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CONSTITUTIONAL LAW—JURY SELECTION—RESTRICTIONS ON PEREMPTORY CHALLENGE EXTENDED TO CIVIL CASES. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989).

While attempting to take a suspected narcotics trafficker into custody, a white Richmond County, Georgia, deputy sheriff, Frank Tiller, shot Willie Albert Fludd, who is black. Fludd sued Tiller and Richmond County Sheriff J.B. Dykes in federal district court,¹ alleging the shooting was an unreasonable seizure and a denial of substantive due process.

A six-person jury chosen from a venire of fifteen persons tried the case. The venire was divided into two groups: a group of twelve from which the petit jury would be chosen; and a group of three from which the one alternate juror position would be filled. Each party could exercise three peremptory challenges to the twelve venire members proposed for the six-person petit jury. The court allowed each party one peremptory challenge to the three members proposed for the alternate juror position. Defendants' counsel used two of his peremptory challenges to exclude blacks from the jury.

Citing *Batson v. Kentucky*,² Fludd asked the trial court to require the defendants' attorney to explain why he struck the two blacks from the venire. The trial judge denied Fludd's request, holding that *Batson* was "limited to criminal cases."³ To preserve the issue for appeal, Fludd moved to discharge the panel and begin the jury selection process anew. The trial court denied Fludd's motion. At the close of evidence, the trial court directed a verdict in favor of Sheriff Dykes. The jury returned a verdict in favor of Deputy Sheriff Tiller.

1. The suit was brought under 42 U.S.C. § 1983 (1982) which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 476 U.S. 79, 89 (1986) (limiting prosecutor's use of peremptory challenges in criminal cases when the challenge is used to strike 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").

3. 863 F.2d 822, 824 (11th Cir. 1989).

Fludd appealed to the United States Court of Appeals for the Eleventh Circuit, contending that the defendants' use of peremptory challenges to strike blacks from the jury denied him equal protection of the laws guaranteed by the due process clause of the fifth amendment to the Constitution.⁴ The Eleventh Circuit held that *Batson* applies in civil as well as criminal cases. Therefore, Fludd should have the opportunity to demonstrate a prima facie case of the racially discriminatory use of peremptory challenges. The court remanded the case as to defendant Tiller⁵ for a determination of whether the defendants purposefully discriminated against Fludd by striking members of his race from the venire. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989).

The first stage of any jury trial in the United States is that of jury selection. The jury selection process generally consists of three phases: the preparation of the jury list;⁶ selection of the venire;⁷ and the voir dire⁸ process which allows both challenges for cause⁹ and peremptory challenges.¹⁰

The peremptory challenge originated in the common law of Eng-

4. *Id.* The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. Although the fifth amendment makes no express provision regarding equal protection, the *Fludd* court noted that "[t]he right to the equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment, which contains no equal protection clause." *Fludd*, 863 F.2d at 824 n.3 (citing *Johnson v. Robison*, 415 U.S. 361, 364 n.4 (1974)).

5. The court, without extensive discussion, affirmed the district court's directed verdict in favor of Sheriff Dykes. 863 F.2d at 823 n.1.

6. See generally 47 AM. JUR. 2D *Jury* § 141 (1969).

7. The venire is "[t]he list of jurors summoned to serve as jurors for a particular term." BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

8. "The voir dire stage of the trial is intended to permit questioning of prospective jurors as a predicate for the exercise of challenges. The purpose is to select a fair and impartial jury." V.H. STARR & M. MCCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* § 2.1.10, at 39 (1985) (footnote omitted) [hereinafter STARR].

9. A challenge for cause in general is a challenge to an individual prospective juror in which a reason is advanced for the person's alleged disqualification. All challenges for cause must be predicated on an express reason as to why the court should not permit the person to sit on the jury. The object, of course, is to arrive at a fair and impartial jury.

Id. § 2.1.11, at 43 (footnotes omitted).

10. The peremptory challenge is "[t]he right to challenge a juror without assigning a reason for the challenge." BLACK'S LAW DICTIONARY 1023 (5th ed. 1979). In contrast to the challenge for cause, counsel may use the peremptory challenge to "strike the permitted number of jurors simply because of disliking their looks or because a challenged juror indicated some disfavor toward counsel's cause, or simply on a hunch that those jurors challenged peremptorily would not make good jurors for counsel's side." JORDAN, *JURY SELECTION* § 4.09, at 55 (1980).

land.¹¹ Its purpose was to "eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."¹² The peremptory challenge also serves a number of subsidiary functions.¹³ For example, peremptory challenges allow the litigant, through counsel, to participate in the selection of an impartial jury by peremptorily striking the veniremen the litigant does not like.¹⁴ Furthermore, peremptory challenges can be exercised against individuals that counsel feels "fit common stereotypes."¹⁵

The courts in this country initially recognized the common law right to peremptory challenges in *United States v. Johns*.¹⁶ Congress first made statutory provision for the peremptory challenge in criminal cases in 1865,¹⁷ and extended peremptory challenges to civil cases in 1872.¹⁸

In the modern federal system, the number of peremptory challenges allowed in a criminal case is governed by the Federal Rules of Criminal Procedure and varies according to the possible punishment for the offense.¹⁹ In a federal civil case, statutes²⁰ allow each party

11. Blackstone notes that:

[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *346. For an excellent detailed discussion of the history of the peremptory challenge, see *Swain v. Alabama*, 380 U.S. 202, 212-21 (1965).

12. *Swain*, 380 U.S. at 219.

13. STARR, *supra* note 8, § 10.4.3, at 314-15.

14. *Id.*

15. *Id.*

16. 4 U.S. (4 Dall.) 412 (Cir. Ct. Pa. 1806).

17. Act of March 3, 1865, ch. 86, § 2, 13 Stat. 500. The statute entitled the defendant to twenty peremptory challenges and the prosecutor five in capital cases. In all other cases, the defendant could exercise ten peremptory challenges, the prosecutor two.

18. See Act of June 8, 1872, ch. 333, § 2, 17 Stat. 282 ("[I]n all other cases, civil and criminal, each party shall be entitled to three peremptory challenges . . .").

19. FED. R. CRIM. P. 24(b) provides:

If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

20. 28 U.S.C. § 1870 (1982). If the court impanels alternate jurors, each party is entitled

three peremptory challenges, although the court has wide discretion in limiting or expanding that number.²¹ All states provide for a similar challenge mechanism.²²

The United States Supreme Court recognized long ago that granting peremptory challenges is not constitutionally mandated.²³ However, once peremptory challenges become a part of the judicial machinery, the procedures governing their use must comport with the Constitution.²⁴ In the context of discriminatorily motivated peremptory challenges, the focus is upon the equal protection clause.²⁵

Cases involving denial of equal protection through some phase of the jury selection process date back to 1880 and the United States Supreme Court's decision in *Strauder v. West Virginia*.²⁶ The Court held that a state denied a criminal defendant equal protection when it purposefully excluded members of the defendant's race from the venire from which the defendant's petit jury was chosen.²⁷ A state statute provided that only white males were eligible to serve as jurors.²⁸ An all-white jury tried and convicted Strauder, who was black, of

to additional peremptory challenges. FED. R. CIV. P. 47(b). The parties can use these additional peremptory challenges only with respect to the alternate jurors. *Id.*

21. *E.g.*, Goldstein v. Kelleher, 728 F.2d 32, 37 (1st Cir.), *cert. denied*, 469 U.S. 852 (1984) (noting that "the trial court's discretion under the statute is considerable, [but] it is not unlimited").

22. "State statutes and rules vary, but all states allow peremptory challenges or provide a struck jury system in both civil and criminal cases. In most states, the number of challenges and procedures are analogous to those in the federal system." STARR, *supra* note 8, § 2.1.12, at 46 (footnotes omitted).

23. *Stilson v. United States*, 250 U.S. 583, 586 (1919) (nothing in the Constitution requires "Congress to grant peremptory challenges The number of challenges is left to be regulated by the common law or the enactments of Congress").

24. See generally S. Salizburg and M. Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982).

25. The application of the equal protection clause in the context of jury selection is the subject of much commentary. See Johnson, *Black Innocence and The White Jury*, 83 MICH. L. REV. 1611 (1985); Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673 (1983); Comment, *Batson v. Kentucky: Equal Protection, the Fair Cross-Section Requirement, and The Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755 (1988); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985); Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under The Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026 (1987); Note, *Batson v. Kentucky: The New and Improved Peremptory Challenge*, 38 HASTINGS L.J. 1195 (1987); Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811 (1988).

26. 100 U.S. 303 (1880).

27. *Id.* at 310.

28. *Id.* at 305.

murder.²⁹ The Supreme Court held the statute unconstitutional, stating that:

[i]t 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 [fourteenth] 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?³⁰

The Court's holding, precluding the purposeful exclusion of blacks from jury service,³¹ has been reaffirmed on several occasions.³²

Not until *Swain v. Alabama*,³³ decided eighty-five years after *Strauder*, did the Supreme Court address whether exclusion of blacks from the petit jury through the use of peremptory challenges violated the equal protection clause. Swain, a black man, was convicted of rape and sentenced to death by an all-white jury.³⁴ Although the venire included eight blacks, two were exempt and the prosecution exercised peremptory challenges to strike the other six.³⁵ The trial court rejected Swain's motion to declare the petit jury void.³⁶

Showing great deference to the peremptory challenge, the Supreme Court found merit in the state's argument that the peremp-

29. *Id.* at 304.

30. *Id.* at 309.

31. The *Strauder* Court stressed, however, that there was no guarantee for the criminal defendant of a right to a petit jury composed in whole or in part of persons of his own race. *Id.* at 305.

32. See *Neal v. Delaware*, 103 U.S. 370 (1881) (state's exclusion of blacks from jury service based upon the presumption that blacks were not qualified to sit on juries constituted denial of equal protection rights); *Norris v. Alabama*, 294 U.S. 587, 598-99 (1935) (Court rejected as "impossible" the state's contention that no black in the county was "generally reputed to be honest and intelligent"); *Patton v. Mississippi*, 332 U.S. 463 (1947) (the fact that no black had served on a grand or petit criminal court jury in the county for more than thirty years created a presumption of systematic exclusion); *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (process used to select the venire which included printing the names of white persons on white tickets and the names of black persons on yellow tickets made it "easier for those to discriminate who are of a mind to discriminate").

33. 380 U.S. 202 (1965).

34. *Id.* at 203.

35. *Id.* at 205.

36. *Id.* at 203.

tory challenge "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."³⁷ The Court maintained that subjecting peremptory challenges in a particular case to the strictures of the equal protection clause would eliminate a "great many uses of the challenge."³⁸ The Court recognized the "constitutional command forbidding intentional exclusion"³⁹ of racial groups from the jury system, but stated that such "purposeful discrimination may not be assumed or merely asserted."⁴⁰ The *Swain* Court held that purposeful discrimination could be inferred only through proof of a "systematic practice"⁴¹ of excluding blacks through the use of peremptory challenges over an extended period of time and in a great number of cases.⁴² Applying this newly-stated rule, the Court found that the defendant presented insufficient proof that prosecutors purposefully excluded blacks from petit juries peremptorily,⁴³ even though no black had served on a petit jury in the county since 1950.⁴⁴ A mere showing that blacks were excluded from petit juries over a period of time was insufficient to raise an inference of purposeful discrimination.⁴⁵

The *Swain* standard that required the showing of a prosecutor's systematic discriminatory use of peremptory challenges proved a virtually insurmountable burden for criminal defendants.⁴⁶ Most states

37. *Id.* at 212. The Court also said the peremptory challenge "provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants, or those with blue eyes." *Id.*

38. *Id.* at 222.

39. *Id.* at 205.

40. *Id.* The Court held that mere allegations that the prosecutor removed all black veniremen from the jury are insufficient to overcome the presumption that the prosecutor used the peremptory challenges for a legitimate purpose. *Id.* at 222. "Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it." *Id.*

41. *Id.* at 223.

42. *Id.*

43. *Id.* at 224. The record did not demonstrate that the prosecutor had been solely responsible for excluding blacks from juries.

44. *Id.* at 226.

45. *Id.* at 227. The Court distinguished the challenge phase from the process which results in the selection of the venire. The Court stressed that selection of venires is within the exclusive control of the state. *Id.* Because defense counsel participates in the challenge phase, however, the defendant must show that it was the prosecutor who actually excluded black jurors in a particular case or cases. "The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials." *Id.*

46. See, e.g., *Prejean v. Blackburn*, 743 F.2d 1091, 1104 (5th Cir. 1984) ("allegations of historic parish-wide discrimination cannot substitute for the necessity of a particularized showing that the prosecution has engaged in the systematic, invidious use of peremptory challenges"); *Scott v. State*, 479 So. 2d 1343, 1345 (Ala. Crim. App. 1985) (the presumption that the prosecutor uses his challenges to obtain a fair and impartial jury is not overcome by testi-

routinely disposed of defendants' attempts to establish violations under the *Swain* standard.⁴⁷ Some states, however, relying upon both federal and state constitutional provisions which guarantee the right of a fair jury trial in criminal cases,⁴⁸ imposed greater restrictions upon the discriminatory use of peremptory challenges than required by *Swain*.⁴⁹

mony that the state "usually" exercises its peremptory challenges "so as to provide for a jury without any black persons thereon"); *Commonwealth v. Futch*, 492 Pa. 359, 361, 424 A.2d 1231, 1232-33 (1981) (no prima facie case of systematic exclusion despite testimony from "eighty-two witnesses, including defense attorneys, former assistant district attorneys . . . two trial judges . . . and former black criminal defendants who had been convicted in jury trials" of such consistent and systematic practices by the District Attorney's office). See also, Annotation, *Use of Peremptory Challenge to Exclude From Jury Persons Belonging to a Class or Race*, 79 A.L.R.3d 14, 24 (1975) (in the 10 years following *Swain*, no defendant was able to prove that a prosecutor used peremptory challenges to systematically exclude blacks from petit juries over a period of time).

The *Swain* test was satisfied with respect to the same prosecutor in *State v. Washington*, 375 So. 2d 1162 (La. 1979) and *State v. Brown*, 371 So. 2d 751 (La. 1979).

Many commentators have criticized *Swain's* evidentiary burden. See Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks From Juries*, 27 HOW. L.J. 1571 (1984); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 MICH. L. REV. 1 (1982); Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555 (1985); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554 (1977); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

47. Justice Marshall expressed his dissatisfaction with the manner in which states summarily disposed of defendants' attacks under *Swain*. See *Gilliard v. Mississippi*, 464 U.S. 867, 871-73 (1983) (Marshall, J., dissenting from denial of certiorari). Marshall felt *Swain's* interpretation of the equal protection clause should be overturned. *Id.* at 869. Others on the Court apparently agreed with Marshall, but felt it best to allow the states the opportunity to remedy abuses of peremptory challenges. *Id.* Applauding the restrictions placed on peremptory challenges by *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), Marshall disagreed that the United States Supreme Court should wait for other states to follow suit. *Gilliard*, 464 U.S. at 870-71.

48. The Supreme Court held that the sixth amendment right to a jury trial in criminal cases "contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). The sixth amendment fair cross-section requirement, however, applies only to the panel from which the petit jury is chosen. *Id.* at 538.

49. Reasoning that the fair cross-section requirement is meaningless unless it extends to the petit jury, a few states have based limitations on peremptory challenges on the sixth amendment's fair cross-section requirement and the correlative provisions in state constitutions. For example, the California Supreme Court held that the fair cross-section of the venire must "be reflected at least in some degree in the 12 persons called at random to the jury box. It is that degree of representativeness—whatever it may prove to be—that we can and must preserve as essential to trial by an impartial jury." *People v. Wheeler*, 22 Cal. 3d 258, 278, 148 Cal. Rptr. 890, 903, 583 P.2d 748, 762 (1978).

The Supreme Judicial Court of Massachusetts reached a similar conclusion in *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979). In pur-

In *Batson v. Kentucky*⁵⁰ the Court re-examined the evidentiary burden *Swain* placed upon criminal defendants. In *Batson* the prosecutor used his peremptory challenges to strike all four blacks on the venire.⁵¹ The all-white jury convicted *Batson*, a black man, on charges of second-degree burglary and receiving stolen goods.⁵² *Batson* moved to discharge the jury on sixth⁵³ and fourteenth amendment grounds. The trial judge denied *Batson's* motion.⁵⁴

Apparently recognizing that *Swain* placed an unattainable bur-

porting to follow *Taylor*, the court refrained "from imposing a requirement that petit juries actually chosen 'mirror the community and reflect the various distinctive groups in the population.' " 377 Mass. at 482, 387 N.E.2d at 513 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)). Nonetheless, based solely on the Massachusetts Constitution, the court held that both the criminal defendant and the state "are constitutionally entitled to expect . . . 'a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.' " 377 Mass. at 488, 387 N.E.2d at 516 (quoting *People v. Wheeler*, 22 Cal. 3d 258, 277, 148 Cal. Rptr. 890, 903, 583 P.2d 748, 762 (1978)). See also *People v. Thompson*, 435 N.Y.S.2d 739 (App. Div. 1981); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

The Second and Sixth Circuits have also extended the fair cross-section requirement to prohibit the exclusion of distinctive groups from the petit jury. *E.g.*, *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987) (reaffirming *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986) (for reconsideration in light of *Batson*)); *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded*, 478 U.S. 1001 (1986) (for further consideration in light of *Batson*), *aff'd per curiam*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

The majority of circuit courts, however, have refused to use the sixth amendment fair cross-section requirement to limit peremptory challenges. See *United States v. Rodriguez-Cardenas*, 866 F.2d 390 (11th Cir. 1989); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), *petition for cert. filed*, November 5, 1988; *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986), *vacated and remanded*, 479 U.S. 1074 (1987) (for consideration in light of *Griffith v. Kentucky*, 479 U.S. 314 (1987)), *remanded*, 813 F.2d 658 (5th Cir. 1987); *United States v. Brown*, 770 F.2d 912 (10th Cir. 1985); *United States v. Clark*, 737 F.2d 679 (7th Cir. 1984); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1063 (1984); *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984); *United States v. Canel*, 708 F.2d 894 (3d Cir. 1983), *cert. denied*, 464 U.S. 852 (1983). Likewise, the Supreme Court has repeatedly refused to apply the fair cross-section requirement to petit juries.

Limitation of the peremptory challenge based on sixth amendment grounds is discussed in Salizburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982); Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555 (1985); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977).

50. 476 U.S. 79 (1986).

51. *Id.* at 83.

52. *Id.*

53. *Id.* *Batson* argued that the all-white jury which resulted from the prosecutor's removal of all the black veniremen violated the fair cross-section requirement implicit in the sixth amendment.

54. *Id.* The trial judge remarked that the parties could use their "peremptory challenges to 'strike anybody they want to.' " *Id.*

den upon his equal protection claim, Batson based his appeal to the Supreme Court of Kentucky on his sixth amendment right to be tried by a jury drawn from a cross-section of the community⁵⁵ and the correlative provision in the Kentucky Constitution.⁵⁶ In an unpublished opinion, the Kentucky court rejected Batson's appeal.⁵⁷ Although Batson adhered exclusively to his fair cross-section argument before the United States Supreme Court, the Court met the state's challenge to re-evaluate *Swain*'s evidentiary formulation.⁵⁸ The Court agreed that the central issue involved application of the equal protection clause. The Court declined to address the merits of Batson's sixth amendment argument.⁵⁹

Although not expressly overruling *Swain*,⁶⁰ the *Batson* Court rejected the evidentiary burden *Swain* placed on the criminal defendant's attempts to show purposeful discrimination through peremptory challenges.⁶¹ Instead, the Court held that the "standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause" should apply to the discriminatory use of peremptory challenges.⁶²

55. Batson urged the court to follow *People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979).

56. KY. CONST. of 1891 § 11 provides:

In all criminal prosecutions the accused . . . [cannot] be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage

57. 476 U.S. at 84.

58. *Id.* at 84-85 n.4.

59. 476 U.S. at 84-85 n.4. Although the Court says it states no view regarding the sixth amendment argument, the Court *did* express its opinion regarding whether the fair cross-section requirement should be extended to petit juries. "Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society." *Id.* at 86 n.6. The Court first announced this rule in *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (While particular groups may not be systematically excluded, there is "no requirement that petit juries must mirror the community."). See also *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) ("We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the compositions of the community at large."). Most recently, the Court refused to extend the fair-cross section requirement to petit juries in *Teague v. Lane*, 109 S. Ct. 1060 (1989).

60. The Court did overrule *Swain* "[t]o the extent that anything in *Swain* . . . is contrary to the principles" articulated in *Batson*. 476 U.S. at 100 n.25.

61. *Id.* at 93.

62. In discussing cases involving exclusion of particular racial groups from the venire, as distinguished from the petit jury, the Court observed that a showing of substantial underrepresentation of members of a particular group over a number of cases is not the only way a defendant can show purposeful exclusion. "In cases involving the venire, this Court has found

Under the new standard announced in *Batson*, it is unnecessary to prove a prosecutor's systematic discrimination against blacks over a number of cases. To establish a prima facie case under *Batson* the defendant need only show that the prosecutor used peremptory challenges to exclude members of the defendant's race from the petit jury, and that all the relevant facts and circumstances raise an inference that the prosecutor's peremptory strikes were discriminatory.⁶³

The prosecutor must then rebut the defendant's prima facie case with a "neutral explanation."⁶⁴ The Court emphasized that the prosecutor does not necessarily have to give a reason for the peremptory challenge sufficient to justify a challenge for cause.⁶⁵ The Court stressed, however, that the mere fact that the prosecutor thinks that prospective jurors of the defendant's race would be "partial to the defendant because of their shared race" is insufficient to rebut a prima facie showing of discriminatory intent.⁶⁶

The *Batson* Court declined to address the question of whether the restrictions placed on the prosecutor's use of the peremptory challenge also apply to the exercise of peremptory challenges by a criminal defendant.⁶⁷ The concept of equal protection limits only governmental action;⁶⁸ when the prosecutor's peremptory challenges are attacked on constitutional grounds, the state action requirement is obviously satisfied.⁶⁹ It is less obvious that the criminal defendant's exercise of peremptory challenges involves state action. This "state action" issue is central to the question of whether *Batson*-type restric-

a prima facie case on proof that members of the defendant's race were substantially under-represented on the venire from which his jury was drawn, and that the venire was selected under a practice providing the opportunity for discrimination." *Id.* at 95 (citations omitted).

63. *Id.* at 96. Under this totality of the circumstances standard, the defendant is entitled to rely upon the fact that the very nature of the peremptory challenge "permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

64. *Id.* at 97.

65. *Id.*

66. *Id.*

67. *Id.* at 89 n.12.

68. For example, the fourteenth amendment provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of the law; nor deny to any persons within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). See *DeShaney v. Winnebago County Dep't of Social Serv.*, 109 S. Ct. 998, 1003 (1989) (The purpose of the fourteenth amendment "was to protect the people from the State, not to ensure that the State protected them from each other.").

69. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 12.1, at 422 (3d ed. 1986) ("actions of any governmental entity give rise to state action for purposes of constitutional limitations"). In contrast, a public defender does not act under color of state law when performing an attorney's traditional functions as counsel to a defendant in a criminal case. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981).

tions apply to the use of peremptory challenges in civil cases.⁷⁰

Only a handful of federal courts have addressed the issue of whether *Batson* applies in civil cases.⁷¹ The issue reached the federal appellate level for the first time⁷² in *Edmonson v. Leesville Concrete Co.*,⁷³ in which a black man sued a corporation⁷⁴ for negligence. The defendant used two of its three peremptory challenges to exclude blacks from the petit jury.⁷⁵ The district court denied Edmonson's request to require the defendant corporation to "articulate a neutral explanation for the manner in which it had exercised its challenges."⁷⁶

70. Some states have placed restrictions on the civil litigant's use of peremptory challenges. See, e.g., *Holley v. J. & S. Sweeping Co.*, 143 Cal. App. 3d 588, 192 Cal. Rptr. 74 (1983); *City of Miami v. Cornett*, 463 So. 2d 399 (Fla. Dist. Ct. App. 1985); *Jackson v. Housing Authority*, 321 N.C. 584, 364 S.E.2d 416 (1988).

71. Prior to *Batson*, at least one court held that the principles announced in *Swain* applied in civil cases. See *King v. County of Nassau*, 581 F. Supp. 493 (E.D.N.Y. 1984) (holding that a party employing racial criteria in making peremptory challenges is not required to explain those challenges).

In *Esposito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986) a circuit judge sitting by designation refused to extend *Batson* to the civil defendants' use of two of their three peremptory challenges to exclude the only two blacks on the venire from the petit jury. The court reasoned that "[s]pecial concern for the plight of the accused criminal was clearly a factor in the *Batson* decision." *Id.* at 761. The court further noted that an "important distinguishing factor is that the complaining party in *Batson* was a criminal defendant, presumably haled into court against his will. Here, the complaining party is a civil plaintiff who has chosen of his own free will to initiate judicial process." *Id.* (emphasis in original).

Another judge in the same district came to the opposite conclusion in *Clark v. City of Bridgeport*, 645 F. Supp. 890 (D. Conn. 1986), which involved three civil rights suits against the city and city police officers. The defendants used their peremptory challenges "to strike every black citizen otherwise available to serve on the juries selected in each of three cases." *Id.* at 891. Before beginning the first of these three trials, the court required defense counsel to give "acceptable reasons" for its challenges. *Id.* at 892. The court reasoned that "the constitutional mandate for equal protection [applies] in civil cases where . . . there is state action involved in the exercise of peremptory challenges." *Id.* at 895. The court based its finding of state action on the fact that the assistant city attorney exercised the peremptory challenges in question. *Id.* at 895 n.6 (citing *Columbus Bd. of Ed. v. Pencik*, 443 U.S. 449, 457 n.5 (1979)). See also *Maloney v. Washington*, 690 F. Supp. 687, 690 (N.D. Ill.), vacated on other grounds, 854 F.2d 152 (7th Cir. 1988) (mere use of the judicial system by private litigants is sufficient to satisfy the state action requirement).

72. In *Wilson v. Cross*, 845 F.2d 163 (8th Cir. 1988), the Eighth Circuit expressed "strong doubts about whether *Batson* was intended to limit the use of peremptory strikes in civil cases." *Id.* at 164-65. Because the plaintiff failed to prove a prima facie case, however, the court found it unnecessary to address the issue. The court disposed of the issue in a similar manner in *Swapshire v. Baer*, 865 F.2d 948 (8th Cir. 1989).

73. 860 F.2d 1308 (5th Cir. 1988), *reh'g en banc granted*, January 23, 1989.

74. The other cases which address whether *Batson* applies in civil cases involve racially dissimilar litigants. The court attached no significance to the fact that the defendant was not a natural person and, therefore, a member of no particular race.

75. 860 F.2d at 1310. The defendant did not challenge Edmonson's use of all of his peremptory challenges to exclude whites from the jury. *Id.*

76. *Id.*

The jury, composed of eleven whites and one black, found for Edmonson but ruled he was eighty percent comparatively negligent.⁷⁷ Edmonson appealed to the Fifth Circuit, asserting that *Batson* should apply in civil cases and that *Batson* was violated by defense counsel's exclusion of the two black jurors.⁷⁸

After an extensive discussion of United States Supreme Court cases involving the distinction between private and governmental action,⁷⁹ the *Edmonson* panel held that a private litigant's use of a peremptory challenge involves state action.⁸⁰ The court found it significant that peremptory challenges are conferred by federal statute.⁸¹ The court further observed that "[t]he litigant exercises the peremptory challenge, but it is the judge, acting in a judicial capacity, who excuses the prospective juror."⁸²

The Eleventh Circuit was confronted with an almost identical situation in *Fludd v. Dykes*.⁸³ Fludd, a black man, filed a section 1983⁸⁴ civil rights action against white defendants.⁸⁵ As in *Edmonson*,⁸⁶ counsel for the defendants used two of his three peremptory challenges to exclude prospective black jurors from the petit jury.⁸⁷ Similarly, the Eleventh Circuit's application of *Batson* to civil cases turned upon a finding of state action.⁸⁸ But unlike the Fifth Circuit panel in *Edmonson*, the *Fludd* court did not examine recent United States Supreme Court state-action doctrine. Nor did the court discuss *Edmonson*⁸⁹ or any of the previous federal district court cases⁹⁰ or

77. *Id.*

78. *Id.*

79. *Id.* at 1311-12. The court discussed the state action inquiry the Supreme Court formulated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("private party's joint participation with state officials . . . is sufficient to characterize that party as a 'state actor'"). The court also discussed *Tulsa Professional Collection Services v. Pope*, 108 S. Ct. 1340 (1988) (private party's use of a non-self-executing nonclaim statute constitutes state action); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (a private restaurant's refusal to serve blacks constituted state action where the restaurant was physically and financially an integral part of a public building); and *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of restrictive property covenants based on race constitutes state action).

80. 860 F.2d at 1312.

81. *Id.*

82. *Id.*

83. 863 F.2d 822 (11th Cir. 1989).

84. 42 U.S.C. § 1983 (1982).

85. 863 F.2d at 824.

86. 860 F.2d at 1310.

87. 863 F.2d at 824.

88. *Id.* at 828.

89. When *Fludd* was decided, the rehearing *en banc* in *Edmonson* had not yet been granted. The court's omission of any mention of the Fifth Circuit panel's decision in *Edmonson* is interesting, since Judge John Wisdom, a senior circuit judge for the Fifth Circuit, who

state cases⁹¹ addressing whether *Batson* applies in civil cases.

The court focused instead on language from the early Supreme Court cases involving equal protection in the jury selection context.⁹² Without extensive analysis, the court concluded that the state-action requirement is satisfied by the "trial judge's decision—to proceed to trial, over the party's objection" to the racial composition of the petit jury.⁹³

After finding that the equal protection clause applies to the use of the peremptory challenge in civil case,⁹⁴ the court turned its attention to the question of whether to apply a *Swain* or *Batson* evidentiary standard.⁹⁵ Since Fludd presented no evidence that the defendants or their attorneys had used peremptory challenges in *other* cases that "deprived their black opponents of any chance of having blacks sworn as petit jurors,"⁹⁶ Fludd's equal protection claim would fail under the *Swain* standard.⁹⁷ The Eleventh Circuit decided, however, to adopt the *Batson* approach.⁹⁸ Because the record was insufficient to make a determination of whether Fludd had met his *prima facie* burden,⁹⁹ the court remanded the case for further proceedings on this issue.¹⁰⁰

Fludd's extension of the *Batson* rule to civil cases seems compelled once the state-action obstacle is hurdled. There is no logical basis for concluding that racial discrimination is prohibited in the selection of juries in criminal cases but permissible in civil cases.¹⁰¹ Nevertheless, the right to a jury trial in criminal cases has traditionally been afforded greater protections than in civil cases.¹⁰² Thus, the

voted with the majority in *Edmonson*, was part of the Eleventh Circuit panel which unanimously decided *Fludd*. Wisdom authored neither opinion.

90. See *supra* note 71.

91. See cases cited *supra* note 70.

92. The court observed that "[w]hen blacks are excluded from jury service on account of their race, the Supreme Court has long recognized that *the discriminatory actor is the trial court* 863 F.2d at 828 (emphasis added) (citing *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. The court stated there was no "distinction in harm to the individual's constitutional rights" between criminal and civil cases. *Id.* at 829.

99. *Id.*

100. *Id.*

101. For an excellent discussion and persuasive argument that *Batson* should apply in civil cases, see Note, *The Civil Implications of Batson v. Kentucky and State v. Gilmore: A Further Look at Limitations on the Peremptory Challenge*, 40 RUTGERS L. REV. 891 (1988).

102. For example, the sixth amendment guarantees the criminal defendant the right to

sixth amendment right to jury trial in a criminal case has been deemed "fundamental to the American scheme of justice,"¹⁰³ and, accordingly, held binding upon the states.¹⁰⁴ Conversely, the seventh amendment right to trial by jury in civil cases¹⁰⁵ has never been extended to the states.¹⁰⁶

The especial importance of peremptory challenges in criminal cases is reflected in the fact that more peremptory challenges are made available to parties in criminal cases than civil cases.¹⁰⁷ This suggests a societal recognition that the consequences of a criminal trial, in terms of both degree and kind,¹⁰⁸ require more extensive protection in the jury selection process than is warranted in civil cases. Moreover, as a practical matter, because the number of peremptories is much more limited in civil cases,¹⁰⁹ it will be more difficult for a litigant motivated by racial discrimination to accomplish his goal of excluding members of a particular cognizable racial group¹¹⁰ from the jury.

The magnitude of the decision in *Fludd* is probably best measured in terms of its potential impact.¹¹¹ The door is now open for a

counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the civil litigant enjoys no such parallel right. Other distinctions include restrictions on the amendment of criminal complaints, see *United States v. Norris*, 281 U.S. 619 (1930) (criminal indictment may not be amended) and FED. R. CRIM. P. 7(e) (limitations on amendment of information in a federal prosecution), compared with the more liberal right to amend complaints in civil cases. See FED. R. CIV. P. 15. See also *Espósito v. Buonome*, 642 F. Supp. 760 (D. Conn. 1986); *Terrio v. McDonough*, 16 Mass. App. 163, 450 N.E.2d 190, 195 (1983) (discussing reasons "why less vigorous monitoring of peremptory challenges might be permitted in civil cases").

103. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

104. *Id.*

105. The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

106. E.g., *Alexander v. Virginia*, 413 U.S. 836 (1973).

107. In criminal cases, each side is allowed 3, 6, 10 or 20 peremptory challenges, depending on the offense charged and the possible punishment. FED. R. CRIM. P. 24(b). Only 3 peremptory challenges are allowed in civil litigation. 28 U.S.C. § 1870 (1982).

108. Jail or freedom in a criminal case compared with gain or loss of property in a civil case.

109. 28 U.S.C. § 1870 (three peremptory challenges in civil cases).

110. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

111. The mere fact that there are many more civil trials than criminal trials in the United States makes *Fludd's* holding significant. The latest figures available show that for the twelve month period ending June 30, 1987, U.S. District Courts heard 254,828 civil cases and 42,156 criminal cases. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 169, 262 (1987). Similar disparity exists in the case loads of state courts. In 1985, for example, state trial courts heard 7,406,610 civil cases compared to only 1,263,802 criminal cases. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASE LOAD STATISTICS ANNUAL REPORT 1985 at 212 (1987).

Batson-type challenge in any civil case in which members of "cognizable racial groups" are on different sides. The Eleventh Circuit at least implicitly held that the use of two peremptory challenges to exclude members of a racial group can constitute an equal protection violation.¹¹² Would the exclusion of just *one* potential juror also constitute a violation?¹¹³ It would be difficult to justify drawing any kind of meaningful line between one and two peremptory challenges. If that line cannot be drawn, then a potential *Batson* claim arises in every civil case each time a member of a cognizable racial group is excluded by a party who belongs to a different racial group.

Fludd also affects criminal cases. *Batson* found state action in the prosecutor's exercise of racially motivated peremptory challenges.¹¹⁴ In order to extend *Batson* to civil cases, where peremptory challenges are not exercised by a state agent, the *Fludd* court was required to find state action in the state's overall involvement in the process of summoning jurors and authorizing peremptory challenges,¹¹⁵ as well as in the judge's toleration of the manner in which they are exercised.¹¹⁶

This may influence the resolution of an important issue unresolved by *Batson*: whether, in a criminal case, the state can raise an equal protection challenge where the *criminal defendant* exercises peremptory challenges in a racially discriminatory manner.¹¹⁷ *Fludd* suggests an affirmative answer by overcoming the expected argument in such a case that no state action exists when the criminal defendant, rather than the prosecutor, exercises the challenges.¹¹⁸

112. *Fludd*, 863 F.2d at 829.

113. Presumably, this decision will be left to the discretion of the trial judge. See *Batson*, 476 U.S. at 97 ("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.").

114. The *Batson* Court referred to the "State's privilege to strike individual jurors through peremptory challenges . . ." 476 U.S. at 89 (emphasis added).

115. *Fludd*, 863 F.2d at 828.

116. *Id.*

117. The *Batson* Court expressed no view on whether the restrictions on peremptory challenges extend to the criminal defendant. 476 U.S. at 89 n.12.

118. Since *Fludd* held that the trial judge is the state actor when a party uses peremptory challenges in a racially discriminatory manner, there is no reason the same principles would not apply to a criminal defendant. See Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355 (1988). See also *State v. Alvarado*, 221 N.J. Super. 324, 534 A.2d 440 (1987); *People v. Muriale*, 138 Misc. 2d 1056, 526 N.Y.S.2d 367, 369 (Sup. 1988).

The United States Supreme Court recently declined the opportunity to address this issue in *Alabama v. Cox*, 531 So.2d 71 (Ala. Crim. App. 1988), *cert. denied*, 109 S. Ct. 817 (1989). The defendants were Ku Klux Klan leaders on trial for the murder of a black teenager. See

Other issues raised and left unresolved by *Batson* are also unanswered in the civil context. For example, is *Batson*'s anti-discrimination rule applicable only to racial groups, or might it be extended to prohibit discriminatory peremptory challenges on the basis of gender,¹¹⁹ or age, or physical handicap?

The dispute regarding *Batson*'s application to civil cases undoubtedly is just beginning. To date, only the Eleventh Circuit in *Fludd* and the Fifth Circuit in *Edmonson* have addressed the issue, and the Fifth Circuit has granted rehearing *en banc* in *Edmonson*.¹²⁰ The issue is a likely one for review by the Supreme Court.

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N.Y. TIMES Feb. 2, 1988, p. 19, col. 5. The trial court denied the prosecutor's request to prohibit defense counsel from using peremptory challenges to exclude blacks from the petit jury. *Id.* In seeking certiorari, the state asked the United States Supreme Court to extend *Batson*'s application to defense counsel. 57 U.S.L.W. 3366 (U.S. Oct. 14, 1988). The Court denied certiorari on January 9, 1989. 109 S. Ct. 817.

119. The only circuit that has addressed the issue has declined to extend *Batson* to gender-based discriminatory use of peremptory challenges. See *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) ("While the strictures of the Equal Protection Clause undoubtedly apply to prohibit discrimination due to gender in other contexts, there is no evidence to suggest that the Supreme Court would apply normal equal protection principles to the unique situation involving peremptory challenges.").

120. A conflict between two circuits would exist if the Fifth Circuit overturns the panel's decision in *Edmonson*. If this happens, the Supreme Court will be presented with an excellent opportunity to resolve the issue, assuming the losing party in either *Fludd* or *Edmonson* seeks certiorari.