BLINKING REALITY: RACE AND CRIMINAL JURY SELECTION IN LIGHT OF *OVALLE*, *MILLER-EL*, AND *JOHNSON*

Heather J. Davenport*

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I. INTRODUCTION

An African-American defendant on trial for aggravated rape looks out at the jury selected to judge his guilt or innocence—supposedly a jury of his peers. Although he lives in a Louisiana parish with a twenty-one percent black population, there is only one black man on his twenty member jury panel, and there were no black members on the grand jury that indicted him.[1] This common scenario raises several concerns, not the least of which is that the jurors would—consciously or unconsciously—be affected by racial prejudice in rendering their verdict. Additionally, the defendant and the jurors may lose faith in the justice system, or the jury may become a less powerful check on the overzealous prosecutor.[2] Furthermore, jury service is a privilege and a duty of citizenship; denial of that opportunity based on race runs contrary to the fundamental ideas of democracy.[3] How can criminal defendants challenge racially disproportionate juries, and how should lower courts and reviewing courts evaluate these challenges?

This Comment will address two related but distinct issues within the larger problem of grand and petit juries that are racially disproportionate to the communities from which they are drawn. First, it will examine the processes by which courts compile grand and petit jury venires (alternately referred to as venires, jury wheels, lists, panels, or pools). Second, it will examine the exercise of peremptory challenges (also called peremptory strikes) in selecting the petit jury during voir dire and assess the status of the law governing their use twenty years after *Batson*.[4] Both of these steps, the formation of grand and petit venires and the exercise of peremptory challenges, are critical stages in the prosecution of the accused and ultimately affect the composition of the petit jury and the adjudication of the defendant. The Supreme Court has applied the same equal protection

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[*] Candidate for J.D., Baylor University School of Law, February 2007; B.A., *magna cum laude*, Psychology, Carleton College, 2003. Following graduation, the Author will serve as a judicial clerk for The Honorable John Cayce, Chief Justice, Second Court of Appeals, Fort Worth, Texas. The Author is grateful to Professor Mark W. Osler for his assistance with this Comment.

[1] *See* Alexander v. Louisiana, 405 U.S. 625, 626–28 (1972).

[2] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 86–87 (1986).

[3] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 402, 406–07 (1991).

[4] *See Batson*, 476 U.S. at 96–98 (creating a three-step, burden-shifting process where the defendant first makes a prima facie case of racial discrimination against members of the petit jury venire, the burden then shifts to the prosecutor to offer a neutral explanation for the strike, and finally, the trial judge determines whether the defendant has established purposeful discrimination).

principles to analyzing discrimination in selecting the venire and in regulating the state's use of peremptory challenges at the petit jury stage.[5]

The historical and contemporary significance of racial discrimination in this country is the topic of much debate, and the Supreme Court has addressed its significance in numerous contexts.[6] In the framework of criminal trials, the Sixth Amendment guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[7] Although litigants in this area often raise Sixth Amendment claims,[8] the Supreme Court generally relies on the Equal Protection Clause of the Fifth and Fourteenth Amendments to resolve claims of racial discrimination in the grand and petit venires and racially motivated use of peremptory challenges.[9] The Equal Protection Clause of the Fourteenth Amendment provides, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[10] The Court has reaffirmed time and again the necessity of fundamental fairness in jury trials, and the issue is still very much at the forefront of the Court's consciousness, indicating a workable solution has yet to be achieved.[11]

This Comment will trace the historical development of the law in these two related areas including two Supreme Court decisions handed down in

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[5] *See, e.g.*, *id.* at 84.

[6] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973) (creating a burden-shifting analysis for courts to use in employment discrimination cases based on Title VII claims of racial discrimination); Furman v. Georgia, 408 U.S. 238, 257 (1972) (calling for a moratorium on the death penalty because it was applied in a racially discriminatory manner) (Douglas, J., concurring); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding the doctrine of separate but equal, particularly in the public school system, was unconstitutional).

[7] U.S. CONST. amend. VI. The Sixth Amendment's guarantee of a jury trial in serious criminal cases was made binding on the states by virtue of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[8] *See, e.g.*, *Powers*, 499 U.S. at 403.

[9] U.S. CONST. amend. V; U.S. CONST. amend. XIV. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 238 (2005); *Powers*, 499 U.S. at 402; Strauder v. West Virginia, 100 U.S. 303, 309 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

[10] U.S. CONST. amend. XIV, § 1.

[11] *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (recognizing the defendant's right to "the unanimous suffrage of twelve of his equals and neighbours") (citations omitted). *See generally Miller-El*, 545 U.S. at 234; Johnson v. California, 545 U.S. 152, 173 (2005).

June 2005, *Miller-El v. Dretke* and *Johnson v. California*.[12] The Comment will assess the current state of the law regarding peremptory challenges, twenty years after *Batson*, including limits on the states' discretion in developing their own procedures for eliminating this enduring form of discrimination.[13] Finally, the Comment will refine the process that the Supreme Court precedent suggests for lower courts to evaluate and review claims of racial discrimination in both contexts.

II. DEVELOPMENT OF THE LAW ADDRESSING RACIAL COMPOSITION OF GRAND AND PETIT JURY VENIRES AND RACIALLY MOTIVATED PEREMPTORY CHALLENGES

A. Historical Beginnings and Public Policy

Non-representative juries are not a new phenomenon in the Anglo-American legal system. In the eighteenth century in Staffordshire, England, "three-quarters of the adult male population were insufficiently wealthy to meet the property qualification for jury service. Similarly, in eighteenth century Essex, only about 8 to 10 percent of the nonexempt heads of households qualified to serve on juries."[14] In this country, claims of unfair treatment in jury selection are also deeply rooted: "[F]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."[15] Commensurate with the Supreme Court's frequent attention to this issue, numerous efforts have been made to alleviate this problem, but no simple solution appears forthcoming.[16] Two recent Supreme Court

[12] *See generally Miller-El*, 545 U.S. at 234; *Johnson*, 545 U.S. at 173.

[13] *See, e.g.*, *Johnson*, 545 U.S. at 168 (noting that "States do have flexibility in formulating appropriate procedures to comply with *Batson* . . . .").

[14] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 164–65 (1989).

[15] *Miller-El*, 545 U.S. at 238 (quoting Georgia v. McCullum, 505 U.S. 42, 44 (1992)) (internal quotation marks omitted).

[16] *See, e.g.*, United States v. Ovalle, 136 F.3d 1092, 1100 (6th Cir. 1998) (striking a subtraction procedure whereby potential white jurors were eliminated in order to achieve a jury more racially representative of the community). *See also* Smith v. Texas, 311 U.S. 128, 130 (1940) ("The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.").

decisions in this area suggest that the Court realizes the problem is of continuing significance.[17]

Albert Alschuler has alleged that questions to a juror about racial prejudice are typically indoctrinating questions, which function simply to "admonish the jurors, reminding them of their responsibilities," because it is rare that such questions will actually elicit honest disclosures of racial prejudice.[18] Additionally, he suggests that such questions border on patronizing and a Supreme Court holding requiring such questions to be asked of jurors, at least when interracial violence is an issue in the trial, "manifests a pattern of condescension toward jurors. . .."[19] Alschuler concludes that despite the Supreme Court's "symbolic opposition to racial discrimination by requiring prospective jurors in some capital cases to answer an insulting question," the net effect of these safeguards is relatively small.[20] However, even based on this Author's admittedly limited observation, such questions can and do occasionally prompt frank confessions of racial or ethnic prejudice. When such an admission is made, the juror is, of course, excused for cause, suggesting that voir dire questions directed at eliciting racial bias may have a profound effect upon the outcome of trial after all.

It is important to note at the outset several corollary issues in this area of the law that will reappear throughout this Comment. First, the Court's discussion of racial discrimination is occasionally intertwined in its discussion of gender discrimination.[21] This Comment focuses on racial discrimination, but will discuss several cases involving gender discrimination where the Court has relied on the two lines of cases as relevant precedent for each other.[22] Additionally, this Comment will focus primarily on the problem of disproportionate representation of African-American jurors. However, this area of the law has been extended to apply to discrimination against other racial minority groups, such as Hispanics, and may be extended to other minority groups in the future.[23] A third

[17] *See generally Johnson*, 545 U.S. at 169–73; *Miller-El*, 545 U.S. at 239–66.

[18] Alschuler, *supra* note 14, at 160–61, 160 n.32 (citations omitted).

[19] Alschuler, *supra* note 14, at 161, 161 n.34 (referring to Turner v. Murray, 476 U.S. 28, 36–37 (1986)); see *supra* notes 145–49 and accompanying text).

[20] Alschuler, *supra* note 14, at 229–30 (citing Turner v. Murray, 476 U.S. 28, 36–37 (1986)).

[21] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 531 (1975).

[22] *See, e.g.*, *id.* at 526–31 (citing Peters v. Kiff, 407 U.S. 493, 500 (1972)).

[23] *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 500–01 (1977).

recurring theme is the Court's use of population and demographic statistics to illustrate the disproportionate representation of minority jurors.[24] Although the Court predictably has never enumerated the exact statistical disparity it would find significant, such reference to statistics often helps illustrate the facts and circumstances of a case.[25]

The obvious injury caused by racial discrimination in jury selection is to the defendant who is wrongly convicted, or sentenced more harshly, based on racial bias or prejudice.[26] A secondary injury is that of the improperly excluded jurors, who suffer real injury although they often are not the litigant.[27] Moreover, exclusion of jurors based on race injures not only the defendant or the excluded panel members, but harms racial minorities in general,[28] and, moreover, society at large, because it casts doubt on the integrity of the judicial process and the fairness of the defendant's trial, and undercuts the jury's role as a check on the prosecutor's power.[29] "Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. It affords ordinary citizens a valuable opportunity to participate in a process of government . . . fostering . . . a respect for law."[30] The Supreme Court recently reiterated the policy behind these decisions: "[T]he overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race."[31] Additionally, it

[24] *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 627–28 (1972); Smith v. Texas, 311 U.S. 128, 128–29 (1940).

[25] *See Alexander*, 405 U.S. at 630.

[26] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 235, 237 (2005) ("Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury . . . .") (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975)).

[27] *See* Powers v. Ohio, 499 U.S. 400, 411, 413–15 (1991) (holding that the defendant had standing to bring equal protection claim of improperly excluded jurors because the defendant suffered an injury in fact, the defendant and the jurors had a close relationship such that the defendant would be an effective advocate of the excluded juror's rights, and barriers existed that made it extremely difficult and unlikely that the excluded jurors would vindicate their own rights).

[28] *Miller-El*, 545 U.S. at 239–38.

[29] *See, e.g.*, Johnson v. California, 545 U.S. 162, 172 (2005) (citations omitted); *Miller-El*, 545 U.S. at 238; *Powers*, 499 U.S. at 406, 411–13; Batson v. Kentucky, 476 U.S. 79, 87 (1986); *Smith*, 311 U.S. at 130.

[30] *Powers*, 499 U.S. at 407 (citations and internal quotation marks omitted).

[31] *Johnson*, 545 U.S. at 172.

stated, "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government."[32]

B. General Rule

It is clear that an individual does not have the right to sit on a particular jury, and defendants do not have the right to have a grand or petit jury composed in whole or in part of members of their race; however, both groups have the right to a fair and non-discriminatory selection process.[33] This selection process encompasses the selection of the grand jury venire, the selection of the petit jury venire, and the voir dire during which the actual petit jury is selected from the petit jury venire.

1. Venire Composition

The general rule regarding racial composition of both grand and petit jury venires is that no one racial group may be systematically excluded from jury service, and there is a compelling government interest in generating jury pools that embody fair cross sections of the community.[34] However, the states may create racially neutral qualifications required of jurors, some of which may have a discriminatory impact on members of a racial minority.[35] Although laws facially excluding African-Americans from jury service did exist in our country's history, they are now historical artifacts.[36] Today's challenges are facially neutral statutes or policies that

[32] *Id.* (quoting *Smith*, 311 U.S. at 130).

[33] *Powers*, 499 U.S. at 409.

[34] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (petit jury venires); Alexander v. Louisiana, 405 U.S. 625, 628 (1972) (grand jury venires); Eric M. Albritton, *Race-Conscious Grand Juror Selection: The Equal Protection Clause and Strict Scrutiny*, 31 AM. J. CRIM. L. 175, 214 (2003).

[35] *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 497–98, 498 n.19 (1977) (affirming the Fifth Circuit Court of Appeals' grant of defendant's writ of habeas corpus because state did not rebut the inference of discrimination, but suggesting that the state could have created racially neutral grand juror qualifications such as citizenship or reading ability).

[36] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 305 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975) (referring to a statute mandating that only white males be eligible for jury service).

have discriminatory effect, such as culling the grand jury venire from voter registration or drivers' license lists.[37]

Prejudice among grand jurors may be uniquely dangerous because grand jurors are typically authorized to deliver indictments on the basis of any evidence, including evidence inadmissible at trial, or even on the basis of their own knowledge, which may include publicity of the case, bias, and prejudice on a variety of levels.[38]

2. Peremptory Challenges

The general rule regarding racial discrimination in the use of peremptory strikes is well known; the Supreme Court articulated the contemporary approach in *Batson v. Kentucky*, overruling the previous test it crafted in *Swain v. Alabama*.[39] The three-step process of *Batson* remains good law twenty years after its creation, although it has been revisited on numerous occasions.[40] The *Batson* holding unfolds in a three-step process: (1) The defendant makes prima facie case of discrimination in jury selection by the "totality of the relevant facts"[41]; (2) "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging . . . jurors,"[42] requiring "a clear and reasonably specific explanation of [the prosecutor's] legitimate reasons for exercising the challenge[e],"[43] and finally (3) the trial court judge then decides whether the defendant has established purposeful discrimination.[44]

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[37] *See, e.g.*, *Castaneda*, 430 U.S. at 484–85, 494–95 (discussing facially neutral grand jury selection procedures that resulted in a substantial underrepresentation of Mexican-Americans).

[38] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 20.09 (Vernon 2005) ("The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge . . . ."); United States v. Calandra, 414 U.S. 338, 344–45 (1974) (holding that excludable fruit of the poisonous tree can be used by the grand jury as a basis of indictment); Costello v. United States, 350 U.S. 359, 363–64 (1956) (holding that an indictment based on hearsay evidence is constitutionally permissible).

[39] Batson v. Kentucky, 476 U.S. 79, 96–100 (1986); Swain v. Alabama, 380 U.S. 202, 203–04 (1965), *overruled by Batson*, 476 U.S. at 100 & n.25.

[40] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 251–53 (2005).

[41] *Batson*, 476 U.S. at 94.

[42] *Id.* at 97.

[43] *Id.* at 98 n.20 (internal quotation marks omitted) (partially quoting Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

[44] *Id.* at 98.

Some of the difficulty in this area stems from the simple fact that peremptory strikes are discretionary by nature; a determination of whether a strike is racially motivated or based on some other factor, often difficult to quantify, may be particularly slippery.[45] The Supreme Court has recognized this intricacy: "The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected."[46] The Court has recently taken pains to conduct extremely detailed analyses, in order to determine the true impetus behind a strike.[47] Some justices and commentators have reached the conclusion that "[a]pplying the Equal Protection Clause to the jury selection process in the same way that the Court has applied it to other governmental activities would abolish the peremptory challenge altogether"; however, the Supreme Court has not yet taken this radical step.[48]

C. Development of the Supreme Court Precedent

1. Grand and Petit Jury Venires

The Supreme Court has taken a strong stance against the exclusion of African-Americans from participation in grand and petit jury venires since 1879. Additionally, the law has been extended to prohibit discrimination based on sex, and has been applied to protect other racial minority groups including Hispanics. Since *Batson* was decided in 1986, recent cases tend to focus on racial discrimination in voir dire, by the use of peremptory strikes (as will be discussed in Part II.C.2); however, disproportionate grand and petit jury venires remain a pertinent topic and a persistent problem in

[45] *See, e.g.*, *Miller-El*, 545 U.S. at 238.

[46] *Id.* *See also* Powers v. Ohio, 499 U.S. 400, 424–26 (1991) (Scalia, J., dissenting).

[47] *See, e.g.*, *Miller-El*, 545 U.S. 231, 239–52 (2005) (conducting an extensive comparison of voir dire remarks by African-American veniremen who were peremptorily challenged by the prosecution and other veniremen who were not so challenged).

[48] Alschuler, *supra* note 14, at 169 & nn.67–69 (citing Batson v. Kentucky, 476 U.S. 79, 107–08, 123–28 (1986) (Marshall, J., concurring) (Burger, J., dissenting). *See also* Swain v. Alabama, 380 U.S. 202, 221–22 (1965); John Gibeaut, *Challenging Peremptories: Court Doesn't Buy Proposal to End Jury-Selection Bias by Barring No-Cause Strikes*, A.B.A. J., Aug. 2005, at 16, 16–17.

the American justice system.[49] This section will chronologically trace the evolution of the grand and petit jury venire cases.

a. The Early Cases

In 1879, the Supreme Court issued two opinions, both authored by Justice Strong, holding racial discrimination in the selection of grand and petit jurors unconstitutional.[50] In *Strauder v. West Virginia*, the defendant, a former slave, was convicted of murder.[51] On appeal, he challenged a West Virginia law that only allowed white males to serve as jurors.[52] The Supreme Court applied the newly minted Fourteenth Amendment, which provided in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[53] Justice Strong emphasized, "[t]he very idea of a jury is a body of men composed of the peers or equals of the [defendant]" and held that the West Virginia statute denied equal protection of the law to the African-American defendant.[54]

In the second of the two 1879 opinions, *Ex Parte Virginia*, a judge was charged and held in custody for violating a federal statute which made it a criminal misdemeanor to exclude otherwise qualified black grand and petit jurors.[55] Citing its decision in *Strauder*, the Court refused to grant the

[49] *See* Holland v. Illinois, 493 U.S. 474, 480–81 (1990) (noting that the Sixth Amendment's impartial jury guarantee and the implied guarantee that the jury be drawn from a fair-cross-section of the community applies to the venire, since the venire is the group from which the petit jury is drawn).

[50] Strauder v. West Virginia, 100 U.S. 303, 309–10 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975); *Ex parte* Virginia, 100 U.S. 339, 347–49 (1879).

[51] *Strauder*, 100 U.S. at 304.

[52] *Id.* at 304–05.

[53] *Id.* at 305–06 (quoting U.S. CONST. amend. XIV).

[54] *Id.* at 308, 310. The opinion also stated that the states could in other ways "prescribe the qualifications of its jurors," for example, by restricting jury service to men only. *Id.* at 310. This part of the opinion has since been overruled. *Taylor*, 419 U.S. at 537. This is one illustration of the Court's tendency to cross over from racial discrimination to gender discrimination.

[55] *Ex parte* Virginia, 100 U.S. at 344. The law at issue, section 4 of the Civil Rights Act of 1875, provided:

> [N]o citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors,

defendant's writ of habeas corpus and held the legislation to be constitutionally enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment.[56] The Court reaffirmed its words in *Strauder*: "In [*Strauder*] we held that the Fourteenth Amendment secures, among other civil rights, to colored men, when charged with criminal offences against a State, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color."[57] In many of the numerous subsequent decisions in this area, the Supreme Court returned to the early foundation it laid in *Strauder* and *Ex parte Virginia* and attempted to follow their mandates, prohibiting racial discrimination in the formation of the grand and petit jury venires.[58]

In 1940, in a decision addressing the formation of grand jury lists in Texas, a unanimous Supreme Court reversed the conviction of a defendant convicted of rape because of the systematic exclusion of blacks from those lists.[59] This case also marks an early point in the Court's reliance on statistics in proving discrimination.[60] The challenged statutory process for selection of potential grand jurors directed the grand jury commissioners to hand pick names from a list of qualified individuals.[61] The Court recited that in Harris County, where the defendant was convicted, African-Americans comprised over twenty percent of the population and almost ten percent of the poll-tax payers, of which three to six thousand (at a minimum) would be qualified under Texas law for grand jury service.[62] Moreover, during the seven-year period between 1931 and 1938, only 5 of the 384 grand jurors who served were black, only 18 of the 512 who were summoned for grand jury service were black, and of those 18, 13 of the

> who shall exclude or fail to summon any citizen for the cause aforesaid shall . . . be deemed guilty of a misdemeanor . . . .

Id.

[56] *Id*. at 345, 347–49.

[57] *Id*. at 345.

[58] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 85 (1986); Peters v. Kiff, 407 U.S. 493, 498–99 (1972); Pierre v. Louisiana, 306 U.S. 354, 357 (1939).

[59] Smith v. Texas, 311 U.S. 128, 132 (1940).

[60] *Id*. at 128–29. The Court examined the relevant statistics and concluded that "[c]hance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service." *Id*. at 131.

[61] *Id*. at 131 n.5.

[62] *Id*. at 128–29. The poll tax has since been abolished. U.S. CONST. amend. XXIV.

individuals' names were placed on the sixteenth position on the 16 person list, effectively assuring they would not serve.[63] In contrast, 379 of the 494 white men summoned actually served as grand jurors.[64]

The Court stated:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.[65]

The Court held that the statutory process of grand jury selection followed by the Texas courts unconstitutionally denied the defendant equal protection of the law because, although not facially unfair, it allowed for too much discretion on the part of the grand jury commissioners.[66] Whether the commissioners discriminated intentionally or not was seen as irrelevant.[67]

Soon thereafter, in 1953, the Court also overturned a conviction resulting from Georgia's procedure of selecting petit jury panels.[68] In *Avery v. Georgia*, the defendant's petit jury panel of approximately sixty was drawn from the county tax records, with the names of white individuals printed on white tickets and the names of African-American individuals printed on yellow tickets.[69] The trial judge, who drew the names from a box, testified that he had never discriminated in performing that duty;

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[63] *Smith*, 311 U.S. at 129.

[64] *Id.*

[65] *Id.* at 130.

[66] *Id.* at 130–32.

[67] *Id.* at 132. The Court stated:

> What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

Id.

[68] Avery v. Georgia, 345 U.S. 559, 563 (1953).

[69] *Id.* at 560–61.

however, the majority noted that not one of the sixty individuals selected was black and concluded that "[e]ven if the white and yellow tickets were drawn . . . without discrimination, opportunity was available to resort to it at other stages in the selection process."[70] The Court found that the defendant had alleged a prima facie case of discrimination, and the state failed to rebut it, requiring reversal.[71]

In a 1967 case also out of Georgia, the Court condemned the procedures used to select both grand and petit jurors and reversed the defendants' murder convictions.[72] Defendants Whitus and Davis's grand and petit juries were selected using a method similar to that found in *Avery*, with potential jurors selected from a tax digest that was color-coded by race; the Court again concluded that this process allowed defendants to create a prima facie case of discrimination that the state had not overcome.[73]

In the following year, Congress passed the Jury Selection and Service Act of 1968.[74] The Act provided, in part:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.[75]

[70] *Id.* at 561–62.

[71] *Id.* at 561–63. Justice Reed found that the demographic statistics created a prima facie case. *Id.* at 563 (Reed, J., concurring). Justice Frankfurter noted testimony that the different colored papers were "designed for purposes of racial discrimination" and that the "aperture in the box was sufficiently wide to make open to view the color of the slips . . . ." *Id.* at 564 (Frankfurter, J., concurring).

[72] Whitus v. Georgia, 385 U.S. 545, 552–53 (1967).

[73] *Id.* at 548–52. The Court compared the percentage of blacks on the tax digest (27.1%) to the percentage of blacks on the grand jury venire (9.1%) and the petit jury venire (7.8%). *Id.* at 552 & n.2.

[74] Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1821, 1861–69, 1871 (2000)).

[75] *Id.* § 1861, 82 Stat. at 54.

Furthermore, the Act codified the Court's attitude toward non-discrimination in jury selection: "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."[76] House and Senate Committee Reports "recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice."[77]

In 1972, the Supreme Court again confronted the procedure of grand jury selection and found invidious and systematic discrimination against potential black jurors in *Alexander v. Louisiana*.[78] The defendant, who was convicted of rape, moved to quash the indictment because blacks were only represented as token members on the grand jury lists and females were systematically excluded from such lists.[79] The Supreme Court again looked to statistics but maintained "[t]his Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a *factual inquiry* is necessary in each case that takes into account all possible explanatory factors."[80] The Court held the indictment invalid under the equal protection and due process guarantees of the Fourteenth Amendment.[81] Importantly, the Court dealt only with the composition of the grand jury venire but stated that "principles that apply to the systematic exclusion of potential jurors on the ground of race are essentially the same for grand juries and for petit juries. . . ."[82]

The process at issue in *Alexander* and the Court's meticulous recitation of statistics deserve attention. According to the 1960 census, 21.06% of Lafayette Parish residents over age twenty-one were black.[83] The Lafayette Parish jury commission, which was comprised of five appointed commissioners who were all white, compiled the grand jury venire list from various sources, including a telephone directory, a city directory, voter registration rolls, lists from a school board, and commissioner-generated

[76] *Id.* § 1862, 82 Stat. at 54.

[77] Taylor v. Louisiana, 419 U.S. 522, 529–30 & nn.7–8 (1975).

[78] 405 U.S. 625, 632 (1972).

[79] *Id.* at 626.

[80] *Id.* at 630 (emphasis added).

[81] *See id.* at 631–32.

[82] *Id.* at 626 n.3 (citing Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Neal v. Delaware, 103 U.S. 370, 396–98 (1881)).

[83] *Id.* at 627.

lists.[84] The commissioners sent a questionnaire to everyone on that list; the questionnaire included a space to indicate race.[85] Of the 7374 questionnaires returned, 1015 (13.76%) had been completed by blacks; additionally, 189 individuals did not indicate their race.[86] The commissioners removed about 5000 individuals, ostensibly representing those not qualified for grand jury service or exempted; the remaining 2000 were put on a table, and 400 of those were selected at random and put into a box from which grand jury panels of twenty were drawn.[87] Twenty-seven of the 400 persons, or 6.75%, were black.[88] On defendant's grand jury venire, one of the twenty members was black (5%), but that individual did not serve as one of the twelve grand jurors who indicted the defendant.[89]

The Court stressed that although a defendant is not entitled to any members of his race on the grand jury, he does have a right to insist that "the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice."[90] Moreover, the Court noted that the defendant was not arguing that no blacks had ever served on a grand jury in the state, but that there existed a "consistent process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury."[91] The Court found that the disparity between blacks who were eligible and those who were chosen created an inference of discrimination, and after this prima facie case of discrimination was established, the burden shifted to the state to disprove it discriminated.[92] The state's bald assertion of good faith was not sufficient to carry this burden.[93] Notably, the Court avoided the constitutional issue resulting from the defendant's claim that women were also excluded from the grand jury.[94]

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[84] *Id.*

[85] *Id.*

[86] *Id.* at 627 & n.6.

[87] *Id.* at 628.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 628–29.

[91] *Id.* at 629.

[92] *Id.* at 630–32.

[93] *Id.* at 632.

[94] *Id.* at 633–34. Justice Douglas's concurrence would reach this question and hold for the defendant, overruling the Court's dicta in *Strauder*. *Id.* at 634–35 (Douglas, J., concurring).

b. Extension of the Doctrine

Also in 1972, the Court ventured into a new direction in *Peters v. Kiff*, for the first time overturning the conviction of a white defendant because blacks had been systematically excluded from both his grand and petit juries.[95] This case is also a significant departure because it was decided on the basis of due process rather than equal protection, although later cases returned to the equal protection grounds.[96] The Court noted that "even if there is no showing of actual bias . . . due process is denied by circumstances that create the likelihood or the appearance of bias."[97] The Court concluded:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.
>
> . . . .
>
> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.[98]

Three years later, the Court logically extended the doctrine even farther in *Taylor v. Louisiana*, in which the Court overturned the conviction of a male defendant based on the habitual exclusion of women from the panel of potential petit jurors.[99] The defendant asserted his right to be tried by a

[95] 407 U.S. 493, 497, 505 (1972).

[96] *Id.* at 501. *See* Castaneda v. Partida, 430 U.S. 482, 500–01 (1977).

[97] *Peters*, 407 U.S. at 502.

[98] *Id.* at 503–04 (citations omitted).

[99] 419 U.S. 522, 538 (1975). The challenged practice allowed women to serve only if they filed a written declaration volunteering themselves for service. *Id.* at 523. The "conceded systematic impact" of this system was a "grossly disproportionate" number of women being called

"fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women."[100] The Court held that the defendant, convicted of aggravated kidnapping and sentenced to death, had standing to challenge the exemption of women from his petit jury,[101] and furthermore that such a wholesale exemption of women was unconstitutional.[102] Again the Court noted demographics in support of its holding; whereas 53% of eligible persons were female, no more than 10% of individuals on the jury wheel were women.[103] The majority stated, "[T]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community."[104] The Court also declared, "[T]he 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,"[105] and "[we] are convinced that the requirement has solid foundation."[106] The Court also noted that numerous traditional functions of the jury, including guarding against arbitrary usurpation of power and overzealous prosecution, are compromised if the jury is comprised merely of certain segments of the population.[107] While a state can grant exceptions on an individual basis where particular hardship would result from jury duty, the Court acknowledged it was untenable to assume that it would be a hardship for all women to perform jury duty.[108] Again the Court reiterated that "[d]efendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels, or venires from which juries are

for jury service; in fact, no woman served on the petit jury venire panel from which the defendant's petit jury was drawn. *Id*. at 525.

[100] *Id*. at 526.

[101] *Id*. at 524, 526. The Court noted, "[T]here is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service." *Id*. at 526 (citing *Peters*, 407 U.S. at 503–04).

[102] *Id*. at 538. Notably, the Court rested its decision on the Sixth and Fourteenth Amendments. *Id*.

[103] *Id*. at 524.

[104] *Id*. at 527. The Court, citing a case addressing racial discrimination, reiterated that the tradition of the jury system requires "that the jury be a body truly representative of the community." *Id*. (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

[105] *Id*. at 528.

[106] *Id*. at 530.

[107] *Id*. (citing Duncan v. Louisiana, 391 U.S. 145, 155–56(1968)).

[108] *Id*. at 534–35.

drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[109]

Extending the principle yet again in 1977, in *Castaneda v. Partida* the Court held that a grand jury selection process which had a discriminatory effect on Mexican-Americans denied the defendant equal protection of the laws under the Fourteenth Amendment when he established that Mexican-Americans comprised 79.1% of the population but only 39% of grand juries.[110] The Court found that the broad statistical disparity with regard to the grand jury raised a presumption of discrimination, despite the fact that several members of the defendant's petit jury, the judge, and the sheriff were likely Hispanic.[111] The burden shifted to the state to justify the disparity, and the Court suggested the state could have shown that Mexican-Americans did not meet qualifications for the grand jury based on citizenship or reading ability.[112] Notably, the Court mentioned that generally in equal protection cases, the litigant must prove intent to discriminate; although this litigant only could prove disproportionate impact, the Court found an exception to exist in this type of grand or petit jury discrimination case and found the process unconstitutional despite no finding of intent.[113]

Returning to the issue of discrimination based on sex in 1979, in *Duren v. Missouri* the Court established a three part test to find a violation:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[114]

[109] *Id*. at 538 (citations omitted).

[110] 430 U.S. 482, 495, 500–01 (1977).

[111] *Id*. at 495–96, 499.

[112] *See id*. at 497–99.

[113] *Id*. at 510–11, 511 n.3 (Powell, J., dissenting).

[114] 439 U.S 357, 364 (1979).

The Court held that the automatic excusal of potential women jurors violated the defendant's right to be tried by a fair cross-section of community.[115]

c. An Unsuccessful Attempt To Remedy

Although the problem of discrimination and the resulting disparity in jury composition seems to be continuing, there have been attempts to remedy it. In a Sixth Circuit case, *United States v. Ovalle*, the court held that the actions of a Federal District Court judge in removing a certain percentage of non-minority jury members, in order to achieve a more representative jury panel, were unconstitutional.[116] The court held that a jury selection plan through which one in five non-African-American citizens were removed from the jury wheel (the "subtraction method") violated the Equal Protection Clause of the Fifth Amendment.[117] The court also held that subtracting potential jurors from the jury wheel solely by reason of their race violates the Jury Selection and Service Act.[118] In addressing the constitutional issues of the defendants who did not preserve the statutory claim, the court found the litigants had third party standing to invoke the rights of the excluded non-minority jurors.[119] Additionally, the court found that this was not a race neutral restriction, and although there existed—arguably—a compelling government interest, "ensuring that jury pools represent a fair cross section of the community," the restriction was not narrowly tailored, and therefore could not stand.[120]

2. Peremptory Challenges

A separate line of cases addresses racial discrimination in the use of peremptory challenges by the prosecutor during voir dire, the selection of the petit jury immediately prior to trial. Exclusion of a juror based on race harms the defendant as well as the excluded juror.[121] Additionally, it harms society at large, "undermin[ing] public confidence in the fairness of our

[115] *Id*. at 360, 370 (citing Taylor v. Louisiana, 419 U.S. 522, 534 (1975)).

[116] 136 F.3d 1092, 1107 (6th Cir. 1998).

[117] *Id*. at 1095, 1107.

[118] *Id*. at 1100 (citing 28 U.S.C. § 1862 (2000)).

[119] *Id.* at 1102–04 (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).

[120] *Id.* at 1105–06.

[121] *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 87 (1986).

system of justice."[122] The Court has noted that "Since the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process."[123]

a. Modest Beginnings: Swain v. Alabama

One of the earliest cases in this line of decisions was *Swain v. Alabama*, decided in 1965.[124] In that case, the Court held that the use of strikes is to be upheld, unless and until the defendant establishes a longstanding pattern of systematic discrimination, beyond the facts and circumstances of an individual defendant's case.[125] The prosecutor in *Swain* used six peremptory strikes to remove the only six black individuals in the jury pool, resulting in an all-white jury that sentenced the African-American defendant to death for the rape of a white woman.[126] The Court affirmed the defendant's conviction because the defendant did not establish a pattern of systematic discrimination by the state, despite the fact that no black man had served on a jury since at least 1950.[127] Recognizing the traditional and salutary role of the peremptory challenge, the Court also distinguished between striking blacks as a strategic move in order to win at trial, which it concluded was permissible, and striking blacks for other reasons—such as racial discrimination—unrelated to outcome of case, which would be impermissible.[128] The Court concluded that the strikes in *Swain* were permissible, strategic moves by the prosecutor.[129]

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[122] *Id*. (citations omitted).

[123] *Id*. at 88 (citations and internal quotation marks omitted).

[124] 380 U.S. 202, 223–24 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79, 100 n.25 (1986).

[125] *Id*.

[126] *Id*. at 210, 231 (Goldberg, J., dissenting).

[127] *Id*. at 205. The Court mentioned:

> Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since about 1950. In this case there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor . . . .

Id.

[128] *Id*. at 224. The Court described this distinction:

b. Batson *and Progeny*

In the 1986 decision of *Batson v. Kentucky*, destined to become the seminal case on a prosecutor's racially motivated use of peremptory strikes, the Court reexamined *Swain*'s evidentiary burden on the defendant and established the modern three-part process to evaluate claims of racial discrimination.[130] The facts in *Batson* reveal that the prosecutor used four peremptory strikes on the four black individuals in the venire, resulting in an all-white jury that subsequently convicted Batson of second-degree burglary and receiving stolen goods.[131] The Supreme Court reversed and remanded Batson's conviction.[132]

The Court held that equal protection precludes a prosecutor from exercising peremptory challenge "solely on account of [a juror's] race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[133] Additionally, the Court advanced the three-step process by which a defendant is to make a claim for racially motivated use of peremptory strikes.[134] First, the defendant must object and make a prima facie showing of purposeful racial discrimination.[135] The Court indicated that this prima facie case is composed of three elements: (1) "the defendant first must show that he is a

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> [W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance.

Id. at 223 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)).

[129] *Id*. at 222.

[130] 476 U.S. 79, 96–98 (1986). The *Batson* Court noted that "basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.'" *Id.* at 84 n.3 (quoting Alexander v. Louisiana, 405 U.S. 625, 626 n.3 (1972)). The Court based its holding expressly on the equal protection clause of the Fourteenth Amendment rather than the Sixth Amendment guarantees. *Id*. at 85 n.4.

[131] *Id*. at 82–83.

[132] *Id*. at 100.

[133] *Id*. at 89, 97.

[134] *Id*. at 96–98.

[135] *Id*. at 96–97 ("In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances . . . [including] a 'pattern' of strikes against black jurors . . . [and] the prosecutor's questions and statements during *voir dire* . . . .").

member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[136] (2) The Court took notice of the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[137] (3) "[T]he defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[138] Notably, the Court went on to link the venire jurisprudence with this peremptory challenge decision: "This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."[139]

Secondly, after the defendant has established a prima facie case of discrimination as outlined above, the burden shifts to the prosecutor to offer a race-neutral explanation for his or her use of peremptory strikes/challenges.[140] Finally, the judge must determine whether purposeful discrimination has been established—whether or not the government's explanation was a pretext.[141]

Notably, the *Batson* Court specifically commented on the future of the peremptory strike.[142] The Court reaffirmed the importance of the peremptory challenge in our system of criminal trials and asserted that its decision would not unduly impinge the vitality of the peremptory challenge.[143] The Court remanded the case to allow the prosecutor to explain the strikes.[144]

On the same day in 1986 that it decided *Batson*, the Supreme Court held that—at least in some circumstances—the trial judge has an affirmative duty to inquire about racial bias.[145] In *Turner v. Murray*, a capital case involving allegations of interracial violence, the trial judge refused to

[136] *Id.* at 96 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

[137] *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[138] *Id.*

[139] *Id.*

[140] *Id.* at 97–98.

[141] *Id.* at 98.

[142] *Id.* at 98–99.

[143] *Id.*

[144] *Id.* at 100.

[145] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

submit Defendant's question to prospective jurors asking about potential bias, specifically racial prejudice.[146] The Supreme Court cited an earlier case, also involving interracial violence, that indicated "that a refusal to question prospective jurors about possible racial prejudice violated the Due Process Clause when the defendant was a black civil rights worker charged with a drug offense."[147] The *Turner* Court held that the trial judge's refusal to ask potential jurors about racial prejudice was inconsistent with the defendant's right to an impartial jury and held that his death sentence should be vacated (but allowed the determination of guilt to stand).[148] Thus, at least where interracial tension is implicated in a capital trial, there appears to be an affirmative duty on the judge to question jurors regarding racial bias.[149]

Five years after *Batson*, in 1991, the Court held in *Powers v. Ohio* that a white defendant had standing to make a *Batson* challenge to the constitutionality of his conviction on behalf of black panel members excluded on the basis of race.[150] The Court elucidated the requirements of third party standing: the defendant suffered injury himself; there was a close relationship between the defendant and the jurors, making the defendant as effective a proponent of their claims; and there existed a significant barrier blocking the excluded juror from vindicating his own rights.[151]

Justice Scalia raised several questions regarding the consequences of *Batson* and *Powers* in his dissent in *Powers*, many of which have subsequently been answered by the Court.[152] For example, the *Batson* theory has since been extended to prohibit criminal defense attorneys from

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[146] *Id*. at 30–31. "The trial judge did ask the venire . . . whether any person was aware of any reason why he could not render a fair and impartial verdict . . . all answered 'no.'" *Id*. at 31.

[147] Alschuler, *supra* note 14, at 159 (citing Ham v. South Carolina, 409 U.S. 524, 527–28 (1973)). *But see* Ristaino v. Ross, 424 U.S. 589, 597–98 (1976) (holding that it was permissible not to ask potential jurors questions about racial prejudice in the trial of a black defendant accused of robbing, assaulting, and attempting to murder a white security guard).

[148] *Turner*, 476 U.S. at 37. The Court based its holding on three factors: "the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case." *Id*.

[149] *See id*. The *Powers* Court reiterated that "where racial bias is likely to influence a jury, an inquiry must be made into such bias." Powers v. Ohio, 499 U.S. 400, 415 (1991) (citing *Turner*, 476 U.S. at 28; *Ristaino*, 424 U.S. at 596).

[150] 499 U.S. at 415.

[151] *Id*. at 410–11.

[152] *Id*. at 429–30 (Scalia, J., dissenting).

exercising peremptory strikes based on race,[153] to prohibit civil litigants from making racially motivated strikes,[154] and to prohibit peremptory strikes based on gender.[155] Commentators have speculated about future extensions of the doctrine, including prohibiting strikes based on ethnic origin and religious affiliation.[156]

c. Two 2005 Cases Refining Batson*:* Miller-El v. Dretke *and* Johnson v. California

Two 2005 Supreme Court decisions underscore the continuing evolution of the Court's *Batson* jurisprudence and the persistent occurrences of racial discrimination in the jury selection process.[157] In the first of these two decisions, *Miller-El v. Dretke*, the Supreme Court revisited *Batson*'s steps two and three and conducted an extremely detailed and fact-intensive analysis of the prosecutor's use of peremptory challenges and other tactics during voir dire.[158] In the second case, *Johnson v. California*, the Supreme Court focused on *Batson*'s step one, holding that the state standard of what sufficed to establish a prima facie case was incompatible with *Batson*.[159]

In June 2005, in *Miller-El v. Dretke*, the Supreme Court considered the federal habeas corpus petition of Texas death row inmate Thomas Joe Miller-El[160] for an unusual second time[161] and held that Miller-El was entitled to habeas relief based on his claim that the prosecutor exercised his

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[153] Georgia v. McCollum, 505 U.S. 42, 59 (1992).

[154] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991).

[155] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

[156] *See, e.g.*, Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 164 n.51 (2005).

[157] *See generally* Johnson v. California, 545 U.S. 162 (2005); Miller-El v. Dretke, 545 U.S. 231 (2005).

[158] 545 U.S. at 239–66.

[159] *Id*. at 169–73.

[160] A Dallas County, Texas jury convicted Miller-El, a black man, of capital murder. *Miller-El*, 545 U.S. at 235.

[161] The Court's decision in Miller-El's first visit to the Supreme Court, *Miller-El v. Cockrell*, 537 U.S. 322 (2003), has been cited as establishing the new standard for granting a certificate of appealability in federal habeas proceedings: whether "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or [whether] the issues presented [are] adequate to deserve encouragement to proceed further." LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 247 (Foundation Press 2003) (quoting *Miller-El v. Cockrell*, 537 U.S. at 336) (internal quotation marks and citations omitted).

peremptory strikes based on jurors' race at Miller-El's 1986 capital murder trial.[162] The Court held that the prosecutor's race-neutral explanations for peremptory challenges of two black panel members were a pretext by clear and convincing evidence, stating, "It blinks reality to deny that the State struck Fields and Warren . . . because they were black."[163] The Court explained, with regard to *Batson*'s step two:

> [P]eremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren

[162] *Miller-El*, 545 U.S. at 235. Miller-El's case has a complex procedural history. *See id*. At Miller-El's criminal trial, ten of the eleven blacks on the venire were eliminated by the prosecutor's use of peremptory strikes. *Id*. The defendant objected, citing the Dallas County District Attorney's history of excluding blacks from juries, the then-current standard under *Swain*. *Id*. The trial court denied the defendant's request for a new jury, finding no systematic exclusion of blacks as a matter of policy, and Miller-El was convicted and sentenced to death. *Id.*

Shortly after Miller-El's conviction, while his appeal was pending, the *Swain* systematic discrimination standard was replaced by *Batson*'s three-step method, and the Texas Court of Criminal Appeals remanded Miller-El's conviction to the trial court. *Id*. at 235–37. The trial court reviewed the voir dire record, heard the prosecutor's justifications for the strikes (some of which were not offered at the original voir dire), and affirmed, finding no *Batson* violation, and the Texas Court of Criminal Appeals affirmed. *Id*. at 236–37.

The Federal District Court subsequently denied habeas relief, and the Fifth Circuit Court of Appeals denied a certificate of appealability. *Id*. at 237. In Miller-El's first appearance before the Supreme Court, the Court reversed the Fifth Circuit, holding that the defendant was entitled to a certificate of appealability because there was room for debate among reasonable jurists whether peremptory challenges were used by the prosecutor as a result of purposeful discrimination. *Id*. (citing *Miller-El v. Cockrell*, 537 U.S. at 341). The Fifth Circuit granted the certificate of appealability but rejected Miller-El's *Batson* claim on the merits, and the Supreme Court granted certiorari again. *Id.*

[163] *Id.* at 266.

> does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.[164]

The Court cited with suspicion several pieces of evidence and tactics used by prosecution that suggested discrimination, including the following: (1) statistics (91% of peremptory challenges of the state were used to disqualify black panel members)[165]; (2) a comprehensive side-by-side comparison of responses of black veniremen who were struck with non-black veniremen who were not struck by the prosecution (indicating similar responses to questions about the possibility of rehabilitation of the defendant, remarks that life in prison might be worse than the death penalty, the juror's ambivalence to the death penalty, and the criminal history of the juror's relatives)[166]; and (3) broader patterns of practice of the prosecutors during voir dire, including the Texas practice known as the jury shuffle,[167] contrasting questions posed to members of the venire, apparently based on

[164] *Id*. at 252 (citing Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring)).

[165] *Id*. at 241.

[166] *Id*. at 241–53.

[167] *Id*. at 252–55. Under Texas criminal procedure, either the prosecution or the defense may request a jury shuffle, which reorders the seating of the venire members. *Id*. at 252–53 & n.12 (citing TEX. CODE CRIM. PROC. ANN. art. 35.11 (Vernon Supp. 2004–2005)). *See generally* John D. White, Comment, *Constitutional Law—Equal Protection—A New Hand From the Same Deck of Cards—Randomness and the Intersection of Race with Gender in the Texas Jury Shuffle*, 40 S. TEX. L. REV. 509 (1999) (discussing the role of race and gender discrimination in the jury selection process and how courts have addressed these issues).

The Court indicated that the prosecution shuffled the venire three times, and the defense shuffled the venire four times throughout the course of voir dire, and several of the prosecutor's shuffles appeared motivated to remove several black veniremen from the front of the venire. *Miller-El*, 545 U.S. at 254. In the absence of race-neutral reasons offered by the prosecutor, the suspicion of discrimination rose to an inference. *Id.* at 254–55. The Court repeated its comments from Miller-El's first Supreme Court opinion:

> [T]he prosecution's decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense's shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney's Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past.

Id. at 254 (quoting *Miller-El v. Cockrell*, 537 U.S. at 346).

race, including a general inquiry into views on the death penalty[168] and questions about minimum acceptable sentences,[169] as well as evidence of the general discriminatory policy of Dallas County District Attorney's Office (contained in the Sparling Manual).[170] In its side-by-side comparison of the panelists' responses, the Court noted, "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."[171]

The Court concluded that Miller-El was entitled to prevail on his *Batson* claim and granted habeas corpus relief, noting, "The prosecutors' chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion . . . ."[172] The Court found the lower court's decision that the peremptory strikes of two veniremen—Fields and Warren—were not racially motivated was incorrect to the requisite clear and convincing degree.[173] Justice Souter wrote, for the

[168] *Miller-El*, 545 U.S. at 253–262. When inquiring as to views on the death penalty, prosecutors recited either a graphic or a bland narrative of the death penalty, using the graphic script with 53% of the black panelists but only 3% of the white panelists, apparently in order to create cause to strike those responding to the graphic script. *Id.* at 255–57, 264. The graphic script indicated that the defendant would be "taken to the death house and placed on a gurney and injected with a lethal substance until he is dead," whereas the bland script was less gruesome and merely indicated, "We anticipate that we will be able to . . . convict him of capital murder . . . ." *Id.* at 255–56.

The Court concluded, "As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script." *Id.* at 260.

[169] *Id.* at 261–65. Prosecutors asked potential jurors the minimum sentence they would consider for murder, disclosing the statutory minimum to some jurors but not to others, largely following racial lines. *Id.* at 261. The Court characterized the questioning as trickery since it was highly correlated with race and admittedly "was used to create cause to strike." *Id.* (citations omitted). For example, only 27% percent of the non-black jurors who had expressed ambivalence over the death penalty were given the trick question, whereas 100% of the black jurors who had expressed ambivalence were given the trick question. *Id.* at 263.

[170] *Id.* at 264 (citing *Miller-El*, 537 U.S. at 334–35). The Court cited the 1986 testimony of two Dallas County district judges regarding both formal and informal office policies and the inter-office circulation of a manual written by a Dallas County prosecutor that contained information on excluding African-Americans from jury service. *Id.*

[171] *Id.* at 241 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

[172] *Id.* at 265.

[173] *Id.* at 266.

majority, "The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State."[174] Justice Breyer's concurrence in *Miller-El*, similar to Justice Marshall's concurrence in *Batson*, asserts that the resolution of this problem lies in the elimination of peremptory challenges.[175]

On the same day in June 2005 that it decided *Miller-El*, the Supreme Court also handed down *Johnson v. California*, in which the Court struck down a standard that California had adopted in implementing *Batson*'s step one.[176] The prosecutor in Johnson's case used three peremptory challenges to remove the only three blacks remaining on the venire (after challenges for cause had been exercised).[177] After exercising the second and third of the strikes at issue, the defense objected; however, the judge did not require the prosecutor to offer a race-neutral explanation and held that the defendant had not established a prima facie case of racial discrimination in each instance (that is, he did not meet *Batson*'s step one), stating that "there's not been shown a *strong likelihood* that the exercise of the peremptory challenges were based upon a group rather than an individual basis," and that "the prosecutor's strikes could be justified by race-neutral reasons," but noting, at least with regard to the second strike, that it was a close case.[178]

The Supreme Court held that at *Batson*'s first step, the defendant was not required to establish that it was more likely than not that discrimination motivated the peremptory strikes, but only needed to raise a permissible

[174] *Id*.

[175] *Id*. at 266–67 (Breyer, J., concurring) (noting that even Miller-El's "extensive evidence of racial bias" resulted in seventeen years of mostly unsuccessful litigation); Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). This remedy appears to be the minority position. *See* Gibeaut, *supra* note 48, at 16–17.

[176] 545 U.S. 162, 169–73 (2005).

[177] *Id*. at 164. A California state court jury convicted Johnson, a black male, of second-degree murder and assault of a white child. *Id*.

[178] *Id*. at 165 (citing People v. Johnson, 71 P.3d 270, 272 (2003)) (internal quotation marks omitted). The California Court of Appeals reversed the conviction (applying a reasonable inference standard), and the California Supreme Court reversed the Court of Appeals, reinstating the conviction (noting that *Batson* allowed the states freedom in implementing its mandates and concluding that the strong likelihood standard was equivalent to the reasonable inference standard, and both were consistent with *Batson*). *Id*. at 166–67.

inference of discrimination.[179] The Court explained, "Although we recognize that States do have flexibility in formulating appropriate procedures to comply with *Batson*, we conclude that California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case."[180] *Batson* merely requires facts give "rise to an inference of discriminatory purpose,"[181] and the trial court's comment that the case was a close call and the California Supreme Court's note that the strikes looked suspicious demonstrated that such an inference of discrimination had been raised.[182] The Court stated:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.[183]

Johnson functions to refocus *Batson*'s step one and limit the state's discretion in crafting procedures for assessing *Batson* claims. Moreover, by holding that an inference of discrimination (established by statistics and comments that the case was close and the strikes appeared suspicious) is all that is required to meet the prima facie case, the Court reinforced that *Batson*'s step one is a relatively low hurdle for defendants, perhaps suggesting more *Batson* claims can and should be made.

III. THE SUPREME COURT MANDATES A FACTS AND CIRCUMSTANCES EXHAUSTIVE REVIEW

This Comment has traced Supreme Court decisions affecting two distinct processes, the assembly of grand and petit jury venires and the exercise of peremptory challenges over the petit jury array, because both of these processes can contribute to the problem of racially disproportionate

[179] *Id*. at 173.

[180] *Id*. at 168.

[181] *Id*. at 169 (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

[182] *Id*. at 173 (citations omitted).

[183] *Id.* at 170.

juries in criminal jury trials. Moreover, recent cases such as *Batson*, *Ovalle*, *Miller-El*, and *Johnson* indicate that courts still struggle to apply the Supreme Court's mandates prohibiting racial discrimination in both of these components of the jury selection process. The simple rule, repeated in *Batson*, that "[a] person's race simply is unrelated to his fitness as a juror," has proven hard to administer over the years.[184]

Racial discrimination in our system of jury trials has changed form over time. Today, racially disproportionate juries result not from facially discriminatory statutes, but rather from subtle discrimination manifested by either facially neutral practices with a disproportionate impact on racial minorities or racially motivated use of peremptory challenges.[185] Twenty years ago, the *Batson* Court judiciously noted:

> In *Strauder*, the Court invalidated a state statute that provided that only white men could serve as jurors. We can be confident that no State now has such a law. The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford protection against action of the State through its administrative officers in effecting the prohibited discrimination.[186]

Viewing these two lines of decisions as a cohesive whole, the Supreme Court's mandate to lower courts becomes clear. The Supreme Court has stated, "The courts are under an affirmative duty to enforce the strong statutory and constitutional policies [against discrimination in the selection of jurors]."[187] The detailed facts and circumstances inquiry mandated by two recent Supreme Court decisions provides guidance to lower courts, as they continue to struggle to realize this affirmative duty of eradicating racism in criminal jury trials.

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[184] *Batson*, 476 U.S. at 87 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)) (internal quotation marks omitted).

[185] *See Johnson*, 545 U.S. at 168–73; Miller-El v. Dretke, 545 U.S. 231, 235–38 (2005); Castaneda v. Partida, 430 U.S. 482, 484–85 (1977); *Ex parte* Virginia, 100 U.S. 339, 340 (1879); Strauder v. West Virginia, 100 U.S. 303, 305 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975). *See generally* Albritton, *supra* note 34, at 214 (discussing the Texas procedure for selecting grand jurors).

[186] *Batson*, 476 U.S. at 88 (citations and internal quotation marks omitted).

[187] Powers v. Ohio, 499 U.S. 400, 416 (1991) (citing Peters v. Kiff, 407 U.S. 493, 505, 507 (1972) (majority opinion) (White, J., concurring)).

A. Racially Motivated Peremptory Strikes and Meticulous Judicial Review of Batson *Challenges*

Significant voices have emerged calling for the elimination of peremptory strikes altogether.[188] However, the Supreme Court in *Batson* recognized the traditional and contemporary importance of the peremptory strike in the American system of criminal justice, and this stance has yet to be disturbed by the majority, demonstrating an unwillingness to take the drastic step of eliminating the peremptory strike altogether (notwithstanding the obvious simplicity such a solution would occasion).[189] The Supreme Court's two recent decisions in *Miller-El* and *Johnson* clearly illuminate the process courts should undertake to review and remedy these pernicious forms of racism while retaining the peremptory strike.

Instead of elimination of peremptory challenges, the Court advanced—by way of example—the extremely detailed factual analysis that lower courts should undertake. The Supreme Court modeled this case-by-case, meticulous facts and circumstances review in *Miller-El*, teaching by example that lower courts should make very detailed findings.[190] The *Batson* Court, in overruling *Swain*'s requirement of a longstanding pattern of systematic discrimination, served as the bellwether for this minute and focused inquiry and individualized concern for the facts and circumstances of an individual defendant's case.[191] In *Miller-El* the Court made almost passing reference to the statistics in the defendant's case but continued to conduct a painstaking, line-by-line comparison of the individual voir dire remarks of two excluded African-American veniremen and other veniremen who were not struck by the prosecution.[192] The Court did not stop there but continued to analyze other practices by the prosecutor including a potentially discriminatory state procedural practice, disparate lines of questioning that the Court characterized as trickery, and a longstanding

[188] *See, e.g.*, *Miller-El*, 545 U.S. at 267 (Breyer, J., concurring); *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring); Gibeaut, *supra* note 48, at 16–17. *See also* Georgia v. McCollum, 505 U.S. 42, 60 (1992) (Thomas, J., concurring) ("I am certain that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.").

[189] *See Batson*, 476 U.S. at 98–99.

[190] *See Miller-El*, 545 U.S. at 239–65; Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

[191] *See Batson*, 476 U.S. at 96–97.

[192] *Miller-El*, 545 U.S. at 239–65.

informal practice of discrimination by that particular prosecutor's office.[193] The Court exhaustively "consider[ed] all relevant circumstances," notably including both the facts and circumstances of the defendant's case and the history of discrimination, in determining that the defendant established a prima facie case of discrimination by clear and convincing evidence.[194] Importantly, the Court declined to indicate whether any one of these factors could alone be dispositive.

In addition to reviewing the use of peremptory strikes, the Supreme Court's precedent establishes additional ways courts may review and regulate other manifestations of racism in the jury selection process. For example, courts may look suspiciously on facially neutral practices, traditionally (at least potentially) applied in a discriminatory fashion, such as the Texas jury shuffle.[195] Furthermore, even though motivated by laudable intentions (creating a more representative jury panel), judges and court administrators cannot engage in reverse discrimination, such as subtracting non-minority members of venires.[196] The Court recognizes that jurors may be excused for hardship on an individual basis; however, courts may not automatically excuse a class of individuals, such as African-Americans, Mexican-Americans, or women.[197] Also, the Court has reiterated that states can and should enjoy some freedom and autonomy in tailoring their procedures to comply with *Batson*[198]; however, states may not create heavier burdens on defendants than *Batson* contemplated.[199]

This detailed, multi-factored analysis was forecast in *Batson* when the court noted that "[i]n deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances . . . [including] a 'pattern' of strikes against black jurors included in the particular venire . . .[and] the prosecutor's questions and statements during *voir dire* . . .[but] [t]hese examples are merely illustrative."[200]

[193] *Id*. at 252–66.

[194] *Id.* at 239–66; *see Batson*, 476 U.S. at 96–95.

[195] *Miller-El*, 545 U.S. at 252–55 & nn.12–14.

[196] United States v. Ovalle, 136 F.3d 1092, 1107 (6th Cir. 1998).

[197] Duren v. Missouri, 439 U.S. 357, 370 (1979).

[198] Johnson v. California, 545 U.S. 162, 168 (2005).

[199] *Id*. at 169–73 (holding that the more likely than not standard is not an appropriate measure for *Batson*'s first step).

[200] Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

The Supreme Court suggested in *Batson* that the difficulty in this area of the law is not from disagreement with the principles of law but with application to the facts of each particular case.[201] While *Batson* foreshadowed this minute inquiry, the Supreme Court's exhaustive, line-by-line analysis in *Miller-El* makes this requirement impossible to ignore.

This test may make it particularly onerous for the prosecutor to justify striking an individual minority juror. Justice Scalia's argument in his dissent in *Powers* seems relevant:

> Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality . . . that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members.[202]

Justice Scalia's concerns are assuaged, however, if the trial court takes a race-blind individual review of the record, such as the Supreme Court did in *Miller-El*, when weighing *Batson*'s third step; this line-by-line review is similarly the reviewing court's prerogative under the Supreme Court's example in *Miller-El*.[203] If we assume, as the Court does for the purpose of reviewing a *Batson* challenge, that jurors are responding to voir dire questions honestly, sympathies toward anyone—own group member or not—should be apparent if the attorneys ask the right questions.[204] The attorneys' (particularly the prosecutor's) job of selecting the correct questions to ask to elicit admissions of prejudice or sympathy may indeed turn out to be the key.

Johnson v. California also promotes this case-by-case review. There the Court emphasized concern for the individual defendant, as it held that California's more likely than not standard resulted in too heavy of a burden on the defendant at *Batson*'s step one, and the appropriate standard is lower—that the defendant must only establish a reasonable inference of discrimination.[205] The Court characterized the defendant's case as

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[201] *Id.* at 89–90.

[202] Powers v. Ohio, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting).

[203] Miller-El v. Dretke, 545 U.S. 231, 239–65 (2005).

[204] *See id.*

[205] 545 U.S. 162, 173 (2005).

suspicious and relied heavily—in contrast to the Court's holding in *Miller-El*, in which the Court relied on numerous factors—on statistics and comments that the case was a "close call."[206] This relatively meager evidentiary showing establishes that lower courts must earnestly delve into the facts and circumstances of any particular case to determine whether the defendant's *Batson* claim is to be successful because while no factor is dispositive, as few as one or two factors can raise a reasonable inference of racial discrimination. The Supreme Court emphasized the affirmative duty on lower courts to examine and give considerable credence to any evidence the defendant can muster, again suggesting reinvigorated concern for claims of racial discrimination.

B. Grand and Petit Jury Venires: A Similar Facts and Circumstances Review Would Be Effective

Another contributing factor to the larger problem of racially disproportionate juries are facially neutral processes by which courts compile their grand and petit jury venires. *Ovalle* demonstrates that courts continue to search for a means of reducing the disproportion between the racial composition of the community and of the grand and petit jury venire.[207] Courts should be guided by the same principle as in peremptory challenge cases—race can play no part in jury selection—and should conduct detailed, line-by-line comparisons in order to ferret out discrimination, similar to the peremptory challenge realm. Although comparison of statistics may play a larger role in revealing discrimination in this context (grand and petit jury venires) than it did in *Miller-El*'s analysis of peremptory strike use, statistics alone will likely continue not to be dispositive on the issue of discrimination, and the trial court and reviewing courts should look to multiple factors to determine whether racial discrimination has occurred.

In the same breath as it assessed the review of peremptory challenges, the *Batson* Court stressed that the facts and circumstances test—a detailed factual inquiry into each case—would be appropriate in assessing challenges to the venire (grand or petit) as well:

> This combination of factors raises the necessary inference of purposeful discrimination because the Court has

[206] *Id.* at 173; *Miller-El*, 545 U.S. 239–68.

[207] United States v. Ovalle, 136 F.3d 1092, 1095 (6th Cir. 1998).

> declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a "factual inquiry" that "takes into account all possible explanatory factors" in the particular case.[208]

If use of facially neutral grand and petit venire selection procedures, such as relying exclusively on driver's license lists, has a disparate impact on racial minority representation, challenges should be reviewed by looking to many factors, such as statistics, other procedures employed by the prosecutor's office, and any history of discrimination. This inquiry should be as detailed and thorough as necessary. Even when the venire is gathered from a variety of sources, there is often potential for abuse, and the trial court and subsequent reviewing courts should conduct a detailed and exhaustive, facts and circumstances individualized inquiry, following the Supreme Court's model in *Miller-El*.[209]

IV. CONCLUSION

Minority defendants often find themselves judged by a jury significantly less diverse than the composition of the jurisdiction from which the jurors are called. While no defendant has a right to a jury composed exclusively, or even partially, of members of his or her own race, both potential jurors and defendants have the right to insist that race be no part of the qualification or selection process. The Supreme Court has reinforced numerous times that racial discrimination in jury selection is a problem that harms not only the accused and the excluded jurors, but society as a whole.[210]

No judicial actor is permitted to make race any part of the jury selection decision. When peremptory challenges are an issue, litigants must continue to use the *Batson* framework established by the Supreme Court twenty years ago in order to effectuate these interests. States must develop standards that are in compliance with *Batson* and of course can offer more

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[208] Batson v. Kentucky, 476 U.S. 79, 95 (1986) (citing Alexander v. Louisiana, 405 U.S. 625, 630 (1972)).

[209] *See, e.g.*, *Alexander*, 405 U.S. at 627–28 (noting that the grand jury venire was called from numerous lists but finding prima facie case of discrimination upon close scrutiny).

[210] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 406–07 (1991).

protection that the Constitution mandates, but not less.[211] However, affirmative steps to reduce the disparity may be unconstitutional if they involve any consideration of race, such as elimination of jurors based on non-minority status.[212] Moreover, the Supreme Court has revisited and reaffirmed many of its past decisions in this area and modeled the careful review it directs lower courts to make, first when considering venire cases and *Batson*'s step three and then when reviewing venire and *Batson* claims on appeal. A vocal minority's solution is to eliminate the peremptory strike altogether; however, the Court has consistently declined to follow that suggestion.[213]

Although the Supreme Court cases discussed in this Comment are diverse, they send a unified message to all actors in the judicial process: race simply may play no part in the selection of a particular juror. As a result, the reviewing court has an affirmative obligation to make an individualized review of the facts and circumstances of each charge of discrimination, be it in the assembly of the grand or petit venire or in the use of peremptory strikes. The Supreme Court has frequently looked to demographics and statistics in finding prima facie cases of discrimination; however, it is clear that statistics alone do not necessarily prove discrimination, and courts are to make case-by-case inquiries into the circumstances resulting in disproportionate juries, with statistics being only one of many factors.[214] Clearly, there are no easy answers. Fortunately, however, the Supreme Court continues to make this problem a priority and has issued numerous decisions to guide lower courts.[215] The Supreme Court decisions indicate that a similar facts and circumstances, detailed review should be undertaken to review claims of racial discrimination in two distinct but related situations: grand and petit jury venires and use of peremptory strikes during voir dire.

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[211] *See Johnson*, 545 U.S. 168–69.

[212] *Ovalle*, 136 F.3d at 1106–07.

[213] Miller-El v. Dretke, 545 U.S. 231, 267 (2005) (Breyer, J., concurring); *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring); *see also* Gibeaut, *supra* note 48, at 16–17 (commenting on the recent Court decisions that have refused to eliminate peremptory strikes completely).

[214] *Miller-El*, 545 U.S. at 239–69; *Alexander*, 405 U.S. at 630 (noting that "a factual inquiry is necessary in each case that takes into account all possible explanatory factors").

[215] *See, e.g.*, *Johnson*, 545 U.S. at 173; *Miller-El*, 545 U.S. at 267.