§ 11. Due process of law; obligation of contracts; taking or...

VA CONST Art. 1, § 11

§ 11. Due process of law; obligation of contracts; taking or damaging of private property; prohibited discrimination; jury trial in civil cases

Effective: January 1, 2013

Currentness

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms “lost profits” and “lost access” are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.

Notes of Decisions (686)

VA Const. Art. 1, § 11, VA CONST Art. 1, § 11
Current through End of the 2016 Reg. Sess.
§ 8.01-2. General definitions for this title, VA ST § 8.01-2

As used in this title, unless the context otherwise requires, the term:

1. “Action” and “suit” may be used interchangeably and shall include all civil proceedings whether upon claims at law, in equity, or statutory in nature and whether in circuit courts or district courts;

2. “Decree” and “judgment” may be used interchangeably and shall include orders or awards;

3. “Fiduciary” shall include any one or more of the following:
   a. guardian,
   b. committee,
   c. trustee,
   d. executor,
   e. administrator, and administrator with the will annexed,
   f. curator of the will of any decedent, or
   g. conservator;

4. “Rendition of a judgment” means the time at which the judgment is signed and dated;
§ 8.01-2. General definitions for this title, VA ST § 8.01-2

5. “Person” shall include individuals, a trust, an estate, a partnership, an association, an order, a corporation, or any other legal or commercial entity;

6. “Person under a disability” shall include:

   a. a person convicted of a felony during the period he is confined;

   b. an infant;

   c. an incapacitated person as defined in § 64.2-2000;

   d. an incapacitated ex-service person under § 64.2-2016; or

   e. any other person who, upon motion to the court by any party to an action or suit or by any person in interest, is determined to be (i) incapable of taking proper care of his person, or (ii) incapable of properly handling and managing his estate, or (iii) otherwise unable to defend his property or legal rights either because of age or temporary or permanent impairment, whether physical, mental, or both. Such impairment may also include substance abuse as defined in § 37.2-100;

7. “Sheriff” shall include deputy sheriffs and such other persons designated in § 15.2-1603;

8. “Summons” and “subpoena” may be used interchangeably and shall include a subpoena duces tecum for the production of documents and tangible things;

9. “Court of equity,” “law and equity court,” “law and chancery court,” “chancery court,” “corporation court,” “the chancery side,” “court exercising powers in chancery,” “court with equitable jurisdiction,” and “receivership court” shall mean the circuit court when entertaining equitable claims;

10. A “motion for judgment,” “bill,” “bill of complaint,” or “bill in equity” shall mean a complaint in a civil action, as provided in the Rules of Supreme Court of Virginia;

11. “Equity practice,” “equity procedure,” “chancery practice,” and “chancery procedure” shall mean practice and procedure in a civil action as prescribed by this Code and the Rules of Supreme Court of Virginia.

Credits
§ 8.01-2. General definitions for this title, VA ST § 8.01-2

Notes of Decisions (17)

VA Code Ann. § 8.01-2, VA ST § 8.01-2
Current through End of the 2016 Reg. Sess.
§ 8.01-336. Jury trial of right; waiver of jury trial; court-ordered..., VA ST § 8.01-336

VA Code Ann. § 8.01-336

§ 8.01-336. Jury trial of right; waiver of jury trial; court-ordered jury trial; trial by jury of plea in equity; equitable claim

Effective: July 1, 2014

A. The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties. Unless waived, any demand for a trial by jury in a civil case made in compliance with the Rules of Supreme Court of Virginia shall be sufficient, with no further notice, hearing, or order, to proceed thereon.

B. Waiver of jury trial.--In any action at law in which the recovery sought is greater than $20, exclusive of interest, unless one of the parties demands that the case or any issue thereof be tried by a jury, or in a criminal action in which trial by jury is dispensed with as provided by law, the whole matter of law and fact may be heard and judgment given by the court.

C. Court-ordered jury trial.--Notwithstanding any provision in this Code to the contrary, in any action asserting a claim at law in which there has been no demand for trial by jury by any party, a circuit court may on its own motion direct one or more issues, including an issue of damages, to be tried by a jury.

D. Trial by jury of plea in equity.--In any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury.

E. Suit on equitable claim.--In any suit on an equitable claim, the court may, of its own motion or upon motion of any party, supported by such party's affidavit that the case will be rendered doubtful by conflicting evidence of another party, direct an issue to be tried before an advisory jury.

Credits

Notes of Decisions (81)

VA Code Ann. § 8.01-336, VA ST § 8.01-336
Current through End of the 2016 Reg. Sess.
§ 8.01-337. Who liable to serve as jurors, VA ST § 8.01-337

VA Code Ann. § 8.01-337

§ 8.01-337. Who liable to serve as jurors

Effective: July 1, 2014

Currentness

All citizens over 18 years of age who have been residents of the Commonwealth one year, and of the county, city, or town in which they reside six months next preceding their being summoned to serve as such, and competent in other respects, except as hereinafter provided, shall be liable to serve as jurors. No person shall be deemed incompetent to serve on any jury because of blindness or partial blindness. Military personnel of the United States Army, Air Force, Marine Corps, Coast Guard, or Navy shall not be considered residents of this Commonwealth by reason of their being stationed herein.

Credits

Notes of Decisions (6)
VA Code Ann. § 8.01-337, VA ST § 8.01-337
Current through End of the 2016 Reg. Sess.
The following persons shall be disqualified from serving as jurors:

1. Persons adjudicated incapacitated;

2. Persons convicted of treason or a felony; or

3. Any other person under a disability as defined in § 8.01-2 and not included in subdivisions 1 or 2 above.

Credits

Notes of Decisions (2)
VA Code Ann. § 8.01-338, VA ST § 8.01-338
Current through End of the 2016 Reg. Sess.
§ 8.01-339. No person eligible for whom request is made, VA ST § 8.01-339

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 11. Juries (Refs & Annos)
Article 2. Jurors

VA Code Ann. § 8.01-339
§ 8.01-339. No person eligible for whom request is made

Currentness

No person shall be eligible to serve on any jury when he, or any person for him, solicits or requests a jury commissioner to place his name in a jury box or in any way designate such person as a juror.

Credits

VA Code Ann. § 8.01-339, VA ST § 8.01-339
Current through End of the 2016 Reg. Sess.

§ 8.01-340. No person to serve who has case at that term, VA ST § 8.01-340

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 11. Juries (Refs & Annos)
Article 2. Jurors

VA Code Ann. § 8.01-340

§ 8.01-340. No person to serve who has case at that term

Currentness

No person shall be admitted to serve as a juror at a term of a court during which he has any matter of controversy which has been or is expected to be tried by a jury during the same term.

Credits

VA Code Ann. § 8.01-340, VA ST § 8.01-340
Current through End of the 2016 Reg. Sess.
§ 8.01-341. Who are exempt from jury service, VA ST § 8.01-341

The following shall be exempt from serving on juries in civil and criminal cases:

1. The President and Vice President of the United States,

2. The Governor, Lieutenant Governor and Attorney General of the Commonwealth,

3. The members of both houses of Congress,

4. The members of the General Assembly, while in session or during a period when the member would be entitled to a legislative continuance as a matter of right under § 30-5,

5. Licensed practicing attorneys,

6. The judge of any court, members of the State Corporation Commission, members of the Virginia Workers' Compensation Commission, and magistrates,

7. Sheriffs, deputy sheriffs, state police, and police in counties, cities and towns,

8. The superintendent of the penitentiary and his assistants and the persons composing the guard,

9. Superintendents and jail officers, as defined in § 53.1-1, of regional jails.

Credits
§ 8.01-341. Who are exempt from jury service, VA ST § 8.01-341

Notes of Decisions (1)

VA Code Ann. § 8.01-341, VA ST § 8.01-341
Current through End of the 2016 Reg. Sess.
§ 8.01-341.1. Exemptions from jury service upon request, VA ST § 8.01-341.1

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 11. Juries (Refs & Annos)
Article 2. Jurors

VA Code Ann. § 8.01-341.1

§ 8.01-341.1. Exemptions from jury service upon request

Effective: July 1, 2012

Currentness

Any of the following persons may serve on juries in civil and criminal cases but shall be exempt from jury service upon his request:

1. through 3. Repealed.

4. A mariner actually employed in maritime service;

5. through 7. Repealed.

8. A person who has legal custody of and is necessarily and personally responsible for a child or children 16 years of age or younger requiring continuous care by him during normal court hours, or any mother who is breast-feeding a child;

9. A person who is necessarily and personally responsible for a person having a physical or mental impairment requiring continuous care by him during normal court hours;

10. Any person over 70 years of age;

11. Any person whose spouse is summoned to serve on the same jury panel;

12. Any person who is the only person performing services for a business, commercial or agricultural enterprise and whose services are so essential to the operations of the business, commercial or agricultural enterprise that such enterprise must close or cease to function if such person is required to perform jury duty;

13. Any person who is the only person performing services for a political subdivision as a firefighter, as defined in § 65.2-102, and whose services are so essential to the operations of the political subdivision that such political subdivision will suffer an undue hardship in carrying out such services if such person is required to perform jury duty;
§ 8.01-341.1. Exemptions from jury service upon request, VA ST § 8.01-341.1

14. Any person employed by the Office of the Clerk of the House of Delegates, the Office of the Clerk of the Senate, the Division of Legislative Services, and the Division of Legislative Automated Systems; however, this exemption shall apply only to jury service starting (i) during the period beginning 60 days prior to the day any regular session commences and ending 30 days after the day of adjournment of such session and (ii) during the period beginning seven days prior to the day any reconvened or special session commences and ending seven days after the day of adjournment of such session;

15. Any general registrar, member of a local electoral board, or person appointed or employed by either the general registrar or the local electoral board, except officers of election appointed pursuant to Article 5 (§ 24.2-115 et seq.) of Chapter 1 of Title 24.2; however, this exemption shall apply only to jury service starting (i) during the period beginning 90 days prior to any election and continuing through election day, (ii) during the period to ascertain the results of the election and continuing for 10 days after the local electoral board certifies the results of the election under § 24.2-671 or the State Board of Elections certifies the results of the election under § 24.2-679, or (iii) during the period of an election recount or contested election pursuant to Chapter 8 (§ 24.2-800 et seq.) of Title 24.2. Any officer of election shall be exempt from jury service only on election day and during the periods set forth in clauses (ii) and (iii); and

16. Any member of the armed services of the United States or the diplomatic service of the United States appointed under the Foreign Service Act (22 U.S.C. § 3901 et seq.) who will be serving outside of the United States at the time of such jury service.

Credits

VA Code Ann. § 8.01-341.1, VA ST § 8.01-341.1
Current through End of the 2016 Reg. Sess.
§ 8.01-352. Objections to irregularities in jury lists or for legal..., VA ST § 8.01-352

VA Code Ann. § 8.01-352

§ 8.01-352. Objections to irregularities in jury lists or for legal disability; effect thereof

Currentness

A. Prior to the jury being sworn, the following objections may be made without leave of court: (i) an objection specifically pointing out the irregularity in any list or lists of jurors made by the clerk from names drawn from the jury box, or in the drawing, summoning, returning or impaneling of jurors or in copying or signing or failing to sign the list, and (ii) an objection to any juror on account of any legal disability; after the jury is sworn such objection shall be made only with leave of court.

B. Unless objection to such irregularity or disability is made pursuant to subsection A herein and unless it appears that the irregularity was intentional or that the irregularity or disability be such as to probably cause injustice in a criminal case to the Commonwealth or to the accused and in a civil case to the party making the objection, then such irregularity or disability shall not be cause for summoning a new panel or juror or for setting aside a verdict or granting a new trial.

Credits

Notes of Decisions (21)

VA Code Ann. § 8.01-352, VA ST § 8.01-352
Current through End of the 2016 Reg. Sess.
§ 8.01-354. “Writ of venire facias” defined, VA ST § 8.01-354

The term “writ of venire facias” for the purpose of this chapter shall be construed as referring to the list or lists of jurors made by the clerk from names drawn from the jury box and notice to appear in court served or mailed as provided herein shall be equivalent to summoning such juror in execution of a writ of venire facias.

Credits
§ 8.01-356. Failure of juror to appear, VA ST § 8.01-356

If any juror who has been given due notice to appear in court shall fail to do so without sufficient excuse, he shall be fined not less than $50 nor more than $200.

Credits
The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

Credits

Notes of Decisions (573)

VA Code Ann. § 8.01-358, VA ST § 8.01-358
Current through End of the 2016 Reg. Sess.
§ 8.01-359. Trial; numbers of jurors in civil cases; how jurors selected from panel

A. Five persons from a panel of not less than 11 shall constitute a jury in a civil case when the amount involved exclusive of interest and costs does not exceed the maximum jurisdictional limits as provided in § 16.1-77 (1). Seven persons from a panel of not less than 13 shall constitute a jury in all other civil cases except that when a special jury is allowed, 12 persons from a panel of not less than 20 shall constitute the jury.

B. The parties or their counsel, beginning with the plaintiff, shall alternately strike off one name from the panel until the number remaining shall be reduced to the number required for a jury. Where there are more than two parties, all plaintiffs shall share three strikes between them and all defendants and third-party defendants shall share three strikes between them.

C. In any case in which there are two or more parties on the same side, if counsel or the parties are unable to agree on the full number to be stricken, or, if for any other reason a party or his counsel fails or refuses to strike off the full number of jurors allowed such party, the clerk shall place in a box ballots bearing the names of the jurors whose names have not been stricken and shall cause to be drawn from the box such number of ballots as may be necessary to complete the number of strikes allowed the party or parties failing or refusing to strike. Thereafter, if the opposing side is entitled to further strikes, they shall be made in the usual manner.

D. In any civil case in which the consent of the plaintiff and defendant shall be entered of record, it shall be lawful for the plaintiff to select one person who is eligible as a juror and for the defendant to select another, and for the two so selected to select a third of like qualifications, and the three so selected shall constitute a jury in the case. They shall take the oath required of jurors, and hear and determine the issue, and any two concurring shall render a verdict in like manner and with like effect as a jury of seven.

Credits

Notes of Decisions (3)
VA Code Ann. § 8.01-359, VA ST § 8.01-359
Current through End of the 2016 Reg. Sess.
§ 8.01-360. Additional jurors when trial likely to be protracted, VA ST § 8.01-360

Whenever in the opinion of the court the trial of any criminal or civil case is likely to be a protracted one, the court may direct the selection of additional jurors who shall be drawn from the same source, in the same manner and at the same time as the regular jurors. These additional jurors shall have the same qualifications, and be considered and treated in every respect as regular jurors and be subject to examination and challenge as such jurors. When one additional juror is desired, there shall be drawn three veniremen, and the plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one peremptory challenge. When two or more additional jurors are desired there shall be drawn twice as many veniremen as the number of additional jurors desired. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall each be allowed one additional peremptory challenge for every two additional jurors. The court shall select, by lot, those jurors to be designated additional jurors. The plaintiff and defendant in a civil case or the Commonwealth and accused in a criminal case shall be advised by the court which jurors are additional jurors at the time the jury is impaneled; however, in no event, shall any juror be made aware of his status as a regular or additional juror until he is excused as a juror. Before final submission of the case, the court shall excuse any additional jurors in order to reduce the number of jurors to that required by §§ 8.01-359 and 19.2-262.

Credits

Notes of Decisions (9)
VA Code Ann. § 8.01-360, VA ST § 8.01-360
Current through End of the 2016 Reg. Sess.
Defendant was convicted in the Circuit Court, City of Richmond, James M. Lumpkin, J., of rape and sodomy of his infant daughter. Defendant appealed. The Court of Appeals, Bray, J., held that defendant failed to establish purposeful racial or gender discrimination in jury selection, after state justified peremptory strike with facially neutral sensory perceptions of potential juror's indifference to proceedings, and explained that other potential jurors were struck on basis of their status as singles and not parents.

Affirmed.

West Headnotes (3)

[1] Jury

 Peremptory Challenges
 Defendant failed to establish purposeful racial or gender discrimination in jury selection, after state justified peremptory strike with facially neutral sensory perceptions of potential juror's indifference to proceedings; defendant merely asserted that potential juror was dressed neatly and was otherwise attentive, but trial court stated that potential juror had been detached in attitude, demeanor, and appearance. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote


[3] Criminal Law

 Competency of Jurors and Challenges
 Defendant's contentions about state's explanation for its peremptory challenges that were not presented to trial court would not be considered for first time on appeal. Sup.Ct.Rules, Rule 5A:18; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

Attorneys and Law Firms

**714 *636 James B. Thorsen, Richmond (Thorsen, Page & Marchant, on brief), for appellant.


Present: BAKER, BARROW and BRAY, JJ.

Opinion

BRAY, Judge.

Alvin Presley Robertson (defendant) was convicted by a jury for the rape and sodomy of his infant daughter. He complains on appeal that the prosecution unconstitutionally exercised its peremptory challenges to remove black and male venirepersons. For the reasons which follow, we disagree and affirm the convictions.

445 S.E.2d 713

Because the assigned error relates solely to procedural aspects of the proceeding below, we recite only those facts pertinent to that issue.

Following voir dire, the prosecutor peremptorily struck one black female, Wright, a white male, Blanock, and two black *637 males, Miller and Randolph, from the venire and similarly removed one black male from among three possible alternate jurors. 1 Defendant argued to the trial judge that these peremptory challenges were impermissibly motivated by “racial and gender” considerations and not “good articulable reason[s].” Although defendant failed to incorporate his concerns into either an objection or motion, the court and Commonwealth engaged the issue as a race and gender-based equal protection challenge under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In Batson, the Supreme Court reaffirmed a defendant’s “right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria” and denounced the peremptory exclusion of potential jurors “on account of race” as violative of the Equal Protection Clause. Id. at 85-86, 106 S.Ct. at 1716-18. 2 Recently, in J.E.B. v. Alabama Ex Rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Court extended this protection to embrace “[i]ntentional discrimination” by “state actors” “on the basis of gender.” Id. at ----, 114 S.Ct. at 1422. 3

Batson and its progeny have outlined the procedures in the trial court necessary to resolve an allegation of discriminatory conduct in jury selection, which have since been often recognized and applied by the appellate courts of this Commonwealth. These protocols were just recently succinctly restated in James v. Commonwealth, 247 Va. 459, 461, 442 S.E.2d 396, 398 (1994).

The defendant must make a prima facie showing that the prosecutor has exercised peremptory strikes on the basis of race. Powers v. Ohio, 499 U.S. at 409 [111 S.Ct. at 1369-70]. If this showing is made, the burden shifts to the prosecutor to articulate a racially neutral explanation for striking the jurors in question. Clearly, Batson’s “proof structure” requires a defendant, confronted with a facially neutral explanation for a prosecutor’s peremptory strikes, “to show both that these reasons were merely pretextual and that race [or gender] was the real reason.” United States v. McMillon, 14 F.3d 948, 953 (4th Cir.1994). See also Hill v. Berry, 247 Va. 271, 272-73, 441 S.E.2d 6, 7 (1994); Buck v. Commonwealth, 247 Va. 449, 450, 443 S.E.2d 414, 415 (1994); Broady v. Commonwealth, 16 Va.App. 281, 285, 429 S.E.2d 468, 471 (1993). The trial court is not required “to seek out and evaluate information or evidence not utilized by either party ... in the absence of ... counsel's identification of a false or pretextual reason for the peremptory strikes.” Buck, 247 Va. at 453, 443 S.E.2d at 416. The burden of “proving that the prosecution engaged in purposeful discrimination” remains with the defendant and may not be shifted to the trial court. Id.

Here, the trial court responded properly to defendant's challenge of the Commonwealth's peremptory strikes and required the prosecutor to provide “racially” and “sexist neutral reasons” for her conduct. Without contesting the implicit finding by the trial court that the defendant had established a prima facie case of willful discrimination, 4 the prosecutor explained that she removed venirepersons Wright, Blanock, and Randolph because each was “single,” not “a parent.” Addressing the related gender
issue, the prosecutor observed that it simply “turned out that most of the males were not parents.” She further noted that venireperson Miller “did not seem to be involved, even at this stage of the proceedings.” The trial judge agreed that Miller exhibited a detached “attitude and demeanor and appearance.”

*639 At the conclusion of the prosecutor's representations to the court, defendant noted that Miller was “nicely, neatly” dressed, “seemed otherwise attentive,” and argued that Miller's “silence” during voir dire was “no indication [that] he shouldn't be with us.” Without specificity, defendant characterized the prosecutor's explanation for removing the other jurors in issue as “poor, at best,” and, again, generally protested the racial and “sexual makeup” of the petit jury and the race/gender ratios of the prosecutor's strikes. In response, after acknowledging defendant's “objection,” the trial judge “enter[ed] a finding that the reasons advanced by the Commonwealth for her strikes [were] racially ... and sexually neutral.”

“In evaluating the race [and gender] neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.” Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). If the explanation is constitutionally acceptable, the “decisive question” before the trial judge then becomes “whether counsel's ... explanation ... should be believed.” Id. at 365, 111 S.Ct. at 1869. “[O]nce that has been settled, there seems nothing left to review.” Id. at 367, 111 S.Ct. at 1870. A “trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.” id. at 364, 111 S.Ct. at 1868, and this decision will not be reversed unless clearly erroneous. Id. at 369, 111 S.Ct. at 1871-72; James, 247 Va. at 462, 442 S.E.2d at 398; Barksdale v. Commonwealth, --- Va.App. at ----, 438 S.E.2d at 761, 763 (1993). This standard of review logically recognizes the trial court's unique opportunity to observe and evaluate “the prosecutor's state of mind based on demeanor and credibility” in the context of the case then before the court. Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869; see Barksdale, --- Va.App. at ----, 438 S.E.2d at 763-64.

[1] Here, the prosecutor offered facially neutral, nondiscriminatory reasons for striking **716 venirepersons Miller, Wright, Blanock, and Randolph, which correctly prompted the judge to call upon defendant for a response. Defendant, however, disputed the prosecutor's explanations only with respect to venireperson Miller, asserting that he was “nicely, neatly dressed” and “seemed otherwise attentive.” This argument was obviously intended to counter the Commonwealth's observation that Miller had exhibited an indifference *640 to the proceedings, a view shared by the court. Defendant's references to Miller's clothing and demeanor “otherwise” offer nothing to discredit the facially neutral “sensory perceptions” of the court and prosecutor which are “relevant and appropriate considerations” in an assessment of the prosecutor's actions and reasoning. Barksdale, ---Va.App. at ----, 438 S.E.2d at 764. Manifestly, disinterested jurors should be identified and removed whenever possible, irrespective of race or gender.

[2] [3] Defendant's characterization of the prosecutor's explanations for her strikes of the remaining venirepersons in issue as “poor” was insufficient to establish pretextual surrogates intended to disguise an impermissible discriminatory purpose. Although defendant argues on appeal that the prosecutor's explanations for striking venirepersons Wright, Blanock, and Randolph were unsupported or contradicted by the record, these contentions were not presented to the trial court and will not be considered by this Court for the first time on appeal. Rule 5A:18; Hogan v. Commonwealth, 5 Va.App. 36, 44-45, 360 S.E.2d 371, 376 (1987); see Buck, 247 Va. at 452, 443 S.E.2d at 416. Accordingly, we are unable to conclude that the trial court was plainly wrong in finding that defendant failed to sufficiently prove the requisite purposeful discrimination in this instance, and we affirm the convictions. Affirmed.

All Citations
18 Va.App. 635, 445 S.E.2d 713
445 S.E.2d 713

Footnotes

1 The trial jury was comprised of eight black females, one white female, one black male, and two white males, a ratio of black representation which actually exceeded that of the panel.


3 Although J.E.B. was decided after the instant case was briefed and argued before this Court, the trial court and counsel foretold the decision and also addressed the gender issue.

4 The “actual sequence of events at trial” oftentimes “merges the separate procedural steps” incidental to a Batson challenge and analysis. James, 247 Va. at 462, 442 S.E.2d at 398. However, this “[c]onsolidation ... does not invalidate the process as long as ... [it] does not adversely impact the rights of any party.” Id.
Petitioner, a black man, was convicted in a Kentucky state court, and he appealed. The Kentucky Supreme Court affirmed, and petitioner sought review. The Supreme Court, Justice Powell, held that: (1) Equal Protection Clause forbids prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant, and (2) to establish a prima facie case of purposeful discrimination in selection of the petit jury defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Reversed and remanded.

Justice White filed a concurring opinion.

Justice Marshall filed a concurring opinion.

Justice Stevens filed a concurring opinion in which Justice Brennan joined.

Justice O'Connor filed a concurring opinion.

Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.
106 S.Ct. 1712, 90 L.Ed.2d 69, 54 USLW 4425

**Peremptory Challenges**

A defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial; to establish such a case, defendant must first show that he is a member of a cognizable racial group, that prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race and that the facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race; overruling Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. U.S.C.A. Const.Amend. 14.

11278 Cases that cite this headnote

**[5]** **Jury**

**Affidavits and Other Evidence**

In deciding whether a defendant has made a prima facie case of purposeful discrimination in the selection of the petit jury, trial court should consider all relevant circumstances. U.S.C.A. Const.Amend. 14.

4425 Cases that cite this headnote

**[6]** **Jury**

**Affidavits and Other Evidence**

Once a defendant makes a prima facie showing of purposeful discrimination in selection of the petit jury, burden shifts to State to come forward with a neutral explanation for challenging black jurors; prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption where his intuitive judgment, that they would be partial to the defendant because of their shared race, but rather, must articulate a neutral explanation related to the particular case to be tried. U.S.C.A. Const.Amend. 14.

7342 Cases that cite this headnote

**1713**  **79 Syllabus**

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted voir dire examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and had held that a defendant alleging lack of a fair cross section must demonstrate systematic exclusion of a group of jurors from the venire.

**Held:**

1. The principle announced in Strauder v. West Virginia, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed. Pp. 1715-1719.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. Strauder v. West Virginia, 10 Otto 303, 305, 100 U.S. 303, 305, 25 L.Ed. 664. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race,
the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Pp. 1716-1718.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, 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 or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. Pp. 1718-1719.

2. The portion of Swain v. Alabama, supra, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In Swain, it was held that a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in Swain did not meet that standard because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. Pp. 1719-1722.

3. A defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a prima facie showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections. Pp. 1722-1724.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties. Pp. 1724-1725.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings. Pp. 1725-1726.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE and MARSHALL, JJ., filed concurring opinions, post, p. ---. STEVENS, J., filed a concurring opinion, in which BRENNAN, J., joined, post, p. ---. O'CONNOR, J., filed a concurring opinion, post, p. ---. BURGER, C.J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. ---. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C.J., joined, post, p. ---.

Attorneys and Law Firms

J. David Niehaus argued the cause for petitioner. With him on the briefs were Frank W. Heft, Jr., and Daniel T. Goyette.
Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were David L. Armstrong, Attorney General, and Carl T. Miller, Jr., Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Acting Solicitor General Fried, Assistant Attorney General Trott, and Sidney M. Glazer.*

* Briefs of amici curiae urging reversal were filed for the NAACP Legal Defense and Educational Fund, Inc., by Julius LeVonne Chambers, Charles Stephen Ralston, Steven L. Winter, Anthony G. Amsterdam, and Samuel Rabinove; for the Lawyers' Committee for Civil Rights Under Law by Barry Sullivan, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson, and Norman J. Chachkin; and for Michael McCray et al. by Steven R. Shapiro.

Robert E. Weiss, Donald A. Kuebler, Robert J. Miller, and Jack E. Yelverton filed a brief for the National District Attorneys Association, Inc., as amicus curiae urging affirmance.

Briefs of amici curiae were filed for the National Legal Aid and Defender Association by Patricia Unsinn; and for Elizabeth Holtzman by Elizabeth Holtzman, pro se, and Barbara D. Underwood.

Opinion

*82 Justice POWELL delivered the opinion of the Court.

This case requires us to reexamine that portion of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (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 **1715 exclude members of his race from the petit jury. 1

II

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted voir dire examination of the venire, excused certain jurors for cause, and permitted the parties to *83 exercise peremptory challenges. 2 The prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws. Counsel requested a hearing on his motion. Without expressly ruling on the request for a hearing, the trial judge observed that the parties were entitled to use their peremptory challenges to “strike anybody they want to.” The judge then denied petitioner's motion, reasoning that the cross-section requirement applies only to selection of the venire and not to selection of the petit jury itself.

The jury convicted petitioner on both counts. On appeal to the Supreme Court of Kentucky, petitioner pressed, among other claims, the argument concerning the prosecutor's use of peremptory challenges. Conceding that Swain v. Alabama, supra, apparently foreclosed an equal protection claim based solely on the prosecutor's conduct in this case, petitioner urged the court to follow decisions of other States, People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979), and to hold that such conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution **1716 to a jury drawn from a cross section of the community. Petitioner also contended *84 that the facts showed that the prosecutor had engaged in a “pattern” of discriminatory challenges in this case and established an equal protection violation under Swain.

The Supreme Court of Kentucky affirmed. In a single paragraph, the court declined petitioner's invitation to adopt the reasoning of People v. Wheeler, supra, and Commonwealth v. Soares, supra. The court observed that it recently had reaffirmed its reliance on Swain, and had held that a defendant alleging lack of a fair cross section must

II

In Swain v. Alabama, this Court recognized that a “State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.” 380 U.S., at 203-204, 85 S.Ct., at 826-27. This principle has been “consistently and repeatedly” reaffirmed, id., at 204, 85 S.Ct., at 827, in numerous decisions of this Court both preceding and following Swain. 3 We reaffirm the principle today. 4

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. Strauder v. West Virginia, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In Strauder, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Id., at 306-307. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

**1717 In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder recognized, however, that a defendant has no right to a “petit jury composed in whole or in part of persons of his own race.” Id., at 305. 5 “The number of our races and nationalities stands in the way of evolution of such a conception” of the demand of equal protection. Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945). 6 But the defendant does have the right to be *86 tried by a jury whose members are selected pursuant to nondiscriminatory criteria. Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); Ex parte Virginia, 10 Otto 339, 100 U.S. 339, 345, 25 L.Ed. 676 345 (1880). The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, Strauder, supra, 100 U.S., at 305, 7 or on the false assumption that members of his race as a group are not qualified to serve as jurors, see Norris v. Alabama, 294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935); Neal v. Delaware, 13 Otto 370, 397, 103 U.S. 370, 397, 26 L.Ed. 567 (1881).

Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. “The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” Strauder, supra, 100 U.S., at 308; see Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 330, 90 S.Ct. 518, 524, 24 L.Ed.2d 549 (1970). The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). 8 Those on the *87 venire must be “indifferently chosen,” 9 to secure the defendant's right under the Fourteenth Amendment to “protection of life and liberty against race or color prejudice.” Strauder, supra, 100 U.S., at 309.

Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. See Thiel v. Southern Pacific Co., 328 U.S. 217, 223-224, 66 S.Ct. 984, 987-88, 90 L.Ed. 1181 (1946). A person's race simply “is unrelated to his fitness as a juror.” Id., at 227, 66 S.Ct., at 989 (Frankfurter, J., dissenting). As long ago as Strauder, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against

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the excluded juror. 100 U.S., at 308; see Carter v. Jury
Comm’n of Greene County, supra, 396 U.S., at 329-330, 90
S.Ct., at 523-524; Neal v. Delaware, supra, 103 U.S., at 386.

The harm from discriminatory jury selection extends
beyond that inflicted on the defendant and the excluded
juror to touch the entire community. Selection procedures
that purposefully exclude black persons from juries
undermine public confidence in the fairness of our system
of justice. See Ballard v. United States, 329 U.S. 187, 195,
67 S.Ct. 261, 265, 91 L.Ed. 181 (1946); McCray v. New
York, 461 U.S. 961, 968, 103 S.Ct. 2438, 2443, 77 L.Ed.2d
1322 (1983) (MARSHALL, J., dissenting from denial of
certiorari). Discrimination within the judicial system
is most pernicious because it is “a stimulant to that race
prejudice which is an impediment to securing to [black
citizens] that equal justice which the law aims to secure to
all others.” Strauder, 100 U.S., at 308.

B

In Strauder, the Court invalidated a state statute that
provided that only white men could serve as jurors. Id., at 305. We can be confident that no State now
has such a law. The Constitution requires, however,
that we look beyond the face of the statute defining
juror qualifications and also consider challenged selection
practices to afford “protection against action of the
State through its administrative officers in effecting the
prohibited discrimination.” Norris v. Alabama, supra, 294
U.S., at 589, 55 S.Ct. 579, 580, 79 L.Ed. 1074; see
Hernandez v. Texas, 347 U.S. 475, 478-479, 74 S.Ct. 667,
670-71, 98 L.Ed. 866 (1954); Ex parte Virginia, supra,
100 U.S., at 346-347. Thus, the Court has found a denial
of equal protection where the procedures implementing
a neutral statute operated to exclude persons from
the venire on racial grounds, and has made clear
that the Constitution prohibits all forms of purposeful
racial discrimination in selection of jurors. While
decisions of this Court have been concerned largely
with discrimination during selection of the venire, the
principles announced there also forbid discrimination on
account of race in selection of the petit jury. Since the
Fourteenth Amendment protects an accused throughout
the proceedings bringing him to justice, Hill v. Texas,
316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559
(1942), the State may not draw up its jury lists pursuant
to neutral procedures but then resort to discrimination at
“other stages in the selection process,” Avery v. Georgia,
345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953);
see **1719 McCray v. New York, supra, 461 U.S., at
965, 968, 103 S.Ct., at 2440, 2443 *89 (MARSHALL, J.,
dissenting from denial of certiorari); see also Alexander
v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31
L.Ed.2d 536 (1972).

[2] [3] Accordingly, the component of the jury
selection process at issue here, the State's privilege to
strike individual jurors through peremptory challenges,
is subject to the commands of the Equal Protection
Clause. 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, United
States v. Robinson, 421 F.Supp. 467, 473 (Conn.1976),
mandamus granted sub nom. United States v. Newman,
549 F.2d 240 (CA2 1977), the Equal Protection Clause
forbids the prosecutor to challenge potential jurors solely
on account of their race or on the assumption that black
jurors as a group will be unable impartially to consider the
State's case against a black defendant.

III

The principles announced in Strauder never have been
questioned in any subsequent decision of this Court. *90
Rather, the Court has been called upon repeatedly to
review the application of those principles to particular
facts. A recurring question in these cases, as in any
case alleging a violation of the Equal Protection Clause,
was whether the defendant had met his burden of proving
purposeful discrimination on the part of the State. Whitus
L.Ed.2d 599 (1967); Hernandez v. Texas, supra, 347 U.S.,
at 478-481, 74 S.Ct., at 670-672; Akins v. Texas, 325 U.S.,
at 403-404, 65 S.Ct., at 1279; Martin v. Texas, 200 U.S.
316, 26 S.Ct. 338, 50 L.Ed. 497 (1906). That question also
was at the heart of the portion of Swain v. Alabama we
reexamine today.
**1720** A

Swain required the Court to decide, among other issues, whether a black defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. 380 U.S., at 209-210, 85 S.Ct., at 830. The record in Swain showed that the prosecutor had used the State's peremptory challenges to strike the six black persons included on the petit jury venire. Id., at 210, 85 S.Ct., at 830. While rejecting the defendant's claim for failure to prove purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory challenges. Id., at 222-224, 85 S.Ct., at 837-838.

The Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, id., at 214-220, 85 S.Ct., at 832-836, and the constitutional prohibition on exclusion of persons from jury service on account of race, id., at 222-224, 85 S.Ct., at 837-838. While the Constitution does not confer a right to peremptory challenges, id., at 219, 85 S.Ct., at 835 (citing Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)), those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury, 380 U.S., at 219, 85 S.Ct., at 835. To preserve the peremptory nature of the prosecutor's challenge, the Court in Swain declined to scrutinize his actions in a particular case by relying on a presumption that he properly exercised the State's challenges. Id., at 221-222, 85 S.Ct., at 836-837.

The Court went on to observe, however, that a State may not exercise its challenges in contravention of the Equal Protection Clause. It was impermissible for a prosecutor to use his challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." Id., at 224, 85 S.Ct., at 838. Accordingly, a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system was "being perverted" in that manner. Ibid. For example, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." Id., at 223, 85 S.Ct., at 837. Evidence offered by the defendant in Swain did not meet that standard. While the defendant showed that prosecutors in the jurisdiction had exercised their strikes to exclude blacks from the jury, he offered no proof of the circumstances under which prosecutors were responsible for striking black jurors beyond the facts of his own case. Id., at 224-228, 85 S.Ct., at 838-840.

A number of lower courts following the teaching of Swain reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of Swain has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause.

**1721** B

Since the decision in Swain, we have explained that our cases concerning selection of the venire reflect the general equal protection principle that the "invidious quality" of governmental action claimed to be racially discriminatory "must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). As in any equal protection case, the "burden is, of course," on the defendant who alleges discriminatory selection of the venire "to prove the existence of purposeful discrimination." Whittus v. Georgia, 385 U.S., at 550, 87 S.Ct., at 646-67 (citing Tarrance v. Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903)). In deciding if the defendant has carried his burden of persuasion,
a court must undertake “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). Circumstantial evidence of invidious intent may include proof of disproportionate impact. Washington v. Davis, 426 U.S., at 242, 96 S.Ct., at 2049. We have observed that under some circumstances proof of discriminatory impact “may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.” Ibid. For example, “total or seriously disproportionate exclusion of Negroes from jury venires,” ibid., “is itself such an ‘unequal application of the law ... as to show intentional discrimination,’ ” id., at 241, 96 S.Ct., at 2048 (quoting Akins v. Texas, 325 U.S., at 404, 65 S.Ct., at 1279).

Moreover, since Swain, we have recognized that a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Washington v. Davis, supra, 426 U.S., at 239-242, 96 S.Ct., at 2047-49. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. Alexander v. Louisiana, 405 U.S., at 632, 92 S.Ct., at 1226. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. See Alexander v. Louisiana, supra, 405 U.S., at 632, 92 S.Ct., at 1226; Jones v. Georgia, 389 U.S. 24, 25, 88 S.Ct. 4, 5, 19 L.Ed.2d 25 (1967). Rather, the State must demonstrate that “permissible racially neutral selection criteria and procedures have produced the monochromatic result.” Alexander v. Louisiana, supra, at 632, 92 S.Ct., at 1226; see Washington v. Davis, supra, 426 U.S., at 241, 96 S.Ct., at 2048.

The showing necessary to establish a prima facie case of purposeful discrimination in selection of the venire may be discerned in this Court's decisions. E.g., Castaneda v. Partida, supra, 430 U.S., at 494-495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977); Alexander v. Louisiana, supra, 405 U.S., at 631-632, 92 S.Ct., at 1225-1226. The defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment. Castaneda v. Partida, supra, 430 U.S., at 494, 97 S.Ct., at 1280. In combination with that evidence, a defendant may then make a prima facie case by proving that in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time. Id., at 494, 97 S.Ct., at 1280. Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the “result bespeaks discrimination.” 95 Hernandez v. Texas, 347 U.S., at 482, 74 S.Ct., at 672-73; see Arlington Heights v. Metropolitan Housing Development Corp., supra, 429 U.S., at 266, 97 S.Ct., at 564.

Since the ultimate issue is whether the State has discriminated in selecting the defendant's venire, however, the defendant may establish a prima facie case “in other ways than by evidence of long-continued unexplained absence” of members of his race “from many panels.” Cassell v. Texas, 339 U.S. 282, 290, 70 S.Ct. 629, 633, 94 L.Ed. 839 (1950) (plurality opinion). In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing “the opportunity for discrimination.” Whitus v. Georgia, supra, 385 U.S., at 552, 87 S.Ct., at 647; see Castaneda v. Partida, supra, 430 U.S., at 494, 97 S.Ct., at 1280; Washington v. Davis, supra, 426 U.S., at 241, 96 S.Ct., at 2048; Alexander v. Louisiana, supra, 405 U.S., at 629-631, 92 S.Ct., at 1224-26. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse. When circumstances suggest the need, the trial court must undertake a “factual inquiry” that “takes into account all possible explanatory factors” in the particular case. Alexander v. Louisiana, supra, at 630, 92 S.Ct., at 1225.

Thus, since the decision in Swain, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. These decisions are in accordance with the proposition, articulated in Arlington Heights...
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v. Metropolitan Housing Department Corp., that “a consistent pattern of official racial discrimination” is not “a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act” is not “immunized by the absence of such discrimination in the making of other comparable decisions.” 429 U.S., at 266, n. 14, 97 S.Ct., at 564, n. 14. For evidentiary requirements 96 to dictate that “several must suffer discrimination” before one could object, McCray v. New York, 461 U.S., at 965, 103 S.Ct., at 2440 (MARSHALL, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all. 19

[4] The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. See Castaneda v. Partida, supra, 430 U.S., at 494-495, 97 S.Ct., at 1280; Washington v. Davis, 426 U.S., at 241-242, 96 S.Ct., at 2048-2049; Alexander v. Louisiana, supra, 405 U.S., at 629-631, 92 S.Ct., at 1224-1226. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, Castaneda v. Partida, supra, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” Avery v. Georgia, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

[5] In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. 97 For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

[6] Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See McCray v. Abrams, 750 F.2d, at 1132; Booker v. Jabe, 775 F.2d 762, 773 (CA6 1985), cert. pending, No. 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race. Cf. Norris v. Alabama, 294 U.S., at 598-599, 55 S.Ct., at 583-84; see Thompson v. United States, 469 U.S. 1024, 1026, 105 S.Ct. 443, 445, 83 L.Ed.2d 369 (1984) (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, at 1716, so it forbids the States to strike black veniremen on the assumption that they will be biased against a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of 98 such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by 1724 denying that he had a discriminatory motive or “affirm[ing] [his] good faith in making individual selections.” Alexander v. Louisiana, 405

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U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause “would be but a vain and illusory requirement.” Norris v. Alabama, supra, 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. 20 The trial court then will have the duty to determine if the defendant has established purposeful discrimination. 21

IV

The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that Swain did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.

While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the *99 contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. 22 In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, 23 and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed 24 upon a defendant's timely objection to a prosecutor's challenges.

*100 V

In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed. E.g., Whitus v. Georgia, 385 U.S., at 549-550, 87 S.Ct., at 646-47; Hernandez v. Texas, 347 U.S., at 482, 74 S.Ct., at 672-673; Patton v. Mississippi, 332 U.S., at 469, 68 S.Ct., at 187. 25

It is so ordered.

Justice WHITE, concurring.

The Court overturns the principal holding in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (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, *101 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 black juror could fairly judge a black defendant would violate the Equal Protection Clause.

It appears, however, that the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs. If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond. If not persuaded otherwise, the judge may conclude that the challenges rest on the belief that blacks could not fairly try a black defendant. This, in effect, attributes to the prosecutor the view that all blacks should be eliminated from the entire venire. Hence, the Court's prior cases dealing with jury venires rather than petit juries are not without relevance in this case.

The Court emphasizes that using peremptory challenges to strike blacks does not end the inquiry; it is not unconstitutional, without more, to strike one or more blacks from the jury. The judge may not require the prosecutor to respond at all. If he does, the prosecutor, who in most cases has had a chance to voir dire the prospective jurors, will have an opportunity to give trial-related reasons for his strikes—some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant.

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

I would, however, adhere to the rule announced in DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968), that Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), which held that the States cannot deny jury trials in serious criminal cases, did not require reversal of a state conviction for failure to grant a jury trial where the trial began prior to the date of the announcement in the Duncan decision. The same result was reached in DeStefano with respect to the retroactivity of Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), as it was in Daniel v. Louisiana, 420 U.S. 202, 95 S.Ct. 704, 42 L.Ed.2d 171 (1975) (per curiam), with respect to the decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), holding that the systematic exclusion of women from jury panels violated the Sixth and Fourteenth Amendments.

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. 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.

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, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. See Swain v. Alabama, 380 U.S. 202, 231-238, 85 S.Ct. 824, 841-846, 13 L.Ed.2d 759 (1965) (Goldberg, J., dissenting); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235 (1968); see also J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 155-157 (1977) (hereinafter Van Dyke). Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics...
showing the extent of that practice, but the few cases setting out such figures are instructive. See **1727 United States v. Carter, 528 F.2d 844, 848 (CA8 1975) (in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81% of black jurors), cert. denied, 425 U.S. 961, 96 S.Ct. 1745, 48 L.Ed.2d 206 (1976); United States v. McDaniels, 379 F.Supp. 1243 (ED La.1974) (in 53 criminal cases in 1972-1974 in the Eastern District of Louisiana involving black defendants, federal prosecutors used 68.9% of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); McKinney v. Walker, 394 F.Supp. 1015, 1017-1018 (SC 1974) (in 13 criminal trials in 1970-1971 in Spartansburg County, South Carolina, involving black defendants, prosecutors peremptorily challenged 82% of black jurors), affirmance order, 529 F.2d 516 (CA4 1975).2

Prosecutors *104 have explained to courts that they routinely strike black jurors, see State v. Washington, 375 So.2d 1162, 1163-1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "‘any member of a minority group.’ " 3 In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.4

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "‘in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color.’ " Neal v. Delaware, 13 Otto 370, 394, 103 U.S. 370, 394, 26 L.Ed. 567 (1881), quoting Virginia v. Rives, 10 Otto 313, 323, 100 U.S. 313, 323, 25 L.Ed. 667 (1880). Justice REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and ... in many cases hopefully mistaken" notions. Post, at 1745. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes—even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks *105 lack the "intelligence, experience, or moral integrity,” Neal, supra, 103 U.S., at 397, to be entrusted with that role.

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries, on the basis of their race, violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court, ante, at 1723, has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the **1728 limitations of the 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. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See Commonwealth v. Robinson, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no prima facie case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); People v. Rousseau, 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no prima facie case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are 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, trial courts face the difficult burden of assessing prosecutors' motives. See *106 King v. County of Nassau,
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581 F.Supp. 493, 501-502 (EDNY 1984). 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 had a son about the same age as defendant, see People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), or seemed “uncommunicative,” King, supra, at 498, or “never cracked a smile” and, therefore “did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,” Hall, supra, at 165, 197 Cal.Rptr. at 73, 672 P.2d, at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. “[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.” King, supra, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As Justice REHNQUIST concedes, prosecutors' peremptories are based on their “seat-of-the-pants instincts” as to how particular jurors will vote. Post, at 1745; see also THE CHIEF JUSTICE's dissenting opinion, post, at 1736-1737. Yet “seat-of-the-pants instincts” may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet. It is worth remembering that “114 years after the close of the War Between the States and nearly 100 years after Strader, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in *107 our society as a whole.” Rose v. Mitchell, 443 U.S. 545, 558-559, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979), quoted in Vasquez v. Hillery, 474 U.S. 254, 264, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986).

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in Swain, emphasized that “[w]ere it necessary to make an absolute choice between **1729 the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.” 380 U.S., at 244, 85 S.Ct., at 849. I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as “essential to the fairness of trial by jury,” Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), and “one of the most important of the rights secured to the accused.” Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse, 14 New England L.Rev. 192 (1978). I would not find that an acceptable solution. Our criminal justice system “requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.” Hayes v. Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 353, 30 L.Ed. 578 (1887). We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of *108 peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the Lewis and Pointer Courts are

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noted above; the Swain Court emphasized the “very old credentials” of the peremptory challenge, 380 U.S., at 212, 85 S.Ct., at 813, and cited the “long and widely held belief that peremptory challenge is a necessary part of trial by jury.” Id., at 219, 85 S.Ct., at 835. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. Frazier v. United States, 335 U.S. 497, 505, n. 11, 69 S.Ct. 201, 206, n. 11, 93 L.Ed. 187 (1948); United States v. Wood, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919); see also Swain, 380 U.S., at 219, 85 S.Ct., at 835. The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

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. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (memorandum of BRENNAN, J., joined by STEVENS, J.), and New Jersey v. T.L.O., 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984) (STEVENS, J., dissenting)-cases in which the Court directed the State to brief and argue questions not presented in its petition *109 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 1732-1733, 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 **1730 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 simply 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.

"Petitioners show no case other than the State of California's case dealing with the use of peremptories wherein the Sixth Amendment was cited as authority for resolving the problem. So, we believe that the Fourteenth Amendment is indeed the issue. That was the guts and primarily the basic concern of Swain.

"In closing, we believe that the trial court of Kentucky and the Supreme Court of Kentucky have firmly embraced Swain, and we respectfully request that this Court affirm the opinion of the Kentucky court as well as to reaffirm Swain versus Alabama.”

In addition to the party's reliance on the equal protection argument in defense of the judgment, several amici curiae *110 also addressed that argument. For instance, the argument in the brief filed by the Solicitor General of the United States begins:

"PETITIONER DID NOT ESTABLISH THAT HE WAS DEPRIVED OF A PROPERLY CONSTITUTED PETIT JURY OR DENIED EQUAL PROTECTION OF THE LAWS

"A. Under Swain v. Alabama A Defendant Cannot Establish An Equal Protection Violation By Showing Only That Black Veniremen Were Subjected To Peremptory Challenge By The Prosecution In His Case”

Several other amici similarly emphasized this issue. 3

In these circumstances, although I suppose it is possible that reargument might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years, 4 **1731** I believe the Court acts wisely in *111 resolving the issue now on the basis of the arguments that have already been fully presented without any special invitation from this Court. 5

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.

*112 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.

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, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Reversal of such settled principles would be unusual enough on its own terms, for only three 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, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983). What makes today's holding truly extraordinary is that it is based 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 the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment. See Brief for Appellant 14 and Reply Brief for Appellant 1 in No. 84-SC-733-MR (Ky.). As petitioner explained at oral argument here: “We have not made an equal protection claim.... We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking Swain as such.” Tr. of Oral Arg. 6-7. Petitioner has not suggested any barrier prevented raising an equal protection claim in the Kentucky courts. In such circumstances, review of an equal protection argument is improper in *113 this Court: “The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state **1732 court decisions....” *Illinois v. Gates*, 459 U.S. 1028, 1029, n. 2, 103 S.Ct. 436, 437, n. 2, 74 L.Ed.2d 595 (1982) (STEVENS, J., dissenting) (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162-63, 22 L.Ed.2d 398 (1969)). Neither the Court nor Justice STEVENS offers any justification for departing from this time-honored principle, which dates to *Owings v. Norwood's Lessee*, 5 Cranch 344, 3 L.Ed. 120 (1809), and *Crowell v. Randell*, 10 Pet. 368, 9 L.Ed. 458 (1836).

Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here. This provides an additional and completely separate procedural novelty to today's decision. Petitioner's “question presented” involved only the “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. These provisions are found in the Sixth Amendment, not the Equal Protection Clause of the Fourteenth Amendment relied upon by the Court. In his brief on the merits, under a heading distinguishing equal protection cases, petitioner noted “the irrelevance of the *Swain* analysis to the present case,” Brief for Petitioner 11; instead petitioner relied solely on Sixth Amendment analysis found in cases such as *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). During oral argument, counsel for petitioner was pointedly asked:

“QUESTION: Mr. Niehaus, Swain was an equal protection challenge, was it not?
“MR. NIEHAUS: Our claim here is based solely on the Sixth Amendment.

“QUESTION: Is that correct?

“MR. NIEHAUS: That is what we are arguing, yes.

*114 “QUESTION: You are not asking for a reconsideration of Swain, and you are making no equal protection claim here. Is that correct?

“MR. NIEHAUS: We have not made an equal protection claim. I think that Swain will have to be reconsidered to a certain extent if only to consider the arguments that are made on behalf of affirmance by the respondent and the solicitor general.

A short time later, after discussing the difficulties attendant with a Sixth Amendment claim, the following colloquy occurred:

“QUESTION: So I come back again to my question why you didn't attack Swain head on, but I take it if the Court were to overrule Swain, you wouldn't like that result.

“MR. NIEHAUS: Simply overrule Swain without adopting the remedy?

“QUESTION: Yes.

“MR. NIEHAUS: I do not think that would give us much comfort, Your Honor, no.

“QUESTION: That is a concession.” Id., at 10.

Later, petitioner's counsel refused to answer the Court's questions concerning the implications of a holding based on equal protection concerns:

“MR. NIEHAUS: ... [T]here is no state action involved where the defendant is exercising his peremptory challenge.

*115 “QUESTION: But there might be under an equal protection challenge if it is the state system that allows that kind of a strike.

“MR. NIEHAUS: I believe that is possible. I am really not prepared to answer that specific question....” Id., at 20.

In reaching the equal protection issue despite petitioner's clear refusal to present **1733 it, the Court departs dramatically from its normal procedure without any explanation. When we granted certiorari, we could have-as we sometimes do-directed the parties to brief the equal protection question in addition to the Sixth Amendment question. See, e.g., Paris Adult Theatre I v. Slaton, 408 U.S. 921, 92 S.Ct. 2487, 33 L.Ed.2d 331 (1972); Colorado v. Connelly, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986). Even following oral argument, we could have-as we sometimes do-directed reargument on this particular question. See, e.g., Brown v. Board of Education, 345 U.S. 972, 73 S.Ct. 1114, 97 L.Ed. 1388 (1953); Illinois v. Gates, supra; New Jersey v. T.L.O., 468 U.S. 1214, 82 L.Ed.2d 881, 104 S.Ct. 3583, (1984). This step is particularly appropriate where reexamination *116 of a prior decision is under consideration. See, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 468 U.S. 1213, 104 S.Ct. 3582, 82 L.Ed.2d 880 (1984) (directing reargument and briefing on issue of whether National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), should be reconsidered); Alfred Dunhill of London, Inc. v. Republic of Cuba, 422 U.S. 1005, 95 S.Ct. 2624, 45 L.Ed.2d 668 (1975) (directing reargument and briefing on issue of whether the holding in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), should be reconsidered). Alternatively, we could have simply dismissed this petition as improvidently granted.

The Court today rejects these accepted courses of action, choosing instead to reverse a 21-year-old unanimous constitutional holding of this Court on the basis of constitutional arguments expressly disclaimed by
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petitioner. The only explanation for this action is found in Justice STEVENS' concurrence. Justice STEVENS apparently believes that this issue is properly before the Court because “the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance.” Ante, at 1729. Cf. Illinois v. Gates, 459 U.S., at 1029, n. 1, 103 S.Ct., at 437, n. 1 (STEVENS, J., dissenting) (“[T]here is no impediment to presenting a new argument as an alternative basis for affirming the decision below”) (emphasis in original). To be sure, respondent and supporting amici did cite Swain and the Equal Protection Clause. But their arguments were largely limited to explaining *117 that Swain placed a negative gloss on the Sixth Amendment claim actually raised by petitioner. In any event, **1734 it is a strange jurisprudence that looks to the arguments made by respondent to determine the breadth of the questions presented for our review by petitioner. Of course, such a view is directly at odds with our Rule 21.1(a), which provides that “[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.” Justice STEVENS does not cite, and I am not aware of, any case in this Court's nearly 200-year history where the alternative grounds urged by respondent to affirm a judgment were then seized upon to permit petitioner to obtain relief from that very judgment despite petitioner's failure to urge that ground.

Justice STEVENS also observes that several amici curiae address the equal protection argument. Ante, at 1730. But I thought it well settled that, even if a “point is made in an amicus curiae brief,” if the claim “has never been advanced by petitioners ... we have no reason to pass upon it.” Knetsch v. United States, 364 U.S. 361, 370, 81 S.Ct. 132, 137, 5 L.Ed.2d 128 (1960).

When objections to peremptory challenges were brought to this Court three years ago, Justice STEVENS agreed with Justice MARSHALL that the challenge involved “a significant and recurring question of constitutional law.” McCray v. New York, 461 U.S. 961, 963, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) (MARSHALL, J., dissenting from denial of certiorari), referred to with approval, id., at 961, 103 S.Ct., at 2438 (opinion of STEVENS, J., respecting denial of certiorari). Nonetheless, Justice STEVENS wrote that the issue could be dealt with “more wisely at a later date.” Id., at 962, 103 S.Ct., at 2439. The same conditions exist here today. Justice STEVENS concedes that reargument of this case “might enable some of us to have a better informed view of a problem that has been percolating in the courts for several years.” Ante, at 1730. Thus, at bottom his position is that we should overrule an extremely important prior constitutional decision of this Court on a claim not advanced here, even though briefing and oral *118 argument on this claim might convince us to do otherwise. 3 I believe that “[d]ecisions made in this manner are unlikely to withstand the test of time.” United States v. Leon, 468 U.S. 897, 962, 104 S.Ct. 3430, 3448, 82 L.Ed.2d 702 (1984) (STEVENS, J., dissenting). Before contemplating such a holding, I would at least direct reargument and briefing on the issue of whether the equal protection holding in Swain should be reconsidered.

II

Because the Court nonetheless chooses to decide this case on the equal protection grounds not presented, it may be useful to discuss this issue as well. The Court acknowledges, albeit in a footnote, the “‘very old credentials’” of the peremptory challenge and the “‘widely held belief that **1735 peremptory challenge is a necessary part of trial by jury.’” Ante, at 1720, n. 15 (quoting Swain, 380 U.S., at 219, 85 S.Ct., at 835). But proper resolution of this case requires more than a nodding reference to the purpose of the challenge. Long ago it was *119 recognized that “[t]he right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial.” W. Forsyth, History of Trial by Jury 175 (1852). The peremptory challenge has been in use without scrutiny into its basis for nearly as long as juries have existed. “It was in use amongst the Romans in criminal cases, and the Lex Servilia (B.C. 104) enacted that the accuser and the accused should severally propose one hundred judices, and that each might reject fifty from the list of the other, so that one hundred would remain to try the alleged crime.” Ibid.; see also J. Pettingal, An Enquiry into the Use and Practice of Juries Among the Greeks and Romans 115, 135 (1769).

In *Swain* Justice WHITE traced the development of the peremptory challenge from the early days of the jury trial in England:

“In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to ‘infinite delays and danger.’ Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if ‘they that sue for the King will challenge any ... Jurors, they shall assign ... a Cause certain.’ So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to ‘stand aside’ until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies.” 380 U.S., at 212-213, 85 S.Ct., at 832 (footnotes omitted).

The Court's opinion, in addition to ignoring the teachings of history, also contrasts with *Swain* in its failure to even discuss the rationale of the peremptory challenge. *Swain* observed:

“The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed for them, and not otherwise. In this way the peremptory satisfies the rule that ‘to perform its high **1736** function in the best way, “justice must satisfy the appearance of justice.” ’” *Id.*, at 219, 85 S.Ct., at 835 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

*121* Permitting unexplained peremptories has long been regarded as a means to strengthen our jury system in other ways as well. One commentator has recognized:

“The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.... Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise.... [For example,] [a]lthough experience reveals that black males as a class can be biased against young alienated blacks who have not tried to join the middle class, to enunciate this in the concrete expression required of a challenge for cause is societally divisive. Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.” Babcock, *Voir Dire: Preserving Its Wonderful Power,* 27 Stan.L.Rev. 545, 553-554 (1975).

For reasons such as these, this Court concluded in *Swain* that “the [peremptory] challenge is ‘one of the most

*120* Peremptory challenges have a venerable tradition in this country as well:

“In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear....

“The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, the prosecution was thought to have retained the Crown's common-law right to stand aside, and by 1870, most if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant.” *Id.*, at 214-216, 85 S.Ct., at 833 (footnotes omitted).
important of the rights’” in our justice system. Swain, 380 U.S., at 219, 85 S.Ct., at 835 (quoting Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894)). For close to a century, then, it has been settled that “[t]he denial or impairment of the right is reversible error without a showing of prejudice.” Swain, supra, at 219, 85 S.Ct., at 835 (citing Lewis v. United States, 146 U.370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)).

Instead of even considering the history or function of the peremptory challenge, the bulk of the Court's opinion is spent recounting the well-established principle that intentional exclusion of racial groups from jury venires is a *122 violation of the Equal Protection Clause. I too reaffirm that principle, which has been a part of our constitutional tradition since at least Strauder v. West Virginia, 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880). But if today's decision is nothing more than mere “application” of the “principles announced in Strauder,” as the Court maintains, ante, at 1719, some will consider it curious that the application went unrecognized for over a century. The Court in Swain had no difficulty in unanimously concluding that cases such as Strauder did not require inquiry into the basis for a peremptory challenge. See post, at 1743-1744 (REHNQUIST, J., dissenting). More recently we held that “[d]efendants are not entitled to a jury of any particular composition....” Taylor v. Louisiana, 419 U.S., at 538, 95 S.Ct, at 702.

A moment's reflection quickly reveals the vast differences between the racial exclusions involved in Strauder and the allegations before us today:

“Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) ... has made the general determination that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in the trial phase of our adversary system of justice, that the challenged venireperson will likely be more unfavorable to that litigant in that particular case than others on the same venire.

“Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks a priori across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusion from venires focuses on the inherent attributes of the excluded group and infers its inferiority, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not.” United States v. Leslie, 783 F.2d 541, 554 (CA5 1986) (en banc).

Unwilling to rest solely on jury venire cases such as Strauder, the Court also invokes general equal protection principles in support of its holding. But peremptory challenges are often lodged, of necessity, for reasons “normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty.” Swain, supra, 380 U.S., at 220, 85 S.Ct., at 835-36. Moreover, in making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch. The process cannot be indicted on the sole basis that such decisions are made on the basis of “assumption” or “intuitive judgment.” Ante, at 1723. As a result, unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum “rationality” in government actions has no application to “‘an arbitrary and capricious right,’ ” Swain, supra, at 219, 85 S.Ct., at 835 (quoting Lewis v. United States, supra, 146 U.S., at 378, 13 S.Ct., at 139); a constitutional principle that may invalidate state action on the basis of “stereotypic notions,” Mississippi University for Women v. Hogan, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), does not explain the breadth of a procedure exercised on the “‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.’ ” Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138 (quoting 4 W. Blackstone, Commentaries * 353).

That the Court is not applying conventional equal protection analysis is shown by its limitation of its new rule to allegations of impermissible challenge on the basis of race; the *124 Court's opinion clearly contains such a limitation. See ante, at 1723 (to establish a prima facie case, “the defendant must show that he is a member of a cognizable racial group”) (emphasis added); ibid. (“Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race”) (emphasis added). But if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex, Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); age, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); religious or political affiliation, Karcher v. Daggett, 462 U.S. 725, 748, 103 S.Ct. 2653, 2668-2669, 77 L.Ed.2d 133 (1983) (STEVENS, J., concurring); mental capacity, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); number of children, Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); living arrangements, Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); and employment in a particular industry, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); or profession, *1738 Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 563 (1955).4

In short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a “classification” subject to equal protection scrutiny. See McCray v. Abrams, 750 F.2d 1113, 1139 (CA2 1984) (Meskill, J., dissenting), cert. pending, No. 84-1426. Compounding the difficulties, under conventional equal protection principles some uses of peremptories would be reviewed under “strict scrutiny and ... sustained only if ... suitably tailored to serve a compelling state interest,” *125 Cleburne, 473 U.S., at 440, 105 S.Ct., at 3255; others would be reviewed to determined if they were “substantially related to a sufficiently important government interest,” id., at 441, 105 S.Ct., at 3255; and still others would be reviewed to determine whether they were “a rational means to serve a legitimate end.” Id., at 442, 105 S.Ct., at 3255.

The Court never applies this conventional equal protection framework to the claims at hand, perhaps to avoid acknowledging that the state interest involved here has historically been regarded by this Court as substantial, if not compelling. Peremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic. Nearly a century ago the Court stated that the peremptory challenge is "essential to the fairness of trial by jury." Lewis v. United States, 146 U.S., at 376, 13 S.Ct., at 138. Under conventional equal protection principles, a state interest of this magnitude and ancient lineage might well overcome an equal protection objection to the application of peremptory challenges. However, the Court is silent on the strength of the State's interest, apparently leaving this issue, among many others, to the further “litigation [that] will be required to spell out the contours of the Court's equal protection holding today....” Ante, at 1725 (WHITE, J., concurring). 5

The Court also purports to express “no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.” Ante, at 1718, n. 12 (emphasis added). But the clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable *126 tool to both prosecutors and defense attorneys alike. Once the Court has held that prosecutors are limited in their use of peremptory challenges, could we rationally hold that defendants are not?6 “Our criminal justice system ‘requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.’ ” Ante, at 1729 (MARSHALL, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887)).

Rather than applying straightforward equal protection analysis, the Court substitutes *1739 for the holding in Swain a curious hybrid. The defendant must first
establish a “prima facie case,” ante, at 1721, of invidious discrimination, then the “burden shifts to the State to come forward with a neutral explanation for challenging black jurors.” Ante, at 1723. The Court explains that “the operation of prima facie burden of proof rules” is established in “[o]ur decisions concerning ‘disparate treatment’....” Ante, at 1721, n. 18. The Court then adds, borrowing again from a Title VII case, that “the prosecutor must give a ‘clear and reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges.” Ante, at 1723, n. 20 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)). 7

While undoubtedly these rules are well suited to other contexts, particularly where (as with Title VII) they are required by an Act of Congress, 8 they seem curiously out *127 of place when applied to peremptory challenges in criminal cases. Our system permits two types of challenges: challenges for cause and peremptory challenges. Challenges for cause obviously have to be explained; by definition, peremptory challenges do not. “It is called a peremptory challenge, because the prisoner may challenge peremptorily, on his own dislike, without showing of any cause.” H. Joy, On Peremptory Challenge of Jurors 1 (1844) (emphasis added). Analytically, there is no middle ground: A challenge either has to be explained or it does not. It is readily apparent, then, that to permit inquiry into the basis for a peremptory challenge would force “the peremptory challenge [to] collapse into the challenge for cause.” United States v. Clark, 737 F.2d 679, 682 (CA7 1984). Indeed, the Court recognized without dissent in Swain that, if scrutiny were permitted, “[t]he challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.” Swain, 380 U.S., at 222, 85 S.Ct., at 837.

Confronted with the dilemma it created, the Court today attempts to decree a middle ground. To rebut a prima facie case, the Court requires a “neutral explanation” for the challenge, but is at pains to “emphasize” that the “explanation need not rise to the level justifying exercise of a challenge for cause.” Ante, at 1723. I am at a loss to discern the governing principles here. A “clear and reasonably specific” explanation of “legitimate reasons” for exercising the challenge will be difficult to distinguish from a challenge for cause. Anything *128 short of a challenge for cause may well be seen as an “arbitrary and capricious” challenge, to use Blackstone's characterization of the peremptory. See 4 W. Blackstone, Commentaries * 353. Apparently the Court envisions permissible challenges short of a challenge for cause that are just a little bit arbitrary—but not too much. While our trial judges are “experienced in supervising voir dire,” ante, at 1723, they have no experience in administering rules like this.

**1740 An example will quickly demonstrate how today's holding, while purporting to “further the ends of justice,” ante, at 1724, will not have that effect. Assume an Asian defendant, on trial for the capital murder of a white victim, asks prospective jury members, most of whom are white, whether they harbor racial prejudice against Asians. See Turner v. Murray, 476 U.S. 28, 36-37, 106 S.Ct. 1683, ----, 90 L.Ed.2d 27 (1986). The basis for such a question is to flush out any “juror who believes that [Asians] are violence-prone or morally inferior....” Ante, at ----. 9 Assume further that all white jurors deny harboring racial prejudice but that the defendant, on trial for his life, remains unconvinced by these protestations. Instead, he continues to harbor a hunch, an “assumption,” or “intuitive judgment,” ante, at 1723, that these white jurors will be prejudiced against him, presumably based in part on race. The time-honored rule before today was that peremptory challenges could be exercised on such a basis. The Court explained in Lewis v. United States:

“[H]ow necessary it is that a prisoner (when put to defend his life) should have good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom *129 he has conceived a prejudice even without being able to assign a reason for such his dislike.” 146 U.S., at 376, 13 S.Ct., at 138.

The effect of the Court's decision, however, will be to force the defendant to come forward and “articulate a neutral explanation,” ante, at 1723, for his peremptory challenge, a burden he probably cannot meet. This example demonstrates that today's holding will produce juries that the parties do not believe are truly impartial.
This will surely do more than “disconcert” litigants; it will diminish confidence in the jury system. A further painful paradox of the Court's holding is that it is likely to interject racial matters back into the jury selection process, contrary to the general thrust of a long line of Court decisions and the notion of our country as a “melting pot.” In *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953), for instance, the Court confronted a situation where the selection of the venire was done through the selection of tickets from a box; the names of whites were printed on tickets of one color and the names of blacks were printed on different color tickets. The Court had no difficulty in striking down such a scheme. Justice Frankfurter observed that “opportunity for working of a discriminatory system exists whenever the mechanism for jury selection has a component part, such as the slips here, that differentiates between white and colored ....” *Id.*, at 564, 73 S.Ct., at 894 (concurring) (emphasis added).

Today we mark the return of racial differentiation as the Court accepts a positive evil for a perceived one. Prosecutors and defense attorneys alike will build records in support of their claims that peremptory challenges have been exercised in a racially discriminatory fashion by asking jurors to state their racial background and national origin for the record, despite the fact that “such questions may be offensive to some jurors and thus are not ordinarily asked on voir dire.” *People v. Motton*, 39 Cal.3d 596, 604, 217 Cal.Rptr. 416, 420, 704 P.2d 176, 180, modified, 40 Cal.3d 4b (1985) (advance sheet). 10 This process is sure to tax even the most capable counsel and judges since determining whether a prima facie case has been established will “require a continued monitoring and recording of the ‘group’ composition of the panel present and prospective....” *People v. Wheeler*, 22 Cal.3d 258, 294, 148 Cal.Rptr. 890, 915, 583 P.2d 748, 773 (1978) (Richardson, J., dissenting).

Even after a “record” on this issue has been created, disputes will inevitably arise. In one case, for instance, a conviction was reversed based on the assumption that no blacks were on the jury that convicted a defendant. See *People v. Motton*, supra. However, after the court's decision was announced, Carolyn Pritchett, who had served on the jury, called the press to state that the court was in error and that she was black. 71 A.B.A.J. 22 (Nov. 1985). The California court nonetheless denied a rehearing petition. 11

The Court does not tarry long over any of these difficult, sensitive problems, preferring instead to gloss over them as swiftly as it slides over centuries of history: “[W]e make no attempt to instruct [trial] courts how best to implement our holding today.” *Ante*, at 1724, n. 24. That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created “right.” I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these “implementation” questions leads quickly to the conclusion that there is no “good” way to implement the holding, let alone a “best” way. As one apparently frustrated judge explained after reviewing a case under a rule like that promulgated by the Court today, judicial inquiry into peremptory challenges

“from case to case will take the courts into the quagmire of quotas for groups that are difficult to define and even more difficult to quantify in the courtroom. The pursuit of judicial perfection will require both trial and appellate courts to provide speculative and impractical answers to artificial questions.” *Holley v. J & S Sweeping Co.*, 143 Cal.App.3d 588, 595-596, 192 Cal.Rptr. 74, 79 (1983) (Holmdahl, J., concurring) (footnote omitted).

The Court's effort to “furthe[r] the ends of justice,” *ante*, at 1724, and achieve hoped-for utopian bliss may be admired, but it is far more likely to enlarge the evil “sporting contest” theory of criminal justice roundly condemned by Roscoe Pound almost 80 years ago to the day. See Pound, Causes of Popular Dissatisfaction with the Administration of Justice, August 29, 1906, reprinted in The Pound Conference: Perspectives on Justice in the Future 337 (A. Levin & R. Wheeler eds. 1979). Pound warned then that “too much of the current dissatisfaction has a just origin in our judicial organization and procedure.” *Id.*, at 352. I am afraid that today's newly

I also add my assent to Justice WHITE's conclusion that today's decision does not apply retroactively. *Ante*, at 1726 (concurring); see also *ante*, at 1731 (O'CONNOR, J., concurring). We held in *Solem v. Stumes*, 465 U.S. 638, 643, 104 S.Ct. 1338, 1343, 79 L.Ed.2d 579 (1984), that

"[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall v. Denno*, 388 U.S. 293, 297 [87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199] (1967).

If we are to ignore Justice Harlan's admonition that making constitutional changes prospective only “cuts this Court loose from the force of precedent,” *Mackey v. United States*, 401 U.S. 667, 680, 91 S.Ct. 1160, 1174, 28 L.Ed.2d 404 (1971) (concurring in judgment), then all three of these factors point conclusively to a nonretroactive holding. With respect to the first factor, the new rule the Court announces today is not designed to avert “the clear danger of convicting the innocent.” *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966). Second, it is readily apparent that “law enforcement authorities and state courts have justifiably relied on a prior rule of law....” *Solem*, 465 U.S., at 645-646, 104 S.Ct., at 1343. Today's holding clearly “overrule[s] [a] prior decision” and drastically “transform[s] standard practice.” *Id.*, at 647, 104 S.Ct., at 1343-1344. This fact alone “virtually compel[s]” the conclusion of nonretroactivity. *United States v. Johnson*, 457 U.S. 537, 549-550, 102 S.Ct. 2579, 2586-87, 73 L.Ed.2d 202 (1982). Third, applying today's decision retroactively obviously would lead to a whole host of problems, if not utter chaos. Determining whether a defendant has made a “prima facie showing” of invidious intent, *ante*, at 1723, and, if so, whether the state has a sufficient “neutral explanation” for its actions, *ibid.*, essentially requires reconstructing *ibid.* the entire voir dire, something that will be extremely difficult even if undertaken soon after the close of the trial. 12 In most cases, therefore, retroactive application of today's decision will be “a virtual impossibility.” *State v. Neil*, 457 So.2d 481, 488 (Fla.1984).

In sum, under our prior holdings it is impossible to construct even a colorable argument for retroactive application. The few States that have adopted judicially created rules similar to that announced by the Court today have all refused full retroactive application. See *People v. Wheeler*, 22 Cal.3d, at 283, n. 31, 148 Cal.Rptr., at 908, n. 31, 583 P.2d, at 766, n. 31; *State v. Neil*, supra, at 488; *Commonwealth v. Soares*, 377 Mass. 461, 493, n. 38, 387 N.E.2d 499, 518, n. 38, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). 13 I therefore am persuaded by Justice WHITE's position, *ante*, at 1725-26 (concurring), that today's novel decision is not to be given retroactive effect.

IV

An institution like the peremptory challenge that is part of the fabric of our jury system should not be casually cast aside, especially on a basis not raised or argued by the petitioner. As one commentator aptly observed:

“The real question is whether to tinker with a system, be it of jury selection or anything else, that has done the job for centuries. We stand on the shoulders of our ancestors, as Burke said. It is not so much that the past is always worth preserving, he argued, but rather that ‘it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society....’ ” Younger, Unlawful Peremptory Challenges, 7 Litigation 23, 56 (Fall 1980).

At the very least, this important case reversing centuries of history and experience ought to be set for reargument next Term.

Justice REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.
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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, 85 S.Ct. 824, 13 L.Ed.2d 759 (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 1714 (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 administration of justice enjoyed by the white population,” 380 U.S., at 224, 85 S.Ct., at 838, might violate the guarantees of equal protection. See id., at 222-228, 85 S.Ct., at 837-40. The Court felt that the important and historic purposes of the peremptory challenge were not furthered by the exclusion of blacks “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be.” Id., at 223, 85 S.Ct., at 837 (emphasis added).

Nevertheless, the Court ultimately held that “the record in this case is not sufficient to demonstrate that th[is] rule has been violated.... Petitioner has the burden of proof and he has failed to carry it.” Id., at 224, 226, 85 S.Ct., at 838, 839. Three Justices dissented, arguing that the petitioner's evidentiary burden was satisfied by testimony that no black had ever served on a petit jury in the relevant county. See id., at 228-247, 85 S.Ct., at 840-50 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

Significantly, the Swain Court reached a very different conclusion with respect to the second kind of peremptory-challenge scenario. In Part II of its opinion, the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection. Id., at 209-222, 85 S.Ct., at 829-37. Justice WHITE, writing for the Court, explained:

“While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. Hayes v. Missouri, 120 U.S. 68, 70 [7 S.Ct. 350, 352, 30 L.Ed. 578] [1887]. It is often exercised upon the ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,’ Lewis [v. United States, 146 U.S. 370,] 376 [13 S.Ct. 136, 138, 36 L.Ed. 1011] [1892], upon a juror's ‘habits and associations,’ Hayes v. Missouri, supra, [120 U.S.,] at 70, [7 S.Ct., at 351], or upon the feeling that ‘the bare questioning [a juror’s] indifference may sometimes provoke a resentment,’ Lewis, supra, [146 U.S.,] at 376 [13 S.Ct., at 138]. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and
Yet the Court in the instant case offers absolutely no
operation of the challenge. The challenge, \textit{pro tanto},
would no longer be peremptory...” \textit{Id.}, at 220-222, 85
S.Ct., at 835-837 (emphasis added; footnotes omitted).

At the beginning of Part III of the opinion, the \textit{Swain}
Court reiterated: “We have decided that it is permissible
to insulate from inquiry the removal of Negroes from a
particular jury on the assumption that the prosecutor is
acting on acceptable considerations related to the case
he is trying, \textit{the particular defendant involved} and the
particular crime charged.” \textit{Id.}, at 223, 85 S.Ct., at 837
(emphasis added).

Even the \textit{Swain} dissenters did not take issue with the
majority's position that the Equal Protection Clause
does not prohibit the State from using its peremptory
challenges to exclude blacks based on the assumption or
belief that they would be partial to a black defendant.
The dissenters emphasized that their view concerning
the evidentiary burden facing a defendant who alleges
an equal protection claim based on the State's use of
peremptory challenges “would \textit{*137} [not] mean that
where systematic exclusion of Negroes from jury service
has not been shown, a prosecutor's motives are subject
to question or judicial inquiry when he excludes Negroes
or any other group from sitting on a jury \textit{in a particular
case}.” \textit{Id.}, at 245, 85 S.Ct., at 849 (Goldberg, J., dissenting)
(emphasis added).

The Court today asserts, however, that “the Equal
Protection Clause forbids the prosecutor to challenge
potential jurors solely ... on the assumption that black
jurors as a group will be unable impartially to consider
the State's case against a black defendant.” \textit{Ante}, at
1719. Later, in discussing the State's need to establish a
nondiscriminatory basis for striking blacks from the jury,
the Court states that “the prosecutor may not rebut the
defendant's prima facie case of discrimination by stating
merely that he challenged jurors of the defendant's race on
the assumption—or his intuitive judgment—that they would
be partial to the defendant because of their shared race.”
\textit{Ante}, at 1723. Neither of these statements has anything
to do with the “evidentiary burden” necessary to establish an
equal protection claim in this context, and both statements
are directly contrary to the view of the Equal Protection
Clause shared by the majority and the dissenters in \textit{Swain}.
Yet the Court in the instant case offers absolutely no
analysis in support of its decision to overrule \textit{Swain} in this
regard, and in fact does not discuss Part II of the \textit{Swain}
opinion at all.

I cannot subscribe to the Court's unprecedented use of
the Equal Protection Clause to restrict the historic scope
of the peremptory challenge, which has been described as
“a necessary part of trial by jury.” \textit{Swain}, 380 U.S.,
at 219, 85 S.Ct., at 835. In my view, there is simply
nothing “unequal” about the State's using its peremptory
challenges to strike blacks from the jury in cases involving
black defendants, so long as such challenges are also used
to exclude whites in cases involving white defendants,
Hispanics in cases involving Hispanic **1745 defendants,
Asians in cases involving Asian defendants, and so *138
on. This case-specific use of peremptory challenges by the
State does not single out blacks, or members of any other
race for that matter, for discriminatory treatment. ¹ Such
use of peremptories is at best based upon seat-of-the-pants
instincts, which are undoubtedly crudely stereotypical and
may in many cases be hopelessly mistaken. But as long as
they are applied across-the-board to jurors of all races and
nationalities, I do not see-and the Court most certainly has
not explained-how their use violates the Equal Protection
Clause.

Nor does such use of peremptory challenges by the
State infringe upon any other constitutional interests. The
Court does not suggest that exclusion of blacks from
the jury through the State's use of peremptory challenges
results in a violation of either the fair-cross-section or
impartiality component of the Sixth Amendment. See
\textit{ante}, at 1716, n. 4. And because the case-specific use of
peremptory challenges by the State does not deny blacks
the right to serve as jurors in cases involving nonblack
defendants, it harms neither the excluded jurors nor the
remainder of the community. See \textit{ante}, at 1717-1718.

The use of group affiliations, such as age, race, or
occupation, as a “proxy” for potential juror partiality,
based on the assumption or belief that members of one
group are more likely to favor defendants who belong to
the same group, has long been accepted as a legitimate
basis for the State's exercise of peremptory challenges.
See \textit{Swain}, supra; \textit{United States v. Leslie}, 783 F.2d 541
(CA5 1986) (en banc); \textit{United States v. Carter}, 528 F.2d
Footnotes


2. The Kentucky Rules of Criminal Procedure authorize the trial court to permit counsel to conduct *voir dire* examination or to conduct the examination itself. Ky.Rule Crim.Proc. 9.38. After jurors have been excused for cause, the parties exercise their peremptory challenges simultaneously by striking names from a list of qualified jurors equal to the number to be seated plus the number of allowable peremptory challenges. Rule 9.36. Since the offense charged in this case was a felony, and an alternate juror was called, the prosecutor was entitled to six peremptory challenges, and defense counsel to nine. Rule 9.40.


The basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries." Alexander v. Louisiana, 405 U.S. 625, 626, n. 3, 92 S.Ct. 1221, 1223, n. 3, 31 L.Ed.2d 536 (1972); see Norris v. Alabama, supra, 294 U.S., at 589, 55 S.Ct., at 583-584. These principles are reinforced by the criminal laws of the United States. 18 U.S.C. § 243.

In this Court, petitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider Swain to find a constitutional violation on this record. We agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments.

Similarly, though the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), we have never held that the Sixth Amendment requires that "petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." id., at 538, 95 S.Ct., at 702. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court's holding that a jury of six persons is not unconstitutional. Williams v. Florida, 399 U.S. 78, 102-103, 90 S.Ct. 1893, 1906-1907, 26 L.Ed.2d 446 (1970).

In Duncan v. Louisiana, decided after Swain, the Court concluded that the right to trial by jury in criminal cases was such a fundamental feature of the American system of justice that it was protected against state action by the Due Process Clause of the Fourteenth Amendment. 391 U.S., at 147-156, 88 S.Ct., at 1446-52. The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government." Id., at 155, 156-157, 88 S.Ct., at 1450-52. For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. Id., at 156, 88 S.Ct., at 1451; Glasser v. United States, 315 U.S. 60, 86-88, 62 S.Ct. 457, 473, 86 L.Ed. 680 (1942). By compromising the representative quality of the jury, discriminatory selection procedures make "juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." Akins v. Texas, supra, 325 U.S., at 408, 65 S.Ct., at 1281 (Murphy, J., dissenting).

We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.

Nor do we express any views on the techniques used by lawyers who seek to obtain information about the community in which a case is to be tried, and about members of the venire from which the jury is likely to be drawn. See generally J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels 183-189 (1977). Prior to voir dire examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case. In some jurisdictions, where a pool of jurors serves for a substantial period of time, see id., at 116-118, counsel also may seek to learn which members of the pool served on

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juries in other cases and the outcome of those cases. Counsel even may employ professional investigators to interview persons who have served on a particular petit jury. We have had no occasion to consider particularly this practice.

Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here.


The decision in Swain has been the subject of extensive commentary. Some authors have argued that the Court should reconsider the decision. E.g., Van Dyke, supra, at 166-167; Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loyola (LA) L.Rev. 247, 268-270 (1973); Kuhn, Jury Discrimination: The Next Phase, 41 S.Cal.L.Rev. 235, 283-303 (1968); Note, Rethinking Limitations on the Peremptory Challenge, 85 Colum.L.Rev. 1357 (1985); Note, Peremptory Challenge-Systematic Exclusion of Prospective Jurors on the Basis of Race, 39 Miss.L.J. 157 (1967); Comment, Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury, 52 Va.L.Rev. 1157 (1966). See also Johnson, Black Innocence and the White Jury, 83 Mich.L.Rev. 1611 (1985).

On the other hand, some commentators have argued that we should adhere to Swain. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337 (1982).

In Swain, the Court reviewed the “very old credentials” of the peremptory challenge system and noted the “long and widely held belief that peremptory challenge is a necessary part of trial by jury.” 380 U.S., at 219, 85 S.Ct., at 835; see id., at 212-219, 85 S.Ct., at 831-835.


See McCray v. Abrams, 750 F.2d, at 1120, and n. 2. The lower courts have noted the practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race. As the Court of Appeals for the Fifth Circuit observed, the defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. United States v. Pearson, 448 F.2d 1207, 1217 (1971). The court believed this burden to be “most difficult” to meet. Ibid. In jurisdictions where court records do not reflect the jurors' race and where voir dire proceedings are not transcribed, the burden would be insurmountable. See People v. Wheeler, 22 Cal.3d, at 285-286, 148 Cal.Rptr., at 908-909, 583 P.2d, at 767-768 (1978).

Our decisions concerning “disparate treatment” under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S., at 252-256, 101 S.Ct., at 1093-95.

Decisions under Title VII also recognize that a person claiming that he has been the victim of intentional discrimination may make out a prima facie case by relying solely on the facts concerning the alleged discrimination against him. See cases in n. 18, supra.

The Court of Appeals for the Second Circuit observed in McCray v. Abrams, 750 F.2d, at 1132, that “[t]here are any number of bases” on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause. As we explained in another context, however, the prosecutor must give a “clear and reasonably specific” explanation of his “legitimate reasons” for exercising the challenges. Texas Dept. of Community Affairs v. Burdine, 450 U.S., at 258, 101 S.Ct., at 1096.
In a recent Title VII sex discrimination case, we stated that "a finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court. Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Id., at 575-576, 105 S.Ct., at 1512-1513.

While we respect the views expressed in Justice MARSHALL's concurring opinion concerning prosecutorial and judicial enforcement of our holding today, we do not share them. The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race. We have no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes. Certainly, this Court may assume that trial judges, in supervising voir dire in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination. Nor do we think that this historic trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecutors and trial judges will not perform conscientiously their respective duties under the Constitution.

For example, in People v. Hall, 35 Cal.3d 161, 197 Cal.Rptr. 71, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges.

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see Booker v. Jabe, 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see United States v. Robinson, 421 F.Supp. 467, 474 (Conn.1976), mandamus granted sub nom. United States v. Newman, 549 F.2d 240 (CA2 1977).

To the extent that anything in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), is contrary to the principles we articulate today, that decision is overruled.

* 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.


4 Id., at 1, col. 1; see also Comment, A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process, 18 St. Louis U.L.J. 662 (1974).

2 Brief for United States as Amicus Curiae 7.

3 The argument section of the brief for the National District Attorneys Association, Inc., as amicus curiae in support of respondent begins as follows:

"This Court should conclude that the prosecutorial peremptory challenges exercised in this case were proper under the fourteenth amendment equal protection clause and the sixth amendment. This Court should further determine that there is no constitutional need to change or otherwise modify this Court's decision in Swain v. Alabama." Id., at 5.

Amici supporting petitioner also emphasized the importance of the equal protection issue. See, e.g., Brief for NAACP Legal Defense and Educational Fund, American Jewish Committee, and American Jewish Congress as Amici Curiae 24-36; Brief for Lawyers' Committee for Civil Rights Under Law as Amicus Curiae 11-17; Brief for Elizabeth Holtzman as Amicus Curiae 13.


The eventual federal habeas corpus disposition of McCray, of course, proved to be one of the landmark cases that made the issues in this case ripe for review. McCray v. Abrams, 750 F.2d 1113 (CA2 1984), cert. pending, No. 84-1426. See also Pet. for Cert. 5-7 (relying heavily on McCray as a reason for review). In McCray, as in almost all opinions that have considered similar challenges, the Court of Appeals for the Second Circuit explicitly addressed the equal protection issue and the viability of Swain. 750 F.2d, at 1118-1124. The pending petition for certiorari in McCray similarly raises the equal protection question that has long been central to this issue. Pet. for Cert. in No. 84-1426 (Question 2).

Indeed, shortly after agreeing to hear Batson, the Court was presented with a motion to consolidate McCray and Batson, and consider the cases together. Presumably because the Court believed that Batson adequately presented the issues with which other courts had consistently grappled in considering this question, the Court denied the motion. See Abrams v. McCray, 471 U.S. 1097, 105 S.Ct. 2318, 85 L.Ed.2d 837 (1985). Cf. Ibid. (BRENNAN, MARSHALL, and STEVENS, J., dissenting from denial of motion to consolidate).

Although I disagree with his criticism of the Court in this case, I fully subscribe to THE CHIEF JUSTICE's view, expressed today, that the Court should only address issues necessary to the disposition of the case or petition. For contrasting views, see, e.g., Bender v. Williamsport Area School Dist., 475 U.S. 534, 551, 106 S.Ct. 1326, 1336, 89 L.Ed.2d 501 (1986) (BURGER, C.J., dissenting) (addressing merits even though majority of the Court found a lack of standing); Colorado v. Nunez, 465 U.S. 324, 104 S.Ct. 1257, 79 L.Ed.2d 338 (1984) (concurring opinion, joined by BURGER, C.J.) (expressing view on merits even though writ was dismissed as improvidently granted because state-court judgment rested on adequate and independent state grounds); Florida v. Casal, 462 U.S. 637, 639, 103 S.Ct. 3100, 3101-3102, 77 L.Ed.2d 277 (1983) (BURGER, C.J., concurring) (agreeing with Court that writ should be dismissed as improvidently granted because judgment rested on adequate and independent state grounds, but noting that “the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement”). See also Colorado v. Connelly, 474 U.S. 1050, 106 S.Ct. 785, 88 L.Ed.2d 763 (1986) (ordering parties to address issue that neither party raised); New Jersey v. T.L.O., 468 U.S. 1214 (1984) (same).

In Colorado v. Connelly, Justice BRENNAN, joined by Justice STEVENS, filed a memorandum objecting to this briefing of an additional question, explaining that “it is hardly for this Court to ‘second chair’ the prosecutor to alter his strategy or guard him from mistakes. Under this Court's Rule 21.1(a), ‘only the questions set forth in the petition or fairly included therein will be considered by the Court.’ Given petitioner's express disclaimer that [this] issue is presented, that question obviously is not ‘fairly included’ in the question submitted. The Court's direction that the parties address it anyway makes meaningless in this case the provisions of this Rule and is plainly cause for concern, particularly since it is clear that a similar dispensation would not be granted a criminal defendant, however strong his claim.” 474 U.S., at 1052, 106 S.Ct., at 786-87. If the Court's limited step of directing briefing on an additional point at the time certiorari was granted was “cause for concern,” I would think a fortiori that the far more expansive action the Court takes today would warrant similar concern.

Justice STEVENS, joined by Justice BRENNAN and Justice MARSHALL, dissented from the order directing reargument in New Jersey v. T.L.O. They explained:

“The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that [petitioner] decided not to bring here.... Volunteering unwanted advice is rarely a wise course of action.

“I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.” 468 U.S., at 1215-1216, 104 S.Ct., at 3584-3585.

Justice STEVENS' proffered explanation notwithstanding, see ante, at 1729 (concurring opinion), I am at a loss to discern how one can consistently hold these views and still reach the question the Court reaches today.

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C.J., concurring), the issues discussed were all the primary issues advanced, briefed, and argued by the petitioners in this Court or related directly to the Court's basis for deciding the case. To be sure, some of the discussion in these separate statements might be parsimoniously viewed as "[u]nnecessary to the disposition of the case or petition." Ante, at 1730-1731, n. 5. But under this approach, many dissenting opinions and dissents from the denial of certiorari would have to be condemned as well. More important, in none of these separate statements was it even suggested that it would be proper to overturn a state-court judgment on issues that had not been briefed and argued by petitioner in this Court, as the Court does today. Finally, in Colorado v. Connelly, 474 U.S. 1050, 106 S.Ct. 824, 13 L.Ed.2d 759 (1986), and New Jersey v. T.L.O., 468 U.S. 1214, 104 S.Ct. 3583, 82 L.Ed.2d 881 (1984), we directed briefing and argument on particular questions before deciding them. Such a procedure serves the desirable end of ensuring that the issues which the Court wishes to consider will be fully briefed and argued. My suggestion that the Court hear reargument of this case serves the same end.

While all these distinctions might support a claim under conventional equal protection principles, a defendant would also have to establish standing to raise them before obtaining any relief. See Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536 (1972).

The Court is also silent on whether a State may demonstrate that its use of peremptories rests not merely on "assumptions," ante, at 1723, but on sociological studies or other similar foundations. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md.L.Rev. 337, 365, and n. 124 (1982). For "[i]f the assessment of a juror's prejudices based on group affiliation is accurate, ... then counsel has exercised the challenge as it was intended-to remove the most partial jurors." Id., at 365.

"[E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." United States v. Leslie, 783 F.2d 541, 565 (CA5 1986) (en banc).

One court has warned that overturning Swain has "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." United States v. Clark, 737 F.2d 679, 682 (CA7 1984). That "potential" is clearly about to be realized.

It is worth observing that Congress has been unable to locate the constitutional deficiencies in the peremptory challenge system that the Court discards today. As the Solicitor General explains in urging a rejection of the Sixth Amendment issue presented by this petition and an affirmation of the decision below, "[i]n reconciling the traditional peremptory challenge system with the requirements of the Sixth Amendment it is instructive to consider the accommodation made by Congress in the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq. ... [T]he House Report makes clear that ... 'the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.' " Brief for United States as Amicus Curiae at 20, n. 11 (quoting H.R.Rep. No. 1076, 90th Cong., 2d Sess., 5-6 (1968)), U.S.Code Cong. & Admin.News 1968, pp. 1792, 1795.

This question, required by Turner in certain capital cases, demonstrates the inapplicability of traditional equal protection analysis to a jury voir dire seeking an impartial jury. Surely the question rests on generalized, stereotypic racial notions that would be condemned on equal protection grounds in other contexts.

The California Supreme Court has attempted to finesse this problem by asserting that "discrimination is more often based on appearances than verified racial descent, and a showing that the prosecution was systematically excusing persons who appear to be Black would establish a prima facie case" of racial discrimination. People v. Motton, 39 Cal.3d, at 604, 217 Cal.Rptr., at 420, 704 P.2d, at 180. This suggests, however, that proper inquiry here concerns not the actual race of the jurors who are excluded, but rather counsel's subjective impressions as to what race they spring from. It is unclear just how a "record of such impressions is to be made.

Similar difficulties may lurk in this case on remand. The Court states as fact that "a jury composed only of white persons was selected." Ante, at 1715. The only basis for the Court's finding is the prosecutor's statement, in response to a question from defense counsel, that "[i]n looking at them, yes; it's an all-white jury." App. 3.

It should also be underscored that the Court today does not hold that petitioner has established a "prima facie case" entitling him to any form of relief. Ante, at 1725.

Petitioner concedes that it would be virtually impossible for the prosecutor in this case to recall why he used his peremptory challenges in the fashion he did. Brief for Petitioner 35.

Although Delaware has suggested that it might follow a rule like that adopted by the Court today, see Riley v. State, 496 A.2d 997 (1985), the issue of retroactive application of the rule does not appear to have been litigated in a published decision.

I note that the Court does not rely on the argument that, because there are fewer “minorities” in a given population than there are “majorities,” the equal use of peremptory challenges against members of “majority” and “minority” racial groups has an unequal impact. The flaws in this argument are demonstrated in Judge Garwood's thoughtful opinion for the en banc Fifth Circuit in United States v. Leslie, 783 F.2d 541, 558-561 (1986).

Black construction worker who was injured in a job-site accident at a federal enclave sued concrete company for negligence. During voir dire, defendant used two of its three peremptory challenges to remove black persons from the prospective jury. Plaintiff requested that defendant be required to articulate a race-neutral explanation for striking the jurors. After denying request, the United States District Court for the Western District of Louisiana, Earl E. Veron, J., entered judgment on jury verdict which found plaintiff 80% contributorily negligent, and plaintiff appealed. The Court of Appeals for the Fifth Circuit, 860 F.2d 1308, reversed and remanded. On rehearing en banc, the Court of Appeals, 895 F.2d 218, affirmed. Plaintiff sought certiorari. The Supreme Court, Justice Kennedy, held that: (1) private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race; race-based exclusion of potential jurors violates their equal protection rights. U.S.C.A. Const.Amends. 5, 14.

Justice Scalia filed a dissenting opinion.

Opinion on remand, 943 F.2d 551.

West Headnotes (8)

[1] Constitutional Law
   Peremptory challenges
   Jury
   Eligibility in general

Private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race; race-based exclusion of potential jurors violates their equal protection rights. U.S.C.A. Const.Amends. 5, 14.

222 Cases that cite this headnote

[2] Constitutional Law
   Private persons and entities

Test to determine whether constitutional deprivation caused by private party involves “state action” is whether claimed deprivation resulted from exercise of a right or privilege having its source in state authority, and whether private party charged with the deprivation can be described in all fairness as a state actor.

153 Cases that cite this headnote

[3] Constitutional Law
   Applicability to Governmental or Private Action; State Action

In determining whether particular action or course of action constitutes “state action,” it is relevant to examine: extent to which actor relies on governmental assistance and benefits; whether actor is performing a traditional governmental function; and whether injury caused is aggravated in a
unique way by the incidents of governmental authority.

89 Cases that cite this headnote

Constitutional Law

Private persons and entities

Although private use of state-sanctioned private remedies or procedures does not arise, by itself, to the level of "state action," such action may be found when private parties make extensive use of state procedures with the overt, significant assistance of state officials.

78 Cases that cite this headnote

Constitutional Law

Jury

Peremptory challenges

Jury

Eligibility in general

Private litigant's use of peremptory challenges in civil case to exclude jurors on account of race constituted "state action," considering that claimed constitutional deprivation resulted from exercise of right or privilege having its source in state authority, and that litigant in all fairness had to be deemed government actor in its use of peremptory challenges, inasmuch as litigant made extensive use of government procedures with overt, significant assistance of the government; moreover, action in question involved performance of a traditional governmental function, and injury allegedly caused by use of peremptory challenges was aggravated in a unique way by the incidents of governmental authority.

164 Cases that cite this headnote

Constitutional Law

Peremptory challenges

Jury

Peremptory challenges

Jury

Eligibility in general

Approach set forth in Batson v. Kentucky, whereby race-neutral explanations for peremptory challenges are required, after prima facie case of racial discrimination in the use of such challenges is established,

332 Cases that cite this headnote

Constitutional Law
Petitioner Edmonson sued respondent Leesville Concrete Co. in the District Court, alleging that Leesville's negligence had caused him personal injury. During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, Edmonson, who is black, requested that the court require Leesville to articulate a race-neutral explanation for the peremptory strikes. The court refused on the ground that Batson does not apply in civil proceedings, and the empaneled jury, which consisted of 11 white persons and 1 black, rendered a verdict unfavorable to Edmonson. The Court of Appeals affirmed, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications.

Held: A private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race. Pp. 2081-2088.

(a) Race-based exclusion of potential jurors in a civil case violates the excluded persons' equal protection rights. Cf., e.g., Powers v. Ohio, 499 U.S. 400, 402, 111 S.Ct. 1364, 1366, 113 L.Ed.2d 411. Although the conduct of private parties lies beyond the Constitution's scope in most instances, Leesville's exercise of peremptory challenges was pursuant to a course of state action and is therefore subject to constitutional requirements under the analytical framework set forth in Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-942, 102 S.Ct. 2744, 2754-2756, 73 L.Ed.2d 482. First, the claimed constitutional deprivation results from the exercise of a right or privilege having its source in state authority, since Leesville would not have been able to engage in the alleged discriminatory acts without 28 U.S.C. § 1870, which authorizes the use of peremptory challenges in civil cases. Second, Leesville must in all fairness be deemed a government actor in its use of peremptory challenges. Leesville has made extensive use of government procedures with the overt, significant assistance of the government, see, e.g., Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 486, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565, in that peremptory challenges have no utility outside the jury trial system, which is created and governed by an elaborate set of statutory provisions and administered solely by government officials, including the trial judge, himself a state actor, who exercises substantial control over voir dire and effects the final and practical denial of the excluded individual's opportunity to serve on the petit jury by discharging him or her. Moreover, the action in question involves the performance of a traditional governmental function, see, e.g., Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, since the peremptory challenge is used in selecting the jury, an entity that is a quintessential governmental body having no attributes of a private actor. Furthermore, the injury allegedly caused by Leesville's use of peremptory challenges is aggravated in a unique way by the incidents of governmental authority, see Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, since the courtroom is a real expression of the government's constitutional authority, and racial exclusion within its confines compounds the racial insult inherent in judging a citizen by the color of his or her skin. Pp. 2081-2087.

(b) A private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. Just as in the criminal context, see Powers, supra, all three of the requirements for third-party standing are satisfied in the civil context. First, there is no reason to believe that the daunting barriers to suit by an excluded criminal juror, see id., at 414, 111 S.Ct., at 1372, would be any less imposing simply because the person was excluded from civil jury service. Second, the relation between the excluded venireperson and the litigant challenging the exclusion is just as close in the civil as it is in the criminal context. See id., at 413, 111 S.Ct., at 1372. Third, a civil litigant can demonstrate that he or she has suffered a concrete, redressable injury from the exclusion of jurors on account of race, in that racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of
We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors. This civil case originated in a United States District Court, and we apply the equal protection component of the Fifth Amendment's Due Process Clause. See Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Thaddeus Donald Edmonson, a construction worker, was injured in a jobsite accident at Fort Polk, Louisiana, a federal enclave. Edmonson sued Leesville Concrete Company for negligence in the United States District Court for the Western District of Louisiana, claiming that a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment. **2081 Edmonson invoked his Seventh Amendment right to a trial by jury.

During voir dire, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing our decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Edmonson, who is *617 himself black, requested that the District Court require Leesville to articulate a race-neutral explanation for striking the two jurors. The District Court denied the request on the ground that Batson does not apply in civil proceedings. As empaneled, the jury included 11 white persons and 1 black person. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000. It also attributed 80% of the fault to Edmonson's contributory negligence, however, and awarded him the sum of $18,000.

Edmonson appealed, and a divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that our opinion in Batson applies to a private attorney representing a private litigant and that peremptory challenges may not be used in a civil trial for the purpose of excluding jurors on the basis of race. 860 F.2d 1308 (1989). The Court of Appeals panel held that private parties become state actors when they exercise peremptory challenges and that to limit Batson to criminal cases

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KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C.J., and SCALIA, J., joined, post, p. 2089. SCALIA, J., filed a dissenting opinion, post, p. 2095.

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“would betray Batson 's fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause.” Id., at 1314. The panel remanded to the trial court to consider whether Edmonson had established a prima facie case of racial discrimination under Batson.

The full court then ordered rehearing en banc. A divided en banc panel affirmed the judgment of the District Court, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications. 895 F.2d 218 (1990). The court concluded that the use of peremptories by private litigants does not constitute state action and, as a result, does not implicate constitutional guarantees. The dissent reiterated the arguments of the vacated panel opinion. The Courts of Appeals have divided on the issue. See Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (CA7 1990) (private litigant may not use peremptory challenges to exclude venirepersons on account of race); *618 Fludd v. Dykes, 863 F.2d 822 (CA11 1989) (same).

Cf. Dias v. Sky Chefs, Inc., 919 F.2d 1370 (CA9 1990) (corporation may not raise a Batson-type objection in a civil trial); United States v. De Gross, 913 F.2d 1417 (CA9 1990) (government may raise a Batson-type objection in a criminal case), rehearing en banc granted, 930 F.2d 695 (1991); Reynolds v. Little Rock, 893 F.2d 1004 (CA8 1990) (when government is involved in civil litigation, it may not use its peremptory challenges in a racially discriminatory manner). We granted certiorari, 498 U.S. 809, 111 S.Ct. 41, 112 L.Ed.2d 18 (1990), and now reverse the Court of Appeals.

II

A

In Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), we held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury. Our conclusion rested on a two-part analysis. First, following our opinions in Batson and in Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), we made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service. 499 U.S., at 407-409, 111 S.Ct., at 1369-1370. Second, we relied on well-established rules of third-party standing to hold that a defendant may raise the excluded jurors' equal protection rights. Id., at 410-415, 111 S.Ct., at 1370-1373.

Powers relied upon over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process. **2082 See, e.g., Batson, supra, 476 U.S., at 84, 106 S.Ct., at 1716; Swain v. Alabama, 380 U.S. 202, 203-204, 85 S.Ct. 824, 826-827, 13 L.Ed.2d 759 (1965); Carter, supra, 396 U.S., at 329-330, 90 S.Ct., at 523-524; Neal v. Delaware, 103 U.S. 370, 386, 26 L.Ed. 567 (1881); Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880). While these decisions were for the most part directed at discrimination by a prosecutor or other government officials in the context of criminal proceedings, we have not intimated that race discrimination is permissible in civil proceedings. See Thiel v. Southern Pacific Co., 328 U.S. 217, 220-221, 66 S.Ct. 984, 985-986, 90 L.Ed. 1181 (1946). Indeed, *619 discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. See id., at 220, 66 S.Ct., at 985-86. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.

That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. The Constitution's protections of individual liberty and equal protection apply in general only to action by the government. National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988). Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972). Thus, the legality of the exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.

The Constitution structures the National Government, confines its actions, and, in regard to certain individual

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liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. Tarkanian, supra, 488 U.S., at 191, 109 S.Ct., at 461; Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978).

This fundamental limitation on the scope of constitutional guarantees “preserves an area of individual freedom by limiting the reach of federal law” and “avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.” Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

*620 To implement these principles, courts must consider from time to time where the governmental sphere ends and the private sphere begins. Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action, which explores the “essential dichotomy” between the private sphere and the public sphere, with all its attendant constitutional obligations. Moose Lodge, supra, 407 U.S., at 172, 92 S.Ct., at 1971.

[2] We begin our discussion within the framework for state-action analysis set forth in Lugar, supra, 457 U.S., at 937, 102 S.Ct., at 2753-54. There we considered the state-action question in the context of a due process challenge to a State's procedure allowing private parties to obtain prejudgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, **2083 457 U.S., at 939-941, 102 S.Ct., at 2754-2756; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, id., at 941-942, 102 S.Ct., at 2755-2756.

There can be no question that the first part of the Lugar inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact. While we have recognized the value of peremptory challenges in this regard, particularly in the criminal context, see Batson, 476 U.S., at 98-99, 106 S.Ct., at 1723-1724, there is no constitutional obligation to allow them. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L.Ed.2d 80 (1988); Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919). Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

*621 Legislative authorizations, as well as limitations, for the use of peremptory challenges date as far back as the founding of the Republic; and the common-law origins of peremptories predate that. See Holland v. Illinois, 493 U.S. 474, 481, 110 S.Ct. 803, 808, 107 L.Ed.2d 905 (1990); Swain, 380 U.S., at 212-217, 85 S.Ct., at 831-834. Today in most jurisdictions, statutes or rules make a limited number of peremptory challenges available to parties in both civil and criminal proceedings. In the case before us, the challenges were exercised under a federal statute that provides, inter alia:

“In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.” 28 U.S.C. § 1870.

Without this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts.

[3] Given that the statutory authorization for the challenges exercised in this case is clear, the remainder of our state-action analysis centers around the second part of the Lugar test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. Although we have recognized that this aspect of the analysis is often a factbound inquiry, see Lugar, supra, 457 U.S., at 939, 102 S.Ct., at 2754-55, our cases disclose certain principles of general application.
Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); whether the actor is performing a traditional governmental function, see Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); cf. San Francisco Arts & Athletics, Inc. v. United States Olympic *622 Comm., 483 U.S. 522, 544-545, 107 S.Ct. 2971, 2985-2986, 97 L.Ed.2d 427 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 97 L.Ed. 1161 (1948). Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, **2084 Tulsa Professional, 485 U.S., at 485, 108 S.Ct., at 1345, our cases have found state action when private parties make extensive use of state procedures with “the overt, significant assistance of state officials.” Id., at 486, 108 S.Ct., at 1345; see Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers. In the federal system, Congress has established the qualifications for jury service, see 28 U.S.C. § 1865, and has outlined the procedures by which jurors are selected. To this end, each district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. 28 U.S.C. § 1863; see, e.g., Jury Plan for the United States District Court for the Western District of Louisiana (on file with Administrative Office of United States Courts).

This plan, as with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, 28 U.S.C. § 1861, and non-exclusion on account of race, color, religion, sex, national origin, or economic status, 18 U.S.C. § 243; 28 U.S.C. § 1862. Statutes prescribe many of the details of the jury plan, 28 U.S.C. § 1863, defining the jury wheel, § 1863(b)(4), voter lists, §§ 1863(b)(2), *623 1869(c), and jury commissions, § 1863(b)(1). A statute also authorizes the establishment of procedures for assignment to grand and petit juries, § 1863(b)(8), and for lawful excuse from jury service, §§ 1863(b)(5), (6).

At the outset of the selection process, prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. See 28 U.S.C. § 1864. Failure to do so may result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. Ibid. In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. See G. Bermant, Jury Selection Procedures in United States District Courts 7-8 (Federal Judicial Center 1982). The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service. 28 U.S.C. § 1871.

The trial judge exercises substantial control over voir dire in the federal system. See Fed.Rule Civ.Proc. 47. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire voir dire by themselves, a common practice in the District Court where the instant case was tried. See Louisiana Rules of Court, Local Rule 13.02 (WD La.1990). The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. 28 U.S.C. § 1870. When a lawyer exercises a peremptory *624
challenge, the judge advises the juror he or she has been excused.

As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination.

**2085** The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the “final and practical denial” of the excluded individual's opportunity to serve on the petit jury. *Virginia v. Rives*, 100 U.S. 313, 322, 25 L.Ed. 667 (1880). Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court “has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.” *Burton v. Wilmington Parking Authority*, 365 U.S., at 725, 81 S.Ct., at 862. In so doing, the government has “create[d] the legal framework governing the [challenged] conduct,” *National Collegiate Athletic Assn.*, 488 U.S., at 192, 109 S.Ct., at 462, and in a significant way has involved itself with invidious discrimination.

In determining Leesville's state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction.

As we noted in *Powers*, the jury system performs the critical governmental functions of guarding the rights of litigants and “ensur[ing] continued acceptance of the laws by all of the people.” 499 U.S., at 407, 111 S.Ct., at 1369. In the federal system, the Constitution itself commits the trial of facts in a civil cause to the *625 jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final. *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 83 S.Ct. 965, 10 L.Ed.2d 80 (1963). In some civil cases, as we noted earlier this Term, the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). A judgment based upon a civil verdict may be preclusive of issues in a later case, even where some of the parties differ. See *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). And in all jurisdictions a true verdict will be incorporated in a judgment enforceable by the court. These are traditional functions of government, not of a select, private group beyond the reach of the Constitution.

If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality. Cf. *Tarkanian*, 488 U.S., at 192-193, 109 S.Ct., at 462-463; *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). At least a plurality of the Court recognized this principle in *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). There we found state action in a scheme in which a private organization known as the Jaybird Democratic Association conducted whites-only elections to select candidates to run in the Democratic primary elections in Ford Bend County, Texas. The Jaybird candidate was certain to win the Democratic primary and the Democratic candidate was certain to win the general election. Justice Clark's concurring opinion drew from *Smith v. Allwright*, 321 U.S. 649, 664, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944), the principle that “any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints.” *Terry, supra*, 345 U.S., at 481, 73 S.Ct., at 819. The concurring opinion concluded:

**2086** *626* “[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.” 345 U.S., at 484, 73 S.Ct., at 821.

The principle that the selection of state officials, other than through election by all qualified voters, may constitute state action applies with even greater force in the context of jury selection through the use of peremptory
We find respondent's reliance on Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. See id., at 325, 102 S.Ct., at 453-54; Branti v. Finkel, 445 U.S. 507, 519, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574 (1980). While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. 454 U.S., at 323, n. 13, 102 S.Ct., at 452, n. 13. “[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, ... a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.” Id., at 321, 102 S.Ct., at 451.

Our decision in West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), provides a further illustration. We held there that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but we held his “function[s] within the state system, not the precise terms of his employment, [determined] whether his actions can fairly be attributed to the State.” Id., at 55-56, 108 S.Ct., at 2259. We noted:

“Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care.” Id., at 55, 108 S.Ct., at 2258-2259.

In the case before us, the parties do not act pursuant to any contractual relation with the government. Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony,
Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. Rose v. Mitchell, 443 U.S. 545, 556, 99 S.Ct. 2993, 3000, 61 L.Ed.2d 739 (1979); Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not “questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.” Powers, 499 U.S., at 402, 111 S.Ct., at 1366. To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

**2088** Id., at 413, 111 S.Ct., at 1372. Exclusion of a juror on the basis of race severs that relation in an invidious way.

We believe the only issue that warrants further consideration in this case is whether a civil litigant can demonstrate a sufficient interest in challenging the exclusion of jurors on account of race. In Powers, we held:

“The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. See Allen v. Hardy, 478 U.S., [255.] at 259 [106 S.Ct. 2878, at 2880, 92 L.Ed.2d 199 (1986) ] (recognizing a defendant's interest in 'neutral jury selection procedures'). This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' Rose v. Mitchell, [supra, at 556, 99 S.Ct., at 3000], and places the fairness of a criminal proceeding in doubt.” Id., at 411, 111 S.Ct. at 1371.

The harms we recognized in Powers are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. See Thiel v. Southern Pacific Co., 328 U.S., at 220, 66 S.Ct., at 985-86. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil

It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.

III

[8] It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In Batson, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. **2089 476 U.S., at 96-97, 106 S.Ct., at 1722-23. The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.

The judgment is reversed, and the case is remanded for further proceedings consistent with our opinion.

It is so ordered.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

The Court concludes that the action of a private attorney exercising a peremptory challenge is attributable to the government and therefore may compose a constitutional violation. *632 This conclusion is based on little more than that the challenge occurs in the course of a trial. Not everything that happens in a courtroom is state action. A trial, particularly a civil trial is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.

In order to establish a constitutional violation, Edmonson must first demonstrate that Leesville's use of a peremptory challenge can fairly be attributed to the government. Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency. Perhaps this is because the state action determination is so closely tied to the “framework of the peculiar facts or circumstances present.” See Burton v. Wilmington Parking Authority, 365 U.S. 715, 726, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961). Whatever the reason, and despite the confusion, a coherent principle has emerged. We have stated the rule in various ways, but at base, “constitutional standards are invoked only when it can be said that the [government] is responsible for the

*633 The Court concludes that this standard is met in the present case. It rests this conclusion primarily on two empirical assertions. First, that private parties use peremptory challenges with the “overt, significant participation of the government.” *Ante*, at 2084. Second, that the use of a peremptory challenge by a private party “involves the performance of a traditional function of the government.” *Ante*, at 2085. Neither of these assertions is correct.

*634* The Court amasses much ostensible evidence of the Federal Government's “overt, significant assistance” in the peremptory process. See *ante*, at 2083-2085. Most of this evidence is irrelevant to the issue at hand. The bulk of the practices the Court describes—the establishment of qualifications for jury service, the location and summoning of prospective jurors, the jury wheel, the voter lists, the jury qualification forms, the per diem for jury service—are independent of the statutory entitlement to peremptory strikes, or of their use. All of this Government action is in furtherance of the Government's distinct obligation to provide a qualified jury; the Government would do these things even if there were no peremptory challenges. All of this activity, as well as the trial judge's control over *voir dire*, see *ante*, at 2084, is merely prerequisite to the use of a peremptory challenge; it does not constitute participation in the challenge. That these actions may be necessary to a peremptory challenge—in the sense that there could be no such challenge without a venire from which to select—no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

The entirety of the government's actual participation in the peremptory process boils down to a single fact: “When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused.” *Ante*, at 2084-2085. This is not significant participation. The judge's action in “advising” a juror that he or she has been excused is state action to be sure. It is, however, if not de *minimis*, far from what our cases have required in order to hold the government “responsible” for private action or to find that private actors “represent” the government. See *Blum, supra*, 457 U.S., at 1004, 102 S.Ct., at 2785-86; *Tarkanian, supra*, 488 U.S., at 191, 109 S.Ct., at 461. The government “normally can be held responsible for a private decision only when it has exercised coercive power
or has provided such significant encouragement, *635 either overt or covert, that the choice must in law be deemed to be that of the State.” Blum, supra, 457 U.S., at 1004, 102 S.Ct., at 2786.

As an initial matter, the judge does not “encourage” the use of a peremptory challenge at all. The decision to strike a juror is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge. It is the attorney who strikes. The judge does little more than acquiesce in this decision by excusing the juror. In point of fact, the government has virtually no role in the use of peremptory challenges. Indeed, there are jurisdictions in which, with the consent of the parties, voir dire and jury selection may take place in the absence of any court personnel. See Haith v. United States, 231 F.Supp. 495 (ED Pa.1964), aff’d, 342 F.2d 158 (CA3 1965) (per curiam); State v. Eberhardt, 32 Ohio Misc. 39, 282 N.E.2d 62 (1972).

The alleged state action here is a far cry from that which the Court found, for example, in Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). In that case, state courts were called upon to enforce racially **2091 restrictive covenants against sellers of real property who did not wish to discriminate. The coercive power of the State was necessary in order to enforce the private choice of those who had created the covenants: “[B]ut for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.” Id., at 19, 68 S.Ct., at 845. Moreover, the courts in Shelley were asked to enforce a facially discriminatory contract. In contrast, peremptory challenges are “exercised without a reason stated [and] without inquiry.” Swain, supra, 380 U.S., at 220, 85 S.Ct., at 835-36. A judge does not “significantly encourage” discrimination by the mere act of excusing a juror in response to an unexplained request.

There is another important distinction between Shelley and this case. The state courts in Shelley used coercive force to impose conformance on parties who did not wish to discriminate. “Enforcement” of peremptory challenges, on *636 the other hand, does not compel anyone to discriminate; the discrimination is wholly a matter of private choice. See Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv.L.Rev. 808, 819 (1989). Judicial acquiescence does not convert private choice into that of the State. See Blum, 457 U.S., at 1004-1005, 102 S.Ct., at 2785-2786.

Nor is this the kind of significant involvement found in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). There, we concluded that the actions of the executrix of an estate in providing notice to creditors that they might file claims could fairly be attributed to the State. The State's involvement in the notice process, we said, was “pervasive and substantial.” Id., at 487, 108 S.Ct., at 1345-46. In particular, a state statute directed the executrix to publish notice. In addition, the District Court in that case had “reinforced the statutory command with an order expressly requiring [the executrix] to ‘immediately give notice to creditors.’ ” Ibid. Notice was not only encouraged by the State, but positively required. There is no comparable state involvement here. No one is compelled by government action to use a peremptory challenge, let alone to use it in a racially discriminatory way.

The Court relies also on Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). See ante, at 2083, 2085. But the decision in that case depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building. The State had “so far insinuated itself into a position of interdependence with” the restaurant that it had to be “recognized as a joint participant in the challenged activity.” Burton, supra, at 725, 81 S.Ct., at 861-62. Among the “peculiar facts [and] circumstances” leading to that conclusion was that the State stood to profit from the restaurant's discrimination. 365 U.S., at 726, 81 S.Ct., at 862, 861. As I have shown, the government's involvement in the use of peremptory challenges falls far short of “interdependence” or *637 “joint participation.” Whatever the continuing vitality of Burton beyond its facts, see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358, 95 S.Ct. 449, 457, 42 L.Ed.2d 477 (1974), it does not support the Court's conclusion here.
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Jackson is a more appropriate analogy to this case. Metropolitan Edison terminated Jackson's electrical service under authority granted it by the State, pursuant to a procedure approved by the state utility commission. Nonetheless, we held that Jackson could not challenge the termination procedure on due process grounds. The termination was not state action because the State had done nothing to encourage the particular termination practice:

“Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice **2092 by ordering it, does not transmute a practice initiated by the utility and approved by the commission into ‘state action.’ ... Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so ‘state action’ for purposes of the Fourteenth Amendment.” Id., at 357, 95 S.Ct., at 456-57 (emphasis added; footnote omitted).

The similarity to this case is obvious. The Court's “overt, significant” government participation amounts to the fact that the government provides the mechanism whereby a litigant can choose to exercise a peremptory challenge. That the government allows this choice and that the judge approves it, does not turn this private decision into state action.

To the same effect is Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). In that case, a warehouse company's proposed sale of goods entrusted to it for storage pursuant to the New York Uniform Commercial Code was not fairly attributable to the State. We held that “the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings.” Id., at 165, 98 S.Ct., at 1738. *638 Similarly, in the absence of compulsion, or at least encouragement, from the government in the use of peremptory challenges, the government is not responsible.

“The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.” Swain, 380 U.S., at 220, 85 S.Ct., at 836. The government neither encourages nor approves such challenges. Accordingly, there is no “overt, significant participation” by the government.

B

The Court errs also when it concludes that the exercise of a peremptory challenge is a traditional government function. In its definition of the peremptory challenge, the Court asserts, correctly, that jurors struck via peremptories “otherwise ... satisfy the requirements for service on the petit jury.” Ante, at 2083. Whatever reason a private litigant may have for using a peremptory challenge, it is not the government's reason. The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service. “'Peremptory challenges are exercised by a party, not in selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger.’ ” C. Lincoln, Abbott's Civil Jury Trials 92 (3d ed. 1912), quoting O'Neil v. Lake Superior Iron Co., 67 Mich. 560, 561, 35 N.W. 162, 163 (1887). For this reason, the Court is incorrect, and inconsistent with its own definition of the peremptory challenge, when it says that “[i]n the jury selection process [in a civil trial], the government and private litigants work for the same end.” See ante, at 2086. The Court is also incorrect when it says that a litigant exercising a peremptory challenge is performing “a traditional function of the government.” See ante, at 2085.

*639 The peremptory challenge is a practice of ancient origin, part of our common law heritage in criminal trials. See Swain, supra, at 212-218, 85 S.Ct., at 831-835 (tracing history); Holland, 493 U.S., at 481, 110 S.Ct., at 808
private actor exercise "a power 'traditionally exclusively
exclusivity. The public-function doctrine requires that the
functions in these cases had one thing in common:
L.Ed. 984 (1932) . We explained that the government
(1944), and
at 157-160, 98 S.Ct., at 1733-35, reviewing
and other cases that found state action in the exercise of
its sidewalks certain protected speech.
company that owned a town had attempted to prohibit on
the outcome of county general elections. In
In those cases, the Court held that private control over
out a "traditional governmental function."

A peremptory challenge by a private litigant does not meet
the Court's standard; it is not a traditional government
function. Beyond this, the Court has misstated the law.
The Court cites Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809,
97 L.Ed. 1152 (1953), and Marsh v. Alabama, 326 U.S.
501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), for the proposition
that state action may be imputed to one who carries
out a "traditional governmental function." Ante, at 2083.
In those cases, the Court held that private control over
certain core government activities rendered the private
action attributable to the State. In Terry, the activity
was a private primary election that effectively determined
the outcome of county general elections. In Marsh, a
company that owned a town had attempted to prohibit on
its sidewalks certain protected speech.

*640 In Flagg Bros., supra, the Court reviewed these
and other cases that found state action in the exercise of
certain public functions by private parties. See 436 U.S.,
at 157-160, 98 S.Ct., at 1733-35, reviewing Terry, Marsh,
Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987
(1944), and Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484,
76 L.Ed. 984 (1932). We explained that the government
functions in these cases had one thing in common:
exclusivity. The public-function doctrine requires that the
private actor exercise "a power 'traditionally exclusively
reserved to the State.' " 436 U.S., at 157, 98 S.Ct., at
1734, quoting Jackson, 419 U.S., at 352, 95 S.Ct., at 454.
In order to constitute state action under this doctrine,
private conduct must not only comprise something that
the government traditionally does, but something that only
the government traditionally does. Even if one could
fairly characterize the use of a peremptory strike as the
performance of the traditional government function of
jury selection, it has never been exclusively the function
of the government to select juries; peremptory strikes are
older than the Republic.

West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d
40 (1988), is not to the contrary. The Court seeks to
dervi e from that case a rule that one who "serve[s] an
important function within the government," even if not a
government employee, is thereby a state actor. See ante,
at 2087. Even if this were the law, it would not help the
Court's position. The exercise of a peremptory challenge
is not an important government function; it is not a
government function at all. In any event, West does not
stand for such a broad proposition. The doctor in that
case was under contract with the State to provide services
for the State. More important, the State hired the doctor
in order to fulfill the State's constitutional obligation to
attend to the necessary medical care of prison inmates. 487
U.S., at 53, 10, 57, 108 S.Ct., at 2257, n. 10, 2260. The
doctor's relation to the State, and the State's responsibility,
went beyond mere performance of an important job.

The present case is closer to Jackson, supra, and
L.Ed.2d 418 (1982), than to Terry, Marsh, *641 or West.
In the former cases, the alleged state activities were those
of state-regulated private actors performing what might
be considered traditional public functions. See Jackson
(electrical utility); Rendell-Baker (school). In each case,
the Court held that the performance of such a function,
even if state regulated or state funded, was not state action
unless the function **2094 had been one exclusively the
prerogative of the State, or the State had provided such
significant encouragement to the challenged action that
the State could be held responsible for it. See Jackson,
419 U.S., at 352-353, 357, 95 S.Ct., at 454-455, 456-57;
Rendell-Baker, supra, 457 U.S., at 842, 840, 102 S.Ct., at
2771-72, 2770-71. The use of a peremptory challenge by a
private litigant meets neither criterion.
C

None of this should be news, as this case is fairly well controlled by Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). We there held that a public defender, employed by the State, does not act under color of state law when representing a defendant in a criminal trial. In such a circumstance, government employment is not sufficient to create state action. More important for present purposes, neither is the performance of a lawyer's duties in a courtroom. This is because a lawyer, when representing a private client, cannot at the same time represent the government.

Trials in this country are adversarial proceedings. Attorneys for private litigants do not act on behalf of the government, or even the public as a whole; attorneys represent their clients. An attorney's job is to "advanc[e] the 'undivided interests of his client.' This is essentially a private function ... for which state office and authority are not needed." Id., at 318-319, 102 S.Ct., at 449-450 (footnotes omitted). When performing adversarial functions during trial, an attorney for a private litigant acts independently of the government:

"[I]t is the function of the public defender to enter 'not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities." Id., at 320, 102 S.Ct., at 451 (footnote omitted).

Our conclusion in Dodson was that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id., at 325, 102 S.Ct. at 453. It cannot be gainsaid that a peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection. The Court does not challenge the rule of Dodson, yet concludes that private attorneys performing this adversarial function are state actors. Where is the distinction?

The Court wishes to limit the scope of Dodson to the actions of public defenders in an adversarial relationship with the government. Ante, at 2086-2087. At a minimum then, the Court must concede that Dodson stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client, nor is an attorney representing a private litigant in a civil suit against the government. Both of these propositions are true, but the Court's distinction between this case and Dodson turns state action doctrine on its head. Attorneys in an adversarial relation to the state are not state actors, but that does not mean that attorneys who are not in such a relation are state actors.

The Court is plainly wrong when it asserts that “[i]n the jury selection process, the government and private litigants work for the same end.” See ante, at 2086. In a civil trial, the attorneys for each side are in an adversarial relation, ibid.; they use their peremptory strikes in direct opposition to one another, and for precisely contrary ends. The government cannot “work for the same end” as both parties. In fact, the government is neutral as to private litigants' use of peremptory strikes. That's the point. The government does not encourage or approve these strikes, or direct that they be used in any particular way, or even that they be used at all. The government is simply not “responsible” for the use of peremptory strikes by private litigants.

Constitutional “liability attaches only to those wrongdoers ‘who carry a badge of authority of [the government] and represent it in some capacity.’ ” Tarkanian, 488 U.S., at 191, 109 S.Ct., at 461. A government attorney who uses a peremptory challenge on behalf of the client is, by definition, representing the government. The challenge thereby becomes state action. It is antithetical to the nature of our adversarial process, however, to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.
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II

Beyond “significant participation” and “traditional function,” the Court’s final argument is that the exercise of a peremptory challenge by a private litigant is state action because it takes place in a courtroom. *Ante*, at 2087. In the end, this is all the Court is left with; peremptories do not involve the “overt, significant participation of the government,” nor do they constitute a “traditional function of the government.” The Court is also wrong in its ultimate claim. If *Dodson* stands for anything, it is that the actions of a lawyer in a courtroom do not become those of the government by virtue of their location. This is true even if those actions are based on race.

Racism is a terrible thing. It is irrational, destructive, and mean. Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum *644* established by the government for the resolution of disputes through “quiet rationality.” See *ante*, at 2088. But not every opprobrious and inequitable act is a constitutional violation. The Fifth Amendment’s Due Process Clause prohibits only actions for which the Government can be held responsible. The Government is not responsible for everything that occurs in a courtroom. The Government is not responsible for a peremptory challenge by a private litigant. I respectfully dissent.

Justice SCALIA, dissenting.
I join Justice O’CONNOR’s dissent, which demonstrates that today’s opinion is wrong in principle. I write to observe that it is also unfortunate in its consequences.

The concrete benefits of the Court’s newly discovered constitutional rule are problematic. It will not necessarily be a net help rather than hindrance to minority litigants in obtaining racially diverse juries. In criminal cases, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), already prevents the prosecution from using race-based strikes. The effect of today’s decision (which logically must apply to criminal prosecutions) will be to prevent the defendant from doing so-so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to prove race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today’s decision represents a net loss to the minority litigant. In civil cases that is probably not true—but it does not represent an unqualified gain either. Both sides have peremptory challenges, and they are sometimes used to assure rather than to prevent a racially diverse jury.

The concrete costs of today’s decision, on the other hand, are not at all doubtful; and they are enormous. We have now added to the duties of already-submerged state and **2096** federal trial courts the obligation to assure that race is not included among the other factors (sex, age, religion, political *645* views, economic status) used by private parties in exercising their peremptory challenges. That responsibility would be burden enough if it were not to be discharged through the adversary process; but of course it is. When combined with our decision this Term in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which held that the party objecting to an allegedly race-based peremptory challenge need not be of the same race as the challenged juror, today’s decision means that both sides, in all civil jury cases, no matter what their race (and indeed, even if they are artificial entities such as corporations), may lodge racial-challenge objections and, after those objections have been considered and denied, appeal the denials—with the consequence, if they are successful, of having the judgments against them overturned. Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of *Batson* claims that have made their way even as far as this Court under the pre-)*Powers* regime, it is a certainty that the amount of judges’ and lawyers’ time devoted to implementing today’s newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion. See *Holland v. Illinois*, 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990).

Although today’s decision neither follows the law nor produces desirable concrete results, it certainly has great

symbolic value. To overhaul the doctrine of state action in this fashion—what a magnificent demonstration of this institution’s uncompromising hostility to race-based judgments, even by private actors! The price of the demonstration is, alas, high, and much of it will be paid by the minority litigants who use our courts. I dissent.

Footnotes
* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
* Dodson was a case brought under Rev.Stat. § 1979, 42 U.S.C. § 1983, the statutory mechanism for many constitutional claims. The issue in that case, therefore, was whether the public defender had acted “under color of state law.” 454 U.S., at 314, 102 S.Ct., at 447-48. In Lugar v. Edmondson Oil Co., 457 U.S. 922, 929, 102 S.Ct. 2744, 2749-50, 73 L.Ed.2d 482 (1982), the Court held that the statutory requirement of action “under color of state law” is identical to the “state action” requirement for other constitutional claims.

All Citations
500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660, 59 USLW 4574
The Circuit Court, Henrico County, George F. Tidey, J., entered a judgment in favor of plaintiff in a wrongful death action arising from an automobile accident, and the defendant appealed. The Supreme Court, Stephenson, J., held that: (1) trial court did not abuse its discretion or commit manifest error in finding that white plaintiff did not advance racially neutral reasons for striking only black member of the venire; (2) statement made by witness approximately five minutes after automobile accident, that he saw that traffic light was amber, was not admissible in wrongful death action as an “excited utterance”; and (3) statement by witness was not admissible as a prior consistent statement.

Reversed and remanded.

Compton, J., filed an opinion dissenting in part in which Carrico, C.J., joined.

West Headnotes (8)

[1] **Jury**
- Peremptory Challenges

**Jury**
- Standing and Waiver

Out-of-court statement made by witness approximately five minutes after automobile accident, that he saw that traffic light was amber, was not admissible as a prior consistent statement of a witness where
record did not indicate that witness was impeached by a charge or bias, or interest or corruption, that witness' testimony was a “recent fabrication,” that he had some motive for testifying falsely or that he was charged with a design to misrepresent because of a relation to a party litigant or to the case.

16 Cases that cite this headnote

[6] Trial
  ❇ Failure of Party to Testify or to Call Witness or Produce Evidence

Trial court did not err in refusing to give a “missing witness” instruction where evidence respecting existence and availability of witness was in sharp conflict.

1 Cases that cite this headnote

[7] Evidence
  ❇ Failure to Call Witness

Availability of a witness is one essential element for invoking “missing witness” rule.

1 Cases that cite this headnote

[8] Automobiles
  ❇ Intersections and Crossings

Question of whether defendant's speed was reasonable under the attending facts and circumstances was properly submitted to jury in wrongful death action where evidence suggested that intersection was extremely congested at time of the accident and that defendant slowed to a speed of five or ten miles per hour less than speed limit as he approached the intersection.

1 Cases that cite this headnote

Attorneys and Law Firms

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*397 Present: All the Justices.

Opinion

STEPHenson, Justice.

In this appeal, we determine whether the peremptory striking of a black person from the jury panel violated the rule first pronounced in

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and extended to civil litigation in


I

Gail M. Hudson, administrator of the estate of her deceased husband, Ulus Grant Hudson, Jr. (the Administrator), brought a wrongful death action against William Ivory Faison and Faison & Faison Hauling, Inc. (collectively, Faison). The Administrator alleged that Hudson's death was caused by Faison's negligent operation of a motor vehicle.

On October 17, 1989, a dump truck operated by Faison collided with an automobile driven by Hudson, resulting in Hudson's death. The collision occurred at the intersection of Nine Mile Road and Airport Drive in Henrico County when Hudson made a left turn in front of Faison's approaching truck. There was testimony that each operator had proceeded on a green traffic light.

A jury returned a verdict in favor of the Administrator in the amount of $410,000, and the trial court entered judgment on the verdict. Faison appeals.
II

The Administrator is a white person; William Ivory Faison is a black man. During jury selection, 13 veniremen were qualified for the jury panel. Twelve were white; one venireman, Dorothy Gregg, was black. Before the jury was sworn and the remaining veniremen were excused, Faison objected to the Administrator’s use of a peremptory strike to remove Gregg from the panel. Faison contended at trial, as he does on appeal, that the striking of Gregg was racially motivated and in contravention of *Batson.*

When the trial court asked counsel for the Administrator to respond to Faison’s objection, counsel stated that he did not think that the ruling in *Batson,* a criminal case, applied to a civil case. The Administrator’s counsel also stated the following:

In addition, I would advise the Court that there were neutral reasons for striking that juror, one being her age of 43 being exactly the same age as the defendant in this case.

Additionally, in terms of attitude, demeanor, it was just the collective impression of [co-counsel] and myself that other jurors would be better suited to try this case. Her occupation as well was another factor, as a radiologist technologist at [the Medical College of Virginia].

In overruling Faison’s objection, the trial court opined as follows:

Well, I don't think that you have given me a racially neutral reason. However, as the law stands now, as I understand it, *Batson* has not been extended to civil cases and I don't feel that at this time I can have any control over that, but I will for the record find that there's not a racially neutral explanation [for striking this venireman].

(Emphasis added.)

In *Batson,* the Supreme Court held, *inter alia,* that the equal protection clause forbids a prosecutor to challenge a potential juror, by exercising a peremptory strike, solely on account of the juror’s race or on the assumption that black jurors as a group will be unable impartially to consider a state's case against a black defendant. 476 U.S. at 89, 106 S.Ct. at 1719; *accord Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In *Edmonson,* decided after the trial of the present case, the Supreme Court extended the *Batson* holding to civil cases. 500 U.S. at ----, 111 S.Ct. at 2080, 114 L.Ed.2d 660. The Court stated its ruling as follows:

We must decide ... whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors.

*Id.* In light of *Edmonson,* therefore, the trial court erroneously ruled that *Batson* did not apply in the present case.

The Administrator contends, nonetheless, that the trial court's ruling should be affirmed because (1) the *Batson* procedural requirements were not followed, and (2) the trial court's finding that the Administrator failed to advance racially neutral reasons for excluding juror Gregg is not supported by the record.

A

[I] With respect to the procedural contention, the Administrator claims that “at the time of Faison's motion there was no evidence before the court which would establish a *prima facie* case of jury discrimination nor did Faison direct the court's attention to such evidence.” Quoting *Batson,* the Administrator asserts that, in order to establish a *prima facie* case of discrimination, the moving party must:
first ... show that he is a member of a cognizable racial group ... and that the [opposition] has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” ... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the [opposition] used that practice to exclude the veniremen from the petit jury on account of their race.

476 U.S. at 96, 106 S.Ct. at 1723 (citations omitted).

*402 Under the circumstances in the present case, we do not think that *Batson* required the trial court to make an explicit finding that Faison had established a prima facie case of discrimination. Implicit in the trial court's ruling that counsel had not stated “a racially neutral explanation” was a finding that Faison had established a prima facie case. Moreover, we agree that Faison presented sufficient facts to establish a prima facie case of discrimination. Faison is a black man, and the Administrator removed from the venire the only member of Faison's race. Additionally, Faison was entitled to rely on the fact, which cannot be disputed, that peremptory challenges constitute a practice that permits “ ‘those to discriminate who are of a mind to discriminate.’ ” *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)).

Furthermore, when the Administrator's counsel undertook to articulate reasons for striking Gregg without first raising the procedural issue whether a prima facie case had been established, the issue was waived and became irrelevant. *See United States v. Lane*, 866 F.2d 103, 105 (4th Cir.1989) (court would not address question whether defendant established prima facie showing when prosecutor articulated reasons for peremptory strikes). For these reasons, we reject the Administrator's procedural contention.


More on point to the issue presented, the Supreme Court in *Batson* stated that a trial court has “the duty to determine if the defendant has established purposeful discrimination.” *403 476 U.S. at 98, 106 S.Ct. at 1724. Additionally, because “the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” *Id.* n. 21.

Giving the trial court's finding in the present case the appropriate deference, we cannot say that the court abused its discretion or committed manifest error in finding for the record that the Administrator had not given racially neutral reasons for striking Gregg. In view of that finding and of *Edmonson*, we hold that the trial court erred in allowing the challenged peremptory striking of Gregg. In light of this holding, the other issues raised by Faison in this appeal may arise upon retrial, and, therefore, we will consider them here.

III

Charles W. Layne was called as a witness for the Administrator. At the time of the accident, he was employed as an attendant at a gasoline station located on the southwest corner of the intersection in question. According to Layne, immediately prior to the accident, he
was pumping gasoline into Karen Troutman's automobile which was located on the outside portion of the gas pump island. Layne testified that, when he heard the Hudson and Faison vehicles collide, he looked up and noticed that the traffic light controlling the Hudson vehicle was yellow.

Troutman, called as a witness for Faison, testified that her automobile was located on the inside of the gas pump island. She also testified that Layne was talking to her when the collision occurred.

Ronald J. Smith, a Henrico County police officer who investigated the accident, also testified as a witness for Faison. Smith testified that Layne told him the traffic light in question was yellow. Smith also testified, however, that when he went to the spot from which Layne had observed the light, he, Smith, could not see the color of the light due to a side shielding on the light.

Thereafter, the administrator called William F. Motley, Jr., as a rebuttal witness. Motley also was an employee at the gasoline station at the time of the accident. Over Faison's objection, the trial court allowed Motley to testify that, approximately five minutes after the accident, Layne told Motley that, after Layne heard the collision, he turned his head and saw that the traffic light in question was amber. Faison contends that Layne's out-of-court statement to Motley was inadmissible hearsay.

The Administrator *404 claims that the statement was admissible under one of the exceptions to the hearsay rule.

[3] The Administrator contends that Layne's statement to Motley was admissible as an “excited utterance.” We have said that resolution of this issue depends upon the circumstances of each particular case and rests within the sound discretion and judgment of the trial court. Clark v. Commonwealth, 235 Va. 287, 292, 367 S.E.2d 483, 486 (1988). The trial court ruled that the statement did not constitute an “excited utterance,” and from our review of the circumstances surrounding Layne's statement, we conclude that the trial court's ruling on the issue was correct.


To allow such a statement to corroborate and buttress a witness's testimony would be an unsafe practice, one which not only would be subject to all the objections that exist against the admission of hearsay in general but also would tend to foster fraud and the fabrication of testimony. Scott, 143 Va. at 434, 130 S.E. at 243. Indeed, it has been said that “the repetition of a story does not render it any more trustworthy.” Id.

We have recognized, however, a few narrowly circumscribed exceptions to the general rule excluding a prior consistent statement. In Gallion, we stated that, when a witness is impeached by “a charge of bias, or interest, or corruption,” a prior consistent statement made by the witness is admissible if it was made “before the time when the supposed bias, or interest, or corruption could have existed.” 129 Va. at 127, 105 S.E. at 540.

We also have recognized the so-called “recent fabrication” or “motive to falsify” exception: Where a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive for testifying falsely, proof that he gave a similar account of the transaction when the motive did not exist, before the effect of such an account could be foreseen or motives of interest would have induced a different statement, is admissible.

Honaker Lumber Co. v. Kiser, 134 Va. 50, 60, 113 S.E. 718, 721 (1922); accord Graham, 204 Va. at 138, 129 S.E.2d at 827.

Closely related is the so-called “design to misrepresent” exception. “[W]here a design to misrepresent is charged upon the witness in consequence of his relation
to the party or the cause, it may be shown that he made a similar statement before that relation existed.” *Repass*, 99 Va. at 515, 39 S.E. at 163; accord *Crowson*, 164 Va. at 94, 178 S.E. at 903.

Additionally, we have held that “a prior consistent statement is admissible after a witness's testimony has been attacked by the admission of a prior inconsistent statement.” *Clere v. Commonwealth*, 212 Va. 472, 473, 184 S.E.2d 820, 821 (1971). We reasoned that “[t]he fact that a witness made a prior consistent statement, as well as an inconsistent statement, is relevant in considering the impeaching effect of the inconsistent statement on the witness's testimony.” *Id.*

[5] There is nothing in the record in the present case to suggest that Layne was impeached by “a charge of bias, or interest, or corruption.” The record does not support a finding of a charge that Layne's testimony was a “recent fabrication” or that he had some “motive for testifying falsely.” The record also does not show that Layne, because of any relation to a party litigant or to the case, was charged with a “design to misrepresent.”

The Administrator claims that the testimony of Troutman and Smith brings Layne's out-of-court statement within the “prior inconsistent statement” exception. We do not agree.

While their testimony, especially Smith's, tended to impeach Layne's testimony, Layne remained consistent in his statement that the traffic light was yellow when he observed it. The sort of impeachment evidence presented by the Administrator does not trigger application of any of the recognized exceptions to the general rule. Indeed, we have said that to allow the admission of a prior consistent statement after impeachment of just “any sort” would create an unreasonably “loose rule.” *Gallion*, 129 Va. at 127, 105 S.E. at 540.

We do not think that Layne's out-of-court statement to Motley falls within any of the recognized exceptions to the general rule *against* hearsay evidence. Consequently, we conclude that the trial court erred in admitting the statement into evidence.

IV

[6] Officer Smith testified that the Administrator told him that there was another witness to the accident. According to Smith, the Administrator told him that the witness had stated that, while the witness's vehicle was in a left-turn lane of the intersection in question, Hudson drove his vehicle around the witness's vehicle, turned left against a red traffic light, and collided with Faison. Smith stated that the Administrator also told him that the witness's name was written on a piece of paper that was on a mantel in the Administrator's home. The Administrator categorically denied that such a witness existed or that she made such a statement to Officer Smith.

Based upon Smith's testimony, Faison requested a so-called “missing witness” instruction, which reads as follows:

If you believe that a party, without explanation, fails to call an available witness who has knowledge of necessary and material facts, you may presume that, if called, that witness's testimony would have been unfavorable to the party who failed to call him.

The trial court refused the instruction, and Faison has assigned error to the ruling.

[7] Availability of a witness is one essential element for invoking the “missing witness” rule. *Neeley v. Johnson*, 215 Va. 565, 573, 211 S.E.2d 100, 107 (1975). As noted, the evidence respecting the existence and availability of such a witness was in sharp conflict. Apparently, the trial court was unconvinced that the witness was available, and in view of the record before us, we cannot say that the trial court erred in refusing the instruction.

V

[8] The trial court, over Faison's objection, instructed the jury, *inter alia*, that the driver of a vehicle has a duty to use ordinary care “to operate his vehicle at a reasonable
speed under the existing conditions.” Faison contends that the trial court erred in granting this instruction because “the record ... is devoid of any evidence of excessive speed on the part of Faison as he approached the intersection.” Therefore, he asserts, there was no evidence to support the giving of the instruction. We do not agree.

The evidence suggests that the intersection in question was extremely congested at the time of the accident. One witness testified that, just before the collision, she heard a “loud whoosh, you know, just a fast moving vehicle.” Faison testified that, as he approached the intersection, he slowed to 35 or 40 miles per hour.

While there was no evidence that Faison was exceeding the posted speed limit of 45 miles per hour, “the posted speed limit does not determine whether a particular speed is reasonable under the circumstances.” West v. Critzer, 238 Va. 356, 359, 383 S.E.2d 726, 728 (1989); accord Goodwin and Reed v. Gilman, 208 Va. 422, 431, 157 S.E.2d 912, 919 (1967); Hudgins v. Jones, 205 Va. 495, 499, 138 S.E.2d 16, 20 (1964). We think, therefore, that the question whether Faison's speed was reasonable under the attending facts and circumstances properly was submitted to the jury.

VI

For the reasons stated, we conclude that the trial court did not err in refusing the “missing witness” instruction and in granting the instruction regarding excessive speed. We do conclude, however, that the trial court erred in allowing the Administrator to exercise a peremptory strike to remove Gregg from the jury panel and in admitting into evidence the out-of-court statement made by Layne to Motley.

Accordingly, we will reverse the trial court's judgment and remand the case for a new trial consistent with the views expressed in this opinion.

Reversed and remanded.

COMPTON, J., with whom CARRICO, C.J., joins, dissents in part.

COMPTON, Justice, with whom CARRICO, Chief Justice, joins, dissenting in part.

I agree with the majority's conclusion that Layne's extra-judicial statement to Motley was inadmissible hearsay and that the trial court erred in admitting the statement into evidence. I also believe that this error was reversible error, thus rendering the entire discussion contained in Parts I and II of the majority opinion, dealing with the juror issue, wholly advisory in nature and mere dicta unnecessary to a decision of the appeal.

In our adversary system of justice, appellate courts do not sit to render opinions on moot questions or abstract matters. Instead, appellate courts consider and decide only questions arising in an actual controversy which require a determination of issues affecting the rights of a party to the litigation. Hallmark v. Jones, 207 Va. 968, 970-71, 154 S.E.2d 5, 6-7 (1967). In this case, once the determination is made that error occurred in the admission of the evidence, no discussion of the juror issue is necessary because that error, standing alone, requires a reversal and the juror issue will not arise upon retrial.

Even if it is actually necessary to rule on the juror issue, I disagree with the majority's decision on that question. In my opinion, the Administrator gave racially neutral reasons for striking the juror. Considerations of age, demeanor, and occupation, the reasons used for striking the juror, have nothing to do with race. Any competent trial attorney should consider age, demeanor, and occupation in deciding how to employ peremptory strikes.

And, the trial judge's finding “that there's not a racially neutral explanation” is not binding on this Court on appeal because, under the circumstances of this case, this is a mixed ruling of law and fact. Even though this Court is bound by the factual findings of a trial court, if supported by credible evidence, a mixed finding of law and fact is properly reviewable on appeal. City of Richmond v. Braxton, 230 Va. 161, 163-64, 335 S.E.2d 259, 261 (1985). Thus, I would hold that the rule of Edmonson v.
Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), has not been violated because the exclusion of the juror in question was not race-based.

Footnotes
* We reject the Administrator's contention that Faison violated the contemporaneous objection rule. It is clear from the record that "the objection was stated with reasonable certainty at the time of the [trial court's] ruling." Rule 5:25.
Georgia v. McCollum, 505 U.S. 42 (1992)
112 S.Ct. 2348, 120 L.Ed.2d 33, 60 USLW 4574

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Thomas v. Mundell, 9th Cir.(Ariz.), July 15, 2009
112 S.Ct. 2348

Supreme Court of the United States

GEORGIA, Petitioner

v.

Thomas McCOLLUM, William Joseph McCollum and Ella Hampton McCollum.

No. 91–372.


Decided June 18, 1992.

State filed motion to prohibit defendants from using peremptory strikes in racially discriminatory manner in criminal case. The Georgia Superior Court, Dougherty County, Asa D. Kelley, Jr., J., denied motion, and State appealed. The Supreme Court, 261 Ga. 473, 405 S.E.2d 688, affirmed. Certiorari was granted. The Supreme Court, Justice Blackmun, held that: (1) equal protection clause prohibited defendant from engaging in purposeful discrimination on ground of race in exercise of peremptory challenges. U.S.C.A. Const.Amend. 14.

Reversed and remanded.

Chief Justice Rehnquist concurred and filed opinion.

Justice Thomas concurred in judgment and filed opinion.

Justice O'Connor and Justice Scalia dissented and filed opinions.

West Headnotes (13)

[1] Constitutional Law
   Peremptory challenges

[2] Constitutional Law
   Applicability to Governmental or Private Action; State Action
   Racial discrimination violates Constitution only when it is attributable to state action.

[3] Constitutional Law
   Private persons and entities

   State cannot avoid constitutional responsibilities by delegating public function to private parties.

[5] Constitutional Law
   Criminal Law

Jury
Standing and waiver
State had standing to challenge criminal defendant's discriminatory use of peremptory challenges and to assert excluded jurors' rights; state suffered concrete injury from undermined fairness and integrity of its own judicial process and had close relation to potential jurors as representative of all citizens, and barriers to suit by excluded jurors were daunting. U.S.C.A. Const.Amend. 14.

62 Cases that cite this headnote

Jury
Peremptory challenges

86 Cases that cite this headnote

Jury
Peremptory Challenges
Peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to constitutional end of impartial and fair trial.

77 Cases that cite this headnote

Criminal Law
Consultation with counsel; privacy

Criminal Law
Jury selection and composition
Prohibition against defendant's exercise of discriminatory peremptory challenges does not violate Sixth Amendment right to effective assistance of counsel; counsel can ordinarily explain reasons for challenges without revealing anything about trial strategy or confidential client communications, and in-camera discussion can be arranged if explanation for challenges would entail confidential communications or reveal trial strategy. U.S.C.A. Const.Amends. 6, 14.

32 Cases that cite this headnote

Jury
Peremptory challenges
Attorney-client privilege does not give to criminal defendant right to carry out through counsel unlawful course of conduct by exercising peremptory challenges on basis of race. U.S.C.A. Const.Amend. 14.

64 Cases that cite this headnote

Jury
Statutory provisions
Prohibition against criminal defendant's discriminatory exercise of peremptory challenges does not violate Sixth Amendment to trial by impartial jury. U.S.C.A. Const.Amends. 6, 14.

47 Cases that cite this headnote

Jury
Competence for Trial of Cause
Defendant has right to impartial jury that can view defendant without racial animus. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

Jury
Peremptory challenges
Exercise of peremptory challenge by criminal defendant must not be based on race of juror or racial stereotypes held by the party. U.S.C.A Const.Amend. 14.

202 Cases that cite this headnote

Jury
Peremptory challenges
Georgia v. McCollum, 505 U.S. 42 (1992)

112 S.Ct. 2348, 120 L.Ed.2d 33, 60 USLW 4574


153 Cases that cite this headnote

**2350** Syllabus *

*43* Respondents, who are white, were charged with assaulting two African-Americans. Before jury selection began, the trial judge denied the prosecution's motion to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner. The Georgia Supreme Court affirmed, distinguishing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660—in which this Court held that private litigants cannot exercise peremptory strikes in a racially discriminatory manner—on the ground that it involved civil litigants rather than criminal defendants.

**Held:** The Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Pp. 2352–2359.

(a) The exercise of racially discriminatory peremptory challenges offends the Equal Protection Clause when the offending challenges are made by the State. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411, and, in civil cases, when they are made by private litigants, *Edmonson*, *supra*. Whether the prohibition should be extended to discriminatory challenges made by a criminal defendant turns upon the following four-factor analysis. Pp. 2352–2353.

(b) A criminal defendant's racially discriminatory exercise of peremptory challenges inflicts the harms addressed by *Batson*. Regardless of whether it is the State or the defense who invokes them, discriminatory challenges harm the individual juror by subjecting him to open and public racial discrimination and harm the community by undermining public confidence in this country's system of justice. Pp. 2353–2354.

(c) A criminal defendant's exercise of peremptory challenges constitutes state action for purposes of the Equal Protection Clause under the analytical framework summarized in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482. Respondents' argument that the adversarial relationship between the defendant and the prosecution negates a peremptory challenge's governmental character is rejected. Unlike other actions taken in support of a defendant's defense, the exercise of a peremptory challenge determines the composition of a governmental body. The fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action, since whenever a private actor's conduct is deemed fairly attributable to the government, it is likely that private motives will have animated the actor's decision. Pp. 2354–2357.

(d) The State has third-party standing to challenge a defendant's discriminatory use of peremptory challenges, since it suffers a concrete injury when the fairness and the integrity of its own judicial process is undermined; since, as the representative of all its citizens, it has a close relation to potential jurors; and since the barriers to suit by an excluded juror are daunting. See *Powers*, 499 U.S., at 411, 413, 414, 111 S.Ct., at 1370, 1371, 1372. P. 2357.

(e) A prohibition against the discriminatory exercise of peremptory challenges does not violate a criminal defendant's constitutional rights. It is an affront to justice to argue that the right to a fair trial includes the right to discriminate against a group of citizens based upon their race. Nor does the prohibition violate the Sixth Amendment right to the effective assistance of counsel, since counsel can normally explain the reasons for peremptory challenges without revealing strategy or confidential communication, and since neither the Sixth Amendment nor the attorney-client privilege gives a defendant the right to carry out through counsel an unlawful course of conduct. In addition, **2351** the prohibition does not violate the Sixth Amendment right to a trial by a jury that is impartial with respect to both parties. Removing a juror whom the defendant believes harbors racial prejudice is different from exercising a
Georgia v. McCollum, 505 U.S. 42 (1992)

peremptory challenge to discriminate invidiously against jurors on account of race. Pp. 2357–2359.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C.J., filed a concurring opinion post, p. 2359. THOMAS, J., filed an opinion concurring in the judgment post, p. 2361, and SCALIA, J., post, p. 2364, filed dissenting opinions.

Attorneys and Law Firms

Harrison W. Kohler, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were Michael J. Bowers, Attorney General, and Charles M. Richards, Senior Assistant Attorney General.

Michael R. Dreeben argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Assistant Attorney General Mueller, and Deputy Solicitor General Bryson.

Robert H. Revell, Jr., argued the cause for respondents. With him on the brief was Jesse W. Walters.

Briefs of amici curiae urging reversal were filed for the Criminal Justice Legal Foundation by Kent Scheidegger and Charles L. Hobson; and for the NAACP Legal Defense and Educational Fund, Inc., by Julius L. Chambers, Charles Stephen Ralston, and Eric Schnapper.

Briefs of amici curiae were filed for the National Association of Criminal Defense Lawyers by Judy Clarke and Mario G. Conte; and for Charles J. Hynes, pro se, by Jay M. Cohen, Matthew S. Greenberg, Victor Barall, and Carol Teague Schwartzkopf.

Opinion

Justice BLACKMUN delivered the opinion of the Court.

For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880). Last Term this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges also violates the Equal Protection Clause. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Today, we are asked to decide whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

On August 10, 1990, a grand jury sitting in Dougherty County, Ga., returned a six-count indictment charging respondents with aggravated assault and simple battery. See App. 2. The indictment alleged that respondents beat and assaulted Jerry and Myra Collins. Respondents are white; the alleged victims are African–Americans. Shortly after the events, a leaflet was widely distributed in the local African–American community reporting the assault and urging community residents not to patronize respondents' business.

Before jury selection began, the prosecution moved to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner. The State explained that it expected to show that the victims' race was a factor in the alleged assault. According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African–American citizens from participating as jurors in the trial. Observing that 43 percent of the county's population is African–American, the State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors would be African–American. With 20 peremptory challenges, respondents therefore would be able to remove all the African–American potential jurors.

With 20 peremptory challenges, respondents therefore would be able to remove all the African–American potential jurors. Relying on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a prima facie case of racial
discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

The trial judge denied the State's motion, holding that “[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner.” App. 14. The issue was certified for immediate appeal. Id., at 15 and 18.

The Supreme Court of Georgia, by a 4–to–3 vote, affirmed the trial court's ruling. 261 Ga. 473, 405 S.E.2d 688 (1991). The court acknowledged that in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), this Court had found that the exercise of a peremptory challenge in a racially discriminatory manner “would constitute an impermissible injury” to the excluded juror. 261 Ga., at 473, 405 S.E.2d, at 689.

The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. “Bearing in mind the long history of jury trials as an essential element of the protection of human rights,” the court “decline[d] to diminish the free exercise of peremptory strikes by a criminal defendant.” 261 Ga., at 473, 405 S.E.2d, at 689. Three justices dissented, arguing that *Edmonson* and other decisions of this Court establish that racially based peremptory challenges by a criminal defendant violate the Constitution. 261 Ga., at 473, 405 S.E.2d, at 689 (Hunt, J.); id., at 475, 405 S.E.2d, at 690 (Benham, J.); id., at 479, 405 S.E.2d, at 693 (Fletcher, J.). A motion for reconsideration was denied. App. 60.

We granted certiorari to resolve a question left open by our prior cases—whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges. 3 502 U.S. 937, 112 S.Ct. 370, 116 L.Ed.2d 322 (1991).

## II

Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service. In *Strader v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a “petit jury composed in whole or in part of persons of his own race,” id., at 305, the Court held that a defendant does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. See also *Neal v. Delaware*, 103 U.S. 370, 397, 26 L.Ed. 567 (1881); *Norris v. Alabama*, 294 U.S. 587, 599, 55 S.Ct. 579, 584, 79 L.Ed. 1074 (1935) (State cannot exclude African–Americans from jury venire on false assumption that they, as a group, are not qualified to serve as jurors).

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Court was confronted with the question whether an African–American defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. Id., at 209–210, 85 S.Ct., at 830. Although the Court rejected the defendant's attempt to establish an equal protection claim premised solely on the pattern of jury strikes in his own case, it acknowledged that proof of systematic exclusion of African–Americans through the use of peremptories over a period of time might establish such a violation. Id., at 224–228, 85 S.Ct., at 838–840.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court discarded *Swain's* evidentiary formulation. **2353** The *Batson* Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. *Id.*, at 87, 106 S.Ct., at 1723. “Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.” *Id.*, at 97, 106 S.Ct., at 1723. 4

Last Term this Court applied the *Batson* framework in two other contexts. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), it held that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African–American jurors on the basis of race. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Court decided
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that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner. 5

In deciding whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges, we must answer four questions. First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by Batson. Second, whether the exercise of peremptory challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

III

A

The majority in Powers recognized that “Batson 'was designed ““to serve multiple ends,” ’” only one of which was to protect individual defendants from discrimination in the selection of jurors.” 499 U.S., at 406, 111 S.Ct., at 1368. As in Powers and Edmonson, the extension of Batson in this context is designed to remedy the harm done to the “dignity of persons” and to the “integrity of the courts.” Powers, 499 U.S., at 402, 111 S.Ct., at 1366.

As long ago as Strauder, this Court recognized that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror. 100 U.S., at 308. See also Batson, 476 U.S., at 87, 106 S.Ct., at 1718. While “[a]n individual juror does not have a right to sit on any particular petit jury, ... he or she does possess the right not to be excluded from one on account of race.” 499 Powers, 499 U.S., at 409, 111 S.Ct., at 1370. Regardless of who invokes the discriminatory challenge, there can be no doubt that the harm is the same—in all cases, the juror is subjected to open and public racial discrimination.

But “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” Batson, 476 U.S., at 87, 106 S.Ct., at 1718. One of the goals of our jury system is “to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.” Powers, 499 U.S., at 413, 111 S.Ct., at 1372. Selection procedures that purposely exclude African– Americans from juries undermine that public confidence—as well they should. “The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.” Id., at 412, 111 S.Ct., at 1371. See generally Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 748–750 (1992).

The need for public confidence is especially high in cases involving race-related crimes. In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes. See Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L.Rev. 153, 195–196 (1989) (describing two trials in Miami, Fla., in which all African–American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal).

“[B]e it at the hands of the State or the defense,” if a court allows jurors to be excluded because of group bias, “[i]t is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens’ confidence in it. State v. Alvarado, 221 N.J.Super. 324, 328, 534 A.2d 440, 442 (1987). Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal. 6
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[2] [3] The fact that a defendant's use of discriminatory peremptory challenges harms the jurors and the community does not end our equal protection inquiry. Racial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972). Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause.

Until Edmonson, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor, a quintessential state actor. In Edmonson, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action. In order to determine whether state action was present in that setting, the *51 Court in Edmonson used the analytical framework summarized in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). 7

The first inquiry is “whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority.” Id., at 939, 102 S.Ct., at 2755. “There can be no question” **2355 that peremptory challenges satisfy this first requirement, as they “are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.” Edmonson, 500 U.S., at 620, 111 S.Ct., at 2083. As in Edmonson, a Georgia defendant's right to exercise peremptory challenges and the scope of that right are established by a provision of state law. Ga.Code Ann. § 15–12–163. 8

The second inquiry is whether the private party charged with the deprivation can be described as a state actor. See Lugar, 457 U.S., at 941–942, 102 S.Ct., at 2755–2756. In resolving that issue, the Court in Edmonson found it useful to apply three principles: (1) “the extent to which the actor relies on governmental assistance and benefits”; (2) “whether the actor is performing a traditional governmental function”; and (3) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.” 500 U.S., at 621–622, 111 S.Ct., at 2083.

As to the first principle, the Edmonson Court found that the peremptory challenge system, as well as the jury system as a whole, “simply could not exist” without the “overt, significant participation of the government.” Id., at 622, 111 S.Ct., at 2084. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community. Ga.Code Ann. § 15–12–40. State law further *52 provides that jurors are to be selected by a specified process, § 15–12–42; they are to be summoned to court under the authority of the State, § 15–12–120; and they are to be paid an expense allowance by the State whether or not they serve on a jury, § 15–12–9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, § 15–12–131; they are administered an oath, § 15–12–132; they are questioned on voir dire to determine whether they are impartial, § 15–12–164; and they are subject to challenge for cause, § 15–12–163.

In light of these procedures, the defendant in a Georgia criminal case relies on “governmental assistance and benefits” that are equivalent to those found in the civil context in Edmonson. “By enforcing a discriminatory peremptory challenge, the Court ‘has ... elected to place its power, property and prestige behind the [alleged] discrimination.’” Edmonson, 500 U.S., at 624, 111 S.Ct., at 2085 (citation omitted).

[4] In regard to the second principle, the Court in Edmonson found that peremptory challenges perform a traditional function of the government: “Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact.” Id., at 620, 111 S.Ct., at 2083. And, as the Edmonson Court recognized, the jury system in turn “performs the critical governmental functions of guarding the rights of litigants and ‘ensur [ing] continued acceptance of the laws by all of the people’” Id., at 624, 111 S.Ct., at 2085 (citation omitted). These same conclusions apply with
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even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function. Compare Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (making Sixth Amendment applicable to States through Fourteenth Amendment) with Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916) (States do not have a constitutional obligation to provide a jury trial in civil cases). Cf. West v. Atkins, 487 U.S. 42, 53, n. 10, 57, 108 S.Ct. 2250, 2257, n. 10, 2260, 101 L.Ed.2d 40 (1988) (private *53 physician hired by State to provide medical care to prisoners was state actor because doctor was hired to fulfill State's constitutional obligation to attend to necessary medical care of prison inmates). The State cannot avoid its constitutional responsibilities by delegating a public function to **2356 private parties. Cf. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (private political party's determination of qualifications for primary voters held to constitute state action).

Finally, the Edmonson Court indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action. These concerns are equally present in the context of a criminal trial. Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State. 8

Respondents nonetheless contend that the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge. Respondents rely on Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), in which a defendant sued, under 42 U.S.C. § 1983, the public defender who represented him. The defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation. This Court determined that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant. 9

*54 Polk County did not hold that the adversarial relationship of a public defender with the State precludes a finding of state action—it held that this adversarial relationship prevented the attorney's public employment from alone being sufficient to support a finding of state action. Instead, the determination whether a public defender is a state actor for a particular purpose depends on the nature and context of the function he is performing. For example, in Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), this Court held that a public defender, in making personnel decisions on behalf of the State, is a state actor who must comply with constitutional requirements. And the Polk County Court itself noted, without deciding, that a public defender may act under color of state law while performing certain administrative, and possibly investigative, functions. See 454 U.S., at 325, 102 S.Ct., at 453.

The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends. Thus, as we held in Edmonson, when “a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality.” 500 U.S., at 625, 111 S.Ct., at 2085.

Lastly, the fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed “fairly attributable” to the government, it is likely that private motives will have animated the actor's decision. Indeed, in Edmonson, the Court recognized that the private party's exercise of peremptory challenges constituted *55 state action, even though the motive underlying the exercise of the peremptory challenge may be **2357 to protect a private interest. See id., at 626, 111 S.Ct., at 2086. 10
[5] Having held that a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection, we move to the question whether the State has standing to challenge a defendant's discriminatory use of peremptory challenges. In Powers, 499 U.S., at 416, 111 S.Ct., at 1373, this Court held that a white criminal defendant has standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. While third-party standing is a limited exception, the Powers Court recognized that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party's ability to protect its own interests. Id., at 411, 111 S.Ct., at 1370–1371. In Edmonson, the Court applied the same analysis in deciding that civil litigants had standing to raise the equal protection rights of jurors excluded on the basis of their race.

In applying the first prong of its standing analysis, the Powers Court found that a criminal defendant suffered cognizable injury “because racial discrimination in the selection of jurors ‘casts doubt on the integrity of the judicial process,’ and places the fairness of a criminal proceeding in doubt.” 499 U.S., at 411, 111 S.Ct., at 1370 (citation omitted). In Edmonson, this Court found that these harms were not limited to the criminal sphere. 500 U.S., at 630, 111 S.Ct., at 2088. Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined.

In applying the second prong of its standing analysis, the Powers Court held that voir dire permits a defendant to “establish a relation, if not a bond of trust, with the jurors,” a relation that “continues throughout the entire trial.” 499 U.S., at 413, 111 S.Ct., at 1372. “Exclusion of a juror on the basis of race severs that relation in an invidious way.” Edmonson, 500 U.S., at 629, 111 S.Ct., at 2088.

The State's relation to potential jurors in this case is closer than the relationships approved in Powers and Edmonson. As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State to deny persons within its jurisdiction the equal protection of the laws.

In applying the final prong of its standing analysis, the Powers Court recognized that, although individuals excluded from jury service on the basis of race have a right to bring suit on their own behalf, the “barriers to a suit by an excluded juror are daunting.” 499 U.S., at 414, 111 S.Ct., at 1373. See also Edmonson, 500 U.S., at 629, 111 S.Ct., at 2087. The barriers are no less formidable in this context. See Note, Discrimination by the Defense: Peremptory Challenges after Batson v. Kentucky, 88 Colum.L.Rev., at 367 (1988); Underwood, 92 Colum.L.Rev. 355, 757 (summarizing barriers to suit by excluded juror). Accordingly, we hold that the State has standing to assert the excluded jurors' rights.

*57 D

[6] [7] The final question is whether the interests served by Batson must give way to the rights of a criminal defendant. As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. See Frazier v. United States, 335 U.S. 497, 505, n. 11, 69 S.Ct. 197, 206, n. 11, 93 L.Ed. 187 (1948); United States v. Wood, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154 (1919); see also Swain, 380 U.S., at 219, 85 S.Ct., at 835.

Yet in Swain, the Court reviewed the “very old credentials,” id., at 212, 85 S.Ct., at 831, of the peremptory challenge and noted the “long and widely held belief that the peremptory challenge is a necessary part of trial by jury,” id., at 219, 85 S.Ct., at 835; see id., at 212–219, 85 S.Ct., at 831–835. This Court likewise has recognized that “the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system.
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and of its verdicts.” Edmonson, 500 U.S., at 630, 111 S.Ct., at 2088.

We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, “if race stereotypes are the price for acceptance of a jury panel as fair,” we reaffirm today that such a “price is too high to meet the standard of the Constitution.” Id., at 630, 111 S.Ct., at 2088. Defense counsel is limited to “legitimate, lawful conduct.” Nix v. Whiteside, 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123 (1986) (defense counsel does not render ineffective assistance when he informs his client that he would disclose the client's perjury to the court and move to withdraw from representation). It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.

*58 [8] [9] Nor does a prohibition of the exercise of discriminatory peremptory challenges violate a defendant's Sixth Amendment right to the effective assistance of counsel. Counsel can ordinarily explain the reasons for peremptory challenges without revealing anything about trial strategy or any confidential client communications. In the rare case in which the explanation for a challenge would entail confidential communications or reveal trial strategy, an in camera discussion can be arranged. See United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); cf. Batson, 476 U.S., at 97, 106 S.Ct., at 1723 (expressing confidence that trial judges can develop procedures to implement the Court's holding). In any event, neither the Sixth Amendment right nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct. See Nix, 475 U.S., at 166, 106 S.Ct., at 994; Zolin, 491 U.S., at 562–563, 109 S.Ct. at 2625–2626. See Swift, Defendants, Racism and the Peremptory Challenge, 22 Colum.Hum.Rights L.Rev. 177, 207–208 (1991).

[10] Lastly, a prohibition of the discriminatory exercise of peremptory challenges does not violate a defendant's Sixth Amendment right to a trial by an impartial jury. The goal of the Sixth Amendment is “jury impartiality with respect to both contestants.” Holland v. Illinois, 493 U.S. 474, 483, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990). See also Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887).

[11] We recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice. We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism. See Ham v. South Carolina, 409 U.S. 524, 526–527, 93 S.Ct. 848, 850–851, 35 L.Ed.2d 46 (1973); Rosales–Lopez v. United States, 451 U.S. 182, 189–190, 101 S.Ct. 1629, 1634–1635, 68 L.Ed.2d 22 (1981) (plurality opinion of WHITE, J.). Cf. Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (exclusion of juror in capital trial is permissible upon showing that juror is incapable of considering sentences other than death).

[12] But there is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in Powers, “[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns.” 499 U.S., at 410, 111 S.Ct., at 1370. “In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.” Ristaino v. Ross, 424 U.S. 589, 596, n. 8, 96 S.Ct. 1017, 1021, n. 8, 47 L.Ed.2d 258 (1976). We therefore reaffirm today that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.

IV

[13] We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory
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challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges. The judgment of the Supreme Court of Georgia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, concurring.

I was in dissent in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe that it controls the disposition of this case on the *60 issue of “state action” under the Fourteenth Amendment. I therefore join the opinion of the Court.

Justice THOMAS, concurring in the judgment.

As a matter of first impression, I think that I would have shared the view of the dissenting opinions: A criminal defendant's use of peremptory strikes cannot violate the Fourteenth Amendment because it does not involve state action. Yet, I agree with the Court and THE CHIEF JUSTICE that our decision last Term in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), governs this case and requires the opposite conclusion. Because the respondents do not question Edmonson, I believe that we must accept its consequences. I therefore concur in the judgment reversing the Georgia Supreme Court.

I write separately to express my general dissatisfaction with our continuing attempts to use the Constitution to regulate peremptory challenges. See, e.g., Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Edmonson, supra. In my view, by restricting a criminal defendant's use of such challenges, this case takes us further from the reasoning and the result of Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880). I doubt that this departure will produce favorable consequences. On the contrary, I am certain **2360 that black criminal defendants will rue the day that this Court ventured down this road that inexorably will lead to the elimination of peremptory strikes.

In Strauder, as the Court notes, we invalidated a state law that prohibited blacks from serving on juries. In the course of the decision, we observed that the racial composition of a jury may affect the outcome of a criminal case. We explained: “It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.” Id., 100 U.S., at 309. We thus recognized, *61 over a century ago, the precise point that Justice O'CONNOR makes today. Simply stated, securing representation of the defendant's race on the jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial. Post, at 2364.

I do not think that this basic premise of Strauder has become obsolete. The public, in general, continues to believe that the makeup of juries can matter in certain instances. Consider, for example, how the press reports criminal trials. Major newspapers regularly note the number of whites and blacks that sit on juries in important cases. Their editors and readers apparently recognize that conscious and unconscious prejudice persists in our society and that it may influence some juries. Common experience and common sense confirm this understanding.

In Batson, however, this Court began to depart from Strauder by holding that, without some actual showing, suppositions about the possibility that jurors may harbor prejudice have no legitimacy. We said, in particular, that a prosecutor could not justify peremptory strikes “by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.” 476 U.S., at 97, 106 S.Ct., at 1723. As noted, however, our decision in Strauder rested on precisely such an “assumption” or “intuition.” We reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly.

Our departure from Strauder has two negative consequences. First, it produces a serious misordering
of our priorities. In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict. Cf. Fed.Rule Evid. 606(b) (generally excluding juror testimony after trial to impeach the verdict). In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death. At a minimum, I think that this inversion of priorities should give us pause.

Second, our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen. See, e.g., **2361 State v. Carr, 261 Ga. 845, 413 S.E.2d 192 (1992).** Next will come the question whether defendants may exercise peremptories on the basis of sex. See, e.g., *United States v. De Gross, 960 F.2d 1433 (CA9 1992)*. The consequences for defendants of our decision and of these future cases remain to be seen. But whatever the benefits were that this Court perceived in a criminal defendant's having members of his class on the jury, see *Strauder, 100 U.S., at 309–310,* they have evaporated.

Justice *O'CONNOR*, dissenting.

The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection. The Court purports merely to follow *63 precedents, but our cases do not compel this perverse result. To the contrary, our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.

It is well and properly settled that the Constitution's equal protection guarantee forbids prosecutors to exercise peremptory challenges in a racially discriminatory fashion. See *Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Powers v. Ohio, 499 U.S. 400, 409, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991).* The Constitution, however, affords no similar protection against private action. “Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment[,] ..., and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.” *National Collegiate Athletic Assn. v. Tarkanian, 488 U.S. 179, 191, 109 S.Ct. 454, 461, 102 L.Ed.2d 469 (1988)* (footnote omitted). This distinction appears on the face of the Fourteenth Amendment, which provides that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14, § 1 (emphasis added). The critical but straightforward question this case presents is whether criminal defendants and their lawyers, when exercising peremptory challenges as part of a defense, are state actors.

In *Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)*, the Court developed a two-step approach to identifying state action in cases such as this. First, the Court will ask “whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority.” *Id.,* at 939, 102 S.Ct., at 2755. Next, it will decide whether, on the particular facts at issue, the parties who allegedly caused the deprivation of a federal right can “appropriately” and “in all fairness” be characterized as state actors. *Ibid.; Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660 (1991).* The Court's determination in this case that the peremptory challenge is a creation of state authority, *ante,* at 2355, breaks no new ground. See *Edmonson, supra,* at 620–621, 111 S.Ct., at 2083. But disposing of this threshold matter leaves the Court with the task of showing that criminal defendants who exercise peremptories should be deemed governmental actors. What our cases require, and what the Court neglects, is a realistic appraisal of the relationship between defendants and the government that has brought them to trial.
Georgia v. McCollum, 505 U.S. 42 (1992)
112 S.Ct. 2348, 120 L.Ed.2d 33, 60 USLW 4574

We discussed that relationship in Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), which held that a public defender does not act “under color of state law” for purposes of 42 U.S.C. § 1983 “when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.” 454 U.S., at 325, 102 S.Ct., at 453. We began our analysis by explaining that a public defender's obligations toward her client are no different than the obligations of any other defense attorney. Id., at 318, 102 S.Ct., at 449–450. These obligations **2362 preclude attributing the acts of defense lawyers to the State: “[T]he duties of a defense lawyer are those of a personal counselor and advocate. It is often said that lawyers are ‘officers of the court.’ But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor....” Ibid.

We went on to stress the inconsistency between our adversarial system of justice and theories that would make defense lawyers state actors. “In our system,” we said, “a defense lawyer characteristically opposes the designated representatives of the State.” Ibid. This adversarial posture rests on the assumption that a defense lawyer best serves the public “not by acting on behalf of the State or in concert with it, but rather by advancing “the undivided interests of his client.” ” Id., at 318–319, 102 S.Ct., at 449–450 (quoting Ferri v. Ackerman, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979)). Moreover, we pointed out that the independence of defense attorneys from state control does have a constitutional dimension. *65 Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), “established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against [them].” 454 U.S., at 322, 102 S.Ct., at 452 (internal quotation marks omitted). Implicit in this right “is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.” Ibid. Thus, the defense's freedom from state authority is not just empirically true, but is a constitutionally mandated attribute of our adversarial system.

Because this Court deems the “under color of state law” requirement that was not satisfied in Dodson identical to the Fourteenth Amendment's state action requirement, see Lugar, supra, 457 U.S., at 929, 102 S.Ct., at 2749–2750, the holding of Dodson simply cannot be squared with today's decision. In particular, Dodson cannot be explained away as a case concerned exclusively with the employment status of public defenders. See ante, at 2356. The Dodson Court reasoned that public defenders performing traditional defense functions are not state actors because they occupy the same position as other defense attorneys in relevant respects. 454 U.S., at 319–325, 102 S.Ct., at 450–454. This reasoning followed on the heels of a critical determination: Defending an accused “is essentially a private function,” not state action. Id., at 319, 102 S.Ct., at 450. The Court's refusal to acknowledge Dodson's initial holding, on which the entire opinion turned, will not make that holding go away.

The Court also seeks to evade Dodson's logic by spinning out a theory that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions. See ante, at 2356. Dodson, however, established that even though public defenders might act under color of state law when carrying out administrative or investigative functions outside a courtroom, they are not vested with state authority “when performing a lawyer's traditional functions as counsel to a defendant in a *66 criminal proceeding.” 454 U.S., at 325, 102 S.Ct., at 453. Since making peremptory challenges plainly qualifies as a “traditional function” of criminal defense lawyers, see Swain v. Alabama, 380 U.S. 202, 212–219, 85 S.Ct. 824, 831–835, 13 L.Ed.2d 759 (1965); Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011 (1892), Dodson forecloses the Court's functional analysis.

Even aside from our prior rejection of it, the Court's functional theory fails. “[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement ... that the choice must in law be deemed to be that of the State.” **2363 Blum v. Yaretsky, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982). Thus, a private party's exercise of choice allowed by state law does not amount to state action for purposes of the Fourteenth Amendment so long as “the initiative comes from [the private party] and not from the State.” Jackson v. Metropolitan Edison Co., 419 U.S.
From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. Rather than squarely facing this fact, the Court, as in Edmonson, rests its finding of governmental action on the points that defendants exercise peremptory challenges in a courtroom and judges alter the composition of the jury in response to defendants' choices. I found this approach wanting in the context of civil controversies between private litigants, for reasons that need not be repeated here. See id., at 632, 111 S.Ct., at 2089 (O'CONNOR, J., dissenting). But even if I thought Edmonson was correctly decided, I could not accept today's simplistic extension of it. Dodson makes clear that the unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State, whatever is the case in civil trials. How could it be otherwise when the underlying question is *68 whether the accused “can be described in all fairness as a state actor”? 500 U.S., at 620, 111 S.Ct., at 2083. As Dodson accords with our state action jurisprudence and with common sense, I would honor it.

II

What really seems to bother the Court is the prospect that leaving criminal defendants and their attorneys free to make racially motivated peremptory challenges will undermine the ideal of nondiscriminatory jury selection we espoused in Batson, 476 U.S., at 85–88, 106 S.Ct., at 1716–1718. The concept that the government alone must honor constitutional dictates, however, is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (disclosure of evidence favorable to the accused); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) (“The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

Certainly, Edmonson v. Leesville Concrete Co. did not render Dodson and its realistic approach to the state action inquiry dead letters. The Edmonson Court distinguished *67 Dodson by saying: “In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury selection process, the government and private litigants work for the same end.” Edmonson, 500 U.S., at 627, 111 S.Ct., at 2086. While the nonpartisan administrative interests of the State and the partisan interests of private litigants may not be at odds during civil jury selection, the same cannot be said of the partisan interests of the State and the defendant during jury selection in a criminal trial. A private civil litigant opposes a private counterpart, but a criminal defendant is by design in an adversarial relationship with the government. Simply put, the defendant seeks to strike jurors predisposed to convict, while the State seeks to strike jurors predisposed to acquit. The Edmonson Court clearly recognized this point when it limited the statement that “an adversarial relation does not exist between the government and a private litigant” to “the ordinary context of civil litigation in which the government is not a party.” Ibid. (emphasis added).
Considered in purely pragmatic terms, moreover, the Court's holding may fail to advance nondiscriminatory criminal justice. It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. See Developments in the Law—Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559–1560 (1988); Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110–112 (1990). Using peremptory challenges to secure minority representation on the jury may help to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury. See *43 id., at 112–115; Developments in the Law, *44 supra, at 1559–1560. As amicus NAACP Legal Defense and Educational Fund explained in this case:

“The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the Fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.”

Brief for NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae 9–10 (footnote omitted).

See Brief for National Association of Criminal Defense Lawyers as Amicus Curiae 56–57; Edmonson, supra, 500 U.S., at 644, 111 S.Ct., at 2095 (SCALIA, J., dissenting). In a world where the outcome of a minority defendant's trial may turn on the misconceptions or biases of white jurors, there is cause to question the implications of this Court's good intentions.

That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure. But such limitations are the necessary and intended consequence of the Fourteenth Amendment's state action requirement. Because I cannot accept the Court's conclusion that government is responsible for decisions criminal defendants make while fighting state prosecution, I respectfully dissent.

Justice SCALIA, dissenting.

I agree with the Court that its judgment follows logically from Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). For the reasons given in the Edmonson dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: *70 A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. Justice O’CONNOR demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and **2365 the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider Edmonson distinguishable in principle—except in the principle that a bad decision should not be followed logically to its illogical conclusion.

Today's decision gives the lie once again to the belief that an activist, “evolutionary” constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair. I dissent.

All Citations

505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33, 60 USLW 4574

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

When a defendant is indicted for an offense carrying a penalty of four or more years, Georgia law provides that he may "peremptorily challenge 20 of the jurors impaneled to try him." § 15–12–165.

The Ninth Circuit recently has prohibited criminal defendants from exercising peremptory challenges on the basis of gender. United States v. De Gross, 960 F.2d 1433 (1992) (en banc). Although the panel decision now has been vacated by the granting of rehearing en banc, a Fifth Circuit panel has held that criminal defendants may not exercise peremptory strikes in a racially discriminatory manner. See United States v. Greer, 939 F.2d 1076, rehearing granted, 948 F.2d 934 (1991).

The Batson majority specifically reserved the issue before us today. 476 U.S., at 89, n. 12, 106 S.Ct., at 1719, n. 12. The two Batson dissenters, however, argued that the "clear and inescapable import" was that Batson would similarly limit defendants. Id., at 125–126, 106 S.Ct., at 1738. Justice Marshall agreed, stating: "[O]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' Hayes v. Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887)." Id., 476 U.S., at 107, 106 S.Ct., at 1729 (concurring opinion).

In his dissent in Edmonson, Justice SCALIA stated that the effect of that decision logically must apply to defendants in criminal prosecutions. 500 U.S., at 644, 111 S.Ct., at 2095.

The experience of many state jurisdictions has led to the recognition that a race-based peremptory challenge, regardless of who exercises it, harms not only the challenged juror, but the entire community. Acting pursuant to their state constitutions, state courts have ruled that criminal defendants have no greater license to violate the equal protection rights of prospective jurors than have prosecutors. See, e.g., State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990); People v. Kern, 149 App.Div.2d 187, 545 N.Y.S.2d 4 (1989); People v. Alvarado, 221 N.J.Super. 324, 534 A.2d 499 (1987); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

The Court in Lugar held that a private litigant is appropriately characterized as a state actor when he "jointly participates" with state officials in securing the seizure of property in which the private party claims to have rights. 457 U.S., at 932–933, 941–942, 102 S.Ct., at 2751–2752, 2755–2756.

Indeed, it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors, thus enhancing the perception that it is the court that has rejected them. See Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

Although Polk County determined whether or not the public defender's actions were under color of state law, as opposed to whether or not they constituted state action, this Court subsequently has held that the two inquiries are the same, see, e.g., Rendell–Baker v. Kohn, 457 U.S. 830, 838, 102 S.Ct. 2764, 2769–2770, 73 L.Ed.2d 418 (1982), and has specifically extended Polk County's reasoning to state-action cases, see Blum v. Yaretsky, 457 U.S. 991, 1009, n. 20, 102 S.Ct. 2777, 2788, n. 20, 73 L.Ed.2d 534 (1982).


A computer search, for instance, reveals that the phrase "all white jury" has appeared over 200 times in the past five years in the New York Times, Chicago Tribune, and Los Angeles Times.

The NAACP Legal Defense and Educational Fund, Inc., has submitted a brief arguing, in all sincerity, that "whether white defendants can use peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors." Brief for NAACP Legal Defense and Educational Fund, Inc., as
Amicus Curiae 3–4. Although I suppose that this issue technically remains open, it is difficult to see how the result could be different if the defendants here were black.
356 S.E.2d 157

Defendant was convicted by jury in the Suffolk Circuit Court, James C. Godwin, J., of capital murder in commission of robbery, robbery, abduction, use of firearm in commission of each of those felonies, and arson and was separately sentenced to death. On consolidated appeal, the Supreme Court, Stephenson, J., held that: (1) defendant's right to counsel and privilege against self-incrimination had been scrupulously honored; (2) search of defendant's home for drugs was not sham and defendant had voluntarily consented to automobile search; (3) identity of drug informant was privileged; (4) defendant was not entitled to public funds to choose his own psychiatrist, for investigator, or for statistical reports; (5) prosecutor had discretion not to charge codefendant with capital murder; (6) defendant was not denied effective assistance of counsel or due process through pretrial transfer to other jails for security reasons; (7) defendant was not prejudiced by denial of his request to inspect and copy statements of Commonwealth witnesses prior to trial; (8) trial court could refuse to grant change of venue or venire; (9) removal for cause of six black veniremen who had voiced absolute objection to imposition of death penalty, and peremptory strike of seventh black venireman who had given equivocal answer in that regard, were nondiscriminatory; (10) trial court could refuse to strike former law enforcement officer who had stated that he could be fair and impartial and could refuse to sequester jury; (11) photographs of victim's bloody head, although gruesome, were relevant and admissible; (12) defendant could be required to wear leg irons during trial; (13) testimony of fellow inmates regarding defendant's admission of crime, and codefendant's testimony as to defendant's admission of additional uncharged murders, was not incredible as matter of law; (14) instructions were adequate; and (15) sentence was not excessive or disproportionate.

Affirmed.

West Headnotes (33)

[1] Criminal Law
   Absence or denial of counsel

Criminal Law
   Form and sufficiency in general

Defendant's right to counsel and privilege against self-incrimination had been scrupulously honored by police under totality of circumstances, where defendant had executed “legal rights advice form” before speaking with detective, defendant had given detailed account to detective without questioning or interruption, detective had arranged for defendant to be interviewed by court-appointed counsel before their subsequent meeting, and defendant had been required to execute another rights form before making statement against advice of counsel.


22 Cases that cite this headnote

[2] Controlled Substances
   Premises, Search of

Search of defendant's home pursuant to warrant authorizing search for marijuana, paraphernalia, and other drug-related items was not sham merely because defendant was possible suspect in murder case at time of search and police anticipated that they might find evidence relating to murder.


1 Cases that cite this headnote

[3] Searches and Seizures

- Consent, and validity thereof
  Burden is on Commonwealth to prove that consent to search is voluntary.
  3 Cases that cite this headnote

[4] Searches and Seizures
  - Custody, restraint, or detention issues
  Mere fact that defendant is in custody is not enough in itself to demonstrate coerced consent to search.
  6 Cases that cite this headnote

[5] Searches and Seizures
  - Particular concrete applications
  Defendant freely and voluntarily consented to search of his automobile where he had verbally authorized search and had subsequently executed authorization form, had never retracted consent despite being told he could withdraw consent at any time, and had not been threatened or intimidated.
  2 Cases that cite this headnote

[6] Criminal Law
  - Informers or Agents, Disclosure
  Identity of person furnishing prosecution with information concerning criminal activities is generally privileged, so as to further and protect public's interest in effective law enforcement.
  16 Cases that cite this headnote

[7] Criminal Law
  - Informer supplying probable cause
  Identity of informant relied upon by police for issuance of warrant to search defendant's home for drugs was privileged from discovery in capital murder prosecution in absence of indication that informant participated in or knew anything about that crime.
  11 Cases that cite this headnote

[8] Costs
  - Medical or psychiatric witnesses or assistance
  Before indigent defendant is entitled to court-appointed independent psychiatrist to assist defense in capital case, there must be threshold showing that defendant's sanity is likely to be significant factor in his defense.
  2 Cases that cite this headnote

[9] Costs
  - Medical or psychiatric witnesses or assistance
  When Commonwealth in capital sentencing proceeding presents psychiatric evidence of indigent defendant's future dangerousness, defendant must be provided with assistance of psychiatrist on that issue.
  Cases that cite this headnote

[10] Costs
  - Expert witnesses or assistance in general
  Indigent black capital murder defendant was not constitutionally entitled to publicly paid investigator or to public funds to secure statistical reports regarding imposition of death penalty upon blacks accused of murdering whites.
  6 Cases that cite this headnote

  - Charging discretion
  Institution of criminal charges is matter of prosecutorial discretion.
  1 Cases that cite this headnote

[12] District and Prosecuting Attorneys
  - Charging discretion
356 S.E.2d 157

Commonwealth's attorney did not act arbitrarily or abuse prosecutorial discretion in trying only one of two codefendants on capital murder charge; evidence revealed that tried codefendant had motive based on victim's recent firing of defendant's wife from her job and means as he had stolen pistol, whereas untried codefendant had no personal acquaintance with victim prior to crime.

1 Cases that cite this headnote

[13] Constitutional Law
  ✤ Adequacy and Effectiveness of Representation

Criminal Law
  ✤ Consultation with counsel; privacy

Defendant was not denied effective assistance of counsel or due process through his transfer to jails within 45-mile radius between arrest and trial; transfers were for security reasons, and counsel had conferred with defendant on frequent basis. U.S.C.A. Const.Amends. 5, 6, 14.

Cases that cite this headnote

[14] Criminal Law
  ✤ Discovery and disclosure; transcripts of prior proceedings

Defendant was not prejudiced by trial court's denial of his request to inspect and copy witnesses' statements to Commonwealth prior to trial where he had been furnished with those statements before witnesses' testimony and those witnesses had been vigorously cross-examined by defendant's counsel.

Cases that cite this headnote

[15] Criminal Law
  ✤ Discretion of court

Criminal Law
  ✤ Change of venue

Decision as to whether to change venue or venire is within sound discretion of trial court, whose ruling will be reversed only upon affirmative showing on record that discretion was abused.

1 Cases that cite this headnote

[16] Criminal Law
  ✤ Local Prejudice

Trial court did not abuse discretion in denying change of venue or venire based on alleged widespread publicity of crime in community; no allegation was made that publicity was inaccurate or intemperate, no affidavits suggesting widespread community bias were presented, information in newspaper articles that were submitted was factually accurate, nonprejudicial, and noninflammatory, and each venireman who qualified had, in response to extensive questioning by court and counsel during voir dire, indicated that his decision would not be affected by anything he had heard or read about case.

1 Cases that cite this headnote

[17] Jury
  ✤ Race

Black defendant is not constitutionally entitled to be tried by members of his own race, but does have constitutional right to be tried by jury members selected pursuant to neutral and nondiscriminatory guidelines. U.S.C.A. Const.Amends. 6, 14.

2 Cases that cite this headnote

[18] Jury
  ✤ Trial and determination

Commonwealth's removal for cause of six black veniremen in capital murder prosecution of black defendant was nondiscriminatory, where those veniremen had voiced absolute objections to imposition

2 Cases that cite this headnote

[19] Jury
   → Trial and determination
Commonwealth's use of peremptory strike in capital murder prosecution of black defendant to remove black venireman who gave internally contradictory statement concerning his ability to vote for death penalty was not discriminatory, particularly as two white jurors who expressed similar uncertainty had also been struck. U.S.C.A. Const.Amends. 6, 14.

2 Cases that cite this headnote

[20] Jury
   → Official position
Prospective juror is not automatically excluded because of association with law enforcement personnel, provided he demonstrates that he can be impartial.

2 Cases that cite this headnote

[21] Criminal Law
   → Jury selection
   → Discretion of court
Whether venireman should be excluded from jury is matter within sound discretion of trial court, whose finding is entitled to great weight and will not be disturbed on appeal unless manifest error exists.

5 Cases that cite this headnote

[22] Criminal Law
   → Necessity of keeping jury together generally
Trial court in capital murder case has broad discretion in deciding whether to sequester jury.

Cases that cite this headnote

[23] Criminal Law
   → Admonition as condition of permitting separation
Trial court did not abuse discretion in refusing to sequester jury in capital murder prosecution, where nothing in record suggested that jury had disregarded trial court's repeated admonitions not to discuss case with others and to refrain from having any contact with news media accounts of trial.

Cases that cite this headnote

[24] Criminal Law
   → Photographs and Other Pictures
Admission of photographs is matter resting within sound discretion of trial court.

2 Cases that cite this headnote

[25] Criminal Law
   → Purpose of admission
Photographs of murder victim are relevant if they tend to show motive, intent, method, preméditation, malice, or degree of atrociousness of crime.

10 Cases that cite this headnote

[26] Criminal Law
   → Photographs arousing passion or prejudice; gruesomeness
Photographs that accurately portray scene created by accused in commission of offense are not rendered inadmissible because they are gruesome or shocking.

7 Cases that cite this headnote
**Criminal Law**

Photographs arousing passion or prejudice; gruesomeness

Photographs of victim's bloody head, though gruesome, were admissible in capital murder prosecution as they accurately portrayed what defendant had created and were relevant to establish intent, malice, premeditation, and atrocity of crime.

15 Cases that cite this headnote

**Discretion of court**

Court's decision to require defendant to wear leg irons at trial is proper exercise of its discretion over trial conduct and need not be made upon formal evidentiary hearing.

3 Cases that cite this headnote

**Weight and Sufficiency of Evidence in General**

It is jury's function to judge credibility of witnesses and weight of their evidence, as jury has opportunity to observe witnesses' demeanor while testifying, to consider their interest in outcome of case, and to determine from all circumstances of case which witnesses are more believable.

8 Cases that cite this headnote

**Testimony of co-perpetrator**

Conviction for capital murder in commission of robbery was supported by testimony of codefendant and of prison inmates to whom defendant had admitted killing, as well as other circumstances from which jury could reasonably infer that defendant was “trigger man.” Code 1950, § 18.2–31(d).

Cases that cite this headnote

**sentencing and Punishment**

Codefendant could testify during penalty phase of capital murder prosecution as to defendant's alleged admission of other uncharged murders; manner in which those victims had been killed was strikingly similar to that of charged offense, and information was relevant to defendant's propensity to commit violent acts in future.

5 Cases that cite this headnote

**Instructions Already Given**

Proffered instructions at penalty phase of capital murder prosecution that were repetitious of instructions actually given or that could have confused jury by telling them that their decision upon specific mitigating factors listed did not have to be unanimous were properly refused.

7 Cases that cite this headnote

**sentencing and Punishment**

Nature, degree, or seriousness of other offense

Sentencing and Punishment

Remorse and actual or potential rehabilitation


### B

**Admissibility of Statements Made by Gray to the Police.**

Gray contends that his statements to the police were “involuntary.” He argues that his statements were not voluntary under either the requirement set forth in *Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)*, or the “totality of circumstances” standard.

Gray gave statements to the police on two occasions. The first statement was given to Officer Freeman on the morning of May 22, 1985. The second statement was given to Sergeant Lilley and Detective Bunker on the evening of May 23, 1985.

Freeman testified at the suppression hearing that at 8:30 a.m. on May 22, 1985, Gray, who was in a holding cell at the Suffolk jail, “shouted out that he wanted to talk to me.” Freeman walked to the cell, and Gray said he “wanted to get something off his mind that had been bothering him.”

Approximately 9:30 a.m., after Gray had eaten breakfast, he was brought to Freeman's office. Freeman told Gray that he **162** would not talk to him unless Gray executed a “Legal Rights Advice *322** Form.” Freeman then presented Gray with a form and read each question on the form to him. Gray executed the form, which reads as follows:

---

**SUFFOLK POLICE DIVISION**

**Legal Rights Advice Form**

**Date May 22, 1985**

1. Do you understand what you may be charged with?
   
   Armed Robbery
   
   Yes

2. Do you understand that you have the right to remain
silent?
Yes

3. Do you understand that any statement you make may be used as evidence against you in a court of law?
Yes

4. Do you understand that you have a right to talk to a lawyer and to have the lawyer present during all questioning, if you so desire?
Yes

5. Do you understand that if you cannot afford to hire a lawyer, a lawyer will be appointed to represent you and be present during all questioning, if you so desire?
Yes

6. The above rights have been fully explained to me, and I sign this paper with complete understanding of them. I further state that I waive these rights and desire to make a statement. I understand that I have the right to stop answering questions at any time.
Yes

7. This statement is completely free and voluntary on my part without any threats or promises from anyone.
Yes

Witness /s/ Lt. W. A. Freeman /s/ Coleman W. Gray

Signature of Person

Witness ............................................................. Being Advised of His Rights

Date 5/22/85 Time 9:33 A.M.

Suffolk Det. Bur

*323 Freeman testified that after executing the form, Gray, without any questioning by Freeman, became “emotional,” and began walking around the room, hitting the wall and exclaiming, “the man wasn't supposed to die.” Freeman suggested that Gray “[c]alm ... down, just sit down [and] [t]ell me what happened.”

Without any questioning or interruption by Freeman, Gray proceeded to give him a detailed account of how the offenses had occurred. Gray admitted he had participated in the commission of the crimes with Melvin Tucker, but stated that Tucker actually shot McClelland. Gray told Freeman: “I'm not going to let you write anything. When we get into court it will just be your word against mine.” After the interview, Freeman immediately returned to his office and reduced his recollection of Gray's statements to typewritten form.

On the evening of May 22, Gray told Detective Lilley that he wanted to talk with him, saying he would tell “everything.” Lilley told Gray that he would talk with him after the arraignment the following day. On the morning of the 23rd, Gray again told Lilley that he wanted to talk with him. Lilley first contacted Gray's court-appointed counsel and arranged for him to interview Gray. When he arrived at the police station, Gray's counsel conducted a lengthy interview with him.

After his attorney left, Gray again “demanded” in the presence of the Suffolk Chief of Police and Detective Bunker that he be allowed to speak with Lilley. Bunker testified at the suppression hearing that Gray asked him what he should do. Bunker asked Gray, “[W]hat did your attorney tell you to do?” Gray said, “My attorney told me to not say anything,” to which Bunker responded, “Well, then you should do what your attorney said.”

Gray, however, said, “No, I want to talk to Sergeant Lilley.”

*324 Thereafter, Lilley was contacted and he, Bunker, and Gray went to Lilley's office. Gray executed another rights form containing essentially the same questions and answers as the one he had executed for Freeman the preceding day. Gray then gave Lilley a lengthy and detailed statement in question and answer form. The statement was tape-recorded on a machine that was in full view of Gray at all times, and he saw tapes being changed. When transcribed, the statement consisted of 78 typewritten pages. In his statement to Lilley, Gray again admitted his participation in each of the crimes for which he was charged, but continued to assert that Melvin Tucker was the person who shot McClelland.

Gray contends on appeal, as he did at the suppression hearing, that he would not have made any statements had he known that an unwritten statement could be used against him. He also claims he did not fully understand what his signature on the rights form meant. Additionally, Gray **163 claims that the police made certain statements to him that were coercive or threatening or that contained promises of leniency. The police denied making threats, promises, or coercive statements.

The trial court found that Gray desired to make the statements and did so without promises, inducements, or intimidation. The court also concluded that Gray understood thoroughly his constitutional rights as set forth in Miranda.

A defendant's waiver of his Miranda rights is valid only if the waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. at 475, 86 S.Ct. at 1628. Whether a statement is voluntary is ultimately a legal
rather than factual question. See Miller v. Fenton, 474 U.S. 104, ———, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985). Subsidiary factual questions, however, are entitled to a presumption of correctness. Id. at ———, 106 S.Ct. at 451. The test to be applied in determining voluntariness is whether the statement is the “product of an essentially free and unconstrained choice by its maker,” or whether the maker's will “has been overborne and his capacity for self-determination critically impaired.” Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S.Ct. 2041, 2046, 36 L.Ed.2d 854 (1973). In determining whether a defendant's will has been overborne, courts look to “the totality of all the surrounding circumstances,” id. at 226, 93 S.Ct. at 2047, including the defendant's background and experience and the conduct of the police, Correll v. Commonwealth, 232 Va. 454, 464, 352 S.E.2d 352, 357 (1987); Stockton, 227 Va. at 140, 314 S.E.2d at 381.

*325 Gray was nearly 28 years old at the time of the offense. He possessed a high school equivalency diploma and stated that he could read and write. Gray initiated both conversations with the police. He stated that he understood the legal rights advice form, and his 12-year involvement with police and law enforcement procedures corroborates his statement. In addition to carefully explaining the waiver forms, the police repeatedly told him that they could make no promises or guarantees, and Gray indicated he understood. The police told Gray numerous times that he had a right to have his attorney present, a right to stop answering questions at any time, and that anything he said could be used against him. Gray indicated that he understood and repeatedly told the police that he wanted to talk.

[I] Our review of the record reveals that Gray's right to have counsel present and his privilege against self-incrimination were “scrupulously honored” by the police. See Michigan v. Mosley, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). From an assessment of the totality of all the surrounding circumstances of the present case, we conclude, as did the trial court, that Gray's statements to the police were made freely, knowingly, and voluntarily and that his Miranda rights were not violated.

Gray's Telephone Statement to Officer Moore.

Gray moved to suppress certain statements that he made over the telephone to Officer Moore, contending that there was an insufficient identification of Gray as the party with whom Moore spoke. The trial court refused to suppress the statements, concluding that the matter was a question for the jury's consideration, and Gray assigned error to this ruling. Because a proper foundation had been laid for the admission of these statements, we find no merit to this contention.

Searches and Seizures.

Gray contends that the seizure of certain evidence pertaining to McClelland's murder found in his home violated his Fourth Amendment rights. He also claims that the search of his automobile was illegal.

On May 10, 1985, police officers went to Gray's residence armed with a search warrant that authorized a search of his house for marijuana, paraphernalia, and other drug-related items. During the search, the officers found and seized a quantity of marijuana, cocaine, and drug paraphernalia.

The police also seized other items, unrelated to the drug charge, that connected Gray to the McClelland murder. Among the items seized were a quantity of .32-caliber cartridges, a pistol holster, a jewelry box and jewelry bearing Murphy's Mart price tags, and “gym bags” similar to those reported missing from Murphy's Mart.

Gray does not contest the validity of the search warrant as it related to the drug charge; nor does he question the propriety of the seizure of the drug-related items. Moreover, he concedes that during the conduct of a valid search, the police are entitled to seize evidence of other crimes or contraband without securing an additional
warrant. See Harris v. United States, 331 U.S. 145, 155, 67 S.Ct. 1098, 1103, 91 L.Ed. 1399 (1947). Gray also concedes that given the character of the evidence specified in the warrant, the police were permitted to search the places where evidence of the murder was found. See Holloman v. Commonwealth, 221 Va. 947, 949, 275 S.E.2d 620, 622 (1981). Gray contends, nonetheless, that the search for drug-related evidence was a sham; he says the true purpose of the search was to look for evidence related to the McClelland murder.

The Attorney General acknowledges that the police knew that Gray was a potential suspect in the McClelland murder when they secured the search warrant and suspected that evidence pertaining to the murder might be discovered during the course of the drug search. The Attorney General contends, however, that seizure of such evidence was proper. We agree.

[2] The validity of the warrant authorizing the search and seizure of drug-related evidence is not an issue in this appeal. Drug-related evidence was found and seized, and Gray was arrested for possessing marijuana. The search was not a sham merely because Gray was a possible suspect in the murder case and the police anticipated that during the drug search they might find evidence relating to the murder. See Horne v. Commonwealth, 230 Va. 512, 517, 339 S.E.2d 186, 190 (1986). The police had a right to be in Gray's residence to conduct a search for *327 drugs, and in the course of the search, they were entitled to seize evidence of other crimes that was in plain view. Blair v. Commonwealth, 225 Va. 483, 490, 303 S.E.2d 881, 885–86 (1983).

After searching the residence and arresting Gray on the marijuana charge, the police asked Gray for permission to search his automobile. Gray consented to the search, and the police seized a gasoline can, a siphon hose, and three pairs of gloves from the trunk of the automobile.

Gray does not deny that he gave his consent for the search, but he claims the consent was not voluntary. He asserts that in view of all the circumstances, particularly his arrest and being in handcuffs, his consent was the product of police coercion.


[5] The trial court concluded that the consent was voluntary. Nothing in the record suggests that Gray was threatened or intimidated. When asked if they could search his car, Gray said, “Go ahead and search it.” The police told Gray he could withdraw his consent at any time, and he never retracted it. Moreover, after he was arrested and taken to the Suffolk police station, he executed a form authorizing the **165 search of his car. From a totality of all the circumstances, we conclude that Gray's consent to search his automobile was given freely and voluntarily.

Identity of Informant.

In a pretrial hearing, Gray sought, inter alia, to discover the identity of the informant relied upon by the police for the issuance of the search warrant. The trial court, after hearing Gray's testimony and the evidence of the police officer who executed the affidavit *328 for the warrant, denied the request. The court specifically found that “credible evidence [shows] that there was an informant [and] that the search warrant was ... valid,” and concluded that the informant's identity was privileged.

On appeal, Gray argues that “[t]he failure of the Court to allow [him] to examine the alleged informant, or even to confirm his existence, denied [him] the basic rights of the 5th Amendment's Due Process and the

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6th Amendment's right to confront his accusers.” The Supreme Court rejected these identical constitutional arguments in McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967).

[6] Generally, the identity of a person furnishing the prosecution with information concerning criminal activities is privileged. See Webb v. Commonwealth, 137 Va. 833, 836, 120 S.E. 155, 156 (1923); Annot. 76 A.L.R.2d 262 (1961 & Supp.1986). The purpose of the privilege is to further and protect the public's interest in effective law enforcement. Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. at 625. Revealing an informant's identity would discourage private citizens from furnishing the police valuable information; thus, informants demand anonymity to protect themselves and their families. The police often depend upon professional informants for information about crimes. If the public becomes aware of the dual role played by an informant, the informant becomes useless to the police, and persons who might otherwise provide information are discouraged from rendering assistance. See McCray, 386 U.S. at 308–09, 87 S.Ct. at 1061; Roviaro, 353 U.S. at 59, 77 S.Ct. at 627; Webb, 137 Va. at 836, 120 S.E.2d at 156.

Although he concedes the existence of the privilege rule, Gray contends, nevertheless, that the circumstances of the present case warrant an exception. He looks to Roviaro as support for his contention. Roviaro, however, is inapposite.

In Roviaro, the informant had been an active participant in the crime. The Court stated that he “had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged.” Id. at 55, 77 S.Ct. at 625. After reviewing the particular circumstances of Roviaro's trial, the Court noted that the informant was the only participant in the crime other than the accused and therefore his possible testimony was “highly relevant,” that he might have “disclosed an entrapment[,] thrown doubt upon [Roviaro's] identity or on the identity of the *329 package[, or] ... testified to [Roviaro's] possible lack of knowledge of the contents of the package....” Id. at 63–64, 77 S.Ct. at 629. The Court concluded that “under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee.” Id. at 65, 77 S.Ct. at 630.

[7] The circumstances of Gray's case are altogether different. Nothing in the record suggests that the informant participated in or knew anything about the crimes for which Gray stands convicted. Unlike Roviaro, the informant in the present case could not have been helpful in Gray's defense of his capital murder charge. Indeed, the affidavit for the search warrant shows that the information furnished was limited to Gray's drug activities and the informant was a person who had furnished the police with reliable information of narcotic activities in the past. We conclude, therefore, that under the circumstances of the present case the privilege rule applies and the trial court did not err in its ruling.

F

Psychiatric Examinations.

In response to Gray's motion, the trial court appointed a private psychiatrist to evaluate Gray and assist in his defense. Gray contends, nonetheless, that the court erred in refusing to provide him with funds so he could choose his own psychiatrist. The contention is meritless.

[8] [9] Before an indigent defendant is entitled to a court-appointed independent psychiatrist to assist the defense in a capital case, there must be a threshold showing that his sanity is likely to be a significant factor in his defense. Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985); Tuggle v. Commonwealth, 230 Va. 99, 104, 334 S.E.2d 838, 841 (1985), cert. denied, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986). Additionally, when the Commonwealth in a capital sentencing proceeding presents psychiatric evidence of an indigent defendant's future dangerousness, the Commonwealth must provide the defendant the assistance of a psychiatrist on the issue. Ake, 470 U.S. at 86–87, 105 S.Ct. at 1098–99; Tuggle, 230 Va. at 107–08, 334 S.E.2d at 843–44. It is clear, however, that an indigent accused does not have “a constitutional right to choose a psychiatrist of his personal liking or...

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to receive funds to hire his own.” Ake, 470 U.S. at 83, 105 S.Ct. at 1097; *330 Pruett v. Commonwealth, 232 Va. 266, 276, 351 S.E.2d 1, 7 (1986); BEAVER V. COMMONWEALTH, 232 VA. 521, 528, 352 S.E.2d 342, 346 (1987); Tuggle, 230 Va. at 107, 334 S.E.2d at 843.

In the present case, Gray made no threshold showing that his sanity would likely be a significant factor in his defense, and the Commonwealth did not present psychiatric evidence that he would be a danger to society in the future. Nevertheless, the trial court appointed a private psychiatrist to assist the defense. Thus, Gray received more than is constitutionally mandated, and clearly the trial court did not err in refusing to allow Gray to choose his own psychiatrist.

After furnishing Gray with the private psychiatrist, the trial court, on the Commonwealth's motion, and over Gray's objection, ordered that Gray be sent to Central State Hospital for a psychiatric examination to determine his mental condition at the time of the offense and whether he might be dangerous in the future. Although Gray complains about the entry of the order, the record shows that he refused to answer all questions posed by the hospital staff. Moreover, no psychiatric evidence was produced at either the guilt phase or the penalty phase of the trial. We conclude, therefore, that Gray's contention that the trial court erred in ordering the examination is without merit.

Refusal of Funds for an Investigator and Statistical Reports.


Commonwealth's Attorney's Election to Prosecute Gray Rather Than Melvin Tucker.

Both Gray and Melvin Tucker were indicted for capital murder. Afterwards, the Commonwealth's Attorney elected to try **167 only Gray on the charge of capital murder and entered into a plea bargain agreement with Tucker whereby he would be tried on a charge of first-degree murder. Gray contends that to vest a prosecutor with such unbridled discretion renders the imposition of the death sentence upon Gray “cruel and unusual punishment” in violation of the Eighth Amendment to the Federal Constitution.

Ample evidence of motive and means supports the Commonwealth's decision to try only Gray on the capital murder charge. Less than two months prior to the murder, McClelland, manager of a Murphy's Mart store, had fired Gray's wife, Melinda, from her job at the store. The day after McClelland discharged Melinda, Gray visited McClelland at the Murphy's Mart store and discussed her termination with him for about 15 minutes. Eleven days after McClelland discharged Melinda, Gray stole a .32–caliber pistol from a friend's home. The same gun was used to murder McClelland. Gray told one witness several times that he was “going to get” McClelland for firing his wife.

In addition to Tucker's testimony that Gray was the actual perpetrator (the “trigger man”) of the capital murder, two witnesses testified that Gray had told them he killed McClelland, and another witness testified that he had overheard Gray admit to someone else that he was the killer. Gray told Melvin Tucker and two of the witnesses that he had to kill McClelland because McClelland knew him and could identify him. On the other hand, Melvin Tucker did not have any personal acquaintance with McClelland prior to the crime.
[11] The institution of criminal charges is a matter of prosecutorial discretion. Bradshaw v. Commonwealth, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984). Nothing in the record suggests that the Commonwealth's Attorney acted arbitrarily or abused his prosecutorial discretion. We reject the contention that in exercising his discretion he violated the constitutional proscription against cruel and unusual punishment.

[12] Place of Incarceration.

[13] Gray was tried in the City of Suffolk. Immediately after his arrest for capital murder, Gray was moved from the Suffolk City jail to the Newport News City jail. Several weeks before the trial, Gray was transferred to the Hampton City jail. Both the Newport News and Hampton jails are located within 45 miles of Suffolk. The record shows that security problems, including Gray's own safety, dictated that he not remain in the Suffolk City jail.

Although Gray concedes that his counsel “conferred in person with [him] on a frequent basis,” he contends, nonetheless, that placing him in other locations when the Suffolk jail was available denied him effective assistance of counsel and due process in violation of the Federal Constitution. We do not agree.

While Gray's incarceration in other jails was an inconvenience to his counsel, he was not denied access to counsel. Moreover, the court permitted Gray to remain at the Suffolk City jail for several hours on the evenings of the trial so his attorneys could consult with him. Nothing in the record supports his contention that his counsel was ineffective as a result of his incarceration outside of Suffolk.


In a discovery motion, Gray sought, inter alia, the opportunity to inspect and copy statements that Melvin Tucker and the three other witnesses had given to the Commonwealth prior to trial. The trial court ordered that these statements be furnished to Gray “if and when said witnesses testify in this matter and before said testimony is given.” Because Gray believed he should be furnished this information a reasonable time prior to trial, he assigns error to the court's ruling.

On appeal, Gray argues that “any inconsistencies between the statements these four individuals gave to the Commonwealth and their subsequent testimony at trial would be of tremendous importance to [his] defense and more importantly, possibly exculpatory.” However, Gray has not told us, and the record does not disclose, how he has been prejudiced by not receiving these statements earlier. He alleges no inconsistencies between the statements and the witnesses' testimony; nor does he explain how the statements were exculpatory.

Gray was furnished these statements before the witnesses testified, and his counsel vigorously cross-examined the witnesses. Because Gray has suffered no harm or prejudice as a result of the court's ruling, we reject his contention.

II

JURY MATTERS

A

Change of Venue or Venire.

Gray claims the trial court erred in refusing to grant a change of venue or, alternatively, a change of venire. He bases his claim on alleged widespread publicity of the crime in the community, but makes no allegation that the publicity was inaccurate or intemperate.
Gray presented no affidavits suggesting widespread community bias and submitted only three newspaper articles. The information in the newspaper articles was factually accurate, nonprejudicial, and noninflammatory. In response to extensive questioning by the court and counsel during voir dire, each venireman who qualified indicated that his decision would not be affected by anything he had heard or read about the case.

**169** After the court had ruled on all challenges for cause and the required number of veniremen had been qualified, only one black, Alknah Thomas, remained. The Commonwealth used its third peremptory strike to remove Thomas.

While recognizing that it is constitutionally permissible for a court to exclude a venireman who voices an absolute objection to the imposition of the death penalty, see *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Witherspoon*, 391 U.S. at 518, 88 S.Ct. at 1775, Gray contends that the exclusion of such veniremen in the present case “is a violation of the rights provided to [him] under the 6th [and 14th Amendments] of the U.S. Constitution for an impartial jury” and precluded him from being tried “by a group of his peers.” He *335* contends that because of the views blacks purportedly hold respecting imposition of the death penalty, their exclusion pursuant to *Lockhart* and *Witherspoon* constitutes the use of a “discriminatory criterion.” See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1717, 90 L.Ed.2d 69 (1986) (reaffirming the general rule that jury members must be selected in accordance with a non-discriminatory criterion). *6* We find no merit to this contention.

[15] [16] The decision whether to change venue or venire is a matter within the sound discretion of the trial court, and its ruling will be reversed only upon an affirmative showing on the record that the discretion was abused. *Watkins*, 229 Va. at 481–82, 331 S.E.2d at 432; *Washington v. Commonwealth*, 228 Va. 535, 544, 323 S.E.2d 577, 584 (1984), cert. denied, 471 U.S. 1110, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985); *LeVasseur*, 225 Va. at 577–78, 304 S.E.2d at 651; *Newcomer v. Commonwealth*, 220 Va. 64, 67, 255 S.E.2d 485, 487 (1979); *Poindexter v. Commonwealth*, 218 Va. 314, 319, 237 S.E.2d 139, 142 (1977). Nothing in the record suggests that the trial court abused its discretion in denying a change of venue or venire.

**169** At the outset, we note that a black defendant is not constitutionally entitled to be tried by members of his own race. *Batson*, 476 U.S. at —, 106 S.Ct. at 1716–17; *Stradner v. West Virginia*, 100 U.S. 303, 305, 10 Otto 303, 25 L.Ed. 664 (1880); *Watkins*, 229 Va. at 491–92, 331 S.E.2d at 438. A defendant does have a constitutional right, however, to be tried by jury members selected pursuant to neutral and non-discriminatory guidelines. See *Martin v. Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497 (1906); *Ex parte Virginia*, 100 U.S. 339, 10 Otto 339, 25 L.Ed. 676 (1880). As Gray concedes, the Supreme Court recently held in *Lockhart* that a death-qualified jury does not violate the right of a defendant in a capital case to be tried by an impartial jury selected from a representative cross-section of the community. 476 U.S. at —, 106 S.Ct. at 1764. See also *Pruett*, 232 Va. at 277, 351 S.E.2d at 8; *Waye*, 219 Va. at 690–91, 251 S.E.2d at 207.

B

Composition of the Jury.

Forty-three veniremen, of whom 33 were white and 10 were black, were summoned to appear for Gray's trial. The record establishes that the venire panel was properly selected at random. See Code §§ 19.2–260, 8.01–343 to –363. Of the 43 veniremen, only 36 prospective jurors underwent a complete, individualized voir dire. Of these 36 veniremen, eight were black. Six of the black veniremen were struck for cause by the trial court because each voiced unequivocal objections to the imposition of the death penalty. See *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 reh’g. denied, 393 U.S. 898, 89 S.Ct. 21 L.Ed.2d 186 (1968); *LeVasseur*, 225 Va. at 576, 304 S.E.2d at 650; *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E.2d 797, 802 (1979), cert. denied, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). On Gray's motion, the court struck for cause venireman Holt, the seventh black, because Holt's father had been the victim of a recent robbery-murder.
The Lockhart Court stated that “the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.” *Lockhart* 476 U.S. at ———, 106 S.Ct. at 1770. In Gray's case, each of the prospective jurors removed for cause stated unequivocally that he or she could not impose the death penalty in any case and, therefore, could not apply the laws of the Commonwealth. The trial court had a duty to remove those veniremen. We conclude, therefore, that the Commonwealth's removal for cause of the six veniremen who voiced absolute objections to imposing the death penalty was accomplished pursuant to a non-discriminatory criterion.

*Gray* further contends that he was denied “the opportunity to be tried by a group of his peers” because the Commonwealth used one of its peremptory strikes to remove venireman Thomas. In *Batson*, the Supreme Court held that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.” 476 U.S. at ———, 106 S.Ct. at 1719. The Court then concluded that “a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's *Batson* trial.” *Id.* at ———, 106 S.Ct. at 1722–23. To establish such a prima facie case the defendant:

[F]irst must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” ... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

*Id.* at ———, 106 S.Ct. at 1723 (citations omitted).

In the present case, Gray made no timely objection at trial regarding the peremptory striking of Thomas by the Commonwealth's Attorney. Thus, the Commonwealth's Attorney was not afforded an opportunity to explain his reason for the strike, and the trial court had no opportunity to decide whether the reason was constitutionally acceptable. Nevertheless, nothing in the record raises an inference that the Commonwealth's Attorney used his peremptory strike to exclude Thomas from the jury on account of his race. Indeed, it seems apparent from a reading of the following excerpt of Thomas' *voir dire* that it was highly unlikely he would vote for the death penalty under any circumstances.

THE COURT: Could you in a proper case impose the death penalty?

*JUROR THOMAS:* No.

THE COURT: You could not?

JUROR THOMAS: (Nods head negatively.)

THE COURT: You could not in any way impose the death penalty?

JUROR THOMAS: Yea, I will if I have to.

THE COURT: That's what I said. Could you in a proper case impose the death penalty?

JUROR THOMAS: Yes, yes, yes. If I have to.

THE COURT: Now, we're still talking about a capital murder case. Could you also in a proper case impose the lesser penalty of life imprisonment?

JUROR THOMAS: Yea.

[COMMONWEALTH]: Your Honor, I would like to just ask a couple of questions to clarify a couple of things.
Mr. Thomas, you indicated that in a proper case you said that—Could you personally vote to impose the death penalty on somebody that's been convicted of capital murder?

JUROR THOMAS: Can I do that?

[COMMONWEALTH]: Could you vote to give somebody the death penalty in a proper case that's been convicted of capital murder? You, yourself? Could you vote to give a man the death penalty?

JUROR THOMAS: No.

[COMMONWEALTH]: You could not do that?

JUROR THOMAS: If I have to do it I would.

[COMMONWEALTH]: I don't mean if you have to do it. If you had your choice. There are two sentences in this case. He can either be sentenced if convicted of capital murder to life in the penitentiary or to the death penalty.

JUROR THOMAS: I vote for the life.

[COMMONWEALTH]: You would vote for life. Would you vote automatically for a life sentence no matter what the facts?

JUROR THOMAS: No, it's got to be what he did.

[COMMONWEALTH]: Excuse me?

JUROR THOMAS: Depends on what he did.

[COMMONWEALTH]: Depends on what he did?

JUROR THOMAS: That's right.

*338 [COMMONWEALTH]: That's what I'm trying to get straight. You said immediately you would vote for the life imprisonment. If you heard the evidence and determined guilt first and you found **171 the person guilty of capital murder and you then had to decide between voting for the death penalty or voting for life imprisonment could you vote, if the facts justified it, to sentence a man to death or vote for the death penalty? Could you personally vote to do that?

JUROR THOMAS: Yea, I can.

[COMMONWEALTH]: You could? Okay. I have no further questions, Judge.

[DEFENSE COUNSEL]: No questions, Your Honor.

[19] Clearly, Thomas gave an internally contradictory statement concerning his ability to vote for the death penalty. His equivocation was a reasonable, nonracial basis for the Commonwealth's Attorney's strike. Significantly, the Commonwealth's Attorney also peremptorily struck two white jurors who, during voir dire, expressed similar uncertainty about imposing the death penalty. We will not infer purposeful discrimination by the peremptory strike of one black, when, as previously noted, the record indicates that there existed a neutral and non-discriminatory basis for the strike.

C

Venireman Duplissey.

Gray assigns error to the trial court's refusal to exclude venireman William Duplissey for cause. 7 Duplissey is a former police officer, having served for 15 years in the County of Nansemond and the City of Suffolk. He later served as a security guard at Newport News Shipbuilding and Drydock Company. His occupation at the time of trial did not involve police or security duties. He last testified in court in 1974. On voir dire, he stated that he could render a fair and impartial verdict based on the evidence.

[20] [21] A person is not automatically excluded from a jury because of an association with law enforcement personnel, provided he demonstrates that he can be impartial. Clozza v. Commonwealth, 228 Va. 124, 129, 321 S.E.2d 273, 276 (1984), cert. denied *339, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985). Whether a venireman should be excluded from a jury is a matter within the sound discretion of the trial court. Because the trial court observes the venireman, its finding is entitled to great weight and will not be disturbed on appeal unless manifest error exists. Watkins v. Commonwealth, 229 Va.
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Duplissey's answers on voir dire support the trial court's finding that, notwithstanding his previous employment in police work, he would be fair and impartial. Thus, we cannot say the court abused its discretion in refusing to strike Duplissey for cause.

D  
Alternate Juror Murphy.

During voir dire, the trial court asked a group of veniremen that included George Murphy this question: “Are you or any members of your immediate family employed by any law enforcement agency?” Murphy made no response to the question. Subsequently, Murphy became one of the two alternate jurors.

Prior to the second day of trial, Gray's counsel learned that Murphy's son was currently a member of the Virginia State Police. Gray moved to declare a mistrial, and the trial court denied the motion. Gray assigns error to this ruling.

We reject this contention. Murphy was released from the panel before the case was submitted to the jury. Murphy was merely an alternate and, therefore, did not participate in the jury's deliberations or decision. Because it is clear that Gray has suffered no harm, this issue is without merit.

E  
Refusing to Sequester the Jury.

At the beginning of the trial, Gray moved for the sequestration of the jury, **172 based on the anticipated length of the trial and the publicity it was receiving. The trial court denied the motion. After the jury returned its verdict finding Gray guilty of capital murder, Gray again moved for sequestration of the jury until the penalty phase of the trial commenced the following day. The court also *340 denied this motion. Although Gray makes no specific allegation that failure to sequester the jury adversely affected the trial, he argues that “as a matter of policy, sequestration of a jury in a capital murder case, especially after a guilty verdict has been returned, should be the norm rather than the exception.”


[23] In the present case, the trial court admonished the jury twice each day during the five-day trial not to discuss the case with others and to refrain from having any contact with any news media accounts of the trial. Nothing in the record suggests that the jury disregarded the trial court's admonitions. From the record before us, we cannot say the trial court abused its discretion in refusing to sequester the jury.

III  
THE GUILT TRIAL

A  
Facts.

According to established principles of appellate review, we must view the evidence in the light most favorable to the Commonwealth, the prevailing party at trial. As previously indicated, Richard McClelland was the manager of Murphy's Mart store in the City of Portsmouth. He and the store's security guard worked late the evening of May 2, 1985, both having arrived at the store between 9:30 and 10:00 p.m.
On the same evening, approximately 9:30 p.m., Gray and Melvin Tucker, both “high” from “free basing” cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store. They saw McClelland and the guard inside the store.

Shortly before midnight, McClelland and the security guard left the store in separate automobiles. Gray and Tucker followed *341 them in Gray's automobile, which Gray was driving. McClelland and the guard went to a fast-food restaurant. McClelland went inside the restaurant, and the security guard went through the “drive-thru” and then left.

When McClelland left the restaurant, he drove toward Smithfield. Gray and Tucker continued to follow him. At a stop sign at the intersection of Nansemond Parkway and Bennett's Pasture Road, Gray pulled his automobile in front of McClelland's car and blocked McClelland's way. Gray, armed with a .32-caliber revolver, directed McClelland to get out of his automobile and into Gray's. Gray struck McClelland, and the two men took McClelland's wallet and threatened to harm his family if he did not cooperate. Gray then drove Tucker and McClelland back to the Murphy's Mart store.

When they arrived at Murphy's Mart, Gray forced McClelland at gunpoint into the store while Tucker waited outside in Gray's automobile. Approximately one-half hour later, Gray and McClelland emerged from the store with a shopping cart containing three gym bags filled with money. Gray, Tucker, and McClelland put the gym bags in the back seat of Gray's automobile and McClelland was told to get back into the car.

Gray then drove to a service station to obtain gasoline. He put some gas in the tank of the car and filled a gas can that was in the car's trunk.

After paying for the gas purchase, Gray drove McClelland and Tucker to the Frederick **173 campus of Tidewater Community College. After passing the college, Gray backed the car down a small side road and ordered McClelland out of the car. Gray then took McClelland to a place approximately 15 to 20 feet behind the automobile and ordered him to lie down on the ground. McClelland obeyed Gray's command.

McClelland begged Gray not to hurt or shoot him, and Gray assured him that he would not be harmed. As McClelland lay face down on the ground, Gray fired six pistol shots in rapid succession into McClelland's head from a distance of 3 to 18 inches. Gray told Tucker as they drove away that he had had to kill McClelland because McClelland knew him.

Gray and Tucker then drove to the intersection where they had left McClelland's car. Gray told Tucker that he was going to burn McClelland's car to destroy evidence. Gray took the can of gasoline from the trunk of his car and doused the interior of McClelland's *342 automobile with gasoline. He lit a match, threw it into McClelland's car, and closed the door. Gray and Tucker subsequently returned to Gray's apartment to count the stolen money, which amounted to between $12,000 and $13,000.

Some days later, Tucker and Gray went to the Nansemond Treatment Plant where Tucker was employed, and Gray threw the revolver into a contact tank. The police later recovered the revolver after Gray showed them its location.

The police discovered McClelland's body at the scene of the crime on the morning of May 3 just a few hours after he had been shot. An autopsy performed later that day established that McClelland had received six close-range .32-caliber gunshot wounds to the head, any one of which could have caused his death.

Photographs Depicting Victim's Body and Wounds.

The trial court, over Gray's objections, admitted into evidence six color photographs of the victim's body, including five of his bloody head. Three photographs depicted the victim's body as found at the scene of the crime; the remaining three photographs were taken at the autopsy. Gray contends the court erred in admitting these photographs because they “served no purpose other than to inflame the jury.” We disagree.

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[27] In the present case, the photographs of the victim, though gruesome, accurately portrayed what the defendant had created and were relevant to establish intent, malice, premeditation, and atrociousness of the crime. We note, moreover, that **174** the trial court rejected two photographs offered by the Commonwealth because they were duplicative of other photographs that were admitted. We hold that the trial court did not abuse its discretion in admitting the six photographs into evidence.

Gray contends that because the pathologist who performed the autopsy on the victim testified at trial, the admission of the autopsy report constituted error. He argues that the report has “no probative value and only tends to inflame the jury.” We do not agree.


D

**Requirement that Gray be in Leg Irons.**

Gray contends that the trial court erred in requiring him to remain in leg *iron* during his trial. The court concluded that the restraints should be imposed because of the serious nature of the charges against him and to maintain security. The court, however, took pains to ensure that the jury remained unaware that Gray was shackled. Moreover, when Gray took the witness stand *344* to testify during the sentencing phase, the leg *iron* had been removed outside the jury's view.


In the present case, the trial court's ruling was reinforced by Gray's extensive and violent criminal history and the gravity of the offense for which he was being tried. Thus, we conclude that the trial court did not abuse its discretion in requiring that Gray remain in leg *iron* during the trial.

C

**Admissibility of the Autopsy Report.**

E
**Sufficiency of the Evidence of Capital Murder.**

Gray claims the evidence is insufficient to support his conviction of capital murder because the testimony of Melvin Tucker, the co-defendant, and the three other prison inmates who testified that Gray admitted killing McClelland is incredible. We do not agree.

[29] It is a jury's function to judge the credibility of the witnesses and the weight of their evidence. The jury has the opportunity to observe the witnesses' demeanor while testifying, to consider their interest in the outcome of the case, and to determine from all the circumstances of the case which witnesses are more believable. See Johnson v. Commonwealth, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); Coppola, 220 Va. at 252, 257 S.E.2d at 803.

The trial judge, who also observed the witnesses and considered the evidence, has approved the jury's verdict. A trial court's judgment approving a jury's verdict is entitled to great weight on appeal and will not be disturbed unless it is contrary to law or plainly wrong. Code § 8.01–680; Stockton, 227 Va. at 145–46, 314 S.E.2d at 385.

[30] The Commonwealth relied in large measure upon the testimony of Tucker and the other three prison inmates to establish that Gray actually perpetrated McClelland's murder. Although Gray has attacked their veracity, the jury was in the best position to assess their credibility. Moreover, from other circumstances proved, the jury reasonably could infer that Gray was the "trigger man." The murder weapon had been stolen by Gray. Gray, not Tucker, was acquainted with McClelland. Because McClelland had fired Gray's wife from her job at Murphy's Mart, Gray had a motive to kill McClelland. Indeed, he told a friend that he was "going to get" McClelland. The jury and the trial court were convinced beyond a reasonable doubt that Gray was the perpetrator of the murder.

We cannot say that the judgment is plainly wrong or that the evidence that Gray was the "trigger man" is incredible as a matter of law. Accordingly, we conclude that the Commonwealth successfully proved "beyond a reasonable doubt that motive, time, place, means and conduct concur in pointing out the accused as the perpetrator of the crime." Quintana, 224 Va. at 143, 295 S.E.2d at 651 (citation omitted).

**IV**

**THE PENALTY TRIAL**

**A**

**The Sorrell Murders.**

During the penalty phase of the trial, Melvin Tucker testified that Gray told him he had "knocked off" Lisa Sorrell. According to Tucker, Gray made the statement as he pointed to a picture of Lisa Sorrell in a newspaper while searching for news articles concerning McClelland's murder.

Over Gray's objection, the court permitted the Commonwealth to present additional evidence showing that two Sorrell murders actually had occurred. The police officer who had investigated the murders testified that he found the body of Lisa Sorrell slumped in the front passenger seat of a partially burned automobile in Chesapeake, a city that shares borders with Suffolk. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. The officer identified various photographs of the automobile and the victims. The photographs were admitted into evidence.

*346* A State medical examiner who had performed autopsies on the bodies of Lisa and Shanta Sorrell testified about the causes of their deaths. He opined that Lisa was killed by six gunshot wounds to the head, apparently inflicted by a .32–caliber firearm, and that Shanta died of carbon monoxide inhalation. Gray, testifying in the penalty phase, denied any involvement in the Sorrell murders.

Gray contends on appeal that the trial court erred in admitting evidence of the Sorrell murders. He argues that the evidence was "highly inflammatory and inherently prejudicial." Gray points out that at the time of the trial

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he had not even been charged with the commission of these crimes. Gray says the only evidence linking him to these murders was the testimony of Melvin Tucker, the codefendant with whom the Commonwealth had reached a plea bargain agreement.

In the penalty phase of a bifurcated capital murder trial, “it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision.” Gregg v. Georgia, 428 U.S. 153, 204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). Consistent with Gregg, Code § 19.2–264.4(B) provides that the jury may consider evidence that includes “the history and background of the defendant.” Indeed, “[t]he jury has the duty to consider all the evidence relevant to sentencing, both favorable and unfavorable” before determining whether it is probable that the defendant would commit future acts of violence that would constitute a continuing, serious threat to society. Stamper, 220 Va. at 275–76, 257 S.E.2d at 819. “[E]vidence of prior unadjudicated criminal conduct ... may be used in the penalty phase to prove the defendant's propensity to commit criminal acts of violence in the future.” Watkins, 229 Va. at 488, 331 S.E.2d at 436. See Quintana, 224 Va. at 147–48, 295 S.E.2d at 654. Determining the credibility of witnesses is peculiarly within the province of the jury. 8 *347 **176

Johnson, 224 Va. at 528, 298 S.E.2d at 101; Coppola, 220 Va. at 252, 257 S.E.2d at 803.

Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker. We cannot say Tucker's testimony was incredible as a matter of law.

Moreover, the evidence of the police officer and the medical examiner indicated that the Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. Lisa Sorrell also was shot six times in the head, and her automobile, like McClelland's, was burned after the murder. Thus, the officer's and doctor's evidence tended to corroborate Tucker's testimony of Gray's admission.

Gray's admission and the information about the particulars of the Sorrell murders were relevant evidence of Gray's propensity to commit violent acts in the future. We conclude, therefore, that the trial court did not err in admitting this evidence.

B

Criminal Record, History, and Background.

Gray, 28 years old at the time of his trial, has a criminal record dating to 1973. In August 1973, while a juvenile, he was found not innocent of petit larceny and ordered to complete one year of supervised probation. In January 1976, as an adult, Gray was convicted of burglary in Los Angeles, California. For this conviction, he served four days in jail and was placed on probation for one year.

In March 1977, Gray was convicted of disturbing the peace and resisting arrest in the City of Portsmouth, for which he was fined $10.00 and sentenced to five days in jail. The jail sentence was suspended on the condition that he be of good behavior for 12 months.

In May 1978, also in the City of Portsmouth, Gray was found guilty of malicious wounding, attempted robbery, and use of a firearm. He was sentenced to a total of 21 years in prison. In August 1983, he was released on parole. Gray was on parole at the *348 time he committed the offenses involved in these appeals. He also has been convicted of possession of marijuana with intent to distribute and possession of cocaine.

From November 1983 to May 1984, while on parole, Gray worked at Morrison's Cafeteria. William Palmer, general manager of the cafeteria, testified that Gray's employment was terminated because of his use of profanity. Palmer stated that Gray had a “bad attitude.” Thaddeus Eley, a chef at the cafeteria, testified that Gray had told him that he “could kill” Palmer for firing him.

Ronald Whitte testified that in July 1977, while he, his wife, and two small children were bicycling, Gray and another man accosted them. Gray displayed a pistol, ordered Whitte to halt, threatened to kill Whitte, and demanded money from him. When Whitte refused
to comply, Gray fired several shots from the pistol, wounding Whitte in the arm and foot.

Lawrence Tucker, who is Melvin Tucker's brother and a convicted felon, testified that, in May 1985, he had overheard Gray recount to Melvin the details of Gray's robbery of the Circle Seafood Restaurant. Gray related the incident to relieve Melvin Tucker's concerns about the Murphy's Mart robbery. Lawrence Tucker stated, “[H]e told Melvin don't worry about it, because he got away with something like that and he can get away with this.”

Melvin Tucker testified that Gray told him “he had took the Circle Restaurant off” and showed Tucker the money taken **177 in the robbery. Melvin Tucker also testified that, within a week after the Murphy's Mart robbery, he and Gray heard a rumor that a young woman had been talking about the incident. When they saw the woman on the street, Gray told Tucker that if “she keep on running her mouth [I'm] going to fuck her up.”

Sylvester Joyner and Gray were both incarcerated in the same cell block in the Suffolk City jail. Joyner testified that Gray told him that he had to leave California because “he had killed a guy out there.” The jury also heard evidence pertaining to the Sorrell murders, which has been discussed in the preceding section.

Gray called seven witnesses who gave mitigating testimony. Gray, himself, also testified in the penalty phase.

Catrina Hargrove had been a neighbor of Gray for several months preceding his arrest. She had frequent contact with Gray and his wife. She described Gray as a “very nice person” and stated that she had never seen Gray exhibit any anger or hostility *349 toward her or anybody. Hargrove had observed Gray playing with her four-year-old daughter. Hargrove said she was shocked and surprised to learn of Gray's involvement in the murder.

Keith Silver also was a friend and former neighbor of Gray. He had known Gray for approximately four years and for about one year they lived across the hall from each other. He testified that Gray treated Silver's wife and daughter as if they were “family.” Silver said he did not believe that Gray was capable of murdering McClelland because such conduct was totally out of character for Gray.

Kelvin Penny, a friend and former co-worker with Gray at Morrison's Cafeteria, testified that Gray was “great,” a “good guy.” He also believed that the murder was out of character with his friend.

David Wilson, a contractor for brick work and former employer of Gray, described Gray as a “[v]ery good worker.” He stated that Gray got along well with everyone, never threatened anyone, and never got into fights. He also said that the murder was out of character with Gray.

Terry Carter, a probation and parole officer in the City of Portsmouth, testified that Gray had been under his supervision from August 1983 to January 1985. He stated that Gray was punctual in keeping appointments and respectful to him. He never observed any hostility in Gray.

Mavis Spitzer, who had been Gray's probation officer since January 1985, testified that Gray was “always very polite, very well-mannered, very cooperative.” She also stated that on her unannounced visits she found his home “always very neat and clean, very tidy.”

Rafiq Zaidi, who described himself as a Muslim minister, testified that in January 1985 Gray had been generous in contributing funds to a needy woman and her children. The minister said that the acts involved in the murder were “[t]otally inconsistent” with Gray.

Bishop Maurice Johnson, an elderly retired minister, was well acquainted with Gray. Johnson's wife is related to Gray, and Johnson performed the marriage ceremony for Gray and his wife. Bishop Johnson described Gray as an outgoing person who never exhibited hostility to him or to anyone else.

Gray testified that he was not the “trigger man.” He denied any involvement in the Sorrell murders and stated that he had been *350 acquitted of the murder charge in California. Conceding that the part he played in the McClelland murder was wrong, he reiterated that he did not pull the trigger.
Gray contends that the trial court erred in refusing four jury instructions he proffered at the penalty phase of the trial. They were identified as Instructions 4A, 4B, 4C, and 4D.

[32] Instruction 4A would have told the jury that it was not required to impose the death penalty even though it believed beyond a reasonable doubt that one or both **178 of the aggravating factors necessary to support a death penalty had been proved. The court did instruct the jury, however, as follows:

You have convicted the defendant, Coleman Wayne Gray, of capital murder which may be punished by death. You must decide whether the defendant shall be sentenced to death or life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

(1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

*351 If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

(Emphasis added.)

The above-quoted instruction sufficiently and properly states the statutory framework. LeVasseur, 225 Va. at 594–95, 304 S.E.2d at 661. Refused Instruction 4A would have been repetitious of the language that we have emphasized in the granted instruction. “When granted instructions fully and fairly cover a principle of law, a trial court does not abuse its discretion in refusing another instruction relating to the same legal principle.” Stockton, 227 Va. at 145, 314 S.E.2d at 384.

Instruction 4B would have told the jury that life imprisonment must be imposed if the jury had a reasonable doubt as to “any fact or conclusion which is required before the death penalty can be imposed.” This instruction also is repetitious. The last two paragraphs of the granted instruction fully cover the principle of law involved.

The trial court properly refused Instruction 4C, which listed specific mitigating factors that the jury could consider and would have told the jury that their decision upon the mitigating factors need not be unanimous. Indeed, failure to list mitigating factors inures to the benefit of a defendant. Whereas aggravating factors are limited and must be listed, “a jury is not so limited in considering mitigating factors, but may consider any and all [such] factors.” Clark v. Commonwealth, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), cert. denied, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, informing the jury that its decision on mitigating factors need not be unanimous could create confusion in the jurors' minds because they are instructed that unanimity is required to impose the death penalty. See Code § 19.2–264.4(E).

Instruction 4D would have told the jury that it “must assume that the Defendant will be executed” if it imposed the death penalty. We assume that Gray requested this instruction to evoke the jury’s sympathy. The instruction, a comment upon the obvious, was redundant, and the court properly refused it.
SENTENCE REVIEW

Code § 17–110.1(C) mandates that we review the death sentence. In so doing, we are required to consider and determine whether the death sentence “was imposed under the influence of passion, prejudice or any other arbitrary factor,” and whether the sentence “is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” *Id.*

**179** Contending that the sentence of death was the product of passion, prejudice, or other arbitrary factors, Gray again raises the issue of the court's failure to immediately exclude alternate juror Murphy who had “close family ties to ... law enforcement.” Gray suggests that the trial court “permitted [Murphy] to communicate his opinion to the other jury members throughout the several days leading up to [Gray's] conviction.”

Elsewhere in this opinion, we have considered and rejected Gray's contention respecting Murphy. We reiterate, however, that Murphy was merely an alternate juror. He did not participate in the deliberations and decisions of the jury. Moreover, there is absolutely nothing in the record to suggest that Murphy “communicate[d] his opinion to the other jury members.”

Gray again raises the argument that the photographs of the victim were inflammatory, and we will stand on what we have previously said concerning this issue. We also have addressed Gray's final argument: that the court erred in admitting evidence of the Sorrell murders in the penalty trial. For reasons previously stated, we again reject this contention.

Gray also argues that in our review of the sentence we “should consider the cumulative effect of the errors of the trial court.” Because we have found no error in the conduct of either the guilt or penalty trial, we reject Gray's cumulative-effect argument. See Wise, 230 Va. at 335, 337 S.E.2d at 723; Boggs, 229 Va. at 522, 331 S.E.2d at 422; Waye, 219 Va. at 704, 251 S.E.2d at 214.

By its verdict, the jury found that both the “dangerousness” and “vileness” predicates had been proved beyond a reasonable doubt. Gray contends that the evidence does not rise to the level necessary for the imposition of the death sentence based upon either predicate. We do not agree.

**353** Respecting “dangerousness,” we look first to Gray's lengthy criminal record. It is significant that in July 1977, during the period in which he was under a one-year suspended jail sentence, Gray participated in the crimes against Ronald Whitte that led to his convictions of malicious wounding, attempted robbery, and use of a firearm. More significantly, however, is Gray's participation in all of the present violent crimes against McClelland while Gray was on parole for the Whitte offenses. His record establishes that from 1976 to 1985 Gray committed 13 felonies, at least nine of which were crimes of violence. This is shocking, especially when we take into account that during this nine-year period Gray was confined in prison for more than five of those years. His record clearly demonstrates a trend towards increasingly violent crimes.

We also look to the testimony relating to Gray's history and background. From this, we learn that he told others he had committed a robbery at the Circle Seafood Restaurant in May 1985 and had locked the restaurant employees in a food freezer. He told another he murdered the Sorrells in 1984. He has threatened the lives of two persons other than McClelland.

We have considered the circumstances surrounding McClelland's murder, especially Gray's arming himself and engaging in a planned enterprise. Additionally, we have reviewed the evidence presented in mitigation. After considering all aggravating and mitigating factors, we conclude that the evidence supports the jury's finding that Gray posed a continuing, serious threat to society.

We turn next to the “vileness” predicate. From the time McClelland fired Gray's wife, Gray planned revenge. He stole the gun that he later used in McClelland's murder. He had his wife sketch the layout of Murphy's Mart. He solicited Melvin Tucker to assist him with the robbery.
On the night of the murder, Gray and Tucker waited about three hours for McClelland to come out of the store and followed him until he reached a deserted intersection. Gray ordered McClelland out of the car at gunpoint, striking him in the face with his hand.

Throughout the ordeal, Gray threatened to harm McClelland's family. Indeed, before entering Murphy's Mart, Gray told McClelland that Tucker would stay outside in the car to “take care” of McClelland's family if he were uncooperative. McClelland never resisted and was totally cooperative.

Gray originally wanted to push McClelland into a contact tank at the treatment plant. However, Tucker would not use his employee status to escort Gray through the plant's entrance gate. Consequently, Gray took McClelland to a remote area by Tidewater Community College and had him lie face down on the ground. Without any provocation whatsoever, Gray fired six bullets into McClelland's head. In retelling the story of McClelland's murder to an inmate, Gray “laugh[ed] about the fact that he shot and killed the guy, as if it was nothing to him.” Gray's laughter and total lack of remorse prompted the inmate to inform the police of Gray's confession.

From our review, we believe the evidence is sufficient to support the jury's finding of “vileness” beyond a reasonable doubt. Indeed, Gray's overall conduct in committing McClelland's murder was outrageously vile and inhuman, in that it involved depravity of mind and aggravated battery to the victim.

Pursuant to Code § 17–110.1(E), we have accumulated and considered the records of all capital murder cases reviewed by this Court to determine whether “juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.” Stamper, 220 Va. at 284, 257 S.E.2d at 824. From this review, we conclude that Gray's sentence was not excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for crimes similar in nature.

VI

CONCLUSION

We have considered all 41 of Gray's assignments of error and find no reversible error in any of them. Accordingly, the judgments of the trial court will be affirmed.

Record No. 860373—Affirmed.
Record No. 860374—Affirmed.

All Citations
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Footnotes
* Justice Cochran participated in the hearing and decision of this case prior to the effective date of his retirement on April 20, 1987.

1 Code § 19.2–264.2 reads as follows:
In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

2 Code § 19.2–264.4(C) reads as follows:
The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.
Similarly, we reject Gray's contention that the trial court erred in refusing to declare a mistrial because the Commonwealth failed to disclose the name of Carl Bond, who was incarcerated with Gray for a period of time. Bond's testimony regarding a conversation with Gray about the McClelland murder contradicted the testimony of another inmate. Because Gray himself discovered Bond's name and whereabouts and called him as a witness at trial, we conclude that Gray suffered no prejudice.

Gray incorrectly states that “8 out of 10 Negroes or 80%” of the veniremen were struck for cause because they objected to the death penalty. The record clearly shows that only six veniremen were disqualified on this ground. It is not clear from the record that the six veniremen were black. However, because the Commonwealth does not challenge Gray's assertion that the six were black, we assume they were.

Gray presented no empirical data supporting his conclusion that blacks as a group oppose the death penalty.


Gray's defense counsel subsequently removed Duplissey with a peremptory strike.

Although he made no objection to Tucker's testimony at trial, Gray now relies on Lee v. Illinois, 391 U.S. —–, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), to press the argument that Tucker's testimony was “presumptively unreliable” and should not have been introduced because there were insufficient indicia of reliability to rebut the presumption. Lee involved the introduction of a co-defendant's out-of-court written confession incriminating the accused in a double-murder case. The co-defendant did not testify and, thus, was not subject to cross-examination. The Supreme Court held that the inability to cross-examine the co-defendant violated the accused's Sixth Amendment right to confront witnesses. Id. at —–, 106 S.Ct. at 2063.

In the present case, however, Gray had the opportunity to cross-examine Tucker, and the jury had the opportunity to assess Tucker's credibility and reliability. We conclude, therefore, that Lee has no application to the facts of this case.
Action was brought to recover damages arising out of automobile accident. The Circuit Court, City of Hopewell, Ernest P. Gates, Sr., Judge Designate, entered judgment on jury verdict for defendant, and plaintiff appealed. The Supreme Court, Hassell, J., held that defendant failed to articulate racially neutral reason for removing African-Americans from jury venire.

Reversed and remanded.

West Headnotes (2)

[1] Jury

Objections and exceptions
Litigant may make objection relating to impaneling of jurors after jury has been sworn with leave of court. Code 1950, § 8.01–352.

5 Cases that cite this headnote


Peremptory challenges
Tort defendant failed to articulate racially neutral reason for removing African-Americans from jury venire; proffered reason, venireperson's occupation, was unknown to defendant, and remaining proffered reasons, “just intuitive reasons, the way people look, * * * just a sense,” were insufficient to satisfy defendant's burden.

6 Cases that cite this headnote
Well, Your Honor, [the reasons] are based on just intuitive reasons, the way people look, they—just a sense. Some of it is based on, on, on their occupations. I don't, I don't believe I can state any more than that without going into, into my trial strategy, Your Honor.

The trial court overruled Hill's objection. The jury returned a verdict in favor of Berry, and we awarded Hill an appeal from the trial court's judgment confirming the verdict.

Hill, relying upon Batson, Edmonson, and Faison, argues that Berry removed the African–Americans from the venire because of their race. Berry argues, however, that Hill waived his objection because his Batson motion was made after the jury was sworn. Furthermore, Berry argues that even if Hill's motion was timely, Berry's peremptory strikes were exercised for racially neutral reasons. We agree with Hill.

Applying former Code § 8–202, we have held that any objection to the impaneling of jurors must be made before the jury is sworn or the objection is deemed waived. Oyler, Admr. v. Ramsey, 211 Va. 564, 565, 179 S.E.2d 904, 905 (1971). Former Code § 8–202 stated, in relevant part:

No irregularity in any writ of venire facias or in the drawing, summoning, returning or empaneling of jurors shall be sufficient to set aside a verdict unless the party making the objection was injured by the irregularity or unless an objection specifically pointing out such irregularities was made before the swearing of the jury; and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias unless made a ground of exception in the trial court before the jury is sworn.

In 1977, the General Assembly enacted Code § 8.01–352, that, among other things, permits a litigant to make an objection relating to the impaneling of jurors after the jury has been sworn with leave of court. Code § 8.01–352 states, in relevant part:

A. Prior to the jury being sworn, the following objections may be made without leave of court: (i) an objection specifically pointing out the irregularity in any list or lists of jurors made by the clerk from names drawn from the jury box, or in the drawing, summoning, returning or impaneling of jurors or in copying or signing or failing to sign the list, and (ii) an objection to any juror on account of any legal disability; after the jury is sworn such objection shall be made only with leave of court.

(Emphasis added). The revisers' note to Code § 8.01–352 is instructive here:

Section 8.01–352 consolidates certain provisions found in former [Code] § ... 8–208.27. * Under this section, objections to any irregularity in the jury list, etc., or to any legal disability generally must be made before the jury is sworn. Thereafter, such objections may be made only with leave of court. This alters former § 8–208.27 which permits objection only before the jury is sworn.

Our review of the record reveals that the trial court implicitly granted Hill leave of court to make his motion challenging the impaneling of jurors after the jury was sworn. The court permitted Hill to make his motion, which the court subsequently considered on its merits and denied. Therefore, we hold that Hill's motion was not waived.

We now consider whether counsel for Berry articulated a racially neutral reason for removing the African–Americans from the venire. The Supreme Court held in Batson that the equal protection clause does not permit a prosecutor to exercise a peremptory strike to remove a prospective juror solely on account of the
prospective juror's race. 476 U.S. at 89, 106 S.Ct. at 1719. In Edmonson, the Supreme Court extended the Batson rule to civil cases. 500 U.S. at ——, 111 S.Ct. at 2080.

In Batson, the Supreme Court articulated the test that we must apply here:

To establish ... a case [of purposeful discrimination in the selection of the jury], the [moving party] first must show that he is a member of a cognizable racial group, ... and that the [opposing party] has exercised peremptory challenges to remove *275 from the venire members of the [moving party's] race. Second, the [moving party] is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” Finally, the [moving party] must show that these facts and any other relevant circumstances raise an inference that the [opposing party] used that practice to exclude the veniremen from the ... jury on account of their race. This combination of factors in the empaneling of the ... jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

....

Once the [moving party] makes a prima facie showing, the burden shifts to the [opposing party] to come forward with a neutral explanation for challenging black jurors.


[2] Here, Hill established a prima facie case of purposeful discrimination, and the burden shifted to counsel for Berry to present a racially neutral explanation for removing the African–American veniremen. For purposes of our resolution of this appeal, we need only consider the reasons counsel for Berry advanced for removing Angela D. Stewart, one of the three African–Americans. Ms. Stewart's occupation is not identified on the trial court's jury list. Her occupation is described as “unknown.” Counsel for Berry did not ask any questions of Ms. Stewart or any other member of the venire regarding their respective occupations. Counsel for Berry admitted at the bar of this Court that he did not know Ms. Stewart's occupation and her occupation could not have been “a valid reason” to remove her from the venire. We also observe that counsel for Berry did not remove Caucasian members of the venire whose occupations were described as unknown.

The remaining reasons offered by Berry's counsel for removing Ms. Stewart, “just intuitive reasons, the way people look, they—just a sense,” simply fail to satisfy Berry's burden of producing a racially neutral reason for removing her from the venire. We hold that counsel for Berry failed to provide a racially neutral reason for removing Ms. Stewart from the venire and, therefore, the trial court erred in denying Hill's motion. We do not consider Berry's reasons for removing the *276 other African–Americans from the venire because permitting the improper removal of any one venireman constitutes reversible error. See Faison, 243 Va. at 402–03, 417 S.E.2d at 308.

Accordingly, we will reverse the judgment of the trial court and remand this case for a new trial.

Reversed and remanded.

All Citations

247 Va. 271, 441 S.E.2d 6

Footnotes

* Former Code § 8–202 was the precursor to former Code § 8–208.27. Former Code § 8–208.27 stated in relevant part: No irregularity in any list or lists of jurors made by the clerk from names drawn from the jury box, in the drawing, summoning, returning or impaneling of jurors or in copying or signing or failing to sign the list shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto specifically pointing out such irregularities was made before the jury was sworn.
441 S.E.2d 6

Supreme Court of the United States

J.E.B., Petitioner
v.
ALABAMA ex rel. T.B.

No. 92-1239.
| Decided April 19, 1994.

Putative father appealed from order entered on jury verdict finding him to be father of the child, challenging state's use of peremptory challenges to exclude men from jury. The Alabama Court of Civil Appeals affirmed, 606 So.2d 156. On grant of certiorari, the Supreme Court, Justice Blackmun, held that intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause.

Reversed and remanded.

Justice O'Connor filed a concurring opinion.

Justice Kennedy filed an opinion concurring in the judgment.

Chief Justice Rehnquist filed a dissenting opinion.

Justice Scalia dissented and filed an opinion in which Chief Justice Rehnquist and Justice Thomas joined.

West Headnotes (14)

[1] Constitutional Law
   ➔ Method of Selection

   Jury
   ➔ Eligibility in General

   ➔ Eligibility in General

   Gender, like race, is an unconstitutional proxy for juror competence and impartiality.

   45 Cases that cite this headnote

[3] Constitutional Law
   ➔ Juries

   Intentional discrimination on the basis of gender by state actors violates the equal protection clause in jury selection, particularly where the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women. U.S.C.A. Const.Amend. 5.

   169 Cases that cite this headnote

   ➔ Eligibility in General

   Prohibition of women on juries was derived from the English common law which excluded women from juries under the doctrine of “propter defectum sexus,” or “the defect of sex.”

   8 Cases that cite this headnote

   ➔ Sex

   Jury
   ➔ Peremptory Challenges


In determining permissibility of peremptory challenges based on gender, court does not weigh the value of peremptory challenges as an institution against the commitment to eradicate invidious discrimination from the courtroom; rather, court considers whether peremptory challenges based on gender stereotypes provide substantial aid to litigant's effort to secure fair and impartial jury. U.S.C.A. Const.Amend. 14.

172 Cases that cite this headnote

   — Sex
   — Peremptory Challenges

97 Cases that cite this headnote

   — Sex
   — Peremptory Challenges
   Even if measure of truth can be found in some gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. U.S.C.A. Const.Amend. 14.

132 Cases that cite this headnote

[8] Constitutional Law
   — Discrimination and Classification
   Equal protection clause acknowledges that shred of truth may be contained in some stereotypes but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize them as well as to perpetuate historical patterns of discrimination. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[9] Jury
   — Peremptory Challenges
   — Eligibility in General
   Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process; litigants are harmed by risk that prejudice which motivated discriminatory selection of the jury will infect the entire proceedings; community is harmed by state's participation in perpetuation of invidious group stereotypes and inevitable loss of confidence in the judicial system that state-sanctioned discrimination in the courtroom engenders. U.S.C.A. Const.Amend. 14.

105 Cases that cite this headnote

[10] Jury
   — Peremptory Challenges
   — Eligibility in General
   Individual jurors have a right to nondiscriminatory jury selection principles and that right extends to both men and women.

6 Cases that cite this headnote

   — Sex
   — Peremptory Challenges
   It is irrelevant to constitutionality of gender-based peremptory challenges that women, unlike African-Americans, are not in numerical minority and therefore are

99 Cases that cite this headnote

[12] Jury
   ➤ Peremptory Challenges
   Peremptory strikes based on characteristics that are disproportionately associated with one gender may be appropriate, absent showing of pretext. U.S.C.A. Const.Amend. 14.

86 Cases that cite this headnote

   ➤ Peremptory Challenges
   Party alleging gender discrimination in use of peremptory challenges must make prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for that strike; when explanation is required, it need not rise to level of a “for cause” challenge but merely must be based on juror characteristic other than gender; proffered explanation may not be pretextual. U.S.C.A. Const.Amend. 14.

386 Cases that cite this headnote

[14] Jury
   ➤ Special or Struck Jury
   Under “struck-jury system,” litigants are required to strike alternately until 12 persons remain, who then constitute the jury.

9 Cases that cite this headnote

**1420 Syllabus**

At petitioner's paternity and child support trial, respondent State used 9 of its 10 peremptory challenges to remove male jurors. The court empaneled an all-female jury after rejecting petitioner's claim that the logic and reasoning of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69-in which this Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes based solely on race-extend to forbid gender-based peremptory challenges. The jury found petitioner to be the father of the child in question and the trial court ordered him to pay child support. The Alabama Court of Civil Appeals affirmed.

Held: The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. Respondent's gender-based peremptory challenges cannot survive the heightened equal protection scrutiny that this Court affords distinctions based on gender. Respondent's rationale-that its decision to strike virtually all males in this case may reasonably have been based on the perception, supported by history, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action, while women equally qualified might be more sympathetic and receptive to the arguments of the child's mother-is virtually unsupported and is based on the very stereotypes the law condemns. The conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. So long as gender does not serve as a proxy for bias, unacceptable jurors may still be removed, including those who are members of a group or class that is normally subject to “rational basis” review and those who exhibit characteristics that are disproportionately associated with one gender. Pp. 1422-1430.


BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a concurring opinion, post, p. 1430. KENNEDY, J., filed an opinion concurring in the judgment, post, p. 1433. REHNQUIST, C.J., filed a dissenting opinion, post, p. 1434. SCALIA, J., filed a dissenting opinion, in which...
REHNQUIST, C.J., and THOMAS, J., joined, post, p. 1436.

Attorneys and Law Firms

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Opinion

Justice BLACKMUN delivered the opinion of the Court.

[1] In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has “no right to a ‘petit jury composed in whole or in part of persons of his own race,’” id., at 85, 106 S.Ct., at 1717, quoting Strauder v. West Virginia, 100 U.S. 303, 305, 25 L.Ed. 664 (1880), the “defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.” 476 U.S., at 85-86, 106 S.Ct., at 1717. Since Batson, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. See Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); Edmondson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

[2] Although premised on equal protection principles that apply equally to gender discrimination, all our recent cases *129 defining the scope of Batson involved alleged racial discrimination in the exercise of peremptory challenges. Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

I

On behalf of relator T.B., the mother of a minor child, respondent State of Alabama filed a complaint for paternity and child support against petitioner J.E.B. in the District Court of Jackson County, Alabama. On October 21, 1991, the matter was called for trial and jury selection began. The trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the court excused three jurors for cause, only 10 of the **1422 remaining 33 jurors were male. The State then used 9 of its 10 peremptory strikes to remove male jurors; petitioner used all but one of his strikes to remove female jurors. As a result, all the selected jurors were female.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. App. 22. Petitioner argued that the logic and reasoning of Batson v. Kentucky, which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender. The court rejected petitioner's claim and empaneled the all-female jury. App. 23. The jury found petitioner to be the father of the child, and the court entered an order directing him to pay child support. On post judgment motion, the court reaffirmed its ruling that Batson does not extend to gender-based peremptory challenges. App. 33. The Alabama Court of Civil Appeals affirmed, 606 A.2d 156 (1992), relying *130 on Alabama precedent, see, e.g., Murphy v. State, 596 So.2d 42 (Ala.Crim.App.1991), cert. denied, 506 U.S. 827, 113 S.Ct. 86, 121 L.Ed.2d 49 (1992), and Ex parte Murphy, 596 So.2d 45 (Ala.1992). The Supreme Court of Alabama denied certiorari, No. 1911717 (Oct. 23, 1992).

[3] We granted certiorari, 508 U.S. 905, 113 S.Ct. 2330, 124 L.Ed.2d 242 (1993), to resolve a question that has created a conflict of authority—whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race. 1 Today we
II

Discrimination on the basis of gender in the exercise of peremptory challenges is a relatively recent phenomenon. Gender-based peremptory strikes were hardly practicable during most of our country's existence, since, until the 20th century, women were completely excluded from jury service. So well entrenched was this exclusion of women that in 1880 this Court, while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, expressed no doubt that a State “may confine the selection [of jurors] to males.” *Strauder v. West Virginia*, 100 U.S., at 310, 25 L.Ed. 664; see also *Fay v. New York*, 332 U.S. 261, 289-290, 67 S.Ct. 1613, 1628-1629, 91 L.Ed. 2043 (1947).

Many States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920. States that did permit women to serve on juries often erected other barriers, such as registration requirements and automatic exemptions, designed to deter women from exercising their right to jury service. See, e.g., *Fay v. New York*, 332 U.S., at 289, 67 S.Ct., at 1628 (“[I]n 15 of the 28 states which permitted women to serve [on juries in 1942], they might claim exemption because of their sex”); *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) (upholding affirmative registration statute that exempted women from mandatory jury service).

The prohibition of women on juries was derived from the English common law which, according to Blackstone, rightfully excluded women from juries under “the doctrine of *propter defectum sexus*, literally, the ‘defect of sex.’” *United States v. De Gross*, 960 F.2d 1433, 1438 (CA9 1992) (en banc), quoting 2 W. Blackstone, Commentaries *362.* In this country, supporters of the exclusion of women from juries tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere. See *Bailey v. State*, 215 Ark. 53, 61, 219 S.W.2d 424, 428 (1949) (“Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady”); *In re Goodell*, 39 Wis. 232, 245-246 (1875) (endorsing statutory ineligibility of women for admission to the bar because “[r]everence for all womanhood would suffer in the public *spectacle of women ... so engaged”); *Bradwell v. State*, 16 Wall. 130, 141, 21 L.Ed. 442 (1873) (concurring opinion) (“[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator”). Cf. *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 1769, 36 L.Ed.2d 583 (1973) (plurality opinion) (This “attitude of ‘romantic paternalism’ ... put women, not on a pedestal, but in a cage”).

**1424 This Court in *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946), first questioned the fundamental fairness of denying women the right to serve on juries. Relying on its supervisory powers over the federal courts, it held that women may not be excluded from the venire in federal trials in States where women were eligible for jury service under local law. In response to the argument that women have no superior or unique perspective, such that defendants are denied a fair trial by virtue of their exclusion from jury panels, the Court explained:

“It is said ... that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action...
men-personality, background, economic status-and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class.... The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.” Id., at 193-194, 67 S.Ct., at 264 (footnotes omitted).

Fifteen years later, however, the Court still was unwilling to translate its appreciation for the value of women's contribution to civic life into an enforceable right to equal treatment under state laws governing jury service. In Hoyt v. Florida, 368 U.S., at 61, 82 S.Ct., at 162, the Court found it reasonable, “[d]espite the enlightened emancipation of women,” to exempt women from mandatory jury service by statute, allowing women to serve on juries only if they volunteered to serve. The Court justified the differential exemption policy on the ground that women, unlike men, occupied a unique position “as the center of home and family life.” Id., at 62, 82 S.Ct., at 162.

In 1975, the Court finally repudiated the reasoning of Hoyt and struck down, under the Sixth Amendment, an affirmative registration statute nearly identical to the one at issue in Hoyt. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). 5 We explained: “Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.” Id., at 530, 95 S.Ct., at 697. The diverse and representative character of the jury must be maintained “ ‘partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.’ ” Id., at 530-531, 95 S.Ct., at 697-698, quoting Thiel v. Southern Pacific Co., 328 U.S. 217, 227, 66 S.Ct. 984, 989, 90 L.Ed. 1181 (1946) (Frankfurter, *135 J., dissenting). See also Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

Despite the heightened scrutiny afforded distinctions based on gender, respondent argues that gender discrimination in the selection of the petit jury should be permitted, though discrimination on the basis of race is not. Respondent suggests that “gender discrimination in this country ... has never reached the level of discrimination” against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom. Brief for Respondent 9.

While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, “overpower those differences.” Note, Beyond Batson: Eliminating Gender-Based Peremptory Challenges, *136 105 Harv.L.Rev. 1920, 1921 1992). As a plurality of this Court observed in Frontiero v. Richardson, 411 U.S., at 685, 93 S.Ct., at 1769-1770:

“[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War
slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.... And although blacks were guaranteed the right to vote in 1870, women were denied even that right-which is itself ‘preservative of other basic civil and political rights'- until adoption of the Nineteenth Amendment half a century later.” (Footnote omitted.)

Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.

[5] [6] We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that “our Nation has had a long and unfortunate history of sex discrimination,” id., at 684, 93 S.Ct., at 1769, a history which warrants the heightened scrutiny we afford all gender-based classifications today. Under our equal protection jurisprudence, gender-based classifications require “an exceedingly persuasive justification” in order to survive constitutional scrutiny. See Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870 (1979). See also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461, 101 S.Ct. 1195, 1199, 67 L.Ed.2d 428 (1981). Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial. In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom. Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.

Far from proffering an exceptionally persuasive justification for its gender-based peremptory challenges, respondent maintains that its decision to strike virtually all the males from the jury in this case “may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.” Brief for Respondent 10.

[7] [8] We shall not accept as a defense to gender-based peremptory challenges “the very stereotype the law condemns.” Powers v. Ohio, 499 U.S., at 410, 111 S.Ct., at 1370. Respondent's rationale, not unlike those regularly expressed for gender-based strikes, is reminiscent of the arguments advanced to justify the total exclusion of women from juries. Respondent offers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box. Respondent seems to assume that gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender.

[9] Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. See Edmanson, 500 U.S., at 628, 111 S.Ct., at 2087 (discrimination in the courtroom “raises serious questions as to the fairness of the proceedings conducted there”). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.
When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection “invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.” *Powers v. Ohio*, 499 U.S., at 412, 111 S.Ct., at 1371.

The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the “deck has been stacked” in favor of one side. See *id.* , at 413, 111 S.Ct., at 1372 (“The verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset”).

In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection *procedures*. See *Powers*, supra, *Edmonson*, supra, and *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 458 (1992). Contrary to respondent's suggestion, this right extends to both men and women. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723, 102 S.Ct. at 3335 (that a state practice “discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review”); cf. Brief for Respondent 9 (arguing that men deserve no protection from gender discrimination in jury selection because they are not victims of historical discrimination). All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination. Striking individual jurors on the assumption that they hold particular views simply because of their gender is “practically a brand upon them, affixed by the law, an assertion of their inferiority.” *Strauder v. West Virginia*, 100 U.S. at 308, 25 L.Ed. 664 (1880). It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.

If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently. See, e.g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 602, 96 S.Ct. 2791, 2823, 49 L.Ed.2d 683 (1976) (Brennan, J., concurring in judgment) (*voir dire* “facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause”); *United States v. Whitl*, 718 F.2d 1494, 1497 (CA10 1983) (“Without an adequate foundation [laid by *voir dire*], counsel cannot exercise sensitive and intelligent peremptory challenges”).

The experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender. See n. 1, *supra*
Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

V

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. *Powers v. Ohio*, 499 U.S., at 407, 111 S.Ct., at 1369 (“*Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process*”). When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the “core guarantee of equal protection, ensuring citizens that their State will not discriminate ..., would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors’ [gender].” *Batson*, 476 U.S., at 97-98, 106 S.Ct., at 1723-1724.

The judgment of the Court of Civil Appeals of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

*It is so ordered.*

Justice OCONNOR, concurring.

I agree with the Court that the Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person’s gender. *Ante*, at 1424-1426. The State’s proffered justifications for its gender-based peremptory challenges are far from the “‘exceedingly persuasive’ “ showing required to sustain a gender-based *Batson* classification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982); *ante*, at 1426-1427. I therefore join the Court’s opinion in this case. But today’s important blow against gender discrimination is not costless. I write separately to discuss some of these costs, and to express my belief that today’s holding should be limited to the government’s use of gender-based peremptory strikes.

*Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), itself was a significant intrusion into the jury selection process. *Batson* mini hearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today’s holding may have an even greater impact than did *Batson* itself. In further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event.

For this same reason, today’s decision further erodes the role of the peremptory challenge. The peremptory challenge is “a practice of ancient origin” and is “part of our common law heritage.” *Edmonson v. Leesville
The principal value of the peremptory is that it helps produce fair and impartial juries. Swain v. Alabama, 380 U.S. 202, 218-219, 85 S.Ct. 824, 834-835, 13 L.Ed.2d 759 (1965); Babcock, Voir Dire: Preserving “Its Wonderful Power,” 27 Stan. L. Rev. 545, 549-558 (1975). “Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.” Holland v. Illinois, 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990) (emphasis deleted; internal quotation marks and citations omitted). The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States. Id., at 481, 110 S.Ct., at 808.

Moreover, “[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without *148 inquiry and without being subject to the court's control.” Swain, 380 U.S., at 220, 85 S.Ct., at 836. Indeed, often for a reason it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's “ ‘bare looks and gestures.’ ” Ibid. That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous. Cf. V. Starr & M. McCormick, Jury Selection 522 (1993) (nonverbal cues can be better than verbal responses at revealing a juror's disposition). Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge. But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable.

In so doing we make the peremptory challenge less discretionary and more like a challenge for cause. We also increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic. Similarly, in jurisdictions where lawyers exercise their strikes in open court, lawyers may be deterred from using their peremptories, out of the fear that if they are unable to justify the strike the court will seat a juror who knows that the striking party thought him unfit. Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.

Nor is the value of the peremptory challenge to the litigant diminished when the **1432 peremptory is exercised in a gender-based manner. We know that like race, gender matters. A *149 plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140-141 (1983) (collecting and summarizing empirical studies). Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. “ ‘Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.’ ” Beck v. Alabama, 447 U.S. 625, 642, 100 S.Ct. 2382, 2392, 65 L.Ed.2d 392 (1980). Individuals are not expected to ignore as jurors what they know as men-or women.

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to Batson: “That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.” Brown v. North Carolina, 479 U.S. 940, 941-942, 107 S.Ct. 423, 424-425, 93 L.Ed.2d 373 (1986) (opinion concurring in denial of certiorari). Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, see Batson, 476 U.S., at 102, 106...

114 S.Ct. 1419, 64 Empl. Prac. Dec. P 42,967, 128 L.Ed.2d 89, S.Ct., at 1726 (Marshall, J., concurring), gender is now governed by the special rule of relevance formerly reserved for race. Though we gain much from this statement, we cannot ignore what we lose. In extending Batson to gender we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants *150 to act on sometimes accurate gender-based assumptions about juror attitudes.

These concerns reinforce my conviction that today's decision should be limited to a prohibition on the government's use of gender-based peremptory challenges. The Equal Protection Clause prohibits only discrimination by state actors. In Edmonson, supra, we made the mistake of concluding that private civil litigants were state actors when they exercised peremptory challenges; in Georgia v. McCollum, 505 U.S. 42, 50-55, 112 S.Ct. 2348, 2354-2357, 12 L.Ed.2d 33 (1992), we compounded the mistake by holding that criminal defendants were also state actors. Our commitment to eliminating discrimination from the legal process should not allow us to forget that not all that occurs in the courtroom is state action. Private civil litigants are just that-private litigants. “The government erects the platform; it does not thereby become responsible for all that occurs upon it.” Edmonson, 500 U.S., at 632, 111 S.Ct., at 2089 (O'CONNOR, J., dissenting).

Clearly, criminal defendants are not state actors. “From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see.... [T]he unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State....” McCollum, supra, 505 U.S., at 67, 112 S.Ct., at 2363 (O'CONNOR, J., dissenting). The peremptory challenge is “‘one of the most important of the rights secured to the accused.’ ” Swain, 380 U.S., at 219, 85 S.Ct., at 835 (emphasis added); Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv.L.Rev. 808, 826-833 (1989). Limiting the accused's use of the peremptory is “a serious misordering of our priorities,” for it means “we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces **1433 imprisonment or even death.” McCollum, supra, 505 U.S., at 61-62, 112 S.Ct., at 2360 (THOMAS, J., concurring in judgment).

*151 Accordingly, I adhere to my position that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants. This case itself presents no state action dilemma, for here the State of Alabama itself filed the paternity suit on behalf of petitioner. But what of the next case? Will we, in the name of fighting gender discrimination, hold that the battered wife-on trial for wounding her abusive husband-is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not.

Justice KENNEDY, concurring in the judgment.

I am in full agreement with the Court that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges. I write to explain my understanding of why our precedents lead to that conclusion.

Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against “persons because of race, color or previous condition of servitude,” the Amendment submitted for consideration and later ratified contained more comprehensive terms: “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” See Oregon v. Mitchell, 400 U.S. 112, 172-173, 91 S.Ct. 260, 289, 27 L.Ed.2d 272 (1970) (Harlan, J., concurring in part and dissenting in part); B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867, pp. 90-91, 97-100 (1914). In recognition of the evident historical fact that the Equal Protection Clause was adopted to prohibit government discrimination on the basis of race, the Court most often interpreted it in the decades that followed in accord with that purpose. In Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880), for example, the Court invalidated a West Virginia law prohibiting blacks from serving on juries. In so doing, the decision said of the Equal Protection Clause: *152 “What is this but declaring that the law in the States shall be the same for the black as for the white.” Id., 100 U.S., at

114 S.Ct. 1419, 64 Empl. Prac. Dec. P 42,967, 128 L.Ed.2d 89, 307. And while the Court held that the State could not confine jury service to whites, it further noted that the State could confine jury service “to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.” Id., 100 U.S., at 310. See also Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1072-1073, 30 L.Ed. 220 (1886).

As illustrated by the necessity for the Nineteenth Amendment in 1920, much time passed before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex. In over 20 cases beginning in 1971, however, we have subjected government classifications based on sex to heightened scrutiny. Neither the State nor any Member of the Court questions that principle here. And though the intermediate scrutiny test we have applied may not provide a very clear standard in all instances, see Craig v. Boren, 429 U.S. 190, 221, 97 S.Ct. 451, 469, 50 L.Ed.2d 397 (1976) (REHNQUIST, J., dissenting), our case law does reveal a strong presumption that gender classifications are invalid. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).  

There is no doubt under our precedents, therefore, that the Equal Protection Clause prohibits sex discrimination in the selection of jurors. Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The only question is whether the Clause also prohibits peremptory challenges based on sex. The Court is correct to hold that it does. The Equal Protection Clause and our constitutional tradition are based on the theory that an individual *1434 possesses rights that are protected against lawless action by the government. The neutral phrasing of the Equal Protection Clause, extending its guarantee to “any person,” reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). “At the heart of *153 the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class.” Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602, 110 S.Ct. 2997, 3028, 111 L.Ed.2d 445 (1990) (O'CONNOR, J., dissenting) (emphasis deleted; internal quotation marks omitted). For purposes of the Equal Protection Clause, an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors. Cf., e.g., Powers v. Ohio, 499 U.S. 409, 111 S.Ct. 1364, 1369-1370, 113 L.Ed.2d 411 (1991); Palmore v. Sidoti, 466 U.S. 429, 431-432, 104 S.Ct. 1879, 1881-1882, 80 L.Ed.2d 421 (1984); Ex parte Virginia, 100 U.S. 339, 346-347, 25 L.Ed. 676 (1880). The injury is to personal dignity and to the individual's right to participate in the political process. Powers, supra, 499 U.S., at 410, 111 S.Ct., at 1370. The neutrality of the Fourteenth Amendment's guarantee is confirmed by the fact that the Court has no difficulty in finding a constitutional wrong in this case, which involves males excluded from jury service because of their gender.

The importance of individual rights to our analysis prompts a further observation concerning what I conceive to be the intended effect of today's decision. We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias if his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.

In this regard, it is important to recognize that a juror sits not as a representative of a racial or sexual group but as an *154 individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice. Cf. Metro Broadcasting, supra, 497 U.S., at 618, 110 S.Ct., at 3037 (O'CONNOR, J., dissenting). The jury pool must be representative of the community, but that is a structural mechanism for preventing bias, not enfranchising it. See, e.g., Ballard v. United States, 329 U.S. 187, 193, 67 S.Ct. 261, 264, 91 L.Ed. 181 (1946); Thiel v. Southern Pacific Co., 328 U.S.

114 S.Ct. 1419, 64 Empl. Prac. Dec. P 42,967, 128 L.Ed.2d 89, 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946). “Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system.” Id., at 220, 66 S.Ct., at 985. Thus, the Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender. See Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990); Strauder, 100 U.S., at 305.

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For these reasons, I concur in the judgment of the Court holding that peremptory strikes based on gender violate the Equal Protection Clause.

Chief Justice REHNQUIST, dissenting.
I agree with the dissent of Justice SCALIA, which I have joined. I add these words in support of its conclusion. Accepting Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as correctly decided, there are sufficient differences between race and gender discrimination such that the principle of Batson should not be extended to peremptory challenges to potential jurors based on sex.

That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering “strict scrutiny,” while gender-based classifications are judged under a heightened, but less searching, standard of review. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality. See, e.g., D. Kirp, M. Yudof, & M. Franks, Gender Justice 137 (1986).

Batson, which involved a black defendant challenging the removal of black jurors, announced a sea change in the jury selection process. In balancing the dictates of equal protection and the historical practice of peremptory challenges, long recognized as securing fairness in trials, the Court concluded that the command of the Equal Protection Clause was superior. But the Court was careful that its rule not “undermine the contribution the challenge generally makes to the administration of justice.” 476 U.S., at 98-99, 106 S.Ct., at 1724. Batson is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amendment. Not surprisingly, all of our post-Batson cases have dealt with the use of peremptory strikes to remove black or racially identified venirepersons, and all have described Batson as fashioning a rule aimed at preventing purposeful discrimination against a cognizable racial group. * As Justice O'CONNOR once recognized, Batson does not apply “outside the uniquely sensitive area of race.” Brown v. North Carolina, 479 U.S. 940, 942, 107 S.Ct. 423, 424, 93 L.Ed.2d 373 (1986) (opinion concurring in denial of certiorari).

Under the Equal Protection Clause, these differences mean that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue. Unlike the Court, I think the State has shown that jury strikes on the basis of gender “substantially further” the State's legitimate interest in achieving a fair and impartial trial through the venerable practice of peremptory challenges. Swain v. Alabama, 380 U.S. 202, 212-220, 85 S.Ct. 824, 831-835, 13 L.Ed.2d 759 (1965) (tracing the “very old credentials” of peremptory challenges); Batson, supra, 476 U.S., at 118-120, 106 S.Ct., at 1734-1735 (Burger, C.J., dissenting); post, at 1438-1439 (SCALIA, J., dissenting). The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely “stereotyping” to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.

Justice O'CONNOR's concurring opinion recognizes several of the costs associated with extending Batson to gender-based peremptory challenges-lengthier trials, an increase in the number and complexity of appeals...

114 S.Ct. 1419, 64 Empl. Prac. Dec. P 42,967, 128 L.Ed.2d 89, addressing jury selection, and a “diminished ... ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.” Ante, at 1432. These costs are, in my view, needlessly **1436 imposed by the Court's opinion, because the Constitution simply does not require the result that it reaches.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display—a modest price, surely—is that most of the opinion is quite irrelevant to the case at hand. The hasty reader will be surprised to learn, for example, that this lawsuit involves a complaint about the use of peremptory challenges to exclude men from a petit jury. To be sure, *157 petitioner, a man, used all but one of his peremptory strikes to remove women from the jury (he used his last challenge to strike the sole remaining male from the pool), but the validity of his strikes is not before us. Nonetheless, the Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot). See ante, at 1422-1425. All this, as I say, is irrelevant, since the case involves state action that allegedly discriminates against men. The parties do not contest that discrimination on the basis of sex is subject to what our cases call “heightened scrutiny,” and the citation of one of those cases (preferably one involving men rather than women, see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-724, 102 S.Ct. 3331, 3335-3336, 73 L.Ed.2d 1090 (1982)) is all that was needed.

The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror's sex has some statistically significant predictive value as to how the juror will behave. See ante, at 1426, and n. 9. This assertion seems to place the Court in opposition to its earlier Sixth Amendment “fair cross-section” cases. See, e.g., Taylor v. Louisiana, 419 U.S. 522, 532, n. 12, 95 S.Ct. 692, 698, n. 12, 42 L.Ed.2d 690 (1975) (“Controlled studies ... have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result”). But times and trends do change, and unisex is unquestionably in fashion. Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line. But it does not matter. The Court's fervent defense of the proposition il n'y a pas de difference entre les hommes et les femmes (it stereotypes the opposite view as hateful “stereotyping”) turns out to be, like its recounting of the history of sex discrimination against women, utterly irrelevant. Even if sex was a remarkably good predictor in certain cases, the Court would find its use in peremptories unconstitutional. See ante, at 1427, n. 11; cf. ante, at 1431-1432 (O'CONNOR, J., concurring).

Of course the relationship of sex to partiality would have been relevant if the Court had demanded in this case what it ordinarily demands: that the complaining party have suffered some injury. Leaving aside for the moment the reality that the defendant himself had the opportunity to strike women from the jury, the defendant would have some cause to complain about the prosecutor's striking male jurors if male jurors tend to be more favorable toward defendants in paternity suits. But if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor's “impermissible” use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant. Indeed, far from having suffered harm, petitioner, a state actor under our precedents, see Georgia v. McCollum, 505 U.S. 42, 50-51, 112 S.Ct. 2348, 2354-2355 (1992); cf. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626-627, 111 S.Ct. 2077, 2086-2087, 114 L.Ed.2d 660 (1991), has himself actually inflicted harm on female jurors. *159 The Court today presumably supplies petitioner with a cause of action by applying the uniquely expansive third-party standing analysis of Powers v. Ohio, 499 U.S. 400, 415, 111 S.Ct. 1364, 1373, 113 L.Ed.2d 411 (1991), according petitioner a remedy because of the wrong done to male jurors. This case illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea. Not


only has petitioner, by implication of the Court's own reasoning, suffered no harm, but the scientific evidence presented at trial established petitioner's paternity with 99.92% accuracy. Insofar as petitioner is concerned, this is a case of harmless error if there ever was one; a retrial will do nothing but divert the State's judicial and prosecutorial resources, allowing either petitioner or some other malefactor to go free.

The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. That conclusion can be reached only by focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection. See *id.*, at 423-424, 111 S.Ct., at 1377-1378 (SCALIA, J., dissenting); Batson v. Kentucky, 476 U.S. 79, 137-138, 106 S.Ct. 1712, 1744-1745, 90 L.Ed.2d 69 (1986) (REHNQUIST, J., dissenting). That explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years. This case is a perfect example of how the system as a whole is evenhanded. While the only claim before the Court is petitioner's complaint that the prosecutor struck male jurors, for every man struck by the government petitioner's own lawyer struck a woman. To say that men were singled out for discriminatory treatment in this process is preposterous. The situation would be different if both sides systematically struck individuals of one group, so that the strikes evinced group-based animus and served as a proxy for segregated venire lists. See Swain v. Alabama, 380 U.S. 202, 223-224, 85 S.Ct. 824, 837-838, 13 L.Ed.2d 759 (1965). The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case. That is why the Court's characterization of respondent's argument as “reminiscent of the arguments advanced to justify the total exclusion of women from juries,” *ante*, at 1426, is patently false. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. See Powers, supra, 499 U.S., at 424, 111 S.Ct., at 1378 (SCALIA, J., dissenting). There is discrimination and dishonor in the former, and not in the latter—which explains the 106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880), and our holding that peremptory challenges on the basis of race were unconstitutional, Batson v. Kentucky, *supra*.

Although the Court's legal reasoning in this case is largely obscured by anti-male-chauvinist oratory, to the extent such reasoning is discernible it invalidates much more than sex-based strikes. After identifying unequal treatment (by separating individual exercises of peremptory challenge from the process as a whole), the Court applies the “heightened scrutiny” mode of equal protection analysis used for sex-based discrimination, and concludes that the strikes fail heightened scrutiny because they do not substantially further an important government interest. The Court says that the only important government interest that could be served by peremptory strikes is “securing a fair and impartial trial,” *ante*, at 1426, and n. 8. It refuses to accept respondent's argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on “ ‘the very stereotype the law condemns.’ ” *Ante*, at 1426 (quoting Powers, 499 U.S., at 410, 111 S.Ct., at 1370). This analysis, entirely eliminating the only allowable argument, implies that sex-based strikes do not even rationally further a legitimate government interest, let alone pass heightened scrutiny. That places all peremptory strikes based on any group characteristic at risk, since they can all be denominated “stereotypes.” Perhaps, however (though I do not see why it should be so), only the stereotyping of groups entitled to heightened or strict scrutiny constitutes “the very stereotype the law condemns” -so that other stereotyping (e.g., wide-eyed blondes and football players are dumb) remains OK. Or perhaps when the Court refers to “impermissible stereotypes,” *ante*, at 1427, n. 11, it means the adjective to be limiting rather than descriptive-so that we can expect to learn from the Court's peremptory/stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not.
Even if the line of our later cases guaranteed by today's decision limits the theoretically boundless Batson principle to race, sex, and perhaps other classifications subject to heightened scrutiny (which presumably would include religious belief, see Larson v. Valente, 456 U.S. 228, 244-246, 102 S.Ct. 1673, 1683-1684, 72 L.Ed.2d 33 (1982)), much damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its whole character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given. The right of peremptory challenge "is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011 (1892), quoting Lamb v. State, 36 Wis. 424, 427 (1874). See also Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138; United States v. Marchant, 12 Wheat. 480, 482, 6 L.Ed. 700 (1827) (Story, J.); 4 W. Blackstone, Commentaries *353. The loss of the real peremptory will be felt most keenly by the criminal defendant, see Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992), whom we have until recently thought "should not be held to accept a juror, apparently indifferent, whom he distrusted for any reason or for no reason." Lamb, supra, at 426. And make no mistake about it: there really is no substitute for the peremptory. Voir dire (though it can be expected to expand as a consequence of today's decision) cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.

And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands. The extension of Batson to sex, and almost certainly beyond, cf. Batson, 476 U.S., at 124, 106 S.Ct., at 1737 (Burger, C.J., dissenting), will provide the basis for extensive collateral litigation, which especially the criminal defendant (who litigates full time and cost free) can be expected to pursue. While demographic reality places some limit on the number of cases in which race-based challenges will be an issue, every case contains a potential sex-based claim. Another consequence, as I have mentioned, is a lengthening of the voir dire process that already burdens trial courts.

*163 The irrationality of today's strike-by-strike approach to equal protection is evident from the consequences of extending it to its logical conclusion. If a fair and impartial trial is a prosecutor's only legitimate goal; if adversarial trial stratagems must be tested against that goal in abstraction from their role within the system as a whole; and if, so tested, sex-based stratagems do not survive heightened scrutiny-then the prosecutor presumably violates the Constitution when he selects a male or female police officer to testify because he believes one or the other sex might be more convincing in the context of the particular case, or because he believes one or the other might be more appealing to a predominantly male or female jury. A decision to stress one line of argument or present certain witnesses before a mostly female jury-for example, to stress that the defendant victimized women-becomes, under the Court's reasoning, intentional discrimination by a state actor on the basis of gender.

* * *

In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.

For these reasons, I dissent.

All Citations


There was one brief exception. Between 1870 and 1871, women were permitted to serve on juries in Wyoming Territory. They were no longer allowed on juries after a new chief justice who disfavored the practice was appointed in 1871. See *Abrahamson, Justice and Juror*, 20 Ga.L.Rev. 257, 263-264 (1986).


In England there was at least one deviation from the general rule that only males could serve as jurors. If a woman was subject to capital punishment, or if a widow sought postponement of the disposition of her husband’s estate until birth of a child, a *writ de ventre inspiciendo* permitted the use of a jury of matrons to examine the woman to determine whether she was pregnant. But even when a jury of matrons was used, the examination took place in the presence of 12 men, who also composed part of the jury in such cases. The jury of matrons was used in the United States during the Colonial period, but apparently fell into disuse when the medical profession began to perform that function. See Note, *Jury Service for Women*, 12 U.Fla.L.Rev. 224, 224-225 (1961).


Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect. See *Mississippi Univ. for Women*, 458 U.S., at 724, n. 9, 102 S.Ct., at 3336, n. 9; *Stanton v. Stanton*, 421 U.S. 7, 13, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 26, n. 114 S.Ct. 367, 373, n. 126 L.Ed.2d 295 (1993) (GINSBURG, J., concurring) (“[I]t remains an open question whether ‘classifications based on gender are inherently suspect ’”) (citations omitted).

Although peremptory challenges are valuable tools in jury trials, they “are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial.” *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 2358, 120 L.Ed.2d 33 (1992).
Respondent argues that we should recognize a special state interest in this case: the State's interest in establishing the paternity of a child born out of wedlock. Respondent contends that this interest justifies the use of gender-based peremptory challenges, since illegitimate children are themselves victims of historical discrimination and entitled to heightened scrutiny under the Equal Protection Clause.

What respondent fails to recognize is that the only legitimate interest it could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620, 111 S.Ct. 2077, 2083, 114 L.Ed.2d 660 (1991) ("[T]he sole purpose of the peremptory challenge is to permit litigants to assist the government in the selection of an impartial trier of fact"). This interest does not change with the parties or the causes. The State's interest in every trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner.

Respondent cites one study in support of its quasi-empirical claim that women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140 (1983). The authors conclude: "Neither student nor citizen judgments for typical criminal case materials have revealed differences between male and female verdict preferences... The picture differs [only] for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors." The majority of studies suggest that gender plays no identifiable role in jurors' attitudes. See, e.g., V. Hans & N. Vidmar, Judging the Jury 76 (1986) ("[I]n the majority of studies there are no significant differences in the way men and women perceive and react to trials; yet a few studies find women more defense-oriented, while still others show women more favorable to the prosecutor").

Even in 1956, before women had a constitutional right to serve on juries, some commentators warned against using gender as a proxy for bias. See F. Busch, Law and Tactics in Jury Trials § 143, p. 207 (1949) ("In this age of general and specialized education, availed of generally by both men and women, it would appear unsound to base a peremptory challenge in any case upon the sole ground of sex...").

A manual formerly used to instruct prosecutors in Dallas, Texas, provided the following advice: "'I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their "women's intuition" can help you if you can't win your case with the facts. " Aischuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U.Chi.L.Rev. 153, 210 (1989).

Another widely circulated trial manual speculated:

"If counsel is depending upon a clearly applicable rule of law and if he wants to avoid a verdict of 'intuition' or 'sympathy,' if his verdict in amount is to be proved by clearly demonstrated blackboard figures for example, generally he would want a male juror.

[But] women ... are desired jurors when plaintiff is a man. A woman juror may see a man impeached from the beginning of the case to the end, but there is at least the chance [with] the woman juror (particularly if the man happens to be handsome or appealing) [that] the plaintiff's derelictions in and out of court will be overlooked. A woman is inclined to forgive sin in the opposite sex; but definitely not her own." 3 M. Belli, Modern Trials §§ 51.67 and 51.68, pp. 446-447 (2d ed. 1982).

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 645, 95 S.Ct. 1225, 1232, 43 L.Ed.2d 514 (1975) (holding unconstitutional a Social Security Act classification authorizing benefits to widows but not to widowers despite the fact that the justification for the differential treatment was "not entirely without empirical support"); Craig v. Boren, 429 U.S. 190, 201, 97 S.Ct. 451, 459, 50 L.Ed.2d 397 (1976) (invalidating an Oklahoma law that established different drinking ages for men and women, although the evidence supporting the age differential was "not trivial in a statistical sense"). The generalization advanced by Alabama in support of its asserted right to discriminate on the basis of gender is, at the least, overbroad, and serves only to perpetuate the same "outmoded notions of the relative capabilities of men and women," Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 105 S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985), that we have invalidated in other contexts. See Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Stanton v. Stanton, supra; Craig v. Boren, supra; Mississippi Univ. for Women v. Hogan, supra. The Equal Protection Clause, as interpreted by decisions
of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

12 Given our recent precedent, the doctrinal basis for Justice SCALIA's dissenting opinion is a mystery. Justice SCALIA points out that the discrimination at issue in this case was directed at men, rather than women, but then acknowledges that the Equal Protection Clause protects both men and women from intentional discrimination on the basis of gender. See post, at 1436, citing Mississippi Univ. for Women v. Hogan, 458 U.S., at 723-724, 102 S.Ct., at 3335-3336. He also appears cognizant of the fact that classifications based on gender must be more than merely rational, see post, at 1438; they must be supported by an "exceedingly persuasive justification," Hogan, 458 U.S., at 724, 102 S.Ct., at 3336. Justice SCALIA further admits that the Equal Protection Clause, as interpreted by decisions of this Court, governs the exercise of peremptory challenges in every trial, and that potential jurors, as well as litigants, have an equal protection right to nondiscriminatory jury selection procedures. See post, at 1436-1438, citing Batson, Powers, Edmonson, and McCollum. Justice SCALIA does not suggest that we overrule these cases, nor does he attempt to distinguish them. He intimates that discrimination on the basis of gender in jury selection may be rational, see post, at 1436, but offers no "exceedingly persuasive justification" for it. Indeed, Justice SCALIA fails to advance any justification for his apparent belief that the Equal Protection Clause, while prohibiting discrimination on the basis of race in the exercise of peremptory challenges, allows discrimination on the basis of gender. His dissenting opinion thus serves as a tacit admission that, short of overruling a decade of cases interpreting the Equal Protection Clause, the result we reach today is doctrinally compelled.

13 It is irrelevant that women, unlike African-Americans, are not a numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. Cf. United States v. Broussard, 987 F.2d at 220 (declining to extend Batson to gender; noting that "women are not a numerical minority," and therefore are likely to be represented on juries despite the discriminatory use of peremptory challenges). Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

14 The popular refrain is that all peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. See post, at 1438. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life. See Babcock, A Place in the Palladium, Women's Rights and Jury Service, 61 U.Cinn.L.Rev. 1139, 1173 (1993).

15 Justice SCALIA argues that there is no "discrimination and dishonor" in being subject to a race- or gender-based peremptory strike. Post, at 1437. Justice SCALIA's argument has been rejected many times, see, e.g., Powers v. Ohio, 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991), and we reject it once again. The only support Justice SCALIA offers for his conclusion is the fact that race- and gender-based peremptory challenges have a long history in this country. Post, at 1437 (discriminatory peremptory challenges have "coexisted with the Equal Protection Clause for 120 years"); post, at 1437-1438 (there was a "106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, [Strauder], and our holding that peremptory challenges on the basis of race were unconstitutional, [Batson]"). We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so. Many of "our people's traditions," see post, at 1439, such as de jure segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause.

16 For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based. See Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

17 Respondent argues that Alabama's method of jury selection would make the extension of Batson to gender particularly burdensome. In Alabama, the "struck-jury" system is employed, a system which requires litigants to strike alternately until 12 persons remain, who then constitute the jury. See Ala.Rule Civ.Proc. 47 (1990). Respondent suggests that, in some
cases at least, it is necessary under this system to continue striking persons from the venire after the litigants no longer have an articulable reason for doing so. As a result, respondent contends, some litigants may be unable to come up with gender-neutral explanations for their strikes.

We find it worthy of note that Alabama has managed to maintain its struck-jury system even after the ruling in *Batson*, despite the fact that there are counties in Alabama that are predominately African-American. In those counties, it presumably would be as difficult to come up with race-neutral explanations for peremptory strikes as it would be to advance gender-neutral explanations. No doubt the *voir dire* process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges. The same should be true for gender. Regardless, a State's choice of jury-selection methods cannot insulate it from the strictures of the Equal Protection Clause. Alabama is free to adopt whatever jury-selection procedures it chooses so long as they do not violate the Constitution.

The temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women. All four of the gender-based peremptory cases to reach the Federal Courts of Appeals and cited in n. 1, *supra*, involved the striking of minority women.

This Court almost a half century ago stated:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.... This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.” *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 986, 90 L.Ed. 1181 (1946).


Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

I continue to agree with Justice O'CONNOR that *McCollum* and *Edmonson* erred in making civil litigants and criminal defendants state actors for purposes of the Equal Protection Clause. I do not, however, share her belief that correcting that error while continuing to consider the exercise of peremptories by prosecutors a denial of equal protection will make things right. If, in accordance with common perception but contrary to the Court's unisex creed, women really will decide some cases differently from men, allowing defendants alone to strike jurors on the basis of sex will produce—and will be seen to produce—juries intentionally weighted in the defendant's favor: no women jurors, for example, in a rape prosecution. That is not a desirable outcome.

It does not seem to me that even this premise is correct. Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. See, e.g., 4 W. Blackstone, Commentaries *353. In point of fact, that may well be its greater value.
Defendant was convicted in the Circuit Court, City of Richmond, James M. Lumpkin, J., of rape and sodomy of his infant daughter. Defendant appealed. The Court of Appeals, Bray, J., held that defendant failed to establish purposeful racial or gender discrimination in jury selection, after state justified peremptory strike with facially neutral sensory perceptions of potential juror's indifference to proceedings, and explained that other potential jurors were struck on basis of their status as singles and not parents.

Affirmed.

West Headnotes (3)

[1] Jury

→ Peremptory Challenges

Defendant failed to establish purposeful racial or gender discrimination in jury selection, after state justified peremptory strike with facially neutral sensory perceptions of potential juror's indifference to proceedings; defendant merely asserted that potential juror was dressed neatly and was otherwise attentive, but trial court stated that potential juror had been detached in attitude, demeanor, and appearance. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote


**714 *636 James B. Thorsen, Richmond (Thorsen, Page & Marchant, on brief), for appellant.


Present: BAKER, BARROW and BRAY, JJ.

Opinion

BRAY, Judge.

Alvin Presley Robertson (defendant) was convicted by a jury for the rape and sodomy of his infant daughter. He complains on appeal that the prosecution unconstitutionally exercised its peremptory challenges to remove black and male venirepersons. For the reasons which follow, we disagree and affirm the convictions.
Because the assigned error relates solely to procedural aspects of the proceeding below, we recite only those facts pertinent to that issue.

Following voir dire, the prosecutor peremptorily struck one black female, Wright, a white male, Blanock, and two black *637 males, Miller and Randolph, from the venire and similarly removed one black male from among three possible alternate jurors. 1 Defendant argued to the trial judge that these peremptory challenges were impermissibly motivated by “racial and gender” considerations and not “good articulable reason[s].” Although defendant failed to incorporate his concerns into either an objection or motion, the court and Commonwealth engaged the issue as a race and gender-based equal protection challenge under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In Batson, the Supreme Court reaffirmed a defendant's “right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria” and denounced the peremptory exclusion of potential jurors “on account of race” as violative of the Equal Protection Clause. Id. at 85-86, 106 S.Ct. at 1716-18. Recently, in J.E.B. v. Alabama Ex Rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Court extended this protection to embrace “[i]ntentional discrimination” by “state actors” “on the basis of gender.” Id. at ----, 114 S.Ct. at 1422. 3

Batson and its progeny have outlined the procedures in the trial court necessary to resolve an allegation of discriminatory conduct in jury selection, which have since been often recognized and applied by the appellate courts of this Commonwealth. These protocols were just recently succinctly restated in James v. Commonwealth, 247 Va. 459, 461, 442 S.E.2d 396, 398 (1994).

The defendant must make a prima facie showing that the prosecutor has exercised peremptory strikes on the basis of race. Powers v. Ohio, 499 U.S. at 409 [111 S.Ct. at 1369-70]. If this showing is made, the burden shifts to the prosecutor to articulate a racially neutral explanation for striking the jurors in question. Clearly, Batson’s “proof structure” requires a defendant, confronted with a facially neutral explanation for a prosecutor's peremptory strikes, “to show both that these reasons were merely pretextual and that race [or gender] was the real reason.” United States v. Joe, 928 F.2d 99, 103 (4th Cir.1991). But, ultimately, the trial court must **715 determine whether the defendant has carried his burden of proving purposeful discrimination. Batson, 476 U.S. at 98 [106 S.Ct. at 1723-24].

Here, the trial court responded properly to defendant's challenge of the Commonwealth's peremptory strikes and required the prosecutor to provide “racially” and “sexist neutral reasons” for her conduct. Without contesting the implicit finding by the trial court that the defendant had established a prima facie case of willful discrimination, 4 the prosecutor explained that she removed venirepersons Wright, Blanock, and Randolph because each was “single,” not “a parent.” Addressing the related gender
issue, the prosecutor observed that it simply “turned out that most of the males were not parents.” She further noted that venireperson Miller “did not seem to be involved, even at this stage of the proceedings.” The trial judge agreed that Miller exhibited a detached “attitude and demeanor and appearance.”

At the conclusion of the prosecutor's representations to the court, defendant noted that Miller was “nicely, neatly” dressed, “seemed otherwise attentive,” and argued that Miller's “silence” during voir dire was “no indication [that] he shouldn't be with us.” Without specificity, defendant characterized the prosecutor's explanation for removing the other jurors in issue as “poor, at best,” and, again, generally protested the racial and “sexual makeup” of the petit jury and the race/gender ratios of the prosecutor's strikes. In response, after acknowledging defendant's “objection,” the trial judge “enter[ed] a finding that the reasons advanced by the Commonwealth for her strikes [were] racially ... and sexually neutral.”

“In evaluating the race [and gender] neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.” Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). If the explanation is constitutionally acceptable, the “decisive question” before the trial judge then becomes “whether counsel's ... explanation ... should be believed.” Id. at 365, 111 S.Ct. at 1869. “[O]nce that has been settled, there seems nothing left to review.” Id. at 367, 111 S.Ct. at 1870. A “trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal,” id. at 364, 111 S.Ct. at 1868, and this decision will not be reversed unless clearly erroneous. Id. at 369, 111 S.Ct. at 1871-72; James, 247 Va. at 462, 442 S.E.2d at 398; Barksdale v. Commonwealth, --- Va.App. at ----, 438 S.E.2d at 761, 763 (1993). This standard of review logically recognizes the trial court's unique opportunity to observe and evaluate “the prosecutor's state of mind based on demeanor and credibility” in the context of the case then before the court. Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869; see Barksdale, --- Va.App. at ----, 438 S.E.2d at 763-64.

[1] Here, the prosecutor offered facially neutral, nondiscriminatory reasons for striking venirepersons Miller, Wright, Blanock, and Randolph, which correctly prompted the judge to call upon defendant for a response. Defendant, however, disputed the prosecutor's explanations only with respect to venireperson Miller, asserting that he was “nicely, neatly dressed” and “seemed otherwise attentive.” This argument was obviously intended to counter the Commonwealth's observation that Miller had exhibited an indifference to the proceedings, a view shared by the court. Defendant's references to Miller's clothing and demeanor “otherwise” offer nothing to discredit the facially neutral “sensory perceptions” of the court and prosecutor which are “relevant and appropriate considerations” in an assessment of the prosecutor's actions and reasoning. Barksdale, ---Va.App. at ----, 438 S.E.2d at 764. Manifestly, disinterested jurors should be identified and removed whenever possible, irrespective of race or gender.

[2] Defendant's characterization of the prosecutor's explanations for her strikes of the remaining venirepersons in issue as “poor” was insufficient to establish pretextual surrogates intended to disguise an impermissible discriminatory purpose. Although defendant argues on appeal that the prosecutor's explanations for striking venirepersons Wright, Blanock, and Randolph were unsupported or contradicted by the record, these contentions were not presented to the trial court and will not be considered by this Court for the first time on appeal. Rule 5A:18; Hogan v. Commonwealth, 5 Va.App. 36, 44-45, 360 S.E.2d 371, 376 (1987); see Buck, 247 Va. at 452, 443 S.E.2d at 416.

Accordingly, we are unable to conclude that the trial court was plainly wrong in finding that defendant failed to sufficiently prove the requisite purposeful discrimination in this instance, and we affirm the convictions.

Affirmed.

All Citations
18 Va.App. 635, 445 S.E.2d 713
445 S.E.2d 713

Footnotes

1 The trial jury was comprised of eight black females, one white female, one black male, and two white males, a ratio of black representation which actually exceeded that of the panel.


3 Although J.E.B. was decided after the instant case was briefed and argued before this Court, the trial court and counsel foretold the decision and also addressed the gender issue.

4 The “actual sequence of events at trial” oftentimes “merges the separate procedural steps” incidental to a Batson challenge and analysis. James, 247 Va. at 462, 442 S.E.2d at 398. However, this “[c]onsolidation ... does not invalidate the process as long as ... [it] does not adversely impact the rights of any party.” Id.
Defendant was convicted in the Circuit Court, City of Richmond, James B. Wilkinson, J., of capital murder, rape, and burglary. His appeals of rape and burglary convictions were certified from the Court of Appeals and consolidated with his capital murder conviction and automatic review of his death sentence. The Supreme Court, Stephenson, J., held that: (1) defendant did not have constitutional right to act as cocounsel with his attorney; (2) retention of venireman who had been exposed to pretrial publicity about another murder allegedly committed by defendant was proper; (3) admission of DNA print identification test as a reliable scientific technique was supported by undisputed evidence; and (4) evidence that defendant had also committed rapes and murders of two other women, which were unadjudicated crimes, was properly admitted during penalty phase.

Affirmed.

West Headnotes (30)

[1] Criminal Law

  Right of Defendant to Counsel

  Criminal Law

  In general; right to appear pro se

Defendant has a Sixth Amendment right to counsel and also has the right to conduct his own defense. U.S.C.A. Const.Amend. 6.
A trial court, as opposed to a jury, is presumed to separate the admissible from the inadmissible and to have considered only competent evidence.

Whether witness qualified as an expert was a matter within the trial court's sound discretion.

Supreme Court would not review claim that trial court improperly limited defendant's cross-examination of assistant director of laboratory concerning his testimony that there was no disagreement in scientific community about the reliability of deoxyribonucleic acid (DNA) print testing where defendant failed to proffer questions he wanted to ask and answers which assistant director would have made.

Finding that prospective juror's views about death penalty would have substantially impaired performance of her duties as a juror was supported by her 12 unequivocal statements that she would vote only for life imprisonment; Supreme Court was required
384 S.E.2d 785

A Criminal Law
to consider prospective juror’s equivocal response to defendant's strained hypothetical in light of entire voir dire examination.

2 Cases that cite this headnote

[13] Criminal Law
  ➔ Selection and impaneling

Criminal Law
  ➔ Jury selection
Finding that venireman could be fair and impartial is entitled to great weight and will not be reversed absent a showing of abuse of discretion or manifest error.
Cases that cite this headnote

[14] Jury
  ➔ Belief of juror that opinion will not affect verdict in general
Retention of venireman who had been exposed to pretrial publicity about another murder allegedly committed by defendant was proper in view of her statements that based on what she had read, heard, or seen, she had neither expressed nor formed any opinion as to defendant's guilt or innocence and could be impartial.
1 Cases that cite this headnote

[15] Constitutional Law
  ➔ Peremptory challenges
Record established that Commonwealth did not strike four potential black jurors on account of race in violation of equal protection clause but rather had a racially neutral reason for each of the strikes; one venireman had a record of criminal activity, another was lacking in knowledge of matters that would make her a competent juror, and two others gave internally inconsistent responses about their abilities to consider imposing death penalty. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[16] Criminal Law
  ➔ For defense
Ruling that defendant's counsel could not use opening statement for argument was proper. Code 1950, § 19.2-265.

2 Cases that cite this headnote

[17] Criminal Law
  ➔ Photographs and Other Pictures
Admission of photographs into evidence rests within the sound discretion of the trial court.

1 Cases that cite this headnote

[18] Criminal Law
  ➔ Special types of photographs; enlargements, motion and sound pictures, X-rays
Admission of a crime scene videotape is discretionary with the trial court.

8 Cases that cite this headnote

[19] Criminal Law
  ➔ Depiction of places; scene of crime

Criminal Law
  ➔ Special types of photographs; enlargements, motion and sound pictures, X-rays
Photographs and videotape of crime scene were relevant in that they tended to show motive, intent, method, malice, premeditation, and atrocity of the crimes.

7 Cases that cite this headnote

[20] Criminal Law
  ➔ Photographs arousing passion or prejudice; gruesomeness
Where photographic evidence accurately portrays the crime scene created by an accused, the evidence is not rendered inadmissible simply because it is gruesome or shocking.

2 Cases that cite this headnote

[21] Criminal Law
CMP Competency of witness
Decision as to whether a witness qualifies as an expert will not be disturbed on appeal unless it clearly appears that the witness was not qualified.

3 Cases that cite this headnote

[22] Criminal Law
CMP Knowledge, Experience, and Skill
Ruling that manager and supervisor of forensic and paternity testing laboratories qualified as an expert in the fields of molecular and population genetics was proper; in addition to his supervisory duties, he had personally used deoxyribonucleic acid (DNA) printing technique more than a thousand times and had previously qualified as an expert witness in these fields on eight occasions.

1 Cases that cite this headnote

[23] Criminal Law
CMP Particular tests or experiments
Admission of results of deoxyribonucleic acid (DNA) print identification test as a reliable scientific technique for determining whether DNA molecules extracted from defendant's blood were identical to DNA molecules extracted from semen stains at crime scene was proper in view of uncontradicted expert testimony that no dissent existed in scientific community concerning reliability of technique and that testing procedure performed in case was conducted in a reliable manner.

15Cases that cite this headnote

[24] Sex Offenses
CMP Bodily contact; penetration
Finding of penetration in prosecution for rape and capital murder was supported by evidence that when victim was discovered, she was nude except for a pair of shorts, that the posterior of her vagina was bruised, and that sperm were found in her vagina and rectum. Code 1950, § 18.2–31(e).

Cases that cite this headnote

[25] Criminal Law
CMP Sufficiency of evidence
Contention that evidence was insufficient to support burglary conviction on ground that element of unauthorized entry was not sufficiently established would not be considered on appeal where it was not advanced at trial. Sup.Ct.Rules, Rule 5:25.

Cases that cite this headnote

[26] Criminal Law
CMP Necessity of setting forth evidence excluded
Supreme Court would not consider defendant's claim that refusal to permit detective to state whether, in his opinion, anyone could have climbed in the victim's kitchen window and left it in the shape that it was in, where record contained no proffer of what detective's answer would have been.

1 Cases that cite this headnote

[27] Sentencing and Punishment
CMP Dangerousness
In penalty phase of capital murder case, jury must consider evidence of prior history of defendant in determining whether he would
constitute a continuing serious threat to society. Code 1950, § 19.2–264.4, subd. C.

3 Cases that cite this headnote

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Sentencing and Punishment

Option

STEPHENSON, Justice.

In one indictment, Timothy Wilson Spencer was charged with capital murder, i.e., the willful, deliberate, and premeditated killing of Debbie Dudley Davis during the commission of, or subsequent to, rape. Former Code § 18.2–31(e) (1987 Cum.Supp.). In a second indictment, Spencer was charged with the rape of Davis. A third indictment charged Spencer with burglary, i.e., breaking and entering Davis' dwelling house in the nighttime with intent to commit rape. The three indictments were tried together, and a jury found Spencer guilty on each charge. The jury fixed his punishment at life imprisonment for rape and at 20 years' imprisonment for burglary.

Following the penalty phase of the capital murder trial, the jury fixed Spencer's punishment at death. After a sentencing hearing, the trial court sentenced Spencer in accordance with each jury verdict.

Spencer's appeal of the capital murder conviction has been consolidated with the automatic review of his death sentence, Code §§ 17–110.1(A) and –110.1(F), and we have given them priority on our docket, Code § 17–110.2. By order entered January 26, 1989, Spencer's appeals of the rape and burglary convictions were certified from

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the Court of Appeals and consolidated with the capital murder appeal. Code § 17–116.06.

I

FACTS

Under settled principles of appellate review, we will recite the evidence and all inferences fairly deducible therefrom in the light most favorable to the Commonwealth, the prevailing party at trial. On Saturday, September 19, 1987, between 1:00 a.m. and 2:00 a.m., a Southside Richmond resident noticed a strange automobile parked outside his home. When he awoke at 6:30 a.m. Saturday morning, the car was still parked in front of his house, the keys were in the ignition, and the engine was running. The resident called the Richmond Bureau of Police to report the abandoned automobile.

The police checked Division of Motor Vehicles records, which revealed that the automobile was registered to Debbie Dudley Davis. The address listed for Davis was an apartment four blocks from where the car had been abandoned.

When the police arrived at Davis' apartment at 9:35 a.m., they found Davis' body lying face down on her bed. She was clad only in a pair of shorts. Around her neck was a black sock used as a ligature. The ligature was tied around a section of vacuum cleaner pipe, which had been used as a ratchet-device to tighten the sock around Davis' neck. Tied to the neck ligature were shoestrings that bound the victim's left wrist in front of her and her right wrist behind her.

The medical examiner determined that the cause of death was "[l]igature strangulation" caused by "very extreme pressure." The ligature, tightened down and "twisted two or three times" with the vacuum cleaner pipe, had cut "into the larynx, the voice box, [and] the muscles on the side of the neck." The "intense blood pressure congestion" in the victim's head due to the ligature had caused hemorrhage in one of her eyes. The victim also suffered bruising to her nose and mouth.

Three semen stains were found on the comforter from the victim's bed. The fitted bed sheet contained four semen stains. Two "characteristically negroid" hairs were found when Davis' pubic area was combed. The posterior portion of the victim's vagina was bruised. Microscopic examination of smears made from the rectal and vaginal swabs obtained from Davis' body revealed the presence of spermatozoa.

Entry to Davis' apartment had been gained by raising the screen in a kitchen window located approximately eight feet above the ground. Under the window was a rocking chair that had been stolen from the porch of a nearby residence between Friday afternoon and Saturday morning. Inside the kitchen immediately beneath the window was the kitchen sink and counter top. There was no evidence of disarray in Davis' apartment, except that her eyeglasses and toothbrush were found on the floor of the hallway leading to her bedroom.

At the time of Davis' murder, Spencer was living in a Richmond residence approximately 2.7 miles from Davis' apartment. A walk between Davis' apartment and Spencer's residence takes about 37 minutes. Spencer had left his residence at 7:30 p.m. on Friday, September 18, and had not returned until 12:30 a.m. on Saturday, September 19. Davis, who had had a telephone conversation with her parents Friday evening, was last known to have been alive between 8:30 p.m. and 9:00 p.m. Friday.

Forensic analysis established that the two negroid hairs combed from Davis' pubic area "were consistent with" Spencer's underarm hair. Analysis of the semen stains found on Davis' comforter and bed sheet showed that the stains had been deposited by a "secretor," i.e., one whose blood characteristics are expressed in other bodily fluids. Analysis of Spencer's blood and saliva samples established that Spencer, who is a secretor with blood type O, PGM type 1, PGM subtype 1+, and peptidase A type 1, was "included in a group [comprising approximately 13 percent of the population] that could have contributed the seminal fluid" found on the comforter and bed sheet.

Spencer's blood sample and the semen collected from the comforter and from the bed sheet were subjected

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to a forensic procedure that detects and labels the unique configurations of an individual's deoxyribonucleic acid (DNA) molecules, the substance that carries a person's genetic information. **790** 1 This “DNA print identification” technique established that the DNA molecules extracted from Spencer's blood were identical to the DNA molecules extracted from the semen stains. Spencer is a black male. The statistical likelihood of finding duplication of Spencer's particular DNA pattern in the population of North American blacks is one in 705 million. There are approximately 10 million black males in North America.

II

PRETRIAL MATTERS

A

Constitutionality of the Death Penalty

By a pretrial motion to dismiss, Spencer challenged the constitutionality of the death penalty. The trial court rejected his several contentions, and Spencer assigns error to the rulings.

*302* Spencer first contends that “[t]he death penalty is, in all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution.” He further contends that the “facts and circumstances” in the present case do not justify imposition of the death penalty; thus, he asserts, the death penalty statute is “cruel and unusual punishment” as applied to him. Reaffirming our previous holdings, we reject Spencer's contention that the death penalty constitutes “cruel and unusual punishment.” See, e.g., *Spencer v. Commonwealth*, 238 Va. 275, ———, 384 S.E.2d 775, 777 (1989) (this day decided) (compiling cases) (*Spencer I*).


B

Right of Spencer to Act as Co-counsel

Spencer also filed a pretrial motion requesting that he be permitted “to participate as co-counsel in the presentation of his own defense.” He contends that he has the constitutional right to act as co-counsel. We do not agree.


Under *Faretta*, a pro se defendant retains actual control over the case he chooses to present. *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 945, 79 L.Ed.2d 122 (1984). Indeed, control “is the core of the *Faretta* right.” *Id.* Conversely, when a defendant does not assert his *Faretta* right, counsel has control over the presentation **791** of the case. See *Townes*, 234 Va. at 320, 362 S.E.2d at 657.

[2] If a defendant were permitted to act as co-counsel, however, such a “hybrid” representation could promote a conflict over who controls tactical trial decisions, thereby frustrating the orderly conduct of the trial. “*Faretta* does not require a trial judge to permit ‘hybrid’ representation,”
McKaskle, 465 U.S. at 183, 104 S.Ct. at 953, and we hold that no such constitutional right exists.

C

Discovery Claims

Spencer filed a pretrial motion seeking, inter alia, written scientific reports and the “work notes [or] memoranda” that were the basis of the reports. The trial court granted the motion as to the reports, but ruled that the “work notes are not discoverable.” We agree.


Spencer also argues that the trial court erred in permitting the Commonwealth to introduce updated statistics on the probability of the DNA extracted from the semen stains found at the crime scene matching the DNA extracted from Spencer's blood samples. He admits that, pursuant to the discovery order, he received a copy of the written report concerning DNA print identification testing prior to trial. The report stated that the chance that anyone other than Spencer produced the semen stains was one in 135 million.

Dr. Kevin C. McElfresh, an expert in molecular and population genetics and the manager and supervisor of the forensic and paternity laboratories at Lifecodes Corporation in New York, testified on behalf of the Commonwealth at a pretrial hearing concerning the admissibility of the DNA printing evidence. Spencer admits that Dr. McElfresh testified that the probability figure contained in the written report had been calculated in March 1988 and that an August 30, 1988 update of the data base had increased the probability of a random match to one in 705 million. Nonetheless, Spencer contends that the Commonwealth violated its continuing duty under the discovery order by failing to provide him a written report of the updated statistics and that the trial court therefore erred in permitting Dr. McElfresh to testify at trial about the new probability figure.

[3] Significantly, Spencer does not allege, and, indeed, we cannot discern from the record, any element of prejudice or surprise resulting from the timing of the disclosure of the new statistics. As previously noted, Spencer was made cognizant of the updated probability figure before trial. Prior to his cross-examination of Dr. McElfresh at trial, Spencer requested and was granted an overnight recess to consult with a scientist about the new figure.

[4] Following the overnight recess, Spencer did not request a continuance nor did he indicate that he was unprepared to cross-examine Dr. McElfresh. Indeed, Spencer's cross-examination of Dr. McElfresh was skilled and thorough. We hold, therefore, that Spencer's claim concerning the admission into evidence of the updated statistics is without merit.

D

Pretrial Testimony of Dr. Richard J. Roberts

In a pretrial hearing on the admissibility of the DNA print test evidence, Dr. Richard J. Roberts, Assistant Director of the Cold Spring Harbor Laboratory in New York, testified that...

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York, testified as an expert for the Commonwealth. While qualifying Dr. Roberts as an expert, the Commonwealth, over Spencer's objection, was permitted to show that the director of the laboratory had won the Nobel Prize. On appeal, Spencer contends that the trial court “violated [his] rights to due process, equal protection and a fair trial as guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution.” The contention is meritless.

Assuming, without deciding, that the testimony was inadmissible, a trial court, as opposed to a jury, is presumed to separate “the admissible from the inadmissible,” and to have considered only competent evidence. *Richard Eckhart v. Commonwealth*, 222 Va. 213, 216, 279 S.E.2d 155, 157 (1981). Moreover, Dr. Roberts' qualifications were substantial and unchallenged by Spencer. Indeed, whether Dr. Roberts qualified as an expert was a matter within the trial court's sound discretion, *Lane v. Commonwealth*, 223 Va. 713, 718, 292 S.E.2d 358, 361 (1982), and we find no abuse of that discretion.

During the same pretrial hearing, Dr. Roberts testified unequivocally that there was no disagreement in the scientific community about the reliability of DNA print testing. Spencer contends that the trial court limited his cross-examination of Dr. Roberts on this point. Because Spencer failed to proffer the questions he wanted to ask Dr. Roberts and the answers Dr. Roberts would have made, we are unable to review Spencer's claim. See *Mackall v. Commonwealth*, 236 Va. 240, 256–57, 372 S.E.2d 759, 769 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

III

JURY MATTERS

A

Voir Dire

During the voir dire of prospective juror Patricia Jackson, Spencer's counsel asked Jackson the following question in an attempt to show bias: “If an individual who is a scientist, an expert gets on the stand and tells you a fact, would you accept that as fact simply because he is a scientist?” The trial court ruled the question improper on the ground that Spencer was “asking *793 the juror to pass on testimony before the whole evidence is there.” Spencer assigns error to the court's ruling.

Spencer further contends that the trial court erred by asking Jackson during voir dire if she “would impose the death penalty.” Spencer asserts that, under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the appropriate question “is whether or not one can consider imposition of the death penalty, not whether or not one would actually vote for it.” (Emphasis in original.)

Under Rule 5:25, certain principles govern our review of assignments of error concerning the voir dire of prospective jurors. If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections. Grounds of objections to the seating of a juror that are not stated with sufficient specificity at the time of the trial court's ruling will not be considered on appeal.

Although Spencer objected to the court's rulings during voir dire, he voiced no objection when the court seated Jackson on the *307 jury panel. We hold, therefore, that Spencer waived the objections he made during the voir dire of Jackson. Rule 5:25.

B

Exclusions

The trial court excluded for cause two prospective jurors, Mary Greene and Alma Wright, on the ground that they were unwilling to consider imposing the death penalty. Spencer acknowledges that a trial court in a capital case properly may exclude a juror whose views concerning imposition of a death sentence “ ‘would prevent or substantially impair the performance of his duties ... in
accordance with his instructions and his oath.’ ” *O'Dell v. Commonwealth*, 234 Va. 672, 695, 364 S.E.2d 491, 504 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)), cert. denied, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Spencer asserts, however, that Greene does not fall into this category. 8 Although Greene initially stated she did not believe in the death penalty, Spencer contends that he successfully rehabilitated her.


Prior to Spencer's attempt to rehabilitate Greene, she stated unequivocally on seven separate occasions that, if given a choice between voting for life imprisonment and voting for the death penalty, she would vote for life imprisonment. In addition, she responded to a question from the trial judge by indicating that she would not, under any circumstances, vote for the death penalty.

*308* During Spencer's rehabilitation attempt, Greene unequivocally stated on four different occasions that she “would vote for life.” Nonetheless, Spencer says the following exchange successfully rehabilitated Greene:

MRS. GREENE: I would have some ... recommendations for them to contain this individual [in prison].

**794** [DEFENSE COUNSEL]: As a juror, you can't make those recommendations. The question is, could you consider both options [if an imprisoned individual is still a future danger]?

MRS. GREENE: Okay. He or she runs the risk of killing the prison personnel?

[DEFENSE COUNSEL]: Let's assume that. You are convinced of that beyond a reasonable doubt.

MRS. GREENE: Well, I guess I could consider it.

12 We do not agree that Greene's equivocal response to Spencer's strained hypothetical successfully rehabilitated Greene. We must consider Greene's response in light of the entire voir dire examination, see *Wise v. Commonwealth*, 230 Va. 322, 325–26, 337 S.E.2d 715, 717–18 (1985), cert. denied, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986), during which she unequivocally stated 12 different times that she would vote only for life imprisonment. We conclude that the record clearly supports the trial court's finding that Greene's views about the death penalty would have substantially impaired the performance of her duties as a juror.

C

Retention

[13] Spencer contends that the trial court should have excluded for cause venireman Ann Kent because she had been exposed to pretrial publicity about another murder allegedly committed by Spencer in the City of Richmond. The trial judge, who saw and heard the examination of Kent, ruled that she could be fair and impartial. That finding is entitled to great weight and will not be reversed absent a showing of abuse of discretion or manifest error. *Mackall*, 236 Va. at 252, 372 S.E.2d at 767.

In this case, venireman Kent specifically stated that, based on what she had read, heard, or seen, she had neither expressed nor formed any opinion as to Spencer's guilt or innocence. She further stated that she could “be impartial in terms of reviewing any evidence in court.” Thus, we conclude that the court did not abuse its discretion in retaining Kent as a juror. Clearly, the record supports the trial court's ruling.

Batson Issue

Relying upon Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Spencer contends that the Commonwealth “systematically excluded" Blacks from the jury panel through the use of [its] peremptory strikes.” The final jury panel consisted of 20 individuals, 13 of whom were black and 7 of whom were white. The Commonwealth peremptorily struck four blacks. Spencer used two of his peremptory strikes to remove black individuals. The final 12-person jury consisted of seven blacks and five whites.

The Supreme Court held in Batson that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.” 476 U.S. at 89, 106 S.Ct. at 1719. To establish a prima facie case of purposeful discrimination in the selection of the jury based on the prosecutor's use of peremptory challenges, the defendant

**795** first must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” ... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 106 S.Ct. at 1723 (citations omitted).

In the present case, the Commonwealth's Attorney explained his reasons for each of the four peremptory strikes. The trial judge expressly ruled that he was “convinced, beyond a doubt, [the reasons were] not racial.” The court noted that, as a general matter, juries drawn from the Richmond jurisdiction are predominantly black. The court further noted, and defense counsel agreed, that the Commonwealth's Attorney had never exhibited a pattern of racially discriminatory jury strikes in the cases he tried. Because the trial court's findings largely “turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.” Batson, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

Assuming, without deciding, that Spencer established a prima facie case of purposeful discrimination under the Batson criteria, we conclude that the record clearly establishes that the Commonwealth's Attorney had racially-neutral reasons for striking each of the four veniremen. The Commonwealth's Attorney observed that one venireman had a record of criminal activity dating to 1938. The Commonwealth's Attorney also opined that another venireman was lacking in knowledge of matters that would make her a competent juror. The prosecutor struck two other veniremen because he felt they gave internally inconsistent responses during voir dire about their respective abilities to consider imposing the death penalty.

We conclude, therefore, that the record supports the trial court's findings that the Commonwealth's Attorney articulated reasonable, nonracial bases for each of the strikes.

*311 IV

GUILT PHASE

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A

Opening Statement

Spencer contends that the trial court erred in limiting the scope of his opening statement. Spencer's counsel began his opening statement by telling the jury of the seriousness of the case, of Spencer's presumption of innocence, and of the Commonwealth's burden of proving Spencer guilty by evidence beyond a reasonable doubt. Spencer's counsel conceded that Davis had been the victim of a violent crime, but told the jury that Spencer “did not commit that crime.”

Spencer's counsel then proceeded to tell the jury what he expected the Commonwealth's evidence would show. At that point, the Commonwealth's Attorney objected on the ground that Spencer's opening statement should be limited to what Spencer's evidence would show. The trial court sustained the objection because Spencer's counsel had been “arguing” his case. The court stated:

The purpose of the opening statement is to tell the jury where your evidence anticipates going. That allows you to show what your evidence might be. Your case might be based on weaknesses that you will point out of the Commonwealth's case. But this is not the time for argument.

(Emphasis added.)

Although Spencer contends that his counsel “was entitled to discuss the anticipated evidence,” it is clear from the trial court's ruling that his counsel was not in fact precluded from doing so. Indeed, the court told defense counsel that Spencer's case might be based on weaknesses in the Commonwealth's evidence that counsel “will point out.” Moreover, the record discloses **796** that when defense counsel resumed his opening statement, he repeatedly told the jury what he anticipated the Commonwealth's evidence would show. He also stated that the defense would endeavor to discredit the Commonwealth's expert testimony.

[16] While Spencer had a statutory right to an opening statement, Code § 19.2–265, the trial court may exercise “broad discretion in the supervision of opening statements,” *312 O'Dell, 234 Va. at 703, 364 S.E.2d at 509. Clearly, the trial court did not abuse its discretion in ruling that Spencer's counsel could not use the opening statement “for argument.”

B

Admission into Evidence of Photographs and Videotape


Spencer does not claim that the photographs are inaccurate. He merely asserts that “the horrific nature of the photos, coupled with their redundancy when combined with the videotape, render the photos prejudicial to the extent that any probative value is clearly outweighed.” Nor does Spencer claim that the videotape is inaccurate. He argues, however, that “the introduction of the graphic videotape, coupled with the still photographs, was inflammatory to the point of tending to induce a guilty verdict regardless of any other evidence.”

[19] [20] The photographic evidence in the present case, as in *Stamper, “portrayed a scene of otherwise indescribable violence.”* 220 Va. at 271, 257 S.E.2d at 816. The evidence was relevant because it tended to show motive, intent, method, malice, premeditation and the atrociousness of the crimes. *Gray, 233 Va. at 342–43, 356 S.E.2d at 173.* Where as here, photographic evidence accurately portrays the crime scene created by an accused, the evidence is not rendered inadmissible simply because
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it is gruesome or shocking. *Id.* at 343, 356 S.E.2d at 173. We conclude, therefore, that the trial court did not abuse its discretion in admitting this photographic evidence.

*313 C

Qualifying an Expert Witness

Spencer contends that the trial court erred in qualifying Dr. McElfresh as an expert in the fields of molecular and population genetics. In doing so, Spencer asserts, the trial court “violated [his constitutional] rights to due process, equal protection and a fair trial.”

Whether a witness may qualify as an expert is a matter that rests largely in a trial court's discretion. The trial court's decision will not be disturbed on appeal unless it clearly appears that the witness was not qualified. *Freeman v. Commonwealth*, 223 Va. 301, 315, 288 S.E.2d 461, 469 (1982).

As previously stated, Dr. McElfresh is the manager and supervisor of the forensic and paternity testing laboratories at Lifecodes Corporation. In addition to his supervisory duties at the laboratory, Dr. McElfresh has personally used the DNA printing technique “over a hundred times” at Lifecodes' laboratory and approximately “[a] thousand” times at other locations. He previously had qualified as an expert witness in the fields of molecular genetics and population genetics on eight occasions. Both counsel and the court examined Dr. McElfresh about his professional qualifications and his expertise in the DNA printing technique.

From the examination, the court found that Dr. McElfresh was “eminently qualified” to render an opinion in the fields of molecular and population genetics. Clearly, in making this finding, the trial court did not abuse its discretion.9

DNA Printing

Spencer assigns error to the trial court's admitting into evidence the results of the DNA print identification test. We briefly summarize the test as described by the expert witnesses.10

The DNA molecule is described as a double-helical strand and physically resembles a twisted ladder. The molecule is contained in every cell that has a nucleus, which includes nearly all the cells of the human body. The configuration of the DNA molecule differs in every individual with the exception of identical twins. The DNA molecule's configuration is the same in every nucleated cell of a particular person, and its characteristics do not change during the life of that individual.

The DNA molecule is very complicated, and certain chemical procedures must be performed to “read” the genetic information contained in the molecule. Once the DNA is chemically extracted from the biological specimen, enzymes called “restriction endonucleases” are applied to the molecule. These enzymes recognize particular sequences of genetic information coded by certain chemicals. At the precise point of recognition, the enzymes cut the DNA strand into fragments. Next, a procedure called “electrophoresis” is used to separate the different lengths of the DNA fragments. The DNA fragments are then transferred to a piece of nylon membrane. Next, radioactive probes are added, which identify and bind to particular fragments that the probes are designed to recognize. The resulting accumulation of radioactivity exposes X-ray film that is placed next to the nylon membrane. Developing the X-ray film reveals bands of DNA. The pattern of the bands is then compared to the pattern of DNA bands obtained from testing other specimens.

A sample of Spencer's blood and the semen stains discovered at the crime scene were forwarded to Lifecodes Corporation for DNA print identification testing. The tests established that the DNA extracted from the semen stains matched the DNA extracted from Spencer's blood sample. The statistical likelihood that anyone other than Spencer produced the semen stains is one in 705 million.
Spencer argues that the DNA tests results were inadmissible because the Commonwealth failed to establish the test's reliability as required by O’Dell, 234 Va. 672, 364 S.E.2d 491. We do not agree.

[23] The record is replete with uncontradicted expert testimony that no “dissent whatsoever [exists] in the scientific community” concerning the reliability of the DNA printing technique. Unrebutted expert testimony further established that the testing procedure performed in this case was conducted in a reliable manner. Indeed, defense counsel admitted to the trial judge that he had no *315 evidence to contradict the testimony of the Commonwealth's experts.

Because the undisputed evidence supports the trial court's conclusion that DNA testing is a reliable scientific technique and that the tests performed here were properly conducted, we hold that the trial court did not err in admitting into evidence the results of the DNA testing. 11

Jury Instruction “A”


F

Sufficiency of the Evidence

Spencer contends that the evidence is insufficient as a matter of law to support the jury's finding that a rape and capital murder occurred. More specifically, he asserts that there is insufficient evidence that his penis penetrated the victim's vagina. We do not agree.

[24] [25] [26] When the victim was discovered, she was nude except for a pair of shorts. She had been bound, beaten, and strangled to death. The posterior of her vagina was bruised. Sperm were found *316 in her vagina and in her rectum. Viewing this evidence and all reasonable inferences deductible therefrom in the light most favorable to the Commonwealth, we hold that the evidence clearly supports the jury's finding of penetration. See, e.g., Spencer I, 238 Va. at ——, 384 S.E.2d at 779; Tuggle, 228 Va. at 509–12, 323 S.E.2d at 549–50. 13

V

PENALTY PHASE

A

Facts

Spencer had been released from prison to a “half-way” house in Richmond on September 4, 1987, just two weeks before he raped and murdered Davis. Forensic evidence presented during the penalty phase established that Spencer also raped and murdered another Richmond woman in October 1987, and raped and murdered a woman in Arlington in late November 1987. Each of these victims had been strangled to death by strikingly similar methods.

Spencer has been convicted of six prior burglaries, three as an adult and three as a juvenile. His past criminal record
also disclosed that Spencer has been convicted of three counts of trespassing.

Spencer presented six witnesses who gave testimony in mitigation. According to these witnesses, Spencer had been a shy, quiet, nonviolent person. He was a “loner.” None of these witnesses could believe that he committed the crimes against Davis.

*317 B

Unadjudicated Crimes

Spencer contends that the trial court erred in admitting evidence concerning the rape-murder of the other Richmond woman and the rape-murder of the woman in Arlington. He asserts that only evidence of adjudicated criminal conduct is admissible. We do not agree.

[27] In the penalty phase of a capital murder case, a jury shall consider “evidence of the prior history of the defendant” **799 in determining whether he “would constitute a continuing serious threat to society.” Code § 19.2–264.4(C). We have construed this provision to permit the admission into evidence of unadjudicated misconduct. See, e.g., O’Dell, 234 Va. at 700, 364 S.E.2d at 507; Pruett v. Commonwealth, 232 Va. 266, 285, 351 S.E.2d 1, 12 (1986), cert. denied, 482 U.S. 931, 107 S.Ct. 3220, 96 L.Ed.2d 706 (1987); Watkins v. Commonwealth, 229 Va. 469, 488, 331 S.E.2d 422, 436 (1985), cert. denied, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986). Spencer acknowledges these prior holdings, but claims that unadjudicated conduct is admissible only when the evidence consists of “extrajudicial statements” by the defendant. We rejected a similar claim in Pruett.

[28] There, the defendant contended that evidence of unadjudicated crimes “should have [been] limited ... to his videotaped confession.” 232 Va. at 283, 351 S.E.2d at 11. Rejecting this contention, we said that “the trial court was [not] bound to limit the evidence of prior unadjudicated conduct to what was revealed by the videotape,” id. at 284, 351 S.E.2d at 12, and concluded that “evidence of prior criminal acts of violence, whether adjudicated or not, is relevant to a determination of future dangerousness,” id.

C

*318 Jury Instruction “B”

Spencer contends that the trial court erred in refusing Instruction “B,” which reads as follows:

In order to return a sentence of death, it is absolutely necessary that all twelve jurors agree on the sentence. If any juror does not believe beyond a reasonable doubt after consideration of all the evidence and the instructions given that a sentence of death is appropriate or if the jury is unable to reach a unanimous decision of a sentence of death, then the Court will impose a sentence of life imprisonment.

In Justus v. Commonwealth, 220 Va. 971, 979, 266 S.E.2d 87, 92 (1980), cert. denied, 455 U.S. 983, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982), we said:

The court properly refused an instruction ... which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss [the jury] and impose a life sentence. While this was a correct statement of law it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree.

See also Pruett, 232 Va. at 279 n. 6, 351 S.E.2d at 9 n. 6.

We therefore reject this contention.
VI

SENTENCE REVIEW

Spencer does not claim that the death sentence was imposed arbitrarily. Nonetheless, Code § 17–110.1 requires us to review the death sentence on the record to determine “[w]hether the sentence ... was imposed under the influence of passion, prejudice or any other arbitrary factor.”

[29] We find nothing in the record to suggest that the sentence is the product of any arbitrary factor. To the contrary, after considering all aggravating and mitigating factors, we conclude that the evidence supports the jury's findings that (1) based on Spencer's prior history and the circumstances surrounding the commission of the offense, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and (2) Spencer's conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, and aggravated battery to the victim. Code § 19.2–264.4(C).

[30] Code § 17–110.1 also requires us to determine “[w]hether the sentence of death is excessive or disproportionate to **800 the penalty *319 imposed in similar cases, considering both the crime and the defendant.” Accordingly, we have accumulated the records of all capital murder cases reviewed by this Court, and having considered those records, we hold that Spencer's death sentence was not excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for comparable or similar crimes. See, e.g., Hoke, 237 Va. 303, 377 S.E.2d 595 (capital murder in the commission of robbery, abduction, and rape, both future dangerousness and vileness found); Stout v. Commonwealth, 237 Va. 126, 376 S.E.2d 288, cert. denied, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989) (capital murder in the commission of robbery, both future dangerousness and vileness found); Gray, 233 Va. 313, 356 S.E.2d 157 (capital murder in the commission of robbery, both future dangerousness and vileness found); Pruett, 232 Va. 266, 351 S.E.2d 1 (capital murder in the commission of rape and robbery, both future dangerousness and vileness found); Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807, cert. denied, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985) (capital murder in the commission of robbery, both future dangerousness and vileness found); Watkins, 229 Va. 469, 331 S.E.2d 422 (capital murder in the commission of robbery, both future dangerousness and vileness found); Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985) (capital murder in the commission of rape, both future dangerousness and vileness found); Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984) (capital murder in the commission of rape, both future dangerousness and vileness found); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983) (capital murder in the commission of robbery, both future dangerousness and vileness found); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982) (capital murder in the commission of robbery, both future dangerousness and vileness found); James Dyral Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980) (capital murder in the commission of rape and robbery, both future dangerousness and vileness found); Linwood Earl Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980), cert. denied, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981) (capital murder in the commission of robbery, both future dangerousness and vileness found); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979) (capital murder in the commission of rape, both future dangerousness and vileness found); M. *320 Smith, 219 Va. 455, 248 S.E.2d 135 (capital murder in the commission of rape, both future dangerousness and vileness found).

VII

CONCLUSION

We have considered all 44 of Spencer's assignments of error. We also have reviewed the death sentence mandated

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by Code § 17–110.1. We find no error in the trial court's judgments, and therefore, we will affirm them.

Footnotes

1 For a concise explanation of the DNA printing procedure, see Part IV, infra.

2 To the extent that Spencer seeks to raise an “equal protection” claim in this appeal, such claim, not having been raised at trial, is defaulted. Rule 5:25. Also defaulted for the same reason is Spencer's claim on appeal that the death penalty statute is “vague” because it “does not specify which party bears the burden of proof on the question of mitigation, and does not specify the standard of proof for carrying that burden.”

3 Because of our holding on this issue, we need not address Spencer's other contentions relating to his alleged right to act as co-counsel.

4 For an explanation of how a larger data base increases the statistical likelihood of finding matching DNA patterns in a given population, see Spencer I, 238 Va. at ——— n. 8, 384 S.E.2d. at 782 n. 8.

5 Alleging a third violation of the discovery order, Spencer has assigned error to the trial court's permitting Dr. McElfresh to testify about the written protocol that delineates the specific procedures followed by Lifecodes laboratory personnel in the conduct of a DNA print test. During the pretrial hearing, Dr. McElfresh stated that he would “[g]ladly” give Spencer a copy of the protocol if he wanted it. Spencer did not indicate that he found this remedy unsatisfactory, and he never again brought the matter to the trial court's attention. He, therefore, has waived this claim for purposes of appeal. Rule 5:25.

6 Prior to trial, the court, over Spencer's objection, permitted the Commonwealth to obtain “hair, blood and saliva samples” from Spencer. The ground for Spencer's objection was that the Commonwealth had failed to establish “probable cause.” When the evidence was introduced at trial, however, Spencer voiced no objection to its admissibility. Because Spencer did not object at trial to the admissibility of this evidence, we will not consider the issue on appeal. Rule 5:25.

7 We likewise reject Spencer's claim of error concerning the voir dire of prospective juror Steven Sinnenberg. Spencer made no objection to Sinnenberg's being seated on the jury panel and, therefore, waived any objection he made to the trial court's voir dire ruling. Rule 5:25.

8 The exclusion claim concerning Wright that Spencer raises on appeal is not the same claim he raised when the trial court excluded Wright. Therefore, we will not consider his claim on appeal. Rule 5:25.

9 Spencer raises two other contentions respecting Dr. McElfresh's testimony that are frivolous and without merit.

10 For a detailed explanation of the DNA print identification technique, see Spencer I, 238 Va. at ———, 384 S.E.2d at 781.

11 Spencer further contends that the Commonwealth failed to establish that DNA print identification testing also is generally accepted in the scientific community as required by Frye v. United States, 293 F. 1013 (D.C.Cir.1923). In O'Dell, we rejected adoption of the so-called “Frye test,” 234 Va. at 695–96, 364 S.E.2d at 504. Even if Frye were the test in the Commonwealth, however, the DNA print technique would satisfy the requirements of Frye.

12 We express no opinion, however, with respect to the correctness of this language.

13 Spencer also contends that the evidence is insufficient to support the burglary conviction because the element of “unauthorized entry” was not sufficiently established. This contention was not advanced at trial, and, therefore, we will not consider it on appeal. Rule 5:25.

Nor will we consider Spencer's claim that the trial court erred in refusing to permit Detective Williams to state whether in his opinion “anyone could have climbed in [the victim's kitchen] window and left it in the shape that that's in now.” Because the record contains no proffer of what Williams' answer would have been, the issue has not been properly preserved. See, e.g., Mackall, 236 Va. at 256–57, 372 S.E.2d at 769; O'Dell, 234 Va. at 697–98, 364 S.E.2d at 505–06.
After defendant's murder for hire conviction and death sentence were affirmed on direct appeal, 227 Va. 124, 314 S.E.2d 371, defendant petitioned for writ of habeas corpus. The United States District Court for the Western District of Virginia, Jackson L. Kiser, J., granted writ in part, and appeal was taken. The United States Court of Appeals for the Fourth Circuit, 852 F.2d 740, affirmed. At resentencing, the Circuit Court, City of Newport News, Frank I. Richardson, Jr., J., again imposed death sentence, and automatic sentence review followed. The Supreme Court, Carrico, C.J., held that: (1) defendant was not denied fair trial when he was brought in the courtroom shackled prior to start of jury selection; (2) prospective juror whose grandson had been shot and killed was not required to be excluded for cause; (3) defendant was not denied right of self-representation; (4) transcript of guilt phase was admissible to inform jury of nature of offense; (5) prosecutor gave racially neutral reasons for exercising peremptory challenges against black juror; (6) evidence of unadjudicated crimes was admissible; and (7) evidence was sufficient to support finding of aggravating factors.

Affirmed.

West Headnotes (22)

[1]  **Sentencing and Punishment**
  - Hearing and Determination

  Requiring defendant convicted of capital murder to be shackled during jury selection at resentencing hearing was within trial court's discretion, despite alleged prejudicial effect on prospective jurors; conviction gave defendant motive to escape, defendant had record of escape, and defendant had previously cursed and made disparaging remarks about trial judge. U.S.C.A. Const.Amend. 6.

  2 Cases that cite this headnote

[2]  **Jury**
  - Membership in Association or Organization

  Prospective juror whose grandson had been shot and killed and belonged to group formed to publicize unsolved murders was not required to be excluded for cause during sentencing phase of capital murder case, where juror indicated during voir dire that he had no interest in trial or outcome of case, had not expressed or formed opinion regarding case, was not sensible of any bias or prejudice, and knew no reason why he could not give defendant and Commonwealth a fair trial. U.S.C.A. Const.Amend. 6.

  2 Cases that cite this headnote

[3]  **Jury**
  - Membership in Association or Organization

  Membership in particular organization does not per se disqualified prospective juror.

  1 Cases that cite this headnote

[4]  **Jury**
  - Personal Relations in General

  Prospective juror is not per se disqualified because family member has been victim of violent crime.

  2 Cases that cite this headnote

[5]  **Criminal Law**
Delay or Misuse of Waiver or Right of Self-Representation

Criminal Law

Decisions, Findings, and Order

Trial court's finding that defendant's request for self-representation was tactic to secure delay was sufficient to support trial court's refusal to permit defendant to represent himself during sentencing hearing in capital murder case. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[6] Criminal Law

Effect of Waiver or Appearing Pro Se


2 Cases that cite this headnote

[7] Sentencing and Punishment

Admissibility

Transcript of guilt phase of capital murder trial could be used by Commonwealth at resentencing hearing without establishing unavailability of witnesses whose testimony it sought to introduce by transcript, where use of transcript was limited to informing jury of nature of offense with which defendant was charged and circumstances under which it was committed. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[8] Criminal Law

Appeals to Sympathy or Prejudice; Argument as to Punishment

Defendant was not prejudiced during resentencing hearing in capital murder case when prosecutor stated that transcript of sentencing phase would be relevant to issue of future of dangerousness, where statement was not made in jury's presence. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[9] Criminal Law

Arguments and Conduct in General

Criminal Law

Particular Statements, Arguments, and Comments

Claim that prosecutor improperly used guilt phase transcript during resentencing hearing and discussed vileness and future dangerousness during closing argument would not be considered on appeal, where defendant failed to object. Sup.Ct.Rules, Rule 5:25.

2 Cases that cite this headnote

[10] Jury

Criminal Prosecutions

Prosecutor may not rebut prima facie case of discriminatory use of peremptory challenges merely by denying he or she had discriminatory motive or affirming his or her good faith in making individual selections. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote


Peremptory Challenges

Jury

Criminal Prosecutions

Prosecutor's reason for exercising peremptory challenges against two black jurors were racially neutral, in determining whether use of challenges violated equal protection; prosecutor struck one juror because of her demeanor during voir dire and other juror because of his age and apparent physical problem associated with his eye. U.S.C.A. Const.Amends. 6, 14.
Evidence of unadjudicated crimes was admissible during sentencing phase of capital murder trial for purposes of determining whether defendant was continuing threat to society. U.S.C.A. Const.Amends. 5, 14; Code 1950, § 19.2-264.4, subd. C.

Evidence suggesting that defendant did not murder victim was inadmissible during resentencing hearing in capital murder case to establish residual doubt. U.S.C.A. Const.Amends. 8, 14.

Evidence that defendant convicted of murder for hire had long record of felony convictions, had been hired to kill five people other than victim, and had killed a witness because he was “running his mouth” about victim's murder was sufficient to support finding of future dangerousness, as aggravating factor at sentencing. Code 1950, § 19.2-264.2.

Evidence that defendant cut off murder victim's hands was sufficient to support jury's finding of vileness based on aggravated battery, as aggravating factor at sentencing; although there was no evidence that victim's hands were cut off before he suffered gunshot wound to his head evidence indicated that victim could have lived for a short time after he was shot and could have been alive but unconscious when his hands were severed. Code 1950, § 19.2-264.2.
**Procedure**


4 Cases that cite this headnote

[20] **Sentencing and Punishment**

**Documentary Evidence**

Admission into evidence of photographs of murder victim's decomposed body during sentencing phase of capital murder trial was not abuse of discretion, in determining whether death sentence was imposed as result of passion and prejudice. Code 1950, § 17-110.1, subd. C, par. 1.

1 Cases that cite this headnote

[21] **Criminal Law**

**Points and Authorities**

Assignment of error that was not briefed could not be considered on appeal in capital murder case.

1 Cases that cite this headnote

[22] **Sentencing and Punishment**

**Contract Killing**

Death sentence imposed upon defendant convicted of murder for hire was not excessive or disproportionate to sentence imposed in other cases. Code 1950, § 17-110.1, subd. C, par. 2; U.S.C.A. Const.Amend. 8.

2 Cases that cite this headnote

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**Attorneys and Law Firms**

**198**  **196** Karen I. Meyer, Barry L. Johnson (William E. Cook, Jr., Carolyn M. Landever, Kevin L. Anderson, Kathy Gear Owens, Arnold & Porter, on briefs), for appellant.


*192* Present: All the Justices.

**Opinion**

CARRICO, Chief Justice.


On June 18, 1987, the United States District Court for the Western District of Virginia found that Stockton had been denied a fair trial. This finding was based upon a prejudicial remark made by a third party in the presence of jurors during a luncheon recess in the sentencing phase of Stockton's trial. The district judge granted Stockton a writ of habeas corpus and ordered that he either be given a new sentencing hearing or sentenced to life imprisonment. Stockton v. Virginia, Civil Action No. 86-0106-D (W.D.Va.1987). This order was affirmed on appeal, Stockton v. Virginia, 852 F.2d 740 (4th Cir.1988), and the Supreme Court denied certiorari, Virginia v. Stockton, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989).

*197* Upon return of the case to the Circuit Court of Patrick County, the court granted a change of venue and ordered that the new sentencing hearing be conducted in the Circuit Court of the City of Newport News. A jury in that court heard evidence both in aggravation and in mitigation and fixed Stockton's penalty at death. On July 30, 1990, the trial judge imposed the death penalty, and the matter is here for automatic sentence review pursuant to Code § 17-110.1.
At the new sentencing hearing, the trial court informed prospective jurors that Stockton earlier had been found guilty of murder for hire and that the function of the new jury would be to determine an appropriate sentence for the defendant. Over Stockton's objection, a transcript of the testimony given during the guilt phase of Stockton's original trial was read to the jury.

In brief, the testimony showed that in June of 1978, Stockton overheard Tommy McBride offer Randy Bowman $1,500 to kill Kenneth Arnder because of the latter's failure to pay McBride for drugs he had purchased. Stockton said he needed money and would kill Arnder for McBride.

Arnder's mother last saw Kenneth alive on July 20, 1978, when he left her home with Stockton en route to Kibler Valley in Patrick County. On July 25, Kenneth Arnder's body was found in a remote area of Surry County, North Carolina. Arnder had been shot once between the eyes, and both **199 his hands had been severed above the wrists.

Stockton admitted on at least three occasions that he killed Arnder. For example, in an admission to a cellmate during a period of confinement in 1980, Stockton stated that he killed Arnder because the latter "had ripped somebody off for some drugs," that he had been hired to kill Arnder, and that the killing occurred at Kibler Valley in Patrick County, Virginia. Later, Stockton and the same cellmate "got in a fight." Stockton said "he'd cut Arnder's hands off and he'd do [the cellmate] the same way."

I. Shackling of Stockton

[1] Prior to the start of jury selection, Stockton was brought into the courtroom shackled around his ankles. Defense counsel told the trial court that he "thought Mr. Stockton was going to be unshackled." When the sheriff stated he had been told Stockton "was an escape risk and security risk," the trial judge refused to order the shackles removed.

*198 After the luncheon recess, defense counsel informed the court that Stockton wished to remain in jail during the remainder of jury selection. Stockton was brought to the courtroom so he could discuss the issue with the court. He complained, among other things, about having to appear before the jury in shackles. During the discussion, he stated he wanted to discharge his counsel and represent himself. When the trial court indicated disapproval, Stockton called the judge a "crook" and a "vile son-of-a-bitch." The judge then ordered Stockton removed from the courtroom.

Thereafter, Stockton refused to return to the courtroom unless allowed to appear unshackled. The trial judge repeatedly told defense counsel that Stockton would be allowed to return if he agreed to conduct himself properly. On the second day following his removal, he was allowed to return to the courtroom, and he apparently remained unshackled for the remainder of the resentencing hearing.

Citing Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), Stockton contends his appearance in shackles was inherently prejudicial to his constitutional right to a fair and impartial jury. The shackling was especially prejudicial during his sentencing hearing, Stockton asserts, since the jurors would be required to determine whether he posed a future danger to society, and the trial court's refusal to order the shackles removed "was tantamount to a declaration ... of [the court's] belief that Stockton did pose such a danger." Accordingly, Stockton says, his shackling in front of prospective jurors was prejudicial error requiring a new sentencing proceeding.

We disagree with Stockton. The basic reason for our disagreement is that "a trial judge's decision to shackle a defendant is not per se unconstitutional." Jones v. Meyer, 899 F.2d 883, 884 (9th Cir.1990) (quoting Spain v. Rushen, 883 F.2d 712, 716 (9th Cir.1989)). 

[1] Trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Allen, 397 U.S. at 343, 90 S.Ct. at 1061.

Further basis for our disagreement with Stockton is found in Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986). There, on trial for the capital murder of a law enforcement officer, *199 Frye was "restrained by chains
or handcuffs ... visible to the jury.” *Id.* at 381, 345 S.E.2d at 276. He argued that being so restrained prejudiced him before the jury.

In rejecting Frye's argument, we said:

While we agree that requiring a defendant to stand trial in physical restraints may create prejudice in the minds of jurors by suggesting that the defendant is dangerous or that his guilt is a foregone conclusion, we also believe that in extraordinary cases such shackling of the defendant is necessary to protect the rights of those present in the courtroom and society at large.

A trial court may consider various factors in determining whether a defendant should be restrained, such as the seriousness of the charge, the defendant's temperament, age, and physical attributes, his criminal record, and any past escapes, escape attempts, or threatened misconduct. This determination need not be made upon a formal hearing, and the information upon which it is based need not be evidence formally offered and admitted at trial.

*Id.* at 381-82, 345 S.E.2d at 276 (citations omitted).

This rationale applies with equal force here. Indeed, considering that Stockton stood before the court already convicted of a capital offense, he had an enhanced motive to attempt an escape and, in the process, to injure anyone who stood in his way, be they court officials or spectators. Hence, there was more reason to restrain him. His offense was grave, he had a propensity for violent crime, and he had a record of escape. He also had previously cursed and made disparaging remarks about the trial judge. In short, this was one of those “extraordinary cases [where] shackling of the defendant is necessary to protect the rights of those present in the courtroom and society at large.” *Id.* at 381, 345 S.E.2d at 276.

II. Refusal to Exclude Prospective Juror for Cause

Stockton contends that the trial court erred in refusing to exclude for cause prospective juror William H. Savage. On voir dire, Savage stated that, two years earlier, his grandson had been shot and killed and that the killers had not been apprehended. Savage also said that he belonged to a group called “Family and Friends Against Crime Today,” which was formed by Savage's wife and daughter to publicize the murders of the grandson and other young victims so the group could “solve some of these murders.” When asked if he would like to see his grandson's killers executed, Savage replied in the affirmative.

Stockton says that Savage's voir dire examination showed he was so biased and prejudiced that he was incapable of serving as an impartial juror. Hence, Stockton concludes, the trial court “committed manifest error in not excluding [Savage].”

We do not agree. Whether a prospective juror stands indifferent to the cause is a matter for the exercise of discretion.

Because the trial judge has the opportunity, which we lack, to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand, the trial court's exercise of judicial discretion in deciding challenges for cause will not be disturbed on appeal, unless manifest error appears in the record.


During voir dire, Savage indicated he had no interest in the trial or the outcome of the case, had not expressed or formed an opinion regarding the case, was not sensible of any bias or prejudice, and knew no reason why he could not give the defendant and the Commonwealth a fair trial. On the subject of life imprisonment, the record shows the following colloquy between Ms. Madonick, one of Stockton's counsel, and prospective jurors:

MS. MADONICK: How do you feel about life imprisonment as a punishment for murder? Do you think that can be an appropriate punishment?

*201 JUROR ALMQUIST: It could be.

MS. MADONICK: And you, Mr. Savage?

JUROR SAVAGE: I'd have to hear the case first. I couldn't give you a definite answer.

MS. MADONICK: But you would be able to consider it?

A JUROR: Yes. I do think it's a definite possibility and I do think there are cases in which that would be the sentence. I would also need to hear the information before I make a decision.

Under these circumstances, we do not think the trial court abused its discretion in refusing to exclude Savage for cause.

III. Denial of Self-Representation

[5] The judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's order awarding Stockton a new sentencing hearing, was entered July 22, 1988. On April 11, 1989, the law firm of Arnold & Porter of Washington, D.C., notified the Circuit Court of Patrick County that the firm would represent Stockton in connection with his resentencing hearing.

On April 28, 1989, Stockton filed in the Circuit Court of Patrick County a Motion for Re-Sentencing Hearing in which he stated that he thereby terminated the representation of Arnold & Porter. In an accompanying letter to the trial judge, Stockton stated that he would direct his own defense.

Citing Faretta v. California, 422 U.S. 806, 835-36, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975), Arnold & Porter wrote the trial judge on May 17, 1989, requesting that the court hold a hearing to determine whether Stockton's waiver of his right to counsel was knowing, intelligent, and voluntary. Following a psychiatric examination of Stockton, the trial court conducted a hearing and on September 1, 1989, ruled that Stockton had knowingly, intelligently, and voluntarily waived his right to counsel. The court appointed J. Grady Monday as stand-by counsel and set the resentencing hearing for January 9, 1990.

Stockton filed several motions pro se, including motions for a continuance and a change of venue. Then on January 4, 1990, a member of the Arnold & Porter firm advised the trial judge that the firm represented Stockton but would need a continuance. On January 8, 1990, the day before the resentencing hearing was scheduled to begin, Stockton filed a notice stating that he had “RETAINED” Arnold & Porter to represent him. The firm's motion for a continuance as well as Stockton's motion for a change of venue were granted, and the case was scheduled for hearing in the Circuit Court of the City of Newport News on May 15, 1990.

During jury selection on May 15, Stockton told the trial judge he had no confidence in his attorneys. He said he was not “asking for a continuance, but if [his] case [went] on [he was] going to represent [himself].” Noting that he had granted Stockton's earlier request to represent himself but that Stockton later withdrew the request, the judge denied the motion. Stockton then engaged in the name-calling recited previously in this opinion, as a result of which the judge ordered him removed from the courtroom. Defense counsel moved for a continuance, and the trial court denied the motion. Counsel then asked leave to withdraw from the case, and the court denied that motion.

**202 Citing Faretta, Stockton contends that a criminal defendant has a right under the Sixth Amendment to waive counsel and represent himself. If the waiver is timely and made knowingly, Stockton says, the right is
unconditional and self-representation must be allowed absent a finding that the request therefor is a tactic to secure delay. Stockton asserts that the trial court previously had found him competent to decide whether he wanted to represent himself, his decision was made knowingly, and his request was timely because made before “the jury had been chosen.” United States v. Dougherty, 473 F.2d 1113 (D.C.Cir.1972).

Stockton maintains that the trial court “did not articulate a rationale for rejecting [his] motion to represent himself.” We find in the record, however, this express statement made by the trial judge: “I feel [Stockton] is deliberately trying to not have [the case] tried.” This represents clear articulation of a finding that *203 Stockton's request for self-representation was a tactic to secure delay, and the finding is sufficient alone to justify affirmance of the trial court's refusal to permit Stockton to represent himself. Fritz v. Spalding, 682 F.2d 782, 784-85 (9th Cir.1982). 3

[6] Furthermore, as noted supra, between April 1989 and May 1990, Stockton shifted back and forth in his position with respect to self-representation. At first, he wanted Arnold & Porter to represent him. Then, he decided to represent himself. Later, he changed his mind and “retained” Arnold & Porter. Lastly, he decided he wanted to represent himself. We think Stockton “forfeited his right to self-representation by his vacillating positions.” United States v. Bennett, 539 F.2d 45, 51 (10th Cir.), cert. denied, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976).

IV. Admissibility of Guilt-Phase Transcript

Stockton contends that the admission of hearsay evidence, consisting of the transcript of the testimony given at the guilt phase of his original trial, violated “the Virginia laws of evidence” as well as his “rights under both the United States and Virginia Constitutions to confront the witnesses against him.” For his reference to Virginia law, Stockton cites Burton v. Oldfield, 195 Va. 544, 79 S.E.2d 660 (1954), and states that “[t]his Court has long recognized that the transcript of testimony at a former trial is hearsay and is inadmissible at a later trial unless the witnesses who gave the testimony in the former trial are unavailable.”

With reference to his right of confrontation, Stockton cites Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), where the Supreme Court stated:

“There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.”

*204 390 U.S. at 721, 88 S.Ct. at 1320 (quoting Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)).

Stockton also cites Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). There, the Supreme Court said:

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, ... the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective **203 means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that “there is no material departure from the reason for the general rule.”

Id. at 65, 100 S.Ct. at 2538 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107, 54 S.Ct. 330, 333, 78 L.Ed. 674 (1934)) (citations omitted).

Finally, Stockton cites Fisher v. Commonwealth, 217 Va. 808, 232 S.E.2d 798 (1977), where we applied the Barber test requiring the prosecution to show unavailability as
a prerequisite to the admission of the prior testimony of an absent witness. We upheld the admission of the preliminary hearing testimony of a witness who was deceased at the time of trial. *Id.* at 813, 232 S.E.2d at 802.

Stockton says that *Barber* is “controlling.” In *Barber*, the prosecution sought to introduce into evidence at the defendant’s robbery trial a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in another state. The Supreme Court held that admission of the transcript was error because the prosecutorial authorities had not made a good faith effort to obtain the presence of the witness at trial. 390 U.S. at 724-25, 88 S.Ct. at 1321-22.

[7] Stockton maintains we must reach the same result here because the Commonwealth made no effort to establish the unavailability of the witnesses whose testimony it sought to introduce by transcript. “A demonstration of unavailability, however, is not always *required.*” *Roberts*, 448 U.S. at 65 n. 7, 100 S.Ct. at 2538 n. 7. Indeed, in *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970), the Supreme Court said that “the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.’” (Quoting *California v. Green*, 399 U.S. 149, 161, 90 S.Ct. 1930, 1936, 26 L.Ed.2d 489 (1970)) (emphasis added).

If, in application of this “practical concern,” it appears that “the utility of trial confrontation [is] ... remote [the prosecution is not required] to produce a seemingly available witness.” *Roberts*, 448 U.S. at 65 n. 7, 100 S.Ct. at 2538 n. 7. And the utility of trial confrontation is remote if “the possibility that cross-examination ... could conceivably have shown the jury that [a prior] statement ... might have been unreliable [is] wholly unreal.” *Dutton*, 400 U.S. at 89, 91 S.Ct. at 220.

We think this case presents the sort of situation contemplated by *Roberts* and *Dutton* and thus is not subject to the rule applied in *Barber*. The transcript in *Barber* was offered to establish the guilt of the accused. Here, Stockton's culpability had been established conclusively, and guilt was not an issue in the new sentencing hearing. Use of the transcript was appropriate for the purpose of informing the jury of the nature of the offense with which Stockton was charged and the circumstances under which it was committed. In ruling the transcript was admissible, the trial court limited its use to that purpose.


Stockton argues, however, that the guilt-phase transcript was used by the prosecution not only to inform the jury of the nature of the offense with which Stockton was charged and the circumstances under which it was committed but also to establish the vileness and future dangerousness predicates for imposition of the death penalty. Stockton refers us to several places in the record where, he says, the prosecutor made this allegedly improper use of the transcript.

[8] *The first instance occurred during pretrial argument on the question whether the transcript should be admitted into evidence. During this argument, the Commonwealth's Attorney stated that portions of the transcript testimony would be relevant to and probative of the issue of future dangerousness. It suffices to say that this statement was not made in the jury's presence and, hence, could not have prejudiced Stockton.*

[9] The other instances occurred during the prosecutor's closing argument where, in discussing vileness and future dangerousness, the prosecutor referred briefly to the guilt-phase transcript. As noted supra, the trial court limited use of the transcript to the purpose of informing the jury of the nature of the offense charged against Stockton and the circumstances under which it was committed. We think it was incumbent upon Stockton to object when the prosecutor allegedly exceeded the court's limitation. Stockton failed to object. Hence, we will not notice his argument on this point. *Rule 5:25.*
We find that the transcript in question is “marked with such trustworthiness that ‘there is no material departure from the reason [for] the general rule.’ ” Roberts, 448 U.S. at 65, 100 S.Ct. at 2538-39. The incident which tainted Stockton's sentence did not occur during the guilt phase but during the sentencing phase of the original trial. Stockton was represented by counsel in that trial and was given, and took full advantage of, the opportunity to cross-examine the witnesses whose testimony is contained in the transcript that was read to the new sentencing jury.

Stockton argues, however, that the holding in Barber “did not turn on whether there was an opportunity to cross-examine the witness at the prior proceeding, but rather on the necessity of providing the ‘occasion for the jury to weigh the demeanor of the witness[es].’ ” Stockton complains that admission of the transcript denied him the occasion for the jury in his new sentencing hearing to weigh the demeanor of the witnesses.

Stockton applies Barber out of context. As noted previously, the transcript in Barber consisted of the preliminary hearing testimony of a witness who was absent at the time of trial. The Supreme Court noted that defense counsel had failed to cross-examine the witness at the preliminary hearing. The Court held that it would reach the same result had defense counsel actually cross-examined the witness at the preliminary hearing. The Court explained:

*207 The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Here, the transcript in dispute consists of testimony given, not at a preliminary hearing, but in a trial where the witnesses were cross-examined and the jury had full opportunity to “weigh the demeanor of the witness[es].” Id. Hence, the trustworthiness of the transcript was established beyond doubt and there was no necessity to provide a second “occasion for [a] jury to weigh the demeanor of the witness[es].” Id.

Indeed, paying full deference to the mission of the Confrontation Clause “to advance a practical concern for the accuracy of the truth-determining process,” Dutton, 400 U.S. at 89, 91 S.Ct. at 220, we think it is “wholly unreal” to say there was a possibility that cross-examination of the guilt-phase witnesses at the new sentencing hearing “could conceivably have shown ... that the [prior testimony] might have been unreliable.” Id. Accordingly, we hold the **205 trial court did not err in admitting the transcript of the earlier testimony.

V. Racially Discriminatory Use of Peremptory Challenges

Citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Stockton contends that the Commonwealth exercised its peremptory challenges in a racially discriminatory manner. Stockton points out that the Commonwealth used three of its four peremptory strikes to exclude three of the four blacks from the venire and also struck the only black among the four alternates.

At the conclusion of jury selection, Stockton moved “to have the proceeding dismissed” on the ground the Commonwealth had exercised its peremptory challenges in “a racially biased way.” The trial judge then called upon the Commonwealth's Attorney to *208 state “the reason for the strikes.” After the prosecutor gave his reasons, the trial judge stated that he did not “feel [the peremptory challenges] were racially motivated” and overruled Stockton's motion.

Batson holds that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.” Id. at 89,

106 S.Ct. at 1719. A defendant makes a prima facie case of discrimination by showing “that he is a member of a cognizable racial group, ... that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race ... [and] that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.” Id. at 96, 106 S.Ct. at 1722-23. 5

[10] “Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.” Id. at 97, 106 S.Ct. at 1723. The prosecutor may not rebut the prima facie case by stating merely that he challenged jurors of the defendant's race on the assumption “they would be partial to the defendant because of their shared race.” Id. Nor may the prosecutor rebut the prima facie case merely by denying he had a discriminatory motive or affirming his good faith in making individual selections. Id. at 98, 106 S.Ct. at 1723-24. “The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.” Id.

Here, the three black prospective jurors struck by the prosecutor were Ms. Winbush, Ms. Jenkins, and Mr. Wright, and the one black alternate was Ms. Wilson. The prosecutor explained that he struck Ms. Winbush and Ms. Wilson because of their reservations about the death penalty. Stockton then limited his complaint to the two remaining prospective jurors, Ms. Jenkins and Mr. Wright. We will limit our discussion to the same two persons.

[11] In his explanation, the prosecutor stated that in deciding to strike Ms. Jenkins, he considered her age, her educational background, her employment, and her demeanor during the course of voir dire. The prosecutor also said that he considered Ms. Jenkins' *209 suitability as a juror in comparison with “a number of other jurors who [he] felt would be preferable because of their educational background [and] their attentiveness during the course of voir dire examination.” In summary, the prosecutor said Ms. Jenkins' exclusion was the result of “the process of elimination” and, among other things, his “observation of ... her personal demeanor” during voir dire.

With respect to Mr. Wright, the prosecutor stated that he considered the age of the prospective juror who, at 67, would be the oldest member of the jury panel. The prosecutor also said he had noticed that Wright “appeared to have physical problems associated with his eye,” and the prosecutor questioned whether Wright “would be attentive.” **206 given the stressful nature of the matter on trial.

Because a trial judge's findings in this context “‘turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.’ ” Spencer v. Commonwealth, 238 Va. 295, 310, 384 S.E.2d 785, 795 (1989), cert. denied, 493 U.S. 1093, 110 S.Ct. 1171, 107 L.Ed.2d 1073 (1990) (quoting Batson, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21) (Spencer II). We conclude that the present case is not out of the ordinary, that the trial court's finding of racial neutrality in the prosecutor's strikes is adequately supported, and that the finding should not be disturbed on appeal.

VI. Admissibility Issues

a. Evidence of Unadjudicated Crimes

[12] Stockton contends that the trial court erroneously admitted evidence of unadjudicated crimes. Specifically, Stockton complains of evidence that he killed one Ronnie Tate because Tate was “running [his] mouth” about the murder of Kenneth Arnder. Stockton says that he was “never tried for, much less convicted of, this crime,” and that evidence of its commission violated his due process rights to a presumption of innocence and an unbiased jury.

In Spencer II, however, we pointed out that under Code § 19.2-264.4(C), a sentencing jury shall consider evidence of a defendant’s “prior history” in determining whether he “would commit criminal acts of violence that would constitute a continuing serious threat to society.” 238 Va. at 317, 384 S.E.2d at 798-99. We said that we have construed this provision “to permit the admission into evidence of unadjudicated misconduct,” *210 id. at 317,

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Stockton maintains that the decisions of other states indicate that evidence of unadjudicated crimes is inadmissible, and he cites cases from Indiana, Tennessee, and Washington. Our research discloses, however, a split of authority, with Georgia, Nevada, South Carolina, and Texas permitting such evidence. We reaffirm our earlier decisions and reject Stockton's contention that evidence of unadjudicated crimes is inadmissible.

Stockton argues further, however, that even if this type of evidence is admissible, Virginia's capital sentencing scheme is unconstitutional because it fails to require proof beyond a reasonable doubt of the commission of unadjudicated crimes and thus permits the jury to consider unreliable and prejudicial evidence. However, in Beaver v. Commonwealth, 232 Va. 521, 529, 352 S.E.2d 342, 347, cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), we rejected a contention that evidence of unadjudicated criminal activity is “not reliable.” And in Gray v. Commonwealth, 233 Va. 313, 346-47, 356 S.E.2d 157, 175-76, cert. denied, 484 U.S. 873, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987), we rejected an argument that such evidence is “highly inflammatory and inherently prejudicial.”

b. Evidence of Innocence

[13] Stockton contends the trial court erred in refusing to allow admission of evidence and to permit argument suggesting that he did not murder Kenneth Arnder. Stockton says that “[p]reventing the sentencing jury from obtaining this critical information violated notions of fundamental fairness ... and constituted a violation of the Eighth and Fourteenth Amendments **207 ... and the companion provisions of the Virginia Constitution.”

The disputed evidence, Stockton submits, was material to the issues of vileness and future dangerousness and “relevant to establishing ‘residual doubt’ as mitigating evidence in sentencing.”

The trial court excluded the proffered evidence on the ground that Stockton's guilt had “already been decided.” In reaching this conclusion, the trial court cited Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), and Frye, supra.

In Franklin, the defendant argued that he was entitled as a matter of constitutional right to an instruction telling his sentencing jury that it could consider residual doubt as a basis for mitigation. Rejecting this argument, the Court stated that its prior decisions did not “suggest that capital defendants have a right to demand jury consideration of ‘residual doubts’ in the sentencing phase” of a capital penalty trial. Id. at 173, 108 S.Ct. at 2326 (emphasis in original). The Court said further that permitting consideration of residual doubt in the penalty phase “is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence— but not the underlying conviction—is struck down on appeal.” Id. at 173 n. 6, 108 S.Ct. at 2326 n. 6.

In Frye, the defendant argued in the trial court that the jury in the sentencing phase of his capital murder trial “should consider the ... possibility that additional evidence might later demonstrate Frye's innocence of the crime for which it had convicted him.” 231 Va. at 393, 345 S.E.2d at 283. The trial court ruled the argument impermissible.

We affirmed, stating that “the trial court would have been remiss if it had permitted defense counsel” to argue that the jury's verdict “was wrong, that the Commonwealth had failed to prove its case against Frye.” Id. We stated further that “[t]he issue of guilt had been resolved in the first phase of the trial and could not properly be raised again in the penalty phase.” Id. at 393-94, 345 S.E.2d at 283.

If, as Franklin holds, a defendant is not entitled to an instruction permitting a sentencing jury to consider residual doubt and if, as Frye teaches, a defendant may not argue residual doubt in the sentencing phase, it follows that the trial court did not err in refusing to admit evidence
VII. Aggravating Factors

Code § 19.2-264.2 provides that the death penalty may not be imposed unless the court or jury shall find one or both of two aggravating factors: First, “that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society,” termed “future dangerousness” in our opinions. Second, “that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim,” referred to in our opinions as “vileness.” Here, the jury found the existence of both predicates, but based its finding of vileness upon the aggravated battery component alone.

Stockton argues that the evidence does not support a finding of either future dangerousness or vileness. We disagree.

[14] With respect to future dangerousness, the evidence shows that Stockton had a long record of felony convictions, including three convictions for discharging a firearm into an occupied building, one conviction for escape, seven convictions for unlawful possession of firearms, and one burglary conviction. In addition, according to his own admissions to police authorities, Stockton had been hired to kill five people other than Kenneth Arnder, had committed arson for hire, and had stolen a large number of firearms in a breaking and entering.

Then there are the frightening prospects revealed in Stockton's hired murder of Kenneth Arnder, where the victim was shot and dismembered, and in its aftermath, where Ronnie Tate was killed because he was “running [his] mouth” about Arnder's murder. Added to all this is the testimony given at the new sentencing hearing by Dr. Miller Ryans, a psychiatrist at Central State Hospital, who stated that Stockton “presents a continuing serious threat to society.”

[15] As noted previously, the jury based its finding of vileness upon the component of aggravated battery. We have defined aggravated battery as one which, “qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.” M. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

Stockton argues that the evidence was insufficient to sustain the jury's finding of vileness because the Commonwealth offered no evidence that Arnder's hands were cut off before he suffered the gunshot wound to his head. Stockton quotes Jones v. Commonwealth, 228 Va. 427, 448, 323 S.E.2d 554, 565 (1984), cert. denied, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985), where we said that aggravated battery connotes “conduct preceding death of the victim.”

What we actually said in Jones was that aggravated battery “ordinarily connotes conduct preceding death of the victim.” Id. (emphasis added). We do not think, however, that this is an ordinary situation.

Dr. Page Hudson, who was North Carolina's chief medical examiner at the time of the Arnder murder, testified that he was present when an autopsy was conducted on Arnder's body. He said that the gunshot wound to Arnder's head was the “probable” cause of death, that Arnder would have “become immediately unconscious,” and that death would have “followed shortly thereafter.”

Dr. Hudson testified further, however, that the wounds to Arnder's hands would “easily have been fatal” if untreated.

In Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196 (1987), cert. denied, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988), addressing the subject of aggravated battery, we said that the Commonwealth is not required to prove the order of infliction of multiple wounds to establish which causes death, provided death does not result instantaneously from the first wound. *214 Then there are the frightening prospects revealed in Stockton's hired murder of Kenneth Arnder, where the victim was shot and dismembered, and in its aftermath, where Ronnie Tate was killed because he was “running [his] mouth” about Arnder's murder. Added to all this is the testimony given at the new sentencing hearing by Dr. Miller Ryans, a psychiatrist at Central State Hospital, who stated that Stockton “presents a continuing serious threat to society.” 233 Va.
Here, although Arnder would have died “shortly” from the gunshot wound to his head, his death was not instantaneous, and the jury could have found that he was still alive but unconscious when his hands were severed. Accordingly, the evidence was sufficient to support the jury's finding of vileness based upon aggravated battery.

VIII. Prosecutorial Misconduct

Stockton contends that his due process rights were violated when, in the presence of the jury, the prosecutor referred to disparaging remarks Stockton had directed to the trial judge out of the hearing of the jury. Stockton argues that the prejudice caused by the prosecutor's misconduct requires a new sentencing trial.

During presentation of his case, Stockton called William Dent, chaplain of the Powhatan Correctional Center, as a character witness. Dent testified that he had met with Stockton on a number of occasions while Stockton was an inmate at the Correctional Center. The chaplain testified that Stockton had been friendly and respectful to him but that Stockton had said he had not “always been respectful to other people.” In response to a question on cross-examination, Dent said that Stockton could say “some pretty nasty things to people.” The prosecutor then asked Dent: “You're not aware of some comments directed to the judge in this case, are you?”

When defense counsel objectd, the trial court sustained the objection, and the prosecutor said he would withdraw the question. Stockton then moved for a mistrial. The court denied the motion, stating that the jury had no “knowledge of what the statement was and they're not supposed to guess, surmise or do anything of that nature, and the Court ... does not feel that that ... comment tainted the jury in any way.” We agree with the trial judge and reject Stockton's contention.

IX. Verdict Form

Stockton contends that the verdict form prescribed by Code § 19.2-264.4(D) and used by the trial court “discouraged the jury from giving effect to ... mitigating evidence once it found an aggravating factor.” Stockton acknowledges that in Watkins, supra, we held that the form adequately emphasizes mitigating factors. 229 Va. at 490-91, 331 S.E.2d at 438. Stockton “respectfully requests,” however, that we reconsider our decision. We decline the request. See Hoke v. Commonwealth, 237 Va. 303, 315, 377 S.E.2d 595, 602, cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989); Clark v. Commonwealth, 220 Va. 201, 213, 257 S.E.2d 784, 791-92 (1979), cert. denied, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

X. Validity of Death Sentence

Stockton also requests that we reconsider our decisions, such as Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), in which we upheld the constitutionality of Virginia's death penalty statutes, and decisions, such as
Further, Stockton contends that he “cannot obtain meaningful appellate review of his death sentence because of this Court's failure *216 to apply a standard method to determine ‘whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.’ Va.Code Ann. § 17-110.1(c)(2).” We reject this contention.

[19] Finally, citing Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), Stockton argues that he “is denied meaningful appellate review because the Virginia statutory death sentencing scheme ... does not require the trial judge or jury to specify the findings that justified imposition of a death sentence.” Proffitt involved Florida's death penalty statutes. Under those statutes, a jury's death verdict is advisory only; the trial judge determines the actual sentence. Id. at 248-49, 96 S.Ct. at 2965. The trial judge is required to weigh the statutory aggravating and mitigating circumstances and, if the trial court imposes a sentence of death, it must “ ‘set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances.’ ” Id. at 250, 96 S.Ct. at 2965 (citation omitted).

Under Virginia's statutes, the jury fixes the sentence. Code § 19.2-264.3. As noted previously, a sentence of death may not be imposed unless the jury finds the existence of one or both of the aggravating circumstances of future dangerousness and vileness. Code § 19.2-264.2. A Virginia jury's verdict must be in writing, and it must set forth the statutory aggravating circumstances upon which it is based. Code § 19.2-264.4(D). The trial judge may “set aside the sentence of death and impose a sentence of imprisonment for life” only “upon good cause shown.” Code § 19.2-264.5. Hence, Proffitt is inapposite, and we reject Stockton's contention.

XI. Passion and Prejudice

Under Code § 17-110.1(C)(1), this Court must determine “[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.” Stockton argues that his “death sentence was imposed under the influence of prejudice.” He says “the jury's ability to fairly sentence [him] was undermined by ... being shackled in front of the jury ... and [by] highly prejudicial prosecutorial misconduct.”

*217 We have demonstrated in Part I of this opinion that there was no reversible error in the shackling of Stockton and in Part VIII that there was no reversible error in the conduct of the prosecutor. Neither instance, therefore, can support Stockton's claim of prejudice.

[20] Stockton also argues that his death sentence “was infected by impermissible passion and prejudice” resulting from photographs of Arnder's decomposed body that were admitted into evidence. As we have said on many occasions, including Stockton I, 227 Va. at 144, 314 S.E.2d at 384, the admission of photographs is a matter resting within the sound discretion of the trial court, and we will not disturb its action unless a clear abuse of discretion is shown. We find no abuse of discretion here.

[21] Stockton also attempts to rely upon issues raised in assignments of error he has not briefed. He seeks to place the blame on this Court for refusing to grant him leave to file a brief in excess of the 50-page limitation set by Rule 5:26. However, we will adhere to the rule that we will not consider any assignment of error that is not briefed. Rule 5:27(e); Cheng v. Commonwealth, 240 Va. 26, 41, 393 S.E.2d 599, 607 (1990).

XII. Excessiveness and Disproportionality

[22] Code § 17-110.1(C)(2) requires that we consider and determine “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” In Boggs, supra, we said that “[b]ecause we are directed by Code § 17-110.1(C)(2) to compare ‘similar'
cases, we give special attention to those in which the underlying felony, the penalty predicate, and the facts and circumstances surrounding the commission of the crime are fairly comparable.” 229 Va. at 522, 331 S.E.2d at 422.

In an earlier murder-for-hire case, Clark, supra, we affirmed the conviction and death sentence of a defendant who, with a cousin, murdered the victim in return for $7,000. In Stockton I, advertting to Clark, we said: “Stockton also has not shown any reason why his punishment is excessive or disproportionate. The single gunshot wound between Arnder's eyes is indicative of a deliberate, execution-type murder which Stockton performed for a purely pecuniary motive. In addition, the mutilation of the victim's body was shocking.” Stockton I, 227 Va. at 152-53, 314 S.E.2d at 389.

*218 We also made in Stockton I a comparison with other cases in which the sentences of death were imposed upon findings of both dangerousness and vileness. Id. at 152, 314 S.E.2d at 389. We said that, from our review, “we determine that the sentence of death imposed upon Stockton was not excessive or disproportionate to sentences generally imposed by other sentencing bodies in this jurisdiction for crimes of a similar nature.” Id.

In the meantime, we have decided several other capital cases where the death penalty was based upon findings of both dangerousness and vileness. E.g., Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609, cert. denied, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990) (Spencer IV); Edmonds v. Commonwealth, 229 Va. 303, 329 S.E.2d 807, cert. denied, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). A review of pre- and post-Stockton I decisions, as well as capital cases resulting in life imprisonment, convinces us that “juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.” Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Stockton submits, however, that his actions do not approach the “heinous behavior” exhibited in some of our decisions. “But no concept of proportionality requires that each new capital murder case equal in horror the worst possible scenario yet encountered, else the death penalty may not be imposed.” Turner v. Commonwealth, 234 Va. 543, 556, 364 S.E.2d 483, 490, cert. denied, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988). Besides, by its very name, a murder-for-hire case imports its own special heinousness.

XIII. Conclusion

Finding no error in the record or any other reason to disturb Stockton's death sentence, we will affirm the judgment of the trial court.

Affirmed.

All Citations

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Stockton also maintains that the trial court "could not permissibly have held that [his request to represent himself] was a delaying tactic" because he represented to the court he was "not asking for a continuance." We disagree. The trial court had every reason to believe the representation was not made in good faith.

Continuing, the Court stated that "[w]hile there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not ... such a case." 390 U.S. at 725-26, 88 S.Ct. at 1322.

We will assume, without deciding, that Stockton has standing to question the Commonwealth's use of its peremptory strikes to exclude blacks. We will also assume, without deciding, that Stockton made out a prima facie case of purposeful discrimination.


Stockton argues that the trial court erred in allowing the Commonwealth to introduce his conviction for escape without showing that the escape was from a road gang rather than a correctional facility. We find this argument frivolous, typical of several Stockton makes. In the first place, other than defense counsel's statement on brief, nothing establishes the situs of the escape. Second, if the escape did occur from a road gang, the defense could have brought this fact to the jury's attention. Third, so far as the outcome of this case is concerned, whether the escape was from a road gang or a correctional facility should make no difference.

On cross-examination, Dr. Ryans admitted that Stockton would not "pose a future continuing serious threat of violence to either himself or to others" if he "continues to be incarcerated in the Virginia correctional system." Stockton then cites Giarratano v. Commonwealth, 220 Va. 1064, 1076, 266 S.E.2d 94, 101 (1980) where, he says, we “specifically considered the future dangerousness of a party while incarcerated” in determining the appropriateness of a death sentence. (Emphasis in original.) Stockton then argues that “[t]he sentencing court should have focused only on Stockton's conduct while incarcerated.” This is another example of Stockton's frivolous arguments. In Giarratano, we cited the opinion of the same Dr. Ryans that Giarratano, while incarcerated, "would constitute a homicidal threat to himself and to the prison population." Id. But the trial court did not, and we certainly did not, focus “only on [Giarratano's] conduct while incarcerated” to paraphrase Stockton's words. Indeed, we cited other testimony of Dr. Ryans that “it is probable that [Giarratano] if he were to be released would continue to present a threat to society.” Id. And we quoted the testimony of another psychiatrist that “if [Giarratano] was to be 'at large in the community' in the future, [he] had the 'potential' for violence.” Id. at 1077, 266 S.E.2d at 102.

We assume the prosecutor was referring to the occasion during jury selection when Stockton called the trial judge a "crook" and a "vile son-of-a-bitch."
Defendant was convicted, in the Circuit Court, Talladega County, for rape, and he appealed. The Alabama Supreme Court, 275 Ala. 508, 156 So.2d 368, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that since defense counsel also participate in peremptory challenge process mere showing that Negroes have not served during specified period of time does not, absent sufficient showing of prosecutors' participation, give rise to inference of systematic discrimination on part of State by exercise of peremptory challenges.

Affirmed.

Mr. Justice Goldberg, the Chief Justice, and Mr. Justice Douglas dissented.

West Headnotes (26)

[1] Constitutional Law
   ◆ Juries
   ◆ Race

A Negro defendant is not entitled to a jury containing members of his race, but State's purposeful or deliberate denial to Negroes, on account of race, of participation as jurors in administration of justice violates Equal Protection Clause. U.S.C.A.Const. Amend. 14.

99 Cases that cite this headnote

   ◆ Representation of community, in general

Constitutional command forbidding intentional exclusion applies to any identifiable group in community which may be subject of prejudice, and is not limited to Negroes. U.S.C.A.Const. Amend. 14.

22 Cases that cite this headnote

[3] Constitutional Law
   ◆ Equal protection

Purposeful discrimination may not be assumed or merely asserted but must be proven. U.S.C.A.Const. Amend. 14.

16 Cases that cite this headnote

   ◆ Presumptions, inferences, and burden of proof


7 Cases that cite this headnote

[5] Constitutional Law
   ◆ Proportional representation, underrepresentation, or token inclusion


45 Cases that cite this headnote

[6] Indictment and Information
   ◆ Evidence

Evidence, including showing that while no Negro had actually served on petit jury
there had been an average of six to seven Negroes on petit jury venires in criminal cases, failed to make out prima facie case of invidious discrimination under Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

101 Cases that cite this headnote

Purposeful discrimination based on race alone is not satisfactorily proved merely by showing that an identifiable group in community is underrepresented, even by as much as 10%. U.S.C.A.Const. Amend. 14.

231 Cases that cite this headnote

Indictment and Information

Composition or constitution of grand jury

Jury

Grounds

Alabama statute aims at an exhaustive jury list, but failure to include name of every qualified person on jury roll is not, absent fraud or purposeful discrimination, ground to quash indictment or venire. Code of Ala., Tit. 30, §§ 20, 21; Laws Ala.1955, p. 1081; U.S.C.A.Const. Amend. 14.

50 Cases that cite this headnote

Constitutional Law

Proportional representation, underrepresentation, or token inclusion

Jury

Race

Neither jury roll nor venire need be perfect mirror of community nor accurately reflect proportionate strength of every identifiable group, and defendant in criminal case is not constitutionally entitled to demand proportionate number of his race on jury which tries him nor on venire or jury roll from which petit jurors are drawn. U.S.C.A.Const. Amend. 14.

182 Cases that cite this headnote

Criminal Law

Proportional representation, underrepresentation, or token inclusion

Jury

Race


12 Cases that cite this headnote

Jury

Peremptory Challenges

There is nothing in Constitution which requires Congress or States to grant peremptory challenges; but right to peremptory challenge is one of most important of rights secured to accused, and denial or impairment of such right is reversible error, even without showing of prejudice.

239 Cases that cite this headnote
Jury

Challenges for Cause

Function of challenge is not only to eliminate extremes of partiality on both sides but to assure parties that jurors before whom they try case will decide on basis of evidence placed before them, and not otherwise.

64 Cases that cite this headnote

Peremptory Challenges

Essential nature of “peremptory” challenge is that it is one exercised without reason stated, without inquiry and without being subject to court's control; and while challenges for “cause” permit rejection of jurors on narrowly specified, provable and legally cognizable basis of partiality, peremptory challenges permit rejection for real or imagined partiality that is less easily designated or demonstrable.

144 Cases that cite this headnote

Constitutional Law

Peremptory challenges

Constitution does not require examination of prosecutor's reasons for exercise of his peremptory challenges in any given case.


220 Cases that cite this headnote

Criminal Law

Selection and impaneling of jury

Presumption in any particular case must be that prosecutor used State's challenges to obtain fair and impartial jury to try case; and such presumption is not overcome, and prosecutor therefore subjected to examination, by allegations that in case at hand all Negroes were removed from jury or that they were removed because they were Negroes.

93 Cases that cite this headnote

Jury

Motion to strike trial jury on ground that prosecutor had used peremptory challenges to exclude Negroes was properly denied, notwithstanding showing that no Negro had actually served on petit jury in recent years.

58 Cases that cite this headnote

Constitutional Law

Peremptory challenges

In quest for impartial and qualified jury, Negro and white are alike subject to being challenged without cause, and striking of Negroes in particular case does not constitute denial of equal protection of laws.


180 Cases that cite this headnote

Jury

Making and sufficiency

Purposes of peremptory challenge are perverted when prosecutor, in case after
Swain v. Alabama, 380 U.S. 202 (1965)

85 S.Ct. 824, 13 L.Ed.2d 759

case, whatever circumstances, whatever crime and whoever defendant or victim may be, is responsible for removal of Negroes who have been selected as qualified jurors by jury commissioners and who have survived challenges for cause, with result that no Negroes ever serve on petit juries.

114 Cases that cite this headnote

[21] Jury
   ☀ Race

If State has not seen fit to leave single Negro on any jury in any criminal case, presumption protecting prosecutor in exercise of peremptory challenges may well be overcome.

70 Cases that cite this headnote

[22] Jury
   ☀ Objections and exceptions

Proof that State has not seen fit to leave a single Negro on any jury in any criminal case might support reasonable inference that Negroes were excluded from juries for reasons wholly unrelated to outcome of particular case on trial and that peremptory system was being used to deny Negroes same right and opportunity to participate in administration of justice as was enjoyed by white population.

104 Cases that cite this headnote

[23] Jury
   ☀ Objections and exceptions

Defendant moving to strike trial jury had burden of proving that purposes of peremptory challenge were being perverted to deny Negroes same right and opportunity to participate in administration of justice as was enjoyed by white population; and on record showing that no Negro had served on petit jury in recent years but failing to show that prosecutors' exercise of right of peremptory challenge was responsible, such burden was not sustained.

447 Cases that cite this headnote

[24] Jury
   ☀ Objections and exceptions

Total exclusion of Negroes by state officers responsible for selecting names of jurors gives rise to fair inference of discrimination, and such inference is determinative in absence of sufficient rebuttal evidence.

11 Cases that cite this headnote

[25] Jury
   ☀ Objections and exceptions

Unlike selection process, which is wholly in hands of state officers, defense counsel participate in peremptory challenge process, and for that reason mere showing that Negroes have not served during specified period of time does not, absent sufficient showing of prosecutors' participation, give rise to inference of systematic discrimination on part of State.

450 Cases that cite this headnote

[26] Jury
   ☀ Objections and exceptions

Defendant, attacking prosecutors' use of peremptory challenges over period of time, need not elicit admission from prosecutors that discrimination accounted for their rejection of Negroes, but defendant must, to pose issue, show prosecutors' systematic use of peremptory challenges against Negroes over period of time.

326 Cases that cite this headnote
Opinion

Mr. Justice WHITE delivered the opinion of the Court.

The petitioner, Robert Swain, a Negro, was indicted and convicted of rape in the Circuit Court of Talladega County, Alabama, and sentenced to death. His motions to quash the indictment, to strike the trial jury venire and to declare void the petit jury chosen in the case, all based on alleged invidious discrimination in the selection of jurors, were denied. The Alabama Supreme Court affirmed the conviction, 275 Ala. 508, 156 So.2d 368, and we granted certiorari, 377 U.S. 915, 84 S.Ct. 1183, 12 L.Ed.2d 185.

In support of his claims, petitioner invokes the constitutional principle announced in 1880 in Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664, where the Court struck down a state statute qualifying only white people for jury duty. Such a statute was held to contravene the central purposes of the Fourteenth Amendment: ‘exemption from unfriendly legislation against (Negroes) distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy * * *. ’ 100 U.S., at 308. Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful exclusion of Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.

And it has been consistently and repeatedly applied in many cases coming before this Court.1 The principle of these cases is broadly based.

‘For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.’ Smith v. State of Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84.

Further, ‘(j)urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.’ Cassell v. State of Texas, 339 U.S. 282, 286, 70 S.Ct. 629, 631, 94 L.Ed. 839 (opinion of Mr. Justice Reed, announcing judgment). Nor is the constitutional command forbidding intentional exclusion limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice. Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.


Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84. It is not the soundness of these principles, which is unquestioned, but their scope and application to the issues in this case that concern us here.
I.

We consider first petitioner’s claims concerning the selection of grand jurors and the petit jury venire. The evidence was that while Negro males over 21 constitute 26% of all males in the county in this age group, only 10 to 15% of the grand and petit jury panels drawn from the jury box since 1953 have been Negroes, **828** there having been only one case in which the percentage was as high as 23%. In this period of time, Negroes served on 80% of the grand juries selected, the number ranging from one to three. There were four or five Negroes on the grand jury panel of about 33 in this case, out of which two served on the grand jury which indicted petitioner. Although there has been an average of six to seven Negroes on petit jury venires in criminal cases, no Negro has actually served on a petit jury since about 1950. In this case there were eight Negroes on the petit jury venire but none actually served, two being exempt and six being struck by the prosecutor in the process of selecting the jury.

*206 [5] [6] It is wholly obvious that Alabama has not totally excluded a racial group from either grand or petit jury panels, as was the case in Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76; Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866; and Reese v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77. Moreover, we do not consider an average of six to eight Negroes on these panels as constituting forbidden token inclusion within the meaning of the cases in this Court. Thomas v. State of Texas, 212 U.S. 278, 282, 29 S.Ct. 393, 394, 53 L.Ed. 512; Akins v. State of Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; Avery v. State of Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244. Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment.

[7] Alabama law requires that the three jury commissioners in Talladega County place on the jury roll all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment. Ala.Code, Tit. 30, ss 20, 21 (1958). * In practice, however, the *207 commissioners do not place on the roll all such citizens, either white or colored. A typical jury roll at best contains about 2,500 names, out of a total male population over 21, according to the latest census, of 16,406 persons. Each commissioner, with the clerk’s assistance, produces for the jury list names of persons who in his judgment are qualified. The sources are city directories, registration lists, club and church lists, conversations with other persons in the community, **829** both white and colored, and personal and business acquaintances. *208 [8] [9] Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn. State of Virginia v. Rives, 100 U.S. 313, 322—323, 25 L.Ed. 667; Gibson v. State of Mississippi, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075; Thomas v. State of Texas, 212 U.S. 278, 282, 29 S.Ct. 393, 394, 53 L.Ed. 512; **830** Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group. ‘Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible.’ Cassell v. State of Texas, 339 U.S. 282, 286—287, 70 S.Ct. 629, 631—632 (opinion of Mr. Justice Reed, announcing judgment). We cannot say that purposeful discrimination based on race alone is satisfactorily *209 proved by showing that an identifiable group in a community is underrepresented by as much as 10%. See Thomas v. State of Texas, 212 U.S. 278, 283, 29 S.Ct. 393, 394, 53 L.Ed. 512; Akins v. State of Texas, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; Cassell v. State of Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. Here the commissioners denied that racial considerations entered into their selections of either their contacts in the community or the names of prospective jurors. There
is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community. Nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards being administered by the commissioners. It is not clear from the record that the commissioners even knew how many Negroes were in their respective areas, or on the jury roll or on the venires drawn from the jury box. The overall percentage disparity has been small, and reflects no studied attempt to include or exclude a specified number of Negroes. Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case.

II.

Petitioner makes a further claim relating to the exercise of peremptory challenges to exclude Negroes from serving on petit juries.

*210 In Talladega County the petit jury venire drawn in a criminal case numbers about 35 unless a capital offense is involved, in which case it numbers about 100. Ala. Code, Tit. 30, ss 60, 62, 63 (1958). After excuses and removals for cause, the venire in a capital case is reduced to about 75. The jury is then ‘struck’—the defense striking two veniremen and the prosecution one in alternating turns, until only 12 jurors remain. Ala. Code, Tit. 30, s 64 (1958). This essentially is the Alabama struck-jury system, applicable in all criminal cases and available in civil cases. Ala. Code, Tit. 30, ss 54, 60 (1958). In this case, the six Negroes available for jury service were struck by the prosecutor in the process of selecting the jury which was to try petitioner.

In the trial court after the jury was selected, petitioner moved to have the jury declared void on Fourteenth Amendment grounds. Among other things the motion alleged:

‘(4) That because of the systematic and arbitrary method of selecting the names of qualified male citizens, negro male citizens, by the Jury Commission of Talladega County, Alabama, the State can, and did in this case, readily strike members of the negro race and that there were only six negroes remaining on the final venire in this case, in violation of the Fourteenth Amendment of the Constitution of the United States and also the Constitution of the State of Alabama * * *.’ DC The main thrust of the motion according to its terms was the striking of the six Negroes from the petit jury venire. No evidence was taken, petitioner apparently being content to rely on the record which had been made in connection with the motion to quash the indictment. We think the motion, seeking as it did to invalidate the alleged purposeful striking of Negroes from the jury which was to try petitioner, was properly denied.

[10] [11] In providing for jury trial in criminal cases, Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, the system followed in the federal courts by virtue of the Sixth Amendment. As part of this system it provides for challenges for cause and substitutes a system of strikes for the common-law method of peremptory challenge. Alabama contends that its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. This system, it is said, in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes. Based on the history of this system and its actual use and operation in this country, we think there is merit in this position.

The peremptory challenge has very old credentials. In all trials for felonies at common law, the defendant was allowed to challenge peremptorily 35 jurors, and the prosecutor originally had a right to challenge any number of jurors without cause, a right which was said to tend to ‘infinite delays and danger.’ Coke on Littleton 156 (14th ed. 1791). Thus The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), provided that if ‘they that sue for the King will challenge any * * * Jurors, they shall...
assign * * a Cause certain.’ So persistent was the view that a proper jury trial required peremptories on both sides, however, that the statute was construed to allow the prosecution to direct any juror after examination to ‘stand aside’ until the entire panel was gone over and the defendant had exercised his challenges; only if there was a deficiency of jurors in the box at that point did the Crown have to show cause in respect to jurors recalled to make up the required number. 11 Peremptories on both sides became the settled law of England, continuing in the above form until after the separation of the Colonies. 12

*214 This common law provided the starting point for peremptories in this country. In the federal system, Congress early took a part of the subject in hand in establishing that the defendant was entitled to 35 peremptories in trials for treason and 20 in trials for other felonies specified in the 1790 Act as punishable by death, 1 Stat. 119 (1790). In regard to trials for other offenses without the 1790 statute, both the defendant and the Government were thought to have a right of peremptory challenge, although the source of this right was not wholly clear. 13 In 1865, the Government was **833 given by statute five peremptory challenges in capital and treason cases, the defendant being entitled to 20, and two in other cases where the right of the defendant to challenge then existed, *215 he being entitled to 10. 13 Stat. 500 (1865). 14 Subsequent enactments increased the number of challenges the Government could exercise, the Government now having an equal number with the defendant in capital cases, and six in cases where the crime is punishable by more than one year's imprisonment, the defendant or defendants having ten. 15

The course in the States apparently paralleled that in the federal system. The defendant's right of challenge was early conferred by statute, the number often corresponding to the English practice, 16 the prosecution was *216 thought to have retained the Crown's common-law right to stand aside, 17 and by 1870, most, if not all, States had enacted statutes conferring on the prosecution a substantial number of peremptory challenges, the number generally being at least half, but often equal to, the number had by the defendant. 18 Although there has been **834 some criticism in the twentieth century leveled at peremptory challenges, on the basis of the delays, expense and elimination of qualified jurors incident to their use, 19 the system *217 has survived these attacks. In every State, except where peremptory strikes are a substitute, peremptory challenges are given by statute to both sides in both criminal and civil cases, the number in criminal cases still being considerably greater. Under these statutes the prosecution generally possesses a substantial number of challenges. 20

The system of struck juries also has its roots in ancient common-law heritage. 21 Since striking a jury allowed *218 both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of ‘great nicety’ or ‘where the sheriff (responsible for the jury list) was suspected of partiality.’ 3 Bl.Comm. 357. It is available in many States for both civil and **835 criminal cases. 22 The Alabama system adheres to the common-law form, except that the veniremen are drawn from the regular jury list, are summoned to court before striking begins and the striking continues until 12 rather than 24 remain. It was adopted as a fairer system to the defendant and prosecutor and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties. 23

[12] In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society. 24 The voir dire in American trials tends to be *219 extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted. 25 The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011. Although ‘(t)here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges,’ Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154, nonetheless the challenge is ‘one of the most important of the rights secured to the accused,’
Swain v. Alabama, 380 U.S. 202 (1965)

85 S.Ct. 824, 13 L.Ed.2d 759

**Pointerv. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208. The denial or impairment of the right is reversible error without a showing of prejudice,** Lewis v. United States, supra; Harrison v. United States, 163 U.S. 140, 16 S.Ct. 961, 41 L.Ed. 104; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348, 15 S.Ct. 641, 39 L.Ed. 727. ‘(F)or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.’ Lewis v. United States, 146 U.S., at 378, 13 S.Ct., at 139.

[13] The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that ‘to perform its high function in the best way ‘justice must satisfy the appearance of justice.’’ In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause. Although historically the incidence of the prosecutor’s challenge has differed from that of the accused, the view in this country has been that the system should guarantee ‘not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.’ Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578.

**836 [14] [15] The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control. State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011. While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. Hayes v. State of Missouri, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578. It is often exercised upon the ‘sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,’ Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138, upon a juror’s ‘habits and associations,’ Hayes v. State of Missouri, supra, 120 U.S., at 70, 7 S.Ct., at 351, or upon the feeling that ‘the bare questioning (a juror’s) indifference may sometimes provoke a resentment,’ Lewis, supra, 146 U.S., at 376, 13 S.Ct., at 138. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. 26 For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. 27 It is well known that these factors are widely explored during the voir dire, by both prosecutor and accused, Miles v. United States, 103 U.S. 304, 26 L.Ed. 481; Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054. 28 This Court has held that the fairness of trial by jury requires no less. Aldridge, supra. 29 Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

[16] With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor’s challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor’s judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

[17] [18] [19] In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an
examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case.

III.

Petitioner, however, presses a broader claim in this Court. His argument is that not only were the Negroes *223 removed by the prosecutor in this case but that there never has been a Negro on a petit jury in either a civil or criminal case in Talladega County and that in criminal cases prosecutors have consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself. This systematic practice, it is claimed, is invidious discrimination for which the peremptory system is insufficient justification.

[20] [21] [22] We agree that this claim raises a different issue and it may well require a different answer. We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. In these circumstances, **838 giving even the *224 widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purpose of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

[23] We need pursue this matter no further, however, for even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County. Cf. Glasser v. United States, 315 U.S. 60, 87, 62 S.Ct. 457, 472, 86 L.Ed. 680.

The difficulty with the record before us, perhaps flowing from the fact that it was made in connection with the motion to quash the indictment, is that it does not with any acceptable degree of clarity, show when, how often, and under what circumstances the prosecutor alone has been responsible for striking those Negroes who have appeared on petit jury panels in Talladega County. The record is absolutely silent as to those instances in which the prosecution participated in striking Negroes, except for the indication that the prosecutor struck the Negroes in this case and except for those occasions when the defendant himself indicated that he did not want Negroes on the jury. Apparently in some cases, the prosecution agreed with the defense to remove Negroes. There is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar. 31 In one instance the prosecution offered the defendant an all-Negro jury but the defendant in that case did not want a jury with any Negro members. There was other testimony that in many cases the Negro defendant preferred an all-white to a mixed jury. One lawyer, who had represented both white and Negro defendants in criminal cases, could recall no Negro client
who wanted Negroes on the jury which was to try him. The prosecutor himself, who had served since 1953, said that if the Negro defendant wanted Negroes on the jury it would depend ‘upon the circumstances and the conditions and the case and what I thought justice demanded and what (it) was in that particular case,’ and that **839 striking is done differently depending on the race of the defendant and the victim of the crime. These statements *226 do not support an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations. The fact remains, of course, that there has not been a Negro on a jury in Talladega County since about 1950. But the responsibility of the prosecutor is not illuminated in this record. There is no allegation or explanation, and hence no opportunity for the State to rebut, as to when, why and under what circumstances in cases previous to this one the prosecutor used his strikes to remove Negroes. In short, petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case. Petitioner has the burden of proof and he has failed to carry it.

[24] [25] [26] A dissent asserts that a showing that there are qualified Negroes and that none have served makes out a prima facie case of purposeful discrimination on the part of the State and that the continued vitality of Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664, as well as ‘a practical accommodation’ between the constitutional right of equal protection and the statutory right of peremptory challenge, requires application of such a rule here. Where discrimination is said to occur in the selection of veniremen by state jury commissioners, ‘proof that Negroes constituted a substantial segment of the population * * * that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time * * * constitute(s) prima facie proof of the systematic exclusion of Negroes from jury service,’ Hernandez v. State of Texas, 347 U.S. 475, 480, 74 S.Ct. 667, 671, 98 L.Ed. 866, as does proof ‘that no Negro had served on a criminal court grand or petit jury for a period of thirty years,’ Patton v. State of Mississippi, 332 U.S. 463, 466, 68 S.Ct. 184, 186, 92 L.Ed. 76. (Emphasis added.) See also Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Harper v. State of Mississippi, 251 Miss. 699, 171 So.2d 129 (1965). Total exclusion of Negroes by the state officers **227 responsible for selecting names of jurors gives rise to a fair inferences of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service. Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials. This is not to say that a defendant attacking the prosecutor's use of peremptory challenges over a period of time need elicit an admission from the prosecutor that discrimination accounted for his rejection of Negroes, any more than a defendant attacking jury selection need obtain such an admission from the jury commissioners. But the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. This is the teaching of Hernandez v. State of Texas, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866; Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074; Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76. We see no reason, except for blind application of a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion, **840 why the defendant attacking the prosecutor's systematic use of challenges against Negroes should not be required to establish on the record the prosecutor's conduct in this regard, especially where the same prosecutor *228 for many years is said to be responsible for this practice and is quite available for questioning on this matter. 32 Accordingly the judgment is affirmed.

Affirmed.

Mr. Justice HARLAN, concurring.

In joining the opinion of the Court I deem it appropriate to emphasize my understanding that the Court reserves,
and does not decide, the question which in Part III of its opinion it finds not presented by the record in this case.

Mr. Justice BLACK concurs in the result.

Mr. Justice GOLDBERG, with whom The CHIEF JUSTICE and Mr. Justice DOUGLAS join, dissenting.


This set of principles was recently and explicitly reaffirmed by this Court in Eubanks v. State of Louisiana, supra, and Arnold v. North Carolina, supra.

The reasons underlying the Court's decisions in these cases were well expressed in Strauder:

‘The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter'. It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular
classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.’ 100 U.S., at 308—309.

Moreover,
‘(t)he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race *231 prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.’ 100 U.S. at 308.

The principles and reasoning upon which this long line of decisions rests are sound. The need for their reaffirmation is present. The United States Commission on Civil Rights in its 1961 Report, 842 Justice 103, after exhaustive study of the practice of discrimination in jury selection, concluded that ‘(t)he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the 14th amendment.’ It is unthinkable, therefore, that the principles of Strauder and the cases following should be in any way weakened or undermined at this late date particularly when this Court has made it clear in other areas, where the course of decision has not been so uniform, that the States may not discriminate on the basis of race. Compare Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, with Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; compare Pace v. State of Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207, with McLaughlin v. State of Florida, 379 U.S. 184, 85 S.Ct. 283.

Regrettably, however, the Court today while referring with approval to Strauder and the cases which have followed, seriously impairs their authority and creates additional barriers to the elimination of jury discrimination practices which have operated in many communities to nullify the command of the Equal Protection Clause. This is evident from an analysis of the Court's holding as applied to the facts which are virtually undisputed.

Petitioner, a 19-year-old Negro, was indicted in Talladega County for the rape of a 17-year-old white girl, found guilty, and sentenced to death by an all-white jury. The petitioner established by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living *232 has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama. Yet, of the group designated by Alabama as generally eligible for jury service in that county, 74% (12,125) were white and 26% (4,281) were Negro.

Under well-established principles this evidence clearly makes out ‘a prima facie case of the denial of the equal protection which the Constitution guarantees.’ Norris v. State of Alabama, supra, 294 U.S., at 591, 55 S.Ct., at 581. The case here is at least as strong as that in Norris where ‘Proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the ‘rule of exclusion,’ has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.’ Hernandez v. State of Texas, supra, 347 U.S. at 480, 74 S.Ct., at 671.

It is also at least as strong as the case in Patton v. State of Mississippi, supra, where the Court stated:
‘It is to be noted at once that the indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. When such a showing was made, it became a duty of the State to try to justify such an exclusion as having been brought about for some reason other than racial discrimination.’ 332 U.S. at 466, 68 S.Ct., at 186.

It is clear that, unless the State here can ‘justify such an exclusion as having been brought about for some reason *233 other than racial discrimination,’ Patton v. State of Mississippi, ibid., this conviction ‘cannot stand.’ Id., at

Alabama here does not deny that Negroes as a race are excluded from serving on juries in Talladega County. The State seeks to justify this admitted exclusion of Negroes from jury service by contending that the fact that no Negro has ever served on a petit jury in Talladega County has resulted from use of the jury-striking system, which is a form of peremptory challenge. While recognizing that no Negro has ever served on any petit jury in Talladega County, that the method of venire selection was inadequate, that the prosecutor in this case used the peremptory challenge system to exclude all Negroes as a class, and that the systematic misuse by the State of a peremptory challenge system to exclude all Negroes from all juries is prohibited by the Fourteenth Amendment, the Court affirms petitioner’s conviction on the ground that petitioner has ‘failed to carry’ his burden of proof. The Court holds this because it believes the record is silent as to whether the State participated in this total exclusion of all Negroes from jury service in all other cases; it would require petitioner specifically to negative the possibility that total exclusion of Negroes from jury service in all other cases was produced solely by the action of defense attorneys.

I cannot agree that the record is silent as to the State’s involvement in the total exclusion of Negroes from jury service in Talladega County. The Alabama Supreme Court found that ‘Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury.’ 275 Ala. 508, 515, 156 So.2d 368, 375. In response to a question concerning the operation of the jury-striking system, the Circuit Solicitor, the state prosecuting attorney, stated:

‘Sometimes, it depends on who is involved in a case. We have been very fortunate in this county, we have not had any white against black or black against white. If we have—where we have a situation arising in a case such as that, in the cases that we have had—we have had no capital felonies, but, we strike a jury different from what if it was two white men involved or two colored men.’

This statement, it seems to me, plainly indicates that, at the very least, the State—‘we’—participates, in Talladega County, in employing the striking or peremptory challenge system to exclude Negroes from jury service in cases where white men are involved.

Also, the state prosecuting attorney testified as follows: ‘Many times I have asked Mr. Love for instance, I would say there are so many colored men on this jury venire, do you want to use any of them, and he would say, my client doesn’t want them, or we don’t see fit to use them. And then if I didn’t see fit to use them, then we would take them off. We would strike them first or take them off.

‘If I am trying a case for the State, I will ask them what is their wish, do they want them (Negro jurors), and they will as a rule discuss it with their client, and then they will say, we don’t want them. If we are not going to want them, if he doesn’t want them, and if I don’t want them, what we do then is just take them off. Strike them first.’

These quotations show either that the State ‘many times’ abandons even the facade of the jury-striking system and agrees with the defense to remove all Negroes as a class from the jury lists even before the striking begins, or that pursuant to an agreement the State directly participates in the striking system to remove Negroes from the venire. Indeed the Court recognizes that ‘(a) apparently in some cases, the prosecution agreed with the defense to remove Negroes.’ Ante, at 838. The Court, however, goes on to state that ‘(t)he record makes clear that this was not a general practice.’ Ante, at 838, n. 31. With all deference, it seems clear to me that the record statement quoted by the Court to support this conclusion, cuts against rather than in favor of the Court’s statement and inference that the general practice was not to exclude Negroes by agreement between the prosecution and defense or by the State acting alone. The prosecutor, in the quoted statement, denied that he had stated that
Negro defendants 'generally do not want' Negroes to serve on juries and stated that there had only 'been occasion here when that has happened.' Ante, at 838, n. 31. Since it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion from the record statement that only on occasion have Negro defendants desired to exclude Negroes from jury service, is that in a good many cases Negroes have been excluded by the state prosecutor, either acting alone or as a participant in arranging agreements with the defense.  

*236 Moreover, the record shows that in one case, the only one apparently in the history of the county where the State offered Negroes an opportunity to sit on a petit jury, the state prosecutor offered a Negro accused an all-Negro jury where the case involved an alleged crime against another Negro. The offer was refused but it tends to confirm the conclusion that the State joins in systematically excluding Negroes from jury service because it objects to any mixing of Negro and white jurors and to a Negro sitting in a case in which a white man is in any way involved.

Furthermore, the State concededly is responsible for the selection of the jury venire. As the Court recognizes, ante, at 827, the evidence showed that while Negroes represent 26% of the population generally available to be called for jury service in Talladega County, Negroes constituted a lesser proportion, generally estimated from 10% to 15%, of the average venire. The Alabama Supreme Court noted that under state law 'the jury commission is required to keep a roll containing the names of all male citizens living in the county who possess the qualifications prescribed by law and who are not exempted by law from serving on juries,' supra, 275 Ala., at 514, 156 So.2d, at 374, and, in fact, this had not been done in Talladega County. The Alabama Supreme Court noted that under state law 'the jury commission is required to keep a roll containing the names of all male citizens living in the county who possess the qualifications prescribed by law and who are not exempted by law from serving on juries,' supra, 275 Ala., at 514, 156 So.2d, at 374, and, in fact, this had not been done in Talladega County. The Alabama Supreme Court concluded that the method of jury selection in Talladega County was 'not exhaustive enough to insure the inclusion of all qualified persons,' ibid., and this Court admits it is 'imperfect,' ante, at 830, and that 'venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community.' Ante, at 829. It may be, for the reasons stated by the Court, that this 'haphazard' method of jury selection standing alone as an alleged constitutional violation does not show unlawful jury discrimination. However, this method of venire selection cannot be viewed in isolation and must be considered in connection with the peremptory challenge system with which it is inextricably bound. When this is done it is evident that the maintenance by the State of the disproportionately low number of Negroes on jury panels enables the prosecutor, alone or in agreement with defense attorneys, to strike all Negroes from panels without materially impairing the number of peremptory challenges available for trial strategy purposes.

Finally, it is clear that Negroes were removed from the venire and excluded from service by the prosecutor's use of the peremptory challenge system in this case and that they have never served on the jury in any case in the history of the county. On these facts, and the inferences reasonably drawn from them, it seems clear that petitioner has affirmatively proved a pattern of racial discrimination in which the State is significantly involved, cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45; Lombard v. State of Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338; Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323, or for which the State is responsible, cf. Terry v. Adams, 345 U.S. 461, 473, 73 S.Ct. 809, 815, 97 L.Ed. 1152. As this Court held in Strauder, systematic exclusion of Negroes from jury service constitutes a brand of inferiority affixed upon them and state involvement in affixing such a brand is forbidden by the Fourteenth Amendment.

There is, however, a more fundamental defect in the Court's holding. Even if the Court were correct that the record is silent as to state involvement in previous cases in which Negroes have been systematically excluded from jury service, nevertheless, it is undisputed that no Negro has ever served on any petit jury in the history of Talladega County. Under Norris, Patton and the other cases discussed above, it is clear that petitioner by proving this made out a prima facie case of unlawful jury exclusion. The burden of proof then shifted to the State to prove, if it could, that this exclusion was brought about for some reason other than racial discrimination in which the State participated.
This established principle is well illustrated by the recent decision of the Mississippi Supreme Court, Harper v. State of Mississippi, supra, in which that court rejected an argument of the State of Mississippi strikingly similar to the one advanced here by the State of Alabama and accepted by this Court. In the Mississippi case a Negro defendant made out a prima facie case of jury exclusion by showing that only a token number of Negroes had served on juries in the county in question. The State attempted to rebut this prima facie case by contending **846 that the exclusion resulted from a perfectly neutral system of employing voting registration lists to select prospective jurors and the fact that the number of Negroes selected was in proportion to their number on the voting registration lists. The Mississippi Supreme Court, held, however, that this did not rebut the prima facie case of jury exclusion unless **239 the State could additionally prove that the disproportionately low number of Negroes on the voting registration list was caused by factors other than state-involved racial discrimination. Similarly in the instant case, it seems to me indisputable that Alabama did not rebut petitioner's prima facie case, which here is based on a showing of total exclusion, by the contention that it is the result of a neutral peremptory challenge system unless the State additionally proved that the peremptory challenge system is not being used in a way constituting state-involved discrimination. That it did not do so is uncontested.

Despite the fact that the petitioner therefore has made out what is, under the settled decisions of this Court, a prima facie case of jury exclusion which the State has not rebutted, the Court today affirms petitioner's conviction because, according to the Court, petitioner has 'failed to carry' his burden of proof. Ante, at 839. The Court concedes that if this case involved exclusion of Negroes from jury panels, under Norris and Patton a prima facie case of unconstitutional jury exclusion would be made out. However, the Court argues that because this case involved exclusion from the jury itself and not from the jury venire, the burden of proof on a defendant should be greater. This distinction is novel to say the least.

The Court's jury decisions, read together, have never distinguished between exclusion from the jury panel and exclusion from the jury itself. Indeed, no such distinction can be drawn. The very point of all these cases is to prevent that deliberate and systematic discrimination against Negroes or any other racial group that would prevent them, not merely from being placed upon the panel, but from serving on the jury. The Court quotes from Hernandez v. State of Texas, supra, to show that the prima facie rule applies only where no Negro 'had been called for jury service,' ante, at 839, but such a view is rejected by *240 Patton's statement of the rule, for Patton held that a prima facie case was made out when it was shown that 'no Negro had served on a criminal court grand or petit jury for a period of thirty years.' 332 U.S., at 466, 68 S.Ct., at 186. (Emphasis added.) And, Patton is confirmed by our very recent cases. Eubanks v. State of Louisiana, supra, and Arnold v. North Carolina, supra, which also speak only in terms of jury 'service' and jury 'duty.' 'The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.' Hernandez v. State of Texas, supra, 347 U.S., at 479, 74 S.Ct., at 671. (Emphasis added.)

The rule of exclusion set forth in these cases is a highly pragmatic one. It is designed to operate in jury cases so that once the defendant has made a showing of total exclusion, the burden of going forward with the evidence is placed upon the State, the party in the better position to develop the facts as to how the exclusion came about. The defendant is a party to one proceeding only, and his access to relevant evidence is obviously limited. The State is a party to all criminal cases and has greater access to the evidence, if any, which would tend to negative the State's involvement in discriminatory jury selection. The burden of proof rule developed in Norris, Patton, and other cases, which until today the Court has uniformly applied, is a simple and workable one designed to effectuate the Constitution's command. This is demonstrated **847 by our past cases, as well as state cases.3 Because the same factors—availability of evidence, simplicity, and workability—exist whether exclusion from the jury panel or exclusion from the jury itself is involved, to apply the prima facie rule of Norris and Patton to this case is neither 'blind' nor 'wooden,' but is realistic and sensible.

*241 I agree with the Court that it is a reasonable inference that the State is involved in unconstitutional discrimination where total exclusion of Negroes from all
venires is established. I believe that it is also a reasonable inference that the State is involved where, although some Negroes are on venires, none has ever served on a jury, cf. Eubanks v. State of Louisiana, supra; Arnold v. North Carolina, supra, and the State in the case at bar has excluded from jury service the Negroes on the venire by exercise of its peremptory challenges. The Court in Patton and in other cases rejected the State's argument, and held that it would be unreasonable to assume where Negroes were totally excluded from venires that this came about because all Negroes were unqualified, unwilling, or unable to serve. It would be similarly unreasonable to assume where total exclusion from service has been established and the prosecutor has used peremptory challenges to exclude all Negroes from the jury in the given case that in all previous cases Negroes were excluded solely by defense attorneys without any state involvement. If the instant case is really a unique case, as the Court implies, surely the burden of proof should be on the State to show it.

Finally, the Court's reasoning on this point completely overlooks the fact that the total exclusion of Negroes from juries in Talladega County results from the interlocking of an inadequate venire selection system, for which the State concededly is responsible, and the use of peremptory challenges. All of these factors confirm my view that no good reason exists to fashion a new rule of burden of proof, which will make it more difficult to put an end to discriminatory selection of juries on racial grounds and will thereby impair the constitutional promise of "Equal Protection of the Laws," made effective by Strauder and the cases which follow it. By undermining the doctrine of the prima facie case while paying lip service to "Strauder the Court today allies itself with those 'that keep the word of promise to our ear and break it to our hope.'"

The Court departs from the long-established burden of proof rule in this area, and imposes substantial additional burdens upon Negro defendants as stated by Blackstone in a passage quoted with approval by this Court:

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

1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.

2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.’ 4 Bl.Comm. 353.

Quoted with approval in Lewis v. United States, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L.Ed. 1011; see also United States v. Marchant, 12 Wheat. 480, 482, 6 L.Ed. 700.

Indeed in England, as the Court points out, ante, at 831—832, although the Crown at early common law had an unlimited number of peremptory challenges, as early as 1305 that right was taken away, and since that time in England peremptories may be exercised only by the defendant. Orfield, Criminal Procedure From Arrest to Appeal 355 (1947). Harris, Criminal Law 443 (20th ed. 1960). It appears that in modern times peremptories are rarely used in England, even by defendants. Ibid.

While peremptory challenges are commonly used in this country both by the prosecution and by the defense, we have long recognized that the right to challenge peremptorily is not a fundamental right, constitutionally guaranteed, even as applied to a defendant, much less to
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Swain v. Alabama, 380 U.S. 202 (1965)

85 S.Ct. 824, 13 L.Ed.2d 759

the State. Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154. This Court has sanctioned numerous incursions upon the right to challenge peremptorily. Defendants may be tried together even though the exercise by one of his right to *244 challenge peremptorily may deprive his codefendant of a juror he desires or may require that codefendant to use his challenges in a way other than he wishes. United States v. Marchant, supra. A defendant may be required to exercise his challenges prior to the State, so that some may be wasted on jurors whom the State would have challenged. Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208. Congress may regulate the number of peremptory challenges available to defendants by statute and may require codefendants to be treated as a single defendant so that each has only a small portion of the number of peremptories he would have if tried separately. Stilson v. United States, supra. In Stilson this Court stated, ‘There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.’ 250 U.S., at 586, 40 S.Ct., at 30. The Fourteenth Amendment would impose no **849 greater obligation upon the States. Today this Court reverses Stilson's maxim, in effect holding that ‘There is nothing in the Constitution of the United States which requires the State to grant trial by an impartial jury so long as the inviolability of the peremptory challenge is secured.’

Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail. But no such choice is compelled in this situation. The holding called for by this case, is that where as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and *245 that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out; that the State, under our settled decisions, is then called upon to show that such exclusion has been brought about ‘for some reason other than racial discrimination,’

Patton v. State of Mississippi, supra, 332 U.S., at 466, 68 S.Ct., at 186; and that the State wholly fails to meet the prima facie case of systematic and purposeful racial discrimination by showing that it has been accomplished by the use of a peremptory challenge system unless the State also shows that it is not involved in the misuse of such a system to prevent all Negroes from ever sitting on any jury. Such a holding would not interfere with the rights of defendants to use peremptories, nor the right of the State to use peremptories as they normally and traditionally have been used.

It would not mean, as the Court's prior decisions, to which I would adhere make clear, that Negroes are entitled to proportionate representation on a jury. Cassell v. State of Texas, supra, 339 U.S., at 286—287, 70 S.Ct., at 631 (opinion of Mr. Justice Reed). Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to justify its use of peremptories or to negative the State's involvement in discriminatory jury selection.

This holding would mean, however, that a conviction cannot stand where, as here, a Negro defendant, by showing widespread systematic exclusion, makes out a prima facie case of unconstitutional discrimination which the *246 State does not rebut. Drawing the line in this fashion, in my view, achieves a practical accommodation of the constitutional right and the operation of the peremptory challenge system without doing violence to either.

I deplore the Court's departure from its holdings in Strauder and Norris. By affirming petitioner's conviction on this clear record of jury exclusion because of race, the Court condones the highly discriminatory procedures used in Talladega County under which Negroes never have served on any petit jury in that county. By adding to the present heavy burden of proof required of defendants in these cases, the Court creates additional barriers to the elimination of practices which have operated **850 in many communities throughout the Nation to nullify the command of the Equal Protection Clause in this
important area in the administration of justice. See 1961 United States Commission on Civil Rights Report, Justice 81—103.

I would be faithful to the teachings of this Court in its prior jury exclusion cases and the view, repeatedly expressed by this Court, that distinctions between citizens solely because of their race, religion, or ancestry, are odious to the Fourteenth Amendment. I would reaffirm and apply here what this Court said in Smith v. State of Texas, supra, 311 U.S., at 130, 61 S.Ct., at 165:

‘It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. * * * The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.’

Applying these principles, I would reverse. This, of course, would ‘not mean that a guilty defendant must go free.’ Patton v. State of Mississippi, supra, 332 U.S., at 469, 68 S.Ct., at 187; see Hill v. State of Texas, supra, 316 U.S., at 406, 62 S.Ct., at 1162. For, as the Court pointed out in Patton v. State of Mississippi, supra, 332 U.S., at 469, 68 S.Ct., at 187, the State, if it so desired, could retry petitioner by a jury ‘selected as the Constitution commands.’

All Citations
380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759

Footnotes

2 There is a special statute governing jury selection in Talladega County. Ala. Acts, 1955 Sess., Act No. 475, vol. 2, at 1081. The provisions pertinent to this case follow the general state statute and thus all references will be to the latter. Ala.Code, Tit. 30, s 21 (1958) provides:

‘Qualifications of persons on jury roll.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.’

3 Although the statute aims at an exhaustive jury list, failure to include the name of every qualified person on the jury roll is not a ground to quash an indictment or venire, absent fraud or purposeful discrimination. Fikes v. State of Alabama, 263 Ala. 89, 81 So.2d 303 (1955), rev'd on other grounds, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246.
Swain v. Alabama, 380 U.S. 202 (1965)  
85 S.Ct. 824, 13 L.Ed.2d 759

The commissioners testified that since 1959 they have met once or twice yearly, for about an hour each meeting, at which time each commissioner presented a list of persons he deemed qualified for jury service. Their names were obtained from disparate sources, each commissioner going about his task in his area of the county in his own way. The chief commissioner testified that with the assistance of city directories, and registration lists, he went out into the beats to which he was assigned and asked persons he knew for suggestions and information. He also secured names from customers of his paint store. He averred that he was familiar with Negro and white members of the community, talked with both, and used the same method for determining the qualifications of both Negro and white citizens. Another commissioner, working a predominantly rural area, testified that membership lists of Farm Bureau Cooperatives in the area and the Rural Electric Cooperative were his main sources of names, both organizations having a substantial number of Negro and white persons. He also relied on the city directory for Talladega City and on the people he knew through his 40 years of residence and farming in the area. He noted that he did not rely on predominantly white social clubs or on Negro churches, adding that he was not familiar with the relative percentage of Negroes or whites in his beats and and could not identify the persons on the jury list by race. He also stated that the jury list did not contain the names of all qualified citizens and that compilation of an all-inclusive list would be impossible. The third commissioner testified that he used the telephone directory and went out into the various beats to gather names through local merchants and citizens, both Negro and white. He also relied on the customers of his business. He too was unable to identify the persons on the jury list by race. The clerk stated that she assisted by supplying some additional names to the commissioners; she compiled these names from various directories, church rolls, club rolls and from lists sent by the managers of local plants and industries. She testified that she was acquainted with more white persons than Negroes but that she did not visit the beats or talk with persons in the beats to gather names for the commission's approval. All the commissioners averred that they did not watch the color line in obtaining names, did not know the number of Negroes in their beats, and, accordingly, did not count the number of whites and colored people in preparing the lists. The record contains no admission by the commissioners that they had relatively few Negro acquaintances or that they tended primarily to use white church lists or white club lists. "It may be that the jury commissioners did not give the negro race a full pro rata with the white race in the selection of the grand and petit jurors in this case, still this would not be evidence of discrimination. If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated." Thomas v. State of Texas, 212 U.S. 278, 283, 29 S.Ct. 393, 394.

The issue in regard to striking Negroes was raised in a different form in the motion to quash the venire. It read in pertinent part:

‘4. Defendant avers the existence of a system or practice in the drawing or organization of juries to serve in Talladega County, Alabama, deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries by either excluding them from the venire altogether or by keeping the number included so small that they can be systematically and uniformly struck from the venire and prevented from serving in the trial of any case.' This claim was repeated in the motion to declare void the petit jury selected.

‘(3) That because of the systematic and arbitrary method of selecting the names of qualified male citizens by the jury commission of Talladega County, Alabama, it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause * * *.'

The above claim as well as the objection to the prosecutor's exercise of his strikes against the six Negroes in this case was repeated in the motion for a new trial. No further claims were made and no further evidence was taken on any of these motions.

In all prosecutions by indictment the accused has a right to a speedy public trial by an impartial jury in the county in which the offense was committed. Ala.Const. of 1901, s 6. See also Ala.Const. of 1901, ss 11, 12; Collins v. State, 88 Ala. 212, 7 So. 260 (1890).

Alabama had long provided both the defendant and prosecutor with a substantial number of peremptory challenges. Under the 1867 Code, the defendant was entitled to 21 peremptories in capital cases and 15 in noncapital felony cases; correspondingly the State had 14 peremptories in capital trials and 10 in other felony trials. 1867 Ala.Rev.Code ss 4178, 4179. These numbers were altered in the 1907 Act, the defendant having eight peremptories in a noncapital felony case and the State four. The numbers in capital cases remained the same. 1907 Ala.Code s 7275. The struck-jury system was introduced in 1909 as a part of a comprehensive amendment of the statutes governing the selection and impaneling
of juries in the State. 1909 Leg.Acts, Spec.Sess., p. 319. The history and purposes of this legislation, as set out by the sponsor of the Act, may be found in John, The Jury Law, 1910—1911 Alabama Bar Assn.Rep. 198:

‘The provision for struck juries in criminal cases, is found to be much fairer to the Solicitor and the Attorneys for defendants, and under it a jury can be more easily and quickly obtained, and it would be a decided step backward to restore the challenge system, with its delay and chances for errors.’ Id., at 205.

It was thought that peremptory challenges were allowed at common law in capital felonies only. Thus Blackstone states: ‘(I)n criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.’ 4 Blackstone Commentaries 353 (15th ed. 1809) (hereafter Bl. Comm.).

This statement was not far amiss, since most felonies were generally punishable by death. 4 Bl.Comm. 98. But peremptories were allowable in trials of felonies that were not capital. Gray v. Reg., 11 Cl. & Fin. 427 (H.L.1844). See I Thompson, Trials s 42 (2d ed. 1912) (hereafter Thompson); I Stephen, History of Criminal Law of England 302 (1883) (hereafter Stephen).

The defendant's right remained unaltered until 22 Hen. 8, c. 14, s 6 (1530); 25 Hen. 8, c. 3 (1533), when the number was limited to 20 in all cases except high treason. See generally Proffatt, Trial By Jury s 156 (1877) (hereafter Proffatt).

Lord Grey's Case, 9 How.St.Tr. 128 (1682); Reg. v. Frost, 9 Car. & P. 129 (1839); Mansell v. Reg., 8 El. & Bl. 54 (1857); 4 Bl.Comm. 353. The number of jurors called was in the discretion of the court and it is reported that the right to stand aside was exercised liberally. Proffatt s 160. All attempts to limit or abolish the Crown's right were rejected. Reg. v. Frost, supra; O'Coigly's Case, 26 How.St.Tr. 1191, 1231; I Thompson s 49; Busch, Law and Tactics in Jury Trials s 69 (1949) (hereafter Busch).

It remains the law of England today, except the number the defendant may now exercise is seven. See 6 Geo. 4, c. 50, s 29 (1825); 1 & 12 Geo. 6, c. 58, s 35 (Criminal Justice Act of 1948). The actual use of challenges by either side has been rare, for at least a century, but the continued availability of the right is considered important. I Stephen 303; Devlin, Trial By Jury s 156 (1877) (hereafter Devlin); Howard, Criminal Justice In England 362—364 (1931) (Hereafter Howard).

United States v. Johns, Fed.Cas.No.15,481, 4 Dall. 412, 414, 1 L.Ed. 888 (Cir.Ct.Pa.1806). Mr. Justice Washington, sitting on circuit, stated:

‘The right of challenge was a privilege highly esteemed, and anxiously guarded, at the common law; and it cannot be doubted, but that at the common law, a prisoner is entitled, on a capital charge, to challenge peremptorily, thirty-five of the jurors. If, therefore, the act of congress has substituted no other rule * * * the common law rule must be pursued.’ See also United States v. Wilson, Fed.Cas.No.16,730, 1 Baldw. 78, 82 (Cir.Ct.Pa.1830) United States v. Douglass, Fed.Cas.No.14,989, 2 Blatchf. 207 (Cir.Ct.S.D.N.Y.1851). But see United States v. Cottingham, Fed.Cas.No.14,872, 2 Blatchf. 470 (Cir.Ct.N.D.N.Y.1852).

In United States v. Marchant, 12 Wheat. 480, 6 L.Ed. 700, this Court indicated that the Crown's power to stand aside was a part of the common law inherited from the English. Federal courts allowed the Government to stand aside on the basis of this decision. United States v. Wilson, supra; United States v. Douglass, supra. In 1856, the Court held in United States v. Shackleford, 18 How. 588, 15 L.Ed. 495, that federal statutes affording the defendant a right of challenge did not incorporate the Government's right to stand aside. The Government could do this only by virtue of the 1840 Act, 5 Stat. 394, empowering the federal courts to adopt the state practice in regard to selection and impaneling of juries.

A few years later Congress extended the defendant's right to 10 challenges in all noncapital felony cases and the Government was entitled to three in such cases; it also extended the right to misdemeanors and civil cases, each party being entitled to three. 17 Stat. 282 (1872).

See 36 Stat. 1166 s 287 (1911) providing that where the offense is a capital offense or treason, the defendant is entitled to 20 peremptory challenges and the United States to six; in all other felony trials, the defendant has 10, the United States six. Rule 24(b) of the Federal Rules of Criminal Procedure provides:

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

The Government's right to stand aside was deemed to survive early statutes giving the Government peremptory challenges. See Sawyer v. United States, 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972.

The State's right to stand aside was deemed to survive these statutes, Warren v. Commonwealth, 37 Pa. 45 (1860); Haines v. Commonwealth, 100 Pa. 317, 322 (1882); State v. McNinch, 12 S.C. 89 (1879); State v. Benton, 19 N.C. 196, 203 (1836); I Thompson s 49, although opinion was divided, Sealy v. State, 1 Ga. 213 (1846); Mathis v. State, 31 Fla. 291, 315, 12 So. 681, 688 (1893). In many States this right has been expressly barred by statute. E.g., N.C.Gen.Stat. ss 15—163, 15—164 (1953); Pa.Stat.Ann. Tit. 19, s 811 (1964); S.C.Code s 38—211 (1962).

The charges leveled at peremptory challenges have been that they required summoning a large number of veniremen, that they were used by defendants to eliminate intelligent and highly qualified jurors, that the imbalance in number in favor of defendants was unfair, that the voir dire as a predicate for their exercise was too extensive and that they generally protracted the selection process. See Proposed Legislation For Jury Reform in New York, 30 Col.L.Rev. 721, 726 (1930); Missouri Crime Survey 356—357 (1926); Evans, Recommendations For Reforms In Criminal Procedure, 24 Ill.Rev. 112, 113—114 (1929); Challenges and the Powers of Judges, 23 Green Bag 84 (1911); 3 Proc.Am.Law Inst. 501 (1925); Report of Illinois Judicial Advisory Council 17—18 (1931); Extracts from Rep. of Comm. to Third Ann. Meeting of A.L.I., Defects in Criminal Justice, 11 A.B.A.J. 297, 298 (1925). See also II Bishop, Criminal Procedure s 941 (1913) (hereafter Bishop); I Thompson s 49; II Bishop s 938, 939.

Historically 48 names would be selected from a special jury list and each side would alternately strike 12 names, the remaining 24 being summoned for the case. Brown v. State, 62 N.J.L. 666, 688—690, 42 A. 811, 818 (1899) aff'd, 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119; Forsyth, History of Trial by Jury 173. Use of the struck jury system was not confined to criminal cases at common law, as the peremptory challenge was. Busch s 62; Proffatt s 72.

For a listing of the state statutes in effect in 1930 and the variations in number and classifications among the States, see A.L.I.Code of Criminal Procedure, Commentary to s 282, at 855—862 (1930).
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Swain v. Alabama, 380 U.S. 202 (1965)

See Devlin, supra, at 32—34; Busch ss 145—154; Bodin, Selecting a Jury 44—72 (PLI 1954) (hereafter Bodin).


This is especially so under the Alabama strike system, where all the veniremen are known to the parties before striking begins.

See cases cited in n. 26, supra.


This claim was not set forth in the motion to quash the venire or the motion to declare void the petit jury selected, the only motions in which the Alabama strike system was challenged in the trial court. However, the decision of the Alabama Supreme Court may be read to have ruled on the challenge to the exercise of strikes against Negroes in its broadest form. ‘As to the contention that Negroes are systematically excluded from trial juries, the evidence discloses that Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury. It has long been held that, where allowed by statute, peremptory challenges may be used without any assigned or stated cause. Both the federal and Alabama jurisdictions have statutes providing for peremptory challenges. The fact that the prosecution peremptorily strikes every Negro from the jury panel in a case where the defendant is a Negro does not constitute a violation of the defendant's constitutional rights * * *.’ 275 Ala. 508, 515, 156 So.2d 368, 375 (citations omitted). Cf. Saltonstall v. Saltonstall, 276 U.S. 260, 267—268, 48 S.Ct. 225, 226, 72 L.Ed. 565; Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185—186, 65 S.Ct. 624, 627, 89 L.Ed. 857.

The prosecutor testified that on occasion he would ask defense counsel if he wanted Negroes on the jury; if the defense did not, and the prosecutor agreed, ‘what we do then is just to take them off. Strike them first.’ The record makes clear that this was not a general practice and the matter was not explored further:

‘Q. Let me ask you this. You stated that the defendants generally do not want a negro to serve on a jury that is sworn to try him?
‘A. I didn't say that. I didn’t—they generally didn't want it. I said in the past there has been occasion here where that has happened.
‘Q. Have there been any cases where they did want negroes to serve on juries in their behalf?
‘A. I wouldn't know if there has been. Not to my knowledge, because I am not representing defendants. I am representing the State. Do you see what I mean?
‘Q. Yes.
‘A. In other words, that would be between attorney and client, privileged, and I wouldn't know what they wanted. You would have to ask these defense attorneys about that.’

We also reject the assertion that the method of selecting veniremen in Talladega County, with its lower proportion of Negroes on the venire list, when considered with the system of peremptory strikes establishes a prima facie case of discrimination. Absent a showing of purposeful exclusion of Negroes in the selection of veniremen, which has not been made, the lower proportion of Negroes on the venire list sheds no light whatsoever on the validity of the peremptory strike system or whether the prosecutor systematically strikes Negroes in the county. Moreover, the constitutional issue in
regard to the prosecutor's systematic use of strikes against Negroes remains much the same whatever the number of Negroes on the venire list.

See also State v. Lawry, 263 N.C. 536, 139 S.E.2d 870.

I believe that the record shows that agreement between the State and the defense to exclude Negroes has occurred 'many times.' The Court itself admits that at least 'in some cases, the prosecution agreed with the defense to remove Negroes.' Ante, at 838. It concludes, however, that this is not sufficient on the ground that '(t)here is no evidence, however, of what the prosecution did or did not do on its own account in any cases other than the one at bar.' Ibid. (Emphasis added.) This Court, however, has never held in any case involving racial discrimination under the Fourteenth Amendment that such discrimination is unconstitutional only if it is brought about by the State acting alone. The test which has been applied is whether the State 'to some significant extent * * * has been * * * involved.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45. See Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 45; Lombard v. State of Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338. 'The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied * * * rights merely because they are colored.' Terry v. Adams, 345 U.S. 461, 473, 73 S.Ct. 809, 815, 97 L.Ed. 1152 (separate opinion of Mr. Justice Frankfurter). The State's agreement with the defense, which the record establishes, to remove Negroes from jury venires, under the Court's settled decisions meets the 'state action' requirement of the Fourteenth Amendment. Under the principles of Strauder and the cases following, it constitutes 'action of a state * * * through its * * * administrative officers' excluding persons 'solely because of their race or color' from serving on juries. Carter v. State of Texas, supra, 177 U.S., at 447, 20 S.Ct., at 689.


The Crown's right to challenge peremptorily was removed in that year by 33 Edw. 1, Stat. 4, because the King's right to challenge without showing cause 'was mischievous to the subject, tending to infinite delays and danger.' Coke on Littleton 156 (14th ed. 1791). Since 33 Edw. 1, Stat. 4, the Crown can only require jurors whom it wishes to challenge to stand aside from the panel until the defendant has exercised all his challenges. Then, if a jury has not been selected, the jurors, who have 'stood aside' will be used unless the Crown can challenge them for cause. Orfield, supra, at 356, Harris, supra, at 443, III Bacon's Abridgment 764 (5th ed. 1798). Even this limited procedure as the Court notes, ante, at 832, n. 12, however, is rarely used today. Orfield, supra, at 355; Harris, supra, at 443.

Defendant was convicted in the Circuit Court, City of Virginia Beach, Austin E. Owen, J., of robbery, capital murder in the commission of robbery, and use of firearm while committing robbery, and he appealed. The Supreme Court, Carrico, C.J., held that: (1) defendant's waiver of his right to counsel, and his assertion of his right to represent himself, was valid, where defendant was advised of his right to effective assistance of counsel and of potential pitfalls involved in pro se representation; (2) conviction for capital murder was supported by evidence that defendant was at scene of crime on night in question, defendant's gun was murder weapon, and gun was placed against victim's head when fatal shot was fired; and (3) imposition of death penalty was not excessive.

Affirmed.

West Headnotes (29)

[1] Criminal Law
   ➔ Validity and sufficiency, particular cases
   Defendant's waiver of his right to counsel, and his assertion of his right to represent himself in capital murder prosecution, were valid; defendant asserted that he had adequate training and experience to represent himself, and trial court impressed on defendant necessity and desirability of representation by trained counsel, especially where defendant was charged with offense which could have subjected him to death penalty. U.S.C.A. Const.Amend. 6.

   1 Cases that cite this headnote

[2] Criminal Law
   ➔ Necessity of Objections in General
   Criminal Law
   ➔ Effect of waiver or appearing pro se
   Defendant's pro se representation was not sufficient cause for excusing his failure to observe contemporaneous objection rule, and matters to which defendant failed to make proper objection in trial court would not be considered on appeal.

   18 Cases that cite this headnote

[3] Criminal Law
   ➔ Defendant filing pro se motions while represented by counsel
   Questions raised by pro se defendant before appellate counsel was appointed to represent him, but not raised in assignments filed by counsel, would not be considered on appeal.

   37 Cases that cite this headnote

[4] Criminal Law
   ➔ Delay caused by accused
   For statutory speedy trial purposes, defendant was chargeable for delay in bringing action to trial due to grant of defendant's motion for continuance until scheduled trial date. Code 1950, § 19.2–243.

   4 Cases that cite this headnote

[5] Criminal Law
   ➔ Time of continuance
   Trial court has discretion in determining length of time case should be continued due to illness of witness. Code 1950, § 19.2–243(2).
362 S.E.2d 650

2 Cases that cite this headnote

[6] **Criminal Law**

- **Consent to or waiver of delay**

  Defendant was not denied his statutory right to speedy trial where order entered within statutory period stated that trial date was set “on motion of both parties by agreement.” Code 1950, § 19.2–243.

  6 Cases that cite this headnote

[7] **Criminal Law**

- **Time and manner of required disclosure**

  Prosecution’s failure to provide defendant with evidence that eyewitness selected two “possibles” after viewing photographic array until six days before witness testified did not deny defendant fair trial; defendant cross-examined witness about her selection of two “possibles,” but failed to shake her identification of him as assailant.

  4 Cases that cite this headnote

[8] **Criminal Law**

- **Test results; demonstrative and documentary evidence**

  Prosecution was not required to furnish defendant with credit card receipts made during murder victim’s shift at gasoline station on night of her murder, where last of listed purchases was made at least one and one-half hours before murder took place.

  Cases that cite this headnote

[9] **Criminal Law**

- **Discovery and disclosure; transcripts of prior proceedings**

  Trial court’s refusal to allow defendant access to witness’ juvenile conviction record was harmless error, if any, in capital murder prosecution, where Commonwealth brought out on direct that witness had been convicted of 18 felonies.

  4 Cases that cite this headnote

[10] **Jury**

- **View of capital punishment**

  Exclusion of jurors opposed to death penalty in capital murder prosecution did not deny defendant of fair trial.

  1 Cases that cite this headnote


- **Rejection on court’s own motion**

  Trial court had no duty to make sua sponte determination as to whether any prospective jurors in capital murder prosecution had preset standards for opposing death penalty. Sup.Ct.Rules, Rule 3A:14.

  1 Cases that cite this headnote

[12] **Jury**

- **Punishment prescribed for offense**

  Prospective juror who indicated that execution was appropriate punishment if prosecution met criteria for execution was not required to be stricken for cause from jury in capital murder prosecution, where juror stated that he was capable of following instructions that were given.

  1 Cases that cite this headnote

[13] **Jury**

- **Weight and effect of evidence**

  Prospective jurors who indicated during voir dire that they “wanted” or “expected” defendant to testify were not subject to per se exclusion from jury in capital murder prosecution.

  2 Cases that cite this headnote
Jury

Pretrial publicity

Prospective juror who read newspaper article which mentioned unrelated charge against defendant was not required to be stricken for cause, where juror only remembered that article stated that defendant was going to represent himself.

Cases that cite this headnote

Criminal Law

Homicide, assault, and kidnapping

Witness in capital murder prosecution who allegedly sold murder weapon to defendant had source of identification independent of uncounseled lineup to remove any taint resulting therefrom.

1 Cases that cite this headnote

Criminal Law

Photographs and Drawings

Photographs and drawings

It is not impermissible per se for witness to be shown photo array before attempting to identify suspect in lineup or accused at trial.

Cases that cite this headnote

Criminal Law

Prior confrontation in general

Witnesses' identification of defendant at preliminary hearing in which defendant was only person dressed in prison garb did not taint witnesses' in-court identifications of defendant in capital murder prosecution so as to render in-court identifications inadmissible.

3 Cases that cite this headnote

Costs

Expert witnesses or assistance in general

Indigent defendant accused of capital murder was not entitled to court appointment of expert to aid defense in explaining to jury "tricks of the mind" employed by police which allegedly tainted witnesses' in-court identification of defendant.

Cases that cite this headnote

Criminal Law

Impeaching evidence

Defendant was not entitled to continuance on last day evidence was taken in guilt phase of capital murder trial in order for defendant to subpoena information for impeachment of witness.

Cases that cite this headnote

Criminal Law

Discretion of court

Whether continuance should be granted is matter within trial court's discretion.

Cases that cite this headnote

Robbery

Instructions

Defendant charged with robbery was not entitled to instruction that jury was required to find that currency was taken by defendant, where, if jury believed that defendant murdered clerk, it could not find element of contemporaneous robbery by defendant lacking.

Cases that cite this headnote

Criminal Law

Degree of proof

Where evidence is circumstantial, it must be consistent with guilt and inconsistent with innocence, and must point unerringly to defendant as guilty party.
362 S.E.2d 650

Cases that cite this headnote

[23] **Homicide**  
✧ Relation between predicate offense or conduct and homicide  
**Homicide**  
✧ Miscellaneous particular circumstances

Homicide  
✧ Presence at scene of crime

Conviction for capital murder in commission of robbery was supported by evidence that defendant was at scene of crime on night in question, defendant's gun was murder weapon, weapon was placed against store clerk's head when fatal shot was fired, and robbery took place contemporaneously with murder.

1 Cases that cite this headnote

[24] **Homicide**  
✧ Robbery

Where murder and robbery are closely related in time, place, and causal connection, they become parts of single criminal enterprise.

Cases that cite this headnote

[25] **Constitutional Law**  
✧ Sentencing and punishment  
**Sentencing and Punishment**  
✧ Matters relating to racial or other prejudice

Imposition of death penalty for black defendant who was found guilty of murdering white victim did not violate defendant's equal protection rights. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[26] **Sentencing and Punishment**  
✧ Determination and disposition

Prosecution's use, in sentencing phase of capital murder prosecution, of evidence that defendant had earlier shot witness four times did not require new sentencing hearing due to fact that witness had only been shot two times.

Cases that cite this headnote

[27] **Sentencing and Punishment**  
✧ Dangerousness  
**Sentencing and Punishment**  
✧ Sufficiency

Finding that defendant convicted of capital murder in commission of robbery was “dangerous” so as to justify imposition of death penalty was supported by evidence that defendant had been convicted of 27 prior offenses, and that present offense indicated that defendant killed victim in cold blood for no other reason than to permanently seal lips of potential witness. Code 1950, §§ 19.2–264.2, 19.2–264.4, subd. C.

7 Cases that cite this headnote

[28] **Criminal Law**  
✧ Validity and sufficiency, particular cases  
**Sentencing and Punishment**  
✧ Counsel

Defendant was not denied fair trial due to fact that he chose to represent himself, and imposition of death penalty thus did not constitute cruel and unusual punishment, where defendant did creditable job in representing himself in trial court, trial judge gave defendant great leeway in all aspects of trial, court appointed standby counsel, provided defendant with private investigator, and provided him with expert in firearms, and prosecutor took no advantage of fact that defendant was representing himself. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote
Sentencing and Punishment

Killing while committing other offense or in course of criminal conduct

Imposition of death penalty following defendant's conviction for capital murder in commission or robbery was not excessive in comparison with similar cases. Code 1950, § 17–110.1, subd. E.

2 Cases that cite this headnote

Attorneys and Law Firms

**652  *312 Deborah C. Wyatt (Gordon & Wyatt, Charlottesville, on briefs), for appellant.


*307 Present All the Justices.

Opinion

CARRICO, Chief Justice.

Indicted for robbery, capital murder in the commission of robbery, and use of a firearm while committing robbery, Richard Townes, Jr., elected to act as his own counsel.

In the guilt phase of a bifurcated proceeding conducted pursuant to Code § 19.2–264.3, a jury convicted Townes of all three offenses and fixed his punishment at twenty years’ imprisonment on the robbery charge and two years' imprisonment on the weapons charge.

In the sentencing phase, the jury found there was a probability Townes would commit criminal acts of violence that would constitute a continuing threat to society and fixed his punishment on the murder charge at death. After considering the report of a probation officer, the trial court sentenced Townes to the punishment fixed by the jury in its three verdicts.

Townes appealed his non-capital convictions to the Court of Appeals. Pursuant to Code § 17–116.06, we certified those convictions to this Court (Record No. 860794) and consolidated them with Townes' appeal of his murder conviction and the automatic death sentence review mandated by Code § 17–110.1 (Record No. 860793).

After Townes' capital murder conviction reached this Court, we wrote him indicating our belief that he needed the assistance of counsel in the preparation and filing of his brief and in arguing his case before this Court. He responded with a motion in which he asserted his competence and desire to continue representing himself, but, “with grave reservations,” he moved for the assistance of counsel and asked that we appoint Deborah C. Wyatt of Charlottesville. We complied with the request, and Ms. Wyatt has represented Townes ably throughout these appellate proceedings.

**653 FACTS

The victim, Virginia Goebel, was employed as a cashier at the Gulf Majik Market on Indian River Road in the City of Virginia Beach. She worked the night shift, and on April 13, 1985, reported to work at 9:30 p.m. The person she relieved left at 10:00 p.m., and thereafter she was on duty alone. She was observed working behind the cashier's counter about 1:15 a.m. by a Virginia Beach policeman on routine patrol. Another policeman, William C. Meador, drove through the Majik Market parking lot about 2:00 a.m., and Goebel waved to him from the store.

Dorothy Moore, who patronized the Majik Market two or three times a week, arrived at the store about 2:00 a.m. on her way home from work. Goebel was behind the counter, and Moore chatted with her briefly. Moore thought Goebel was “acting really strange, nervous.”

Moore walked to the rear of the store to get a soft drink and was startled by a man standing “in the back corner ... just watching,” with his arms crossed “[l]ike [he had] something in his hand.” He gave Moore “this smile,” but did not speak. She obtained a bottle or can of Coca Cola and proceeded to the cashier's counter. After paying Goebel for her soft drink, Moore asked Goebel whether she was “sure everything [was] okay.” Although “acting scared,” Goebel replied she was “fine” and told Moore to leave because she needed “to lock the doors.” ¹
Moore left the store and went to her car. As she pulled out of the parking lot, she observed that Goebel was still standing behind the counter but that the man who had startled Moore had moved to the front of the store and was “looking as [she] was leaving.”

About 4:45 a.m., Officer Meador returned to the Majik Market. As he entered the parking lot, a motorist pulled up to the gas pumps, tried unsuccessfully “to get gas,” and then went into the store. He “came back out” and said to Meador, “[t]here is something inside you ought to see.”

Meador went inside and found Goebel's body lying face down behind the counter in a pool of blood. Meador felt for a pulse, but Goebel's body was cold. On the floor next to the body, Meador found an empty .45 caliber shell casing.

An autopsy performed on Goebel's body revealed that her death was caused by a gunshot wound to her head. A .45 caliber bullet had entered the top of her head, travelled through the middle of her brain, and lodged in her spinal canal, “where the neck joins the thorax in that canal.” The medical examiner opined that Goebel was on the floor, looking down, with her head “a foot and a *314 half to two feet” from the floor, when she was shot. The medical examiner also said that the murder weapon was resting on the victim's head when the fatal shot was fired. The exact time of death could not be determined.

The last sale recorded on the Majik Market cash register for Goebel's shift occurred at 2:43 a.m. The next previous sale was recorded at 2:16 a.m. for $.52, the price of “canned Cokes,” plus tax.

The cash register drawer and the top of a floor safe were open. No paper currency was found in the cash register. An audit of transactions occurring during Goebel's shift established a shortage of $186.13.

On a shelf under the cashier's counter, a detective discovered a number of “drop envelopes” containing paper currency totaling $240. Store policy required that when a number of large bills accumulated in the cash drawer, they should be placed in “drop envelopes” and put in the floor safe. Goebel, however, had difficulty using the safe. She was a heavy woman, weighing 328 pounds, and had to get down on her knees to open the safe. Her body was lying next to the safe, and blood was spattered on the door of an adjoining cabinet.

Dorothy Moore learned of the murder mid-morning of April 14, but she did not contact the police for four weeks. On May **654 29, a detective showed her photographs of six men. She picked two of the men, including Townes, as suspects and told the officer she “could better [make an identification] in a lineup.” On June 5, she attended a live lineup which included Townes and four other men. She made a positive identification of Townes as the man she had seen in the Majik Market on the night of Goebel's murder. Two other employees of the Majik Market identified Townes as a frequent customer of the store.

Townes was also identified as the person who, on April 10, 1985, a few days before the Goebel murder, called at the home of Herman F. Christenbury in response to an advertisement Christenbury had placed in the Tidewater Trading Post for the sale of a Star brand .45 caliber automatic handgun for $215. Townes paid Christenbury in cash and received the gun plus an extra clip, an unusual cleaning rod with a small screwdriver on one end, and an old brown holster.

Townes worked as a laborer on a project being developed in Virginia Beach by DeAnne Company. He lived nearby in an *315 apartment located within a few minutes drive of the Majik Market. On April 15, the Monday after the Goebel murder, Townes arrived late for work. Goebel's brother-in-law worked in the same construction crew as Townes, and the murder was discussed among members of the crew. Townes worked for about an hour and then left, claiming that he had “a rough weekend” and was feeling ill.

George Ponton was another member of the construction crew. On the construction site one day in late April, Ponton observed a gun “in [Townes'] back pants pocket.” The next day, Ponton asked to see the weapon, and Townes handed it to him. It bore the word “Star” on its side. Townes let Ponton fire the gun and offered to sell it to him. Ponton agreed and paid Townes $250 for the gun,
town clips, a cleaning rod, a box of Federal ammunition, a ski mask, and an old brown holster.

Later, Ponton and Gregory Fair, superintendent for the DeAnne Company, fired the gun into a barrel at the jobsite and also at a firing range, using ammunition Ponton had received as part of his purchase from Townes. Ponton saved the empty casings from the firing at the range and took them home.

Officer Russell Mike of the Virginia Beach Police Department owned one of the homes built by DeAnne Company and knew Fair, Ponton, and Townes. In late April 1985, Mike visited the DeAnne Company office. During his visit, Fair showed Mike the gun Ponton had purchased from Townes.

When Townes learned that Ponton had shown the gun to Fair and that Fair had shown it to Mike, Townes became angry. He told Ponton: “You shouldn't show a gun to a white man.”

In early May, Fair found in his office at the construction site “a Jehovah's Witness book ... and a legal book.” With the books was an essay in Townes' handwriting “pertaining to what Jehovah would do to him for murdering somebody.” Fair confronted Townes with the material and told him to “get it off [Fair's] desk and ... off the job.”

On May 15, Officer Mike returned to the DeAnne construction site. Since his earlier visit, he had learned that a .45 caliber weapon had been used in the Goebel murder. He contacted Ponton and told him to get in touch with Detective Thomas A. Baum, who was in charge of the Goebel murder investigation, at a telephone number Mike gave Ponton.

*316 Ponton decided to “hand the gun to the police.” After work on May 15, he went to a telephone outside a 7–Eleven store and was in the process of placing a call to Detective Baum when Townes drove up and blocked Ponton's car in its parking space. Townes asked Ponton if he still had “the gun” and “demanded [it] back.” Ponton attempted to stall, but Townes became “nervous and shaken.” When Ponton asked about the money he had paid for the gun, Townes shoved a bag into Ponton's hand and “took the gun away” from Ponton, along with one clip and the holster. Townes then got in his car and sped off, running a red light. The bag Townes gave Ponton contained a .44 caliber revolver.

**655 After Townes left, Ponton called Detective Baum and arranged to meet him at a fixed location. Ponton gave Baum the .44 caliber revolver and also the empty shell casings he had kept after firing the .45 caliber Star automatic at the firing range.2

Later in the evening, Townes called Ponton and told him that he, Townes, knew Ponton wanted to turn the Star .45 automatic over to the police. When Ponton asked when he would get his gun back, Townes said: “You will get it back as soon as the heat is off.”

Later that same evening, Fair called Townes at the latter's home and discharged him from employment with the DeAnne Company. The next day, Fair saw Townes and demanded the return of some tools. Fair also asked Townes to give him the Star .45. Townes said “he already had gotten rid of it.”

Townes was arrested on May 16 and charged with the offenses of which he was later convicted. With his consent, his car was searched by Detective Baum; hidden in the trunk was a plastic case containing a cleaning rod for .45 caliber weapons.

At the Virginia Beach jail, Townes was placed in a cell block with Dennis Brezler, an acquaintance of some twelve years. They discussed the charges pending against Townes. After two or three conversations in which Townes told differing stories implicating other people, Brezler asked Townes if he “did ... it.” Townes replied, “yes, but ... the Commonwealth's Attorney's case is so weak there is no way they can prove it.” The case was weak, Townes told Brezler, because “[t]hey didn't have any gun.” Townes explained that he had “swapped” the gun with a co- worker in exchange for another weapon. Townes also said the case was weak because he could not have manhandled “a woman that was supposed to have been so big” and because he frequented the Majik Market and his presence there on the night of the murder would not affect the case “very much at all.”
Townes told Brezler he was restless and could not sleep on the night of the murder, so he got out of bed about 1:30 a.m. and went to the Majik Market, where the “occurrence,” meaning “the killing,” took place “around 2:15 or 2:30.” When he returned home, Townes told Brezler, his wife “was sleeping.”

When Brezler was due to be released from jail, Townes asked him to look through the Trading Post in an effort to acquire a Star .45 and “plant it somewhere” near the scene of the crime in an effort to “more or less screw up the Commonwealth's Attorney's case.” For this service, Townes promised Brezler he would be reimbursed for the gun he purchased and paid $200 for “helping ... out.” After he was released from jail, Brezler did not comply with Townes' request but went to the authorities with the information about his conversations with Townes.

John G. Ward, a firearms expert employed by the State at the crime laboratory in Norfolk, compared the empty shell casing found next to Goebel's body with the empty casings Ponton had saved from the firing range and turned over to the police. Ward determined that the casings were all from .45 caliber cartridges manufactured by Federal Cartridge Company and that all had been fired in the same weapon.

Ward also examined the bullet which was removed from Goebel's body with one removed from the barrel into which Fair and Ponton had fired at the DeAnne jobsite. Both bullets were .45 caliber and shared certain characteristics, but Ward could not say conclusively that they were fired from the same gun. In addition, Ward examined the cleaning rod with the screwdriver on one end which Ponton had turned over to the police. Ward said the “screwdriver tip” on the rod was “rather unique.”

PRETRIAL MATTERS

Waiver of Counsel

Initially, the Office of the Public Defender was assigned to represent Townes. Later, **656** the public defender withdrew from the case and the trial court appointed two other attorneys to represent *318* Townes. Then, on November 21, 1985, Townes moved to dismiss his court-appointed counsel and to be permitted to represent himself. The court heard this motion on December 4, 1985, and granted it.

In the hearing on the motion, Townes stated that his desire to represent himself was not “necessarily” because of anything court-appointed counsel had “failed to do” but, rather, because “this [was] more or less a right that [he was] entitled to.” Townes, who was 35 years of age at time of trial, said that he had completed two years of study at Steed College, a “business college” in Staunton.

Townes also stated that while incarcerated on a previous conviction, he was “a law clerk” and had “studied through correspondence ... and secured a two-year certificate in paralegal.” He further said that his I.Q. was 119 and that he had previously represented himself in a habeas corpus proceeding. Townes told the court that he was familiar with the rules of evidence and procedure and that he understood the necessity of contemporaneous objections.

Townes says on appeal that the trial court made “insufficient inquiry into [his] background and knowledge of the full ramifications of his decision for a valid waiver consistent with [Sixth Amendment] guarantees of counsel in this life-or-death case.” Townes cites his failure to object to “many objectionable actions by the Commonwealth” and his lack of knowledge of death penalty procedure as evidence of his inadequacy to represent himself.

[1] We disagree with Townes. In his motion to dismiss and in supporting documents, he cited and showed familiarity with *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which recognized the constitutional right of one accused of a crime to represent himself. That case is itself a lesson in the dangers of pro se representation. Townes also stated that he had been advised of his right to effective assistance of counsel and of the potential pitfalls involved in pro se representation. Yet, Townes said, he knew of no reason to justify denying him the right to defend himself.

During the hearing on the motion, the trial court impressed upon Townes the necessity and desirability of representation by trained counsel, especially where “a person ... is charged with an offense for which the
penalty could be death.” The court also likened an accused representing himself in a criminal case to a medical technician or orderly undertaking to perform a serious *319 surgical operation. While Townes agreed that the technician or orderly should not be permitted to undertake an operation, he insisted upon his right to act as his own counsel.

The court stated that it saw no reason to question Townes’ competence to decide whether to represent himself. The court also stated that Townes seemed to understand “the seriousness of the situation” and the problems he would face “in undertaking to represent himself.” The court then held that, in accordance with “the [Faretta ] decision of the Supreme Court of the United States,” Townes should be permitted to “appear pro se,” with the assistance of standby counsel.

We think the trial court sufficiently inquired “into [Townes’] background and knowledge of the full ramifications of his decision for a valid waiver consistent with [Sixth Amendment] guarantees.” Accordingly, we hold that the trial court did not err in permitting Townes to act as his own counsel.

Even so, Townes says, his pro se representation should at least constitute good cause for excusing his failure to observe the contemporaneous objection requirement of Rule 5:25 with respect to several points he now wants considered. The Supreme Court said in Faretta, however, that the “right of self-representation is not a license” to fail “to comply with the relevant rules of procedural and substantive law.” 422 U.S. at 834–35 n. 46, 95 S.Ct. at 2541 n. 46. And in Church v. Commonwealth, 230 Va. 208, 213, 335 S.E.2d 823, 826 (1985), applying Rule 5:25 and citing Faretta, we said that “[a] defendant who represents himself is no less bound by the rules of procedure and substantive law than a defendant represented by counsel.”

Accordingly, we will not consider those matters to which Townes failed to make proper objection in the trial court. See Delong v. Commonwealth, 234 Va. 357, —, 362 S.E.2d 669, 675 (1987). Included in this category are the following questions, numbered as they are listed in Townes’ opening brief:

11. Whether jurors should have been asked about their ability to apply the reasonable doubt standard and whether a juror who answered negatively should have been excluded for cause.

15. Whether the court erred in excluding evidence that Townes was not eligible for parole.

*320 16. Whether the court erred in failing to instruct the jury that it had unbridled discretion to sentence Townes to life imprisonment.

17. Whether the jury should have been instructed on the lesser-included offenses of felony murder and second degree murder.

20. Whether the prosecution should be dismissed or the convictions reversed and the case remanded because of prosecutorial misconduct in:

a. Making improper use of withhold exculpatory evidence in cross-examination of defense witness Pope.

b. Failing to furnish scientific evidence in the form of photomicrographs.

e. Releasing to the media information prejudicial to the defense.

f. Invading the confidential relationship between Townes and his court-appointed investigator.

21. Whether the prosecutor's closing argument was improper to the extent it represented a “golden rule” argument and constituted a comment upon Townes' failure to testify.

22. Whether the independence of Townes' firearms expert was compromised.

24. Whether the court erred in excluding tape recordings of prior inconsistent statements of prosecution witnesses.

26. Whether instructions defining malice were proper.

27. Whether an instruction on capital murder was incomplete.
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29. Whether the trial court erred in permitting jurors to question witnesses.

Further, Townes seeks to have us consider six questions raised by assignments of error he filed before Ms. Wyatt was appointed to represent him on appeal but not raised in the assignments she filed. She merely lists the questions in the opening brief and states she has set them forth at Townes' request.

[3] We will not consider these questions. Once Ms. Wyatt was appointed to represent Townes, she controlled the case, and it was for her to decide what questions should be raised. In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1987), the question for decision was "whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant." Id. at 746, 103 S.Ct. at 3310.

*321 The Court answered this question in the negative. The Court stated that none of its decisions suggests that an indigent defendant has "a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points." Id. at 751, 103 S.Ct. at 3312. Such a view, the Court observed, "would deserve the very goal of vigorous and effective advocacy that underlies [counsel's duty to support his client's appeal to the best of his ability]." Id. at 754, 103 S.Ct. at 3314.

Jones states the issue in terms of nonfrivolous points. We have examined the six points Townes seeks to have us consider here. All are frivolous. Hence, Jones applies with even greater force to the points Townes wants considered.

Before concluding the discussion concerning waiver of counsel, it would not be amiss to say that Townes did a creditable **658 job in representing himself in the trial court. While, as indicated, he may not have preserved every possible point for appeal, his trial performance was surprisingly competent for one lacking formal legal training.

Denial of Speedy Trial

Townes contends that his conviction should be reversed and the indictments dismissed for violation of his statutory right to a speedy trial. Townes cites Code § 19.2–243, which provides that one accused of a felony shall be forever discharged from prosecution if he is held in continuous custody and not tried within five months of a finding of probable cause. The provisions of this section do not apply, however, to delay caused by a continuance granted on the motion of the accused or by his concurrence in a motion of the Commonwealth, Code § 19.2–243(4), or to delay caused by the unavailability of a material witness due to sickness or accident, Code § 19.2–243(2).

Probable cause in Townes' case was found by the general district court on August 23, 1985, and he has since been held in continuous custody. On October 16, 1985, Townes, then represented by court-appointed counsel, moved for a continuance, which was granted by order entered the same date, and trial of the case was continued to December 4, 1985.

On December 4, 1985, Townes and his court-appointed counsel appeared in court on a number of motions, including a motion by *322 Townes that his counsel be dismissed and that he be allowed to represent himself. The court granted this motion and designated Townes' former counsel as standby counsel. Thereafter, a discussion took place concerning a trial date. Standby counsel suggested March 3, 1986, and everyone indicated assent. Then, on December 23, 1985, an order was entered embodying the actions taken by the court on December 4 and ending with the statement that "the trial of this matter is set for March 3, 1986, on motion of both parties by agreement."

On March 3, 1986, on Townes' motion, the case was continued to March 17. On March 14, the Commonwealth moved for a continuance because Dorothy Moore was ill and scheduled for surgery. Townes opposed the motion, but the court granted it and rescheduled trial of the case for April 22, 1986. Trial commenced on that date.

Townes argues that the first trial date set in his case was March 3, 1986, or some six months and eight days after the district court found probable cause, and that the March 3 date was "already in violation of the statute." Townes says we should ignore the continuance granted October 16,
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1985, on his motion; he claims that when the October 16 motion was granted, no trial date had been set previously and, hence, no continuance cognizable under Code § 19.2–243 occurred.

[4] We disagree with Townes. We think he is chargeable with the period from October 16 to December 4, or one month and 18 days. This had the effect of extending the five-month speedy trial period, which began August 23, 1985, to March 13, 1986, and the granting of Townes' motion for a continuance from March 3 to March 17 extended the allowable period to March 27. Then, if the continuance granted the Commonwealth due to the illness of Dorothy Moore is fully allowed, the period was extended to May 2, past the date Townes' trial began.

Townes argues, however, that a continuance of only fifteen days, or from March 17 to April 1, should have been allowed because of Moore's illness and, hence, that the continuance for one month and five days until April 22 was in violation of Code § 19.2–243. Townes bases this argument on the fact that the prosecutor represented to the trial court when requesting the continuance that Moore would be hospitalized for five days following surgery and required to recuperate at home for one week to ten days. A continuance is allowed under Code § 19.2–243(2) for the illness of a witness, Townes points out, only for the period the witness is “prevented from attending.”

[5] Townes, however, reads the Code section too narrowly. We think the language *659 of the section allows a trial court discretion in determining the length of time a case should be continued due to the illness of a witness. Here, the trial court stated that the period should be reasonable and then sought to determine “the feasible trial date, taking into account the length of anticipated illness of this witness.” We cannot say on this record that the trial court abused its discretion.

[6] But, in any event, another reason compels the conclusion that Townes was not denied his statutory right to a speedy trial. The order of December 23, entered well within the five-month period, expressly states that the March 3, 1986 trial date was set “on motion of both parties by agreement.” This recitation imports verity and reflects judicial action constituting a continuance granted with the concurrence of both the prosecution and the accused. This continuance, from December 4 until March 3, extended the five-month period for three months less one day, or more than enough to satisfy the requirements of Code § 19.2–243 even if we ignore the continuance of October 16, 1985, and allow an extension of only fifteen days for the illness of Dorothy Moore.  

DISCOVERY

Moore's Selection of Two “Possibles”

Townes contends that under the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and this Court's decision in Cox v. Commonwealth, 227 Va. 324, 315 S.E.2d 228 (1984), he was entitled to have the Commonwealth furnish him any exculpatory evidence it had in its possession. Then, citing Lomax v. Commonwealth, 228 Va. 168, 173, 319 S.E.2d 763, 766 (1984), Townes says he was entitled to receive exculpatory evidence in *324 sufficient time to use it “‘to explore and develop ... evidence.’” Yet, Townes complains, although he filed a motion for discovery of exculpatory evidence as early as November 26, 1985, and discovery was ordered December 23, 1985, it was not until the first day of trial on April 22, 1986, that the prosecution gave him information showing Moore had selected two “possibles” in the photoarray of May 29, 1985.

[7] Townes says that the information concerning Moore's selection of two “possibles” was material and that the delay in furnishing it prejudiced his defense. We disagree. In the first place, we question whether the information was exculpatory. As the Attorney General points out, while Moore's dual selection was a tentative identification of Townes, it was not a positive identification of the other person. Furthermore, the jury might well have believed that Moore's action in selecting two “possibles” displayed commendable caution on her part. Indeed, when asked at trial why she selected two photographs, she said it was because she “could better [make an identification] in a lineup rather than from the photos.”

Second, Townes was furnished the information six days before Moore testified.  

This was ample time for Townes to plan how to put the information to the one use for
which it might have been helpful to him—the cross-
examination of Moore. He did cross-examine Moore
about her selection of two “possibles,” but he failed to
shake her identification of him as the person she saw in the
Majik Market on the night of Goebel's murder.  

**660 Crime Scene Evidence**

Townes complains that the prosecution also failed to
furnish until the first day of trial exculpatory evidence in
the form of seven credit card receipts found at the crime
scene for purchases of gasoline made during Goebel's
shift on the night of her murder.  *325 Townes says
he could have used the names and addresses of the
purchasers as “potential witnesses who may or may not
have been present during the course of Mrs. Moore's
alleged presence.”

[8] The record reveals, however, that Townes was
given information concerning the credit card purchases
well in advance of the first day of trial. Furthermore,
the representation was made to, and accepted by, the
trial court that the last of the seven purchases was
made at 12:20 a.m. during Goebel's shift, or about one
and one-half hours before Moore said she arrived at the
Majik Market; on this basis, the trial court found
that the information concerning the credit card receipts
“would have [had] no exculpatory value whatsoever” to
Townes. This finding was plainly correct. See *Lowe v.
Commonwealth*, 218 Va. 670, 678–79, 239 S.E.2d 112, 117–

**Juvenile Court Records**

Townes sought by way of a motion for discovery to
have the Commonwealth provide him with records of the
Juvenile and Domestic Relations District Court of
Virginia Beach pertaining to Dennis Brezler and Dorothy
Moore. Townes wanted Brezler's conviction record in
Juvenile Court and certain show cause orders entered
against Moore for “failure to live up to [the] terms and
conditions ... of suspended sentence relating to payment
or repayment ... of funds.” Townes says he needed these
records to show that Moore and Brezler had agreements
with the Commonwealth in regard to their testifying
against Townes.

[9] The trial court held that Brezler's conviction record
as a juvenile would be inadmissible and that any
convictions as an adult would be included on the
“overall criminal record” already provided Townes
by the Commonwealth. The court further held that
the show cause orders issued against Moore would be
inadmissible. Concerning the possibility of agreements
involving Moore's and Brezler's testimony, the court
stated it had previously directed the Commonwealth to
provide Townes with information of any such agreements.
The court denied Townes' motion for discovery of the
court records. We do not think this denial constituted
reversible error.

GUILT PHASE

**MATTERS PERTAINING TO THE JURY**

*The Jury Selection Process*

Townes filed a motion in which he attacked the jury
selection process in the City of Virginia Beach. In
the motion, Townes alleged that “the jury pools are
significantly underrepresentative of Blacks, young people,
and other cognizable social groups.”

In argument on the motion, Townes stated there were
227,454 whites and 26,266 blacks in the City of
Virginia Beach, according to the 1980 census, and yet
blacks had not had “a chance to serve as jurors.” Townes
also told the court that the jury list for his trial contained
the names of 68 persons 55 years of age or older and 21
persons aged from 25 to 30.

Noting that jurors in the city and throughout the state
are selected at random from voting lists, and, therefore,
the racial or age makeup of any given jury panel
might or might not reflect the racial or age mix of the
population, the trial court ruled that Townes had failed
to show any constitutional basis for invalidating the jury
selection process. Accordingly, the court denied Townes' motion.

We find no error in the trial court's ruling. Townes failed
to make a prima facie showing of systematic exclusion
of members of distinctive social groups from juries in

Virginia Beach, and, hence, was not entitled to any relief. 


*327 Striking of Prospective Jurors 
Opposed to the Death Penalty

Townes argues that the trial court should not have allowed prospective jurors to be questioned about their opposition to the death penalty. He also argues that the court should not have struck for cause any prospective juror who indicated opposition to the death penalty, even if the opposition was unalterable.

[10] Townes acknowledges that the Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and this Court in Pruett v. Commonwealth, 232 Va. 266, 277–78, 351 S.E.2d 1, 8 (1986), cert. denied, 482 U.S. 931, 107 S.Ct. 3220, 96 L.Ed.2d 706 (1987), expressly rejected the arguments he now advances. Yet, he says, he continues to believe that the exclusion of jurors opposed to the death penalty is discriminatory and produces juries less fair and less reliable than juries in non-capital cases. He offers us, however, no persuasive reason to change our views on the subject, and we reject his arguments. See Delong, 234 Va. at — , 362 S.E.2d at 670–71.

Alternatively, Townes argues that we should remand his case for a hearing to determine whether the Commonwealth's Attorney improperly used peremptory strikes to exclude members of the jury who voiced “mild opposition” to the death penalty. Furthermore, in Brown v. Commonwealth, 212 Va. 515, 517, 184 S.E.2d 786, 787–88 (1971), we rejected the argument that a prosecutor may not use peremptory strikes “to eliminate ... veniremen who [have] any reservations about or scruples against the death penalty.”

*328 Preset Standards for Imposing the Death Penalty

[11] Townes argues that the trial court sua sponte should have determined whether any prospective jurors had preset standards for opposing the death penalty. Townes, however, fails to point to any case or rule which imposes upon a trial court the duty to make such an inquiry. The court complied with the provisions of Rule 3A:14 in conducting the voir dire of prospective jurors, and that is all the law requires.

Prospective Juror Castagna

Townes argues that the trial court should have excluded for cause prospective juror Richard Castagna, who ultimately was selected to serve as an alternate juror. In his voir dire responses, Castagna indicated **662 a firm belief in the death penalty. In response to one question, Castagna told Townes: “If the evidence ... proves that you meet the [criteria] for execution and you [are] found guilty, there would be no question that [execution] is the appropriate punishment.”

[12] Upon further questioning, however, Castagna stated that his personal belief was “a separate issue” and that he was capable of following “the instructions that are given.” The trial court found that Castagna “could and would follow the Court's instructions ... and ... would fairly consider and vote for the sentence of life imprisonment if upon those instructions he felt that was the appropriate verdict.” We find no error in the trial court's refusal to strike Castagna for cause.

Voir Dire Questions Regarding 
Defendant's Failure to Testify

Townes contends that the trial court should have struck for cause four prospective jurors who indicated in response to questions asked by Townes on voir dire that they “wanted” or “expected” him to testify. In
response to further questioning by the trial court and the prosecutor, all four stated they would decide the case on the evidence presented and the law as enunciated in the court's instructions. Specifically, each responded affirmatively when asked whether he or she understood that Townes did not have to testify and that his failure to testify could not be considered by the jury.

*329 [13] It would be unrealistic to think that jurors do not notice when defendants fail to testify. See Carter v. Kentucky, 450 U.S. 288, 301 n. 18, 101 S.Ct. 1112, 1120 n. 18, 67 L.Ed.2d 241 (1981). And it is not surprising that jurors would want or expect a defendant to testify; any conscientious juror naturally would want all the help he or she could get in deciding a case. It should not be grounds for a per se exclusion, therefore, when prospective jurors on voir dire indicate their wants or expectations in this respect.

The real test is whether jurors can disabuse their minds of their natural curiosity and decide the case on the evidence submitted and the law as propounded in the court's instructions. With respect to the four prospective jurors involved in this challenge, it is clear they fully satisfied this test. Hence, the trial court did not err in refusing to strike them for cause.

Newspaper Publicity—Effect on Prospective Juror Cromwell

On the second day of trial, while the court was still engaged in selecting a jury, The Virginian Pilot, a Norfolk newspaper, published an article about Townes and his case. The article mentioned a charge against Townes of possession of a firearm by a convicted felon, a charge which had been severed from the capital murder trial.

*14 One prospective juror, Fremont Cromwell, admitted he had read the article, but he said “the only thing” he remembered was “the defendant was going to represent himself.” Townes contends the trial court should have stricken Cromwell for cause. We disagree. The trial judge noted that the reference in the article to a prior conviction was obscure, and he satisfied himself that Cromwell remembered nothing more about the article than the fact Townes “was going to represent himself.” In these circumstances, it was not error to refuse to exclude Cromwell for cause.

SUPPRESSION OF IDENTIFICATION TESTIMONY

Townes contends the trial court erred in refusing to suppress the identification testimony of Dorothy Moore and Herman Christenbury. Townes says the in-court identification by these witnesses was tainted by undue suggestiveness and irregularities in pretrial identification procedures.

*330 Townes first argues the identification process was tainted because he did not have counsel present when Moore identified him in the lineup conducted on June 5, 1985, or when Herman Christenbury identified him in a lineup conducted on August 21, 1985. The record shows affirmatively, however, that the public defender, who was then representing Townes, was present at the June 5 lineup; the public defender said he was present, and Detective Baum confirmed his presence. The only contrary indication is Moore's testimony that only she and Detective Baum were in the room when she identified Townes in the lineup. But she also said the door “was open when the lineup” was held and that there were people “looking in the door.”

[15] With respect to Christenbury's lineup identification, the trial court found that Townes did not have counsel present, and the court suppressed the evidence of that identification. Townes argues that the court should have gone further and suppressed Christenbury's in-court identification as well. The court found, however, that Christenbury's in-court identification derived from a source sufficiently independent of the uncounseled lineup to remove any taint resulting therefrom. We think that the record fully supports this finding and that it is also supported in law. See United States v. Wade, 388 U.S. 218, 241, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967).

Townes also argues that Moore's in-court identification was tainted because she picked two suspects, including Townes, as “possibles” in the photoarray of May 29, 1985, but of the two only Townes appeared in the live lineup on June 5. Townes cites Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969), for the
proposition that where multiple identification procedures are employed and the defendant is the only “overlapping face,” an unduly suggestive identification occurs.

Foster, however, is inapposite. There, three live confrontations took place. In the first, the accused “stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber.” Id. at 443, 89 S.Ct. at 1128. When the lineup did not produce a positive identification, the witness was allowed to view the accused in a one-to-one confrontation. Still without a positive identification, the police arranged a third lineup in which the accused was the only person who had also participated in the first lineup. The Court found the procedure unfair, judged by the totality of the circumstances. Id. at 442, 89 S.Ct. at 1128. It is not a denial of due process, however, that an accused *331 happens to be “the only individual to appear in both [a] photospread and [a] line-up.” United States v. Portillo, 633 F.2d 1313, 1324 (9th Cir.1980).

Townes complains that the in-court identification by Moore and Christenbury was also tainted because Moore was shown a photograph of the June 5, 1985 lineup about two weeks before the March 3, 1986 trial date and Christenbury was shown a photoarray which included Townes' photo before the August 21, 1985 lineup. Townes was unable, however, to point to any evidence that the police prompted either witness to pick Townes as the person each had observed at different times in the scenario of this case. It is not impermissible per se for a witness to be shown a photoarray before attempting to identify a suspect in a lineup or an accused at trial. See Bowring v. Cox, 320 F.Supp. 688, 690 (W.D.Va.1970).

Townes' final identification complaint is that undue suggestiveness pervaded a confrontation at his preliminary hearing when, as the only person dressed in prison garb, he was identified by Moore and Christenbury. Townes acknowledges that the trial court suppressed the evidence of the preliminary hearing identification, but he argues that the incident contributed to a totality of circumstances which produced a tainted in-court identification.

The criteria for determining whether a particular identification is reliable were listed by the Supreme Court in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972):

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

*664 Id. at 199–200, 93 S.Ct. at 382. See also McCary v. Commonwealth, 228 Va. 219, 233, 321 S.E.2d 637, 644 (1984). Considering these criteria and judging the incident at the preliminary hearing in the totality of the circumstances present in this case, we have no difficulty in saying that the incident was insufficient to taint Moore's and Christenbury's in-court identification of Townes. See Delong, 234 Va. at ——, 362 S.E.2d at 674.

*332 Townes contends further that once the trial court refused to suppress the identification testimony of Moore and Christenbury, the court should have appointed an expert to aid the defense in explaining to the jury “such tricks of the mind as were or might have been employed by the police in this case.” Townes grounds this contention upon Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[18] Ake requires that the state provide an indigent defendant in a capital case the assistance of a competent psychiatrist when the defendant makes “a threshold showing to the trial court that his sanity is likely to be a significant factor in his defense.” Id. at 82, 105 S.Ct. at 1097. Ake does not deal with identification testimony or with what Townes calls an “identification expert,” and we cannot find in the Supreme Court's opinion any requirement that the state provide an indigent defendant the assistance of such an expert. “[T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is
DENIAL OF SUBPOENA

On May 2, 1986, the last day evidence was taken in the guilt phase of the trial, Townes advised the court he had received information which he thought would affect the credibility of Lauren Ponton, who had testified earlier as a witness for the Commonwealth. Lauren Ponton was the wife of George Ponton, who had testified for the Commonwealth about his dealings with Townes concerning the Star .45 caliber weapon.

Townes attempted to cast suspicion upon George Ponton in the murder for which he, Townes, was on trial. During cross-examination of Ponton, Townes brought out that a larger-than-usual deposit had been credited to Ponton's bank account on April 15, the Monday following Goebel's murder. Ponton explained the extra money by saying his wife had worked overtime.

Lauren Ponton testified that her paycheck had been included in the deposit credited April 15, but she said the deposit had actually been made late on Friday, April 12, before the Saturday night murder of Goebel. She stated that according to bank procedures, the deposit was not credited until the next banking day. She said she received the paycheck for a new job she commenced March 23, 1985.

Townes represented to the court that the information that he had received would show Lauren Ponton had commenced her new job in January 1985, rather than March. The employment records of the firm which employed Lauren Ponton were in Richmond. Townes asked the court to issue a subpoena to compel production of the records and the appearance of their custodian. The court denied the request, stating it was not practicable "[t]o subpoena someone and expect them to arrive here from Richmond in time to testify in this trial today." The court agreed to hear the witness if he or she arrived before the evidence was concluded "in this case today."

We do not think the trial court erred in denying Townes' request. Obviously, to grant the request would have required a continuance on the last day evidence was to be taken in the case. Whether a continuance should have been granted was a matter within the trial court's discretion. Parish v. Commonwealth, 206 Va. 627, 631–32, 145 S.E.2d 192, 195 (1965). Considering the lateness of Townes' request and the questionable value of the information he sought, we find no abuse of discretion.

**665 ROBBERY INSTRUCTION

Townes contends that the trial court's instruction defining robbery was incomplete and defective. The instruction stated that the defendant was charged with robbery and that the Commonwealth must prove beyond a reasonable doubt:

(1) That the defendant intended to steal; and
(2) That United States Currency was taken; and
(3) That the taking was from Virginia Goebel or in her presence; and
(4) That the taking was against the will of the owner or possessor; and
(5) That the taking was accomplished by the threat or presenting of a firearm.

Townes says that "[t]o have been sufficient, the instruction should have read: 'That United States Currency was taken —by defendant [or on his behalf].' " Under the instruction as granted, Townes argues, the jury could have found him guilty of robbery if it believed that he went to the Majik Market intending to commit robbery and that he killed Goebel, but that he fled without taking anything and someone else later entered and took the money.

The difficulty with this argument is that it is not supported by any evidence. Only speculation would lead a jury to adopt the scenario Townes suggests, and there was no room in this case for speculation. Under the evidence and the robbery instruction in question, if the jury believed Townes murdered Goebel, it could not "find the element of contemporaneous robbery [by Townes] lacking." LeVasseur v. Commonwealth, 225 Va. 564, 590, 304 S.E.2d 644, 658 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).
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SUFFICIENCY OF THE EVIDENCE TO CONVICT

Townes contends that the evidence was insufficient as a matter of law to sustain his convictions. He acknowledges that the evidence, viewed in the light most favorable to the Commonwealth, indicated that he was at the scene of the crime on the night of the murder and that it was his weapon which killed the victim. The evidence was insufficient, however, he says, to show that he was the triggerman and that, if he was, the killing was with premeditation. And there was no evidence at all, Townes maintains, that he took any money from the Majik Market and, hence, nothing to connect him to the robbery.

We agree with Townes that where the evidence is circumstantial, it must be consistent with guilt and inconsistent with innocence and must point unerringly to the defendant as the guilty party. *335* Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983). We disagree with Townes, however, that his convictions are based wholly upon circumstantial evidence. While there was considerable circumstantial evidence presented to the jury, there was also direct evidence. And we think the evidence as a whole is sufficient to sustain Townes' convictions.

Townes concedes, as, indeed, he must, that the evidence placed him at the scene of the crime on the night in question and established that it was his gun which killed Goebel. We think the evidence also permitted the jury to find that it was Townes who fired the fatal shot. Although other evidence supports this finding, the uncontradicted testimony of Dennis Brezler was sufficient by itself to identify Townes as the triggerman.

The evidence also supports the jury's finding that the killing was deliberate and premeditated. The testimony of the medical examiner showed that the weapon was placed against Goebel's head when the fatal shot was fired. This alone, although there is more, is enough to establish that the shot was fired deliberately and with premeditation.

Further, we are of opinion that the evidence justified the conclusion that the robbery took place contemporaneously with the murder. As indicated in our earlier discussion concerning the court's instruction on robbery, only speculation supports Townes' theory that he left the Majik Market without taking anything and that someone else later entered the store and stole the money an audit showed was missing. **666** The verdicts in this case are supported by evidence rather than by speculation, bringing them within the rule that where a murder and a robbery are closely related in time, place, and causal connection, they become parts of a single criminal enterprise. *LeVasseur*, 225 Va. at 590–91, 304 S.E.2d at 658; *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 542–44, 273 S.E.2d 48, 54–56 (1980), cert. denied, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

SENTENCING PHASE

Constitutionality of Death Penalty Statutes

Townes acknowledges that this Court has rejected all challenges to the constitutionality of Virginia's death penalty statutes. *See Pope v. Commonwealth*, 234 Va. 114, 121–22, 360 S.E.2d 352, 357 (1987) (listing cases rejecting constitutional challenges). See also *Delong*, 234 Va. at —, 362 S.E.2d at 674. Townes states, however, that he “wishes to continue to claim that the death penalty, particularly by electrocution, is cruel and unusual punishment,” so that he will not be deemed to have waived the point in the event the Supreme Court or this Court reverses its rulings. We will adhere to our rulings, but permit Townes to save the point.

Townes also contends that “the death penalty as presently administered constitutes a violation of equal protection because of the greater likelihood that the penalty will be sought and, if sought, administered” when, as here, the victim is white and the defendant is black. Townes recognizes that this sort of challenge was rejected by the Supreme Court in *McCleskey v. Kemp*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and we reject it here.

*336* Use of Perjured Testimony

Townes contends that the Commonwealth knowingly used perjured testimony in the sentencing phase of this case and, therefore, that he is entitled to a new sentencing hearing. Townes' contention involves the
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Townes claims Beasley testified in the sentencing phase that during a robbery in 1976, Townes “shot him in the back four times.” After Townes was sentenced in this case, he secured medical records which showed that Beasley had been shot only twice, once in the wrist and once in the shoulder.

Townes says Beasley's false testimony was material in two respects. First, shooting someone in the back is considered more reprehensible than a face-to-face shooting. Second, the testimony tainted the whole story Beasley told the jury. Townes maintains there is a reasonable probability that his sentence would have been different without Beasley's false testimony.

We disagree with Townes. Indeed, we think he strives mightily to make a mountain out of a molehill.

In the first place, Beasley did not testify he had been shot in the back. Beasley was a taxicab driver, and Townes and another person accosted him with a sawed-off shotgun and forced him into the rear of his cab. After driving around the Norfolk area for several hours, the assailants took Beasley to a field in Virginia Beach and ordered him out of the cab. Beasley testified in the court below that when he got out, “the one behind me shot me.” Hence, the statement that Beasley was “shot ... in the back” comes out of Townes' mouth, not Beasley's.

Beasley did testify he had been shot four times. While this was not altogether true, the medical records, secured after the trial below, showed that Beasley had suffered four wounds, consisting of two entrance wounds and two exit wounds.

Furthermore, there is no evidence the prosecutor in the trial below knew of the discrepancy between Beasley's testimony that he had been shot four times and the facts set forth in the medical records Townes secured after trial. The 1976 indictment charging Townes with maiming Beasley and the order of conviction were introduced into evidence by the prosecution in the trial below, and they contain no information concerning the number of times Beasley was shot. When Townes raised the question of perjured testimony, the prosecutor represented to the court that police reports of the 1976 crime showed only that Beasley had been “shot at a number of times.”

In our opinion, there is little likelihood that knowledge of the alleged perjury would have affected the jury in its determination of the appropriate sentence in this case. Townes, who entered a plea of guilty to the 1976 charge, did not cross-examine Beasley in the trial below or otherwise question the seriousness of the 1976 offense.

Under the circumstances, we think it was wholly immaterial that Beasley was not actually shot four times. The facts remain that he was shot twice, suffering four wounds, and left for dead in a ditch. The parting remark of one of the assailants was that “[t]here's a bunch of snakes in that hole” and they are “[g]oing to eat him.”

**Future Dangerousness**

Under Code §§ 19.2–264.2 and –264.4(C), the death penalty may not be imposed unless the Commonwealth proves beyond a reasonable doubt, and the court or jury finds, (1) that there is a probability the defendant would commit criminal acts of violence which would constitute a continuing serious threat to society, or (2) that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. We have termed these criteria “dangerousness” and “vileness.” Smith v. Commonwealth, 219 Va. 455, 477, 478, 248 S.E.2d 135, 148, 149 (1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

As noted previously, the jury based its sentence of death upon the “dangerousness” predicate. Townes contends the Commonwealth failed to prove “dangerousness” beyond a reasonable doubt.

The evidence in the sentencing phase shows that Townes had been convicted in January 1975 of twenty-two offenses involving forgery and uttering, three robbery offenses and one firearms offense in May 1976, an additional robbery and a maiming offense in August 1976, and a felony escape offense in February 1977.
The Commonwealth presented the testimony of Arthur Beasley, previously outlined in this opinion, concerning his robbery and maiming on January 9, 1976, by Townes and an accomplice. The Commonwealth also called two former police officers who testified they had participated in a stake-out of a Norfolk theater on January 24, 1976, in an area where “[t]here were robberies going down.” Townes was apprehended after robbing the theater cashier at gunpoint.

Townes says that the testimony of Beasley and the two police officers “added nothing but prejudice and passion to the evidence.” He states further that when the record is stripped of this passion and prejudice, all that remains are “convictions for crimes almost entirely over ten years old, almost all for forgery and uttering, only one involving alleged injury to a person, and nothing else about the man to be sentenced.”

Townes would have us ignore, however, that his lack of criminal activity after 1976 resulted not from any reformation on his part but from his incarceration in the Virginia State Penitentiary until October 1983. Even while in the penitentiary, his conduct was not praiseworthy; he was convicted of escape in 1977.

In addition to the evidence of Townes’ past criminal conduct, the jury was entitled to consider the circumstances surrounding his robbery and murder of Goebel in deciding whether it was probable he would commit criminal acts of violence in the future. Code § 19.2–264.4(B). The circumstances surrounding this latest offense **668 in Townes’ saga of crime displays a person who killed in cold blood, probably for no other reason than to seal permanently the lips of a potential witness. The combination of this extremely violent act with the prior acts of violence committed by Townes proves beyond a reasonable doubt the “dangerousness” predicate upon which the jury based its sentence of death.

**Totality of Circumstances**

Townes contends that his convictions and sentences resulted from an unfair and unreliable trial. He states that numerous errors were committed during the trial and, in addition, he represented himself. He says that while he may not have preserved *339 some errors by failing to object, all the errors he has tried to assert form the totality of circumstances of this case and demonstrate the unfairness and unreliability of his trial. To impose the death penalty after such an unfair proceeding, Townes concludes, would constitute cruel and unusual punishment.

[28] We disagree with Townes. While he might have had a better trial had he not represented himself, we think he had a fair trial. As noted previously in this opinion, Townes did a creditable job in representing himself in the trial court. The trial judge was patient and considerate of Townes and gave him a great deal of leeway in all aspects of the trial. The court also appointed standby counsel for Townes, provided him with a private investigator, and furnished him with an expert in firearms. The prosecutor was also considerate of Townes and took no advantage of the fact he was representing himself.

Townes did fail to preserve a number of errors. Experienced lawyers sometimes make the same mistake in trial, but this does not necessarily mean the trial is unfair or unreliable. Besides, Townes’ decision to represent himself was his own, made freely and voluntarily, and if he made mistakes in not objecting on occasion, he has no one to blame but himself.

We have found no reversible error in any assignment of error previously discussed. We now find that the cumulative effect of the alleged errors did not render Townes’ trial unfair or unreliable.

**PROPRIETY OF THE DEATH SENTENCE**

Under Code § 17–110.1(C), this Court, in addition to considering the errors assigned on appeal, must determine (1) whether “the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor,” and (2) whether the sentence is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” Under Code § 17–110.1(D), “[i]n addition to the review and correction of errors in the trial of the case,” this Court may commute the death sentence to imprisonment for life.
Passion and Prejudice

As noted in the discussion on “dangerousness,” Townes says that the testimony of Arthur Beasley injected passion and prejudice into the case. We do not think, however, that Beasley's testimony had this effect or that any other incident or “arbitrary factor” influenced the jury in the sentence it fixed.

Excessiveness and Disproportionality

Townes argues that neither his crime nor his record supports the death penalty when compared with other cases. Accordingly, Townes maintains, his sentence ought to be commuted to life imprisonment.

In determining in a given case whether a sentence of death is excessive or disproportionate, we inquire whether “juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.” Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). To aid us in making this determination, we have accumulated “the records of all capital felony cases ... as a guide in determining whether the sentence imposed in the case under review is excessive.” Code § 17–110.1(E). Where, as here, the basis of imposition of the death sentence is “dangerousness,” we give particular emphasis to those cases where the death penalty was based upon the same predicate. Peterson v. Commonwealth, 225 Va. 289, 301, 302 S.E.2d 520, 528, cert. denied, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983).

[29] Considering both Townes and the crime he committed, and comparing his case with similar cases, we are satisfied that juries in this jurisdiction generally approve the supreme penalty for criminal conduct comparable to Townes'. Indeed, this case closely resembles Peterson, supra, and Pope v. Commonwealth, supra.

Finding no error in the record or any reason to commute the death sentence, we will affirm the judgments of the trial court.

Affirmed.

All Citations

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Footnotes

1 The Majik Market remained open twenty-four hours a day, but night employees were authorized to lock the doors and transact business through a window at the front of the store.

2 The next day, Ponton turned over to the police the extra .45 caliber clip, the ski mask, and the cleaning rod he had received from Townes.

3 Townes argues that he did not agree to the order of December 23, 1985, but, rather, that he signed it as “[s]een and objected to.” As noted in the text, however, the order of December 23 incorporated a number of rulings of the trial court, some granting and others denying relief Townes had requested. Because of the general nature of Townes’ objection, we will recognize it as applicable only to the relief denied. Furthermore, the recital in the order of December 23, 1986, with respect to agreement on the trial date, not only imports verity but also is supported by the record.

4 The record indicates that Townes may have had the information before it was furnished to him by the prosecution on April 22, 1986.

5 Townes says he was also prejudiced by the delay in securing the information because he may have presented it to the trial court in the hearing on his motion to suppress Moore's identification testimony. But, in a hearing on the same subject on the first day of trial, the court stated that the information "would have made no difference" on the outcome of the motion to suppress "as [the information] goes [only] to the weight of [Moore's] testimony."

6 This holding may have been erroneous in light of Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). There, the Supreme Court ruled that a defendant's right of confrontation is paramount to the state's policy of protecting juvenile offenders and that a defendant may cross-examine a witness about his juvenile record in an effort to show bias. Although we do not know whether Brezler had a record in juvenile court and, if so, whether it reflected misconduct as a juvenile, we will assume those facts and also assume, without deciding, that it was error to deny Townes the right to
cross-examine Brezler about his juvenile record. Any such error, however, was harmless beyond a reasonable doubt. See *Fulcher v. Commonwealth*, 226 Va. 96, 99, 306 S.E.2d 874, 876 (1983) (applying *Davis v. Alaska*). The Commonwealth brought out on Brezler’s direct examination that he had been convicted of eighteen felonies involving forgery and uttering and four other felonies involving possession of drugs, possession of drugs with intent to distribute, unlawful wounding, and burglary. If the jury chose to believe Brezler despite that sort of record, as it was entitled to do, the addition of a juvenile record could have made no difference.

Townes contends the trial court erred in denying him a new trial on the basis of after-discovered evidence when he brought to light the medical records which showed Beasley had lied in the sentencing phase of the trial below. Because, as we have noted in the text, there is little likelihood that knowledge of the alleged perjury would have affected the jury in its determination of sentence, the trial court did not err in denying Townes a new trial.