Attachment C

The Evolution of Peremptory Challenges

1. Common Law through Swain v. Alabama, 380 U.S. 202 (1965)

Peremptory challenges took root in England during the thirteenth century, when the Crown had unlimited discretion to challenge jurors and, in response, "courts began to permit defendants to exercise some peremptories in capital cases." Hon. Morris B. Hoffman, Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective, 64 U. Chi. L. Rev. 809, 819 (1997). "Unlike the United States, England never extended peremptory challenges to civil trials." April J. Anderson, Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies As Seen in Practitioners' Trial Manuals, 16 Stan. J. C.R. & C.L. 1, 16 (2020).

> By 1300, just thirty to eighty years after prosecutorial peremptory challenges first sprouted in England, it was settled as a matter of common law that in all capital cases the Crown had an unlimited number of peremptory challenges and the defendant had thirty-five. Although most felonies in this period were punishable by death, there is also some indication that peremptory challenges may have been permitted in the rare non-capital felony case as well.
>
> [Hoffman, 64 U. Chi. L. Rev. at 819-20 (footnotes omitted).]

The turn of the fourteenth century marked the high point of peremptory challenges in England:

> From 1305 forward, the number of peremptory challenges allowed in English criminal trials steadily decreased. A defendant's peremptories were reduced from thirty-five to twenty in 1530, to seven in 1948, to three in 1977, and were eliminated entirely in 1989. Although the Crown's right to ask jurors to stand aside remained theoretically available until 1989, it is clear

> that the standing aside procedure was just as rare, and perhaps rarer, than the defendant's exercise of peremptory challenges.
>
> [Id. at 822 (footnotes omitted).]

And several other countries have likewise abolished peremptory challenges: "In England and Wales, the right to 'challenge without cause shown,' known as peremptory challenge, was abolished completely in 1988, in Scotland in 1995 and in 2007 in Northern Ireland." Fiona Gartland, Bringing the Dark Art of Jury Selection into the Open, The Irish Times (Oct. 14, 2013), https://www.irishtimes.com/news/crime-and-law/bringing-dark-art-of-jury-selection-into-the-open-1.1557902. Canada abolished peremptories two years ago. See Hassan Kanu, Arizona Breaks New Ground in Nixing Peremptory Challenges, Reuters (Sept. 1, 2021), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/ ("England abolished peremptory strikes in 1988, and Canada did so in 2019, for example, without any chaos in the courts[.]").

"Peremptory challenges have fared much better in this country than in England." Hoffman, 64 U. Chi. L. Rev. at 823. Most colonies granted criminal defendants some peremptory challenges, though not all provided for prosecutorial peremptories. See ibid. And although the Framers created "no constitutional right to peremptory challenges," "Congress quite early on codified portions of the English practice regarding peremptory challenges." See id. at 823-25.

"In 1790, [Congress] directed that a federal criminal defendant would be given thirty-five peremptories in treason cases and twenty in all other capital cases." Id. at 825.

> In 1865, . . . Congress specified that in all non-capital felony cases the defendant would have ten peremptory challenges and the prosecution two. In this same statute Congress decreased the number of defense peremptories in capital cases from thirty-five to twenty, and granted the prosecution five. In 1872, the number of prosecution challenges in non-treason, non-capital felony cases was increased from two to three. In the same statute, Congress for the first time extended the

> notion of peremptory challenges to federal civil cases (three for each side) and to federal misdemeanor cases (three for each side). In 1911, the numbers were again revised: twenty for the defendant and six for the prosecution in treason and other capital cases; ten for the defendant and six for the prosecution in other felony cases; three each in misdemeanor and civil cases. When the Federal Rules of Criminal Procedure were adopted in 1946, Rule 24(b) increased the prosecution's peremptories in capital cases to equal the defendant's at twenty. This is the current federal scheme.
>
> [Id. at 826 (footnotes omitted).]

Judge Hoffman explains that "[t]he evolution of the peremptory challenge in the various states has generally paralleled federal developments," with every state -- now, every state other than Arizona -- "recogniz[ing] some form of peremptory challenges for both sides in criminal and civil cases." See id. at 827.

With respect to the vitality of peremptories in the United States, in comparison with England, Judge Hoffman notes that,

> [l]ike so many things in the United States, the marked difference between the American peremptory challenge and the English peremptory challenge can be traced to the agonies of slavery, civil war, and Reconstruction. While the English version of the peremptory challenge was withering from disuse, the American version was vigorously and comprehensively being applied in attempts to stem the inevitable tide of civil rights.
>
> [Ibid.]

April J. Anderson likewise observes that

> [t]he most important reason for the transatlantic divergence, . . . and the one most clearly captured in trial practice guides, is a nature of American venires. . . . American society was heterogeneous, and a greater

> cross-section of citizens qualified for jury service in American jurisdictions. Because of this, venire panels were more mixed, and perceived differences among jurors drove challenge strategies.
>
> [Anderson, 16 Stan. J. C.R. & C.L. at 24.]

Judge Hoffman explains how peremptories came to be used to minimize jury diversity:

> Despite the presence of comprehensive patent and latent exclusion mechanisms (not to mention widespread physical intimidation) some southern blacks trickled through the system and ended up as prospective jurors. Indeed, as early as 1870, integrated venires -- that is, panels of prospective jurors with at least one black person in them -- were not uncommon in several southern states. Prosecutors were then forced to turn to the peremptory challenge to eliminate the new black faces appearing for jury duty.
>
> From Reconstruction through the civil rights movement, the peremptory challenge was an incredibly efficient final racial filter. When Mr. Swain, of Swain v. Alabama fame, [380 U.S. 202 (1965),] was convicted by his all-white Talladega County jury in the early 1960s, no black person had sat on any Talladega County trial jury, civil or criminal, in living memory. No black person sat on any criminal jury in Talladega County, trial jury or grand jury, for the thirteen years immediately preceding Swain. In 1963, the Alabama Supreme Court itself summed up with chilling simplicity the Jim Crow effectiveness of the peremptory challenge: "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury." [Swain v State, 156 S.2d 368, 375 (Ala. 1963), aff'd, 380 U.S. 202 (1965).] The systematic exclusion of black jurors was not limited to the Deep South. For example, as late as 1880, no black person had ever served as a juror in Delaware.

> It was against this backdrop of comprehensive and unabashed racial exclusion that the Supreme Court began its attempts to defang the peremptory challenge as a tool of racial segregation.
>
> [Hoffman, 64 U. Chi. L. Rev. at 829-30.]

In the late nineteenth century, the United States Supreme Court struck down as violative of equal protection principles a West Virginia statute that prohibited black people from serving on juries. See Strauder v. West Virginia, 100 U.S. 303, 312 (1879), abrogated by Taylor v. Louisiana, 419 U.S. 522, (1975), as to dicta concerning the permissibility of excluding women from jury service).] The Court wrote that

> [I]t is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offence against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?
>
> [Id. at 309.]

Yet, despite that stark repudiation of exclusionary **juror qualification rules**, the Court upheld the exclusion of all black jurors **through peremptory challenges** nearly a century later -- in Swain.

> When the Court described the peremptory challenge in Swain it waxed eloquent on the peremptory's "very old credentials" and described it as "one of the most important of the rights secured to the accused" and "a necessary part of trial by jury." The Court was reluctant to take any steps that would hamper a party's free exercise of its peremptory challenges. Although the Court was disturbed that prosecutors might be using the peremptory to strike African-Americans from petit juries in case after case, and suggested that if this were true "it would appear that the purposes of the peremptory challenge are being perverted," it chose to believe that prosecutors were not acting in this manner.
>
> [Nancy S. Marder, Justice Stevens, the Peremptory Challenge, and the Jury, 74 Fordham L. Rev. 1683, 1692 (2006).]

In a later decision, the Court described its holding in Swain as follows:

> Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. The record in Swain showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges.
>
> The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race. While the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased

jury. To preserve the peremptory nature of the prosecutor's challenge, the Court in Swain declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "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." Evidence offered by the defendant in Swain did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case.

A number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of Swain has placed on defendants a crippling burden of proof, prosecutors'

> peremptory challenges are now largely immune from constitutional scrutiny.
>
> [Batson, 476 U.S. at 90-93 (citations, all to Swain, omitted).]

Twenty years later, the Court revisited the "crippling burden of proof" established in Swain. The Batson Court aimed to curtail the discriminatory exercise of peremptory challenges to exclude qualified jurors from service.

2. Batson v. Kentucky, 476 U.S. 79 (1986), Rejects Swain

The Batson Court described the case before it in this way:

> Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted voir dire examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges. The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to "strike anybody they want to." The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

> The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. . . .
>
> The Supreme Court of Kentucky affirmed. . . . The court observed that it recently had reaffirmed its reliance on Swain, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.
>
> [Id. at 82-84.]

The Court reversed the Supreme Court of Kentucky's decision, holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their 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." Id. at 84, 89. "[R]ejecting [the] evidentiary formulation [established in Swain] as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause," id. at 93, the Court remanded the matter for reconsideration under the new, three-part standard adopted in Batson, see id. at 100.

That standard -- which gave its name to the Batson challenge -- is as follows:

> **[FIRST STEP:]** [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a 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. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those

to discriminate who are of a mind to discriminate." Finally, the 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. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

[SECOND STEP:] Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to

> serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." [(alterations in original).] If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. **[THIRD STEP:]** The trial court then will have the duty to determine if the defendant has established purposeful discrimination.
>
> [Id. at 96-98 (citations omitted).]

The majority opinion in Batson acknowledged that peremptory challenges had the capacity to be -- and had been -- used for discriminatory purposes, but it expressed optimism that the new standard for challenging peremptory strikes would result in a more equitable system of justice:

> The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.
>
> [Id. at 99.]

Yet even as Batson was decided, it was called into question. Justice Powell's opinion for the Court was accompanied by four concurring opinions and two dissents. The dissents by Chief Justice Burger and Justice Rehnquist challenged as unsupported the Court's (1) departure from Swain and (2) undermining of the time-honored tradition of peremptory challenges.

Justice Stevens, joined by Justice Brennan, concurred to explain why joining Batson was not inconsistent with a vote in another matter. Justice O'Connor concurred to express the view that Batson's holding should not apply retroactively. Justice White explained why it was appropriate to overturn Swain and also opined that the holding should not apply retroactively.

Justice White joined the Court's decision in full but predicted, accurately, that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid." Id. at 102 (White, J., concurring). Some of the key cases in which the Court has explained -- or adjusted -- the contours of the Batson framework include:

- Hernandez v. New York, 500 U.S. 352 (1991), in which the Court found that the asserted race-neutral reason for the striking of all prospective Latinx jurors -- difficulty following the interpreter -- passed constitutional muster in that case but nevertheless stressed that "a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination."

- Powers v. Ohio, 499 U.S. 400 (1991), in which the Court held that defendants have standing to challenge the exclusion of jurors -- and that they do not need to be of the same race as excluded jurors to challenge the exclusion of those jurors.

- Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), in which the Court extended Batson to civil jury trials.

- Georgia v. McCollum, 505 U.S. 42 (1992), in which the Court held that defendants' peremptory strikes are also subject to challenge under Batson.

- J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), in which the Court extended Batson to strikes based on gender.

- Purkett v. Elem, 514 U.S. 765 (1995), in which the Court distinguished between the scrutiny a court should apply to asserted race-neutral reasons for a strike in steps two and three of a Batson challenge, explaining that "[t]he second step of [the Batson] process does not demand an explanation that is persuasive, or even plausible," but that at the third "stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." The Court opined that

> to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

Applying that reasoning, the Purkett Court concluded that "[t]he prosecutor's proffered explanation in this case -- that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard -- is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike."

Justice Stevens dissented in Purkett:

> In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the Batson rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is

> a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in Batson.

- Miller-El v. Cockrell, 537 U.S. 322 (2003), in which the Court stressed that the third-stage review of a Batson challenge requires a searching analysis. The Court found in that case that the district court, on habeas review, "did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial." In the Court's view,

  > the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

  And the Court cited evidence beyond those statistics that should have been considered at the third stage, namely the fact that three of the State's asserted race-neutral explanations applied equally to some white jurors who were not challenged; the prosecutor's selective use of Texas's "jury shuffle" procedure, whereby the order in which prospective jurors are questioned in voir dire can be changed; and the history of racial discrimination by the relevant prosecutor's office.

- Johnson v. California, 545 U.S. 162 (2005), in which the Court held that "an appropriate yardstick" for determining whether a party challenging a peremptory strike had satisfied the first step of the Batson framework was that "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias."

- Flowers v. Mississippi, 139 S. Ct. 2228 (2019), in which the Court explained that "Batson's holding raised several important evidentiary and procedural issues" and underscored three of those issues:

> First, what factors does the trial judge consider in evaluating whether racial discrimination occurred? Our precedents allow criminal defendants raising Batson challenges to present a variety of evidence to support a claim that a prosecutor's peremptory strikes were made on the basis of race. For example, defendants may present:
>
> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the Batson hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.
>
> Second, who enforces Batson? As the Batson Court itself recognized, the job of enforcing Batson rests first and foremost with trial judges. America's trial judges operate at the front lines of American justice. In criminal trials, trial judges possess the primary responsibility to enforce Batson and prevent

racial discrimination from seeping into the jury selection process.

As the Batson Court explained and as the Court later reiterated, once a prima facie case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of the prosecutor's credibility is often important. The Court has explained that "the best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge." "We have recognized that these determinations of credibility and demeanor lie peculiarly within a trial judge's province." The trial judge must determine whether the prosecutor's proffered reasons are the actual reasons, or whether the proffered reasons are pretextual and the prosecutor instead exercised peremptory strikes on the basis of race. The ultimate inquiry is whether the State was "motivated in substantial part by discriminatory intent."

Third, what is the role of appellate review? An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." The Court has described the appellate standard of review of the trial court's factual determinations in a Batson hearing as "highly deferential." "On appeal, a trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous."

[(emphases in original; citations omitted.)]

After setting forth both the types of evidence that may be presented in Batson challenges and the respective principles that should guide trial- and appellate-court review of Batson challenges, the Flowers Court reversed the Mississippi Supreme Court's affirmance of the trial court's rejection of the defendant's Batson challenge, explaining that

> the State's pattern of striking black prospective jurors persisted from Flowers' first trial through Flowers' sixth trial. In the six trials combined, the State struck 41 of the 42 black prospective jurors it could have struck. At the sixth trial, the State struck five of six. At the sixth trial, moreover, the State engaged in dramatically disparate questioning of black and white prospective jurors. And it engaged in disparate treatment of black and white prospective jurors, in particular by striking black prospective juror Carolyn Wright.
>
> To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case.

Although the Flowers Court thus stressed its fidelity to Batson, the cases discussed above reveal that, as predicted in Justice White's concurrence, the Batson test has required substantial clarification and boundary-setting over the years.

Justice Marshall, who also filed a concurring opinion in Batson, likewise penned a prediction: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process." 476 U.S. at 102-03 (Marshall, J., concurring).

In his concurrence, Justice Marshall "applaud[s] the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause" but expresses the view that "only by banning peremptories entirely can such discrimination be ended." Id. at 108.

Justice Marshall explains that, after the Court invalidated a statute that prohibited black citizens from serving as jurors in Strauder v. West Virginia, 100 U.S. 303 (1880), "[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires" and that "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant." Id. at 103. Justice Marshall observes, "Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive." Id. at 103-04 (collecting cases). And, Justice Marshall writes, the "[e]xclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the 'intelligence, experience, or moral integrity' to be entrusted with that role." Id. at 104-05 (citation omitted).

Although "wholeheartedly concur[ring] in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause," Justice Marshall "would go further . . . in fashioning a remedy adequate to eliminate that discrimination." Id. at 105.

Justice Marshall observes that experiences in Massachusetts and California, which already employed, under state law, an "[e]videntiary analysis similar to that set out by the Court," have shown that "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." Ibid. Justice Marshall explains that requiring a defendant to establish a prima facie case "means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race" -- "[p]rosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level." Ibid.

Second, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." Id. at 105-06. In Justice Marshall's view, "[i]f such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory." Id. at 106.

And Justice Marshall notes that prosecutors and judges may act based on "conscious or unconscious racism" manifested in the form of "seat-of-the-pants" instincts." Ibid. Justice Marshall expresses skepticism that "[e]ven if all parties approach the Court's mandate with the best of conscious intentions," they will be able to meet the challenge of "confront[ing] and overcom[ing] their own racism on all levels." Ibid.

Justice Marshall posits that peremptories should be banned entirely, rejecting proposals that defendants should be able to retain their peremptories on the ground that "[o]ur criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" Ibid. (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)). Despite the fact that "[m]uch ink has been spilled regarding the historic importance of defendants' peremptory challenges," Justice Marshall reasons that "[t]he potential for racial prejudice . . . inheres in the defendant's challenge as well" and concludes that, "[i]f the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." Id. at 108.

* * * * *

The next attachment -- Attachment D -- provides a bibliography of judicial opinions and empirical and legal analyses. Those works reveal that Justice Marshall's concern about Batson's inability to eliminate the discriminatory exercise of peremptory challenges was well-founded. Although there is great dispute as to why that is true and what should be done about it, there is widespread consensus that it is, indeed, true.

Before turning to those works, however, it is appropriate to consider Batson's New Jersey contemporary: State v. Gilmore.

3. State v. Gilmore

Just as Batson rejected the approach set forth in Swain, so Gilmore rejected both Swain and State v. Smith, in which the Supreme Court of New Jersey cited Swain in holding against a black defendant's challenge to the prosecutor's exclusion of black jurors through peremptory strikes. See 55 N.J. 476, 483-84 (1970). The Smith Court wrote:

> We find no merit in the defendant's fifth point which asserts that the prosecutor's use of peremptory challenges to exclude Negroes (the defendant was a Negro) from the petit jury violated his constitutional rights. The prosecutor and defense counsel each had ten peremptory challenges to use generally as they pleased. They were not called upon to express any reasons and both of them exercised their peremptory challenges freely and without any indications whatever as to their reasons. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." The defendant sets forth, as a fact, that only three Negroes were called on the Voir dire and that the prosecutor exercised peremptory challenges with respect to all three. But that fact without more does not establish any practice of systematic exclusion of Negroes, nor does it establish, as the defendant contends, that the three prospective jurors were excused "solely because of their race"; indeed our examination of the Voir dire suggests that in at least one of the three instances there was an obvious affirmative reason, wholly unrelated to race, for the prosecutor's exercise of his peremptory challenge.
>
> [Ibid. (quoting Swain).]

Gilmore overturned that line of analysis, replacing it with a three-part inquiry that, like the Batson framework, reaches the reasons for the exercise of a peremptory strike. There were three notable decisions in State v. Gilmore, the first two of which preceded Batson.

In Gilmore I, 195 N.J. Super. 163, 163 (App. Div. 1984), the Appellate Division considered "whether the defendant's Federal and State Constitutional rights to a trial by an impartial jury were violated by the prosecutor's use of peremptory challenges to exclude all prospective black jurors apparently on the basis of race." Noting that "[t]he trial judge relied heavily on [Swain] in rejecting defendant's constitutional argument," the court declared itself "persuaded that New Jersey courts should become 'laboratories' to reexamine the use of peremptory challenges to exclude blacks, or other cognizable groups, from serving on petit juries solely because of their group association." Id. at 165 (quoting McCray v. New York, 461 U.S. 961, 963 (1983)). The court remanded the matter, directing the trial court "to conduct a hearing to establish the identity of the black prospective jurors and to afford the assistant prosecutor an opportunity to establish his motive or reasons for excusing each of the seven prospective black jurors." Id. at 166.

In Gilmore II, 199 N.J. Super. 389, 405-06 (App. Div. 1985), aff'd, 103 N.J. 508 (1986), the Appellate Division considered the case again after the record was developed on remand; the court relied on the State Constitution to determine whether the prosecutor's exercise of peremptory challenges had violated the defendant's constitutional rights.

The court explained that

> Article I of the New Jersey Constitution, paragraph 5 provides "[n]o person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right . . . because of . . . race, color, ancestry or national origin." Paragraph 9 provides "[t]he right of trial by jury shall remain inviolate; . . . ." Finally, paragraph 10 provides "[i]n all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; . . ." Read together, these paragraphs of Article I guarantee that a defendant in a criminal case is entitled to a jury trial by a fair and impartial jury without discrimination on the basis of race, color, ancestry or national origin.
>
> [Id. at 397-98.]

From that state constitutional guarantee, the court derived a "procedure to be followed where an unconstitutional use of peremptory challenges is alleged[,] . . . plac[ing] substantial reliance upon the trial judges for enforcement." Id. at 407.

Applying the standard it adopted to the reasons asserted for the peremptory strikes in Gilmore's case, the Appellate Division found that

> [t]he assistant prosecutor's admission that he excluded Blacks because he assumed they were predominately Baptist and would tend to favor the defense is a clear illustration of group bias. He further admitted that [black] women's maternal instincts would make them favor the defendant. This too was an indication of group bias . . . . Not only did he exclude a disproportionate number of Blacks, but he excluded all of them. Hence, we are satisfied that a prima facie case of improper exercise of peremptory challenges was established under today's guidelines by defense counsel at the time he made the motion for a mistrial. The presumption of proper use of the peremptory challenges now gives way and the burden shifts to the assistant prosecutor to justify the use of his seven peremptory challenges on nonracial grounds.
>
> Relying on the evidence produced at the remand hearing, the State argues that Rodgers, a laboratory technician, lived in Hillside which is near Newark. It argues that this prospective juror was excused because he might be influenced by the testimony of defendant's father who is a Baptist minister. Boykin was excused because he was related to a person who had been convicted of a crime and because he might know a potential defense witness, defendant's girlfriend. Overby, a truck driver who also resided in Hillside, was excused because he was a truck driver -- not the professional or intellectual type -- as well because he lived close to Newark and might be influenced by the testimony of defendant's father. . . . The State had urged that Rawlins would not look at the assistant

prosecutor or if he did, he looked at him with a "mean face."

Dedon, a housewife, was excused because of her perceived maternal instincts for believing the alibi evidence. Another female, Margaret Daniels, was also excused because of her maternal instincts and her employment as a clerk typist. Interestingly, the assistant prosecutor permitted three white housewives, Jane Hoffman, Alsa Musta and Gloria Dultz, to remain on the jury. Also, two white female secretaries, Ellen Bergland and Loretta Rake, were not excused by the prosecutor. They, presumably, had the same "maternal instincts" and were not the "professional or intellectual type."

Bailey, a window washer from Plainfield, was excused because the State wanted a more professional type juror and the assistant prosecutor thought he knew a mutual friend. Finally, Bryant, a Plainfield resident employed by the State of New York as a therapist, was excused because he was the "counsellor-type" person who tends to sympathize with defendants.

The assistant prosecutor was undoubtedly aware that the State had a substantial case. In these circumstances, we find the assistant prosecutor's explanation that only the intellectual type was suitable for jury duty lacks genuineness. We perceive no reasonable relevancy between the issues to be resolved by the jury and the high intellectual achievement of jurors. Moreover, the record does not suggest that the assistant prosecutor insisted on intellectual achievement from white jurors. The real issue in each of the robberies was essentially one of identification of defendant as the perpetrator; that was not a very complicated issue.

Also, all black males and females were eliminated regardless of education, occupation, place of residence, or social or economic conditions.

> Additionally, no real attempts were made to bring out on voir dire whether the Blacks harbored any specific bias. The assistant prosecutor never endeavored to find out whether Boykin really knew defendant's girlfriend. Even though possible bias may have been established as to Boykin, we are convinced from our review of the record made on the remand that the assistant prosecutor has failed to demonstrate that he did not use his peremptory challenges to exclude the remaining six Blacks from the jury based solely on their group membership rather than individual bias. . . .
>
> Hence, we are persuaded that the assistant prosecutor's reasons or explanations were "sham excuses belatedly contrived to avoid admitting acts of group discrimination against all the black prospective jurors." We hold that defendant sustained his burden of proving that the State used its peremptory challenges to engage in invidious racial discrimination in violation of N.J. Const. (1947), ¶ 5, ¶ 9 and ¶ 10. While we do not rest our decision on a violation of the Sixth Amendment to the federal constitution, we have no doubt that the assistant prosecutor's conduct also deprived defendant of an impartial jury trial under the Sixth Amendment . . . .
>
> [Id. at 410-13 (citations omitted; some alterations in original).]

In The Evolution of Race in the Jury Selection Process, 48 Rutgers L. Rev. 1105, 1108 (1996), Justice James H. Coleman, Jr., stressed the groundbreaking nature of Gilmore, decided in 1985, given that the Supreme Court of New Jersey had, as late as 1970 -- and the Appellate Division as late as 1973 -- "found that a prosecutor's use of peremptory challenges to excuse all prospective African-American jurors did not" run afoul of the Fourteenth Amendment, in keeping with Swain.

Noting that Swain had "essentially closed the federal courthouse door to claims of invidious racial discrimination in the exercise of peremptory challenges absent a showing that was all but impossible to satisfy," id. at 1120,

Justice Coleman explains that, in the 80s, states began looking to the protections afforded in their state constitutions, id. at 1120-29.

Justice Coleman shares that he volunteered to write Gilmore as an Appellate Division judge but initially found reliance on a state constitution rather than federal law difficult to accept, "[h]aving grown up in the Old South, where reliance on state autonomy as a major source of individual rights permitted the separate but unequal doctrine to be established and perpetuated, and where all-white juries had become a way of life." Id. at 1107. Ultimately, Gilmore held that the New Jersey Constitution offered protection against discrimination through peremptory challenges.

Justice Coleman emphasizes that, even though Batson issued while the petition for certification in Gilmore II was pending, the New Jersey Supreme Court nevertheless relied on the State Constitution in affirming Gilmore II. Id. at 1129. "Together, Gilmore and Batson represent a constitutional revolution that transformed the jury selection system." Ibid.

In Gilmore III, 103 N.J. 508, 545 (1986), the Court summarized as follows the test for challenges to peremptory strikes:

> We begin with the rebuttable presumption that the prosecution has exercised its peremptory challenges on grounds permissible under Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution.
>
> . . . .
>
> This presumption may be rebutted . . . upon a defendant's prima facie showing that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds. To make out such a case, the defendant initially must establish that the potential jurors wholly or disproportionally excluded were members of a cognizable group within the meaning of the representative cross-section rule. The defendant then must show that there is a substantial likelihood that the peremptory challenges resulting in the exclusion were based on assumptions about group

> bias rather than any indication of situation-specific bias.
>
> . . . .
>
> If the trial court finds that the defendant has established a prima facie case, this in effect gives rise to a presumption of unconstitutional action that it is the burden of the prosecution to rebut. . . . To carry this burden, the State must articulate "clear and reasonably specific" explanations of its "legitimate reasons" for exercising each of the peremptory challenges. . . .
>
> . . . .
>
> In deciding whether the prosecutor has rebutted the inference, the trial court must be sensitive to the possibility that "hunches," "gut reactions," and "seat of the pants instincts" may be colloquial euphemisms for the very prejudice that constitutes impermissible presumed group bias or invidious discrimination.
>
> In the final analysis, the trial court must judge the defendant's prima facie case against the prosecution's rebuttal to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias.
>
> [Id. at 534-39 (footnotes and citations omitted).]

In adopting that standard, the Court

> [made] no claim that the framework that this opinion sets forth will ferret out, let alone cure, all possible abuses of peremptory challenges. Eliciting a prosecutor's grounds for exercising such challenges will be awkward and difficult. We offer our trial judges no bright-line for distinguishing between permissible grounds of situation-specific bias and impermissible

> reasons evincing presumed group bias, nor should they want one. Here as in other contexts we ultimately must depend on the judge's sense of fairness and impartial judgment. Although our decision thus is no panacea, it nevertheless is an important step toward insuring that in all criminal prosecutions in New Jersey, the defendant will be afforded his or her right to trial by an impartial jury drawn from a representative cross-section of the community, without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex.
>
> [Id. at 545.]

Twenty-three years after Gilmore III, the Court softened the first step of that Gilmore-Batson test from requiring a "substantial likelihood" of discrimination to requiring "evidence sufficient to draw an inference that discrimination has occurred," in keeping with a shift in federal law. State v. Osorio, 199 N.J. 486, 502 (2009) (quoting Johnson v. California, 545 U.S. 162, 170 (2005)).

And Andujar further clarified the test, holding that it applies in equal force to all peremptories challenged on the basis of bias -- whether explicit or implicit -- reflecting that "our understanding of bias and discrimination has evolved considerably" over time. 247 N.J. at 285.