No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES KIRKLAND BATSON,

Petitioner,

v.

KENTUCKY,

Respondent.

On Writ Of Certiorari To The Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In this Reply Brief, Petitioner responds to arguments raised by the Commonwealth of Kentucky that the nature and function of the peremptory challenge foreclose any supervision of its use, that race is a valid characteristic by which to identify possible juror bias and that Petitioner's failure to show lack of impartiality of the jury that tried his case requires denial of relief. These points are answered in the order presented. As to the objections to the remedy proposed by Petitioner, it should be noted that most were anticipated and answered in Petitioner's first Brief. Those that were not, such as application in civil cases, are generally problems raised because of state constitutional requirements. Those problems will not arise in the present Sixth Amendment context and, therefore, those points are not rehearsed in this Reply.

(A) ARGUMENT FROM THE HISTORY AND FUNCTION OF THE PEREMPTORY CHALLENGE.

A major portion of Respondent's Brief is taken up by its argument that this Court's conclusion as to the importance of peremptory challenges in *Swain* v. *Alabama*, 380 U.S. 202 (1965) requires insulation from review of the prosecutor's use of them in any one proceeding. This thesis is advanced throughout Respondent's Argument B. Although the historic development of peremptory challenges was traced in Petitioner's Brief, Petitioner here must elaborate on this history to rebut Respondent's argument that the adversary system of American and English Common Law supports the unfettered use of peremptory challenges by a state prosecutor. Respondent's argument is that the nature and the function of the peremptory challenge as it has developed simply will not admit of regulation by the courts. To dispose of this con-

tention, it is necessary to examine more closely the origins of the prosecutor's peremptory challenge.

In *Swain* the Court equated the procedure of standing aside jurors with a prosecutorial peremptory challenge. *Swain* v. *Alabama*, 380 U.S. at 213. The assumption made there was that the right to stand aside without statement of cause was the equivalent of a peremptory challenge and that standing aside was devised in order to evade the statute of 33 Edw. I, c. 4 (1305) which forbade prosecutorial peremptory challenges. 380 U.S. at 213. It is certainly true that the practice of standing aside grew out of judicial construction of the statute, but examination of English precedents and the few American precedents that address the standing aside procedure in proper historical context shows that the Court's conclusion in *Swain* was mistaken.

Under the Statute 33 Edw. I, c. 4, the prosecutor for the Crown was forbidden to challenge jurors without stating cause. The doctrine of standing aside jurors developed under this statute not to nullify the statute in favor of prosecutorial peremptory challenges but rather to allow the Crown to comply with the rules of voir dire and challenge for cause. Unlike American practice, in English practice neither party may examine a juror on voir dire unless a factual foundation showing prima facie a probability of prejudice is first laid. 26 Halsbury's Laws of England, 4 ed., 628 p. 327; Devlin, *Trial By Jury*, Ch. 2, "The Composition of the Jury", p. 31-32 (1956). Ancient and modern English authorities show that this rule has been in effect throughout the period of recorded law. *R.* v. *Cook*, 91 Eng. Rep. 141 (1692); *R.* v. *Edmonds*, 106 Eng. Rep. 1009 (1820); *R.* v. *Chandler*, [1964] 1 All.Eng.R. 761. Obviously, the justices and prosecutors traveling on eyre could not be expected to produce the needed extrinsic

evidence on short notice. Time was needed to make inquiries and obtain the witnesses to show the probability of prejudice. To allow this time, the standing aside rule was developed. This conclusion is confirmed in the only American case found on this subject. In *Commonwealth* v. *Joliffe*, 7 Watts 585, 588 (1838), the Supreme Court of Pennsylvania in discussing the practice of standing aside noted that

> . . . the attorney general, who is usually unassisted by a private prosecutor in capital cases, and whose business it is not to hunt up witnesses, might be unprepared with instant proofs and yet be perfectly prepared at the close of the panel.

It is apparent that the practice of standing aside did not develop as a matter of Crown prerogative or as an attempt to avoid the effect of the statute of 33 Edw. I. Rather, the practice was the result of a practical construction of the statute to allow the prosecution a fair opportunity to obtain the proof necessary to present a challenge for cause, the only type of challenge allowed by law. Because this is so, an appeal to the "very old credentials" of the peremptory challenge cannot refer to the peremptory challenge of the prosecutor.

The best evidence available shows that a prosecutor's ability to challenge peremptorily (i.e. without possibility of judicial intervention) came into existence only when Congress and the state legislatures, by positive enactment, granted that ability. No such right had existed in English jurisprudence since the enactment of 33 Edw. I, c. 4 in 1305. Thus, when the peremptory challenge of the prosecutor is spoken of, one is speaking of a legal device that has existed in most jurisdictions for less than 150 years. Respondent neglects the very real differences between the defendant's right to challenge peremptorily,

which grew out of his powerlessness when confronted with the power of the state in criminal prosecutions, and that of the prosecutor.[1] It seems reasonable to conclude that prosecutors were given peremptory challenges because the legislatures perceived that, as in *Commonwealth* v. *Joliffe*, cited above, juries tended to acquit in the face of overwhelming evidence and determined that the prosecutor should have some means of excluding persons thought to be biased but not easily proved so. The legislatures may simply have decided that peremptory challenges would streamline court procedure and eliminate the need for the prosecutor to obtain and present witnesses simply to have the opportunity to question a juror about his possible bias. But no matter what purpose the change was designed to make, in most instances the number of peremptory challenges given to the prosecutor was smaller than the number afforded to the defendant. *Swain* v. *Alabama*, 380 U.S. at 216. The obvious purpose of the smaller number of challenges was to prevent the state from using peremptory challenges to affect mate-

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[1] The quotation from Blackstone that is often referred to in peremptory challenge cases [e.g. *Swain*, 380 U.S. at 212, n.12] is misleading unless put in proper context. In Blackstone's day the defendant was in need of the law's solicitude. Until the 19th Century reforms in England, once a criminal defendant had exercised his peremptory challenges, his participation in the trial, for all practical purposes ceased. The defendant was rarely assisted by counsel and was not allowed to compel attendance of witnesses. When witnesses for the defense appeared, they were not allowed to be sworn. The length of a criminal trial was usually only a few minutes. [Baker, *An Introduction to English Legal History*, 2 ed. "Trial on Indictment," p. 416-417 (1979)]. There was little need for peremptory challenges by the prosecutor under these circumstances. This is why no such peremptory challenges existed in England. No such peremptory challenges existed in the United States until they were created by legislation.

rially the composition of the jury. The purpose of prosecutorial peremptory challenges is to remove those veniremen whose impartiality is in doubt, not to eliminate one group from the mix required for a representative jury.

The right of peremptory challenges on behalf of the prosecution is the product of state legislative action of relatively recent occurrence. If use of these peremptory challenges interferes in a material way with a defendant's right to a representative jury, then the use of the challenges must be subordinated to the defendant's Sixth Amendment right. *Marbury* v. *Madison*, 1 Cranch 137 (1803). The Constitution does not make this Court the guarantor of the rights of the states. Clearly, prosecutorial peremptory challenges were not received in America as part of the common law. Thus, the "adversarial system" alluded to by Respondent in its Brief does not render the Court powerless to control misuse of peremptory challenges by agents of the State. At best, a desire to maintain the adversarial system should only prevent the granting of an unfair advantage to the defendant over the prosecutor. That certainly is not the result here. The restriction on the exercise of prosecutorial peremptory challenges suggested by Petitioner in this case is minimal and justified. Therefore, Respondent's arguments based on the history and function of the peremptory challenge is unconvincing and should be disregarded.

(B) ARGUMENT THAT RACE IS A VALID CHARACTERISTIC BY WHICH TO IDENTIFY POSSIBLE JUROR BIAS.

In part B(2) of its Argument, Respondent maintains that the use of "group characteristics" as a means of identifying probable prejudice in a case is perfectly acceptable

under the law and that this Court in *Swain* concluded that such use was proper as a traditional use of the jury system. This contention accurately reflects the holding of the Court in *Swain*. However, the tradition appealed to must be considered against the background of America's history and what the Court has called the long history of unhappy relations between white and black people. *Fay* v. *New York*, 332 U.S. 261, 282 (1947). Also, careful reflection on the logic underlying the use of group characteristics as a predictor of possible bias shows that the practice is not reasonable at all.

The majority opinion in *Swain* holds that peremptory challenges aid in obtaining an impartial jury because the peremptory challenge eliminates the extremes of partiality. *Swain* v. *Alabama*, 380 U.S. at 219; 211-212. And because all persons remaining on the panel are "alike subject to being challenged without cause" the elimination of black jurors by peremptory challenges is unobjectionable. 380 U.S. at 221. This conclusion is convincing only if one agrees that race or color is just another characteristic like occupation or street address that can fairly be used to evaluate partiality and that impartiality is obtained by replacing a black juror with a white. Neither assumption will withstand close analysis.[2]

The history of America shows that race is most definitely not a characteristic like religion, occupation or eye color. For most of the years of this country's existence, skin color has determined whether a person could vote, sit on a jury, go to first class schools, buy property, stay in

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[2] The premises of the argument made here are taken from a similar discussion of the topic in a master's thesis authored by Prof. Robert Doyel of Mercer University. The thesis will be published in November, 1985, in 38 Okla. L. Rev. No. 3.

certain hotels, eat in certain restaurants and marry whom one wished.[3] Just this past term the Court was called upon to invalidate a provision of a state constitution which disenfranchised blacks. *Hunter* v. *Underwood*, ____ U.S. ____, 105 S.Ct. 1916 (1985). The contention that all persons on a jury panel might be challenged peremptorily does not take into account the fact that black veniremen are a good deal more likely to be so challenged than any other group. Arguments that maintain that a prosecutor will not strike blacks when there is a possibility that some other prospective juror might be more biased. [e.g. dissents in *United States* v. *Leslie*, 759 F.2d 366, 393 (5th Cir., 1985); *McCray* v. *Abrams*, 750 F.2d 1133, 1138 (2nd Cir., 1984)] ignore the irrationality of racial prejudice which results from ignorance about black people and from the stereotyped ideas that arise from that ignorance. A prosecutor does not have to be hostile to blacks or overtly prejudiced in order to possess ideas about "typical" blacks. He has only to be ignorant about blacks or know only about a certain segment of the black community. These ideas or attitudes may cause a prosecutor to conclude that few prospective jurors will be more biased against his case. The belief that the black veniremen will be biased will cause the use of a peremptory challenge to remove him. Because in nearly all areas the white population outnumbers the black population, the chances are good that a white person will replace the black on the panel. In the present case, the prosecutor did not have to

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[3] Citations to the cases considering these issues are: *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967).

use all of his peremptory challenges to remove all blacks and obtain an all white jury. If, as the Court posited in *Swain*, the peremptory challenge is made by a prosecutor who knows little about the prospective jurors [380 U.S. at 221] the explanation for the challenge must be either that an unknown white juror can be impartial but the black juror cannot or that the prosecutor believes that a white juror will be more favorable to his case. Neither explanation justifies dimunition of the representative jury brought about by neutral selection procedures. The first explanation is simply unreasonable unless the inability of blacks to listen fairly to a case involving a black defendant is accepted as true. As to the second explanation, it is plain that in this instance the peremptory challenge is used to pack the jury with favorable jurors, not to eliminate partiality. Thus, patently, the race of a juror, standing alone, is not sufficient to predict partiality. The history of this country shows that race is usually the basis for discrimination rather than a logical basis of a procedure to assure impartiality in a petit jury. The argument that race is an acceptable ground for exercise of peremptory challenges must be rejected. The proposal made by Petitioner in this case does no more than allow determination that the representative character of a petit jury is not diminished or destroyed on the basis of a prosecutor's unreasonable belief. It is a small intrusion into a state privilege to assure that in a criminal case the jury that sits represents the community. The Court is, therefore, urged to reject Respondent's argument on this point.

(C) ARGUMENT THAT PETITIONER'S FAILURE TO SHOW LACK OF AN IMPARTIAL JURY REQUIRES DENIAL OF RELIEF.

Both Respondent and Amicus, the United States of America, argue that because Petitioner did not show that

the jury tried his case was not impartial, he has no real cause of complaint. This argument lacks substance. No juror admitted to prejudice against one side or the other. However, there is almost never any direct evidence of juror partiality in a criminal case once the proceedings get past the challenges for cause. In Kentucky, as in most states, the jurors may not be questioned after the return of the verdict. Ky.R.Crim. Proc. 10.04. Unless the evidence overwhelmingly favors one party over the other, partiality or its absence is not indicated by the jury's verdict. Therefore, in almost all cases, partiality of jurors must be determined indirectly. One might well reverse the question of whether Petitioner can show lack of impartiality and instead ask for evidence that the peremptory challenges exercised by the prosecutor tended to foster impartiality by eliminating the extremes of partiality. The Court has held in *Swain* that such peremptory challenges do contribute to impartiality but no hard evidence of this effect has ever been adduced. As a matter of deduction, the Court reasoned that because peremptory challenges could be used to eliminate persons of doubtful impartiality and because peremptory challenges had been in use for a very long time, peremptory challenges therefore tended to eliminate the "extremes" of partiality and produce a jury that would try a case on the evidence rather than on the prejudices of the jurors. 380 U.S. at 219. There is no doubt that peremptory challenges can achieve this effect. There is no evidence that peremptory challenges necessarily do so. As shown in the argument just preceding, the prosecutor might well use his challenges to remove all blacks because of stereotypical ideas he possesses about that group of people. Given the long history of discrimination against blacks, this use may well be more likely than use to remove veniremen of doubtful impartiality. In any event, there is no hard evidence to show that the effect

spoken of in *Swain* is actually obtained in all or even in many cases. The conclusion reached in *Swain* was achieved by deduction not by empirical study. Because it is so difficult to obtain direct evidence of impartiality or partiality, the Court, when fashioning rules for the use of peremptory challenges, must take those steps that are most likely to effect the desired result, impartiality. The most obvious step is to create a jury of diverse character so that a fair range of experiences and beliefs is represented. When a prosecutor is allowed to remove an entire group without having some articulable reason, the possibility of a sufficiently diverse jury is destroyed.

The remedy proposed by petitioner is more likely to result in an impartial jury than is possible under the present rule. Under *Swain*, the peremptory challenges of the prosecutor are insulated from any inquiry. The chances of corrective action against the prosecutor are practically nonexistent. However, under the remedy proposed by Petitioner, when reason and common sense dictate inquiry into the prosecutor's actions, inquiry can be made. When the number of peremptory challenges made by the prosecutor gives rise to a reasonable belief that no sufficient reason underlies his attempt to remove a group from the jury, he can be called upon to articulate some reason that justifies diminution of the representative character of the jury. Because diversity in the composition of the jury is a better device to assure impartiality than is a peremptory challenge, the Court should adopt Petitioner's argument. Jury diversity is recognized as a component of the Sixth Amendment right to trial by an impartial jury. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Petitioner asks no more than adoption of the best means possible to insure that diversity is carried through from jury selection to jury empanelling. Therefore, the Court

should disregard Respondent's argument as to lack of evidence of impartiality.

CONCLUSION

No argument raised by Respondent answers the showing of necessity and desirability of the adoption of the remedy set out in Petitioner's first Brief. The Court is, therefore, urged to grant the relief moved for in the Conclusion of his first Brief.

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