Mississippi College Law Review

Volume 39
Issue 2 *Issue 2*

Article 2

2021

Deflowering Flowers v. Mississippi

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DEFLOWERING *Flowers v. Mississippi*

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I. INTRODUCTION

Jury service is an important opportunity for citizens to participate in the democratic process, embracing those who may not otherwise have the opportunity to be involved with civic life. This opportunity allows members of the community to exercise their responsibility of citizenship. A recent survey revealed that two-thirds of American citizens believe serving on a jury "is part of what it means to be a good citizen."[1]

To protect this opportunity, equal justice under law requires that criminal trials be free from racial discrimination in jury selection process. Discrimination in the process offends the rights of citizens and defendants and hinders the integrity of the courts. Despite the efforts of the Fourteenth Amendment of the United States Constitution to demand fair and equal treatment to all persons, racial discrimination persisted throughout the decades, which was due in large to the use of the peremptory strike that permits exclusion of a juror without explanation. To reconcile this, the United States Supreme Court in *Batson v. Kentucky* developed a framework that requires parties to offer race-neutral explanations for a contested strike.[2] However, many scholars and commentators have criticized the decision for its failure to eradicate racial discrimination in jury selection.

Recently, the Supreme Court revisited the application of Fourteenth Amendment principles to jury selection in *Flowers v. Mississippi*.[3] The death row case required the Court to review the extraordinary facts stemming from all of Flowers' six trials. The Court's decision hinged on the single issue of whether the State of Mississippi violated Flowers'

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* Sonya Dickson is a 2021 graduate of Mississippi College School of Law. The author would like to thank Mississippi College School of Law Professor Matthew Steffey for his support and guidance throughout the drafting of this Comment. The author would also like to thank her family and friends for all their love, support, and encouragement.

1. John Gramlich, *Jury Duty is Rare, but Most Americans See it as Part of Good Citizenship*, PEW RESEARCH CENTER (Aug. 24, 2017), https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/.

2. Batson v. Kentucky, 476 U.S. 79 (1986).

3. Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

Fourteenth Amendment rights by excluding a prospective African American juror from the jury in his sixth trial. Thus, more than two decades after Flowers entered death row, the Court reversed his conviction on the basis that the State's exercise of a peremptory strike against a prospective African American juror was largely motivated in part by discriminatory intent.[4]

This Note will analyze the holding of *Flowers* and the current standard for adjudicating claims of racial discrimination in jury selection. Part II of this Note discusses the background and history of the law surrounding the peremptory strike. Specifically, part II addresses the prevailing standard under *Batson* and the instant case. Lastly, part III addresses an analysis of the instant case. Particularly, part III addresses the ineffectiveness of *Batson*, as well as the majority's shortcomings in assessing the facts of *Flowers*.

II. BACKGROUND AND HISTORY OF THE LAW

A. Equal Protection and Batson v. Kennedy

Ratified in 1868, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."[5] Relying on this underlying principle, the primary purpose of the Amendment was to provide "freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him."[6] Thereafter, to help enforce the Equal Protection Clause, Congress enacted the Civil Rights Act of 1875, making it a criminal offense for state officials to exclude persons from jury service on the basis of race.[7]

During jury selection, each party is allowed a set number of peremptory challenges or strikes.[8] Traditionally, peremptory strikes may be used to remove any potential juror for any reason and without any explanation.[9] However, the traditional underpinnings of the peremptory strike contravened with the edicts of the Equal Protection Clause.[10] As a

4. *Id.* at 2251.
5. U.S. CONST. amend. XIV, § 1.
6. *Slaughter-House Cases*, 83 U.S. 36, 71 (1872).
7. 18 U.S.C. § 243 (1948).
8. *Flowers*, 139 S. Ct. at 2238.
9. *Id.*
10. *Id.*

result, the Supreme Court faced the issue of applying equal protection principles to jury selection proceedings.[11]

In *Strauder v. West Virginia*,[12] 12 years after the ratification of the Fourteenth Amendment, the Supreme Court first addressed the issue of racial discrimination in the jury selection process. There, a state statute permitted only Caucasians to serve as jurors, so the trial court summoned an all Caucasian venire to try an African American male accused of murder.[13] In response, the defendant objected to the racial composition of the venire, alleging denial of a right afforded to Caucasian males to be tried before a jury consisting of the same race.[14]

The Supreme Court invalidated the state statute as unconstitutional, explaining that the Fourteenth Amendment requires state's laws to apply equally to both African American and Caucasian individuals.[15] Specifically, the Court concluded that all persons, either African American or Caucasian, are equal before the laws of the states and discrimination on the basis of race is impermissible.[16] To that end, the Court held that a denial of an African American to be tired before a jury consistent of his racial peers was a denial of the equal protection guaranteed by the Fourteenth Amendment.[17]

Echoing the decision in *Strauder*, the Court reiterated its holding in subsequent cases that states may not discriminate on the basis of race in the jury selection process.[18] However, problems still persisted in guaranteeing equal protection because although laws excluding African Americans from jury service were unconstitutional after *Strauder*, many jurisdictions employed discriminatory tools to prevent African Americans from serving on a jury.[19]

One tool employed by many jurisdictions was the peremptory strike allowing a prosecutor to strike individuals for any reason.[20] Through the exercise of the peremptory strike, racial exclusion became more concealed and less evident with strikes exercised in individual courtrooms rather than

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11. *Id*.
12. Strauder v. West Virginia, 100 U.S. 303 (1879).
13. *Id.* at 304.
14. *Id.*
15. *Id.* at 307.
16. *Id.*
17. *Id.*
18. *See e.g.,* Neal v. Delaware, 103 U.S. 370, 397 (1880); Carter v. Texas, 177 U.S. 442, 449 (1900); Hale v. Kentucky, 303 U.S. 613, 616 (1938); Pierre v. Louisiana, 306 U.S. 354, 362 (1939); Smith v. Texas, 311 U.S. 128, 130-32 (1940); Avery v. Georgia, 345 U.S. 559, 562 (1953); Hernandez v. Texas, 347 U.S. 475, 477-78 (1954); Coleman v, Alabama, 377 U.S. 129, 133 (1964).
19. *Flowers*, 139 S. Ct. at 2240.
20. *Id.*

by comprehensive operation of law.[21] While *Strauder* was a step toward equality by allowing African Americans to participate in the democratic process, jury selection remained entrenched with discriminatory intent through the employment of peremptory challenges. Thus, 80 years after *Strauder*, the Court revisited the subject of racial discrimination in jury selection in *Swain v. Alabama*.[22]

The defendant was an African American male convicted of a capital offense and sentenced to death.[23] Prior to trial, the prosecutor struck all six qualified African American potential jurors to ensure a panel of all Caucasian jurors.[24] Relying on the *Strauder* decision, the defendant argued that the prosecutor impermissibly discriminated on the basis of race by using peremptory challenges to strike all six African American potential jurors.[25]

However, the Court held that the defendant failed to establish an unconstitutional violation of discrimination based on the state's exercise of the six peremptory strikes.[26] The Court explained that the striking of African Americans in a particular case was not a denial of equal protection, reasoning that prosecutors typically do not judge potential jurors individually in exercising peremptory strikes.[27] But rather, prosecutors strike individual jurors based on limited knowledge afforded to them, which include affiliations of the racial group.[28] Otherwise stated, "a prosecutor could permissibly strike an individual for any reason, including the assumption or belief that a[n] [African American] prospective juror, because of race, would be favorable to a[n] [African American] defendant or unfavorable to the State."[29] In doing this, the Court focused on the nature of the peremptory strike, allowing the strike to be exercised without inquiry and without the court's intrusion or control.[30]

Accordingly, under the *Swain* standard, for a defendant to successfully challenge a prosecutor's exercise of a peremptory challenge, he or she had to prove that the state consistently and systematically discriminated on the basis of race in exercising its peremptory challenges.[31]

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21. *Id.*
22. 380 U.S. 202 (1965).
23. *Id*. at 203.
24. *Id.*
25. *Id.*
26. *Id.* at 209.
27. *Id.*
28. *Id.*
29. *Id.* at 220.
30. *Id.*
31. *Id.* at 223. The Court stated that "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, had

Upon proof of such pattern, the Court could infer that the state purposefully excluded African Americans from the right to serve on a jury, which constituted a denial of equal protection under law.[32] However, this high standard of demonstrating a state's historical and systematic exclusion posed an insurmountable burden on the defendant and essentially insulated prosecutors' peremptory strikes from constitutional review.[33]

In the seminal case of *Batson v. Kentucky*, [34] the Supreme Court revisited the severe burden of proof imposed by *Swain* to remedy the high bar for establishing a constitutional violation. At the time of the *Batson* decision, African Americans continued their fight for fair and equal treatment post-civil rights movement. Despite major legislative reform such as the Civil Rights Act of 1964,[35] the Voting Rights Act of 1964,[36] and the Fair Housing Act of 1968,[37] racial discrimination still remained interwoven in the nation's social and economic fabric. The central focus of the *Batson* decision was to emphasize the Fourteenth Amendment's goal of ending governmental discrimination on the basis of race.[38] Consequently, delivering the majority opinion, Justice Powell effectively overturned the principles underlying the *Swain* decision and removed the obstacles for establishing a constitutional violation.[39]

There, petitioner was an African American man indicted in Kentucky for second-degree burglary and receipt of stolen goods.[40] The prosecution exercised all of its peremptory challenges to strike all four African American potential jurors and, thus the jury consisted of only Caucasian individuals.[41] In response, defense counsel moved to discharge the jury on the basis that the prosecution's removal of the African American veniremen violated the petitioner's Sixth Amendment right to a jury collected from a cross section of the community and Fourteenth Amendment right to equal protection of the laws.[42] Subsequently, the trial judge permitted the parties to exercise their peremptory challenges to strike anyone they wanted and denied petitioner's motion, reasoning that the

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been responsible for the removal for the removal of qualified [African American] prospective jurors so that no [African American] jurors ever serve on petit juries." *Id.*

32. *Id.* at 224.
33. *Flowers*, 139 S. Ct. at 2241.
34. 476 U.S. 79 (1986).
35. CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e, et seq. (1964).
36. *Id.*
37. FAIR HOUSING ACT OF 1964, 42 U.S.C. § 3602, et seq. (1964).
38. *Flowers*, 139 S. Ct. at 2241.
39. *Batson*, 476 U.S. at 82.
40. *Id.* at 82.
41. *Id.* at 83.
42. *Id.*

cross-section requirement applied only to the selection of venire and not to the selection of petit jury itself.[43]

On appeal to the Supreme Court of Kentucky, petitioner conceded that *Swain* foreclosed an equal protection claim based solely on the prosecutor's conduct in his case but urged the court to follow the decisions of other jurisdictions to find a violation of his rights under the Sixth Amendment and the state constitution when the jury was not drawn from a cross section of the community.[44] Petitioner also argued that the prosecution engaged in a "pattern" of discriminatory strikes in his case, thus, establishing an equal protection violation under *Swain.*[45] However, in relying on *Swain*, the Kentucky Supreme Court disagreed with petitioner and affirmed the lower court's judgment, concluding that a defendant alleging lack of fair cross section had to demonstrate systematic exclusion of a group of jurors from the venire to establish a constitutional violation.[46]

Upon examination by the Supreme Court, Justice Powell emphasized that the central purpose of the Fourteenth Amendment was elimination of governmental discrimination on the basis of race.[47] Thus, the high bar for establishing a constitutional violation through proof that the state consistently and systematically employed discriminatory strikes was a denial of equal protection guaranteed by the Constitution.[48] As a result, the *Batson* decision effectively overruled *Swain*.[49]

Under the prevailing standard articulated by *Batson*, if a defendant can demonstrate a prima facie case that the state's peremptory strikes were motivated by racial discrimination, the state is then required to provide race-neutral reasons for its peremptory strikes.[50] To assist courts in adjudicating claims of racial discrimination in the exercise of a peremptory strike, *Batson* established a three-step process.[51] First, the defendant has the burden of proving purposeful discrimination in the exercise of the contested peremptory strike.[52] For a defendant to establish a prima facie case, he must first show that he is a member of a racial group susceptible to differential treatment, and that the prosecution has exercised its peremptory challenges to eliminate members of the defendant's race from the venire.[53]

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43. *Id.*
44. *Id.*
45. *Id.* at 83-4.
46. *Id.* at 84.
47. *Id.*
48. *Id.* at 85.
49. *Id.* at 95.
50. *Id.* at 96-7.
51. *Id.* at 94.
52. *Id.* at 93.
53. *Id.* at 94.

The defendant may also rely on the fact that the jury selection practice of a peremptory strike permits "those to discriminate who are of a mind to discriminate."[54] Lastly, the defendant may establish a prima facie case by showing that the totality of relevant facts gives rise to an inference of discriminatory purpose.[55] All relevant circumstances may include evidence of systematic exclusion of members of his race from jury service over an extended period of time, as well as evidence of the prosecutor's questions and statements during *voire dire*.[56] Importantly, the Court noted that the examples are merely illustrative and placed confidence in the trial judge's to determine if circumstances creates a prima facie case of purposeful discrimination.[57]

Second, once the defendant has established a prima facie case of purposeful discrimination, the burden shifts to the State to offer a race-neutral explanation for the challenged strike.[58] In overcoming its burden, the prosecution's explanation need not rise to the level of justifying a challenge for cause.[59] Yet, the prosecution cannot offer general assertions that it had no discriminatory intent or that it challenged the jurors on the assumption (or intuition) that they would be partial to the defendant because of their shared race.[60] But rather, the prosecution must articulate an explanation related to the case being tried.[61] Lastly, upon the prosecution's proffered race-neutral reason, the trial judge must determine whether the state's reasons were legitimate or were a mere pretext for racial discrimination.[62] Subsequent case law provides that a defendant may offer a variety of evidence to support a claim of a discriminatory strike by the prosecutor, including statistical evidence comparing strikes by the prosecutor against potential African American and Caucasian jurors, evidence of a prosecutor's disparate questioning of potential jurors, side-by-side comparison of potential African American jurors who were struck and potential Caucasian jurors who were not struck, a prosecutor's misrepresentation of the record when offering a race-neutral explanation, relevant history of the state's peremptory strikes in past cases, and other relevant circumstances related to the issue of racial discrimination.[63]

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54. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
55. *Id.* at 96.
56. *Id.* at 96-7.
57. *Id.* at 97.
58. *Id*.
59. *Id.*
60. *Id.*
61. *Id.* at 98.
62. *Id.*
63. *See* Foster v. Chatman, 578 U.S. ___, 136 S. Ct. 1737 (2016); Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

Applying this newly founded standard to the facts of the case, the Court in *Batson* concluded that the petitioner made a timely objection to the prosecutor's removal of all African American potential jurors from the petit jury.[64] However, because the trial court rejected the objection without requiring the prosecutor to offer a race-neutral explanation for the peremptory strike, the Court remanded the case.[65] Importantly, the Court noted that if the trial court determined that the petitioner established a prima facie of purposeful discrimination case based upon the facts and the prosecutor failed to present a race-neutral explanation, the petitioner's conviction would have been reversed as consistent with the precedent established by the Court.[66]

By enforcing the constitutional requirement that a criminal trial be free of racial discrimination in the jury selection process, *Batson* sought to eliminate the common practice of prosecutors excluding African American jurors in cases involving defendants of the same race. [67] The decision sought to protect the rights of defendants and jurors and ensure public confidence in the fairness of the criminal justice system. [68] In doing this, the Court has reiterated and reinforced the decision in *Batson* in subsequent cases and has extended the standard in various ways.[69] For example, a defendant of any race may raise a *Batson* challenge even if the defendant and the juror are not of the same race.[70] Further, *Batson* now applies to gender discrimination and to both criminal and civil cases.[71] Overall, *Batson* sought to safeguard the constitutional guarantee of equal protection in the criminal cases for both defendants and jurors, and thus, a criminal defendant may challenge a state's peremptory strike under the Equal Protection Clause.[72] Notably, though, many scholars and commentators have highly criticized *Batson* for its failure to live up to its ideals, and many studies have shown that racial discrimination still remains in jury selection.[73]

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64. *Batson*, 476 U.S. at 100.

65. *Id.*

66. *Id.*

67. *Flowers*, 139 S. Ct. at 2243.

68. *Id.*

69. *Id.*; *see also Foster*, 578 U.S. at ___; *Snyder*, 552 U.S. at 472; *Miller-El*, 545 U.S. at 231.

70. *Id.*; *see also* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954).

71. *Id.*; *see also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994); Georgia v. McCollum, 505 U.S. 42, 59 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

72. *Id.*

73. *See e.g.* Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 Crim. Just. 43 (2016); Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District*

B. Flowers v. Mississippi

1. Facts and Procedural History of *Flowers v. Mississippi*

Forty years later, in *Flowers v. Mississippi*, the Supreme Court revisited the Fourteenth Amendment's application to peremptory strikes and the standard for determining a constitutional violation articulated by *Batson.* The underlying events of the case occurred in Winona, Mississippi in July 1996 where four victims were murdered at Tardy Furniture.[74] At the time of decision, petitioner, Curtis Flowers, was tried six separate times for the murder of the four employees.[75] The same prosecutor, Doug Evans, represented the state of Mississippi in all six trials.[76]

In Flowers' initial three trials, he was convicted of murder, but the Mississippi Supreme Court reversed each conviction.[77] At Flowers' first trial, the State exercised twelve peremptory strikes, five of which were used to strike all potential African American jurors.[78] The trial court rejected Flowers' *Batson* challenge and allowed the State to exercise all of its

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Attorney's Office, REPRIEVE AUSTRALIA (Aug. 2015), https://perma.cc/KE3Q-KQAX; Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 87 IOWA L. REV. 1531, 1534 (2012); *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf; Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. 61, 63 (1986); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999); Richard Bourke & Joe Hingston, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office 5* (2003); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 (2001); Paul H. Schwartz, *Comment, Equal Protection in Jury Selection? The Implementation of* Batson v. Kennedy *in North Carolina*, 69 N.C. L. REV. 1533, 1577 (1991); Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 65 (1988); Kenneth J. Melilli, Batson *in Practice: What we Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03 (1996); Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1978 (2016); and Lorraine Morey, *Keeping the Dragon Slayers in Check: Reining in Prosecutorial Misconduct*, 5 PHOENIX L. REV. 617, 621-26 (2012).

74. *Flowers*, 139 S. Ct. at 2234.

75. *Id.* at 2234.

76. *Id.*

77. *Id.*

78. *Id.* at 2236.

peremptory strikes.[79] Subsequently, Flowers was convicted.[80] The Mississippi Supreme Court reversed the conviction due to prosecutorial misconduct.[81] In the second trial, the State again exercised its peremptory strikes against all five potential African American jurors, but the trial court found that the State's reason for one of the strikes was based on a pretext of discrimination.[82] Because the trial court disallowed the strike, the court sat the sole African American juror and Flowers was convicted.[83] However, on appeal, the Mississippi Supreme Court reversed the conviction on the basis of prosecutorial misconduct.[84] At the third trial, one of the African American jurors was struck for cause, leaving only sixteen.[85] Thereafter, the State exercised all of its fifteen peremptory strikes against fifteen of the potential African American jurors.[86] Again, the trial court rejected Flowers' *Batson* challenge and petitioner was convicted.[87] Yet again, the Mississippi Supreme Court reversed the conviction after finding that the State had violated *Batson* by discriminating on the basis of race in exercising all of its fifteen peremptory strikes.[88] In reversing the conviction, the court concluded that the case presented a strong prima facie case of racial discrimination and that the State engaged in racially discriminatory practice during the jury selection process.[89]

Flowers' fourth and fifth trial ended in mistrials.[90] In the fourth trial, the State used eleven out of eleven peremptory strikes against potential African American jurors.[91] However, the jury was unable to reach a verdict.[92] At Flowers' fifth trial, there is no information available regarding the race of prospective jurors.[93] At Flowers' sixth trial, which the United States Supreme Court considered upon review of this instant case, there were twenty-six prospective jurors, six African American and twenty Caucasian.[94] There, the State exercised six peremptory strikes, using five

79. *Id.*
80. *Id.*
81. *Id.* (citing Flowers v. State, 773 So. 2d 309, 317 (Miss. 2000)).
82. *Flowers,* 139 S. Ct. at 2236.
83. *Id.*
84. *Id.* at 2237 (citing Flowers v. State, 842 So. 2d 531, 538 (Miss. 2003)).
85. *Flowers,* 139 S. Ct. at 2237.
86. *Id.*
87. *Id.*
88. *Id.* (citing Flowers v. State, 947 So. 2d 910, 939 (Miss. 2007)).
89. *Id.*
90. *Flowers,* 139 S. Ct. at 2237.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

against African American prospective jurors.[95] This left one African American juror to sit on the jury.[96] Again, the trial court rejected Flowers' *Batson* challenge, finding that the State presented race-neutral explanations for each of the five peremptory strikes exercised against the five African American jurors.[97] Thus, the seated jury consisted of eleven Caucasian jurors and one African American juror.[98] Ultimately, the jury convicted Flowers of murder and sentenced him to death.[99]

Upon review, the Mississippi Supreme Court agreed with the trial court's decision regarding the *Batson* issue, concluding that the State's proffered race-neutral reasons were valid and not merely pretextual.[100] Thereafter, Flowers sought review from the United States Supreme Court, in which the Court granted this writ of certiorari, remanding the proceeding for further consideration in view of the decision in *Foster v. Chatman*.[101] On remand, the Mississippi Supreme Court upheld Flowers' conviction in a 5-to-4 vote.[102] Subsequently, the Supreme Court granted certiorari to review the matter.[103]

2. Majority Opinion Delivered by Justice Kavanaugh

Recently appointed Supreme Court Justice, Brett Kavanaugh, delivered the majority opinion of *Flowers v. Mississippi*. Remarkably, Justice Kavanaugh analyzed the landmark case of *Batson v. Kentucky* [104] in his law review note while attending Yale Law School in 1989. [105]

The sole issue upon review was whether the Mississippi trial court clearly erred in concluding that the State was not motivated in substantial part by discriminatory intent when exercising its peremptory strikes at Flowers' sixth trial.[106] Justice Kavanaugh began his opinion with a historical overview of Fourteenth Amendment's prohibition of racial discrimination in jury selection and the relevant case law leading up to the

95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* (citing Flowers v. State, 158 So. 3d 1009, 1058 (Miss. 2014)).
101. 578 U.S. ___, ___, 136 S. Ct. 1737, 195 L.E. 2d 1 (2016).
102. *Flowers*, 139 S. Ct. at 2238 (citing Flowers v. State, 240 So. 3d 1082 (Miss. 2017)).
103. *Flowers*, 139 S. Ct. at 2238.
104. 476 U.S. 79 (1986).
105. Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 YALE L.J. 187 (1989).
106. *Flowers*, 139 S. Ct. at 2244.

Batson decision.[107] Next, Justice Kavanaugh underscored three evidentiary and procedural issues raised by the *Batson* holding.[108]
Throughout his discussion of *Batson*, Justice Kavanaugh revered the decision as immediately revolutionizing jury selection designed to eradicate racial discrimination.[109] According to Justice Kavanaugh, *Batson* ended the widespread practice in which prosecutors routinely struck all African American potential jurors from cases involving defendants of the same race.[110]

Turning next to the application of the case, Justice Kavanaugh addressed the extraordinary facts of Flowers' case against the contextual framework established by *Batson*.[111] In doing so, the majority assessed four evidentiary considerations of the instant case:

> (1) the history from Flowers' six trials, (2) the prosecutor's striking of five and six [African American] prospective jurors at the sixth trial, (3) the prosecutor's dramatically disparate questioning of [African American] and [Caucasian] prospective jurors at the sixth trial, and (4) the prosecutor's proffered reasons for striking [African American] juror (Carolyn White) while allowing other similarly situated [Caucasian] jurors to serve on the jury at the sixth trial.[112]

The first evidentiary consideration the majority addressed was the history from Flowers' six trials.[113] Justice Kavanaugh reiterated that a trial judge may consider the historical evidence of the State's discriminatory peremptory strikes from prior trials in the jurisdiction to support a claim of racial discrimination.[114] Thus, a defendant bringing a *Batson* claim may

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107. *Id*. at 2238-41.
108. *Id*. at 2243.
109. *Id.*
110. *Id.*
111. *Id.* at 2244.
112. *Id.* Importantly, the majority noted that it only had to give great deference to the Mississippi trial court's decision rather than the Mississippi Supreme Court's findings because the case arose on direct review. *Id.*
113. *Id.* at 2245.
114. *Id*. Under the previous standard, the only way a defendant could make a claim that the State discriminated on the basis of race in the exercise of peremptory strikes was for the defendant to establish a historical pattern of racial exclusion of jurors. *Swain*, 380 U.S. at 223.

gather and rely on all relevant evidence and circumstances to support his or her challenge.[115]

Justice Kavanaugh began his review of the history with an overview of the numbers from Flowers' first four trials, noting that the State tried to strike thirty-six prospective African American jurors.[116] This evidenced a pattern of excluding African American prospective jurors by the State, which, under *Batson*, may give rise to an inference of racial discrimination.[117] Moreover, the majority noted that the Mississippi Supreme Court found on two occasions that the State impermissibly excluded African American prospective jurors in violation of *Batson*.[118]

In addition to an overall review of the numbers demonstrating the State's pattern of striking only African American jurors, Justice Kavanaugh summarized the most relevant history of Flowers' trials beginning from petitioner's first trial.[119] Based on the historical overview of Flowers' first four trials, the majority concluded that the State exercised its peremptory strikes to eliminate as many African American prospective jurors as possible.[120] This systematic elimination suggested that the State sought to empanel an all Caucasian jury.[121] Accordingly, the majority's review of the history of Flowers' first four trials strongly supported its conclusion that the prosecutor's exercise of peremptory strikes at Flowers' sixth trial was substantially motivated in part by discriminatory intent.[122]

The second evidentiary consideration the majority addressed was the prosecutor's striking of five of the six African American prospective jurors at petitioner's sixth trial.[123] Again, a pattern of striking members of a particular race may give rise to an inference of racial discrimination.[124]

During Flowers' sixth trial, there were twenty-six prospective jurors with six who were African American.[125] The State accepted one African

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115. *Id.* at 2245 (citing *Batson*, 476 U.S. at 96-97).

116. *Id*.

117. *Id.*

118. *Id*. For example, in Flowers' second trial, the court found that the State discriminated against one African American juror evinced by the State's false proffered reason that the stricken juror was inattentive and nodding off during questioning, and therefore the court sustained Flowers' *Batson* challenge. Also, at Flowers' third trial, the Mississippi Supreme Court held that the case presented a strong prima facie case of purposeful discrimination on the basis of the State exercising all 15 peremptory strikes to eliminate all 15 African American jurors. *Id.*

119. *Id.* at 2246.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

American juror; however, it peremptorily struck the remaining five African American jurors.[126] Thus, the seated jury at the sixth trial consisted of eleven Caucasian jurors and one African American juror.[127]

According to Justice Kavanaugh, the State's exercise of peremptory strikes in petitioner's sixth trial was similar to the first four trials.[128] While the majority did acknowledge that the State in the sixth trial accepted one African American juror, such acceptance did not insulate the State from a *Batson* challenge given the history of the instant case.[129] Bolstering this observation, Justice Kavanaugh relied upon the finding in *Miller-El v. Dretke*[130] that a State may accept one African American juror to obscure a pattern of consistently opposing African American jurors from being seated.[131] Therefore, the majority concluded that the State peremptorily striking five of the six prospective African American jurors at the sixth trial supported the conclusion that the State was motivated in substantial party by discriminatory intent.[132]

Turning next to the third evidentiary consideration, Justice Kavanaugh addressed the disparate questioning of the African American and Caucasian prospective jurors during Flowers' sixth trial.[133] According to *Batson*, a prosecutor's questions and statements during the jury selection process may support or rebut an inference of discriminatory intent.[134]

At Flowers' sixth trial, the majority noted that the State asked the five struck African American jurors a total of 145 questions, in contrast to the total of 12 questions it asked to the 11 seated Caucasian jurors.[135] Statistically speaking, the State asked twenty-nine questions to each African American juror as opposed to one question it asked to each Caucasian juror.[136] As the majority noted, this comparison of questions asked by the State necessarily inferred the finding that the State spent more time questioning the prospective African American jurors than the accepted Caucasian jurors.[137]

In response to the evidence of disparate questioning, which is probative of discriminatory intent, the State argued that it questioned the

126. *Id.*
127. *Id.* at 2247.
128. *Id.*
129. *Id.*
130. 545 U.S. 231, 250 (2005).
131. *Flowers*, 139 S. Ct. at 2247.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*

prospective African American and Caucasian jurors differently because of differences in the jurors' characteristics.[138] However, the Court rejected the argument, finding that the record reflected otherwise.[139] While it is reasonable for the State to ask follow-up questions or to investigate relationships between the jurors and witnesses, the record reflected that the State did not question the prospective Caucasian jurors as extensively or investigated as thoroughly than the struck African American jurors, even though the jurors had substantial ties to the petitioner and the petitioner's family.[140] Importantly, although disparate questioning or investigation alone is not determinative of a *Batson* violation, such questioning, along with other evidence, may support an inference racial discrimination.[141] Consequently, the majority concluded that the dramatically disparate questioning of African American and Caucasian jurors at the petitioner's sixth trial coupled with the historical evidence from the first four trials, supported its conclusion that the State was motivated in substantial part by a discriminatory intent at Flowers' sixth trial.[142]

Finally, the majority reviewed the fourth evidentiary consideration of the facts and circumstances surrounding the State's peremptory strike of prospective African American juror, Carolyn Wright, at Flowers' sixth trial.[143]

As the majority recognized, comparing struck jurors and accepted jurors is a useful strategy in determining whether a *Batson* violation has occurred.[144] Such comparison can insinuate that the State's given reason for striking a juror was a pretext for discrimination.[145] It is important to consider, though, that a defendant is not required to identify an identical Caucasian juror for the comparison to imply a discriminatory intent.[146] According to *Miller-El v. Dretke*,[147] case law does not require that the individuals compared be identical in all respects because a rule providing

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138. *Id.*

139. *Id.*

140. *Id.* at 2248. For example, Dianne Copper, an African American prospective juror, was asked 18 follow-up questions about her relationship with the Flowers' and his family. In contrast, Pamela Chesteen, a Caucasian juror, was not asked nay follow-up questions notwithstanding the fact that Chesteen knew several members of Flowers' family. Similarly, the State asked no follow-up questions of the other four Caucasian prospective jurors, even though they had relationships with the defense's witnesses. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 2249.

144. *Id.* at 2250.; *see also Snyder*, 552 U.S. at 483-84.

145. *Id.*; *see also Foster*, 578 U.S. at ___.

146. *Id.*; *see also Miller-El*, 545 U.S. at 247.

147. 545 U.S. 231, 247, n. 6 (2005).

that a "defendant cannot win a *Batson* claim unless there is an exactly identical [Caucasian] juror would leave *Batson* inoperable."[148]

The majority noted that while Wright was a proponent for the death penalty and had a family member that was a prison guard, the State's proffered reason for the contested strike was due to her relationship with several defense witnesses and her employment at the Wal-Mart where Flowers' father also worked.[149] Yet, Justice Kavanaugh identified three other prospective Caucasian jurors was also knew many individuals involved in the case;[150] nonetheless, the jurors were not asked individual follow-up questions, unlike Wright.[151] Moreover, even though the record reflected that Wright had worked at the local Wal-Mart with Flowers' father, there was no evidence that they worked closely together or even knew each other.[152] This side-by-side comparison of the struck African American to the similarly situated Caucasian jurors suggested a discriminatory intent by the State.[153]

In addition, the State also explained that it struck Wright for her prior litigation with Tardy Furniture thirteen years earlier.[154] However, the majority rejected this reason, explaining that the State failed to explain how Wright's prior lawsuit would affect her ability to impartially serve as a juror at the sixth trial.[155] Further, the State also explained that it struck Wright because she worked with one of Flowers' sisters.[156] However, again, the majority rejected this explanation, finding that the State made an incorrect statement about the record, which is indicative of discriminatory intent.[157] Justice Kavanaugh identified three other occasions where the State misstated the record to justify the striking of African American prospective jurors.[158]

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148. *Flowers*, 139 S. Ct. at 2249.

149. *Id*.

150. *Id.* Chesteen, a Caucasian juror, had provided services to the Flowers family at the local bank and knew several of the Flowers' family members. Similarly, Bobby Lester, another Caucasian juror, also worked at the bank and knew several family members of the defendant.

151. *Id.* at 2250.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* The majority noted that the State made incorrect statements in regard to three prospective African American jurors Tashia Cunningham, Edith Burnside, and Flancie Jones. The State asserted that Cunningham and Flowers' sister were close friends; however, the parties only had a working relationship. Likewise, the State claimed that Burnside had tried to hide a lawsuit involving Tardy Furniture, but she had

In noting that the side-by-side comparison of Wright to accepted Caucasian jurors should not be considered in isolation, the majority examined the strike in the context of all the facts and circumstances as consistent with prior precedent.[159] In light of the history of the State's exercise of peremptory strikes, the State's striking of five of the six African American prospective jurors at Flowers' sixth trial, and the State's dramatically disparate questioning of jurors during the sixth trial suggested that the State was motivated in part by discriminatory intent.[160]

Overall, Justice Kavanaugh reversed and remanded the case on the basis that all the facts and circumstances of the four factors considered as a whole established that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of Wright was not motivated in substantial part by discriminatory intent.[161] Notably, Justice Kavanaugh stated that the Court need not decide that any one of the four factors alone would require reversal, and emphasized that the decision broke no new legal ground.[162]

3. Concurring Opinion by Justice Alito

Justice Alito delivered a brief concurring opinion. In his concurrence, Justice Alito explained that there would have been little difficulty in affirming Flowers' conviction given the State's facially legitimate reasons for its peremptory strikes.[163] However, because of the many connections a high percentage of the potential jurors had to either Flowers or the victims and the fact that the case was tried by the same prosecutor in all six trials, the jury selection process was not able to be assessed as it would have been in a typical proceeding. [164] These connections, as Justice Alito acknowledged, complicated the trial judge's ability to determine whether the prosecutor's proffered reasons was mere pretext of racial discrimination or legitimate intentions.[165] Accordingly, Justice Alito, in viewing the totality of the circumstances, concurred with the Court's reversal of Flowers' conviction and remand of the case for further proceedings.[166]

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not. And, lastly, the State alleged that Jones was Flowers' aunt; however, that was untrue. *Id.*

159. *Id.* at 2251.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 2252.
164. *Id.*
165. *Id.*
166. *Id.*

4. Dissenting Opinion by Justice Thomas

Justice Thomas delivered the dissenting opinion of *Flowers v. Mississippi* with whom Justice Gorsuch joined Parts I, II, and III of the opinion.[167] In his contemptuous opinion, Justice Thomas began his lengthy dissent by admonishing the Court for incorrectly granting review of the case.[168] He chided the majority for reframing the issue of the case, so it could review the factual findings of the state courts without resolving the actual legal question.[169] Justice Thomas further speculated that the Court granted certiorari because of the media attention surrounding the case.[170] Consequently, Justice Thomas contended that the grant of review wasted the State's, defendant's, and lower court's resources by not reviewing the state court's application of *Batson* the first time.[171]

The second part of the dissent's argument focused on the merits of the case, concluding that no evidence presented purposeful race discrimination by the State in jury selection at Flowers' sixth trial.[172] Specifically, Justice Thomas argued that each of the five strikes at the sixth trial were justified by the State's proffered race-neutral grounds, that none of the struck African American jurors were remotely similar to the seated Caucasian jurors, and that the trivial mistakes of fact or disparate questioning on part of the State provided no evidence of purposeful racial discrimination.[173]

Because there was no evidence of racial discrimination, the dissent contended, in part three, that the majority's decision hinged only upon conduct that occurred before the instant case.[174] Particularly, Justice Kavanaugh's reliance upon the narrative that the instant case had a long history of racial discrimination to support its finding of a clear error on part of the trial court was improper and had no basis in the record.[175] According to Justice Thomas, Flowers' was unable to overcome his burden of establishing a prima facie case of purposeful discrimination, and thus, the trial court did not clearly err in its holding.[176]

In the finale of Justice Thomas' laborious dissent, with whom Justice Gorsuch declined to join, part four focused on the constitutional

167. *Id.* at 2253.
168. *Id.*
169. *Id.* at 2254.
170. *Id.*
171. *Id.* at 2255.
172. *Id.*
173. *Id.*
174. *Id.* at 2267.
175. *Id.*
176. *Id.*

implications of *Batson*.[177] According to Justice Thomas, *Batson* has led the Court to disregard the limitations set forth by Article III on standing by allowing a convicted criminal, who has suffered no injury, additional opportunities.[178] In the present case, the dissent noted that Flowers suffered no legally cognizable harm because he was not the juror excluded on the basis of race.[179] Flowers also failed to assert his right to an impartial jury.[180] Therefore, although the majority held that Wright's denial from jury service was a denial of equal protection, she was not the individual challenging Flowers' convictions, and, thereby Flowers' lacked standing to assert her claim.[181]

Additionally, Justice Thomas vehemently opposed *Batson* itself.[182] Unlike Justice Kavanaugh who famed *Batson* as revolutionizing the jury selection process,[183] Justice Thomas contended that the decision imposed equal protection principles upon a procedure designed to give parties absolute discretion in exercising their peremptory strikes.[184] Since the decades following *Batson*, the dissent characterized the cases as a "misguided effort to remedy societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges.[185] *Batson* "emphasiz[es] the rights of excluded jurors at the expense of the traditional protection according criminal defendants of all races,"[186] rather than to help ensure fairness of criminal proceedings.[187] Therefore, Justice Thomas urged the Court to return to the days before *Batson* where race mattered in a courtroom to allow litigants utilization of an important tool to prevent prejudice in their case.[188]

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177. *Id.* at 2270.

178. *Id.*

179. *Id.*; *see also Batson*, 476 U.S. at 89; *see also* Powers v. Ohio, 499 U.S. 400, 414 (1991); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (explaining that to have standing to bring an equal protection claim in a separate suit, "the juror would have to show that the State's action caused him to suffer an injury in fact, and a likelihood that a favorable decision will redress the injury.")

180. *See* U.S. CONST. amend. VI.

181. *Flowers*, 139 S. Ct. at 2270. While a defendant could conceivably suffer an injury under a *Batson* violation if the court believes that he would receive a more favorable outcome if more members of his race are on the jury, this opportunity contravenes with the rejected assumption that jurors might be partial to the defendant because of their shared race. *Batson*, 476 U.S. at 97.

182. *Id.* at 2271.

183. *Id.* at 2243.

184. *Id.* at 2271.

185. *Id.* (quoting Campbell v. Louisiana, 523 U.S. 392, 404 n.1 (1998) (THOMAS, J., concurring in part and dissenting in part)).

186. *Id.*

187. *Flowers*, 139 S. Ct. at 2243.

188. *Id.*

In support of his argument that the Court should abandon the *Batson* framework, Justice Thomas reviewed the evolving jurisprudence of the peremptory strike.[189] *Batson's* reliance on equal protection ignored the nature of the peremptory strike and the realities of racial prejudice.[190] Because "the [peremptory] strike is exercised based on intuition that a potential juror may be less sympathetic to a party's case," a strike "reflect[s] no judgment on a juror's competence, ability or fitness."[191] Thus, a juror is challenged on the basis of the limited knowledge afforded to counsel, which may include the juror's group affiliations.[192]

Moreover, Justice Thomas criticized *Batson* for focusing solely on individual rights of jurors instead of the traditional underpinnings of the peremptory challenge.[193] Historically, the peremptory strike protected against impartiality and effectuated a party's intuitions about a juror's unstated biases.[194] By requiring an explanation for the strike, as demanded by equal protection guarantee, the requirement contravenes with the very nature of the practice.[195] The strike must be exercised with full freedom or its purpose fails.[196] Also, the dissent argued that the application of an equal protection analysis to the peremptory strike has distorted the nation's jurisprudence since the Court did not apply equal protection ideologies to peremptory strikes until more than 100 years after the Fourteenth Amendment was ratified.[197] Thus, in closing, Justice Thomas opposed *Batson* for leading the way to eliminate peremptory strikes by requiring an explanation for individual strikes as inconsistent with the practice's underlying rationale.[198]

IV. ANALYSIS

A. Batson*: An Ineffective Tool*

The overall objective of *Batson* and its progeny was to instill public respect and to ensure confidence in the criminal justice system to safeguard

189. *Id.* at 2272-73.
190. *Id.* at 2273.
191. *Id.*
192. *Id.*; *see Swain*, 380 U.S. at 221.
193. *Id.* at 2273.
194. *Id.*
195. *Id.*
196. *Id.* at 2274; *see* Lewis v. United States, 146 U.S. 370, 378 (1892).
197. *Id.* at 2274.
198. *Id.* Justice Thomas explained that the realities of racial biases, sympathies, and prejudices are part of the racial composition of a jury that should not be rendered obsolete. Such thinking would prevent African American defendants from striking potentially hostile Caucasian jurors, and thus, hindering a fair trial.

the fundamental right that no citizens shall be disqualified from jury service on the basis of race.[199] Yet, evidence suggests that *Batson* is not the effective mechanism the Supreme Court hoped it to be.

Throughout Justice Kavanaugh's majority opinion of *Flowers v. Mississippi*, he praised the *Batson* decision for revolutionizing the jury selection process by providing a mechanism to eliminate discrimination, and for immediately eliminating the widespread practice of prosecutors routinely striking African American jurors in cases involving defendants of the same race.[200] In sharp contrast, Justice Thomas in his dissent repeatedly criticized *Batson* as a misguided effort to remedy a societal wrong by imposing constitutional limitations on a "traditionally discretionary exercise of peremptory challenges."[201] In other words, the majority overstated the effectiveness of *Batson*, while the dissent disagreed with the method of such reform to ensure equal protection rights.

1. Studies of racial discrimination in jury selection

Evidence suggests that substantial disparities still remain.[202] *Batson* has failed to enforce the mandate of equal protection and administration of justice, nor has it ensured the community's interest in a fair and impartial criminal justice system. For example, in a recent study, the Caddo Parish District Attorney's office in Louisiana collected data from 332 felony jury trials from 2003 to 2012.[203] By examining the rate at which prosecutors exercised their peremptory strikes against the race of the stricken or accepted jurors, the data revealed that when presented with a prospective African American juror, prosecutors peremptorily struck that African American juror 46% of the time.[204] In contrast, when presented with a Caucasian juror, the prosecutors struck that juror only 15% of the time.[205] Consequently, based on the data, prosecutors were more than three times as likely to strike African American prospective jurors than others.[206]

Similarly, law students from the University of Iowa studied the exercise of peremptory strikes by prosecutors in capital trials of defendants

199. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

200. *Flowers*, 139 S. Ct. at 2241.

201. *Id.* at 2270.

202. Peter A. Joy & Kevin C. McMunigal, *Racial Discrimination and Jury Selection*, 31 CRIM. JUST. 43 (2016).

203. Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office*, REPRIEVE AUSTRALIA (Aug. 2015), https://perma.cc/KE3Q-KQAX.

204. *Id.*

205. *Id.*

206. *Id.*

on death row in North Carolina as of 2010.[207] Over a twenty-year period, the data revealed that prosecutors struck prospective African American jurors at about 2.5 times the rate that they struck prospective jurors of a different race.[208] The article also examined studies analyzing appellate decisions reviewing *Batson* claims, and concluded that *Batson* has been unsuccessful in expelling race from the jury selection process.[209]

Moreover, a 2010 report conducted by the Equal Justice Initiative focused on jury selection procedures in eight southern states, including Mississippi, finding evidence of racial discrimination in jury selection in every state.[210] The report uncovered that prosecutors excluded nearly 80% of African Americans qualified for jury service.[211] Of the counties composed of a majority of African American residents, capital defendants were tried by all Caucasian juries.[212] Further, the report noted that challenges for underrepresentation in the jury pool is impossible in more than 90% of counties for Latinos and Asian Americans.[213] Further studies have revealed the same.[214] Overall, evidence indicates substantial disparities in race in jury selection, thus suggesting that racial discrimination remains deeply entrenched in jury selection.

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207. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 87 IOWA L. REV. 1531, 1534 (2012).

208. *Id.*

209. *Id.* at 1541.

210. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), at 4, https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

211. *Id.*

212. *Id.*

213. *Id.* at 36.

214. *See e.g.* Billy M. Turner, Rickie D. Lovell, John C. Young & William F. Denny, *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. CRIM. 61, 63 (1986) (finding that 44% of prospective African American jurors were struck, even though the percentage of the population in the Louisiana parish that were African American was 18%); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695 (1999) (finding that prosecutors used 60% of their strikes against African American jurors, who constituted 32% of the venire, while defense attorneys used 87% of their strikes against Caucasian jurors, who constituted 68% of the venire); Richard Bourke & Joe Hingston, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office 5* (2003) (finding that in juries consisting of six or twelve jurors, prosecutors struck prospective African American jurors at more than three times the rate they struck Caucasian jurors); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 (2001) (finding that prosecutors struck on average 51% of African Americans jurors compared to only 26% of jurors of a different race).

2. Reasons for *Batson's* ineffectiveness

One possible reason for *Batson's* ineffectiveness at expelling racial discrimination is that the decision failed to address that a peremptory strike may be still be exercised irrationally and illegitimately, so long as the basis for the strike was not race. In other words, under *Batson*, as long as the reason for the strike is found to be race-neutral, the prosecution may continue to strike prospective jurors for any reason. For example, in the same report conducted by the Equal Justice Initiative in 2010, the results revealed that in many of the cases reviewed, the race neutral explanations for exclusion were based on pretextual reasons intended to conceal racial biases, including exclusion based on low intelligence, wore eyeglasses, were single, married, or separated, or were too old for jury service.[215] The African American prospective jurors were also excluded for having relatives who attended historically African American colleges, for the way they walk, for chewing gum, and for frequently living in predominately African American neighborhoods.[216] Thus, as long as the proffered reason is race neutral, the trial court may accept the reason as permissible, even though the strike was based on illegitimate explanations.

Another possible reason for *Batson's* ineffectiveness is the trial courts' reluctance to find a *Batson* violation and the appellate courts deferential standard in reviewing *Batson* challenges. A prosecutor need only offer a race neutral explanation to overcome the second hurdle of a *Batson* analysis. Typically, this burden is easy to overcome because trial courts accept the reason as permissible instead extending the inquiry to assess the credibility of the prosecutor.[217] Moreover, appellate courts employ a deferential standard of review for *Batson* challenges because appellate courts only review the record, while trial courts are able to view the demeanor of the jurors and attorneys in the court room.[218] As Justice Kavanaugh noted in his opinion of *Flowers*, appellate standard of review of a trial court's factual findings is highly deferential.[219]

Lastly, another possible reason for *Batson's* ineffectiveness is the ease in which prosecutors can meet their burden to offer a race-neutral explanation for the challenged strike.

As previously stated, the burden of establishing a race neutral explanation is not difficult. The prosecutors' race-neutral reason need not be persuasive

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215. *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), at 36, https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

216. *Id.* at 4.

217. Nancy C. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1593 (2012).

218. *Id.*; *see Schwartz*, *supra* note 73, at 1568-71.

219. *Flowers*, 139 S. Ct. at 2244.

or plausible.[220] A prosecutor's race neutral reasons to rebut an inference of discrimination falls within two categories: Objectively verifiable reasons that lead to challenges for cause based on bias or other grounds, and primarily subjective reasons which lead to challenges based on inarticulable gut feelings.[221] Valid explanations that fall within the first category include a juror who has a close relative to the defendant, a juror who was previously represented by defense counsel, a juror about the same age as defendant, a juror who had past legal problems with the government, and a juror who was young, single, unemployed, or poor.[222] Valid reasons falling within the second category include a juror with a poor attitude, a juror who appeared disinterested, unintelligent, or bewildered, a juror who seemed hostile to the prosecutor, a juror who was unable to get along with other jurors, and a juror who was anti-law enforcement from previous experiences.[223] Based on these valid explanations, prosecutors are able to disguise their racial discrimination with race neutral explanations to overcome their burden.

One study reviewed cases from 1986 through 1993 to examine the success rate of prosecutors in offering a race neutral explanation.[224] The results suggested that while it was relatively easy for a defendant to establish a prima facie case, it was difficult to prevail on a *Batson* challenge overall.[225] A possible reason for this was the ease in which the responding party was able to offer a neutral explanation.[226] Further results uncovered that criminal defense attorneys were disproportionately unsuccessful at offering neutral explanations, while in contrast, prosecutors enjoyed a higher success rate at rebutting prima facie cases with neutral explanations.[227] The study further examined the success rate of providing neutral explanations by targeted groups.[228] The overall results indicated that *Batson* respondents offered valid neutral explanations in almost four out of five situations.[229] Notably, the results indicated that in cases of reverse *Batson* challenges against Caucasian jurors, prosecutors had more

220. *Miller-El*, 545 U.S. at 267.

221. Serr & Mark, *supra* note 73, at 44-47.

222. *Id.* at 44-46. (explaining also that a juror who was subscribed to a black newspaper which was pro-defendant in its coverage was a valid reason for a challenge).

223. *Id.* at 46-47.

224. Melilli, *supra* note 73, at 460.

225. *Id.* at 460-61.

226. *Id.*

227. *Id.* at 461.

228. *Id.* at 462-65.

229. *Id.* at 465.

success than defense attorneys challenging prosecutors' strikes.[230] Thus, even if a defendant establishes a prima facie case of purposeful discrimination at the first step, the burden imposed on the prosecutor to present a race-neutral explanation for the strike is easy to overcome, and it remains difficult to prevail on a *Batson* challenge.[231]

3. Solutions for *Batson*

The *Batson* decision was the focal point surrounding the majority's ruling in *Flowers v. Mississippi* where, upon review, the sole question was whether the Mississippi Supreme Court's ruling concerning the State's past use of peremptory strikes in Flowers' case was proper within the scope of the *Batson* challenge. However, because evidence suggests that racial discrimination still remains entrenched in the jury selection process, this provokes the question of whether *Batson* is the proper standard to determine if racial discrimination did indeed exist at the time of the exercise of a peremptory challenge. As many scholars have regarded *Batson* as a failure for its inability to eliminate discriminatory use of the peremptory strike, this suggests that the Mississippi Supreme Court was improperly guided as to its conclusion that no *Batson* violation had occurred, and thus, review by the Supreme Court was unnecessary if the standard had been appropriate.

Based on the standard under *Batson*, once the defendant meets his or her burden of establishing a prima facie case of discrimination, the burden shifts to the prosecution to offer a race neutral explanation for the challenged strike. As scholars and studies have uncovered, this is an exceptionally low burden to overcome because a prosecutor's reason need not be plausible or persuasive, so long as the prosecutor does not rebut the defendant's prima facie case by stating merely that he challenged the juror on the assumption that the juror would be partial to the defendant because of their shared race or by merely denying that he had a discriminatory motive or by affirming his good faith belief in the individual selection.[232] This allows prosecutors to exclude African American jurors for any reason by providing a list of explanations for striking a particular juror that are essentially a substitute for exclusion on the basis of race.

To ensure that racial discrimination does not infiltrate the jury selection process, a more stringent standard should be established to safeguard against racial discrimination. For example, a higher burden of

230. *Id.* at 462-65 (explaining that *Batson* respondents were less successful in providing valid explanations for challenges based on gender or against Caucasian jurors, as compared to challenges against African Americans or Hispanics).

231. *Id.* at 462.

232. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986).

proof should be required for a prosecutor to overcome the burden of offering a race neutral explanation. Even though the *Batson* court stated that the race neutral explanation need not rise to the level justifying a challenge for cause,[233] a similarly high standard should be employed for evaluating a prosecutor's race neutral reason. As studies have shown, the prosecution may easily overcome their burden at the second step because of the thinly veiled justifications accepted by the court, even though the reasons are actually exercised based on discriminatory intent. If a higher burden of proof is required, then this may reduce the likelihood that the prosecution is able to eliminate potential African American jurors on the basis of discrimination because the prosecution may not rest on its laurels and will be required to offer an actual valid reason for the strike.

Moreover, Justice Thomas noted in his dissent of the instant case that race based peremptory strikes are not reviewed under the strict scrutiny standard.[234] As the Supreme Court has consistently held, laws that infringe upon a fundamental right or involve a race-based classification are subject to the strict scrutiny standard pursuant to the Court's equal protection and due process jurisprudence.[235] Yet, even though a *Batson* challenge is based on an argument of racial discrimination, it remains the glaring exception to the strict scrutiny standard. The current standard only requires a barely plausible explanation for the proffered race-neutral explanation. This begs the question of why a *Batson* challenge is exempted from the strict scrutiny review while the Court has historically applied the highest standard for laws that infringe upon a fundamental right or involves a suspect classification, such as race. If the Court were to apply a strict scrutiny standard in reviewing the constitutionality of the government's discrimination, as it does for other race-based classifications, this may reduce the likelihood of discrimination in jury selection because the government's proffered race-neutral explanation would have to pass high constitutional muster. Accordingly, the core of equal justice demands a higher standard for both reviewing a race-based peremptory challenge and overcoming the burden of offering a race-neutral explanation to ensure that discrimination does persist and that the Equal Protection Clause does not become illusory and futile.

In addition to a higher burden of proof at the second step and applying the strict scrutiny standard for reviewing race-based peremptory challenge, a trial court should diligently and strictly analyze a prosecutor's exercise of a peremptory challenge when there is a history of racial

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233. *Id.*

234. *Flowers*, 139 S. Ct. at 2271.

235. *See* Loving v. Virginia, 388 U.S. 1 (1967); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Korematsu v. United States, 323 U.S. 214 (1944).

discrimination or even a hint of it. As the majority stated in *Batson,* "one racially discriminatory peremptory strike is one too many," and as Chief Justice Roberts mentioned at oral argument of the instant case, a prosecutor's *Batson* violation is pertinent to the assessment of a current *Batson* challenge.[236] If the prosecution cannot offer a valid race-neutral explanation coupled with a history of racial discrimination, a prosecutor should not have the privilege of utilizing peremptory challenges to his or her advantage. This may deter the misconduct if peremptory strikes are not made available because a prosecutor may be more careful in striking potential jurors. Just as criminal defendants are incarcerated or fined if found guilty, prosecutors should be penalized for their misconduct.

Lastly, a solution to the ineffectiveness of *Batson* may be to film the hearings so appellate courts are able to watch the jury selection and see what the trial judge views. According to prior studies, appellate courts are highly deferential to a trial court's findings because the trial court is able to gauge the demeanor and mannerisms of the prospective jurors. A recording of the *Batson* hearing may eliminate the need for the highly deferential standard of review because appellate courts are able to view the factual findings presented at trial and may not rely solely on the findings of trial courts. Moreover, the benefits to filming the hearings would outweigh the administrative burdens, if any, because filming may be operated by the court personnel in the ordinary course of the court's business and allow reviewing courts complete visualization of the proceedings. Filming the proceedings may also provide efficiency and modernization to the courtroom because it can be used to record jury selection so that an immediate record is available for use in preparation of appeal and review by the appellate court.[237] Accordingly, by filming *Batson* hearings, an appellate court may have the privilege of viewing the proceedings for itself and not have to rely wholly on findings of the trial courts in determining whether a prosecutor discriminated in striking a potential juror.

B. Legitimizing an Ineffective Tool

Flowers v. Mississippi represents the Supreme Court's recent application of the Fourteenth Amendment to a criminal procedure issue. Throughout the majority opinion, Justice Kavanaugh repeatedly stressed that equal justice requires that a criminal trial be free from racial discrimination in jury selection and that discriminatory jury selection

236. Transcript of Oral Argument at 18:22-25, 19:1, Flowers v. Mississippi*,* 139 S. Ct. 2228 (2019) (No. 17-9572).

237. Guy O. Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L. J. 9, 10 (1972).

violates the Fourteenth Amendment.[238] Yet, the majority opinion failed to further or strengthen *Batson*.

To answer the sole question on review, the Court analyzed four evidentiary categories it deemed relevant.[239] However, the majority limited its application to these four factors, which focused only on the pattern of racial discrimination by the State in Flowers' particular case. Although the *Batson* court discussed that a court may consider the long and unexplained exclusion of members from the defendant's particular race in other jury panels,[240] the majority failed to acknowledge or discuss the exclusion of other prospective African American jurors by the State in other cases. Moreover, Justice Kavanaugh refused to indicate how he weighed the four evidentiary factors leading to the Court's decision, stating that "we need not and do not decide that any of [these] four factors along would require reversal."[241] Instead, Justice Kavanaugh emphasized that the extent of racial discrimination in the instant case was due solely to the State's misconduct, which gave rise to a constitutional violation.

The majority should have expanded its analysis to include instances of blatant discrimination by the State in prior proceedings to further bolster its conclusion of the State's felonious intent. Future defendants alleging claims of discrimination by the State may not be comforted by the majority's decision because lower courts may limit its application to only the facts of the particular proceeding, which may, in turn, impair a defendant's claim of discrimination. Moreover, Justice Kavanaugh should have also indicated the weight he gave to each of the four factors to help lower courts in assessing *Batson* challenges. In refusing to indicate how it weighed the four evidentiary factors, future defendants and courts may not know the point at which the facts demonstrate discrimination, which will allow courts to apply their own standards for assessing *Batson* claims. Although a bright-line rule for weighing evidentiary considerations may impose restrictions, some guidance by the Court would have been helpful for future defendants and courts to accurately assess a claim of discrimination by the State. Thus, by limiting the application of *Batson* to the facts of the instant case and refusing to give weight to any of the four factors, the majority did nothing to clarify or strengthen *Batson*.

Further, as Justice Kavanaugh stated, the decision broke no new legal ground.[242] The opinion merely reaffirmed the current legal standard as legitimate, even though *Batson* has been heavily criticized for its lack of

238. *Flowers*, 139 S. Ct. at 2243.
239. *Id.* at 2245.
240. Batson v. Kentucky, 476 U.S. 79, 95 (1986).
241. *Flowers*, 139 S. Ct. at 2236.
242. *Id.* at 2251.

effectiveness. The majority only remedied the misconduct of one prosecutor without fixing the entire system that has consistently allowed the government to continue its discriminatory practice without consequence. Consequently, aware of the persistent problems of discrimination that have plagued jury selection, Justice Kavanaugh took no steps to solve the inadequate and "toothless"[243] tool designed to prevent discriminatory strikes.

C. The Unresolved Issue of a Wayward Prosecutor

In reaching his decision, Justice Kavanaugh focused solely on the four evidentiary issues the Court deemed relevant in determining whether the prosecutor for the State, Doug Evans, violated Flowers' constitutional right by excluding a prospective African American juror from the sixth trial.[244] Yet, the majority failed to directly address the issue of prosecutorial misconduct, even though the sole issue concerned the prosecutor's unlawful exercise of the contested strike. Prosecutorial misconduct undermines the constitutional guarantee of a fair trial and legitimate judgments, as well as hinders public confidence in the criminal justice system.[245] By failing to address the prosecutor's determination to empanel an all Caucasian jury, the majority allowed Evans to slip through the cracks of the justice system and permitted him to continue his discriminatory practice.

First, the Court's failure to address the issue of prosecutorial misconduct inadvertently allows guilty prosecutors to avoid penalties for their constitutional violations by failing to provide remedies to ensure that prosecutors do not violate the law again. Prosecutors are endowed with much power in the criminal justice system, and as such, judicial and legislative safeguards are provided to ensure that they perform their duties in accordance with established professional and ethical standards. However, the current remedies for prosecutorial misconduct are largely ineffective because of their inadequacy at disciplining offending prosecutors. For example, in the rare event that an appellate court reverses a defendant's conviction for prosecutorial misconduct, the judicial opinion fails to name the offending prosecutor.[246] Consequently, the majority did nothing to protect future defendants from being tried by wrongdoing prosecutors and contributed to the overall ineffectiveness of deterring such

243. Pollitt & Warren, *supra* note 73, at 1978.

244. *Flowers*, 139 S. Ct. at 2236.

245. Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 577 (2017).

246. Morey, *supra* note 73, at 619.

misconduct by allowing offending prosecutors to continue their practices at the detriment of the people.

Second, by failing to provide an answer to the issue of prosecutorial misconduct in the present case, the majority allowed Evans to continue his discriminatory practices without consequence. The issue of prosecutorial misconduct was not novel concept to the present case. In two instances from the prior proceedings, the Mississippi Supreme Court reversed Flowers' conviction for prosecutorial misconduct, and even found the State to be engaged in discrimination against African American prospective jurors.[247] Despite the Mississippi Supreme Court finding proof of prosecutorial misconduct on numerous occasions, Evans still remained the lead prosecutor on the case throughout Flowers' six trials.[248]

Notably, at oral argument of the present case, Justice Alito and Sotomayor questioned the State as to why a single prosecutor was allowed to try a case six times, instead of allowing the State Attorney General to step in and try the case in a different county where the potential jurors would not have had as many connections to the defendant.[249] In response, the State explained that Mississippi statutory law only allows the Attorney General to assist upon request by the district attorney, and Doug Evans, the prosecutor in the instant case, declined to do so.[250] However, if the issue of prosecutorial misconduct had been addressed by the courts from the beginning, the instant case may not have required a finding of purposeful discrimination and would have provided a remedy to hold guilty prosecutors accountable for their constitutional violations.

Even if the Court had addressed the issue and reversed Flowers' conviction based on prosecutorial misconduct, Evans' may still continue his discriminatory practices because such solutions have shown to be ineffective. For example, Mississippians may exercise their democratic power to elect a different district attorney and halt the misconduct adversely affecting the county. However, this solution appears to be ineffective because Evans ran unopposed in 2019, and thus allowed him to continue his usage of racial discrimination in the exercise of a peremptory

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247. *Flowers*, 139 S. Ct. at 2235. Justice Kavanaugh explained that at Flowers' first trial, the Mississippi Supreme Court reversed the conviction because of numerous instances of prosecutorial misconduct. At the second trial, the trial court found that the prosecutor discriminated against prospective African American jurors in exercising the peremptory challenge. While Flowers' was convicted, the Mississippi Supreme Court reversed because of prosecutorial misconduct. Moreover, at the third trial, the Mississippi Supreme Court reversed the conviction because the prosecution had discriminated against African American prospective jurors. *Id.*

248. *Id.*

249. Transcript of Oral Argument, *supra* note 236, at 31:13-19.

250. *Id.* at 31:20-24.

challenge.[251] Importantly, though, Evans has recused himself from the *Flowers* case and asked the Circuit Judge to appoint the Mississippi attorney general's office to the proceeding.[252]

Further, professional sanctions are ineffective at deterring prosecutorial misconduct because in Mississippi, a lawyer who has engaged in racial discrimination in jury selection is not likely to face any form of professional discipline.[253] Private actions appear to be ineffective as well at resolving the issue of prosecutorial misconduct. Recently, a class action lawsuit has been filed against Evans for his alleged violation of constitutionally rights by excluding African Americans from serving on juries.[254] However, the Supreme Court established "absolute immunity" for prosecutors in suits involving monetary damages for unlawful conduct in court.[255] Accordingly, in the absence of court intervention and effective remedies for prosecutorial misconduct, prosecutors may overlook the decision of the Court and continue their racial discriminatory practices in exercising a peremptory challenge.

V. CONCLUSION

The extraordinary facts of *Flowers v. Mississippi* provided another chance for the Supreme Court to rectify the persistent problem of racial discrimination in jury selection and remedy the highly criticized tool ostensibly designed to thwart against discriminatory strikes. Instead, the Court simply reinforced the standard under *Batson* despite widespread criticism of its failure to live up to its ideals of eradicating invidious discrimination. Further, although the Court correctly held that the State violated Flowers' constitutional rights, the opinion did nothing to disincentivize wayward prosecutors from employing the same discriminatory practices. Without consequences, the dictates of the

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251. Parker Yesko, *Doug Evans Running Unopposed for Reelection*, APM REPORTS (Mar. 5, 2019), https://www.apmreports.org/story/2019/03/05/doug-evans-running-unopposed-for-reelection.

252. Parker Yesko, *Evans Quits the Case*, APM REPORTS (Jan. 6, 2020), https://www.apmreports.org/story/2020/01/06/doug-evans-recusal-curtis-flowers-case.

253. Parker Yesko, *Why Don't Prosecutor's Get Disciplined?* APM REPORTS (Sept. 18, 2018), https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined.

254. Compl. at 2, Attala County NAACP v. Evans, No. 4:19-CV-167-DMB-JMV (N.D. Miss. 2019).

255. Parker Yesko, *Doug Evans Sued for Using Race in Jury Selection,* APM REPORTS (Nov. 18, 2019), https://www.apmreports.org/story/2019/11/18/doug-evans-sued-for-using-race-in-jury-selection-naacp; *see also* Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

Fourteenth Amendment go unenforced and defendants and citizens are left without protection from unlawful governmental forces.

To ensure protection of constitutional rights, the Supreme Court should provide a more stringent standard and effective procedures for assessing discriminatory peremptory strikes, such as imposing a higher burden for prosecutors to overcome in providing a race-neutral explanation, reviewing race-based peremptory strikes under the strict scrutiny standard, or filming *Batson* hearings to lower appellate deference. Moreover, the Court in *Flowers* should have addressed the issue of prosecutorial misconduct because without penalties, discriminatory practices go unchecked and allows future prosecutors to continue without fear of punishment. Thus, without intervention by the Court, defendants and jurors are left unprotected and the law is susceptible to regressing back to times when the justice system overlooked the problem of invidious discrimination.