 DePaul Law Review page 399-431]

The Petitioner has cited one federal circuit court opinion, McCray v. Abrams, 2nd Cir. 1984, 750 F.2d 1113 which is an aberrance from the conclusion announced in Swain upholding the use of peremptory challenges in their traditional sense of being entirely unregulated and unexamined by the court in a particular case.

The memorandum opinion dissenting from the denial of certiorari in McCray v. New York, 103 S.Ct.Rep. 438 1983 at page 2440 it is stated: "In the nearly two decades since it was decided, Swain has been the subject of almost universal and often scathing criticism'. But the footnote attached to this sentence only cites ten law review/law journal articles, no judicial opinions. It is a matter of general knowledge that the analytical treatises of legal theorists are often at odds with the constitutional law announced by this court.

In summary, complaints against Swain v. Alabama in actual cases have to date been minimal; the states can adopt a different standard of jury selection from the constitutional mimimum as was done in Wheeler and Soares; only one case in the federal circuits has failed to follow Swain.

III.

THE EXCLUDING BY PEREMPTORY CHALLENGE ALL OF THE BLACK MEMBERS OF THE VENIRE IN THE SELECTION OF THE PETIT JURY DOES NOT VIOLATE THE SIXTH AMENDMENT.

In Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975) this Court held that the selection of a petit jury from a representative cross section of the community was an essential component of the Sixth Amendment right to a jury trial and that a defendant had standing to object to the exclusion of women from his jury even though he was not a member of the excluded class. However, the court expressly stated --

> "It 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. (Citations omitted.

But the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representive thereof." 419 U.S. 538.

Thus, a consideration of the Sixth Amendment, lacking in Swain, left unchanged this Court's conclusion in Swain upholding the use of peremptory challenges. Duren v. Missouri, 439 U.S. 357, 587 L.Ed.2d 579, 99 S.Ct. 664 (1979) followed Taylor but the composition of the final petit jury was not discussed.

IV.

SWAIN V. ALABAMA SHOULD BE LEFT IN TACT AS AUTHORITY FOR TRADITIONAL PEREMPTORY CHALLENGES BY DENYING THE WRIT IN THIS CASE.

Since this Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968), incorporating the Sixth Amendment right to a jury trial in state criminal proceedings, this Court has cited repeatedly to Swain as authority. See, e.g., University of California Board of Regents v. Vakke, 438 U.S. 265, 319 and footnote 53 1978.

"Thus, under either the Fourteenth Amendment analysis of Swain or the Sixth Amendment cross sectional analysis of Taylor and Duren, inquiry into the reasons for exercising peremptory challenges should be limited to the extreme situtation in which the peremptory challenge has been used consistently to exclude groups in a signicant number of cases and not just within the particular case before the court. Unless a consistent under-representation is demonstrated, there should be no constitutional violation." 32 DePaul Law Review 418, supra.

This reasoning was followed by the Rhode Island Supreme Court in State v. Raymond, ___ RI ___, 446 A.2d 743 (1982). In that case the court focused on Taylor, Duren, and

Swain, and ruled that even under the Sixth Amendment cross sectional analysis, systematic exclusion through the use of peremptory challenges must be demonstrated on a case after case basis and not within the context of a particular case.

The goal for our judicial system should be to administer justice without regard to color, race, or class. Whatever may or may not be the merits of quotas or affirmative actions in regard to such matters as education, public and private employment, housing, etc., they have no place in the system of justice. Discrimination against discreet groups should be exposed and eliminated but peremptory challenges should continue to be accorded to all parties in a jury trial without any limitation or examination by the trial court.

CONCLUSION

The Petition for Writ of Certiorari to the Supreme Court of Kentucky herein should be denied.

Respectfully submitted,

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The undersigned hereby certifies that true copy of the Brief in Opposition has been mailed, postage prepaid, to Hon. Frank W. Heft, Jr., Chief Appellate Defender, 200 Civic Plaza, 719 West Jefferson Street, Louisville, KY 40202 on this the 19th day of March, 1985.

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