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Another Step Towards Ending Discrimination in the Jury Selection Process - Powers v. Ohio

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ANOTHER STEP TOWARDS ENDING DISCRIMINATION IN THE JURY SELECTION PROCESS—Powers v. Ohio

I. INTRODUCTION

With the April 1, 1991 decision in Powers v. Ohio, the United States Supreme Court took another step towards ending discrimination in the jury selection process by broadening the holding of Batson v. Kentucky. For the thirty year period between the decisions in Swain v. Alabama in 1965, and Batson, in 1986, the Court permitted prosecutors to use peremptory challenges in any criminal case to exclude members of a racial minority from petit jury service. Both Swain and Batson involved attempts by black defendants to prove purposeful discrimination by prosecutors against black venirepersons during the voir dire process. In addition, both cases required that the defendant had to be of the same race or minority as the excluded venireperson in order for the exclusionary action to be found unconstitutional.

In Batson, the Court attacked discrimination in the jury selection process by holding that whenever a criminal defendant establishes a prima facie case of purposeful discrimination by the prosecutor, the burden shifts to that prosecutor to show a non-racial, non-discriminatory ground for his peremptory challenge. In Pow-

5. A peremptory challenge is the right to challenge a juror without assigning a reason for the challenge. In most jurisdictions, each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges. BLACK’S LAW DICTIONARY 592 (5th ed. 1983).
6. Petit jury is the ordinary jury for the trial of a civil or criminal action; so called to distinguish it from the grand jury. BLACK’S LAW DICTIONARY 856 (6th ed. 1990).
7. Also known as “venireman”: a member of a panel of jurors; a prospective juror. Before becoming a juror, a person must pass voir dire examination. BLACK’S LAW DICTIONARY 1556 (6th ed. 1990).
8. Swain, 380 U.S. at 221-22; Batson, 476 U.S. at 81.

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ers, the Supreme Court extended the Batson rule, holding "that a criminal defendant may object to [the] race-based exclusion of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." The Powers Court based this decision on the Equal Protection Clause of the U.S. Constitution.

This Note has four objectives. First, this Note will review the constitutional history behind Powers, involving racially motivated discrimination in the jury selection process. Second, this Note will analyze and discuss the Powers decision. Third, this Note will attempt to ascertain the impact of the decision. Finally, this Note will suggest that while Powers marks progress in the right direction, there are other important questions that need to be resolved before the jury selection process will be totally free from discrimination.

II. THE CASE

Defendant, Larry Joe Powers, a white male, was indicted on two counts of murder and one count of attempted murder in Franklin County, Ohio. Powers pleaded not guilty and exercised his right to a jury trial. He objected when the State exercised peremptory challenges to exclude seven black venirepersons from the jury. He also requested that the trial court compel the prosecutor to explain, on the record, his reasons for excluding these persons. The trial court denied the request and Powers was convicted on all counts and was sentenced to prison for a term of 53 years to life. Powers appealed his conviction to the Ohio Court of Appeals. He argued that the prosecution's discriminatory use of peremptory challenges violated his Sixth Amendment guarantee to a fair cross-section of the community in his petit jury and voiced his rights under the Fourteenth Amendment's Equal Protection Clause. Powers contended that the fact that he was white and the excluded venirepersons were black was irrelevant to his right to

12. 111 S. Ct. at 1366.
13. 111 S. Ct. at 1364.
14. 111 S. Ct. at 1366.
15. Id.
16. Id.
17. Id.
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object to the prosecution's discriminatory use of peremptories. The Court of Appeals affirmed the lower court's decision, and the Supreme Court of Ohio dismissed Powers' appeal on the ground that the case did not raise a substantial constitutional question.

Powers sought review before the United States Supreme Court. While his petition for certiorari was pending, the Court decided Holland v. Illinois, holding that the Sixth Amendment did not restrict the exclusion of a defendant's racial group at the peremptory challenge stage. However, in dicta, five members of the Court stated that "a defendant might be able to make the objection on equal protection grounds." After the Holland decision, the Court granted the petitioners writ of certiorari, but limited it to the question of "whether, based on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons."

III. BACKGROUND

A. Early Discrimination in the Jury Selection Process in General

Prior to the Civil War, there was widespread discrimination in the jury selection process in the United States. During this period, many black citizens were denied the "significant opportunity to participate in civil life" that jury service afforded its citizens. Following the war, however, the Civil Rights Act of 1875 made it a criminal offense to exclude persons from jury service because of their race. However, despite the Act, widespread discriminatory practices were still effectuated through the use of peremptory challenges.

The Supreme Court first applied the Fourteenth Amendment to the jury selection process in Strauder v. West Virginia. In its decision, the Court held a West Virginia statute which limited

18. Id.
20. 111 S. Ct. at 1367.
22. Powers, 111 S. Ct. at 1367.
23. Id.
24. Id.
25. 111 S. Ct. at 1365; Batson, 476 U.S. at 87.
26. 111 S. Ct. at 1365.
27. 100 U.S. 303 (1888).
petit and grand jury service to white men to be invalid. The opinion of the Court stated that this type of discrimination "is practically a brand upon...[blacks], 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." The Court found the absolute exclusion of blacks from the venire, and ultimately the petit jury, was an easy opportunity to apply the Fourteenth Amendment's Equal Protection Clause, but the exclusion of blacks by peremptory challenges would raise a much more problematic issue.

B. Discriminatory Use of Peremptory Challenges: Swain to Batson

Federal and state laws provide for two types of challenges to eliminate potential jurors: a challenge for cause and a peremptory challenge. A challenge for cause must be explained. The peremptory challenge is a device which enables counsel to strike a predetermined number of jurors from the jury panel without offering an explanation.

The peremptory challenge has historically been a part of the United States legal system and is not without its advantages. It has been a means of "winnowing out" possible sympathies and antagonisms so that the jury will be as fair as possible. However, peremptories have historically been used to effectuate discrimination in the selection of jurors. This is because the use of the term "peremptory" implies that the challenge may be exercised under

28. 100 U.S. at 310.
29. 100 U.S. at 308.
32. In most jurisdictions, each party to the litigation, in addition to a certain number of peremptory challenges, has the right to challenge a juror by furnishing a satisfactory reason why such juror should not be seated such as bias or knowledge of the case. Unlike the peremptory challenge for which no reason need be given, the party challenging a juror for cause must satisfy the trial judge that his reasons are compelling. BLACK'S LAW DICTIONARY 445 (5th ed. 1983).
the complete discretion of its user and will not be subject to the court’s control. Therefore, a conflict arose between the need for selecting an impartial jury that peremptories fulfill and the protection of the Equal Protection Clause. This conflict was first addressed in 1965 in the Swain v. Alabama case.

1. The Swain Case

In Swain, the “struck jury system” procedure was challenged. This procedure allowed both the defense and prosecution a certain number of peremptory challenges. Both sides would alternate challenges or “strikes” until a venire of 35 people in non-capital cases was narrowed to twelve jurors. The defendant in Swain, a black man, alleged that the prosecutor used his peremptory challenges to systematically remove all black members from the venire, thus resulting in an all white jury. The defendant’s position was supported by the fact that, between 1950 and 1965, no black had served on any petit jury in the county, despite the fact that black men comprised almost twenty-six percent of the county’s population. In Swain, the venire contained eight blacks, and two were excused, while the other six were removed through the prosecutor’s use of peremptories.

The Court in Swain found no constitutional requirement for the prosecutor to reveal his reasons for using a peremptory challenge, and went on to state that there is a “presumption in any particular case. . . that the prosecutor is using the state’s challenges to obtain a fair and impartial jury to try the case before the court.” This presumption was not overcome in Swain. However, the Court did attempt to deal with the conflict between the need for peremptory challenges in the jury selection process and the guarantees of the Equal Protection Clause. The Court refused to permit an equal protection claim based on a pattern of jury strikes

38. Id.
39. Id. at 221-222.
40. Id. at 209-210.
41. Id. at 210.
42. Id.
44. Id.
45. Id. at 221-22.
46. Id. at 226-27.
in a particular case. However, the Court held that a prosecutor might violate the Equal Protection Clause through the use of peremptory challenges if, in case after case, regardless of the circumstances, he is responsible for the removal of black venirepersons who have survived challenges for cause with the result that no negroes ever serve on petit juries.

2. The Interim

Following this case, several states attempted to avoid the Swain decision. In People v. Wheeler and Commonwealth v. Soares, the state of California and the Commonwealth of Massachusetts, respectively, attempted to use state constitutions to avoid the Swain decision. In Wheeler, the Supreme Court of California held that Article I, Section 16 of the California Constitution guaranteed the right to a verdict given by "impartial and unprejudiced jurors." The court held that the right to have a jury picked from a cross-section of the population is guaranteed by both the Sixth Amendment to the Federal Constitution and the California Constitution. The court concluded that removing venirepersons on the sole basis of group bias violates the right to a trial by a jury representing a cross-section of the community.

In Soares, the Supreme Court of Massachusetts held that peremptory challenges could not be utilized to "exclude members of discrete groups solely on the basis of bias presumed to derive from [an] individual's membership in the group. . . ." In both the Wheeler and the Soares opinions, the courts noted that their holdings would apply equally to the use of peremptories by both the prosecution and the defense. Other states also used the Wheeler and Soares rationales to avoid the severe standard of the Swain

47. Id. at 223.
49. 583 P.2d 748 (1978).
52. Id. at 265.
53. Id. at 276-77.
3. The Batson Case

In 1986, the U.S. Supreme Court heard the case of Batson v. Kentucky. Batson re-examined the portion of Swain v. Alabama regarding the evidentiary burden placed on the criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury. Batson involved the conviction of a black defendant by an all white jury on charges of second-degree burglary and receiving stolen goods. The prosecutor removed all four black venirepersons through the use of peremptory challenges and the defendant was ultimately convicted. The defendant appealed his conviction to the Supreme Court of Kentucky, arguing that the prosecutor's conduct violated his rights under the Sixth Amendment and the Kentucky Constitution, Section 11, which guaranteed a jury drawn from a cross-section of the community. That court rejected the defendant's argument and pointed out that it had recently followed the decision in Swain.

The Supreme Court of the United States granted the defendant's writ of certiorari which stated that his rights were violated under the Sixth and Fourteenth Amendments. The Court re-examined the portion of Swain regarding the evidentiary burden placed on the criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury. The Court held that a criminal defendant can raise a challenge under the Equal Protection Clause to the use of peremptories at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race.

58. Id. at 122.
59. Id. at 82.
60. Id. at 83.
61. Id.
62. Id. at 82.
63. Id. at 91.
64. Id. at 82.
65. Id. at 96.
The Court's reasoning was two-fold. First, it stated that under *Strauder*, discrimination in the venire selection process violates a defendant's right to equal protection because the protection that trial by jury is intended to insure is denied. The Court held that this principle applied to the jury selection process from the venire. The second half of the Court's rationale focused on the standard of proof required of the defendant to make out a prima facie case of discrimination in the venire selection process. The Court identified several requirements that the defendant must meet in order to satisfy his burden of proof. First, the defendant had to be of the same race as the excluded venireperson. Second, the defendant had to prove either (1) that the prosecutor had systematically excluded members of the defendant's race from venires over a period of time, or (2) that the members of his race were substantially under-represented in the venire. Finally, the defendant had to show that the method of choosing the venire provided the potential for discrimination. The Court concluded that because the defendant could question the venire selection process in his own case, that the same right should be extended to peremptory challenges. The specific test formulated by the Court in *Batson* is as follows:

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

The basis for whether such an inference is created is derived from the circumstances surrounding the use of the peremptory challenge

66. *Id.* at 84.
68. *Id.* at 89.
69. *Id.* at 94-96.
70. *Id.*
71. *Id.*
73. *Id.*
during the voir dire. The judge in each case must decide this issue.

The Court went on to hold that after a prima facie case of discrimination is proven by the defendant, the burden shifts to the prosecutor to produce a non-racial explanation for his use of the peremptory challenge. The explanation need not rise to the level necessary for a challenge for cause, but denial is not sufficient.

IV. Analysis

A. Powers: One More Blow to Discrimination in Jury Selection

Five years after deciding Batson, the Supreme Court was asked by petitioner Larry Joe Powers to extend its holding in Batson to prevent race-based exclusions of jurors through the prosecutor's use of peremptory challenges whether or not the defendant and the excluded jurors shared the same race. During the course of the jury selection in his Ohio state court trial for aggravated murder and related offenses, Powers, a white man, objected to the prosecutor's use of peremptories to exclude seven black venirepersons from the jury, based on the holding in Batson. Power's objection's were overruled and he was convicted on several counts. The trial court's ruling was affirmed by the Ohio Supreme Court, and Powers submitted a writ for certiorari to the United States Supreme Court.

While the defendant's writ was pending, the Court decided Holland v. Illinois, which held that the Sixth amendment did not restrict the exclusion of a racial group at the peremptory challenge stage of jury selection. However, five members of the Court stated that a defendant might be able to make the objection on Equal Protection grounds. Following the Holland decision, the Court granted certiorari to Powers. The writ was granted to determine the question of whether, "based on the Equal Protection

74. Id.
75. Id.
76. Id.
79. Id. at 1366.
80. Id.
81. Id. at 1367.
Clause, a white defendant may object to the prosecution’s peremptory challenges of black venirepersons.\textsuperscript{84} The Court extended \textit{Batson} and held that a criminal defendant could object to race-based exclusions of jurors through the use of peremptory challenges, regardless of whether their race coincided with the race of the excluded venirepersons.\textsuperscript{86} Writing for the majority, Justice Kennedy stated that \textit{Batson} ‘was designed to serve multiple ends,’ only one of which was to protect individual defendants from discrimination in the selection of jurors.’\textsuperscript{86} The Court found that \textit{Batson} also ‘recognized that a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large’ by denying them the right to participate in the administration of justice.\textsuperscript{87} The Court rejected the contention of the State that the holding be limited to the circumstances in \textit{Batson} “and that in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a \textit{Batson} challenge.”\textsuperscript{88} The State of Ohio argued that because Powers was white he could not object to the exclusion of blacks.\textsuperscript{89} The Court reasoned that this limitation would conform neither with “accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law”.\textsuperscript{90} Furthermore, the Court stated that the very fact that members of a particular race are singled out and expressly denied the right of jury participation because of their skin color “is practically a brand upon them, affixed by the law, an assertion of their inferiority.”\textsuperscript{91}

The Court also reasoned that \textit{Batson} recognized that a prosecutor’s “discriminatory use of peremptories harms the excluded jurors by depriving them of a significant opportunity to participate in civil life.”\textsuperscript{92} In addition, the Court found that Congress had addressed discriminatory selection of jurors by passing federal stat-

\begin{itemize}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id} at 1368.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.} at 1369 (quoting \textit{Strauder v. West Virginia}, 100 U.S. 303, 308 (1880)).
\end{itemize}
utes that prohibit such behavior.93 Included in these statutes was the Civil Rights Act of 1875.94 The Court further stated that although a citizen does not have the right to sit on any particular jury, he is entitled to not be excluded because of his race alone.95 The Court went on to reject, on equal protection grounds, the argument that no "particular stigma or dishonor" results if a prosecutor uses skin color alone to determine a prospective juror's objectivity.96 Furthermore, the Court held that race-based peremptories were not permissible, even when visited upon members of all races in equal degree.97

The Court also considered whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of these principles.98 The Court reasoned that the discriminatory use of peremptory challenges by the prosecution causes a criminal defendant "cognizable injury," and that the defendant has a concrete interest in challenging the practice.99 The jury acts as a vital check against wrongful exercise of power by the state and its prosecutors.100 The Court found "[a] prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge to be a constitutional violation committed in open court at the outset of the proceedings."101

The Court reasoned that this effects the composition of the trier of fact itself and the irregularity may pervade all the proceedings that follow.102 Furthermore, the Court stated that the purpose to the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.103 The Court gave further support for the notion that a criminal defendant had standing, regardless of his race, to assert the right of a wrongfully excluded venireperson because that venireperson had

93. Id.
94. Id.
95. Id at 1365.
96. Id.
98. Id. at 1370.
99. Id. at 1372; See Allen v. Hardy, 478 U.S. 255, 259 (1986).
102. Id.
103. Id.
no likelihood or ability to assert their own rights.104

In holding that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges, the Court took another step towards removing discrimination from the jury selection process. In doing so, the Court not only insured that the accused would have a fair trial, but also furthered the opportunities for citizens to have a chance to perform their civic duties by participating in the justice process through jury duty.

B. Discriminatory Practices Not Addressed

Powers most certainly is a step towards removing discrimination from the jury selection process. However, some questions remain unanswered following this case. Two questions this Note will address are (1) whether the decision in Powers, including the rationale of Batson, apply to defense counsel and (2) whether Powers covers other minorities not based on race

1. Application to Defense Counsel

The Court did not address whether their holding in Powers extends to defense counsel's use of peremptory challenges. Following the Court's rationale for extending the Batson decision to apply regardless of the criminal defendant's race, it would seem that the use of discriminatory practices by defense counsel would also injure the rights of the excluded venirepersons. Lower courts have applied the standards of Batson to defense counsel as well as prosecutors.105 However, the Supreme Court will not be able to extend its rationale to defense counsel as easily as these lower courts. This is because those courts have relied on the Sixth Amendment right to a jury comprised of a cross-section of the community, as well as state constitutions.

As mentioned earlier, the Supreme Court based its decisions in Batson and Powers on the Equal Protection Clause of the Fourteenth Amendment. Any attempt to apply a constitutional provision designed to limit State's powers upon an individual (e.g. defense counsel) could possibly result in judicial uproar and constitutional challenges. The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to

104. Id. at 1372-73.
any person within its jurisdiction the equal protection of the
laws."\textsuperscript{106} To prove a violation of the equal protection clause, one
must show "state action,"\textsuperscript{107} such as that of a prosecutor using pe-
remptory challenges to discriminate. Because a criminal defense
attorney does not represent state interests or state power, it would
seem difficult to extend the holding in \textit{Powers} to defense counsel's
actions.

Therefore, if the Court intends to make defense counsel sub-
ject to the same peremptory challenge restrictions regarding race
as the prosecution, they will have to do so outside of \textit{Powers} and
the Equal Protection Clause. However, as the majority in \textit{Batson}
mentioned, three distinct groups are injured by the discriminatory
jury selection procedures: the accused, the excluded juror, and the
entire community.\textsuperscript{108} When the focus shifts from discrimination
against the accused to discrimination against the excluded juror
and the entire community, the need for the Court to make defense
counsel subject to the same peremptory challenge restrictions as to
race becomes magnified. This could be accomplished by applying
the Sixth Amendment of the federal Constitution as state courts
have done.\textsuperscript{109} The Court could do this by holding that the Sixth
Amendment guarantees a right to have a jury drawn from a cross-
section of the population within the jurisdiction of the Court.\textsuperscript{110}

\textbf{2. Other Minorities}

\textit{Swain} mentions the exclusion of minority groups other than
blacks.\textsuperscript{111} However, \textit{Powers} fails to answer the question of whether
its holding will apply to other minorities other than blacks. The
Court has yet to determine whether its use of the words "black," "white," and "race" will allow defendants from other minority
groups to allege and prove discriminatory practices by the prosecu-
tion during the jury selection process in a criminal trial.\textsuperscript{112}
"Race" is defined as "[a]n ethical stock; a great division of
mankind having in common certain distinguishing physical pecu-

\begin{itemize}
  \item \textsuperscript{106} U.S. Const. amend. XIV, § 1.
  \item \textsuperscript{107} The Civil Rights Cases, 109 U.S. 3, 6 (1883).
  \item \textsuperscript{108} Note, \textit{Batson v. Kentucky: One Step Short of Halting The Discrimina-
  \item \textsuperscript{109} \textit{See People v. Wheeler}, 583 P.2d 748 (Cal. 1978).
  \item \textsuperscript{110} \textit{Id.} at 754-58.
  \item \textsuperscript{111} \textit{Swain v. Alabama}, 380 U.S. 202, 221-22 ( Ala. 1965).
  \item \textsuperscript{112} \textit{See Powers v. Ohio}, 111 S. Ct. 1364, 1366 (1991).
\end{itemize}
liarities constituting a comprehensive class appearing to be derived from a distinct primitive source."113 Following this definition of race it seems that all ethnic minorities would be protected by the *Powers* decision.

In addition, *Powers* fails to discuss the use of peremptory challenges to discriminate against female venirepersons when the criminal defendant is a woman. The Court in *Powers* does not discuss this problem, even in dicta. It appears that "sex" will not fall into the *Powers* racial discrimination analysis. This is because judicial decisions and legislation in the past have dealt with sexual discrimination separately from racial discrimination.114 However, women are also protected under the Equal Protection Clause, and this question is open for later Court review.

V. CONCLUSION

*Powers v. Ohio* held that under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.115 This case marks the continuation of the slow movement to remove discrimination from the jury selection process that began with the Civil Rights Act of 1875 and continued through the *Batson v. Kentucky* decision in 1986. *Powers* marks another step towards protecting the rights of criminal defendants, jurors, and the community at large.

Despite this, *Powers* stopped short of forbidding the discriminatory use of peremptory challenges completely. The same interests and considerations that support the holding in *Powers* apply equally to preventing the discriminatory use of peremptory challenges by defense counsel.116 In addition, the interest of criminal defendants, prospective jurors, and the community at large would be better served if *Powers* were broadened to offer protection to other racial minorities and women. However, the decision is a just continuation of the process to remove discrimination from jury se-

113. BLACK'S LAW DICTIONARY, 1132 (5th ed. 1979).


116. See *Powers*, 111 S. Ct. 1364.
lection. Perhaps one day soon, cases will appear before the Court which will mandate that discrimination in the process of jury selection will be totally eradicated.

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