The Burger Court Opinion Writing Database

Batson v. Kentucky

476 U.S. 79 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 18, 1985

MEMORANDUM TO THE CONFERENCE

It develops that Lewis is not fully in accord on 83-1968, Thornburg v. Gingles. Bill Brennan is willing to "surrender" 84-6263, Batson v. Kentucky in a "switch."

With thanks to Bill, I now reassign each of those cases accordingly.

Regards,

WEB

Bill Marshall

I have your memorandum about [illegible] dissent and your [illegible]. I too am "not [illegible] dissent not" Catawba. I, too, seek assistance.

JPS

Copy to Conference

85 DEC 18 P3:20

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1986

Re: No. 84-6263 - Batson v. Kentucky

Dear Lewis:

As you are no doubt aware, I will be dissenting as will Bill Rehnquist, but I will await his dissent.

Regards,

Justice Powell

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: APR 16 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

CHIEF JUSTICE BURGER, dissenting.

Today the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for we have recognized that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on a constitutional argument that the petitioner *expressly* declared he was not relying on, both in his brief to this Court and in oral argument. The Court blithely ignores this factor as well as history.

I

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i. The "constitutional provisions" petitioner relied upon are found in the Sixth Amendment, not the Equal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 24, 1986

84-6263 - Batson v. Kentucky

Dear Bill:

Please join me in your dissenting opinion.

Regards,

WEB

Justice Rehnquist

Copies to Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: APR 25 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

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Today the Court sets aside the peremptory challenge, a procedure which as been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only five years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

minor technical changes

From: **The Chief Justice**

Circulated: _____

Recirculated: APR 28 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 30, 1986]

CHIEF JUSTICE BURGER, joined by JUSTICE REHNQUIST, dissenting.

We granted certiorari to decide whether petitioner was tried "in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community." Pet. for Cert. i.

I

Today the Court sets aside the peremptory challenge, a procedure which as been part of the common law for many centuries and part of our jury system for nearly 200 years. It does so on the basis of a constitutional argument that was rejected, without a single dissent, in *Swain* v. *Alabama*, 380 U. S. 202 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only five years ago we said that "*stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420 (1983). What makes today's holding truly extraordinary is that it is based on on a constitutional argument that the petitioner has *expressly* declined to raise, both in this Court and in the Supreme Court of Kentucky.

In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 9, 1986

Re: Cases Held for Batson v. Kentucky, No. 84-6263

Dear Lewis:

I would be strongly against opening this decision to retroactive application. I also think we have an obligation to decide this issue this term.

Regards,

Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1986

RE: Cases held for No. 84-6263 - Batson v. Kentucky

MEMORANDUM TO THE CONFERENCE:

In accordance with Lewis's suggestion that we have a general discussion concerning the disposition of the cases held for Batson, the matter will be on the agenda for tomorrow's Conference. The Clerk will reschedule the cases held for Batson to May 22.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 23, 1986

No. 84-6263, Batson v. Kentucky

Dear Lewis:

I hope very much to join your truly splendid opinion in Batson v. Kentucky. I would like to suggest two small changes, however, which I believe are necessary to ensure that your decision will be read to work the changes in the law which I think you intend and which I understood all those who voted with us wished to be made.

First, should you not state more explicitly that the constitutional prohibition against striking black jurors "on account of their race" refers not just to strikes motivated by a general hostility toward blacks, but includes the core problem black jurors and defendants face -- the use of peremptories against black jurors based on the prosecutor's assumption that minority jurors cannot impartially judge a defendant of their own race. I realize that on page 17 you state that a prosecutor may not rebut a defendant's prima facie case by claiming that he challenged black jurors on the assumption that "they would be partial to the defendant." I suggest, though, that because peremptory challenges are frequently based on an assumption that the striken juror would be partial to the defendant, your statement would be less subject to misinterpretation if it said something like:

> the prosecutor may not rebut . . . 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 simply because of their shared race.

I also suggest that the clarity of your holding would benefit if, at page 9, where you say that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race," you appended a phrase like "or on the unjustified, race-based assumption that black jurors, as a class, are incapable of rendering an impartial verdict in a case involving a defendant of their race."

Second, while I appreciate that you are trying to accommodate Bryon's view that Swain neither condoned the use of peremptories based on the assumption that black jurors cannot fairly try a black defendant nor precluded a defendant from proving an Equal Protection violation in a single case, the fact is that Swain can and has been read to hold just that. Consequently, I feel strongly that the opinion must say expressly that to the extent Swain can be so read, it is overruled. Perhaps this could be done in a footnote at the end of the opinion or at page 12, where you say that we reject the evidentiary formula lower courts have derived from Swain.

Again, its a splendid job. I'm looking forward to joining it.

Sincerely,

Bill

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1986

No. 84-6263

Batson v. Kentucky

Dear Lewis,

I have sent you my "join" in Batson. Thank you so much for your consideration of my suggestions. They completely meet my concerns. It's really a splendid opinion.

Sincerely,

Bill

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1986

No. 84-6263

Batson v. Kentucky

Dear Lewis,

I agree.

Sincerely,

Bill

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 24, 1986

No. 84-6263, Batson v. Kentucky

Dear Thurgood:

I am not yet ready to decide that peremptory challenges must be eliminated in order to cure the discriminatory use of those challenges and and for that reason do not join you. Nonetheless, I think that your concurring opinion serves both as a powerful warning of ways in which the Court's opinion may be evaded if judges do not carefully supervise prosecutors' use of peremptories and as an eloquent reminder of the lingering problem of unconscious prejudice. May I, however, presume to suggest the fear that some language in Part II of your opinion might inadvertently help an unscrupulous prosecutor, determined to strike blacks from the jury, to convince both trial and appellate courts to read the Court's opinion as embracing the narrow standard that has been adopted by some state courts. My worry is that we might accidentally lose some of the ground that you and I have fought long and hard to attain, and to avoid this, if possible, I am prompted to suggest a few small changes in second and third paragraphs of Part II (pp.3-4). I am being so bold as to propose specific language, but of course I am wedded to none of it. The core of my suggestions is that you consider

eliminating language that implies that results under the Court's standard must inevitably be identical to results state courts have reached by construing similar standards restrictively. You may well be right that the goal the Court seeks to achieve by allowing defendants to challenge the race-based use of peremptories can be circumvented by prosecutors and lower courts, yet, shouldn't we at least make it as difficult as possible for them to do so?

I offer for your consideration some revisions of the pertinent paragraphs with my suggested changes underscored.

> "Evidentiary analyses similar to that adopted by the Court, ante, at 17, have been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of this approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a prima facie case. California and Massachusetts have set a high threshold for the prima facie case, and, as a result, 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. [Cites omitted]. Prosecutors in these States have been left free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level."
>
> "Second, when a defendant can establish a prima facie case, [language eliminated], trial courts face the difficult burden of assessing prosecutor's motives. [Cites omitted]. While the Court properly holds that a prosecutor must articulate a legitimate, that is, significantly case-related, and neutral explanation for his or her peremptory challenges, ante, at 17 & n. 21, I fear, again based on the experience of state courts, that clever prosecutors will be able to convince judges to accept insubstantial justifications. Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror . . . ."

Again, forgive my presumption -- I just want not to give prosecutors the slightest opening.

Sincerely

Bill

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 17, 1986

No. 84-6263

Batson v. Kentucky

Dear John,

Please join me in your concurrence in the above.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 18, 1986

No. 84-6263

Batson v. Kentucky

Dear Lewis;

Although I am inclined to agree with you that Batson should not be applied retroactively, I believe that we should wait to decide that question until it is properly presented to us. Consequently, I hope you will not add the proposed footnote.

Sincerely,

Bill

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 12, 1986

No. 84-6263, Batson v. Kentucky

MEMO TO THE CONFERENCE

I agree with Lewis that we should discuss how to dispose of the question whether Batson should be applied retroactively at Conference on May 15, 1986.

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 21, 1986

84-6263 - Batson v. Kentucky

Dear Lewis,

Your draft is somewhat harder on Swain than it need be since it in effect finds that the decision was indefensible at the time in light of prior decisions. But perhaps this is just a matter of style. You should circulate, and I shall at least concur in the result.

Sincerely yours,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1986

84-6263 - Batson v. Kentucky

Dear Lewis,

I shall likely join your circulating draft but am considering writing separately as well.

Sincerely yours,

Justice Powell

Copies to the Conference

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 8 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March ——, 1986]

JUSTICE WHITE, concurring.

The Court overturns the principal holding in *Swain* v. *Alabama*, 380 U. S. 202 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant And that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons. The Court now rules that such use of peremptory challenges in a given case may, but does not necessarily, raise an inference, which the prosecutor carries the burden of refuting, that his strikes were based on the belief that no black citizen could be a satisfactory juror or fairly try a black defendant.

I agree that, to this extent, *Swain* should be overruled. I do so because *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries.* This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no

*Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 18, 1985

Dear Chief:

I have your memorandum about LFP's difficulty and your solution. I, too, am "not fully in accord with" Catawba. I, too, seek assistance.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: FEB 18 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[February ——, 1986]

JUSTICE MARSHALL, concurring in part.

I join Parts I and II of JUSTICE POWELL's eloquent opinion for the Court, and am in agreement with all but the "bottom line." The Court's opinion cogently explains the pernicious nature of the growing use of peremptory challenges to achieve racially discriminatory jury selection, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by and be flaunted in case after case before a remedy is available."[1] I nonetheless write separately, because the Court's opinion will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of

[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (MARSHALL, J., dissenting from denial of certiorari).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 28, 1986

No. 84-6263, Batson v. Kentucky

Dear Bill:

Thank you for your thoughtful suggestions. While the majority opinion in Batson is certainly an improvement on Swain, I continue to believe that the majority's approach will by its nature be ineffective in ending racial discrimination in the use of peremptories. I see no reason to be gentle in pointing that out, and I doubt that pulling my punches would make the situation any better. Thus, while I appreciate your concern and the care that went into your comments, I plan to leave my opinion in its current form.

Sincerely,

TM

Justice Brennan

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

STYLISTIC CHANGES THROUGHOUT

Circulated: _____

Recirculated: MAR 4 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March ——, 1986]

JUSTICE MARSHALL, concurring in part.

I join Parts I and II of JUSTICE POWELL's eloquent opinion for the Court, and am in agreement with all but the "bottom line." The Court's opinion cogently explains the pernicious nature of the growing use of peremptory challenges to achieve racially discriminatory jury selection, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately, because the Court's opinion will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

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pp. 2-4

Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: 3/18/86

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March ——, 1986]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 24, 1986

No. 84-6263, Batson v. Kentucky

To the Conference:

Just in case you might be interested.

T.M.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: APR 7 1986

STYLISTIC CHANGES THROUGHOUT

+ P. 6

Page 5 of WLR Draft

Page 4

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE MARSHALL, concurring in part.

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[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

pp. 1, 3, 5-7

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: APR 17 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries." The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available.[1] I nonetheless write separately, to express my views. The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). State officials then turned to somewhat more subtle ways of

[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

STYLISTIC CHANGES

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: APR 28 1986

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April 30, 1986]

JUSTICE MARSHALL, concurring.

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[1] *Commonwealth* v. *Martin*, 461 Pa. 289, 299, 336 A. 2d 290, 295 (1975) (Nix, J., dissenting), quoted in *McCray* v. *New York*, 461 U. S. 961, 965, n. 2 (1983) (MARSHALL, J., dissenting from denial of certiorari).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 27, 1986

Re: No. 84-6263, Batson v. Kentucky

Dear Lewis:

Please join me.

Sincerely,

Harry

Justice Powell

cc: The Conference

December 20, 1985

84-6263 Batson v. Kentucky

Dear Byron:

As the Chief has now assigned this case to me, I am particularly interested in your views as the author of Swain as to how an opinion should be written.

I enclose a copy of my Conference notes recording my understanding of your position. I believe you can read the notes despite poor handwriting and bad grammar. Do these accurately reflect the substance of what you said - though at greater length? I appreciate, of course, that how these views are written out will be what counts.

You may recall that I asked to what extent you think Swain must be overruled. It would be helpful if you also would share your thinking on this with me.

I recorded in my own notes the following:

"As I understand BRW, I think I could agree."

In short, I was with you.

Sincerely,

Justice White

lfp/ss

January 22, 1986

84-6263 Batson v. Kentucky

Dear Byron:

In the draft I am circulating today, I have made a number of changes that I hope will satisfy the concerns that you expressed.

In particular, I have eliminated in appropriate places citations to decisions prior to Swain. Similarly - particularly in footnote 15 - I have eliminated citations to a number of the articles discussing Swain. Moreover, I have shown in textual changes that there have been significant developments since Swain that lead us to reexamine its holding. With these changes, I am circulating my opinion today.

If you have suggestions for changes in language, I will certainly consider them. If I had been a member of the Court when Swain was decided, I would have joined your opinion.

Sincerely,

Justice White

lfp/ss

January 24, 1986

84-6263 Batson v. Kentucky

Dear Sandra:

Thank you for your letter. I am delighted you expect to join my opinion.

In the draft I have circulated today, I have made some textual changes that make explicitly clear that the Equal Protection Clause forbids the prosecutor to strike black jurors simply because he believes that blacks as a group are biased. I have revised the sentence that caused you concern that carries over from page 8 to page 9. Similarly, I have revised a sentence on page 17 to emphasize that the prosecutor may not rebut a prima facie case by stating that he struck the jurors because he assumed they shared a group bias. Although I have used language somewhat different from what you proposed, I have made the same point.

The question of standing to raise a claim of this kind is one that has occurred to me. But I am inclined not to mention it, as standing is not a problem in this case.

I add that I fully agree that the prosecutor would be entitled to strike a juror where the voir dire indicated that the juror was acquittal prone.

Sincerely,

Justice O'Connor

lfp/ss

01/23

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated:_____

Recirculated:_____

changes on pp. 9, 11, 12, 16, 17, 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[January ——, 1986]

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury.[1]

[1] Following the lead of a number of state courts construing their state's constitution, two federal Courts of Appeal recently have accepted the view that use of peremptory challenges to strike black jurors in a particular case violates the Sixth Amendment. *Booker* v. *Jabe*, 775 F. 2d 762 (CA6 1985), cert. pending, No. 85-1028; *McCray* v. *Abrams*, 750 F. 2d 1113 (CA2 1984), cert. pending, No. 84-1426. See *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978); *Riley* v. *State*, 496 A. 2d 997, 1009-1013 (Del. 1985); *State* v. *Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N. E. 2d 499, cert. denied, 444 U. S. 881 (1979). See also *State* v. *Crespin*, 94 N. M. 486, 612 P. 2d 716 (App. 1980). Other Courts of Appeal have rejected that position, adhering to the requirement that a defendant must prove systematic exclusion of blacks from the petit jury to establish a constitutional violation. *United States* v. *Childress*, 715 F. 2d 1313 (CA8 1983) (en banc), cert. denied, 464 U. S. 1063 (1984); *United States* v. *Whitfield*, 715 F. 2d 145, 147 (CA4 1983). See *Beed* v. *State*, 271 Ark. 526, 530-531, 609 S. W. 2d 898, 903 (1980); *Blackwell* v. *State*, 248 Ga. 138, 281 S. E. 2d 599, 599-600 (1981); *Gilliard* v. *State*, 428 So. 2d 576, 579 (Miss.), cert. denied, 464 U. S. 867 (1983); *People* v. *McCray*, 57 N. Y. 2d 542, 546-549, 443 N. E. 2d 915, 916-919 (1982), cert. denied, 461 U. S. 961 (1983); *State* v. *Lynch*, 300 N. C. 534, 546-547, 268 S. E. 2d 161,

April 18, 1986

84-6263 Batson v. Kentucky

Dear Chief:

At Conference this morning Harry noted that your dissent cites Davis v. Bandemer, 84-1244 (p. 10 of dissent), and Turner v. Murray, 84-6646 (p. 14), neither of which has been handed down.

I believe all of the writing is "in" on Turner, and so it may come down fairly soon. Bandemer (the Indiana reapportionment case) may well be held up for some time. Sandra is writing - according to the "clerk grapevine" - a long opinion on the justiciability issue.

It occurs to me that probably you could cite other cases for the points you make. Of course, however, I am entirely willing to hold Batson for young convenience.

I am making a minor change in Batson in view of Thurgood's recent changes in his opinion. Thus, Batson will not be ready until next week's Conference in any event.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 9, 1986

84-6263 Batson v. Kentucky

MEMORANDUM TO THE CONFERENCE:

I am now working on the "holds" for Batson, and the Clerk plans to place on next Thursday's discuss list about half of the approximately 20 cases being held. The question of the retroactivity of Batson is an important one, as suggested by the views expressed by several members of the Court. It is clear, I assume beyond dispute, that Batson enunciates a new constitutional rule. On the critical point, our decision overrules Swain.

If the case were accorded retroactivity courts would be reexamining on habeas corpus hundreds of final convictions. I think that the only serious question is whether Batson should be applied to cases pending on direct appeal or prospectively only.

I circulate this memorandum at this time because until this issue is resolved, I cannot recommend dispositions of the cases being held. I am inclined to grant a case that was pending here on direct appeal when Batson was announced, and resolve in that context the extent to which our decision should be applied retroactively.

If we do grant one or more cases to enable us to resolve this question, one option would be to hold all of the presently pending cases until next Term when this issue can be decided. It also may be possible to resolve the issue summarily this Term, though we already are behind in the Court's work.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 10, 1986

84-6263 Batson v. Kentucky

MEMORANDUM TO THE CONFERNCE:

In response to my inquiry of May 9, as to "Holds", I have only heard from the Chief and John Stevens. Several Justices have been away, and both Byron and I now will be away until next Wednesday. I suggest that we delay acting on the "Holds" until our May 22 Conference.

It may be desirable to have a preliminary discussion at our Conference on Thursday, May 15. I am requesting the Clerk, by a copy of this letter, to put this subject on the "Discuss List" for that Conference.

L.F.P., Jr.

ss

cc: Mr. Joseph F. Spaniol, Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 85-5823, Welch v. Rice

In 1979 petr was convicted for armed robbery. Following direct appeal and state habeas proceedings, petr sought federal habeas review in the DC for the ED Va., arguing, among other claims, that his lawyer was ineffective for failing to make certain objections at trial. Before considering petr's allegations, the DC observed that the pertinent standard was set out in Strickland v. Washington. First, petr, who is black, alleged that his lawyer was ineffective for failing to object to the seating of an all-white jury. Citing Swain v. Alabama, 380 U.S. 202 (1965), the DC rejected this contention on the ground that any objection by counsel would have been meritless. Second, petr argued that counsel was ineffective for failing to object to admission of evidence of petr's bad character. The DC noted that the evidence was elicited by defense counsel on cross-examination of the arresting officer, and concluded that counsel's action fell "within the range of 'normal competency.'" Finally, the DC rejected petr's assertion that counsel was ineffective for failing to object to the fact that a juror was acquainted with the complaining witness. The juror stated at trial that, although she knew the witness, she could remain impartial. Under these circumstances, petr had failed to carry his "burden of proving partiality." Citing Irvin v. Dowd, 366 U.S. 717 (1975).

CA4 denied a certificate of probable cause and dismissed the appeal.

Appearing in this Court pro se, petr repeats the arguments described above. I will vote to deny in view of the Conference's decision that Batson will not be applied to cases pending on habeas. Moreover, petr's ineffective assistance claim is weak in light of counsel's apparent and understandable reliance on Swain. Petr's remaining contentions are not certworthy.

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 85-5609, Prejean v. Blackburn

Petr was convicted for murder and sentenced to death. His conviction and sentence were affirmed on direct appeal, and the state courts denied habeas relief. Petr filed a federal habeas petition, which the DC ultimately denied without holding an evidentiary hearing. CA5 affirmed.

In his cert. petition, petr raises six claims, including a Batson claim and a Lockhart v. McCree claim. Petr also argues that the Louisiana death penalty is administered in a racially discriminatory fashion and that he was improperly denied an evidentiary hearing on this issue. Petr has filed a supplemental petition in which he argues that Batson should be applied retroactively on habeas review. In this connection, he urges that capital cases present special concerns under the Court's discussion in Turner v. Murray, No. 84-6646, concerning the danger of racial bias infecting a capital jury's sentencing discretion.

Petr's Lockhart claim lacks merit in light of the Court's decision in that case. Similarly, the Conference has decided to reject petr's argument that Batson should apply retroactively on habeas. I will vote to continue to hold this case, however, pending disposition of the cert. petition in McCleskey v. Kemp, No. 84-6811. Petr's challenge to the Louisiana capital punishment system is similar to the challenge raised in McCleskey to the Georgia scheme. While petr's statistical evidence appears substantially weaker than that presented in McCleskey, and the claim is state-specific, I believe that we should consider the petitions together. If we decide to grant in McCleskey, we then will have the opportunity to decide how to handle this petition and similar challenges raised by capital defendants in other states pending resolution of McCleskey.

My vote is to hold pending disposition of McCleskey v. Kemp, No. 84-6811.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1986

84-6263 Batson v. Kentucky

MEMORANDUM TO THE CONFERENCE:

It was decided at our Conference on May 21, that we would grant one or two cases that are here on direct appeal, limited to the question whether Batson should apply retroactively in those cases, and set them for argument at the top of our October docket. At our last Conference we also voted not to apply Batson to cases here on habeas corpus.

I suggest that we grant one or both of the following cases:

85-5221, Griffith v. Kentucky (cert. to the Supreme Court of Kentucky). This case involves the same prosecutor as Batson; he struck four of five black veniremen. Defense counsel objected, and the record reflects the prosecutor's reasons for striking some of the blacks.

85-5731, Brown v. United States (cert. to CA10). In this case, the prosecutor struck the only two black veniremen, and made some remarks concerning his desire to have as few black jurors as possible because the defendant, who is black, was represented by a prominent black attorney. There was a timely objection by defense counsel.

If we select only one case, I suggest that it be the federal case as we will have the Solicitor General representing the United States. The Batson issue is clearly presented in the cert. petitions in both cases.

I have requested the Clerk to put these two cases at the end of our discuss list in a special category. In addition, I have circulated hold memos in four habeas corpus cases. In view of our vote with respect to habeas cases, I recommend deny in three of the cases, and that we hold or relist 85-5609, Prejean v. Blackburn until we dispose of 84-6811, McCleskey v. Kemp - a case that presents a challenge to capital punishment based on statistical evidence that it

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1986

84-6263 Batson v. Kentucky

MEMORANDUM TO THE CONFERENCE:

In our grant of cert. on one or more of the pending cases, I suggest the grant be limited to the following question:

> In cases pending on direct appeal, should the holding in Batson v. Kentucky, No. 84-6263, be given retroactive effect?

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

Relisted for June 12

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1986

MEMORANDUM TO THE CONFEREN

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 84-1426, Abrams v. McCray

Resp, who is black, was convicted on robbery charges, after a trial at which the prosecutor used peremptory challenges to remove seven blacks and one Hispanic from the petit jury. Resp's conviction was affirmed on direct appeal, and the state courts denied habeas relief. He then filed the habeas petition underlying this cert. petition in the DC for the ED of NY. The DC held that the prosecutor's use of peremptory challenges violated both the Sixth Amendment and the Equal Protection Clause.

On appeal, CA2 first considered the decision in Swain v. Alabama. Although urged to hold that Swain was no longer good law, CA2 observed that it was constrained to follow Swain, and accordingly declined to rest its decision on the Equal Protection Clause. CA2 concluded, however, that Swain did not set the standard for the Sixth Amendment. After adopting an evidentiary standard based on the Sixth Amendment similar to that approved under the Equal Protection Clause in Batson, CA2 remanded to the DC for a hearing at which the State was entitled to come forward with evidence rebutting resp's prima facie case.

The State filed a petition for cert. in which it argues that (1) racial challenges also violate the Equal Protection Clause, whether made by the prosecutor or defense counsel; (2) resp did not establish prima facie that the prosecutor's challenges were based on race; and (3) CA2 erred in placing the burden of proof on the State to prove the absence of discrimination.

In view of the Conference decision that Batson is not to be applied retroactively on habeas review, my vote is to deny. The evidentiary standard adopted here comports with Batson, though CA2 relied on the Sixth Amendment.

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 28, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 85-1028, Michigan v. Booker

Resp, a black man, was convicted for armed robbery, and his conviction was affirmed on direct appeal. He then sought federal habeas corpus relief, arguing that the jury selection process at his trial was so infected with racism as to violate the Sixth and Fourteenth Amendments. The record shows that the prosecutor used his peremptory challenges to exclude twenty-two black veniremen, while defense counsel excused thirty-seven white veniremen. The DC denied relief, and CA6 reversed.

CA6 concluded that the Sixth Amendment prohibits parties in a criminal case from using peremptory challenges to exclude black persons from the petit jury. CA6 observed that Swain v. Alabama foreclosed the Equal Protection claim raised by resp. But for the decision in Swain, CA6 stated that it would find that resp was denied equal protection by the prosecutor's use of peremptory challenges. CA6 then went on to adopt an evidentiary standard under the Sixth Amendment similar to that approved in Batson under the Equal Protection Clause, holding its new standard applicable to both prosecutors and defense counsel. CA6 remanded, ordering the DC to grant the writ unless the State promptly retries resp. The State filed a petition for cert.

In view of the Conference decision that Batson is not to be applied retroactively on habeas review, my vote is to deny and leave the Sixth Amendment questions presented for another day.

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 11, 1986

84-6263

Batson Retroactivity

MEMORANDUM TO THE CONFERENCE:

I enclose a draft of a proposed Per Curiam in Allen v. Hardy, No. 85-6593, a habeas case pending here on cert to CA7. Both the District Court and CA7 rejected Allen's contention that the prosecutor's exercise of peremptory challenges violated Swain and the Sixth Amendment. In the pending petition for cert, Allen may fairly be viewed as arguing that Batson should be applied retroactively on habeas.

On May 29, 1986, the Conference thought that the Court should use Abrams v. McCray, 84-1426, as the case for deciding whether Batson should be applied retroactively on collateral review of convictions that became final before Batson was announced. In McCray, CA2 - applying Sixth Amendment analysis - concluded that Swain was not a binding precedent because it was decided on equal protection grounds. On reflection, I concluded that the retroactivity issue should not be resolved in McCray, primarily because McCray adopted a Sixth Amendment standard that the Court has not yet considered. It would be difficult to write a decision holding that Batson did not apply retroactively in the context of a case that applied a different constitutional rule, without also saying something about the merits of that rule.

If the Court approves a Per Curiam along the lines of my draft, we then could dispose of McCray - and also Michigan v. Booker, 84-1028 (a CA6 case similar to McCray) - by a GVR in light of both Batson and Allen v. Hardy. That disposition would inform CA2 and CA6 that they should reconsider their Sixth Amendment analysis in light of Batson, and that they should not apply the new standard - whether under the Equal Protection Clause or the Sixth Amendment - to final convictions.

I should note that we called for a response in Allen v. Hardy on May 16, 1986. As the time for a response

does not expire until June 16, we should not act on these cases until the June 19 Conference. It is unlikely that anything in the response will require a change in the enclosed draft.

L. F. P.

L.F.P., Jr.

ss

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 84-6732, Orji v. United States (cert. to CA5)

Petr, a black man, was convicted on narcotics charges. The Government used its peremptory challenges to strike the six black persons included on the venire. After the jury was sworn, petr's lawyer stated that he had a motion to make outside the jury's presence. The judge excused the jury, and, without explaining the relief sought, counsel stated that he did not "understand the striking of every single black juror."

On appeal, petr claimed that the Government's exercise of peremptory challenges violated his rights under the Equal Protection Clause and the Sixth Amendment. CA5 "put aside the sufficiency of the objection before the trial court and whether it was timely." The court then rejected the claim on the merits because petr had not satisfied the evidentiary burden imposed by Swain v. Alabama, 380 U.S. 202 (1965).

In his cert. petition, petr argues that the Sixth Amendment forbids prosecutors to exercise peremptory challenges solely on the basis of race, and that we should prohibit such challenges under our supervisory power. In response, the SG points out that there is a "question as to whether [petr] adequately and timely preserved an objection to the prosecution's use of peremptory challenges."

Since CA5 did not in fact rest its decision on a procedural default, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal. In the event that we decide that Batson is to be given retroactive effect, CA5 can consider the issue of procedural default on remand.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States, No. 85-5731.

L.F.P.,Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-5190, Nurse v. Illinois (cert. to Ill. App. Ct.)

Petrs, who are black, claim that the State's use of peremptory challenges exclude nine black veniremen violated petrs' rights to equal protection, and to an impartial jury drawn from a cross-section of the community. In response, the State suggests that petrs may not have properly preserved their equal protection argument because their motion for a new trial merely alleged a denial of equal protection without supplying any facts to support the claim.

Since Ill. App. Ct. rejected the claim on the merits, without any mention of a procedural bar, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct review.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-5940, Holmes v. Illinois (cert. to Ill. App. Ct.)

In his cert. petition, petr raises the claim raised by the petr in No. 84-6263, Batson v. Kentucky. The State responds by arguing that the trial record is "undeveloped," in that it does not reveal the number of black veniremen, the number of blacks excluded by the prosecutor's use of peremptory challenges, or the "racial identity" of those excluded.

Citing to the record, petr contends that he objected to the prosecutor's exercise of challenges against blacks. Moreover, Ill. App. Ct. did not rely on the inadequacy of the record in rejecting the claim. Therefore, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal. In the event that we conclude that our holding should be given retroactive effect, the state courts can consider on remand whether petr failed to make a record supporting his legal claim.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6253, Ford v. Georgia (cert. to Ga. Sup. Ct.)

Petr was convicted for murder and sentenced to death. Ga. Sup. Ct. affirmed, rejecting, among numerous contentions, petr's argument that the prosecutor's use of peremptory challenges to exclude black veniremen violated his right to a representative jury. The court rejected the claim because petr had shown only that a large percentage of black veniremen were struck in his case; he had offered no evidence of systematic exclusion of jurors in the jurisdiction.

In his cert. petition, in addition to raising a claim premised on Lockhart v. McCree, No. 84-1865, and a prosecutorial misconduct claim, petr requests the Court to hold this case pending decision in No. 84-6263, Batson v. Kentucky. The State responds by arguing that Ga. Sup. Ct. properly rejected the Batson claim, and points out that the case is factually distinguishable from Batson because one black citizen served on the jury.

I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal. If we conclude that Batson is to be given retroactive effect, the question whether the facts of this case give rise to an inference of discriminatory intent will be for the state courts to decide on remand.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P.,Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6315, Williams v. Illinois (cert. to Ill. App. Ct.)

Petr was convicted for felony murder. Ill. App. Ct. affirmed, rejecting petr's contention that the State violated his right to a representative jury when it used peremptory challenges to strike three black veniremen. The court rejected the claim under state case law precedent adhering to the evidentiary standard of Swain v. Alabama, 380 U.S. 202 (1965).

In his cert. petition, petr repeats his contention concerning the State's exercise of peremptory challenges and also raises Confrontation Clause claim. Responding to the Batson claim, the State notes that petr's analysis is inconsistent with Swain.

Since this case was pending on direct review when Batson was announced, I will vote to hold the petition for the cases in which we will decide whether Batson should be applied retroactively on direct appeal.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P.,Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6350, Podborny v. Ohio (cert. to Ohio Ct. App.)

Petr, a white woman, was tried along with two co-defendants, black men, on criminal charges. During jury selection, defense counsel moved for a mistrial on the ground that the prosecutor had exercised peremptory challenges against three blacks. The prosecutor explained that he had "not only excused black people from serving on the jury, but had also excused white people." Ohio Ct. App. affirmed petr's conviction, rejecting her contention that the State's use of peremptory challenges violated her constitutional rights. In the court's view, the facts did not give rise to a prima facie case of discrimination, and the prosecutor's response "was a very pertinent argument against any alleged practice of discrimination.

In her cert. petition, petr asserts the Batson claim. The State claims that petr did not properly present her objection to the TC and that the record does not disclose the race of the excluded jurors.

Ohio Ct. App. did not rest its decision on a procedural default. The only precedent cited by the court was Akins v. Texas, 325 U.S. 398 (1945), which involved alleged discrimination in selection of the venire. While cases involving the venire are not irrelevant in this context, it is not clear that the court below rejected petr's claim under the appropriate legal standard. Therefore, my vote is to hold the petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal. In the event that Batson is so applied, the state courts can consider whether petr has standing to raise the claim and whether the claim is procedurally barred.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6552, Jackson v. Ohio (cert. to Ohio Sup. Ct.)

During jury selection at petr's trial for rape, the prosecutor exercised two of his four peremptory challenges against blacks. Petr, who is black, timely objected on the ground that the prosecutor's action violated petr's right to be tried by a jury of his peers, and moved for a continuance so that additional black veniremen could be called. The TC denied the motion, and petr was convicted.

On appeal, Ohio App. Ct. affirmed. The court rejected numerous contentions raised by petr, including an argument concerning the State's exercise of peremptory challenges. The court found the rationale of Swain v. Alabama, 380 U.S. 202 (1965), to be dispositive. Ohio Sup. Ct. denied leave to appeal.

In his cert. petition, among four other claims, petr argues that the State's use of peremptory challenges violated his rights under the Sixth Amendment and the Equal Protection Clause. In response to that argument, the State relies upon the analysis of Swain and contends that the record does not support petr's claim that the prosecutor used his challenges on racial grounds.

Since Ohio App. Ct. rested its decision on the merits, not on any alleged inadequacy in the record, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct review.

My vote is to hold for No. 85-5221, Griffith v. Kentucky and No. 85-5731, Brown v. United States.

L.F.P., Jr.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 84-6633, Williams v. Texas (cert. to Tx. Ct. Crim. App.)

Petr, a black man, was convicted for murdering a white police officer, and sentenced to death. Tx. Ct. Crim. App. rejected on the merits petr's argument that the State violated his rights under the Sixth and Fourteenth Amendment by using peremptory challenges to strike all five blacks on the venire. In his cert. petition, petr repeats, among other claims, his argument concerning the State's exercise of its challenges.

Since this case was pending on direct appeal when our opinion in Batson was announced, I will vote to hold the petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct review.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1986

Re: Cases Held for No. 84-6263, Batson v. Kentucky

MEMORANDUM TO THE CONFERENCE:

Thinking it might be helpful, I summarize the status of the cases held for Batson:

(1) There are 21 cert. petitions held for Batson. One of these, No. 85-5609, Prejean v. Blackburn, a case here on federal habeas, has been relisted with No. 84-6811, McCleskey v. Kemp (the case involving the Baldus study). The Batson claim raised by the petr in Prejean ultimately will be rejected on the ground that Batson does not apply retroactively on habeas review.

(2) Of the remaining 20 petitions, I have circulated hold memos in 9 of the cases pending on direct review. These 9 cases are on the discuss list for tomorrow's Conference. In those cases in which the Batson claim was properly preserved, I recommend a hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States, in which we will decide whether Batson should apply retroactively to cases pending on direct appeal. Where the claim was not preserved, I recommend we deny.

(3) Eleven cases held for Batson, plus No. 85-6593, Allen v. Hardy (my per curiam rejecting retroactive application of Batson on habeas), have been relisted for next week's Conference. I will be circulating hold memos for those eleven cases. Three of the cases are here on federal habeas, and will be disposed of in light of my per curiam opinion. There are six votes for the per curiam. Justice Marshall will circulate a dissent. Seven of the remaining eleven cases are pending on direct review. The hold memos for these cases will be drafted along the lines described in point (2) above. The eleventh case appears to be here on state habeas.

L.F.P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 84-6698, Carter v. United States (cert. to CA3)

Petr, who is black, was convicted for bank robbery. During jury selection, petr objected to the prosecutor's exercise of a peremptory challenge to remove the only black veniremen. The DC overruled the objection.

On appeal, petr primarily argued that the Government violated Fed. R. Crim. P. 12.1 by failing to give him notice of its alibi rebuttal witnesses and that the DC erred in refusing to suppress the testimony of those witnesses. Though agreeing that the prosecutor should have given petr notice, CA3 concluded that the DC did not abuse its discretion in declining to suppress the evidence. After rejecting other claims, CA3 affirmed.

The third question presented in the cert. petition is a Batson claim. CA3's decision lists the claims raised by petr on appeal, but does not mention a Batson claim. The SG states that petr did not press a Batson claim in CA3, and petr does not allege that he did so. Since I conclude that petr failed to raise the claim below, I will vote to deny on this claim.

The first and second questions challenge CA3's disposition of the Government's Rule 12.1 violation. These questions are not certworthy. First, contrary to petr's assertion, this case does not conflict with United States v. Myers, 550 F.2d 1036 (CA5 1977). Second, there is no merit to petr's contention that the DC's application of Rule 12.1 violates Wardius v. Oregon, 412 U.S. 470 (1973). Unlike the statute in Wardius, Rule 12.1 requires reciprocal discovery rights, and petr's allegation that he was denied due process is unconvincing in view of CA3's conclusion that he had actual knowledge of the identities of the rebuttal witnesses.

My vote is to deny.

L.F.P.

L.F.P., Jr.

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 84-6504, Mack v. Illinois (cert. to Ill. Sup. Ct.)

Following a bench trial, petr, a black man, was convicted for murder. During selection of the jury for the penalty hearing, the prosecutor exercised 12 peremptory challenges against blacks, with the result that only one black juror was seated. The jury fixed punishment at death.

Ill. Sup. Ct. affirmed, rejecting, among other claims, petr's contention that he was denied due process by the State's use of peremptory challenges. The court reasoned that a defendant does not make out a constitutional violation by proving that the State exercised peremptory challenges to exclude blacks from his jury. Rather, the defendant had the burden of proving systematic exclusion, a burden that petr had not carried in this case.

In his cert. petition, petr raises two claims, one of which argues that his Sixth Amendment rights were violated by the State's use of peremptory challenges. Responding to that claim, the State urges the Court to reaffirm Swain v. Alabama and contends that the record in this case reflects neutral reasons supporting the prosecutor's challenges.

Ill. Sup. Ct. rejected the Batson claim under the Swain standard, not on the ground that neutral reasons supported the prosecutor's challenges. Therefore, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal. If Batson is so applied, the state courts should decide whether petr has established a prima facie case of discrimination and, if so, whether the prosecutor's explanations rebut that case.

My vote is to hold for Griffith v. Kentucky, No. 85-5221, and Brown v. United States, No. 85-5731.

L.F.P.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 84-6536, White v. Alabama (cert. to Ala. Crim. App.)

Petr was convicted for robbery. During jury selection, petr objected to the prosecutor's exercise of six peremptory challenges against blacks. The TC overruled the objection.

On direct appeal, Ala. Crim. App. rejected petr's claim that he was denied a "fair trial" because the State used peremptory challenges to exclude black veniremen. The court held that petr had not satisfied his burden of proving "systematic exclusion." The court cited Carpenter v. State, 404 So.2d 89 (Ala. Crim. App. 1980), which in turn cited Thigpen v. State, 270 So.2d 666 (Ala. 1972), which relied on the standard of Swain v. Alabama, 380 U.S. 202 (1965).

Appearing in this Court pro se, petr raises eight claims, one of which concerns the State's use of peremptory challenges. Petr primarily argues that he was denied his right to a fair trial under the state constitution, but he also claims that he suffered a deprivation of his rights under the Sixth and Fourteenth Amendments of the Federal Constitution. In response, the State cites Swain, asserting that the Constitution does not require an examination of the reasons underlying its exercise of peremptory challenges.

While petr's inartful papers raise some question as to whether he pressed a federal claim below, the State does not suggest that petr did not preserve a federal question. Moreover, it seems clear that Ala. Crim. App. rejected the claim under a line of state decisions that rested on Swain. Therefore, I will vote to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct appeal.

My vote is to hold for Griffith v. Kentucky, No. 85-5221, and Brown v. United States, No. 85-5731.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 84-1426, Abrams v. McCray

Resp, who is black, was convicted for robbery, after a trial at which the prosecutor used peremptory challenges against seven blacks and one Hispanic. Resp's conviction was affirmed on direct appeal, and the state courts denied habeas relief. He then filed the habeas petition underlying this cert. petition in the DC for the ED of NY. The DC held that the prosecutor's use of peremptory challenges violated both the Sixth Amendment and the Equal Protection Clause.

On appeal, CA2 observed that it was constrained to follow the decision in Swain v. Alabama, and accordingly declined to rest its decision on the Equal Protection Clause. CA2 concluded, however, that Swain did not set the standard for the Sixth Amendment. After adopting an evidentiary standard based on the Sixth Amendment similar to that approved under the Equal Protection Clause in Batson, CA2 remanded to the DC for a hearing at which the State was entitled to come forward with evidence rebutting resp's prima facie case.

The State has filed a petition for cert. in which it argues that (1) racial challenges also violate the Equal Protection Clause, whether made by the prosecutor or defense counsel; (2) resp did not establish prima facie that the prosecutor's challenges were based on race; and (3) CA2 erred in placing the burden of proof on the State to prove the absence of discrimination.

My vote is to GVR in light of Batson v. Kentucky, No. 84-6263, to afford CA2 the opportunity to reconsider its Sixth Amendment analysis, and in light of Allen v. Hardy, No. 85-6593, to inform CA2 not to apply its new rule retroactively on habeas.

L.F.P., Jr.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 85-1028, Michigan v. Booker

Resp, a black man, was convicted for armed robbery, and his conviction was affirmed on direct appeal. He then sought federal habeas corpus relief, arguing that the jury selection process at his trial was so infected with racism as to violate the Sixth and Fourteenth Amendments. The record shows that the prosecutor used his peremptory challenges to exclude twenty-two black veniremen, while defense counsel excused thirty-seven white veniremen. The DC denied relief, and CA6 reversed.

CA6 concluded that the Sixth Amendment prohibits parties in a criminal case from using peremptory challenges to exclude black persons from the petit jury. CA6 observed that Swain v. Alabama foreclosed the Equal Protection claim raised by resp. But for the decision in Swain, CA6 stated that it would find that resp was denied equal protection by the prosecutor's use of peremptory challenges. CA6 then went on to adopt an evidentiary standard under the Sixth Amendment similar to that approved in Batson under the Equal Protection Clause, holding its new standard applicable to both prosecutors and defense counsel. CA6 remanded, ordering the DC to grant the writ unless the State promptly retries resp. The State filed a petition for cert.

My vote is to GVR in light of Batson v. Kentucky, No. 84-6263, to afford CA6 the opportunity to reconsider its Sixth Amendment analysis, and in light of Allen v. Hardy, No. 85-6593, to inform CA6 not to apply its new rule retroactively on habeas.

L.F.P., Jr.

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 84-6263, Batson v. Kentucky

No. 85-5823, Welch v. Rice

In 1979 petr was convicted for armed robbery. Following direct review and state habeas proceedings, petr sought habeas relief in federal DC, asserting, among other claims, that his lawyer was ineffective for failing to make certain objections at trial. Before considering petr's allegations, the DC observed that the pertinent standard was set out in Strickland v. Washington. First, petr, who is black, alleged that his lawyer was ineffective for failing to object to the seating of an all-white jury. Citing Swain v. Alabama, the DC rejected this contention on the ground that any objection by counsel would have been meritless. Second, petr argued that counsel was ineffective for failing to object to admission of evidence of petr's bad character. The DC noted that the evidence was elicited by defense counsel on cross-examination of the arresting officer, and concluded that counsel's action fell "within the range of 'normal competency.'" Finally, the DC rejected petr's assertion that counsel was ineffective for failing to object to the fact that a juror was acquainted with the complaining witness. The juror stated at trial that, although she knew the witness, she could remain impartial. Under these circumstances, petr had failed to carry his "burden of proving partiality." Citing Irvin v. Dowd, 366 U.S. 717 (1975). CA4 denied a certificate of probable cause and dismissed the appeal.

Appearing here pro se, petr repeats the arguments described above. I will vote to deny in view of our decision in Allen v. Hardy, No. 85-6593, that Batson will not be applied retroactively to cases pending on habeas. Petr's ineffective assistance claim is weak since counsel apparently and understandably relied on Swain, and his remaining contentions are not certworthy.

My vote is to deny.

L.F.P.

L.F.P., Jr.

June 25, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-5949, White v. Missouri (cert. to Mo. Ct. App.)

Petr, who is black, was tried for murder. An all-white jury was selected after the prosecutor exercised peremptory challenges against four black veniremen. Petr moved to quash the jury "because of the discriminatory use by the state of its peremptory challenges." The TC denied the motion. Petr was convicted and sentenced to a prison term.

On direct appeal, petr raised an argument concerning the State's exercise of peremptory challenges. Mo. Ct. App. rejected that claim on the grounds that petr had failed to show a violation of the cross-section requirement imposed by Duren v. Missouri, that the actual petit jury need not constitute a cross-section, that petr failed to prove that the "representation of blacks was unfair in relation to the number of blacks in the community," and that he failed to establish systematic exclusion of "blacks as veniremen." The court rejected petr's remaining contentions, and affirmed. Mo. Sup. Ct. denied review.

Among the claims raised in his cert. petition, petr includes his argument concerning the State's use of peremptory challenges, contending that the prosecutor's action violated petr's right to an impartial jury selected from a fair cross-section of the community. Responding to that claim, the State asserts only that it need not discuss the issue because we will resolve the issue in Batson.

Since this case was pending on direct appeal when Batson was announced, I will vote to hold it for the cases in which we will decide whether Batson should apply retroactively on direct appeal.

My vote is to hold for Griffith v. Kentucky, No. 85-5221, and Brown v. United States, No. 85-5731.

L.F.P., Jr.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6475, Caldwell v. Mississippi (Cert. to Miss. Sup. Ct.)

Petr, who is black, was convicted of murder and sentenced to death. Miss. Sup. Ct. affirmed, but we vacated his death sentence. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). Petr then filed in Miss. Sup. Ct., apparently before resentencing occurred, a motion to vacate judgment, on which he argued, among other things, that the State had violated his constitutional rights by using peremptory challenges to strike all blacks and several women from the venire. Relying on Swain v. Alabama, 380 U.S. 202 (1965), Miss. Sup. Ct. held that the argument was "without merit."

In his cert. petition, petr argues that the State's use of peremptory challenges to exclude all black veniremen violated his rights to equal protection and to a fair and impartial jury. He also raises the claim that was rejected in Lockhart v. McCree, No. 84-1865. Responding to the Batson claim, the State argues that the claim is procedurally defaulted since petr never raised it on direct appeal or on his first cert. petition.

Miss. Sup. Ct. did not rest its judgment on a procedural default, instead rejecting the claim on the merits under Swain. Thus, the judgment below is not supported by adequate and independent state grounds. This case appears to be here on state habeas because the underlying proceeding was commenced under the Miss. statutes governing post-conviction collateral relief. Miss. Code Ann. §§99-39-1 et seq. Since resentencing had apparently not yet occurred at the time Batson was announced, however, there may be some doubt as to whether petr's conviction was "final" for purposes of retroactivity analysis. Therefore, I am inclined to hold this petition for the cases in which we will decide whether Batson should be applied retroactively to cases pending on direct review. If Batson is not so applied, we can then simply deny. If Batson is applied retroactively on direct appeal, we can GVR this case in light of both No. 85-6593, Allen v. Hardy, and the decisions concerning direct appeal so that Miss. Sup. Ct. can decide whether or not the

motion filed by petr constituted an attack on a "final" conviction under state law.

Because of the uncertainty as to whether this petition attacks a "final" conviction for retroactivity purposes, my vote is to hold it for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-6678, Walker v. Ohio (cert. to Oh. Sup. Ct.)

After his first trial ended in a hung jury and his second conviction was vacated on federal habeas, petr's third trial resulted in a conviction for murder. On appeal, petr argued that the prosecutor improperly exercised a peremptory challenge on racial grounds, striking the only black on the jury panel. Ohio Ct. App. rejected this claim because "a peremptory challenge does not require a reason." Petr also claimed that the evidence of his guilt was insufficient to support the jury's verdict. Observing that the record presented a "mass of conflicting testimony," the court held that there was "sufficient competent evidence" to support the verdict. Oh. Sup. Ct. denied leave to appeal.

Petr filed a petition for cert., which is NJOT. He contends that the evidence was insufficient under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). He also claims that the prosecutor challenged the only black venireman because he was black and that this action deprived him of his right to an impartial jury selected from a cross-section of the community. The State argues that there was ample evidence to support petr's conviction and that petr did not establish systematic exclusion of black jurors. The State also contends that the record does not support petr's assertions that the prosecutor's challenge was racially motivated or that there was only one black on the venire.

I will vote to hold this petition for the cases in which we will decide whether Batson will be applied retroactively on direct appeal. If Batson is so applied, the state court should decide in the first instance whether this record gives rise to an inference of purposeful discrimination.

My vote is to hold for No. 85-5221, Griffith v. Kentucky, and No. 85-5731, Brown v. United States.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-976, Bell v. United States (cert. to CA7)

Petr, a white woman, was tried along with a black co-defendant, who is the petr in Tucker v. United States, No. 85-1317, for fraud. During jury selection, the prosecutor used four of his seven peremptory challenges against blacks. Defense counsel objected, and the DJ asked the prosecutor to explain the basis for his challenges against blacks. The prosecutor stated that, because the case involved complex commercial transactions, he wished to seat educated jurors with business experience and that he struck the black veniremen because they were uneducated. The DJ accepted this explanation and therefore overruled defense counsel's objection. Petr was convicted.

On appeal, among other claims, petr repeated her argument concerning the prosecutor's exercise of peremptory challenges against blacks. CA7 rejected that argument, noting that Batson was pending before us. Whatever the result in Batson, reasoned CA7, petr was "unlikely to be helped" because the DJ satisfied himself that "racial bias had not been responsible for the exclusion of the blacks." CA7 held that the DJ's finding on this issue "was not clearly erroneous." In addition to the Batson claim, CA7 rejected an argument concerning the prosecutor's in camera submission to the DC of certain documents. While petr argued that the purpose of the submission was to poison the DJ's mind against the defense, CA7 concluded that the prosecutor had acted prudently by asking the DJ to decide if the documents constituted Brady material.

In her cert. petition, petr raises the Batson claim. She emphasizes that the DJ accepted the prosecutor's explanation in an ex parte hearing and claims that the prosecutor's explanations were pretextual. Petr also claims that her right to due process was violated when the prosecutor submitted to the DJ documents concerning other criminal charges against petr; this claim is premised on petr's assertion that the documents biased the DJ against her and led him make unfair evidentiary rulings at trial.

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 26, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-1317, Tucker v. United States (cert. to CA7)

Petr is a black man who was tried for fraud along with the petr in No. 85-976, a white woman. After the prosecutor used four of his seven peremptory challenges against blacks, an all-white jury was selected. Defense counsel objected to exclusion of the black veniremen. When the DJ asked for an explanation, the prosecutor stated that, because the case involved complex commercial transactions, he sought educated jurors with business experience, and that the blacks on the venire were uneducated. Accepting that explanation, the DC overruled defense counsel's objection. Petr was convicted.

On appeal, petr raised three relevant claims. He claimed that he was prejudiced by the prosecutor's in camera submissions to the DJ, that the DC erroneously excluded a letter written by a prosecution witness, and that the prosecutor impermissibly exercised his peremptory challenges on racial grounds. CA7 rejected these arguments. First, CA7 concluded that the prosecutor acted prudently in submitting certain documents to the DJ for a decision as to whether they constituted Brady material. CA7 found petr's suggestion that the documents poisoned the DJ's mind to be "ridiculous" since DJs must be trusted impartially to preside over trials at which they possess information adverse to the defendants that the jurors do not know. Second, CA7 agreed that the DJ erred in excluding the letter. But CA7 observed that the letter had been used extensively to impeach the witness' testimony and that it did not establish that his testimony was false. Under these circumstances, the error was "harmless." Finally, CA7 rejected petr's argument concerning the Government's use of peremptory challenges. CA7 noted that Batson was pending before us, but believed that Batson would not help petr, whatever its holding, since the DJ already had satisfied himself that the prosecutor's challenges were not motivated by racial bias. CA7 held that the DC's findings in this connection were "not clearly erroneous."

In his cert. petition, petr raises the Batson claim, emphasizing that the prosecutor's explanation was given ex

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 27, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Batson v. Kentucky, No. 84-6263

No. 85-5451, Riley v. Delaware (cert. to Del. Sup. Ct.)

During jury selection at petr's murder trial, the prosecutor used 3 of his 12 peremptory challenges against the three blacks remaining on the venire after challenges for cause. Petr did not make a contemporaneous objection to the prosecutor's challenges, but after the jury was selected he renewed an earlier motion to "discharge the venire for racial imbalance." The TC denied the motion. Petr was convicted for both intentional murder and felony murder, and sentenced to death for the felony murder.

On appeal, Del. Sup. Ct. considered petr's argument that the prosecutor exercised his peremptory challenges for "racial reasons" in violation of the Sixth Amendment. The court rejected the argument on two grounds. First, it concluded that petr did not present his Sixth Amendment claim to the TC because he never suggested there that the State had used its challenges on racial grounds. Second, the court decided that, even if petr had presented the claim, he failed to establish a "prima facie claim that the State exercised its peremptory challenges on racial grounds." The court was persuaded by precedent from other jurisdictions that had rejected the standard of Swain v. Alabama, and accordingly held that a defendant could make out a violation of the Delaware Constitution by relying solely on the prosecutor's exercise of challenges at his trial. Applying that new standard, the court found no violation on this record.

Petr raised two additional arguments that are relevant to this petition. First, he claimed that his rights under the Sixth Amendment and the Equal Protection Clause were violated when the venire became "racially disproportionate" through the TC's excusal of black jurors for personal reasons. Del. Sup. Ct. rejected that argument on the ground that simply proving a reduction in the number of black veniremen through such excusals did not violate the Constitution. Second, petr challenged the State's use of the underlying felony (first-degree robbery) (1) to elevate the offense from a reckless killing to a first degree felony murder offense and (2) as an aggravating circumstance to permit imposition of capital punishment. Petr argued that such

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 23, 1986

Re: No. 84-6263 Batson v. Kentucky

Dear Lewis,

In due course I will circulate a dissent in this case.

Sincerely,

WM

Justice Powell

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: FEB 28 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March ——, 1986]

JUSTICE REHNQUIST, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 1 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." Without so much as a hint of analysis or discussion, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny Negroes the same right and opportunity to participate in the adminstration of justice

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

pp 1-4

From: **Justice Rehnquist**

Circulated: _____

Recirculated: MAR 7 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March ——, 1986]

JUSTICE REHNQUIST, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 1 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny Negroes the same right and opportunity to participate in the adminstration of justice

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 15 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE REHNQUIST, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 1 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right and opportunity to participate in the adminstration of justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1986

Re: No. 84-6263 Batson v. Kentucky

Dear Chief,

Please join me in your dissent in this case.

Sincerely,

WHR

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

p. 1

From: **Justice Rehnquist**

Circulated: _____

Recirculated: APR 25 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court states, in the opening line of its opinion, that this case involves only a reexamination of that portion of *Swain* v. *Alabama*, 380 U. S. 202 (1965), concerning "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Ante*, at 1 (footnote omitted). But in reality the majority opinion deals with much more than "evidentiary burden[s]." With little discussion and less analysis, the Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. Because I find the Court's rejection of this holding both ill-considered and unjustifiable under established principles of equal protection, I dissent.

In *Swain*, this Court carefully distinguished two possible scenarios involving the State's use of its peremptory challenges to exclude blacks from juries in criminal cases. In Part III of the majority opinion, the *Swain* Court concluded that the first of these scenarios, namely, the exclusion of blacks "for reasons wholly unrelated to the outcome of the particular case on trial . . . to deny the Negro the same right

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 23, 1986

Re: 84-6263 - Batson v. Kentucky

Dear Lewis:

Please join me.

Respectfully,

John

Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: APR 7 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE STEVENS, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. —— (1986) (Memorandum of BRENNAN, J., joined by STEVENS, J.) and *New Jersey* v. *TLO*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post* at 3–4, nn. 1 & 2. In this case, however—unlike *Connelly* and *TLO*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the Equal Protection issue:

> "Mr. Chief Justice, and may it please the Court, the issue before this Court today is whether Swain versus Alabama should be reaffirmed. . . .
>
> "We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents perhaps an address to the problem. Swain dealt primarily with the use of peremptory challenges to strike individuals who were of a cognizable or identifiable group.

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. —— (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 3–4, nn. 1, and 2. In this case, however—unlike *Connelly* and *T. L. O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the Equal Protection issue:

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>
> . . . . .
>
> ". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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Recirculated: APR 25 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, concurring.

In his dissenting opinion, THE CHIEF JUSTICE correctly identifies an apparent inconsistency between my criticism of the Court's action in *Colorado* v. *Connelly*, 474 U. S. —— (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and *New Jersey* v. *T. L. O.*, 468 U. S. 1214 (1984) (STEVENS, J., dissenting)—cases in which the Court directed the State to brief and argue questions not presented in its petition for certiorari—and our action today in finding a violation of the Equal Protection Clause despite the failure of petitioner's counsel to rely on that ground of decision. *Post*, at 3–4, nn. 1, and 2. In this case, however—unlike *Connelly* and *T. L. O.*—the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance. In defending the Kentucky Supreme Court's judgment, Kentucky's Assistant Attorney General emphasized the State's position on the centrality of the Equal Protection issue:

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>
> . . . . . .
>
> ". . . We believe that it is the Fourteenth Amendment that is the item that should be challenged, and presents

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

9th amended 1/24

January 23, 1986

No. 84-6293 Batson v. Kentucky

Dear Lewis,

I was pleased this case was assigned to you. You have produced a fine opinion, and I plan to join it. I have a question and a suggestion that I would appreciate your considering, although my joinder will not be conditioned upon either one.

(1) The opinion leaves somwhat uncertain whether a race-based peremptory would violate the Fourteenth Amendment even if the defendant and the racially excluded jurors were of different races. On page 14 (first full paragraph) the opinion suggests that in that circumstance a defendant could not make out a prima facie case of discrimination. On page 7, the opinion suggests that a juror excluded on the basis of race has suffered unconstitutional disrimination regardless of the race of the defendant. I realize that the Court's cases are less than crystal clear on this point. But I incline towards the position that any race-based effort to cull certain jurors from the venire represents unlawful discrimination. If the opinion is saying that only excluded jurors and defendants of the same race as the excluded juror have standing to object to the unconstitutional action, perhaps that could be clarified with a brief footnote.

eg. a white D & black victim?

(2) The principal error of Swain, in my view, was that it left prosecutors with the impression that racially motivated peremptories were permissible as long as the motivation was to improve the chances of obtaining a favorable verdict. In other words, Swain drew a distinction between striking blacks because the prosecutor believed that they had no place in the judicial system and striking blacks because they were thought to be acquittal-prone. The opinion seemed to suggest that the latter was permissible, while the former was not.

As your opinion correctly holds on page 17, a peremptory challenge motivated solely by the view that blacks, as a race, are acquittal-prone violates the Equal

Protection Clause. The carryover paragraph on pages 7-8, however, could be read as reaffirming the dichotomy seemingly relied on in Swain. The sentence now reads, with internal quotations and citations omitted:

> "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race."

Perhaps something along the following lines could be added to the end of the sentence: "or solely because of general assumptions about the attitudes towards the criminal justice system held by members of a given race."

I assume that peremptory strikes would still be allowed if, for example, voir dire questioning revealed a basis for the prosecutor to believe a particular juror would be acquittal-prone.

Sincerely,

Sandra

Justice Powell

You haven't made this clear?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 27, 1986

No. 84-6263 Batson v. Kentucky

Dear Lewis,

Please join me. I may add something by way of concurrence to comment upon whether the challenge to strikes by the prosecution can be made only by a defendant of the same race as those peremptorily excused and whether defense peremptory strikes are also subject to challenge by the state.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 3, 1986

No. 84-6263 Batson v. Kentucky

Dear Lewis,

I have decided not to write separately by way of a concurring opinion in this case.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER
v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[April ——, 1986]

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion and judgment, but also agree with the views of THE CHIEF JUSTICE and JUSTICE WHITE that today's decision does not apply retroactively.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 12, 1986

No. 84-6263 Batson v. Kentucky

Dear Lewis,

I will be attending the Sixth Circuit Conference this week on the 15th and, therefore, unable to participate in discussing the holds for Batson. I am inclined to think it would be possible to take one of the "holds" and decide the retroactivity issue by way of a per curiam. If enough others agree you may add my name to such a vote. In my view, Batson should not be retroactively applied.

Sincerely,

Sandra

Justice Powell

Copies to the Conference