No. 84-6263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON,

Petitioner,

—vs—

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICUS CURIAE*

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To The Supreme Court of Kentucky

Brief of The National Legal Aid And Defender Association As Amicus Curiae

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in

civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The NLADA is vitally interested in ensuring that the indigent criminal defendants its members represent are guaranteed their right to be tried by fair and impartial juries. In this case the Court will be deciding whether the fair cross section requirement of the Sixth Amendment, which is one of the means by which the impartiality of the jury is maintained, is violated where

prosecutors employ the peremptory challenge to eliminate the possibilty of representation of a racial minority on the jury. The NLADA urges this Court to recognize that the peremptory challenge can become an obstacle to the ability of the accused to be tried by a jury of his peers and to outlaw the practice of the discriminatory use of the challenge to restore the confidence of the public and the accused in the fairness of the jury system.

SUMMARY OF ARGUMENT

A prosecutor's use of the peremptory challenge to exclude jurors solely on the basis of race interposes an obstacle to the possibility of the accused obtaining a representative cross section of the community on a jury in violation of the Sixth and Fourteenth Amendments. No significant state interest exists which could justify

allowing unrestricted use of the peremptory challenge because the continued existence of the unrestricted right of peremptory challenge is not essential to the ability of the prosecution to select fair and impartial jurors. Recognition of the impermissibility of a prosecutor's discriminatory use of the peremptory challenge will not cause any undue burden on the judicial system as demonstrated by the experience of the California and Massachusetts courts.

ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS PROHIBIT THE USE OF THE PEREMPTORY CHALLENGE TO RESTRICT UNREASONABLY THE POSSIBILITY THAT THE PETIT JURY WILL COMPRISE A FAIR CROSS SECTION OF THE COMMUNITY.

A. The Sixth and Fourteenth Amendments Guarantee An

Accused The Possibility Of A Petit Jury Representative Of A Cross Section Of The Community.

The American tradition of trial by jury necessarily contemplates a jury drawn from a fair cross section of the community. Thiel v. Southern Pacific Co., 328 U.S. 218, 220 (1945). The exclusion of elements of the community from participation contravenes the very idea of a jury composed of the peers or equals of the person whose rights it is selected or summoned to determine. Ballew v. Georgia, 435 U.S. 223, 237 (1978). A State cannot, consistent with due process, subject defendant to trial by a jury selected in an arbitrary or discriminatory manner. Such procedures cast doubt on the integrity of the whole judicial process, as well as creating the appearance of bias in the decision of individual cases and increasing the risk of actual bias as well. Peters v. Kiff, 407

U.S. 493, 402, 503 (1972). Consistent with these principles this Court should hold that a prosecutor's discriminatory use of the peremptory challenge to exclude jurors on the basis of their race violates the Sixth and Fourteenth Amendments.

While defendants are not entitled to a jury of any particular composition and no requirement exists that petit juries actually chosen must mirror the community and reflect the various groups in the population, Taylor v. Louisiana, 419 U.S. 522, 538 (1975), the Sixth Amendment comprehends a jury selected in accordance with procedures that provide a fair possibility for obtaining a representative cross section of the community. Williams v. Florida, 399 U.S. 78, 100 (1970); Taylor, 419 U.S. at 528. Trial by a jury of less than six persons violates the Sixth Amendment because it decreases the opportunity for meaningful and appropriate

representation of a cross section of the community. Ballew, 435 U.S. at 237. Permitting the prosecution to exercise its peremptory challenges to excuse prospective jurors on the basis of race alone similarly violates the fair cross section requirement because it presents no less an obstacle to the possibility of minority representation on the jury.

That the Sixth Amendment is violated not only when identifiable segments of the community are excluded from the venire but also when they are prevented from participating in the deliberative process as petit jurors is apparent from this Court's recognition in Taylor that Louisiana's special exemption for women was unconstitutional because it operated to exclude them from petit juries, 419 U.S at 538, not merely because they were excluded from the jury pool. Selection of a jury from a pool

drawn from a fair cross section of the community is not an end in itself, but contemplates the possibility that the petit jury will be similarly comprised. The fair cross section requirement would be illusory if no restriction existed on the ability of the prosecution to interpose an obstacle to minority representation on the petit jury so long as minorities were not excluded from the jury venire.

Recognition that the fair cross section requirement is applicable to the petit jury is compatible with the constitutional concept of a jury trial. The purpose of a jury is to guard against the exercise of arbitrary power by making available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Just as this prophylactic purpose 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, Taylor, 419 U.S. at 530, neither is it served if jurors are excluded from the petit jury on the basis of their race. The counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any case. Ballew, 435 U.S. at 234. If the discriminatory use of the peremptory challenge is sustained, the counterbalancing envisioned by the fair cross section requirement cannot occur and the possibility of application of the common sense of the community to the facts of the case is diminished. The broad representative character of the jury must be maintained as an assurance of diffused impartiality. Taylor, 419 U.S. at 530.

Community participation in the administration of criminal law is also critical to public confidence in the fairness of the criminal justice system. Taylor, 419 U.S. at 530. When the public perceives that the prosecution is determined to employ its peremptory challenges to exclude a racial group from participation on the jury, misgivings will inevitably arise regarding the quality of justice being sought, no less than when identifiable groups are excluded from jury service by an automatic exemption. See United States v. Leslie, ___F.2d___ (No. 83-3719, 5th Cir., April 10, 1985), where the Court exercised its supervisory power to prohibit the prosecution's use of its peremptory challenges for unjustifiable, racially discriminatory reasons because approval of the practice undermines public confidence in the judicial system.

Exclusion of persons from service on juries harms not only the defendant and the public, but also other members of the excluded class. It denies that class of potential jurors the privilege of participating equally in the administration of justice and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting a brand upon them, affixed by law, an assertion of their inferiority. Peters, 407 U.S. at 499.

B. No Significant State Interest Justifies A Prosecutor's Racially Discriminatory Use Of The Peremptory Challenge.

If the use of the peremptory challenge to exclude jurors on the basis of race constitutes an infringement on the constitutional right to a jury drawn from a fair cross section of the community, the State

bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest which is manifestly and primarily advanced by that aspect of the jury selection process that results in the disproportionate exclusion of a distinctive group. Duren v. Missouri, 439 U.S. 357, 367, 368 (1979). The right to a proper jury cannot be overcome on mere rational grounds as can an equal protection challenge such as was made in Swain v. Alabama, 380 U.S. 202 (1965). Taylor, 419 U.S. at 534.

The exclusion of a racial group from service on a jury by peremptory challenge cannot be excused on the ground that to disallow this practice would be to emasculate the right to peremptory challenge. The right of peremptory challenge being a statutory creation, the interest in its preservation cannot be relied upon to justify diluting

the quality of community judgment represented by the jury. Where the Constitution and a statute are in conflict, the Constitution prevails. Marbury v. Madison, 1 Cranch 137 (1803). Moreover, the right of peremptory challenge will continue to be available to the prosecutor who does not exercise challenges in a racially discriminatory manner. Disallowing a prosecutor's use of the peremptory challenge on the basis of race alone no more abolishes the peremptory challenge than does this Court's decision in Swain: in either instance the trial court controls the use of the peremptory challenge only if the prosecutor employs the challenge so as to violate the Constitution. Consideration should also be given to the fact that survival of the peremptory challenge is not indispensible to an acceptable judicial system. So long as challenges for cause are available, the parties have adequate means

for selecting a fair and impartial jury.

Neither can the discriminatory use of challenges be justified on the basis of the assumption that Black jurors are necessarily biased in favor of Black defendants. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. Thiel, 328 U.S. at 220. Since prosecutors are able to make individualized judgments as to the qualifications of white jurors, no hardship results if prosecutors are required to make the same kind of judgments as to Black jurors. If the fact that the defendant is Black and the complaining witness is white does not create any significant likelihood that racial prejudice will infect the trial

so as to require that the jurors be voir dired specifically about racial prejudice, Ristaino v. Ross, 424 U.S. 589 (1976), then the fact that both the accused and a prospective juror are of the same racial background does not create any significant likelihood that racial affinity will affect their judgment. The convenience of the assumption that a Black juror will be partial to a Black defendant cannot justify the exclusion of the juror by peremptory challenge any more than the administrative convenience of the automatic exemption could justify the exclusion of women in Taylor.

C. Workable Procedures That Have Been Successfully Implemented Provide An Appropriate Remedy Which Would Result In No Undue Burden On The Trial Or Reviewing Courts.

Criticism has been made that disallow-

ance of a prosecutor's use of peremptory challenges on racial grounds is compatible with certain practical considerations, especially the "potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984). An examination of the remedy proposed and successfully implemented by various courts reveals such criticism to be unwarranted.[1]

First, a presumption would exist that the prosecutor was employing his peremptory challenges in a constitutionally permissible manner. Commonwealth v. Soares, 377 Mass.

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[1] Assuming, arguendo, that violation of a constitutional right could be overlooked or ignored because of the added burden which would result to the judicial process if a remedy were provided or the violation not permitted to occur.

461, 387 N.E.2d 499, 517 (1979); People v. Wheeler, 22 Cal.3d 253, 148 Cal.Rptr. 890, 583 P.2d 748 (1978). If the defendant believes the prosecutor is using his challenges to exclude jurors on the basis of race, he must raise the point in timely fashion, make as complete a record of the circumstances as feasible and must establish a prima facie case of such discrimination to the satisfaction of the trial court. Wheeler, 583 P.2d at 764. A prima facie case consists of a demonstration that the jurors being peremptorily challenged are Black and that a likelihood exists that they are being challenged on the basis of their race. Soares, 387 N.E.2d at 517. The Wheeler Court gave the following description of the kind of evidence which might satisfy the defendant's burden:

> ...The party may show that his opponent has struck most or all of the members of the identified group from the venire, or his used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic - their membership in the group - and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly...the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. 583 P.2d at 764.

Both the Massachusetts and California Supreme Court have expressed confidence in the ability of trial judges to weigh this evidence and distinguish a true case of

discrimination by peremptory challenge from a spurious claim interposed simply for purposes of harrassment or delay, given trial courts' extensive experience with jury empanelment, powers of observation, knowledge of local conditions, familiarity with attorneys on both sides and broad judicial experience. Wheeler, 583 P.2d at 764; Soares, 387 N.E.2d at 517.

Both the Massachusetts and California courts thus appropriately give much deference to the trial judge's assessment of whether the presumption of proper use of the peremptory challenge has been rebutted. The mere number of jurors challenged by the prosecution in and of itself may not be sufficient to rebut the presumption of proper use of challenges if the trial judge's judgment is that the numbers alone are not compelling. See Commonwealth v. Robinson, 382 Mass. 189, 415

N.E.2d 805 (1981) (three of four Blacks excluded but record otherwise insufficient to rebut presumption); Commonwealth v. Benbow, 16 Mass.App. 970, 452 N.E.2d 1164 (1983) (presumption not rebutted by fact that of ten Blacks on the venire, prosecution challenged four, defense two and two served on the jury); People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal.Rptr. 892 (1982)(mere statement that only two Blacks on venire and prosecution excused both insufficient to sustain defense burden of rebutting presumption). Of course, as the number of a particular group who are challenged grows larger, the presumption of proper use of the peremptory challenge grows weaker. Commonwealth v. Gagnon, 16 Mass.App. 110, 449 N.E.2d 686 (1983). But it is not essential to demonstrate that the prosecutor has engaged in a pattern of conduct. Dismissal of one member of the banished group

is as repugnant as dismissal of all but one of its members. Commonwealth v. DiMatteo, 12 Mass.App.547, 427 N.E.2d 754, 758 (1981).

If the court finds a prima facie case of discrimination has been made, the burden shifts to the prosecution to demonstrate the juror was not struck on racial grounds. The showing need not rise to the level of a challenge for cause. Wheeler, 583 P.2d 764, 765; Soares, 387 N.E.2d 517. The trial judge retains discretion and reviewing courts will rely on his good judgment to distinguish between bona fide and belatedly contrived sham excuses. Wheeler, 583 P.2d at 765. The distinction to be drawn is between good and bad faith, not good and bad explanations. Commonwealth v. Thomas, 19 Mass.App. 1, 471 N.E.2d 376 (1984). The prosecutor may also support his showing by the totality of circumstances, e.g., it is relevant that he

challenged similarly situated white jurors on identical or comparable grounds in the course of the same voir dire. Wheeler, 583 P.2d at 765.

Reviewing courts, mindful of the fact that the trial judge is in a better position to judge the motivations of the parties, give deference to the trial judge's finding with respect to whether the presumption of proper use has been rebutted and whether the prosecutor is making proper use of his challenges, unless his finding is unsupported by the record. See People v. Randle, 130 Cal.App.3d 286, 181 Cal.Rptr. 745 (1982); People v. Harvey, ___Cal.App.3d___, 208 Cal.Rptr. 910 (1984); People v. Walker, 157 Cal.App.3d 1060, 205 Cal.Rptr. 278 (1984); Commonwealth v. Joyce, 18 Mass.App. 417, 467 N.E.2d 214 (1984); Commonwealth v. Kelly, 10 Mass.App. 847, 406 N.E.2d 1327 (1980);

Commonweath v. Walker, 379 Mass. 297, 397 N.E.2d 1105 (1979). If, however, the trial judge fails to make a sincere and reasoned evaluation of the genuiness of the prosecution's explanation, relief will be granted the accused on appeal. People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983).

The task delegated to the trial judge of discerning the intent of the prosecutor is not an impossible one. As noted in Oregon v. Kennedy, 456 U.S. 667, 656 (1982), it merely calls for the court to make a finding of fact. Inferring intent from objective facts and circumstances is a familiar process in our criminal justice system, and is similar to the judgments trial judges routinely make in judging the credibility of witnesses or the good or bad faith of the prosecution.

No reason exists to conclude that the solution proposed and followed in Wheeler and Soares is unworkable. The California Supreme Court noted recently in response to such a complaint by the prosecution:

> The People have not produced, or called our attention to, any empirical evidence in support of their criticisms of Wheeler. There have been three published opinions of the Court of Appeal since Wheeler and none of these lends support to the People's claims. In particular, the assumption underlying some articles critical of Wheeler (e.g. Younger, Unlawful Peremptory Challenges, supra, 7 Litigation 23) and echoed by the People that restricting the exercise of peremptory challenges to proscribe those prompted by group bias may eliminate the "hunch" challenge is without demonstrable merit. A prosecutor may act freely on the basis of "hunches," unless and until these acts create a prima facie case of group bias, and even then he may rebut the inference. Hall, 672 P.2d at 859.

If this Court makes it clear that use of the peremptory challenge to practice

racial discrimination will not be tolerated, the frequency with which a trial court will be required to distinguish between bona fide and discriminatory use of the peremptory challenge will undoubtedly be reduced. The threat of mistrial or loss of a conviction will deter misuse of the challenge and the vast majority of prosecutors will obligingly conform their conduct to the law.

The refusal or neglect of the trial judge to perform the function of assessing the validity of the prosecutor's use of peremptory challenges may in some cases result merely in remand for a hearing before the trial judge. In other instances this procedure may not be preferable if due to passage of time it is unrealistic to expect the prosecutor to recall in greater detail the reasons for his exercise of his challenges or the trial court to assess those

challenges, which would demand that he be available and able to recall the circumstances of the case and the manner in which the prosecutor examined the venire and exercised his other challenges. Hall, 672 P.2d at 860, People v. Allen, 23 Cal.3d 286, 152 Cal.Rptr. 454, 590 P.2d 30, 35 n. 4 (1979).

CONCLUSION

The practice of employing peremptory challenges to prevent an accused from obtaining a jury representative of the community violates the fair cross section requirement of the Sixth Amendment and should be condemned by this Court. The procedures followed by the California and Massachusetts courts, which have been tested by time and proven to be a workable remedy, should be

adopted by this Court as the solution to discontinue further abuse of the peremptory challenge by prosecutors. Failure or neglect of a trial court to discharge its responsibility to regulate, if warranted, a prosecutor's use of peremptory challenges, justifies granting the defendant relief from his conviction so obtained.

Respectfully submitted,

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