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RACIAL DISCRIMINATION IN THE STATE'S USE OF PEREMPTORY CHALLENGES: THE APPLICATION OF THE UNITED STATES SUPREME COURT'S DECISION IN *BATSON V. KENTUCKY* IN SOUTH CAROLINA

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I. INTRODUCTION

Some one hundred and six years before the United States Supreme Court's 1986 decision in *Batson v. Kentucky*[1] the Court ruled that a black person is denied the equal protection of the laws when the State seeks to convict him of a criminal offense in a proceeding in which members of his race have been excluded from serving on the jury.[2] From this straightforward and common-sense beginning, the Court stumbled and lurched

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1. 476 U.S. 79 (1986). In *Batson* the Court held that the equal protection clause of the fourteenth amendment to the United States Constitution is violated when the prosecution in a criminal case uses its peremptory challenges to exclude minority jurors because of their race.

2. *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

for more than a century before arriving at another equally straightforward and common-sense decision in *Batson*. The purpose of this article is to examine the Supreme Court's decision in *Batson* in light of both the decisions that preceded it and the meaning given the Court's ruling by other state and federal courts. Primarily, however, this article will focus on the first generation of the South Carolina Supreme Court's decisions grappling with *Batson*.[3] After examining the state court's rulings, this article will maintain that although racial discrimination in jury selection is a sensitive and difficult matter for both trial and appellate courts, the South Carolina Supreme Court, at least in its early decisions,[4] has taken an unduly restrictive view of the United States Supreme Court's holding in *Batson*. The article will contend that the deferential analysis employed by the South Carolina Supreme Court, for all practical purposes, has rendered the High Court's mandate meaningless and, furthermore, that such an approach is not only legally unsound but is unwise both as a matter of policy and of court administration.

II. SETTING THE STAGE: AN OVERVIEW OF JURY SELECTION PROCEDURES IN SOUTH CAROLINA

In order to enable the reader to understand *Batson* fully in the context of this article, a brief discussion of the procedure used in selecting a jury in a criminal case in South Carolina is necessary. As in most jurisdictions, jury selection in criminal trials in this state proceeds in several stages. First, a list of prospective jurors is compiled from voter registration lists in the county in which the defendant will be tried.[5] Theoretically, of

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3. In the interest of full disclosure, I was counsel of record for the appellant—the losing party—in several of the cases that will be discussed in this article.

4. The ultimate conclusions in this article are drawn from a relatively small number of decisions that mark the South Carolina Supreme Court's first efforts to construe the scope of *Batson*. Thus, subsequent decisions of the South Carolina Supreme Court could prove the thesis of this article premature.

5. *See* S.C. CODE ANN. § 14-7-130 (Law. Co-op. Supp. 1988). Legislation passed in 1988, however, which was on the November 1988 ballot as a proposed amendment to article V, section 22 of the South Carolina Constitution changed this system somewhat. The new method provides for the jury list to be comprised of both registered voters and licensed drivers. The obvious purpose of the new provision is to increase the number of persons eligible for jury service. It is common knowledge that many people do not register to vote in order to avoid being called for jury duty.

course, this group of prospective jurors represents a fair cross-section of the community; in other words, it is comprised of persons of the various racial and ethnic groups that make up the local community.[6] The individuals who constitute this group, the venire, are summoned to serve as jurors for a particular week or term of court.[7] When a case is called for trial, jury selection is conducted. The trial judge begins the process by questioning the prospective jurors in an attempt to disclose any bias about the case that could threaten a potential juror's impartiality. In cases in which the State seeks the death penalty, the attorneys are permitted to question the jurors. During this process, known as *voir dire*, challenges for cause and peremptory challenges are exercised.

Challenges for cause are unlimited in number, but may be exercised only when the potential juror shows a strong specific bias.[8] Peremptory challenges, however, do not usually require such a showing.[9] They are limited in number depending on the

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6. *See generally* Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that Louisiana statute, which systematically excluded women from jury service, was unconstitutional).

7. Criminal court in South Carolina is referred to as the Court of General Sessions.

8. *See* S.C. CODE. ANN. § 14-7-1020 (Law. Co-op. Supp. 1988). For example, if a juror is closely related to the defendant, the juror would be excused for cause.

9. Historically, the peremptory challenge was intended to protect the defendant. This type of challenge previously was referred to as "standing aside" a juror. *See* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURY PANELS 148 (1977). Thus, in England, from at least the year 1305, the prosecution was required to show cause for all its challenges. A defendant, however, retained 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." 4 W. BLACKSTONE, COMMENTARIES *353. The peremptory challenge was needed in large part to offset the government's advantage; the sheriff of the local community personally selected the jury pool. *See* Note, *The Case for Abolishing Peremptory Challenges in Criminal Trial*, 21 HARV. C.R.-C.L. L. REV. 227 (1986).

The American states accepted a defendant's peremptory challenges as part of the common law. *See* J. VAN DYKE, *supra*, at 148-49 n.5. Some states protested the practice of "standing aside" and denied the defendant any challenges to jurors other than for cause, while others permitted a limited number of peremptory challenges. Congress granted peremptory challenges to defendants in federal courts in the Act of Apr. 30, 1790, § 30, 1 Stat. 112, 119 (codified now as FED. R. CRIM. P. 24), but did not mention the prosecution's right to peremptories. Shortly thereafter, the Supreme Court determined that the practice of "standing aside" was part of the common law and, hence, was the law in the United States. *See* United States v. Marchant, 25 U.S. (12 Wheat.) 480, 483 (1827). By the nineteenth century, prosecutorial peremptory challenges became common in most states. *See* J. VAN DYKE, *supra*, at 150. In an opinion by Justice Field, the United States Supreme Court upheld the prosecutor's use of peremptory challenges, de-

crime charged. Generally, in South Carolina each side has five peremptory strikes. In cases involving more serious crimes, however, the defendant is permitted ten challenges.[10] Theoretically, therefore, a party uses peremptory challenges as a method of obtaining a jury more sympathetic — or in some cases less adverse — to its position,[11] and peremptory strikes most often are used when the attorney believes that a potential juror would not be impartial and is unable to have the juror excused for cause. The peremptory challenge is a subjective tool that often is utilized based upon group stereotypes, as well as hunches and conjecture regarding who is and who is not a fair and impartial juror.[12]

In the typical criminal trial in South Carolina, the court questions the jurors as a group in order to determine whether any juror should be excused for cause. The potential jurors' names then are drawn randomly. As each juror's name is called, both the State and the defense are given an opportunity to exercise a peremptory challenge. If the juror is not excused by either side, the juror is "seated" as a member of the jury. Another potential juror's name is then called, and the process is repeated until the jury is selected.

With this understanding of the context in which peremptory challenges are exercised, a look at the Court's decisions delineating the constitutional implications of the State's use of its strikes is in order.

III. HISTORICAL PROLOGUE: FROM *Strauder* TO *Swain*

It is important to examine the Supreme Court's decision in

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fending it as a necessary means of securing competent and impartial jurors. *See* Hayes v. Missouri, 120 U.S. 68, 70-71 (1887). Therefore, the peremptory strike, which was originally intended to be a defendant's weapon against the government, became a system of challenges for attaining an impartial jury for both the defense and the prosecution. *See* Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1172-73 (1966). Until the Supreme Court's *Batson* decision, the peremptory challenge was used in most states by both the State and the defense to strike potential jurors "without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965).

10. *See* S.C. CODE ANN. § 14-7-1110 (Law. Co-op. Supp. 1988) (designating offenses that entitle defendant to ten peremptory strikes).

11. *See* J. VAN DYKE, *supra* note 9, at 145-47; *see also* R. WENKE, THE ART OF SELECTING A JURY 46-50 (1979).

12. *See Batson*, 476 U.S. at 96; *see also Swain*, 380 U.S. at 220-22.

Batson v. Kentucky against the historical terrain from which it emerged. In *Strauder v. West Virginia*[13] the Court first applied the equal protection clause of the fourteenth amendment to racial discrimination in jury selection, some twelve years after the amendment's ratification. *Strauder* involved a West Virginia statute that limited jury service to white men.[14] Such blatant discrimination on the face of a statute, the Court concluded, "is practically a brand upon [black persons], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."[15]

In a number of subsequent decisions, the Court invalidated a host of other, more subtle methods of preserving the "monochromatic quality" of grand and petit juries.[16] Preventing discrimination in the State's use of its peremptory challenges, however, did not come quite so easily to the Court. This was so, in part, because both prosecutors and defense counsel came to rely on peremptory strikes to remove jurors believed to be unfavorable, and the Court on several occasions noted the importance of the peremptory challenge to the criminal justice system.[17]

Nevertheless, it did not go unnoticed that prosecutors used peremptory strikes to exclude black persons from juries, especially in cases involving black defendants and white victims.[18] In

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13. 100 U.S. 303 (1880).

14. The pertinent West Virginia statute provided that "[a]ll white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors." *Id.* at 305.

15. *Id.* at 308.

16. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977) (grand jury discrimination); Alexander v. Louisiana, 405 U.S. 625 (1972) (grand jury discrimination); Whitus v. Georgia, 385 U.S. 545 (1967) (discrimination in grand jury selection); Avery v. Georgia, 345 U.S. 559 (1953) (use of different-colored tickets for black and white jurors invalidated); Norris v. Alabama, 294 U.S. 587 (1935) (conviction and death sentence reversed because of systematic exclusion of blacks from grand and petit juries).

17. The Supreme Court repeatedly has stated that the peremptory challenge is not a constitutional requirement. The Court, however, also has maintained that the challenge always has been considered "a necessary part of trial by jury . . . [and] 'one of the most important rights secured to the accused.'" Swain v. Alabama, 380 U.S. 202, 219 (1965)(quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

18. Defense counsel too frequently utilized racial and ethnic stereotypes in jury selection. For example, one early trial manual indicated that Catholics are "least desirable" for an insanity defense and that "[N]egroes are generally ill-equipped to evaluate psychiatric testimony." *See* G. SHADOAN, LAW AND TACTICS IN FEDERAL CRIMINAL CASES

Swain v. Alabama[19] the Court first grappled with — but hardly came to grips with — this thorny problem. In *Swain* a black defendant was convicted of rape in Talledega County, Alabama, by an all-white jury.[20] From 1953 to 1965, blacks comprised between ten and fifteen percent of the venires from which grand and petit juries in Talledaga County were selected. Even so, during that period not a single black served on a petit jury. The jury that convicted Swain was drawn from a venire containing eight blacks: two of these jurors were excused by the trial court for cause, and the prosecutor struck the remaining six.[21] After the Alabama Supreme Court affirmed Swain's conviction, it granted certiorari to consider whether "the exercise of peremptory challenges to exclude negroes from serving on petit juries"[22] violated the equal protection clause of the fourteenth amendment.

Justice White, writing for the majority, first praised the virtues of the peremptory challenge as a means of "eliminat[ing] extremes of impartiality"[23] between the state and the accused. He concluded:

> 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. . . .
>
> 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

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265-66 (1964). Clarence Darrow advised defense lawyers that it would be malpractice to strike an Irishman, but that Baptists, Lutherans and Presbyterians should be excused if possible. *See* Uleman, *Striking Jurors Under* Batson v. Kentucky, CRIM. JUST., Fall 1987, at 4.

19. 380 U.S. 202 (1965). See also Batson v. Kentucky, 476 U.S. 79, 100 n.25 (1986), where the Court explained that any principles in *Swain* contrary to *Batson* were overruled.

20. 380 U.S. at 203.

21. *See id.* at 204.

22. *Id.* at 209.

23. *Id.* at 219.

> 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.[24]

In essence, the Court sanctioned the use of racial stereotypes in the petit jury selection process. A defendant could prevail under the *Swain* standard only by showing that the prosecutor "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of [blacks] . . . selected as qualified jurors."[25] *Swain*, therefore, required a black defendant to show not only that the prosecutor discriminated against him in his particular case but also in previous cases against other black defendants. This burden was extremely difficult to meet. Prosecutors in Talledaga County had peremptorily challenged every single black juror for twelve years. Yet the *Swain* Court did not find this practice "systematic" enough to rebut the presumption that the challenges were valid.[26] The *Swain* test virtually required a prosecutor to admit that he challenged jurors because of their race.

The dissenting Justices in *Swain* maintained that even if the record did not prove absolutely that the State systematically had excluded black jurors, the undisputed fact that no black person had ever served on a petit jury established a prima facie case of unlawful discrimination, which shifted the burden to the State to provide a nonracial reason for the exclusion.[27] The dissent, however, agreed with the Court's conclusion that the sys-

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24. *Id.* at 221-22.

25. *Id.* at 223.

26. *See id.* at 224-26. Justice White based his conclusion upon the fact that the record did not indicate when blacks had been removed by the prosection in Talladega County, when the defense had agreed to exclude blacks from the jury, and when blacks were removed for cause. The record, thus,:

> [did] 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.

Id. at 226.

27. *See id.* at 232-33 (Goldberg, J., dissenting) (citing Patton v. Mississippi, 332 U.S. 463 (1947), and Norris v. Alabama, 294 U.S. 587 (1935)). Chief Justice Warren and Justice Douglas joined Justice Goldberg's dissent.

tematic exclusion of blacks from the petit jury in a particular case in and of itself did not overcome the presumption that the prosecutor had not exercised his challenges in a discriminatory manner.[28]

Thus, the extremely onerous burden of proof placed upon a defendant in *Swain* resulted from the Court's initial determination that the peremptory challenge was "necessary" in order to exclude "biased" jurors. The Court apparently believed that because counsel often have inadequate information about the predispositions and hidden biases of prospective jurors, they are forced to rely on stereotypes, common-sense judgments, and even common prejudices in deciding whether a juror with a particular age, race, sex, religion, ethnic background, or occupation will be impartial toward a particular defendant.[29] It was this starting point that led the Court to conclude that peremptory strikes were properly based upon such racial generalizations. Because the burden of proof set forth by the Court in *Swain* was virtually insurmountable, the Court's apparently broad commitment to nondiscriminatory jury selection was not extended to peremptory challenges. For all practical purposes, the State's use of its peremptory challenges was not subject to the constitutional limitations placed upon other state action.[30]

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28. The dissent stated:

> [Systematic exclusion] would not mean . . . that Negroes are entitled to proportionate representation on a jury. . . . 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.

Id. at 245 (Goldberg, J., dissenting) (citation omitted).

29. *See id.*

30. After *Swain*, numerous defendants attempted and failed to meet its rigid test of systematic exclusion. *See* Annotation, *Use of Peremptory Challenge to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R.3D 14 (1977). *But see* State v. Washington, 375 So. 2d 1162 (La. 1979) (burden imposed by *Swain* was met); State v. Brown, 371 So. 2d 751 (La. 1979) (burden imposed by *Swain* met). The heavy burden imposed by *Swain* left minority defendants in many jurisdictions with virtually no chance of having a member of their race on their jury. *See* P. DIPERNA, JURIES ON TRIAL 174-76 (1984); J. VAN DYKE, *supra* note 9, at 166-67; Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-303 (1968); Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967) (authored by Gary L. Geeslin).

It is important to note that when *Swain* was decided, the Court had not yet incorporated the sixth amendment right to an impartial jury into the guarantees of the fourteenth amendment. Four years after *Swain*, in Duncan v. Louisiana, 391 U.S. 145 (1968),

In the years following *Swain*, the Court's ruling was attacked increasingly by commentators[31] and lower courts.[32] In fact, some state courts determined that the prosecution could not exercise its peremptory challenges in a discriminatory manner pursuant to their respective state constitutions.[33] Additionally, later Supreme Court decisions emphasizing the importance of representative juries, rendered the narrow holding in *Swain* suspect,[34] and individual Justices indicated that *Swain* should

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the Court applied the right to a jury trial guaranteed by the sixth amendment to the states. Subsequently, the Court held that this included the right to a petit jury pool drawn from a representative cross-section of the community. *See* Taylor v. Louisiana, 419 U.S. 522 (1975).

31. *See, e.g.*, Johnson, *Black Innocence and the All White Jury*, 83 MICH. L. REV. 1611 (1985); Kuhn, *supra* note 30; Case Comment, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477 (1984); Comment, *supra* note 9; Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1723 n.36 (1977).

32. Various federal courts noted that *Swain* virtually insulated peremptory challenges from appellate review. Furthermore, the lower courts correctly recognized a fundamental tension between the Court's equal protection ruling in *Swain* and the Court's sixth amendment cases such as Taylor v. Louisiana, 419 U.S. 22 (1975) (holding that systematic exclusion of women from jury panels violated sixth amendment), and Duren v. Missouri, 439 U.S. 357 (1979) (holding automatic exemption from jury service upon request for women jurors violated sixth amendment). The post-*Swain* sixth amendment cases identified diversity in the jury system as a guarantee of jury impartiality. Thus, the Second Circuit used a sixth amendment rationale for limiting the racially discriminatory use of peremptory challenges. *See* McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and vacated*, 478 U.S. 1001 (1986) (remanded for reconsideration in light of *Batson v. Kentucky*); *see also* Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom.* Michigan v. Booker, 478 U.S. 1001 (1986) (remanded for reconsideration in light of *Batson*). On the other hand, other circuits rejected the sixth amendment rationale, although in many cases, they still remained highly critical of *Swain*. *See, e.g.*, United States v. Childress, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); United States v. Whitfield, 715 F.2d 145, 147 (4th Cir. 1983). In United States v. Leslie, 759 F.2d 366 (5th Cir.1985), a panel of the Fifth Circuit, relying upon its supervisory power rather than upon constitutional grounds, rejected *Swain* for use in federal criminal trials. The Fifth Circuit, sitting en banc, subsequently rejected that reasoning in United States v. Leslie, 783 F.2d 541 (5th Cir. 1986). The Supreme Court ultimately vacated that decision and remanded *Leslie* for reconsideration in light of *Batson* and Griffith v. Kentucky, 479 U.S. 314 (1987). *See* 479 U.S. 1074.

33. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022-23 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 371 Mass. 461, 387 N.E.2d 499, *cert. denied sub nom.* Massachusetts v. Soares, 444 U.S. 881 (1979); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

34. *See, e.g.*, Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

be overruled.[35] Therefore, it was not surprising that the Court granted certiorari in the case of *Batson v. Kentucky*.[36]

IV. AND THEN THERE WAS *Batson*

In *Batson v. Kentucky* the Supreme Court ostensibly ended *Swain*'s stranglehold on a defendant's challenge to the prosecution's discriminatory use of its peremptory strikes.[37] James Kirkland Batson was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. At trial, the prosecutor used his peremptory challenges to excuse all four prospective black jurors.[38] Batson's counsel objected, maintaining that the prosecutor had used his strikes to exclude potential black jurors on the basis of their race. The trial judge, however, relying upon *Swain*, overruled counsel's objection and stated that the prosecution was entitled to "strike anybody [it wants] to."[39] Batson was convicted and, on appeal to the Kentucky Supreme Court, maintained that the Commonwealth should reject *Swain* and adopt the course taken by several other jurisdictions, which had held that the prosecutor's discriminatory use of his peremptory challenges violated their respective state constitutions.[40] Nevertheless, the Supreme Court of Kentucky rejected Batson's claims and affirmed his conviction.[41] The United States Supreme Court then granted certiorari and reversed the decision of the Kentucky state courts.

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35. *See, e.g.*, Harris v. Texas, 467 U.S. 1261 (1984) (Justices Marshall and Brennan dissenting from denial of certiorari); Williams v. Illinois, 466 U.S. 981 (1984) (same dissenters); Gilliard v. Mississippi, 464 U.S. 867 (1983) (same dissenters); McCray v. New York, 461 U.S. 961 (1983) (same dissenters).

36. 476 U.S. 79 (1986).

37. For other discussions of the *Batson* decision, see Note, Batson v. Kentucky: *The New and Improved Peremptory Challenge*, 38 HASTINGS L. J. 1195 (1987); Note, *Sixth and Fourteenth Amendments - The* Swain *Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. CRIM. L. & CRIMINOLOGY 821 (1986); Comment, Batson v. Kentucky: *Can the 'New' Peremptory Challenge Survive the Resurrection of* Strauder v. West Virginia*?*, 20 AKRON L. REV. 355 (1986).

38. 476 U.S. at 82.

39. *Id.* at 82.

40. *See id.* at 83; *see also* cases cited *supra* note 33.

41. *See* 476 U.S. at 84.

A. *The Majority Opinion*

The majority opinion, written by Justice Powell, began by detailing the history of the Court's attempts to eradicate racial discrimination in the criminal justice system generally and, in jury selection, specifically. The Court also emphasized the central role that an impartial jury plays in the criminal justice system. In doing so, the majority recognized that discrimination in the selection of jurors is harmful not only to the accused, but also to the excluded juror and the entire community.[42] Thus, after setting forth the various discriminatory acts found by the Court in the past to be unlawful in the selection of juries, the Court concluded 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 to impartially consider the State's case against a black defendant."[43]

Justice Powell, in a statement minimizing the chilling impact of *Swain*, indicated that the principles announced in *Strauder* had never been questioned, although the Court had been called upon "to review the application of those principles

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42. *See id.* at 87. "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." *Id.* at 86. The Court also stated that jury "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87.

43. *Id.* at 89. The Court, however, granted certiorari to consider whether the State's use of its peremptory challenges violated the sixth amendment, not the equal protection clause of the fourteenth amendment. *See id.* at 112 (Burger, C.J., dissenting). In fact, at oral argument, counsel for the petitioner stated that he was not relying upon the equal protection clause or requesting the Court to overrule *Swain*. *Id.* at 113-14. Obviously, the certiorari petition and counsel's argument must be considered against the backdrop of the Supreme Court's and the lower federal court's decisions, which clearly seemed to indicate that a successful challenge to the State's discriminatory use of its strikes should be grounded in the sixth amendment, rather than the equal protection clause of the fourteenth amendment. *See supra* note 32 and accompanying text. The Court granted certiorari in Teague v. Lane, 820 F.2d 832 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 1106 (1988), to consider whether the prosection's use of its peremptory challenges violates the fair cross-section requirement of the sixth amendment in a case in which a conviction was final on direct appeal at the time of the Court's *Batson* decision.

The Court, however, declined to reach the sixth amendment issue, instead resolving the case on procedural grounds. *See* Teague v. Lane, 109 S. Ct. 1068 (1989). The day after *Teague* was decided, the Court granted certiorari in Holland v. Illinois, 109 S. Ct. 1309 (1989), to consider again the application of the "fair cross-section" requirement to the State's use of its peremptory challenges.

to particular facts."[44] He then addressed the Court's prior decision in *Swain*, explaining the Court's earlier ruling as an attempt to accommodate the peremptory challenge because of its importance as a means of achieving a qualified and unbiased jury.[45] Then, in a curious statement, he concluded:

> 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 the 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.[46]

After discussing a number of the Court's equal protection cases and the principles derived from those decisions, Justice Powell stated that those 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."[47] To establish a prima facie case, the majority held, a defendant first must show that he is a member of a cognizable racial group and that the prosecutor exercised strikes to remove members of the defendant's race. These facts and any other relevant circumstances — including a pattern of strikes against black jurors in the venire — may raise a prima facie case of purposeful discrimination. The inference, if established, then shifts the burden to the State to come forward with a neutral explanation for challenging the minority jurors.[48]

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44. 476 U.S. at 90.

45. *See id.*

46. *Id.* at 92-93 (footnotes omitted). The statement is interesting because Justice Powell seemed to imply that the lower courts misinterpreted *Swain* and that the Court never intended to require a defendant to prove the striking of blacks in case after case. Such a revisionist history, however, is contradicted by the language and the facts of *Swain*. *See supra* pp. 5-7. Therefore, Justice Powell's statement is best understood as indicating that the majority was somewhat embarrassed by — and, thus, somewhat defensive about — the Court's decision in *Swain*.

47. 476 U.S. at 96.

48. *See id.* at 96-97. The Court also stated that a defendant, in his effort to establish a prima facie case, was entitled to rely, on the fact that "peremptory challenges

The majority made it clear that a prosecutor may not rebut a prima facie case merely by denying that he discriminated or because he believed that the minority jurors "would be partial to the defendant because of their shared race."[49] Rather, the State must articulate "a neutral explanation related to the case to be tried."[50] The trial court then is obligated to determine, based upon all the evidence, if the defendant has established purposeful racial discrimination.[51]

B. The Concurring Opinions

Justice White, who wrote the majority opinion in *Swain*, concurred in *Batson*. He explained the change in his position as resulting from the continued widespread use of the peremptory challenge by prosecutors to exclude black jurors, despite *Swain*'s warning that the equal protection clause proscribed such purposeful discrimination.[52] He noted, however, that "[m]uch litigation will be required to spell out the contours of the Court's Equal Protection holding."[53]

Justice Marshall also concurred. Moreover, he advocated a more drastic remedy: the complete elimination of peremptory challenges in criminal trials. Because he believed that the procedures set forth by the majority would eliminate only the most flagrant instances of racial discrimination, he concluded that "[t]he 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."[54] Because he similarly believed that

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constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

49. *Id.* at 97.

50. *Id.* at 98. The majority stated that "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.*

51. The Court specifically declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.* at 99.

52. The present discriminatory use of peremptory challenges was noted also by Justice Powell in the majority opinion. *Id.* at 99 ("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.").

53. *Id.* at 102 (White, J., concurring).

54. *Id.* at 107 (Marshall, J., concurring).

the majority opinion failed to offer any meaningful guidance for assessing a prosecutor's motives, Justice Marshall maintained that the constitutional safeguards promulgated by the Court to protect minority defendants would prove to be illusory. In his view, a prosecutor easily would be able to evade the Court's ruling by articulating a permissible excuse, whether or not it was the real reason for the challenge.[55]

C. The Dissents

Chief Justice Burger and Justice Rehnquist dissented.[56] The Chief Justice emphasized the history and function of the peremptory challenge and criticized the extension of the Court's decisions regarding discrimination in the selection of the venire to the State's use of its peremptory challenge.[57] He believed that "unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case."[58] He also believed that the majority's approach would require extension of the *Batson* rule to exclusions based on sex, age, religious or political affiliations, mental capacity, number of children, living arrangements, and employment in a particular industry or profession.[59] In addition, he expressed concern that the holding logically could not be limited to prosecutorial abuses[60] and ultimately would result in "juries that the parties do not believe are truly impartial."[61]

Justice Rehnquist did not believe that the Constitution bars the State from "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

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55. *See id.* at 106. Justices Stevens and O'Connor also wrote concurring opinions. Both agreed with Justice Powell's disposition of the merits of the equal protection claim, but wrote separately to discuss procedural aspects of the case.

56. *See id.* at 112 (Burger, C.J., dissenting). Since the petitioner failed to raise an equal protection claim, Chief Justice Burger argued that the majority mistakenly ruled on that issue. Because of the importance of the issue, he felt that the equal protection decision was premature and that he, at least, would have directed reargument of the issue. *Id.* at 134 (Burger, C.J., dissenting).

57. *See id.* at 112.

58. *Id.* at 123.

59. *See id.* at 124.

60. *See id.* at 125-26.

61. *Id.* at 129.

white defendants, Hispanics in cases involving Hispanic defendants . . . and so on."[62] Because the excluded blacks are not denied the right to serve as jurors in cases involving nonblack defendants, he argued, neither the excluded blacks nor the community is harmed. Thus, in his view, there is nothing unconstitutional in the State's exercise of peremptory challenges based on group affiliations or racial classification because the very purpose of the peremptory challenge is to provide a method for each side to obtain what it believes to be an unbiased jury.[63]

In summary, *Batson* marked a clear departure from *Swain* in that the Court held not only that the State violated the fourteenth amendment by purposefully excluding minority jurors from serving on a minority defendant's jury, but also that a defendant could establish purposeful discrimination based solely upon the facts of his case. The ruling, grounded in the Court's prior equal protection and antidiscrimination decisions, also set forth a basic framework for trial and appellate courts to use in evaluating claims of purposeful discrimination in jury selection. For many jurisdictions, including South Carolina, *Batson* presented the courts with a new challenge.

V. FILLING IN THE PIECES: *Batson* IN CONTEXT

A. Basic Equal Protection Principles

The Supreme Court's ruling in *Batson* must be examined in light of its prior antidiscrimination decisions. The equal protection clause of the fourteenth amendment[64] prohibits governmental acts that either burden rights or deny benefits because of arbitrary classifications.[65] More significantly for the purposes of this discussion, any classification based upon race or national origin is considered "suspect" and will be upheld only if the classi-

62. *Id.* at 137-38 (Rehnquist, J., dissenting).

63. *See id.* at 137-39.

64. The equal protection clause of the fourteenth amendment provides in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

65. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 521-801 (3d abr. ed. 1986) [hereinafter J. NOWAK]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1028 (1977). The equal protection clause does not prohibit the government from classifying persons. Rather it prohibits classifications based upon impermissible criteria or which arbitrarily burden a group of individuals. J. NOWAK, *supra*, at 525.

fication is necessary to achieve a compelling state interest.[66]

The most difficult part of challenging governmental action as racially discriminatory is proving that a law is being applied differently to particular groups by classifying members according to a "suspect" or racial trait.[67] Because of this difficulty, the Supreme Court has recognized that statistical proof is relevant in determining whether unlawful racial discrimination is present.[68] Thus, statistical evidence showing a disproportionate impact on a minority racial group may be sufficient to establish a prima facie case of unconstitutional discrimination.[69] Because the criteria used for selecting the jury pool often is subjective, statistical evidence frequently has been used, and accepted, in jury selection cases.[70] Jury selection procedures at the jury pool stage have been found to violate the equal protection clause when the statistics revealed racially disproportionate results or when the statistics indicated that the selectors were using their discretion in a racially discriminatory manner.[71]

The Court also has made clear that an individual challenging racially discriminatory state action must demonstrate that the action was conducted with a discriminatory purpose.[72] In order to make this determination, a reviewing court must undertake an inquiry "into such circumstantial and direct evidence of intent as may be available."[73] Furthermore, the Court has held that relevant circumstantial evidence includes evidence of racially discriminatory impact. In fact, the Court has recognized that in some cases the proof of discriminatory impact "may for

66. *See* Washington v. Davis, 426 U.S. 229 (1976); *see also* J. NOWAK, *supra* note 65, at 530.

67. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (law that is facially neutral but is applied in a manner that discriminates on the basis of race or national origin violates the equal protection clause).

68. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988); Castaneda v. Partida, 430 U.S. 482 (1977). *Cf.* McCleskey v. Kemp, 481 U.S. 279 (1987) (Court accepted that statistics indicated racial discrimination in the application of Georgia's death penalty statute, but nevertheless denied relief).

69. *See Yick Wo*, 118 U.S. 356 (1886).

70. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1979).

71. *See id.*

72. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

73. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1979); *see also* Rogers v. Lodge, 458 U.S. 613 (1982) (considered past discrimination in employment in local community and all other evidence indicating discriminatory intent in evaluating claim of voting discrimination).

all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[74]

B. The Relevance of the Court's Title VII Decisions

The majority opinion in *Batson* also drew on the Court's prior decisions construing Title VII of the Civil Rights Act of 1964,[75] which prohibits discrimination in employment based upon an individual's race or national origin.[76] The Court's Title VII decisions have articulated more clearly than have its equal protection decisions the role of the prima facie case and the associated shifting burdens.[77] In those cases, the Court determined that the plaintiff has the initial burden of demonstrating a prima facie case of discrimination.[78] The prima facie case means, in essence, that a presumption is established that the plaintiff's employer unlawfully discriminated against him.[79] Once a prima facie case has been established, the burden shifts to the defendant, the employer, to prove a "legitimate, non-discriminatory reason"[80] for the adverse action. If the defendant comes forward with a nondiscriminatory reason, then the plaintiff must be given a full and fair opportunity to demonstrate that the race-neutral reason is a pretext and not the true reason for the defendant's action.[81] The Court has recognized that a plaintiff may prove that the defendant's actions were pretextual by showing that similarly situated persons of another race were treated differently.[82]

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74. *Washington*, 426 U.S. at 242. For example, the Court has held that the total or seriously disproportionate exclusion of black persons from jury venires is sufficient to prove intentional discrimination. *See* Akins v. Texas, 325 U.S. 398, 404 (1945).

75. Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

76. *See* 476 U.S. at 94 n.18, 98 n.21.

77. *See, e.g.*, United States Postal Serv. v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

78. *See Burdine*, 450 U.S. at 252-53.

79. *See Aikens*, 460 U.S. at 714.

80. *See Burdine*, 450 U.S. at 254.

81. *See id.* at 256.

82. *See id.* at 258. In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that the "criterion [articulated by the defendant must be] applied alike to members of all races." *Id.* at 804. Other relevant evidence of pretext includes the defend-

C. *Racial Discrimination in the Criminal Justice System*

Batson also must be examined in light of the Court's decision — many of which have been discussed previously in this article — specifically dealing with racial discrimination in the criminal justice system. In these cases, many if not most of which involve discrimination in the jury selection process,[83] the Court has recognized not only the potential for, but the reality of, racial discrimination in the criminal justice system.[84] Furthermore, the Court has recognized that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. . . . [It] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."[85] Finally, the Supreme Court has recognized that the more subjective or discretionary the methods and practices involved in a particular case, the greater the potential for racial discrimination and abuse.[86]

VI. A HOSTILE AUDIENCE: THE DECISIONS OF THE SOUTH CAROLINA SUPREME COURT CONSTRUING *Batson*

In *State v. Smith* the South Carolina Supreme Court first addressed the merits of a claim that the prosecution exercised its peremptory challenges in a racially discriminatory manner.[87]

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ant's general policy and practice towards minorities. *Id.* at 804-05.

83. *See supra* note 16 and accompanying text.

84. *See, e.g., Batson*, 476 U.S. at 99; Rose v. Mitchell, 443 U.S. 545, 558 (1979) ("[R]acial . . . discrimination still remain[s] a fact of life, in the administration of justice as in our society as a whole.").

85. *Rose*, 443 U.S. at 555-56. The Court in *Rose* also noted that discrimination in jury selection "strikes at the fundamental values of our judicial system and our society as a whole." *Id.* at 556. *See also* Amadeo v. Zant, 108 S. Ct. 1771 (1988) (purposeful racial discrimination in drawing up master jury lists).

86. *See* Turner v. Murray, 476 U.S. 27 (1986) (because wide range of discretion is entrusted to a jury in a capital sentencing hearing, there is heightened opportunity for racial prejudice to enter into the sentencer's calculus); Avery v. Georgia, 345 U.S. 559, 562 (1953) (Georgia jury selection practice of having different colored tickets for black and white jurors "makes it easier for those to discriminate who are of a mind to discriminate"); *see also Batson*, 476 U.S. at 96 (peremptory challenge is a device that, because of its subjective nature, is highly susceptible to discriminatory use).

87. 293 S.C. 22, 358 S.E.2d 389 (1987). The court previously had encountered a *Batson* claim in State v. Hawkins, 289 S.C. 482, 347 S.E.2d 98 (1986). In *Hawkins* the court did not reach the merits of the appellant's contentions, as it determined that *Batson* should be given only prospective application and, therefore, did not apply to crimi-

In *Smith* the State utilized two of its five peremptory challenges against prospective black jurors. The solicitor did not exercise his other three strikes, and four black persons were seated.[88] Smith's trial counsel objected and maintained that the State had excused the jurors because of their race. The trial judge determined that Smith had failed to establish a prima facie case of racial discrimination in jury selection. Based upon these facts, the supreme court determined that the trial court did not abuse its discretion in ruling that a prima facie case had not been established.[89] In so ruling, the court noted that "the trial court must examine all relevant circumstances in determining whether a defendant has shown a *prima facie* case of purposeful discrimination in the State's exercise of its peremptory strikes."[90]

State v. Jones[91] marked the South Carolina Supreme Court's first effort to articulate procedures necessary to implement the Supreme Court's mandate in *Batson*. After criticizing the High Court's "vague guidelines," the state court determined that "the better course to follow would be to hold a *Batson* hearing on the defendant's request whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of defendant's race from the venire."[92] Such a procedure, the court reasoned, would remove any doubt about when a *Batson* hearing should be conducted and would ensure a complete record for appellate review.[93] Thus, pursuant to the state procedure set forth in *Jones*, the trial judge should conduct a hearing to determine whether the prosecution violated *Batson v. Kentucky* whenever:

> (1)the defendant requests such a hearing;
> (2) the defendant is a member of a cognizable racial group; *and*

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nal trials conducted before the decision was rendered on April 30, 1986. *Hawkins*, however, was effectively overruled by the United States Supreme Court's decision in Griffith v. Kentucky, 479 U.S. 314 (1987) (holding that *Batson* applied to all cases not yet final on direct appeal at the time of the Court's decision). *Cf.* Allen v. Hardy, 478 U.S. 255 (1986) (*Batson* does not apply retroactively to cases already final on direct appeal at the time of the Court's decision).

88. *See* 293 S.C. at 23, 358 S.E.2d at 390.
89. *See id.*
90. *Id.*
91. 293 S.C. 54, 358 S.E.2d 701 (1987).
92. *Id.* at 57, 358 S.E. at 703.
93. *See id.*

(3) the prosecutor exercises peremptory challenges to remove members of the defendant's race from the venire.[94]

The court also set forth the point at which counsel must object to the State's use of its strikes. Pursuant to *Jones*, counsel must object and request a hearing after the jury is selected, but before it is sworn.[95] The hearing, at which the prosecutor is required to articulate his reasons for challenging minority jurors, should be conducted outside the presence both of the venire and the selected jurors.[96] If the trial judge determines that the defendant has established a prima facie case of purposeful racial discrimination and that the State has failed to rebut the prima facie case, then the jury selection procedure must be conducted once more.[97] Because Jones' trial was not conducted in conformity with the South Carolina Supreme Court's newly articulated guidelines, the case was remanded for further proceedings.[98]

In *State v. Lewis*[99] the State exercised three of its strikes against prospective black jurors and one against an alternate black juror. As a result of the State's use of its challenges, Lewis was tried and convicted of murder by an all-white jury. On appeal, however, she maintained that only one of the State's peremptory challenges was racially discriminatory and, thus, invalid. The articulated reason given by the State for excusing the challenged juror was that during *voir dire* he had indicated that he knew one of Lewis' attorneys.[100] The court held that to rebut a prima facie case under *Batson*, the State "must 'articulate a neutral explanation related to the particular case to be tried.' "[101] The court made clear, however, that the State's reason need not rise to the level needed to justify a challenge for cause. Applying those principles to Lewis' case, the court con-

94. *Id.* at 58, 358 S.E.2d at 703.

95. *See id.*

96. *See id.*

97. The court stated that in large counties it would be possible to select an entirely new jury from the remaining members of the venire. *Id.* at 58 n.3, 358 S.E.2d at 704 n.3. In other counties, however, when there are not sufficient remaining persons in the venire to select a new jury, the venire will have to be "reconstructed" with both the challenged jurors and the jurors actually selected being placed back into the jury pool. *Id.*

98. *See id.* at 58, 358 S.E.2d at 703.

99. 293 S.C. 107, 359 S.E.2d 66 (1987).

100. *See id.* at 111, 359 S.E.2d. at 68.

101. *Id.* at 112, 359 S.E.2d at 68 (quoting *Batson*, 476 U.S. at 98).

cluded that because the reason given by the State was "founded upon evidence in the record and [was] racially neutral," the dictates of *Batson* had been satisfied.[102]

In *State v. Martinez*[103] the court sharply divided over whether the State had used its peremptory challenges in a discriminatory manner. At Martinez's trial, the State excused four of the five black jurors presented. The trial court found that the defendant had established a prima facie case of purposeful discrimination and required the prosecutor to set forth his reasons for excusing the minority jurors.[104] The State's articulated race-neutral reasons were as follows: (1) Juror Johnson - worked for the State Department of Mental Health; (2) Juror Smith - was chronically unemployed; and (3) Jurors Wilson and Salley - were of the same sex and age group as Martinez and had "possible" criminal records.[105] The trial judge determined that although the State's articulated reasons were not good reasons, they were not racially discriminatory. He ruled, therefore, that the State sufficiently had rebutted the prima facie case.[106] A three-judge majority of the supreme court affirmed. In doing so, the majority stated, "*Batson* requires only a racially neutral explanation that need not rise to the level of justification of a challenge for cause. We find the reasons stated are sufficient."[107]

Justices Ness and Finney dissented. Both were convinced that the State had failed to rebut the prima facie case. Chief Justice Ness concluded that the State's supposed race-neutral reasons were inadequate not only because the prosecutor did not apply the reasons to exclude prospective white jurors, but also because one of the reasons, that the juror had a "possible crimi-

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102. *Id.*

103. 294 S.C. 72, 362 S.E.2d 641 (1987).

104. *See id.* at 73, 362 S.E.2d at 642.

105. *See id.*

106. *See* Record at 7-10.

107. 294 S.C. at 73, 362 S.E.2d at 642 (citations omitted). The court also stated:

> Appellant complains the Solicitor's use of age as an explanation is insufficient because he did not strike whites of the same age group. This argument ignores the fact that both Juror Wilson and Juror Salley were noted as having possible criminal records. Appellant also complains unemployment is insufficient as a racially neutral explanation because there is a disproportionate amount of unemployment among blacks. We reject this argument.

Id.

nal record," rested on nothing more than speculation.[108] In the course of his dissenting opinion, Justice Ness made the following evocative comment:

> Members of this Court have informally voiced their disagreement with the United States Supreme Court's holding in *Batson v. Kentucky*. The Court should not be permitted, however, to circumvent the mandates of that decision by accepting any and all explanations offered by solicitors for use of peremptory challenges, however weak they may be. " 'Rubber stamp' approval of all nonracial explanations, no matter how whimsical or fanciful, would cripple *Batson*'s commitment to 'ensure that no citizen is disqualified from jury service because of his race.' "
>
> My dissent in this opinion should not be interpreted as a philosophical disagreement with the other members of this court on the logic of the *Batson* holding; rather it should be seen only as a realization that the decision is binding on this court.[109]

The most recent decision of the court involving a claim of alleged discrimination in jury selection is *State v. Howard*.[110] In *Howard* appellants objected to the State's striking of eight of nine potential black jurors.[111] The trial judge determined that a prima facie case of discrimination had been established and required the prosecutor to set forth his reasons for excusing the minority jurors. Based upon the prosecutor's articulated reasons, the lower court concluded that the State had successfully rebutted the prima facie case. The majority addressed the appellants'

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108. *Id.* at 76, 362 S.E.2d at 643 (Ness, C.J., dissenting). Chief Justice Ness only addressed the reasons offered for excluding juror Wilson. Because the reasons given for striking this juror were inadequate, he did not believe it necessary to examine the other reasons articulated for excusing the other minority jurors. *Id.* His conclusion regarding juror Wilson was supported by the record. The trial judge questioned the prosecutor about the basis for his statement that the juror was excluded because of a possible criminal record, and the State produced no evidence. Additionally, the State accepted five white jurors who were similar in age to Martinez.

109. *Id.* at 76-77, 362 S.E.2d at 643-44) (quoting State v. Butler, 731 S.W.2d 265 (Mo. Ct. App. 1987)). Justice Finney dissented, stating, "Being of the opinion that the reasons set forth by the solicitor are insufficient to establish a racially neutral explanation and, further, the articulated reasons are contradicted in the record, I concur in the result reached in the dissent." *Id.* at 77, 362 S.E.2d at 644 (Finney, J., dissenting).

110. ___ S.C. ___, 369 S.E.2d 132 (1988).

111. *Id.* at ___, 369 S.E.2d at 139. Howard was tried along with a codefendant, Dana Weldon. Thus, the State was permitted ten peremptory challenges.

contention in a perfunctory manner, concluding that the prosecutor indicated that he excused the jurors based upon their "perceived attitudes to the death penalty" and that on the basis of the "record before us, we are satisfied that the trial judge's ruling complied with *Batson*."[112]

Justice Finney again dissented. In a much more detailed and factually specific analysis than that employed by the majority, he addressed the reasons offered by the State[113] and determined that the State's supposed nonracial reasons had not been applied equally to prospective white jurors. Thus, Justice Finney concluded that the State had failed to rebut the prima facie case of purposeful discrimination. In his opinion he noted:

> It is most unfortunate that the majority concludes that the solicitor rebutted appellant's prima facie case in the face of a record which contradicts the state's articulated position. The affirmation of this case effectively undermines appellant's right to an impartial jury drawn from a representative cross section of the community. The majority's willingness to allow the state to prevail upon such blatantly inconsistent standards for its peremptory challenges leaves *Batson* and *Jones* without substance. *See, e.g., State v. Martinez*, 294 S.C. 72, 362 S.E.2d 641 (1987) (Ness, C.J., dissenting). A prosecutor is required to show that he challenged similarly situated members of the majority group on identical or comparable grounds as members of the minority group. Compliance with this requirement establishes consistency in *Batson* hearings and provides a systematic means of determining bona fide neutral reasons for peremptory challenges. *See Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979). *See also, State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150, 1168 (1986) (prosecutor's failure to challenge White jurors who did not meet his asserted criteria is highly probative in determining whether the prima facie case had been rebutted). Such consistency in the record would signifi-

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112. *Id.* at ___, 369 S.E.2d at 134.

113. As Justice Finney pointed out, the majority opinion greatly oversimplified matters. Not all the jurors were challenged because of their views regarding the death penalty. Other reasons offered by the State for excusing several of the jurors, in addition to their views regarding the death penalty, were as follows: several were "young," ages twenty and twenty-three; one juror had an erratic work history; another's spouse was unemployed. As the dissent pointed out, however, none of these reasons were applied to similarly situated white jurors who were young, reluctant to impose the death penalty, or had unstable work histories. *Id.* at ___, 369 S.E.2d at 139-40.

cantly curtail appellate review of this issue and insure the preservation of an accused's right to a fair trial by an impartial jury.[114]

VII. A COMPARISON WITH THE PAST: A HISTORICAL LOOK AT THE SOUTH CAROLINA SUPREME COURT'S PRE-*Batson* DECISIONS

In order to place the South Carolina Supreme Court's post-*Batson v. Kentucky* cases in proper perspective, it is instructive to review briefly the court's prior decisions involving claims of racial discrimination in jury selection. These decisions, both prior to and after *Swain v. Alabama*, reflect a judicial reluctance to find discrimination. *State v. Grant*[115] involved the appeal of a young black man sentenced to death by an all-white jury in Berkeley County for the crime of the assault with intent to ravish — the attempted rape — of a young white woman. At trial and on appeal, Grant maintained that black persons had been excluded from both the grand jury that indicted him and the petit jury that convicted him. At the time of Grant's trial, only one black person was registered to vote and was thus eligible to be chosen as a juror in Berkeley County, even though black persons outnumbered whites in the general population. The court, therefore, concluded that because there was no evidence that "[any] colored person was refused registration" and because there was no evidence that black persons had been deterred from registering, Grant's claim was meritless.[116] Subsequently, Grant was executed.

Four years later in *State v. Middleton*,[117] the court was faced with a similar claim. The appellant maintained that black persons had been excluded from his petit jury, primarily because minority jurors were not able to pay the poll tax of $300. Middleton was tried and convicted in Charleston County for the crime of assault with intent to ravish a white woman. At the time of his trial, fewer than five percent of the registered voters

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114. *Id.* at ___, 369 S.E.2d at 139-40 (Finney, J., concurring in part and dissenting in part).

115. 199 S.C. 412, 19 S.E.2d 638 (1941).

116. *See id.* at 435, 19 S.E.2d at 648. The court also noted that the one black registered voter was listed in the registration books as "Reverend" and, thus, was entitled to a statutory exemption in any event. *Id.* at 435, 19 S.E.2d at 647-48.

117. 207 S.C. 478, 36 S.E.2d 742 (1946).

in the country were black, and approximately 100 of the 3,400 persons in the jury box from which appellant's jury was drawn were black persons. None of the individuals drawn to serve on the jury in the term of court in which Middleton was tried were black persons. The court dealt with appellant's claims in great detail, maintaining that the claim had absolutely no evidentiary basis, and set forth the manner in which the system operated. As is true today, both the grand and the petit jury venires were selected from the list of registered voters. The court concluded that "[t]here is no evidence in this case that any Negro anywhere in the State has ever applied and been refused registration [to vote] if he can both read and write or owns $300.00 worth of property."[118] Furthermore, the court concluded that there was nothing discriminatory about the fact that a "c" was placed by the name of black persons in the registration lists. The court then stated that Middleton's contention was nothing more than an effort to "impugn the motive and conduct of the Courts of this State"[119] because:

> [t]he State of South Carolina is not recreant nor recalcitrant in following the Federal laws in the selection of a jury, and in requiring that Negroes be drawn to sit as jurors and that their names be included with others in the jury box. If no negroes are drawn at any term of Court it is merely incidental to the usual and customary method of presenting the names of jurors for each week.[120]

Similarly, in *State v. Fleming*[121] the court again rejected a claim alleging the systematic exclusion of black persons from the grand and petit juries. Fleming was tried in Clarendon County, which, at the time of his trial, was approximately sixty percent black.[122] The evidence revealed that, at least from 1935 to 1962, no black person had ever served on either a grand or petit jury in the county, although several blacks had been called for jury service after 1962.[123] Nevertheless, the court concluded that the fact that only thirty-five black persons were registered to vote

118. *Id.* at 488, 36 S.E.2d at 746.
119. *Id.* at 486, 36 S.E.2d at 745.
120. *Id.* at 491, 36 S.E.2d at 747.
121. 243 S.C. 265, 133 S.E.2d 800 (1963).
122. *See id.* at 270, 133 S.E.2d at 803.
123. *Id.*

"refutes any contrary inference which might be drawn from the relatively small number of Negro jurors, should only population figures be considered."[124]

In *Bostick v. State*[125] the court again denied a systematic exclusion claim because blacks had not been excluded totally from the jury selection process. One black person had been on the grand jury that indicted Bostick; two others were in the venire — although neither was called or seated — from which the jury that convicted him and sentenced him to death was drawn. The court also credited the testimony of responsible officials who had stated that there had been no systematic exclusion of black persons from jury service in Jasper County.[126] The state court's decision subsequently was reversed and remanded for reconsideration in light of the Supreme Court's decision in *Whitus v. Georgia*.[127]

Despite the court's protestations and denials, the fact that black persons comprised such a small percentage of the registered voters — and, thus, were excluded from jury service — resulted in their wholesale disfranchisement in South Carolina.[128] Black persons were refused voter registration through a combination of both objective barriers, such as the poll tax and literacy tests, and through internalized fear and hostility.[129] Additionally, party rules prevented even the black persons who *did* register from voting in the Democratic primary. Because the Re-

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124. *Id.* at 270-71, 133 S.E.2d at 803; *see also* Thomas v. Leeke, 257 S.C. 491, 186 S.E.2d 516 (1970) (post-*Swain* decision involving black man sentenced to death for the rape of a white woman, holding that appellant failed to establish a prima facie case of discrimination because of flaws in the statistics presented), *sentence vacated* 403 U.S. 948 (1971); Moorer v. State, 244 S.C. 102, 135 S.E.2d 713 (jury discrimination claim denied in case involving black man sentenced to death for the rape of a white woman in Dorchester County), *cert. denied*, 379 U.S. 860 (1964).

125. 247 S.C. 22, 145 S.E.2d 439 (1965), *rev'd*, 386 U.S. 479 (1967).

126. *See id.* at 28, 145 S.E.2d at 442.

127. 385 U.S. 545 (1967) (finding discrimination in Georgia under similar circumstances).

128. *See* McDonald, *An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina*, 37 S.C.L. REV. 557 (1986).

129. In addition to poll taxes and literacy tests, South Carolina law provided that an individual was not qualified to vote if he had been convicted of certain crimes. The disfranchising offenses were crimes that blacks were thought more likely to commit than whites, such as larceny, adultery, fornication, incest, and wife beating. On the other hand, crimes such as murder and fighting, which were thought to be committed more often by whites, did not result in disfranchisement. *See id.* at 571.

publican party was virtually nonexistent in South Carolina at that time, the Democratic primary was, for many years, the only election that mattered.[130] This also significantly depressed black voter registration.[131] Thus, the dearth of black persons called for jury service did not result from a lack of desire among black persons to register to vote or to serve on juries, but rather from intentional discrimination by state and local officials.[132] Furthermore, even the few black persons who were registered seldom were called for jury service, and the ones who were included in the jury pool rarely, if ever, ended up being seated as a juror. Certainly, letter the "c" for "colored" placed beside their names in the jury commissioners' lists contributed to the continued absence of black persons from jury service.

State v. Waitus[133] is the only case in which the South Carolina Supreme Court granted relief because of the exclusion of blacks from jury service. The court did so reluctantly, however, stating that "[w]e are bound by [the Supreme Court's] decisions construing the Federal Constitution, although our own views may not be in accord therewith."[134] In *Waitus* the court was confronted with an appeal from Marion County. Even though ten percent of the registered voters were black, the evidence revealed that "for a period of at least twelve years, no Negro has ever sat on either the grand or the petit jury in Marion County."[135] The court noted that even though it was "quite sure that there was no evil intent or conscious disregard of duty by

130. *Id.* at 572. Even after the Supreme Court's decision in Smith v. Allwright, 321 U.S. 649 (1944), holding that the Texas "white primary" was unconstitutional, blacks still were prevented from voting by party rules in South Carolina.

131. The literacy tests were used by officials to prevent even those blacks who could read from registering. Additionally, a number of tactics, such as closing the voter registration office when blacks came to register, were utilized even after many of the legal barriers to voter registration were invalidated in the middle decades of this century. *See* McDonald, *supra* note 128, at 572.

132. Civil actions alleging jury discrimination were filed in many counties in South Carolina. Almost all were settled by consent decrees, entered into by the parties, which changed the methods for selecting juries in order to ensure black participation.

133. 224 S.C. 12, 77 S.E.2d 256 (1953).

134. *Id.* at 19, 77 S.E.2d at 259. The court also noted later in its opinion that "whatever may be the individual opinions of the members of this court as to the correctness, soundness, or wisdom of these decisions, it becomes our duty to yield thereto." *Id.* at 23, 77 S.E.2d at 261 (quoting Crumb v. State, 205 Ga. 547, 552, 54 S.E.2d 639, 641 (1949)).

135. *Id.* at 21, 77 S.E.2d at 260.

the jury commissioners," relief had to be granted because of the Supreme Court's jury discrimination decisions.[136]

The final pre-*Batson* case in which a claim of this nature was decided by the South Carolina Supreme Court was *State v. Truesdale*.[137] Truesdale's counsel made a pretrial motion to prevent the State from excluding potential jurors on account of their race. In support of the motion, counsel presented a statistical study indicating a pattern of strikes against black jurors in Lancaster County. Both the trial and appellate courts rejected the statistical showing.[138] The court also stated, however, that the trial court did not even have to entertain Truesdale's "bizarre request" to limit the State's discriminatory use of its peremptory challenges because "it assumed a power in the courts of this State which does not exist."[139] Relying on *Swain*, the court stated that a peremptory challenge may be exercised for any reason at all and that "[t]he constitutionality of peremptory challenges as well as their role in the judicial process are now well settled."[140]

Of course, most of the decisions discussed in this section of the article were decided in a different era. Yet in most of the cases, the court reached its decision despite knowledge that black persons were intentionally prevented from registering to vote and, thus, from serving on juries and that discrimination against blacks in jury selection was pervasive. Today, when such blatant discrimination largely has been eradicated and lives no longer hang in the balance, almost everyone is willing to admit that the discrimination vehemently denied by prosecutors and judges at that time, was very real.[141] The language and tone of

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136. *See id.* The apparent test for demonstrating that black persons had been discriminated against in the jury selection process propounded by the court in *Waitus*, and referred to in several of the other decisions discussed previously in this section, was the complete and total exclusion of all black persons from serving on both grand and petit juries.

137. 278 S.C. 368, 296 S.E.2d 528 (1982).

138. *See id.* at 374, 296 S.E.2d at 531-32.

139. *Id.* at 373, 296 S.E.2d at 531.

140. *Id.* (citing *Swain*, 380 U.S. 202).

141. The same is true of other historic discrimination in the criminal justice system. For example, it is acknowledged now that the death penalty for rape and attempted rape was reserved almost exclusively for those cases in which the accused was a black male and the victim was a white female. *See, e.g.*, State v. Grant, 199 S.C. 412, 19 S.E.2d 638 (1941). The racially discriminatory manner in which the death penalty was meted out was one of the Supreme Court's primary unmentioned concerns in Coker v. Georgia, 433

the recent decisions of the South Carolina Supreme Court construing *Batson* is not only similar to that of the prior decisions sanctioning the exclusion of blacks from jury service,[142] but it is fundamentally at odds with the spirit of *Batson*.

VIII. FROM THE CRITIC'S CORNER: RECOGNIZING THE LIMITATIONS OF THE DECISIONS OF THE SOUTH CAROLINA SUPREME COURT

A review of the South Carolina Supreme Court's opinions construing *Batson v. Kentucky* leaves little doubt that the decision is one with which the court does not agree in principle and finds difficult to administer.[143] In part, the court's criticism is well taken. The *Batson* holding is in fact "skeletal," as the High Court specifically declined to articulate "particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."[144] Thus, the state court's criticism of *Batson*'s "vague guidelines" is not without substance.[145] Furthermore, it is true that the United States Supreme Court's decision left many questions unanswered.[146] It is also true that an appellate court may have difficulty discerning a prosecutor's motives from a "cold record." Nevertheless, the South Carolina Supreme

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U.S. 584 (1977), in which the Court held that capital punishment could not be imposed for the crime of rape. Nevertheless, although now commonly acknowledged, racial discrimination previously was denied strenuously by all states that imposed the death penalty in rape cases, almost all of which were former slave states.

142. *Compare* State v. Waitus, 224 S.C. 12, 77 S.E.2d 256 (1953) *and* State v. Grant, 199 S.C. 412, 19 S.E.2d 638 (1941) *with* State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987) *and* State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). The South Carolina Supreme Court's treatment of *Batson* also is surprising in light of the court's zealous protection of other constitutional rights guaranteed to an individual accused of a crime. *See, e.g.*, State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988) (involving fifth amendment privilege against self-incrimination); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (also involving fifth amendment privilege against self-incrimination).

143. *See supra* pp. 21-22.

144. 476 U.S. at 99. The Supreme Court's reluctance to mandate more specific procedures apparently was due to "the variety of jury selection practices followed in our state and federal trial courts." *Id.* at 99 n.24.

145. *See* State v. Jones, 293 S.C. 54, 57, 358 S.E.2d 701, 703 (1987).

146. For example, the Court did not decide whether a defendant is prohibited from discriminating against minority jurors in the use of his or her peremptory challenges — although the South Carolina Supreme Court ruled in an unpublished memorandum opinion that it does not — or whether a defendant had to be black to object to the State's striking black jurors.

Court's reluctance to enforce *Batson* zealously is unwise.

South Carolina, like almost every other jurisdiction — especially our sister southern states — now is faced with the first generation of *Batson* claims. The court's decisions make clear that it is divided over the scope of the ruling in *Batson*. Chief Justice Ness' dissent in *Martinez* exposes the majority's unhappiness with the *Batson* holding. Yet even without the statements contained in the *Martinez* dissent, the narrowness of the state court's interpretation of the *Batson* is readily apparent. The early decisions previously outlined in this article reveal that if a prosecutor has the presence of mind to offer any reason for the use of a peremptory challenge — as long as it is not race — regardless of whether it is supported by the record, plausible on its face or applied to similarly situated white jurors, the court will not disturb a trial court's finding that the strike was legitimate.[147] Of course, after *Batson* and the decisions of the South Carolina Supreme Court, only in the rarest of circumstances would a prosecutor admit that he or she struck black jurors because of their race. Thus, for all practical purposes, the supreme court's extreme deference to the trial judge's ruling on a *Batson* claim insulates the trial court's determination from meaningful appellate review. It remains to be seen, however, whether South Carolina's reluctance to enforce *Batson* rigorously will withstand federal review. It cannot be seriously contended that the Supreme Court intended or will ultimately permit *Batson* to be so easily evaded. Such an interpretation of *Batson*, if accepted by the Court, in effect would mean that the insurmountable burden of *Swain* remains in force in all but the most unusual circumstances. It is doubtful whether that was the Court's intent. Therefore, there is a substantial likelihood that if the South Carolina Supreme Court persists in its extremely narrow interpretation of *Batson*, its approach will be rejected at some point by the federal courts in federal habeas corpus proceedings.[148]

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147. *See, e.g.*, State v. Howard, ___ S.C. ___, 369 S.E.2d 132 (1988); State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

148. The United States Supreme Court granted certiorari in Tompkins v. State, No. 68,870 (Tex. Crim. App. Apr. 22, 1987), *cert. granted sub nom.* Tompkins v. Texas, 108 S. Ct. 1727, *cert. amended*, 108 S. Ct. 2818 (1988), to review a decision of the Texas Court of Criminal Appeals — another court that has interpreted *Batson* very narrowly — which held that *Batson* was not violated when the prosecutor used all his challenges to exclude minority jurors and both the trial appellate courts accepted his articulated

Additionally, the state court's treatment of *Batson* claims sends the wrong message to prosecutors and trial judges. If trial judges and prosecutors understand that the South Carolina Supreme Court will not hesitate to reverse a criminal conviction when the record reveals that the State has exercised its peremptory challenges in a discriminatory manner, then the court's review function eventually will become much easier. Prosecutors will accept the fact that their strikes cannot be used to exclude minority jurors without valid specific reasons related to the case to be tried. Trial judges will carefully scrutinize a prosecutor's articulated race-neutral reasons for excusing minority jurors and require the jury selection process to be conducted again if the reasons are not adequate. Thus, the appellate court will not be faced with as many difficult problems in attempting to discern a solicitor's motives on the basis of the trial transcript. Although South Carolina is not alone in its narrow interpretation of *Batson*,[149] many states have embraced *Batson* more warmly. Consequently, if the South Carolina Supreme Court were to enforce *Batson* rigorously, it would be following the course adopted by several other states, which have set forth more detailed procedures for trial courts to use in evaluating *Batson* claims. These courts have reversed a defendant's conviction when the record reveals purposeful discrimination in the State's use of its peremptory strikes.[150]

A. A Comparison of the South Carolina Approach With That of Other States

As has been set forth previously, *Batson* allows a defendant to establish a prima facie case of purposeful discrimination solely on evidence derived from his case. He first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of his race from the venire. If a prima facie case is established, then the State is required to articulate a race-neutral reason for

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reasons for the strikes.

149. *See, e.g.*, State v. Crump, 747 S.W.2d 193 (Mo. Ct. App. 1988) (suggesting that *Batson* applies only if black defendant is tried before an all-white jury).

150. Additionally, as was noted previously in this article, a number of states proscribed the discriminatory use of peremptory challenges even before the Supreme Court's decision in *Batson v. Kentucky*. *See supra* note 33.

the challenges. The guidelines set forth by the South Carolina Supreme Court about when a trial court should require the prosecution to state the reasons for its strikes are sound. In *State v. Jones*[151] the court wisely determined that a hearing should be conducted at the defendant's request, at which the solicitor is required to set forth his reasons for his peremptory challenges "whenever the defendant is a member of a cognizable racial group and the prosecutor exercises peremptory challenges to remove members of the defendant's race from the venire."[152]

Although the opinion did not articulate this point clearly, the logic of *Jones* is that a prima facie case may be established on minimal evidence. This is as it should be. Such a bright-line test ensures the development of the record for appellate review and simplifies the task of the trial court. As other courts have recognized, it is imperative that the trial judge find a prima facie showing on a minimal showing of discrimination. To do otherwise would foreclose reasonable inquiry into the defendant's claims and possibly "immunize" a single invidious act.[153]

Once a prima facie case is established, a prosecutor must "articulate a neutral explanation"[154] that is "clear and reasonably specific" and "legitimate."[155] *Batson* teaches that the prosecutor may not rebut the prima facie showing if his justifications are merely "sham excuses belatedly contrived to avoid admitting acts of group discrimination."[156] The decisions of the South Carolina Supreme Court, however, indicate that a prosecutor must do very little to rebut the prima facie case. Apparently, any reason, as long as it is not overtly racial, will suffice.[157] The most serious defect in the South Carolina Supreme Court's approach is its apparent unwillingness to require the prosecution to apply

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151. 293 S.C. 54, 358 S.E.2d 701 (1987).

152. *Id.* at 57, 358 S.E.2d at 703.

153. *See, e.g.*, Commonwealth v. Soares, 377 Mass. 461, 473, 387 N.E.2d 499, 508, *cert. denied sub nom.* Massachusetts v. Soares, 444 U.S. 881 (1979). *Batson* is violated if the State excuses a single minority juror for racially discriminating reasons. *See* United States v. David, 803 F.2d 1567 (11th Cir. 1986); Powell v. State, 182 Ga. App. 123, 355 S.E.2d 72 (1987). *Contra Crump*, 747 S.W.2d 193.

154. *Batson*, 476 U.S. at 98.

155. *Id.* at 98 n.20 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).

156. People v. Wheeler, 22 Cal. 3d 258, 282, 583 P.2d 748, 765, 148 Cal. Rptr. 890, 906 (1978).

157. *See supra* p. 319.

its purported race-neutral reasons to prospective white jurors. In evaluating a prosecutor's effort to rebut a prima facie showing, various courts correctly have realized that one very relevant consideration is whether the prosecutor challenged similarly situated white jurors on identical or comparable grounds.[158] For example, in *Gamble v. State*[159] the Georgia Supreme Court determined that a solicitor's articulated reason was legally inadequate to rebut the defendant's prima facie showing of discrimination. The solicitor claimed to have excused a black juror because of his age, but the court rejected that reason because white jurors in the same age group were not challenged.[160] The South Carolina Supreme Court, however, has declined to adopt this approach and has found that the prosecutor's reason was "race neutral" even when the State did not also challenge similarly situated white jurors.[161] Such a comparison is necessary, however, because a prosecutor's purported race-neutral reason is more likely to have been a pretext for prohibited discrimination if white jurors with the same traits were not challenged.[162]

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158. *See, e.g.*, Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987) (reasons for striking black jurors were pretextual because not applied to white jurors), *cert. denied*, 108 S. Ct. 233 (1987); People v. Hall, 35 Cal. 3d 161, 168, 672 P.2d 854, 858, 197 Cal. Rptr. 71, 76 (1983) (disparate treatment of black and white jurors similarly situated "strongly suggestive of bias"); State v. Slappy, 522 So. 2d 18 (Fla. 1988), *cert. denied*, 108 S. Ct 2873 (1988); Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986) (prosecutor's failure to challenge white jurors who, by his own criteria, ought to have been removed highly probative in determining whether prima facie case had been rebutted); *see also* United States v. Allen, 666 F. Supp. 847 (E.D. Va. 1987) (*Batson* not violated because prosecutor's reasons were applied both to black and white jurors), *aff'd*, 847 F.2d 138 (1988).

159. 257 Ga. 325, 357 S.E.2d 792 (1987).

160. *See id.* at 328, 357 S.E.2d at 795.

161. *See supra* pp.21-23. Both Chief Justice Ness and Justice Finney pointed out this defect in the South Carolina Supreme Court's approach in their dissents in State v. Howard, ___ S.C. ___, 369 S.E.2d 132 (1988), and State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

162. Such a comparison also is consistent with the Supreme Court's Title VII decisions previously discussed in this article and cited by the majority in *Batson*. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) (plaintiff may show pretext by demonstrating that similarly situated persons of different races were treated differently). In McDonnell-Douglas v. Green, 411 U.S. 792 (1973), the Court held that the defendant's "criterion [must be] applied alike to members of all races." *Id.* at 804. Part of the South Carolina Supreme Court's difficulty in these cases may be due to its comparative unfamiliarity with claims involving violations of the equal protection clause and Title VII, issues that are addressed primarily in cases filed in the federal courts. The shifting burdens of production and persuasion incorporated by the *Batson* majority are not familiar legal tools to the state court.

Additionally, other courts have considered two other factors important in adjudicating *Batson* claims. These courts scrutinize the prosecutor's articulated reason for striking a juror to determine if it is based upon evidence in the record and actually is related to the case to be tried.[163] Although the South Carolina Supreme Court has indicated that whether the reason is supported by the record or related to the case to be tried, its decisions are to the contrary.[164] If the prosecutor cannot support the strike on the basis of the record evidence or relate the supposed reason to the case to be tried, then there is an increased likelihood that the reason is merely pretextual and that the juror actually was excluded because of his or her race. These requirements necessarily mean that courts should be extremely reluctant to accept general and vague reasons for striking a juror, such as the juror was "sullen," "distant," or "looked mean."[165] Other courts have recognized that such vague and general assertions often indicate that the juror was excused, either consciously or unconsciously, for racial reasons.[166]

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163. *See, e.g., Ex parte* Branch, 526 So. 2d 609 (Ala. 1987); *see also* People v. Hall, 35 Cal. 3d. 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983) (prosecutor must show specific bias related to case to be tried); Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987) (Georgia Supreme Court found violation of *Batson* due to prosecutor's articulated reason that the juror was challenged because he was a mason, when it was not demonstrated how Masonic membership was related to the case). In *Branch* the Alabama Supreme Court set forth several criteria for trial courts to utilize in assessing a prosecutor's justification for his peremptory challenges: (1) the reasons given were not related to the facts of the case; (2) the challenged juror was not asked meaningful questions; (3) white jurors with similar characteristics were not challenged; (4) there was a disparate examination of members of the venire; (5) the prosecutor used fewer than all his peremptory challenges; and (6) the given explanation was based on a group trait where the trait is not specifically shown to apply to the challenged juror. *See* 526 So. 2d at 624. *See also* State v. Slappy, 522 So. 2d 18 (Fla.), *cert. denied*, 108 S. Ct. 2873 (1988).

164. *See* State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987). In *Martinez* the court accepted the prosecutor's articulated reasons even though the trial court determined essentially that the proffered reasons did not make sense. The reasons were accepted by the court because they were not "race related." *Id.* at 76 n.2, 362 S.E.2d at 643 n.2 (Ness, C.J., dissenting).

165. *See* State v. Edwards, No. 87-MO-425, mem. op. (S.C. Dec. 8, 1987) (affirmed without opinion pursuant to Rule 23 of The Rules of the South Carolina Supreme Court) (court rejected *Batson* challenge when prosecutor struck forty-three-year-old black female because she was elderly and another black juror because he looked mean).

166. *See, e.g.*, People v. Turner, 42 Cal. 3d 711, 725, 726 P.2d 102, 110, 230 Cal. Rptr. 656, 664 (1986) (prosecutor's statement that juror was excused because of "something in her work" inadequate to sustain use of peremptory challenge); State v. Slappy, 522 So. 2d 18 (Fla.), *cert. denied*, 108 S. Ct. 2873 (1988).

Furthermore, other courts have recognized that the trial court is obligated to evaluate the prosecutor's explanation carefully in order to determine if it is bona fide,[167] and the court need not and should not accept any reason given by the prosecutor at face value.[168] In fact, in order to ensure that the mandate of *Batson* is followed, the trial judge and the appellate courts should conduct a probing inquiry into the prosecutor's explanation.[169] An excellent example of this more exacting scrutiny is the decision of the Arkansas Supreme Court in *Ward v. State*.[170] In *Ward* the State excused all potential black jurors. The prosecution explained its use of peremptory challenges by saying that several jurors were struck because they were unemployed, unmarried, or both. The court reversed Ward's conviction and death sentence. In so doing, it stated, "Actions sometimes speak louder than words, and any prosecutor who uses all of his peremptory challenges to strike black people better have some good reasons available. . . . The best answer is for prosecutors to put blacks on juries."[171] Similarly, other courts have recognized that a prosecutor's reasons should be given more exacting scrutiny when racial issues are involved in the case.[172]

In short, a proper adherence to *Batson* requires meaningful rebuttal. To accomplish this goal, the trial judge should note all the circumstances relevant to discrimination in the particular case. Among other things, the trial court should keep a record of

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167. *See* People v. Hall, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983); *Slappy*, 522 So. 2d at 22.

168. *See Hall*, 35 Cal. 3d at 169, 672 P.2d at 858, 197 Cal. Rptr. at 76; *see also* State v. Sandoval, 105 N.M. 696, 736 P.2d 501 (Ct. App. 1987) (conviction reversed when the prosecutor challenged only two Hispanic jurors in venire and merely denied doing so on the basis of their race or national origin).

169. *See Hall*, 35 Cal. 3d at 168-69, 672 P.2d at 858, 197 Cal. Rptr. at 75. Thus, the California Supreme Court requires the lower courts to make the determination of discrimination based upon all the relevant circumstances, not merely upon the prosecutor's statement of his reasons. *Compare Hall, id.* at 166, 672 P.2d at 856, 197 Cal. Rptr. at 73-74 (prima facie case not rebutted) *with* People v. Clay, 153 Cal. App. 3d 433, 451-53, 200 Cal. Rptr. 269, 276-77 (1984) (prima facie case rebutted).

170. 293 Ark. 88, 733 S.W.2d 728 (1987).

171. *Id.* at 94, 733 S.W.2d at 731. The *Ward* court also acknowledged that the racially discriminatory use of peremptory challenges by prosecutors was widespread. *Id.*

172. *See, e.g., Hall*, 35 Cal. 3d 161, 672 P.2d 854, 197 Cal. Rptr. 71; Hale v. State, 480 So. 2d 115 (Fla. Dist. Ct. App. 1984) (conviction reversed in interracial case involving white minor victim and black male defendant when black juror was excused to prevent victim from being confused); People v. Scott, 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (1987).

the prosecutor's questions to prospective jurors if *voir dire* is permitted, as well as a record of which jurors were retained and which were excluded, with the reasons for those exclusions. Furthermore, the trial court should determine whether the State's reasons for excusing the minority jurors also were applied to similarly situated white jurors. Finally, the trial judge should determine if the prosecutor's articulated reasons make sense standing alone and if they are both supported by the record and related to the case to be tried.[173] If the articulated reasons do not satisfy these standards, then they should not be deemed adequate to rebut a prima facie showing of discrimination under *Batson*.[174]

This approach does not require much of the State. The Supreme Court recognized in *Batson* that peremptory challenges have been used in the past and continue to be used in this country to exclude black persons from jury service.[175] Typically, potential black jurors have been excluded in cases involving black defendants and white victims and witnesses, cross-racial eyewitness identification, or other issues involving race. Prosecutors frequently excuse black jurors in such cases because they assume that black jurors are more likely to identify with a black defendant or less likely to believe a white witness, whether it be the victim, a police officer, or some other critical witness.[176] Even so, it is precisely those types of generalizations and assumptions about black persons and other minorities that are forbidden by

173. Defense counsel, of course, has the responsibility to bring the relevant information to the trial court's attention. The *Batson* hearing is an adversarial proceeding, and counsel must be given the opportunity to participate in the trial court's consideration of the claim. *See* United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987) (error to hold *Batson* hearing *ex parte* because of critical role of defense counsel in proceeding).

174. Some commentators have maintained that the reason given by the prosecutor should affect the level of scrutiny given by trial and appellate courts. Thus, more vague reasons, such as the juror's employment or looks, should be given more exacting scrutiny than reasons that are more specific and verifiable. *See* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMONOLOGY 1 (1988).

175. *See* Batson, 476 U.S. at 99; *see also id.* at 101 (White, J., concurring) ("practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread"); *id.* at 102 (Marshall, J., concurring) (recognizing the "shameful practice of racial discrimination in the selection of juries").

176. *See* NATIONAL JURY PROJECT, JURYWORK § 4.07 [1][a] at 4-48 (2d ed. 1986) (because minorities presumed to have liberal attitudes toward criminal justice issues, prosecution generally does not want minority representation on jury).

Batson.

It also should be noted that the history underlying the United States Supreme Court's antidiscrimination decisions partially reveals why *Batson* troubles some courts. One result of social reform in the United States, especially in the last twenty-five years, has been the stigmatization of blatant and overt racial prejudice. As a result of this stigmatization, courts, even at times the United States Supreme Court, have been reluctant to find that a government body or official engaged in racial discrimination.[177] Discrimination has become such a societal evil that courts do not want to find it except in the clearest and most blatant of circumstances. Therefore, there is a judicial reluctance to label an official as a racist — either directly or indirectly — without absolute proof of culpability.[178]

The South Carolina Supreme Court, and other courts faced with *Batson* claims, should confront this judicial reluctance head-on. The discriminatory use of peremptory challenges, although purposeful racial discrimination in the legal sense, in many cases is not invidious in the nonlegal sense of the term. In other words, a prosecutor intentionally may use a strike to exclude a black person because that individual is black but not necessarily because of any racial animus. Rather, the juror is excused in order to obtain jurors the prosecutor believes will be more favorable to the State's case. Thus, in the context of the discriminatory use of peremptory challenges, the courts should recognize that a holding that a prosecutor violated *Batson* is not equivalent to a holding that the prosecutor is a racist. Instead, the discriminatory use of peremptory challenges often arises from generalizations about who may or may not be an impartial juror in a particular case. Although trial lawyers often use such generalizations,[179] they no longer are acceptable under the equal

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177. *See* Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1418 (1988).

178. *See id.* Professor Kennedy argues that this judicial reluctance is merely another manifestation of the courts' concern for the feelings of whites rather than those of blacks who have been the victims of discrimination.

179. *See* Swain v. Alabama, 380 U.S. 202 (1965).

> [The peremptory challenge] is often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," upon a juror's "habits and associations," or upon the feeling that "the bare questioning [a juror's] indifference may sometimes provoke a resentment." It is no less frequently exercised on grounds normally thought

protection clause of the fourteenth amendment. Accordingly, the courts should treat *Batson* claims as they would other constitutional guarantees and not utilize an unstated and heightened standard of review.

The racial discrimination involved in *Batson* admittedly is more subtle than the wholesale exclusion of black jurors of the last generation and, therefore, is more difficult to identify in any particular case.[180] Nevertheless, it is equally real, equally pernicious, and equally unacceptable, and the South Carolina Supreme Court should take affirmative steps to eradicate it.[181] The court should recognize, as has the Florida Supreme Court, that:

> discrimination within the judicial system is [the] most pernicious. It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being — to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.

> irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. . . . 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.

Id. at 220-21 (citations omitted).

180. In some cases, racial discrimination may be unconscious. Courts have recognized that peremptories often are based on a prosecutor's "gut reaction" to the potential juror. Hence, if a prosecutor feels uncomfortable with a particular juror, he will strike him or her. Because most prosecutors are white, they naturally are more likely to feel comfortable with persons most like themselves, other white jurors, and less comfortable with black jurors. Thus, if unchecked, the peremptory challenge inherently accommodates racism by sanctioning unexplained subjective decisions. *See* Serr & Maney, *supra* note 174, at 2. It may well be that as more black persons are admitted to the bar and, as a result, are employed as prosecutors, the discriminatory use of peremptory challenges will decrease.

181. Discrimination in the State's use of its peremptory challenges is, in many ways, more pernicious than other types of discrimination in either the criminal justice system or even the jury selection process. This is so because it involves a face-to-face encounter between the person discriminated against, the black juror challenged by the prosecution, and the State. The black person excluded from the jury list is almost always unaware that he has been the victim of discrimination. This is not true, however, for the black juror challenged by the prosecution. The black juror who is struck because of race is a victim of governmental discrimination in open court, in the presence of the community. Consequently, the effects of this type of racial injustice are more pernicious. In many respects, discrimination in the State's use of its peremptory challenges truly remains one of the "badges and incidents of slavery." Civil Rights Cases, 109 U.S. 3, 20 (1883).

> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair crosssection of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws.[182]

The ultimate message of *Batson* is that diversity is the genius of the jury system. A jury comprised of persons from diverse racial and socio-economic backgrounds assures fairness and impartiality because the jurors must share their experiences, values, and beliefs.[183] A verdict obtained in a proceeding in which members of a black defendant's race have been intentionally excluded is not only less reliable, but also ultimately results in an erosion of the public's confidence in the system. Finally, if the legal profession expects jurors to lay aside their prejudices once they enter the jury box, then as a starting point, it is critical that trial lawyers and judges remove their own biases and stereotypes from the jury selection process.

IX. CONCLUSION

This article has attempted to demonstrate the problems inherent in the restrictive view of *Batson* set forth in recent decisions of the South Carolina Supreme Court. The court's reluctance in strictly enforcing the constitutional mandate of the United States Supreme Court, while to a certain degree understandable, is unsound. Because the court's limited view of *Batson*, for all practical purposes, has rendered the Supreme Court's decision meaningless, it runs the risk of ultimately being rejected. This possibly could result in numerous reversals.

Furthermore, the court's opinions send the wrong messages to prosecutors and trial judges of this state and, consequently, inevitably will lead to more — rather than fewer — claims alleg-

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182. State v. Slappy, 522 So. 2d 18, 20 (Fla.) (citations omitted), *cert. denied*, 108 S. Ct. 2873 (1988).

183. *See* Note, *supra* note 9. It is true, therefore, that in some cases a defendant's peers will vote differently than nonpeers because of a greater understanding of the defendant's attitudes and way of life. *See* A. GINGER, JURY SELECTION IN CIVIL AND CRIMINAL TRIALS § 2.2, at 64 (1984). *Batson* recognizes that this diversity is an asset, rather than a liability, to our system of justice.

ing that the State has exercised its strikes to exclude black persons from jury service in criminal cases. Conversely, if the court were to embrace *Batson* more warmly, it is likely that the discriminatory use of the State's peremptory challenges would decrease. Prosecutors would exercise their strikes more carefully, and trial judges would eliminate many problems at the outset. The result of this more rigorous enforcement of *Batson* would be fewer problems for the court reviewing cold appellate records in an attempt to discern racial discrimination. Finally, this article has taken issue with the court on a more fundamental level. Racial discrimination in jury selection exists. It no longer can be tolerated, however, because it damages the integrity of the entire criminal justice system: that is the fundamental teaching of *Batson*. Despite the South Carolina Supreme Court's natural reluctance to hold that any particular solicitor in any particular case has discriminated against black persons in the use of his peremptory challenges, the alternative is to perpetuate, rather than eradicate, the use of stereotypes and generalizations in jury selection. The South Carolina Supreme Court should take the lead in ensuring that no citizen of this state is excluded on the basis of his or her race from the jury selection process.