SECOND CIRCUIT HOLDS RACIALLY BASED PEREMPTORY CHALLENGES UNCONSTITUTIONAL

McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984)

In *McCray v. Abrams*,[1] the United States Court of Appeals for the Second Circuit sharply limited a prosecutor's racially motivated use of the peremptory challenge.

An all white jury found McCray, a black defendant, guilty of robbing a white victim.[2] McCray petitioned for a writ of habeas corpus,[3] challenging the prosecutor's use of peremptories.[4] During voir dire, the prosecutor allegedly used eight peremptory challenges to remove all minority venirepersons.[5] The defense counsel asserted that several of the excused minority jurors displayed no potential for bias.[6] On appeal from the dis-

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1. 750 F.2d 1113 (2d Cir. 1984).

2. *Id.* at 1115 & 1118. Because of an inadequate record, the defense counsel, prosecutor and state trial judge were unsure of the racial makeup of the jury during district court proceedings. McCray v. Abrams, 576 F. Supp. 1244, 1245, 1249 (E.D.N.Y. 1983). On appeal, however, both trial counsel agreed that the jury that convicted McCray consisted of twelve white jurors. 750 F.2d at 1118.

3. *Id.* N.Y. CRIM. PROC. LAW § 270.25(2)(b) (Consol. 1977) allows each side fifteen peremptory challenges. The prosecutor used peremptory challenges to remove seven blacks, one Hispanic, and three whites. The defense counsel contended that the eight challenged minority venirepersons were the only minority members on the jury panel. The prosecutor disputed this contention, arguing that one alternate juror was black. The Second Circuit dismissed this argument because the selection of the alternate did not occur until after the defense counsel had challenged the prosecutor's peremptory challenges. *McCray*, 750 F.2d at 1117 & 1133.

4. *Id.* at 1116. Defense counsel asserted that three excused minority jurors had not stated that they knew anyone who had committed a crime or knew anyone accused or suspected of committing a crime, and that one challenged black juror had stated that he had either a relative or a close friend who had been a victim of a crime and who had been shot during a robbery. *Id.*

5. The district court granted the writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1976), but stayed judgment pending appeal. McCray v. Abrams, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983). During voir dire, the defense counsel moved for a mistrial or in the alternative for a hearing to inquire into the motivations underlying the prosecution's peremptory challenges. 750 F.2d at 1115. The trial court denied these motions, relying on the prosecutor's denial of racial motivation. People v. McCray, 104 Misc. 2d 782, 783, 429 N.Y.S.2d 158, 159 (N.Y. Sup. Ct. 1980). The New York Court of Appeals affirmed McCray's conviction, relying on Swain v. Alabama, 380 U.S. 202 (1965), discussed *infra* notes 13-19 and accompanying text. People v. McCray, 57 N.Y.2d 542, 549, 443 N.E.2d 915, 919, 457 N.Y.S.2d 441, 445 (1982). The United States Supreme Court denied McCray's petition for certiorari. McCray v. New York, 461 U.S. 961 (1983). Five justices dissented, however, from the Court's denial of certiorari. *See infra* notes 39-41 and accompanying text.

6. During voir dire, opposing counsel excused members of the jury panel by exercising either challenges for cause or peremptory challenges. *See generally* Babcock, *Voir Dire: "Preserving Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975). A successful challenge for cause requires trial court approval. Potential jurors may be excluded for predispositions that impair their obligation to

trict court's grant of McCray's petition for a writ of habeas corpus, the Second Circuit *held*: that a state prosecutor's use of peremptory challenges to excuse jurors solely on the basis of their race violates the accused's federal constitutional right to a trial by an impartial jury.[7]

The Supreme Court has long required that the process of selecting juror pools must respect the defendant's constitutional right to equal protection.[8] In *Strauder v. West Virginia*,[9] the Supreme Court held that a state statute that limited jury service to white males denied a black defendant equal protection.[10] Similarly, in *Carter v. Texas*,[11] the Supreme Court held that a jury commissioner's systematic exclusion of blacks from the grand jury list violated the defendant's right to equal protection.[12]

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render an impartial verdict. The challenge for cause is also allowed when the juror is related to one of the parties or has a historical connection to the case. Babcock, *supra*, at 549. Peremptory challenges, however, allow counsel to automatically excuse jurors without any reason. N.Y. CRIM. PROC. LAW § 270.25 (Consol. 1977). The automatic exclusion of the prospective juror pursuant to a peremptory challenge is a statutory, not a constitutional, right. Swain v. Alabama, 380 U.S. 202, 219 (1965). In theory, peremptory challenges insure an impartial jury by providing both parties with an opportunity to exclude biased jurors who for some reason are not removable by challenges for cause.

7. 750 F.2d at 1128-29. "In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of the State . . . ." U.S. CONST. amend. VI. The court also affirmed the district court's conclusion that McCray had established a prima facie sixth amendment violation, but vacated the judgment and remanded for an evidentiary hearing because the prosecution never had an opportunity to rebut. 750 F.2d at 1133-34.

In Swain v. Alabama, 380 U.S. 202, 219 (1965), the Court explained that "[t]he function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence before them, and not otherwise." The peremptory challenge also facilitates voir dire by allowing counsel to probe prospective jurors for bias without the fear that the examination may create an unremovable hostile juror. *Id.* at 219-20.

8. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* Note, *Peremptory Challenges—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 158 (1967).

9. 100 U.S. 303 (1880).

10. *Id.* at 309. The Court also found that exclusion of blacks from the jury selection process infringed upon the rights of the class as a whole, denying them the "privilege of participating equally . . . in the administration of justice." *Id.* at 308; *see also* Virginia v. Rivers, 100 U.S. 313 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880).

11. 177 U.S. 442 (1900).

12. *Id.* at 444; *see also* Alexander v. Louisiana, 405 U.S. 625 (1972); Patton v. Mississippi, 332 U.S. 463 (1967). To establish a prima facie equal protection claim for exclusion of potential jurors from a jury selection process, the defendant must show that the process excluded a distinct class of persons qualified for jury service. Hernandez v. Texas, 347 U.S. 475, 478, 480 (1954) (citing Norris v. Alabama, 294 U.S. 587 (1935)). In *Hernandez*, the Court applied the test of systematic exclusion

In *Swain v. Alabama*,[13] the Supreme Court applied a different equal protection standard to the exclusion of minorities from petit juries by peremptory challenges.[14] The prosecutor in *Swain* used six of eight peremptory challenges to exclude all black members of the jury pool.[15] No blacks ever served on petit juries in the county in which the defendant was tried, and in criminal cases the prosecutors "consistently and systematically" used their challenges to exclude blacks.[16] The Court stressed, however, that the nature of peremptory challenges precludes judicial inquiry into an attorney's motivations.[17]

The Court in *Swain* established a presumption that the prosecutor uses peremptory challenges "to obtain a fair and impartial jury."[18] The defendant can rebut the presumption by proving that the prosecutor systematically excluded black jurors in all types of cases over a period of time.[19] However, defendants have had little success in rebutting the *Swain* presumption.[20] In *United States v. Carter*,[21] for example, the Eighth Circuit held that the prosecutor's use of peremptory challenges to exclude eighty-one percent of all blacks available to serve on petit juries did not rebut the *Swain* presumption.[22]

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of identifiable groups to persons of Mexican descent. *Id.* The Court has also considered the systematic exclusion of women from the jury selection process. Taylor v. Louisiana, 419 U.S. 522 (1975).

Once the defendant establishes a prima facie equal protection claim, the burden shifts to the state to rebut the defendant's claim. *See* Swain v. Alabama, 380 U.S. 202, 238 (1965); Hernandez v. Texas, 347 U.S. 475, 481 (1954). The state's assertion that it lacked discriminatory motive, and that the statute excluded the entire group as unqualified, is insufficient to rebut the prima facie equal protection violation. Norris v. Alabama, 294 U.S. 587, 598-99 (1934).

13. 380 U.S. 202 (1965) (plurality opinion).

14. *Id.* at 222. Justice Harlan joined the plurality, emphasizing that the Court did not uphold a prosecutor's use of peremptory challenges to exclude black jurors. *Id.* at 228. Instead, he found that the petitioner failed to show that the exclusion resulted solely from the prosecution's challenges. *Id.*

15. *Id.* at 205.

16. *Id.* at 223; *see also id.* at 231-32 (Goldberg, J., dissenting).

17. *Id.* at 220. *See supra* note 7 (discussing peremptory challenges).

18. *Id.* at 222.

19. *Id.* at 223.

20. *See, e.g.*, Weathersby v. Morris, 708 F.2d 1493, 1496-97 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984); *see also* Winick, *Prosecutorial Peremptory Challenge Practice in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 10-11 (1982) (criticizing the *Swain* standard); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979) (the *Swain* burden of proof is insurmountable); Note, *supra* note 8, at 163 (an insurmountable burden of proof renders *Swain* unworkable).

21. 528 F.2d 844 (8th Cir. 1975).

22. *Id.* at 850. Defendants have been equally unsuccessful in rebutting the *Swain* presumption in state courts. *See, e.g.*, State v. Davis, 529 S.W.2d 10, 16-19 (Mo. Ct. App. 1975); Rogers v. State, 257 Ark. 144, 146-50, 515 S.W.2d 79, 81-83 (1974), *cert. denied*, 421 U.S. 930 (1975). *But see* State

Four states have rejected the *Swain* approach while interpreting their own constitutions, viewing its standard as unrealistic.[23] In the leading case, *People v. Wheeler*,[24] the California Supreme Court found that a prosecutor's use of peremptory challenges to exclude blacks from a petit jury solely on the basis of "group association" violated the defendant's right under the California Constitution to a trial by an impartial jury.[25] The court stated that a defendant must show that the persons excluded were members of an identifiable group and that the prosecutor likely challenged these persons because of their group association.[26] The prosecutor must then prove that minority jurors were excluded because of specific bias reasonably related to the case.[27]

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v. Washington, 375 So. 2d 1162, 1164-65 (La. 1979) (prosecutor admitted practice of excluding blacks).

23. *See* People v. Wheeler, 22 Cal. 3d 258, 287, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 910 (1978); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 486-88, 387 N.E.2d 499, 515-16, *cert. denied*, 444 U.S. 881 (1979). *But see* State v. Washington, 375 So. 2d 1162, 1164-65 (La. 1979) (*Swain* standard met); State v. Brown, 371 So. 2d 751, 753-54 (La. 1979) (*Swain* standard met).

24. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

25. *Id.* at 277, 583 P.2d at 761-62, 148 Cal. Rptr. at 903. The court held that the California Constitution, Article I, § 16, entitles a defendant 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." *Id.* The prosecutor had not made a colorable effort to discover any specific bias and had not attempted to challenge any of the black jurors for cause. *Id.* The court viewed the removal of jurors with a specific bias towards the parties or the issues as the purpose of all challenges. *Id.* at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901. Consequently, the exercise of peremptory challenges to remove a group of jurors on the assumption that they share a general, or group, bias towards group-member defendants exceeds the scope of the prerogative that the system confers upon the prosecution. *Id.* The court completely rejected the presumption that members of minorities cannot serve as impartial jurors when the defendant is also a member of a minority. *Id.* at 276, 583 P.2d at 761, 148 Cal. Rptr. at 902.

26. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. The court rejected *Swain* because no defendant could realistically hope to sustain its burden. *Id.* at 286, 583 P.2d at 768, 148 Cal. Rptr. at 909. In State v. Crispin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980), the court found that "improper systematic exclusion by use of peremptory challenges can be shown . . . where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor." *But see* State v. Neil, 457 So. 2d 481, 486-87 (Fla. 1984), stating that the exclusion of a significant number of black jurors does not automatically require the trial judge to inquire into the prosecutor's motivations.

27. 22 Cal. 3d at 281-82, 583 P.2d at 764-65, 148 Cal. Rptr. at 906. The prosecution's proof need not establish a challenge for cause. *Id.* Judge Richardson dissented because the statute did not require any reason to use a peremptory challenge. *Id.* at 288, 583 P.2d at 769, 148 Cal. Rptr. at 910. Additionally, Judge Richardson supported the *Swain* Court's view that peremptory challenges based upon even racial considerations further the end of securing an impartial jury. *Id.* at 389, 583 P.2d at 770, 148 Cal. Rptr. at 911. He criticized the majority's belief that a mixing of representative groups would result in impartiality, as opposed to deadlock. *Id.* at 292, 583 P.2d at 771-72, 148 Cal. Rptr.

Although *Swain* appears to insulate a prosecutor's peremptory challenges from an equal protection attack, the jury selection process must also satisfy sixth amendment considerations.[28] The sixth amendment requires that juror pools represent a cross-section of the community where the defendant stands trial.[29] The cross-section rule does not require that the petit jury actually reflect a cross-section of the community.[30] The Supreme Court has relied on the cross-section rule to invalidate jury selection practices at the stages of assembling the venire[31] or empanelling the petit jury.[32] A majority of courts addressing the issue conclude, however, that the cross-section rule does not restrict the exercise of peremp-

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at 913. Commentators criticized *Wheeler*'s failure to define the cognizable groups to which it refers. *See, e.g.*, Comment, *A New Standard for Peremptory Challenges:* People v. Wheeler, 32 STAN. L. REV. 189, 199-203 (1979).

28. Three years after *Swain*, the Supreme Court held that the sixth amendment was incorporated in the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

29. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (purpose of the cross-section rule is to enable the jury to effectively function as a prophylactic against prosecutor and judge by drawing upon the community's common sense judgment and to allow community participation in the administration of justice).

30. *Id.* at 538.

31. In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court held unconstitutional a statute that precluded the selection of women for jury service who had not filed a written declaration of their desire to serve. The Court found that the statute effectively excluded women from jury service, thereby violating the cross-section rule. *Id.* at 533; *see also* Duren v. Missouri, 439 U.S. 357, 360 (1979) (invalidating a statute exempting women from jury service upon request); Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (remanded, on due process grounds, for a hearing on the white defendant's allegation that the state had systematically excluded blacks from grand and petit juries); Bullard v. United States, 329 U.S. 187, 193-94 (1946) (barred exclusion of women from federal jury service); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) (held routine exclusion of wage-earners improper); Glasser v. United States, 315 U.S. 60, 86 (1942) (held limitation on venirewomen to those who belonged to specific civic organizations improper).

32. The Supreme Court has applied the cross-section rule to a variety of issues including: (1) jury size, Balleu v. Georgia, 435 U.S. 223 (1978) (five-member jury too small); Williams v. Florida, 399 U.S. 78, 100 (1970) (six members is sufficient size to comprise cross-section); (2) unanimity, Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (rule does not prohibit verdicts of 11-1 or 10-2); and (3) challenges for cause, Witherspoon v. Illinois, 391 U.S. 510, 518-20 (1968) (improper to uphold challenge for cause on basis of juror's opposition to capital punishment). *But see* Wainwright v. Witt, 105 S. Ct. 844, 852, 861-63 (1985) (Rehnquist, J., and Brennan, J., dissenting, respectively). Both Justices Rehnquist and Brennan viewed *Witherspoon* as grounded in the sixth amendment. Justice Rehnquist, however, saw the cross-section rule as balancing a defendant's right to an impartial jury against the system's need to challenge a potential juror for bias. *Id.* at 852 n.5. Justice Brennan argued that *Witherspoon* guarantees that a jury will represent a cross-section of the community. *Id.* at 861.

Lower federal courts addressing the cross-section rule argue that it does not preclude the use of peremptory challenges to exclude potential jurors who oppose the death penalty. Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983); Jordan v. Watkins, 681 F.2d 1067, 1070 (5th Cir. 1982).

tory challenges.[33]

With respect to the venire, the elements of a prima facie sixth amendment violation are as follows: (1) the excluded group must be a "distinctive" group in the community; (2) the representation of the group in venires must not be fair and reasonable in relation to its representation in the community; and (3) the underrepresentation must result from systematic exclusion of the group during the jury selection process.[34] The defendant need not show that the jury was in fact biased.[35] When the defendant establishes a prima facie sixth amendment violation, the burden shifts to the prosecution to rebut the contention of systematic exclusion.[36]

In *McCray*, a majority of the Supreme Court denied McCray's petition for certiorari but indicated its willingness to reconsider *Swain*.[37] Justice Stevens, joined by Justices Blackmun and Powell, suggested that racially motivated use of peremptory challenges may warrant future consideration.[38] Justices Marshall and Brennan dissented from the denial of certiorari.[39] Justice Marshall opined that because *Swain* was decided prior to the application of the sixth amendment to the states, the Court should reconsider *Swain* in light of sixth amendment considerations.[40] Finally, Justice Marshall urged that the cross-section rule should be extended to

33. *See, e.g.*, United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984); United States v. Thompson, 730 F.2d 82, 85 (8th Cir. 1984); United States v. Childress, 715 F.2d 1313, 1319-20 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 744 (1984); Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984); People v. Williams, 97 Ill. 2d 252, 278-79, 454 N.E.2d 220, 242-33 (1983), *cert. denied*, 104 S. Ct. 2364 (1984). *But see* Grigsby v. Mabry, 569 F. Supp. 1273, 1285-86 (E.D. Ark.), *stay granted*, 583 F. Supp. 692 (E.D. Ark. 1983); People v. Wheeler, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 377 Mass. 461, 482-83, 387 N.E.2d 499, 513, *cert. denied*, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 488, 612 P.2d 716, 718 (Ct. App. 1980).

34. Duren v. Missouri, 439 U.S. 357, 364 (1979).

35. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 538-39 (1975) (Rehnquist, J., dissenting).

36. *See, e.g.*, Castenda v. Partida, 430 U.S. 482, 494 (1977) (quoting Washington v. Davis, 426 U.S. 229, 241 (1976)).

37. McCray v. New York, 461 U.S. 961 (1983).

38. *Id.* at 961-63. Justice Stevens, however, reasoned that the issue of racially motivated peremptory challenges warranted further consideration by the lower courts. Justice Stevens viewed the states as laboratories that develop competing formulas, based upon their own constitutions, from which the Court could select the most viable theory. Furthermore, Justice Stevens noted the absence of any conflict in the federal courts, implying that the lower federal courts should reconsider *Swain* despite its precedential status. *Id.*

39. *Id.* at 963 (Marshall, J., dissenting).

40. *Id.*

empanelled petit juries.[41]

The United States District Court for the Eastern District of New York granted McCray a writ of habeas corpus on both sixth amendment and equal protection grounds.[42] The court reasoned that the sixth amendment's cross-section rule would become meaningless if a prosecutor could use peremptory challenges to exclude all black venirepersons.[43] Furthermore, the court concluded that *Swain* was no longer good law, relying on the apparent willingness of the Supreme Court to reevaluate *Swain*.[44]

On appeal, the Second Circuit agreed with the district court's sixth amendment analysis.[45] Judge Kearse asserted that peremptory challenges were subject to scrutiny under the sixth amendment.[46] She con-

41. *Id.* Justice Marshall felt that the cross-section rule was otherwise meaningless. Justice Marshall also noted that "*Swain* is inconsistent with the rule established in other jury selection cases that a prima facie violation [of the equal protection clause] arises from a showing that an all-white jury was selected and that the selection process incorporated a mechanism susceptible to discriminatory application, irrespective of when in the process that opportunity arose." *Id.* (Marshall, J., dissenting).

42. McCray v. Abrams, 576 F. Supp. 1244, 1248 (E.D.N.Y. 1983).

43. *Id.* (citing McCray v. New York, 461 U.S. 961, 963 (1983) (Marshall, J., dissenting)). The court concluded that the inevitable result of ignoring racially based peremptory challenges would be an inherently biased jury system. *Id.*

44. *Id.* at 1246, 1249. The court recognized that if *Swain* controlled, McCray could not prevail. *Id.* at 1246-47. The district court rejected *Swain* for five reasons: (1) the *Swain* test is practically impossible to satisfy, *id.* at 1247; (2) *Swain* provides no remedy for the first victims of discrimination in a particular jurisdiction, *id.*; (3) sixth amendment cases since *Swain* dilute the validity of the *Swain* Court's assumption that racially based peremptory challenges do not implicate federally guaranteed rights, *id.* at 1247-48 (citing Taylor v. Louisiana, 419 U.S. 522 (1975)); (4) state court developments since *Swain* dilute the validity of the *Swain* Court's assumption that inquiry into the motives underlying prosecutorial peremptory challenges would violate tradition, *id.* at 1248-49 (citing People v. Wheeler, 22 Cal. 3d 263, 148 Cal. Rptr. 890, 583 P.2d 748 (1978)); and (5) no compelling governmental purpose justifies racially based peremptory challenges, *id.* at 1248 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

The court therefore adopted the *Wheeler* approach. *See supra* notes 24-27 and accompanying text (discussing *Wheeler*). The court found that the record established a prima facie case, but concluded that the trial court should have required an attempt at rebuttal. 576 F. Supp. at 1249.

45. McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984). The court held that McCray established a prima facie sixth amendment violation, but vacated and remanded for further proceedings to allow the prosecution an opportunity to rebut.

46. *Id.* at 1128-31. Judge Kearse based her conclusion on three grounds. First, peremptory challenges as creatures of statute must yield when they conflict with a constitutional right. Second, *Swain* indicates that peremptory challenges are not completely immune from judicial scrutiny. Third, no meaningful distinction exists between exclusion of identifiable groups for the venire and for the petit jury; either exclusion undermines the purposes of the cross-section rule. *Id.*

Drawing upon prior Supreme Court opinions, the Second Circuit concluded that the sixth amendment requires the venire to represent a fair cross-section because the defendant must have a reason-

cluded that the sixth amendment prevents racially motivated exercise of peremptory challenges.[47] Judge Kearse, writing for the majority, however, refused to accept the lower court's modification of *Swain*.[48] Despite her disagreement with the fundamental premises of *Swain*, Judge Kearse felt compelled to follow its unequivocal standards regarding equal protection attacks on racially motivated use of peremptory challenges.[49]

Judge Meskill, dissenting, criticized the majority opinion as contrary to the dictates of *Swain*, regardless of subsequent sixth amendment developments.[50] Additionally, Judge Meskill asserted that the majority opinion drastically limited the usefulness of the peremptory challenge, ignored the obvious negative impact on defensive use of peremptory challenges,[51] failed to confront the extreme breadth of its analysis,[52] and ignored the time, effort and expense necessary to implement its

able chance that the petit jury will also represent a cross section. *Id.* at 1124-28 (citing Duren v. Missouri, 439 U.S. 357 (1979); Balleu v. Georgia, 435 U.S. 223 (1978); Taylor v. Louisiana, 419 U.S. 522 (1975); Apodaca v. Oregon, 406 U.S. 404 (1972); Witherspoon v. Illinois, 391 U.S. 510 (1968)). The court emphasized that it was not holding that the sixth amendment requires affirmative steps to ensure that the petit jury represent a cross section, but rather only that it prohibits steps that interfere with the possibility. *Id.* at 1129.

47. *Id.* at 1131. To secure an impartial jury, a prosecutor can eliminate venirepersons who exhibit bias, but not when the only basis for finding bias are the "fallacious and pernicious" notions that group affiliation engenders bias and that minority groups are less fair and impartial than majority groups. *Id.*

The court chose to apply the sixth amendment test espoused in *Duren* for establishing a prima facie violation. *Id.* Thus, to establish a prima facie sixth amendment violation, the claimant must show that (1) the allegedly excluded group constitutes a cognizable group in the community and (2) there is a substantial likelihood that the prosecutor excused the group-member venirepersons solely on the basis of group affiliation. *Id.* at 1131-32. The burden then shifts to the government to rebut the presumption of unconstitutional action by showing that the exclusion resulted from racially neutral peremptory challenges. *Id.* at 1132. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979). The rebuttal need not show a reason that would support a challenge for cause; it need only show germane reasons other than group affiliation. 750 F.2d at 1132.

48. *Id.* at 1118, 1130.

49. *Id.* at 1121-24, 1130. The court found "fanciful" the *Swain* Court's statement that there was no equal protection violation because both blacks and whites are subject to peremptory challenges, concluding that only blacks, as the minority, could be totally excluded. *Id.* at 1121. Finally, the court noted the tragedy of allowing an artificial limitation upon the opportunity for blacks to participate in the judicial system, thus perpetuating an "invidious proposition of racial inferiority." *Id.* at 1122. The court did not believe, however, that *Swain* established the standard for sixth amendment challenges. *Id.* at 1124.

50. *Id.* at 1137 (Meskill, J., dissenting).

51. *Id.* at 1138-39. He perceived assumptions of group bias as essential to an attorney's effective service to his client, *id.*, and predicted the end of the peremptory challenge as an effective jury selection tool, *id.* at 1139.

52. *Id.* He asserted that the term "cognizable group" was uncontrollably broad, allowing con-

procedures.[53]

The Second Circuit reasonably concluded that sixth amendment principles mandated a departure from *Swain*'s restrictive approach to a criminal defendant's claim of improper use of peremptory challenges. Absent some restraint on a prosecutor's use of peremptory challenges to exclude minority jurors, the cross-section rule, applied at the venire selection stage, becomes meaningless.[54]

Judge Meskill argued that just as the flexibility inherent in peremptory challenges outweighed equal protection rights in *Swain*,[55] so does that flexibility outweigh sixth amendment rights.[56] Such a fixed preference for statutory procedures over constitutional rights, however, is difficult to justify.[57] Because the traditional goal of peremptory challenges is to secure an impartial jury, courts should disallow such challenges when made for any other purpose.[58]

Although Judge Meskill overstates the breadth of the "cognizable group" standard,[59] his criticism of the majority's failure to define the nature of the groups to which its standard refers is justified. The difficul-

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stitutional challenges to the exclusion of "men, women, old people, young people, laborers, professionals, Democrats, Republicans . . . ." *Id.*

In fact the Supreme Court defines cognizable groups more narrowly. *See, e.g.,* Casteneda v. Partida, 430 U.S. 482 (1977) (group defined by national origin); Taylor v. Louisiana, 419 U.S. 522 (1975) (group defined by sex); Whitus v. Georgia, 385 U.S. 545 (1967) (group defined by race); *see also* Comment, *A New Standard for Peremptory Challenges: People v. Wheeler,* 32 STAN. L. REV. 189, 199 (1979). *But see* Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (although group excluded was black, court defined group as "any large and identifiable segment of the community").

53. *Id.* at 1140 & n.6. The Second Circuit voted against en banc reconsideration of Judge Kearse's decision. McCray v. Abrams, 756 F.2d 277 (2d Cir. 1985). The court found en banc review inappropriate given the state's concession that a prosecutor may not use peremptory challenges solely on the basis of race.

54. *See supra* note 41 and accompanying text.

55. *See supra* notes 13-20 and accompanying text.

56. *McCray,* 750 F.2d at 1135 & n.1 (Meskill, J., dissenting). Judge Meskill read *Swain* as holding that peremptory challenges are immune from constitutional scrutiny. *Id.*; *accord The Supreme Court, 1982 Term,* 97 HARV. L. REV. 70, 194 (1983).

57. *See, e.g.,* Swain v. Alabama, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) (a constitutional claim must prevail over a nonconstitutional claim).

58. *See* Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges,* 11 FORDHAM L. REV. 927, 941 (1983). The Note suggests that the right to exercise peremptory challenges expands and contracts in proportion to its ability to serve the goal of securing a fair and impartial jury. England eliminated prosecutorial peremptory challenges in 1305, recognizing the challenge as a tool meant only to protect the accused. *See* Swain v. Alabama, 380 U.S. 202, 243 (1965).

59. *See supra* note 52.

ties inherent in the *Swain* test,[60] however, suggest that Judge Meskill's characterization of the majority's approach as unworkable lacks merit. Furthermore, a number of state courts already utilize the majority's approach successfully.[61] The majority's standard permits the defendant an opportunity to assert his constitutional rights, without unduly inhibiting the free exercise of peremptory challenges.[62]

McCray is a realistic reassessment of *Swain*. The Second Circuit's reevaluation of *Swain* strikes a sound balance between the peremptory challenge and a defendant's constitutional rights. Given post-*Swain* decisions that establish the cross-section rule, the difficulty a defendant has in meeting the *Swain* burden of proof, and the availability of alternative approaches preserving peremptory challenges and constitutional rights, *McCray*'s readjustment is good law.[63]

W.G.D.

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60. *See supra* text accompanying notes 18-22.

61. *See supra* notes 23-27 and accompanying text.

62. *See supra* notes 26 & 27 and accompanying text. Judge Meskill also criticizes the majority's approach for precluding the defendant's use of racially motivated peremptory challenges. A number of courts, however, point out that the sixth amendment cross-section rule should act as a bar to racially motivated peremptory challenges by either the prosecutor or defense counsel. The sixth amendment guarantees the defendant the right to an impartial jury, not to a jury that is biased in his favor. The *Wheeler* court stated:

> When a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

People v. Wheeler, 22 Cal. 3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906-07 n.29 (1978). *Accord* Commonwealth v. Soares, 377 Mass. 461, 489-90 n.35, 387 N.E.2d 499, 517 n.35 *cert. denied,* 444 U.S. 881 (1979). *Contra* United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984); United States v. Newman, 549 F.2d 240, 250 n.8 (2d Cir. 1977).

63. Recently, the Supreme Court granted certiorari in Batson v. Kentucky, *cert. granted,* 105 S. Ct. 2111 (1985). In *Batson*, the prosecutor exercised four of six peremptory challenges to exclude all black venirepersons from the panel. The issue raised in *McCray*, therefore, will be decided by the Supreme Court in the near future.