PEREMPTORY CHALLENGES

UNITED STATES v. CHILDRESS: DISCRIMINATORY USE OF PEREMPTORY CHALLENGES; THE SIXTH AMENDMENT AS AN ALTERNATIVE APPROACH

INTRODUCTION

An integral part of the jury selection process is the right to challenge certain jurors through the exercise of either peremptory challenges or challenges for cause.\(^1\) A peremptory challenge allows an attorney to exclude potential jurors from jury panels without having to explain or justify the exclusion and without inquiry into the motivation behind the exclusion.\(^2\) It has been stated that a peremptory challenge is "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all . . . ."\(^3\) On the other hand, a challenge for cause allows for the removal of a member of the jury panel only upon a showing of a specific reason for removal.\(^4\)

Although not constitutionally mandated, the peremptory challenge has been a part of the right to trial by jury for many years.\(^5\) Designed to provide a mechanism assuring the right to trial by an impartial jury, peremptory challenges are often used to remove particular jurors who may harbor biases or be prejudiced against the litigant.\(^6\) However, peremptory challenges have also been exercised as a tool to discriminatorily exclude blacks and other minorities from jury service.\(^7\)

In the leading Supreme Court case concerning the use of peremptory challenges, Swain v. Alabama,\(^8\) the Court stated that a black defendant could establish a violation of the fourteenth amendment's right to equal protection\(^9\) only by showing a pattern of systematic exclusion of blacks from petit juries over an ex-

---


\(^2\) Swain, 380 U.S. at 220.

\(^3\) 4 W. Blackstone, Blackstone Commentaries 353 (15th ed. 1809), quoted in Swain, 380 U.S. at 212 n.9.

\(^4\) See Swain, 380 U.S. at 220.

\(^5\) See notes 35-46 and accompanying text infra.

\(^6\) See Swain, 380 U.S. at 220.


\(^8\) 380 U.S. 202 (1965).

\(^9\) U.S. Const. amend. XIV, §1 provides in relevant part: "[N]o state shall deny to any person within its jurisdiction the equal protection of the laws."
tended period of time.\textsuperscript{10} The burden of proof established by \textit{Swain} proved to be almost insurmountable, and many courts have looked for an alternate means of attacking the discriminatory use of peremptory challenges.\textsuperscript{11}

Such an alternative was presented in \textit{Duncan v. Louisiana},\textsuperscript{12} which held that the sixth amendment was applicable to the states,\textsuperscript{13} and \textit{Taylor v. Louisiana},\textsuperscript{14} which held that a defendant had the right to an impartial jury selected from a fair and representative cross-section of the community.\textsuperscript{15} The sixth amendment, as interpreted by \textit{Taylor} and subsequent lower court decisions, provides a reasonable and constitutionally distinguishable alternative to an equal protection challenge.

This article begins by examining the \textit{Swain} decision and the burdens of proof established by that decision. Next, the article examines recent state and federal court decisions discussing alternatives to the \textit{Swain} approach. This article concludes that the present standards set forth in \textit{Swain} place an insurmountable burden on the plaintiff attempting to establish a prima facie case of invidious discrimination, and the sixth amendment approach provides a viable alternative for establishing discriminatory use of peremptory challenges.

\textbf{FACTS AND HOLDING}

In the case of \textit{United States v. Childress},\textsuperscript{16} C. L. Childress, a black male, was charged in a three count indictment\textsuperscript{17} with violat-

\begin{flushright}
\textsuperscript{10} 380 U.S. at 227.
\textsuperscript{12} 391 U.S. 145 (1968).
\textsuperscript{13} \textit{See id.} at 149. The sixth amendment provides in pertinent part that the defendant shall be tried "by an impartial jury."
\textsuperscript{14} 419 U.S. 522 (1975).
\textsuperscript{15} \textit{See id.} at 538.
\textsuperscript{16} 715 F.2d 1313 (8th Cir. 1983).
ing 18 U.S.C. §1202(a)(1)\(^\text{18}\) by knowingly possessing a firearm on three separate occasions after having been convicted of a felony.\(^\text{19}\) Each of the three counts of possession of a firearm by a convicted felon arose as a result of a conviction in the Circuit Court of the City of St. Louis on two felony charges—assault with intent to kill and attempted robbery.\(^\text{20}\) Childress filed several pretrial motions which were heard before a United States Magistrate on January 14, 1982.\(^\text{21}\) These motions were denied\(^\text{22}\) and the matter was set for trial in the United States District Court for the Eastern District of Missouri.\(^\text{23}\) A trial was held on February 8 and 9, 1982.\(^\text{24}\) The original panel of thirty-six veniremen\(^\text{25}\) included five blacks.\(^\text{26}\) The government proceeded to remove four of the five blacks through the use of peremptory challenges.\(^\text{27}\) The fifth black was struck by the defendant.\(^\text{28}\) After all challenges were made, Childress made a motion to strike the jury and impanel a new jury.\(^\text{29}\) The motion was denied and an all-white jury convicted Childress on each of

\begin{itemize}
  \item Id. at 1-2. Count III alleged that on July 15, 1981, Childress was apprehended with a loaded F.I.E. .38 caliber derringer in his possession. \textit{Id.} at 2.
  \item 18 U.S.C. §1202(a)(1) app. (1982) provides:
    \begin{itemize}
      \item (a) Any person who—
        \begin{itemize}
          \item (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .
          \item and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.
        \end{itemize}
    \end{itemize}
  \item Id.; Grand Jury Indictment at 1-2.
  \item Grand Jury Indictment at 1-2.
  \item Brief for Appellee at 2, United States v. Childress, 715 F.2d 1313 (8th Cir. 1983).
  \item Order of District Court Judge, United States v. Childress, 715 F.2d 1313 (8th Cir. 1983).
  \item Childress, 715 F.2d at 1313.
  \item Brief for Appellee at 3.
  \item Black's Law Dictionary defines venireman as: "A member of a panel of jurors . . ." \textit{Black's Law Dictionary} 1395 (5th ed. 1979). Black's Law Dictionary defines venire as: "The list of jurors summoned to serve as jurors for a particular term." \textit{Id.}
  \item From the venire summoned to serve as potential jurors the actual panel of jurors is selected.
  \item Supplemental Brief for Appellee at 2, United States v. Childress, 715 F.2d 1313 (8th Cir. 1983).
  \item \textit{Id.} The fifth black was struck by the appellant.
  \item \textit{Id.}
  \item \textit{Id.} at 2, wherein the attorney for the appellant made the following record at the bench:
    \begin{quote}
      Mr. Schroeder: Your Honor, at this time, out of the hearing of the jury, I would like the record to reflect that the veniremen panel consisted of 36 individuals, of whom only five were black, and in the Government's peremptory challenges, four of those black jurors were struck. At this time I would like to make a motion to strike this jury and impanel a new jury.
    \end{quote}
  \item \textit{Id.}
\end{itemize}
the three counts of possession of a firearm by a convicted felon.  

Childress appealed his conviction to the Eighth Circuit Court of Appeals, and argued, *inter alia*, that he was denied a trial by a jury of his peers as guaranteed by the sixth amendment. A three-judge panel of the Eighth Circuit affirmed the conviction. A motion was made for a rehearing, and although this motion was denied, the court on its own motion ordered a rehearing en banc on the issue of the government's use of peremptory challenges to remove the blacks from the jury panel. In a unanimous en banc decision, the court affirmed the judgment of the district court, holding that the government's use of its peremptory challenges to remove black prospective jurors did not establish systematic exclusion of blacks from the jury process.

**BACKGROUND**

**Historical Use of Peremptory Challenges**

Peremptory challenges are firmly entrenched in the Anglo-American judicial process. In England, prior to 1305, the peremp-

---

30. *See id.* at 3.
31. Supplemental Brief for Appellee at 3. On appeal Childress also argued that the district court erred in (1) denying his motion to suppress the Raven Arms .25 caliber semi-automatic pistol seized on September 11, 1980, during an alleged illegal investigatory stop, (2) denying his motion to reopen the suppression hearing regarding the pistol, and (3) denying his motion to strike the impanelled jury. United States v. Childress, No. 82-1261, slip op. at 1 (8th Cir. Aug. 24, 1982).
32. United States v. Childress, No. 82-1261, slip op. at 1 (8th Cir. Aug. 24, 1982). The three-judge panel was composed of Chief Judge Lay, Circuit Judge Heaney and Circuit Judge McMillan. *Id.* The court disagreed with the argument that the investigatory stop on September 11, 1980 was illegal, concluding that there was ample evidence from the informant's information to provide the detectives reasonable grounds to detain Childress. *Id.* at 4-5. The court also denied the motion to reopen the suppression hearing stating that Childress and his attorney waived the opportunity to cross-examine the detective at that hearing, and waived the opportunity to have Childress testify on his own behalf. *Id.* at 7. Finally, the court ruled that there was no merit to the argument that there was an error in refusing to strike the impanelled jury. The court stated:

Initially we note that the thirty-six member jury panel included five blacks. The government exercised its peremptory challenges to strike four of the black panel members and Childress used one of his challenges to strike the remaining black panel member. More importantly, we note that Childress does not allege nor did he establish any evidence of a systematic exclusion of blacks from the jury. Thus, Childress has not even attempted to meet the requirements established in *Swain v. Alabama*, 380 U.S. 202 (1965).

The judgment of the district court was affirmed. *Id.* at 7.
33. Supplemental Brief for Appellee at 3.
34. *Childress*, 715 F.2d at 1321 (Ross, J., concurring in the result only; Gibson, J., concurring in parts IV and V of the opinion).
35. For an in depth discussion of the history of peremptory challenges, see *Swain*, 380 U.S. at 212-21 and Brown, McGuire & Winters, *The Peremptory Challenge*
PEREMPTORY CHALLENGES

37. An Ordinance for Inquests, 1305, 33 Edw. I., Stat. 4. That statute provides that "if they that sue for the King will challenge any . . . Jurors, they shall assign . . . a Cause certain . . ." Id. See also Swain, 380 U.S. at 212-13.
38. See Swain, 380 U.S. at 212-13. See also Brown, McGuire & Winters, supra note 35, at 194. (This article points out that although the prosecution was not allowed to use peremptory challenges, they could remove jurors without showing cause under the practice of "standing aside." Under this practice, when an objection was made and no cause given by the prosecutor, that person was required to stand aside. When a panel of jurors was assembled, the persons ordered to "stand aside" were permanently dismissed without the prosecution ever having to explain why they were challenged. Only when twelve unchallenged jurors could not be assembled did the judge ask the prosecution to show cause).
39. 4 W. BLACKSTONE, BLACKSTONE COMMENTARIES 353 (15th ed. 1809).
40. Id. (Blackstone explained that a defendant should be protected from the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another").
42. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119 (this Act entitled the defendant to 35 peremptory challenges in trials for treason and 20 in trials for other felonies). The current version of this Act is FED. R. CRIM. P. 24(b) which states that:
   If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the de-
paralleled the Congressional development of the right to exercise peremptory challenges. It was not until 1865 that Congress granted the prosecutor, in addition to the defendant, the right to exercise peremptory challenges. By 1870, most, if not all, states had enacted statutes granting the prosecutor the right to exercise peremptory challenges. The government's right to exercise peremptory challenges in federal courts is now well established.

Peremptory challenges are designed to provide a mechanism for assuring the existence of an impartial jury. In theory, they are used to eliminate hostile jurors and assure the parties that the case will be decided on the basis of the evidence, and not otherwise. The result is intended to be a jury composed of impartial citizens capable of reaching a just decision. While the legitimate and essential nature of the peremptory challenge is acknowledged in theory, reality suggests that the peremptory challenge may be exercised as a tool for invidious discrimination by prosecutors. In exercising peremptory challenges in this manner, the prosecutor is infringing upon the defendant's constitutional rights to equal protection and a fair trial by an impartial jury.

Equal Protection and Swain v. Alabama

As the Eighth Circuit noted in Childress, "the fundamental obstacle to any successful attack upon the government's use of peremptory challenges . . . [is] Swain v. Alabama." In Swain, the United States Supreme Court considered the traditional propriety of the prosecutorial use of peremptory challenges in light of the constitutional prohibition against purposeful exclusion of blacks from juries under the equal protection clause. Confronted with this problem, the Court held, inter alia, that the peremptory challenge system did not per se deny equal protection of the law.

See also Swain, 380 U.S. at 214.
43. Swain, 380 U.S. at 215.
45. Swain, 380 U.S. at 216.
46. See Fed. R. Crim. P. 24(b); 28 U.S.C. § 1870 (1976) (providing that in "civil cases, each party shall be entitled to three peremptory challenges.").
47. Swain, 380 U.S. at 220.
48. See note 6 and accompanying text supra.
50. See notes 76-105 and accompanying text infra.
51. See notes 106-189 and accompanying text infra.
52. Childress, 715 F.2d at 1314 (citations omitted).
54. Id. at 221-22. The Court stated after recognizing that the essential nature of
In *Swain*, the petitioner, a black man who had been convicted of rape, challenged the selection of the trial jury on the basis of invidious discrimination in three respects. First, *Swain* challenged the composition of the venire on the ground of racial discrimination. Second, *Swain* argued that the government purposefully used its peremptory challenges to remove all black prospective jurors from the petit jury panel in violation of the fourteenth amendment. Third, *Swain* alleged that prosecutors in Talladega County, Alabama, had consistently and systematically exercised their peremptory challenges over an extended period of time to remove all blacks from jury service.

In support of his contentions, the petitioner presented evidence that in Talladega County, black males over twenty-one constituted twenty-six percent of all males over twenty-one, but only ten to fifteen percent of the prospective jurors over a twelve year period were black. In addition, although an average of six to seven black prospective jurors were selected for petit jury panels, no black had ever served on a petit jury in the county. Moreover, in the petitioner's case, eight blacks appeared on the petit jury panel, but two were exempt, and the prosecution removed the other six by peremptory challenges. Despite what appears to have been an overabundance of evidence showing systematic exclusion of blacks from jury service in Talladega County, the Supreme Court found the petitioner's record insufficient to demonstrate the required "pattern of systematic exclusion". The peremptory challenge is the fact that it is exercised without a reason being given for its use:

[W]e 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 unqualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge.

*Id.* at 205.

Even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County. The difficulty with the record is that it does not with any acceptable degree of clarity, show when, how often, and
ing this conclusion, the Court stated that the use of peremptory challenges in a single case, even when used in a discriminatory manner, was insufficient to support an alleged violation of the equal protection clause of the fourteenth amendment.63 The Court stated:

The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.64 Labeling the peremptory challenge a fundamental element in a trial by jury,65 the Court refused to subject the prosecutor's challenges in an individual case to the demands of the equal protection clause because to do so would constitute a "radical change in the nature and operation of the challenge."66 Instead, Swain requires a defendant to show a pattern of systematic exclusion of blacks from jury service over an extended period of time to formulate a fourteenth amendment equal protection violation.67 The fact that defendants have successfully established systematic exclusion in only two cases since Swain underscores the insurmountability of the burden faced by the defendant.68

\[\text{Id.}\]

63. Id. at 221. The Court in Swain said: "We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." Id.

64. Id. at 222 (emphasis added).

65. Id. at 221-22.

66. Id.

67. Id. at 226. The Court stated:

Where discrimination is said to occur in the selection of veniremen by state jury commissioners, "proof that Negroes constituted a substantial segment of the population . . . that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time . . . constitute[s] prima facie proof of the systematic exclusion of Negroes from jury service".

\[\text{Id.}\] (quoting from Hernandez v. Texas, 347 U.S. 475, 480 (1954)).

68. The court in United States v. Childress, 715 F.2d 1313 (1983) pointed out
The *Swain* decision has been widely criticized because of the two cases were State v. Washington, 375 So.2d 1162 (La. 1979), and State v. Brown, 371 So.2d 751 (La. 1979). *Childress*, 715 F.2d at 1316.

Several reasons have been cited by commentators for the astonishing lack of success in establishing systematic exclusion. Most of these reasons stem from the Supreme Court's requirement that the defendant show exclusion not just in an individual case, but over an extended period of time. The first reason for the lack of success is the Supreme Court's failure to fully delineate what is meant by systematic exclusion, and the failure to establish the elements of a prima facie case of systematic exclusion. *Childress*, 715 F.2d at 1316. While subsequent decisions have imposed upon defendants the requirement of proving close to total exclusion over a long period of time, *Swain* held only that "systematic use of peremptory challenges" would violate the fourteenth amendment's equal protection clause. *Swain*, 380 U.S. at 227. A second reason for the lack of success relates to the failure of the Court in *Swain* to establish the amount of statistical proof needed to show purposeful exclusion. See *Childress*, 715 F.2d at 1316-17. The problem of statistically proving discriminatory use is premised on the difficulty the defendant faces in collecting, compiling, and analyzing the data and presenting that data to the court. Id. at 1317. The problem is compounded by the fact that often no information is kept during voir dire that would reveal the racial identity of prospective jurors in previous trials and whether they were removed by peremptory challenge. See *Brown*, McGuire & Winters, supra note 35, at 198. The lack of available data is particularly important given the *Swain* requirement that only the use of peremptory challenges to remove black prospective jurors over an extended period of time is required burden of proof.

the heavy burden of proof discussed above. In addition, the requirement of showing a pattern of systematic discrimination fails to consider that the first defendants will always have to suffer discrimination in any given court because there will be no evidence available to show that it has occurred over a long period of time. Thus, the Swain approach discriminates against the first defendants who allege abuse in the exercise of peremptory challenges and fails to protect their constitutional rights. In the case of Commonwealth v. Martin, Judge Nix noted:

Is justice to sit supinely by and be flaunted in case after case before a remedy is available? Is justice only attainable after repeated injustices are demonstrated? Is there any justification within the traditions of Anglo-Saxon legal philosophy that permits the use of a presumption to hide the existence of an obvious fact?

Despite such criticisms, Swain is still the rule in the federal courts and the overwhelming majority of state courts, and the Supreme Court has refused several recent opportunities to reconsider the issue. Defendants, however, have not been totally without remedy, as alternative means of attacking the use of peremptory challenges have emerged.

The most important step in laying the foundation for attacks on jury selection procedures was the shift from attacks based on the equal protection clause of the fourteenth amendment to attacks based directly on the sixth amendment. Swain was decided three years prior to the Supreme Court decision in Duncan v. Louisiana, which held that the sixth amendment was applicable to the states. In Duncan, the Court stated that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee [of an impartial jury]

70. See note 67 and accompanying text supra.
73. Id.
75. During the 1983 term, the Supreme Court on at least three occasions refused to review cases in which a black defendant alleged that the use of peremptory challenges was discriminatory. Gilliard v. Mississippi, 104 S. Ct. 40 (1983); Teague v. Illinois, 104 S. Ct. 206 (1983); McCray v. New York, 103 S. Ct. 2438 (1983) (decided together with Miller v. Illinois and Perry v. Louisiana). In addition, on January 23, 1984, the Supreme Court refused to review a case in which black prospective jurors were allegedly excluded from a jury through the use of peremptory challenges. Davis v. Illinois, 104 S. Ct. 1017 (1984).
Once the right to an impartial jury was made applicable to the states, it remained for subsequent decisions to define the contours of that right. *Taylor v. Louisiana* defined those contours and "accept[ed] the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment. . . ." Thus, the sixth amendment right to a jury drawn from a fair-cross-section of the community provided a new means for challenging the use of peremptory challenges.

**Taylor v. Louisiana: Sixth Amendment Application**

In *Taylor*, the Supreme Court held that a jury drawn from a representative cross-section of the community is an essential component of a defendant's sixth amendment right to a fair and impartial jury. The Court noted that restricting jury service to only special groups or segments of the community is inconsistent with the concept of jury trials. The Court stated:

"Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

---

78. Id. at 149.
80. Id. at 530.
81. Id. at 528. The necessity that jurors reflect a cross section of the community did not rise to the level of a constitutional right until the United States Supreme Court case of *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946). In *Thiel*, the Court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross section of the community . . . This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

82. 419 U.S. at 530.
83. Id. at 530-31 (quoting from *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J. dissenting)).
Taylor, a male, had been convicted of aggravated kidnapping.\textsuperscript{84} Taylor alleged that women were systematically excluded from the jury pool, denying him of his constitutional right to "a fair trial by jury of a representative segment of the community..."\textsuperscript{85} The Court agreed, stating that:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the over zealous or mistaken prosecutor... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.\textsuperscript{86}

It must be remembered that the focus of the Taylor court remained on the pre-trial jury selection stages.\textsuperscript{87} With respect to the petit jury, the Supreme Court emphasized that "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."\textsuperscript{88}

Another important aspect of the case is that the Taylor court placed such selection procedures within the sixth amendment jury trial guarantees and not the equal protection clause as Swain had done. Recently, a number of state and federal courts have attempted to extend the rationale of Taylor to the petit jury.\textsuperscript{89}

\textit{Extensions of Taylor v. Louisiana}

The California Supreme Court in \textit{People v. Wheeler}\textsuperscript{90} was the first court to extend the representative cross-section rule of Taylor to the petit jury.\textsuperscript{91} In Wheeler an all-white jury convicted two black defendants of murdering a white store owner.\textsuperscript{92} During jury selection all potential black jurors on the jury panel were excluded from

\begin{itemize}
\item \textsuperscript{84} Taylor, 419 U.S. at 524.
\item \textsuperscript{85} \textit{Id.} It was stipulated that 53\% of those eligible for jury service in the parish were female and that no more than 10\% of the names on the jury panel were women. \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at 530 (citations omitted).
\item \textsuperscript{87} \textit{See id.} at 538.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{See notes 115-189 and accompanying text infra.}
\item \textsuperscript{90} 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
\item \textsuperscript{91} \textit{Id.} at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899.
\item \textsuperscript{92} \textit{Id.} at 262-63, 583 P.2d at 752, 148 Cal. Rptr. at 893.
\end{itemize}
the petit jury. The California Supreme Court held that Article I, Section 16, of the California Constitution prohibits the use of peremptory challenges to remove prospective black jurors on the sole ground of "group bias." The California Court noted that the United States Supreme Court decision in Taylor did not rely on the equal protection clause of the fourteenth amendment, but utilized the sixth amendment. While the Taylor decision had focused on the selection of members of the jury panel, the California Court used this opportunity to extend that reasoning to the actual composition of the petit jury. To justify this extension of Taylor, the Wheeler court relied on California law in holding that the California Constitution afforded the defendant more protection than the United States Constitution. Although relying on its state constitution, the court stated that its holding was consistent with federal constitutional law and could be independently supported by reference to the United States Constitution.

Specifically, the Wheeler court held that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." The greater protection afforded defendants by the Wheeler court was a result of the court's interpretation of the California Constitution's, and the sixth amendment's, guarantee of a jury drawn from a fair and impartial panel. The court stated that the overall impartiality of petit juries is secured by the "interaction of the diverse beliefs and values the jurors bring from their group.

93. Id. at 262-63, 583 P.2d at 753-54, 148 Cal. Rptr. at 890.
94. CAL. CONST. art. I, §16 provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all . . . ."
95. Wheeler, 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903 (the court said that "when a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds [this is] 'group bias'").
96. Id. at 269, 583 P.2d at 759, 148 Cal. Rptr. at 898.
97. Id. at 286-87, 583 P.2d at 768, 148 Cal. Rptr. at 909-10. After discussing an earlier California case, People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954) and noting the constitutional requirement of cross-sectionalism, the court stated:
  
  The White opinion did not specify which Constitution—state or federal—it was relying on as the source of its declared requirement of cross-sectionalism, but simply spoke in broad terms of the "American system" and the "American tradition." . . . Accordingly, we now make explicit what was implicit in White, and hold that in this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the Federal Constitution and by article I, section 16, of the California Constitution.

Id. at 272, 583 P.2d 758, 148 Cal. Rptr. at 899.
98. Id.
99. Id. at 277, 583 P.2d at 762, 148 Cal. Rptr. at 903.
experiences."\textsuperscript{100} The court continued, noting that "if jurors are struck simply because they may hold those very beliefs, such interaction becomes impossible and the jury will be dominated by the conscious or unconscious prejudices of the majority."\textsuperscript{101}

The \textit{Wheeler} court adhered to the notion set forth in \textit{Swain}\textsuperscript{102} that an initial presumption of propriety in the exercise of peremptory challenges exists.\textsuperscript{103} Although a presumption arises that all parties are exercising their peremptory challenges on legally permissible grounds, the court refused to follow the assertion by \textit{Swain} that the presumption is rebuttable only by a showing of systematic exclusion over an extended period of time.\textsuperscript{104}

In order to overcome this presumption, the \textit{Wheeler} court formulated a three-step approach to be used in setting forth a prima facie case showing that the peremptory challenge was being used solely on the basis of race. First, the claimant was required to make as complete a record as possible.\textsuperscript{105} Second, the claimant was required to show that those being excluded belonged to a cognizable group.\textsuperscript{106} Finally, based on all the circumstances of the case the defendant had to establish a "strong likelihood that such persons [were] challenged because of their group association. . . ."\textsuperscript{107} Once these requirements are established, and the prima facie case has been set forth, the court must "determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone."\textsuperscript{108} If the court finds an inference does arise, the burden shifts to the party exercising the peremptory challenges to show that they were not "predicated on group bias alone."\textsuperscript{109} If the burden of justification

\textsuperscript{100} \textit{Id.} at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} 380 U.S. 202 (1965).
\textsuperscript{103} \textit{Wheeler}, 22 Cal. 3d at 278, 583 P.2d at 762, 148 Cal. Rptr. at 904. The Court stated: "We begin with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground." \textit{Id.}
\textsuperscript{104} \textit{See id.} at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} For a discussion of California's definition of a cognizable group see \textit{Rubio v. Superior Court of San Joaquin County}, 24 Cal. 3d 93, 97-98, 593 P.2d 595, 598, 154 Cal. Rptr. 734, 737 (1979).
\textsuperscript{107} \textit{Wheeler}, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.
\textsuperscript{108} \textit{Id.} at 281, 583 P.2d at 764, 148 Cal. Rptr. at 906.
\textsuperscript{109} \textit{Id.} at 281, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The court continued: [\textit{T}o sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias . . .]
\textit{Id.} at 282, 583 P.2d at 765, 148 Cal. Rptr. at 906.
placed on the party exercising the peremptory challenges is not met, the presumption of their validity is rebutted and the court must dismiss the jurors selected and select a new jury panel from which to select jurors.\textsuperscript{110}

The \textit{Wheeler} decision is a logical extension of \textit{Taylor}. While recognizing the problems of a requirement that the petit jury reflect the mirror image of the community and its distinctive groups, the \textit{Wheeler} court refused to allow the petit jury to completely escape all representative requirements, by extending the representative cross-section requirement to the composition of the petit jury itself.\textsuperscript{111}

In \textit{Commonwealth v. Soares},\textsuperscript{112} the Massachusetts Supreme Court adopted the \textit{Wheeler} approach. Relying on the Massachusetts Constitution,\textsuperscript{113} the court held that the “exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive solely from that individual’s membership in the group . . .” contravenes the requirements of the Massachusetts Constitution and therefore is forbidden.\textsuperscript{114} As in \textit{Wheeler}, the court in \textit{Soares} concluded that “[t]he right to be tried by a jury drawn fairly from a representative cross-section of the community is critical. . . .”\textsuperscript{115} The Massachusetts court adopted the procedure set forth in \textit{Wheeler} for overcoming the presumption that peremptory challenges were being properly exercised.\textsuperscript{116} Like the \textit{Wheeler} court, the court in \textit{Soares} did not require that the defendant be entitled to a petit jury reflecting a

\begin{enumerate}
\item \textit{Id.}
\item See note 91 and accompanying text supra.
\item Article XII of the Declaration of Rights of the Massachusetts Constitution provides that “no subject shall be . . . deprived of his life [or] liberty . . . but by the judgment of his peers.” MA\textsc{ss.} CON\textsc{st.} art. XII.
\item \textit{Soares}, 377 Mass. at —, 387 N.E.2d at 516.
\item \textit{Id.} at —, 387 N.E.2d at 511.
\item \textit{Id.} at —, 387 N.E.2d at 517-18. The court assumed proper use but noted that such use is rebuttable on a showing that:
\begin{enumerate}
\item a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and (2) there is a likelihood they are being excluded from the jury solely by reason of their group membership . . . .
\end{enumerate}
Once the judge determines that the presumption has been rebutted, the burden shifts to the allegedly offending party to demonstrate, if possible, that the group members . . . were not struck on account of their group affiliation . . . .
If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected.
\item \textit{Id.} at —, 387 N.E.2d at 516-18.
mirror image of the community, but it did restrict the use of peremptory challenges and ease the heavy burden set forth in the *Swain* case.\(^{117}\)

Another court that appears to be willing to follow the approach of the *Wheeler-Soares* rationale is the New Mexico Court of Appeals.\(^{118}\) In *State v. Crespin*,\(^{119}\) although the conviction was affirmed, the court indicated its willingness to allow greater protection for the defendant challenging the use of peremptory challenges by the prosecutor.\(^{120}\) The court stated that although the case was distinguishable from *Wheeler* and *Soares* in that only one black, rather than several, had been removed from the jury panel through peremptory challenges,\(^{121}\) other fact situations might give rise to circumstances where the defendant could overcome the presumptions concerning the use of peremptory challenges.\(^{122}\) The court added that it "found helpful" the procedure suggested in *Wheeler* for meeting the burden of proof in setting forth a prima facie case of discriminatory use of peremptory challenges.\(^{123}\) The court concluded that:

improper, systematic exclusion by use of peremptory challenges can be shown (1) under *Swain v. State of Alabama* . . . by presenting facts beyond the instant case; or (2) under the *Wheeler-Soares* rationale and supported by Article II, Section 14 of the New Mexico Constitution, where the absolute number of challenges in one case raises the inference of systematic acts by the prosecutor.\(^{124}\)

Several members of the Supreme Court of Louisiana have also recognized the impropriety of the discriminatory use of peremptory challenges.\(^{125}\) In *State v. Eames*, for example,\(^{126}\) three concur-

\(^{117}\) *Id.* at —, 387 N.E.2d at 516. The court required that peremptory challenges satisfy a stricter analysis in order to preserve "diffused impartiality" within the petit jury. *Id.* at —, 387 N.E.2d at 512.

\(^{118}\) See notes 119-124 and accompanying text infra.

\(^{119}\) 94 N.M. at 486, 612 P.2d at 716.

\(^{120}\) *Id.* at —, 612 P.2d at 718.

\(^{121}\) *Id.* at —, 612 P.2d at 717.

\(^{122}\) *Id.* The court held:

We are of the opinion that certain fact situations may arise where the defendant can overcome the presumption based entirely upon the facts of his own case. To hold otherwise would provide no protection to the first defendant who suffers such discrimination but, because he is the first, he cannot show enough "instances" to establish a pattern of prosecutorial abuse.

*Id.*

\(^{123}\) *Id.* at —, 612 P.2d at 717-18.

\(^{124}\) *Id.* at —, 612 P.2d at 718.

\(^{125}\) See notes 126-130 and accompanying text infra.

\(^{126}\) 365 So. 2d 1361 (La. 1978).
PEREMPTORY CHALLENGES

ring justices, assigning additional reasons for reversing the conviction of a defendant charged with inciting to riot, stressed the importance of rights afforded by the state constitution over the prosecutor's right to use peremptory challenges. Though not specifically following the Wheeler or Soares decisions, the concurring opinion stated that "[s]ince the state's peremptory challenge is not a federally protected right, Louisiana is free to afford its citizens greater protection against invidious peremptory challenges than the minimum required of a state by the Fourteenth Amendment. . . ." The concurrence goes on to state that "by absolutely prohibiting racially discriminatory state action, our state declaration . . . goes beyond the decisional law construing the Fourteenth Amendment to the United States Constitution."

DIRECT RELIANCE ON THE SIXTH AMENDMENT

The common thread in the decisions discussed above is a reliance on the state constitution. However, two recent cases have relied directly on the sixth amendment, as applicable to the states through the fourteenth amendment, to support findings that the discriminatory exclusion of blacks from the jury panel through the use of peremptory challenges was impermissible.

127. Justice Dennis was joined in his concurring opinion by Justices Tate and Salogero. Id. at 1364.
128. See id. at 1372 (Dennis, J., concurring). The Dennis concurrence in Eames criticized the Swain decision because: (1) the decision in Swain converted the peremptory challenge from a device that protected defendants, into a tool for "restricting the availability of the defendant's constitutional right to equal protection of the law in jury selection"; (2) the historical analysis of the purpose of the peremptory challenge was questionable; and, (3) because the difficult burden of proof established by Swain has been almost insurmountable. Id. at 1367-1370. The Dennis concurrence in Eames would ease the burden on the defendant by holding:

A presumption should exist during the selection of a jury that individual peremptory challenges by the prosecution are being properly used. Once it becomes evident, however, that the prosecution has used a disproportionate number of challenges against members of one race, or has eliminated a disproportionate number of members of a certain race. . . . a prima facie case of discrimination because of race has been established, and the burden of proof should shift to the prosecutor to show that his challenges were not exercised on the basis of race. The State may sustain its burden by offering evidence that its reason for individual challenges were not because of race. Although the reasons need not be sufficient to ground a challenge for cause, they should appear to have been applied consistently to similarly situated jurors of other groups, and they should be reasonably relevant to the particular trial or to non-racial characteristics.

Id. at 1370.
129. Id. at 1368.
130. Id. at 1369.
131. See notes 90-130 and accompanying text supra.
132. See notes 133-171 and accompanying text infra.
People v. Payne

In the recent case of People v. Payne, an Illinois appellate court held that the use of peremptory challenges by the state to exclude blacks from a jury during voir dire, because of their race, is a violation of the defendant’s sixth amendment right to an impartial jury drawn from a fair cross-section of the community. People v. Payne is significant in that it marks the first time a court has relied directly on the sixth amendment instead of on the state constitution to find discriminatory use of peremptory challenges unconstitutional.

The Payne court, like the court in Wheeler, relied on Taylor v. Louisiana. Although Taylor was limited to the selection of the jury panel, the Payne court asserted that there existed “no rational difference warranting the allowance of racial discrimination by the State” in the selection of the petit jury, but not in the selection of the jury panel. The court held that the reason for preventing racial discrimination in the composition of the jury panel “is to prevent the State’s systematic exclusion of any racial group in the composition of the jury itself.” The court stated that if the representative cross-section requirement was confined to the selection of the jury pool, the requirement would be rendered a “nullity.” The Payne court concluded that the sixth amendment guarantee to a jury drawn from a representative cross-section of the community extends to the selection of the petit jury and is not

134. Black’s Law Dictionary defines voir dire as:
To speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness, or juror, where his competency, interest, etc., is objected to.
BLACK’S LAW DICTIONARY 1412 (5th ed. 1979).
135. Payne, 106 Ill. App. 3d at —, 436 N.E.2d at 1048 & n.3.
136. See id. at —, 436 N.E.2d at 1054.
137. Id. at —, 436 N.E.2d at 1048. For a discussion of Taylor see notes 106-114 and accompanying text supra.
138. See notes 112-114 and accompanying text supra.
139. Payne, 106 Ill. App. 3d at —, 436 N.E.2d at 1048.
140. Id. The court continues:
The desired goal of interaction of a cross section of the community does not occur within the venire, but rather, is only effectuated by the petit jury that is selected and sworn to try the issues. It follows that the systematic exclusion of prospective jurors solely because of their race is equally invidious and unconstitutional at any stage of the jury selection, i.e., from the time the general jury list is prepared by the jury commissioner until the jury is actually selected and sworn. If we were to hold otherwise, the constitutional right to a jury drawn from a fair cross section of the community could be rendered a nullity through the use of peremptory challenges.
Id.
141. Id.
confined to the composition of the jury panel.\textsuperscript{142}

In addition to refusing to employ the presumption set forth in \textit{Swain} that the prosecutor was properly exercising his peremptory challenges, the \textit{Payne} court established a procedure similar to that which had been employed in \textit{Wheeler} and \textit{Soares}.\textsuperscript{143} The court held that when it “reasonably appears” to the trial court, either by its own observations or after motion by the defendant, that the prosecutor exercised his peremptory challenges on the basis of race, the court should require that the prosecutor demonstrate that blacks were not excluded on racial grounds.\textsuperscript{144} Thus, the burden shifts to the prosecutor to demonstrate that he was not excluding blacks solely on the basis of race.\textsuperscript{145} If the prosecutor fails to sustain his burden, the court can conclude that the jury fails to comply with the fair cross-section requirement of the sixth amendment and dismiss the jury.\textsuperscript{146}

The \textit{Payne} court rejected the state’s argument that the \textit{Swain} analysis should be controlling, stating that both \textit{Duncan} and \textit{Taylor} had made significant changes in the law subsequent to the \textit{Swain} decision.\textsuperscript{147} At the time \textit{Swain} had been decided, the sixth amendment right to a jury drawn from a fair cross-section of the community had not yet been recognized as applicable to the states via the fourteenth amendment, and therefore this issue was not even raised under \textit{Swain}.\textsuperscript{148} The court stated:

\begin{quote}
Accordingly, Swain does not apply to an accused’s right to have the State affirmatively frustrate his Sixth Amendment right to a jury drawn from a fair cross section of the community. . . . We therefore apply Taylor and its rationale to this case rather than Swain, and we conclude that the Sixth Amendment precludes the State, i.e., the prosecuting attorney, from affirmatively frustrating the right of the accused to a jury drawn from a fair cross section of the community by utilizing peremptory challenges to exclude Blacks from the jury solely because they are Blacks.\textsuperscript{149}
\end{quote}

On December 1, 1983, the Illinois Supreme Court overturned the holding and rationale of \textit{Payne}.\textsuperscript{150} Despite this holding, the

\begin{footnotes}
\item[142.] \textit{id.} at \textemdash, 436 N.E.2d at 1048 & n.3.
\item[143.] \textit{id.} at \textemdash, 436 N.E.2d at 1049-50.
\item[144.] \textit{id.} at \textemdash, 436 N.E.2d at 1050.
\item[145.] \textit{id.}
\item[146.] \textit{id.}
\item[147.] \textit{id.} at \textemdash, 436 N.E.2d at 1052.
\item[148.] \textit{See id.} at \textemdash, 436 N.E.2d at 1051-52.
\item[149.] \textit{id.} at \textemdash, 436 N.E.2d at 1052.
\item[150.] People v. Payne, No. 56907 (Ill. Dec. 1, 1983).
\end{footnotes}
Payne analysis, and its potential as a means of addressing the problems of the heavy burden of proof set forth in Swain, merit serious consideration by any court dealing with the problems of the discriminatory use of peremptory challenges.

McCray v. Abrams

In McCray v. Abrams, a habeas corpus petitioner in the United States District Court for the Eastern District of New York claimed that the State of New York had exercised its peremptory challenges in a racially discriminatory manner and that his conviction for robbery violated the sixth and fourteenth amendments to the United States Constitution. The first trial of the petitioner, which was held in state court, ended with the jury unable to agree on a verdict. At the second trial, the prosecutor used peremptory challenges to remove eight minority members of the jury panel. In that trial, the defendant's motions to declare a mistrial, and alternatively, for a hearing to inquire into the prosecutor's use of peremptory challenges, were denied. On appeal, the New York Court of Appeals relied upon Swain to reject the petitioner's claims of violations of the sixth and fourteenth amendments and affirmed the conviction. Petitioner appealed to the United States Supreme Court which denied the petition for writ of certiorari.

Justices Stevens, Blackmun, and Powell voted to deny certiorari, but stated in an opinion written by Justice Stevens that they did not disagree with the dissent of Justices Marshall and Brennan concerning the "importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members

152. Id. slip op. at 1.
153. Id. slip op. at 2.
154. Id. (it appears that no blacks were on the petit jury, although the record is unclear on this point).
155. Id. slip op. at 3.
156. Id.
157. McCray v. New York, 103 S. Ct. 2438 (1983). In denying the petition for writ of certiorari, the court stated that while agreeing with the magnitude of the importance of the issue:

further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system... In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Id. at 2438-39.
of the same group." \(^{158}\) However, Justices Stevens, Blackmun, and Powell felt that certiorari should be denied because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." \(^{159}\) Their opinion concluded that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." \(^{160}\)

A motion for reargument was denied by the New York Court of Appeals \(^{161}\) and petitioner filed for relief in the federal district court pursuant to 28 U.S.C. §2254. \(^{162}\) Accepting what it termed an "invitation" from the Supreme Court, \(^{163}\) the federal district court examined the *Swain* decision and subsequent decisions from both state and federal courts regarding the right of a defendant to assert either an equal protection violation under the fourteenth amendment or a violation of the sixth amendment right to a jury representing a fair cross-section of the community. \(^{164}\)

In addressing the sixth amendment challenge, the court noted that the restrictions placed on jury selection by the *Taylor* Court applied only to the composition of the jury panel, and that defendants were not entitled "to a [petit] jury of any particular composition. . . ." \(^{165}\) However, the court concluded that "it is another thing to assert that the prosecutor in a case involving a black defendant may use peremptory challenges solely on the basis of an assumption of racial affinity in order to produce an all-white jury." \(^{166}\) Such an assertion would allow a practice of excluding blacks automatically from jury panels in situations when the defendant is black. \(^{167}\) In support of the decision regarding the sixth amendment right to a jury representing a fair cross-section of the community, the court noted that the restrictions placed on jury selection by the *Taylor* Court applied only to the composition of the jury panel, and that defendants were not entitled "to a [petit] jury of any particular composition. . . ." \(^{165}\) However, the court concluded that "it is another thing to assert that the prosecutor in a case involving a black defendant may use peremptory challenges solely on the basis of an assumption of racial affinity in order to produce an all-white jury." \(^{166}\) Such an assertion would allow a practice of excluding blacks automatically from jury panels in situations when the defendant is black. \(^{167}\) In support of the decision regarding the sixth

---

158. *Id.* at 2438.
159. *Id.*
160. *Id.* at 2439.
162. *Id.* at 4-5; 28 U.S.C. §2254 (1976) provides in pertinent part:
   (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
   *Id.*
165. *Id.* at 9.
166. *Id.* at 9-10.
167. *Id.* at 10.
amendment challenge, the court quoted favorably from the dissent by Justice Marhsall in McCray v. New York, which stated that "[t]he right to a jury drawn from a fair cross section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury."168

In discussing the fourteenth amendment equal protection challenge, the court noted that the equal protection clause prohibits racial discrimination because distinctions based on race are invidious.169 The court stated that "[n]o compelling government purpose justifies a prosecutor's use of peremptory challenges solely on the basis of race."170 In granting the writ of habeas corpus, the court concluded that:

[T]he rule of the Swain case, which five members of the Supreme Court have invited the courts to reconsider, should be modified. The equal protection clause should be construed to prohibit a prosecutor's exercise of peremptory challenges to exclude blacks solely on the basis of race in any case. If, as petitioner here alleges, the prosecutor at his trial exercised peremptory challenges solely on the basis of race, his sixth and fourteenth amendment rights were violated. . . . The trial court should have required the prosecutor to offer some reason other than race alone for each of these challenges. The trial judge should then have determined whether any of the challenges were in face based on race alone; if they were, the court should have quashed the venire.171

ANALYSIS

Implicit in the directive from the Eighth Circuit that both the defendant and the prosecutor submit supplemental briefs specifically addressing the decision of the Illinois Appellate Court172 in People v. Payne, and in the order by the Eighth Circuit, on its own

168. Id. (quoting from McCray v. New York, 103 S. Ct. 2438 (1983)).
169. McCray v. Abrams, No. 83 C 4406, slip op. at 10 (E.D.N.Y. Dec. 19, 1983) (mem.) (quoting from Loving v. Virginia, 388 U.S. 1, 10 (1967) where the Supreme Court said that "[T]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").
171. Id. at 13-14.
172. United States v. Childress, 715 F.2d 1313, 1314 (8th Cir. 1983) (the court in its opinion stated that they "specifically directed the parties to address a recent Illinois appellate decision, People v. Payne, 106 Ill. App. 3d 1034, 456 N.E.2d 1046 (1982), rev'd, No. 56907 (Ill. Dec. 1, 1983)).
motion, that the appeal be heard en banc, was the willingness of the Eighth Circuit to consider a break from the traditional precedents concerning prosecutorial use of peremptory challenges to remove black prospective jurors. In fact, the Eighth Circuit had evinced a willingness to limit the discriminatory use of peremptory challenges in earlier cases.

These earlier cases, as well as Childress, illustrate the court's awareness of the heavy burden of proof Swain places on defendants attempting to prove systematic exclusion. The court in Childress reviewed the extensive criticism surrounding Swain, and appeared to emphasize the fact that despite repeated descriptions of the burden as "not insurmountable," defendants had been "overwhelmingly unable to establish a prima facie case of systematic exclusion."

After noting the problems encountered in attempting to establish a prima facie case under Swain, the court turned to an analysis of the cases discussed in the background section of this article. In particular, the court was interested in the Payne decision because of its reliance on the sixth amendment as a basis for challenging the discriminatory use of peremptory challenges. It is likely that the court would have been equally interested in McCray v. Abrams if that case had been decided at that time. After analyzing the Payne decision as a potential means of addressing these problems, the Eighth Circuit reluctantly concluded that "there is no sixth amendment exception to the equal protection analysis in Swain."

The decision in Childress is particularly discouraging given:

1. The court's analysis of the heavy burden of proof set

---

173. Childress, 715 F.2d at 1313.
176. See note 201 and accompanying text infra.
177. Childress, 715 F.2d at 1316-17. See note 201 and accompanying text infra.
179. Childress, 715 F.2d at 1316. The court notes that only two defendants have established systematic exclusion since the Swain decision. Id. (citing State v. Washington, 375 So. 2d 1162 (La. 1979) and State v. Brown, 371 So. 2d 751 (La. 1979)).
181. Id. at 1318.
182. Id.
forth in *Swain*;\(^{183}\)

(2) The court's recognition of the overwhelming inability of defendants to establish systematic exclusion of blacks, as evidenced by the reference to only two cases where the defendants have successfully met the *Swain* test during the past twenty years.\(^{184}\)

(3) The statement that the "extension of *Taylor v. Louisiana* from the venire to the petit jury has much logical and practical appeal."\(^{185}\)

(4) The statement by the court that it wanted briefs covering the *Payne* analysis and its "potential as a means of addressing the problems of proof encountered by defendants attempting to establish systematic exclusion under *Swain*."\(^{186}\) and

(5) The court's statement that "[r]acial discrimination can have no place in a society and legal system committed to equal justice under the law."\(^{187}\)

These statements, coupled with the premise that systematic exclusion of blacks from petit juries is unconstitutional, make the decision by the court unsatisfactory. Particularly frustrating is the fact that although the court recognized two differing approaches to the problem of discriminatory uses of peremptory challenges, it nevertheless adhered to *Swain*, holding that it was bound by precedent.\(^{188}\)

Contrary to the holding by the Eighth Circuit that its hands were tied by the *Swain* decision,\(^{189}\) the court could have deviated from *Swain* and found a sixth amendment violation in the discriminatory use of peremptory challenges. This is because a defendant is not limited to challenging the discriminatory use of the peremptory challenge on fourteenth amendment equal protection grounds, but may proceed on two other grounds as well: (1) under the guarantees of an impartial jury set out in state constitutions,\(^{190}\) or (2) under the sixth amendment analysis guaranteeing the right to a jury composed of a fair cross-section of the community.\(^{191}\) This being the case, the Eighth Circuit could have made use of the fact

---

183. See notes 176-179 and accompanying text *supra*.
184. See note 182 *supra*.
186. *Childress*, 715 F.2d at 1318.
187. Id. at 1321.
188. Id. at 1320.
189. Id.
190. See notes 11, 90-130 and accompanying text *supra*.
191. See notes 11, 131-171 and accompanying text *supra*. The language of the sixth amendment is set out at note 12 *supra*. 

that, contrary to the situation in Swain, Childress did not rely on the equal protection clause. Instead, Childress relied on the sixth amendment right to a trial by an impartial jury drawn from a fair cross-section of the community. Because of this difference, the Eighth Circuit arguably erred in assuming that simply because the discriminatory use of peremptory challenges might not be declared unconstitutional under a fourteenth amendment equal protection attack, it means that such challenges are necessarily constitutional under the sixth amendment.

This argument is supported by the fact that at the time the Supreme Court decided Swain, the Court had not yet recognized the sixth amendment's applicability to the states. As a result, the Swain court did not even discuss an accused's sixth amendment rights. However, after Duncan, where the sixth amendment's right to trial by jury was held to apply to the states, and especially after Taylor, where the Court held that the fair cross-section requirement was a fundamental part of the right to an impartial jury, an argument can be made that the sixth amendment challenge takes on added weight, and that Taylor should be extended to the petit jury. This was the approach adopted by the Payne court, and, based in part on an arguably favorable indication from five justices of the United States Supreme Court, by the McCray court.

---

192. Brief for Appellant at 14, United States v. Childress, 715 F.2d 1313 (8th Cir. 1983).
194. The court states that a practice declared constitutional under one provision is not necessarily constitutional under another:
For example, in Taylor v. Louisiana . . . the Supreme Court held unconstitutional under the sixth amendment a State's system of excluding women from jury venires unless they volunteered. The court reached this result in Taylor even though it had previously held that a similar system for selecting women did not violate the equal protection clause. . . . In Taylor the court distinguished Hoyt with ease, observing that it "did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community . . . ."
195. See note 148 and accompanying text supra.
196. Id. at 145 (1968).
197. Id. at 149.
199. Id. at 538.
200. See notes 90-171 and accompanying text supra.
201. See note 142 and accompanying text supra.
202. See note 158 and accompanying text supra.
CONCLUSION

Because Childress involved a sixth amendment, rather than a fourteenth amendment equal protection, challenge to the use of peremptory challenges, the Eighth Circuit arguably could have departed from Swain. Under this approach, the court could have concluded that because an impartial jury is paramount, the statutory right to exercise peremptory challenges was required to give way to the defendant's constitutional right to an impartial jury. Such an approach would have been justified because the fourteenth amendment's equal protection clause and the sixth amendment's guarantee of a trial by an impartial jury provide entirely different approaches to the use of peremptory challenges.

Such an approach would, in essence, have involved an extension of Taylor from the selection of the jury panel to the petit jury. This approach has much logical and practical appeal and appears to be the ultimate solution for a legal system committed to the fundamental notion that "[r]acial discrimination can have no place in a society and legal system committed to equal justice under the law."203 If jury venires are constitutionally chosen to reflect a fair cross-section of the community, there is no legitimate reason for allowing prosecutors to destroy that diversity by the arbitrary use of the peremptory challenge. The potential discriminatory harm caused by such use justifies some control over peremptory challenges. Thus, under the Payne analysis, once the prima facie case is established the burden shifts to the prosecutor to demonstrate a legitimate reason for the use of his peremptory challenges.

Several decisions since Swain favor the imposition of a less onerous burden of proof on the defendant than previously required. These cases achieve this result by drawing a distinction between the sixth and fourteenth amendments. While many courts have expressed the importance of this issue, they continue to perpetuate the discrimination suffered by blacks by imposing unreasonable burdens on defendants trying to assert discriminatory use of peremptory challenges. In an effort to overcome these problems, the Eighth Circuit should have adopted the sixth amendment approach in Childress. From there it is hoped, and reasonably so, based on the McCray case, that the United States Supreme Court would have granted certiorari, and affirmed.

Scott David Thayer — '85

203. Childress, 715 F.2d at 1321. See also note 187 and accompanying text supra.