THE NEVER ENDING STORY OF THE PEREMPTORY CHALLENGE: RACIAL DISCRIMINATION IN THE NEW JERSEY JURY SYSTEM

Laura LoGiudice

I. INTRODUCTION

At some point, the vast majority of citizens receive the dreaded "jury duty" notice, requesting jury service on either the federal or state level. For many, the one and only thought after receiving such a notice is to somehow avoid the request. Interestingly, a prospective juror may be excused from jury duty exclusive of their own volition, through an attorney's use of the peremptory challenge.[1]

During the jury selection process, an attorney has two tools available to him to remove a prospective juror. First, the attorney may challenge a prospective juror for cause.[2] In raising such a challenge, however, the attorney must articulate a valid reason why the particular juror cannot impartially hear the case.[3]

---

[1]Black's Law Dictionary defines a peremptory challenge as, "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. abr. 1991).

[2]Black's Law Dictionary defines a challenge for cause as, "[a] request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." BLACK'S LAW DICTIONARY 230 (6th ed. abr. 1991). Rule 6(b)(1) of the Federal Rules of Criminal Procedure provides:

> The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

FED. R. CRIM. P. 6(b)(1).

[3]Traditional reasons include the juror knowing one of the parties, or knowing one of the

Second, the attorney may remove a prospective juror by use of the peremptory challenge.[4] This legal device traditionally permitted an attorney to remove a juror from the panel for no stated reason.[5]

Although viewed as both a beneficial and vital tool in the functioning of the legal system, employment of the peremptory challenge has led to the abuse of it. In particular, its employment to remove jurors solely based on race has raised issues of discrimination.[6] It is both sad and ironic that such discrimination has managed to creep into a justice system which is supposed to be "blind" to such matters;[7] a system which determines the fate of its citizens; a system which must

---

witnesses that will testify. In early English law, one reason for sustaining such a challenge was a showing of "specific bias, such as one arising from a relationship by blood or marriage to the litigant." Raymond J. Broderick, *Why The Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 373 (1992).

[4]As to peremptory challenge, Rule 24(b) of the Federal Rules of Criminal Procedure provides:

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

FED. R. CRIM. P. 24(b). Rule 47 of the Federal Rules of Civil Procedure governs the selection of jurors in civil trials, and pertains to both peremptory challenges and challenges for cause. *See* FED. R. Civ. P. 47.

[5]*See* Swain v. Alabama, 80 U.S. 202, 220 (1965).

[6]Batson v. Kentucky, 476 U.S. 79 (1986). *See also*, Broderick, *supra* note 3, at 385 (citations omitted) (stating that "[t]he evidence is convincing that from 1930 to 1965 and beyond, prosecutors utilized the peremptory widely and systematically to bar blacks from sitting on the petit jury").

[7]Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990). Judge McMillian indicated that in Texas in 1970, there was a policy manual in the prosecutor's office advising them to eliminate minorities during jury selection. *Id.* at 363 (citing Note, Batson v. Kentucky*: A Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026, 1041 (1987)). Judge McMillian additionally referred to other studies demonstrating discrimination in the use of the peremptory challenge. *Id.*

be reliable, fair, and impartial.[8]

Throughout history, courts have attempted to secure the justice system from such discrimination.[9] Because of the vital role of the jury selection process, great efforts must be taken to ensure that the procedures are both fair and constitutional. Accordingly, numerous challenges to the system have arisen. The first challenges were directed at the selection of the jury pool or jury venire.[10] These challenges implicated the process which determines which citizens will receive notice in the mail advising them that they must report for jury duty. Challenges also have arisen as to the process of selecting the *petit* jury.[11] In particular, these challenges focused on the use of the peremptory challenge.[12]

---

[8]As Justice Coleman expressed his feelings regarding discrimination in the jury system,

> We felt much like the swallow in Aesop's Fables who built her nest under the eaves of a court of justice. Before the young ones could fly, a serpent glided out of a hole and ate the newborn. When the swallow returned and found the nest empty, she began to mourn her loss. Seeing this, a dispassionate neighbor suggested, perhaps by way of comfort, that the swallow was not the first bird to have lost her young. "True," the swallow replied, "but it is not only my little ones that I mourn, but that I should have been wronged in the very place where the injured fly for justice."

Honorable James H. Coleman, Jr., *The Fourteenth Annual Chief Justice Joseph Weintraub Lecture: The Evolution of Race in the Jury Selection Process*, 48 RUTGERS L. REV. 1105, 1108-09 (1996) (citing THOMAS JAMES, THE SWALLOW IN CHANCERY, in AESOP'S FABLES 122, 122 (Philadelphia, J.B. Lippincott & Co. 1873)).

[9]*See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1974); Duncan v. Louisiana, 391 U.S. 145 (1968); Norris v. Alabama, 294 U.S. 587 (1935); Stilson v. United States, 250 U.S. 583 (1919); Strauder v. West Virginia, 100 U.S. 303 (1879).

[10]*See, e.g.*, Taylor v. Lousiana, 419 U.S. 522 (1974); Duncan v. Louisiana, 391 U.S. 145 (1968); Swain v. Alabama, 380 U.S. 202 (1965); Strauder v. West Virginia, 100 U.S. 303 (1879); State v. Rochester, 54 N.J. 85, 253 A.2d 474 (1969); State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964); Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19 (1956); State v. Stewart, 2 N.J. Super 15, 64 A.2d 372 (App. Div. 1949).

[11]The *petit* jury consists of jurors who are selected to hear the case at hand and determine guilt or innocence, or, in the civil arena, decide in favor of the plaintiff or defendant. *See infra* note 35 (defining the *petit* jury).

[12]*See, e.g.*, Purkett v. Elem, 115 S. Ct. 1769 (1995); Georgia v. McCollum, 505 U.S. 42 (1992); Edmonson v. Leesville, 500 U.S. 614 (1991); Powers v. Ohio, 499 U.S. 400 (1991); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965); State v. McDougald, 120 N.J. 523, 577 A.2d 419 (1990); State v. Watkins, 114 N.J. 259, 553 A.2d 1344 (1988); State v. Gilmore, 103 N.J. 508, 511 A.2d 1150 (1986); Russell v. Rutgers Health Plan, 280 N.J. Super 445, 655 A.2d 948 (App. Div. 1995); State v. Gil-

Section II of this Comment provides the reader with a brief history of the origins of the jury system, as well as the origin and use of the peremptory challenge. Section III explores court decisions prior to 1985 which attempted to prevent peremptory challenges from being used in a discriminatory manner. In order to understand the evolution of New Jersey law, the Section begins with United States Supreme Court decisions which addressed the pertinent issues. The Section then focuses specifically on the manner in which the New Jersey courts have addressed the use of discrimination in the jury selection process.

Section IV begins with a review of the new standard for use of the peremptory challenge, which was established by the United States Supreme Court in *Batson v. Kentucky*,[13] and continues with more recent cases which have interpreted the decision. Section IV then focuses on the New Jersey Supreme Court's decision in *State v. Gilmore*,[14] New Jersey's counterpart to *Batson*. The Section concludes with a discussion of the most recent New Jersey court decisions relating to *Gilmore*. Finally, Section V analyzes the difficulties with the *Gilmore* and *Batson* standards, as well as the controversy regarding the recent developments in the use of the peremptory challenge.

II. HISTORY OF THE JURY TRIAL AND THE PEREMPTORY CHALLENGE

A. THE JURY TRIAL

Due to its important and vital role in the legal system, the functioning of the jury system is a highly debated topic.[15] Some characterize it as the finest system in the world,[16] while others severely criticize it.[17] The "jury" itself has

more, 199 N.J. Super. 389, 489 A.2d 1175 (App. Div. 1986).

[13]476 U.S. 79 (1986).

[14]103 N.J. 508, 511 A.2d 1150 (1986).

[15]For a discussion of the problems with our jury system and how it should be revised, see Stuart Taylor, Jr., *Closing Argument, Jury System Needs Repair, Not Abolition*, N.J. L.J., November 27, 1995, at 29 & 37.

[16]LLOYD E. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY, at v. (1973). G.K. Chesterton stated, "[o]ur civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men . . . . [i]f it wishes anything done that is really serious, it collects twelve of the ordinary men standing about." *Id.*

[17]*Id.* In contrast, as Mark Twain enunciated, "The jury system puts a ban upon intelli-

been defined as "a body of men taken from the community at large, summoned to find the truth of disputed facts, who are quite distinct from the judges or court."[18] The United States Supreme Court has stated, "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[19]

Although the precise origin of the jury trial is unclear, numerous theories abound as to its beginnings.[20] Some historians point to mythology as the birth of the jury system.[21] However, by 450 B.C., records were more reliable, and we begin to see indications of jury systems which resemble the modern one; one example of this is the system used in Athens.[22] At this time, in Athens, there was an appeals court known as the general assembly.[23] As with the modern jury system, there were necessary qualifications for serving as a juror on this court, and questions of both fact and law were decided.[24]

---

gence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago." *Id.*

[18]*Id.* at 8 (quoting WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 8 (1852)). Meanwhile, Black's Law dictionary defines the jury as, "[a] certain number of men and women selected according to law and sworn (*jurati*) to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them." BLACK'S LAW DICTIONARY 855 (6th ed. abr. 1991).

[19]Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

[20]MOORE, *supra* note 16, at 1.

[21]Mythology tells us that the very first jury trial occurred on the Areopaugus, a hill in Athens where the tribunal met. *Id.* Ares, the defendant, was being accused of the murder of Halirrhothius, the son of Poseidon. *Id.* Twelve gods sat as jurors, with a split decision, Ares was acquitted. *Id.* The first trial of a mortal is described in the play Eumenides. *Id.* This story features what today we may consider a crime of passion. *Id.* Defendant, Orestes killed his mother and her new lover after she had killed his father. *Id.* After committing the murders, Orestes was harassed by citizens and three demigods known as Eumenides expressing their revulsion of how he handled the situation. *Id.* Orestes eventually went to Athens to seek refuge, where Pallas Athena (the patron goddess of wisdom) arranged a trial in front of twelve citizens. *Id.* Apollo spoke on behalf of Orestes, and Eumenides spoke to convict. *Id.* The result was a six to six tie, which Pallas Athena broke in favor of Orestes. *Id.*

[22]*Id.* at 2.

[23]*Id.*

[24]*Id.* The citizen had to be at least age thirty, free from debt to the state, and had to have his civil rights in tact. *Id.*

The American jury system finds its roots in English law.[25] Therefore, necessary to tracing the history of the American jury system, one must determine from where the English system stems. It is believed by some that the Athenians brought the jury system to Rome, and Rome then brought it to England.[26] Other origins of the English jury system have also been posed; the probable theory, however, is that England took its jury system from the Franks.[27]

Regardless of its origin, records infer that England began using some type of jury system in approximately 865 A.D.[28] From this time, until it reached America, the English jury system continued to evolve.[29]

Of significant importance to the modern formulation of the jury system was

---

[25]*Id.* at 97. The first Charter of Virginia, dated in 1606, provided that all the rights and liberties granted to the citizens of England would apply to the colonies. *Id.* King James I's instructions regarding the governing of Virginia, dated November 20, 1606, specifically referred to the right to a trial by jury. *Id.*

[26]*Id.* at 3.

[27]*Id.* at 3-18. A man named Heinrich Brunner determined, by comparing the Frankish and Anglo-Norman procedures to the English jury, that the two were of the same origin, focusing on the Frankish inquisitio in making his comparison. *Id.* at 18 (citing HEINRICH BRUNNER, THE ORIGIN OF JURIES 92, 118 (1872)). The Frankish occupied the Netherlands and most of Gaul. *Id.* at 13. By 780 A.D., Charlemagne (Charles the Great), King of the Franks, reformed the Frankish legal system. *Id.* Included in these reforms were a permanent group of law finders, as well as an "inquisitio" for determining factual disputes in which the crown had an interest. *Id.* Following this, the Angles and the Saxons came to Britain and brought their legal procedures. *Id.* at 23. This was the first evolution, creating the Anglo-Norman jury of proof, wherein the jurors were the witnesses. *Id.* at 14; *see infra* note 28 (discussing the *tithing* and *wapentake*). Finally, in England, in the 14th century, the judgment jury came into being, no longer being witnesses, but reviewing evidence presented to them. *Id.* at 14.

[28]*Id.* at 27. One of the statutes pertaining to Wales stated, "[t]welve laymen shall administer the law (or explain it) to the British and English; six English and six British. Let them forfeit all they possess if they administer it wrongly, or let them clear themselves that they know no better." *Id.* (citing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 225 (1852)). Prior to 1066 A.D. in Britain, each individual was required to be part of a *tithing* (a group of people). *Id.* at 23. Each member of the *tithing* was responsible for the others. *Id.* If one committed a crime, the other members were required to arrest him. *Id.* If they thought he was innocent, they would clear him by making oaths of his innocence. *Id.* There was also a larger group, called the *wapentake* that met once a month and had jurisdiction over both criminal and civil matters. *Id.* at 25.

[29]Around 1083 A.D., William the Conqueror began a series of inquests throughout England; most notably, the inquest for the determination of ownership of land most closely resembled the modern jury trial. *Id.* at 35.

the issuance of the Magna Carta in 1215 by King John.[30] Although disputed, it is believed that Article 39 of the Magna Carta guaranteed a right to a jury trial in criminal matters.[31] As the United States Supreme Court stated, "[w]hen the Magna Carta declared no freeman should be deprived of life, . . . but by the judgment of his peers or by the law of the land, it referred to a trial by twelve jurors."[32] Although the Magna Carta supposedly guaranteed a trial by jury, it was not until the Roman Catholic Church prohibited other forms of justice, and upon a writ by Henry III in early 1219, that criminal jury trials began to occur on a regular basis.[33]

Trial procedure during this period was left to the discretion of the judge.[34] Around approximately 1272, however, the indicting jury (known as the accusatory jury) also began deciding guilt or innocence.[35] As time passed, the jury system continued to evolve until eventually, a separate panel determined guilt or innocence, usually consisting of twelve members.[36]

---

[30]*Id.* at 49.

[31]*Id.* Article 39 states, "[n]o freeman shall be taken or imprisoned or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land." *Id.* at 51.

[32]*Id.* at 49 (quoting Thompson v. Utah, 170 U.S. 343 (1898)).

[33]*Id.* at 52. Prior to this, a jury trial could only be obtained for a price, and early trial by jury almost always guaranteed a guilty verdict. *Id.* at 50-51.

[34]*Id.* at 53.

[35]*Id.* at 55. The size of the jury ranged from 24 to 84 members. *Id.* An indictment is, "[a] formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime." BLACK'S LAW DICTIONARY 722 (6th ed. abr. 1991). Therefore, an indictment is merely an accusation. Following an indictment, the defendant will be brought to trial to determine whether in fact he or she is guilty of the accusation. Today the grand jury can be defined as, "[a] jury of inquiry who are summoned and returned by the sheriff to each session of the criminal courts, and whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to be had." BLACK'S LAW DICTIONARY 855 (6th ed. abr. 1991). In comparison, the *petit* jury can be defined as, "[t]he ordinary jury for the trial of a civil or criminal action." BLACK'S LAW DICTIONARY 856 (6th ed. abr. 1991). It is the *petit* jury which determines the guilt or innocence of the accused to the accusations charged by the grand jury.

[36]MOORE, *supra* note 16, at 56.

B. THE PEREMPTORY CHALLENGE

The function of the peremptory challenge throughout the history of the jury trial remains unclear. There are some indications, however, which suggest that the practice was employed as early as the 1300s.[37] During that time period, defendants were given 35 peremptory challenges, while the King was permitted unlimited challenges.[38] In 1305, however, a statute was passed which eliminated all of the King's peremptory challenges.[39] Unfortunately, the King continued to circumvent the statute[40] through a procedure that allowed him to request that certain jurors "stand by."[41] These individuals were not included in the jury panel unless all other individuals from the jury pool were excluded and the jury panel was still lacking in number.[42] Even then, the King retained the opportunity to challenge for cause.[43]

---

[37]*Id.* at 60. In 1302, a knight objected to the jury selected to try him because no member was a knight, as he was. *Id.* Following his objection, the court permitted knights to be called, and further allowed him to object to the individual members. *Id.* This case is particularly interesting because it demonstrates how people interpreted the right to be tried by one's peers. *Id.* Apparently, this meant the same nationality, race or position in life. *Id.* at 60-61. This point is further demonstrated in review of a charter granted by Edward I in 1303. *Id.* The charter stated that foreigners would be tried by juries consisting of six fellow foreigners. *Id.* Over time, this interpretation evolved into the phrase, "fair cross-section of the community," meaning a jury pool of the same approximate make-up of the community. *Id.* The courts in more recent times consistently point out that a defendant is not guaranteed *petit* jurors of his/her race, nationality or position in life. Strauder v. West Virginia, 100 U.S. 303, 305 (1880). *See also* Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522, 538 (1974). The Court has further stated with regard to the review of the defendant's Fourteenth Amendment rights, "[a] mixed jury in a particular case is not essential to the equal protection of the laws." Broderick, *supra* note 3, at 380 (citing Virginia v. Rives, 100 U.S. 313, 323 (1879)). An interesting comparison is the knight from 1302 versus an African-American on trial today. Where the knight was entitled to have other knights on his jury, the African-American would be guaranteed no such right.

[38]MOORE, *supra* note 16, at 56.

[39]*Id.* *See also*, Broderick, *supra* note 3, at 371-373 (discussing the 1305 statute, as well as Parliament's 1988 Criminal Justice Act reversing the English Legislature's decision not to remove the peremptory challenge from criminal defendants at that time).

[40]*Id.*

[41]*Id.*

[42]*Id.*

[43]*Id.* This "stand by" practice was adopted by many early American colonies as well. Broderick, *supra* note 3, at 374-75 (citing Jon M. Van Dyke, *Jury Selection Procedures:*

The procedure of peremptory challenges in England continued to evolve between 1400 and 1789. By that time, a party could challenge the array (jury venire) or the polls (individual jurors).[44]

III. THE HISTORY OF THE PEREMPTORY CHALLENGE IN THE UNITED STATES AND NEW JERSEY

A. THE PEREMPTORY CHALLENGE IN THE UNITED STATES SUPREME COURT PRIOR TO *BATSON*

The peremptory challenge has survived in the United States and has become an integral part of our jury selection process. As an experienced barrister stated, "[i]n England, the trial begins when the jury is picked; in the United States, the trial is over when the jury is picked."[45] The federal Congress adopted the peremptory challenge in its enactment of the 1790 Act,[46] establishing the number of peremptory challenges available in trials for treason and other felonies punishable by death.[47] Although the United States Constitution does not explicitly provide for peremptory challenges,[48] the practice nevertheless affects recognized constitutional rights.[49] The peremptory challenge is a

---

Our Uncertain Commitment to Representative Panels 147, 148-49 (1977)). Some states that adopted this practice were Pennsylvania, Georgia, South Carolina, Florida, Louisiana and North Carolina, while New York and Virginia rejected it. *Id.*

[44]MOORE, *supra* note 16, at 69. Parties at this time had the right to question jurors in a way that would be unheard of today. *Id.* They were permitted to obtain lists of prospective jurors prior to trial, and were then allowed to speak with these individuals outside of court, before commencement of the selection process. *Id.* In 1682, this practice was made illegal. *Id.* at 70.

[45]MOORE, *supra* note 16, at 134. *See also*, Coleman, *supra* note 8, at 1137.

[46]The 1790 Act provided defense counsel with thirty-five peremptory challenges in actions for treason, and twenty in all other capital offenses. Broderick, *supra* note 3, at 374 (citing An Act for the Punishment of Certain Crimes Against the United States, ch. 9, sec. 30, 1 Stat. 119 (1790)). In the 1865 Act Regulating Proceedings in Criminal Cases, ch. 86, sec. 2, 13 Stat. 500 (1865), the government was granted five peremptory challenges, those accused of capital crime or treason were given twenty and those accused of noncapital felonies were given ten. *Id.* at 374-75.

[47]Swain v. Alabama, 380 U.S. 202, 214 (1965).

[48]Stilson v. United States, 250 U.S. 583, 586 (1919).

[49]For example, Amendment VI of the United States Constitution, adopted in 1791, guar-

tool used to secure a fair and impartial jury as guaranteed under the Sixth Amendment.[50] Although the Sixth Amendment guarantees an impartial jury, early challenges to the jury selection process focused on the rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment,[51] exclusive of those rights guaranteed by the Sixth Amendment.[52]

Accordingly, interpretation of the Fourteenth Amendment became critical in the adjudication of such challenges. The broad scope of the Fourteenth Amendment, however, led to some controversy regarding what it required of the states.[53]

The United States Supreme Court attempted to dispel some of the problems surrounding the interpretation of the Fourteenth Amendment in *Strauder v. West Virginia*.[54] The United States Supreme Court reviewed the Fourteenth

---

antees that in all criminal prosecutions the defendant shall, "enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been . . . ." U.S. CONST. amend. VI. Under the United States Constitution ratified in 1787, only citizens of a state could serve on juries. Coleman, *supra* note 8, at 1111 (citing U.S. CONST. art. III, sec. 2, cl. 3). In 1791, the Bill of Rights was added to the Constitution; the first eight amendments, however, including the Sixth Amendment which guarantees the right to an impartial jury, were not applicable to the states for quite some time. *Id.* at 1112. The Court then held in *Dred Scott v. Sandford* that African-Americans were not citizens. 60 U.S. (19 How.) 393 (1857). This was later over-turned, and African-Americans were declared citizens by the adoption of the Civil Rights Act of 1866, Broderick, *supra* note 3, at 377, and the adoption of the Fourteenth Amendment in 1868. Coleman, *supra* note 8, at 1113. An African-American did not serve on a jury in the United States until 1860. *Id.* at 1113.

[50]*Swain*, 380 U.S. at 212.

[51]The Fourteenth Amendment, enacted in 1868, states in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

[52]Early challenges focused only on the Fourteenth Amendment, because it was not until the 1968 case of *Duncan v. Louisiana*, that the court held that the Sixth Amendment guarantee to a trial by jury applied to the states via the Fourteenth Amendment. 391 U.S. 145 (1968). New Jersey did not fully incorporate the Sixth Amendment until the ratification of the most recent New Jersey Constitution in 1947. Coleman, *supra* note 8, at 1114.

[53]In interpreting this phrase, the courts have looked at the Bill of Rights and focused on what rights are fundamental to life, liberty and justice. Duncan v. Louisiana, 391 U.S. 145, 148-149 (1968) (citations omitted). In holding that states are bound by the Sixth Amendment via the Fourteenth Amendment, the Court asked the question, "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions;' whether it is 'basic in our system of jurisprudence;' and whether it is 'a fundamental right, essential to a fair trial.'" *Id.* (citations omitted).

[54]100 U.S. 303 (1879). The Court relied on the Equal Protection Clause of the United

Amendment in light of a West Virginia statute which excluded African-Americans from serving as jurors.[55] The Court commented that the purpose for the enactment of the Fourteenth Amendment was to assist in the emancipation of racial minorities and to provide equal protection under the laws for all people.[56] Thus, the Court held that excluding African-Americans from serving as jurors constituted discrimination in the selection of the jury venire, and was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[57]

Years later, the controversy shifted to discrimination in the selection of the *petit* jury.[58] In the seminal case of *Swain v. Alabama*,[59] no African-American had served as a juror on the *petit* jury panel in the defendant's county for an extended period of years.[60] The defendant, challenging his conviction for

---

States Constitution in making this decision. Coleman, *supra* note 8, at 1117.

[55]Strauder, 100 U.S. at 304-05. Defendant appealed from his conviction for murder because no African-Americans were permitted to serve on either the grand or *petit* juries. *Id.* at 304.

[56]*Id.* at 306. The Court stated that the Fourteenth Amendment is, "one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy." *Id.* Further, the Court held that the Fourteenth Amendment "denied to any State the power to withhold from them [African-Americans] the equal protection of the laws. . . ." *Id.*

[57]*Id.* at 310. However, this apparent race neutral decision did little to increase the number of African-American's serving on *petit* juries. Coleman, *supra* note 8, at 1118. In Smith v. Texas, 311 U.S. 128 (1940), the Court interpreted the Equal Protection Clause of the Fourteenth Amendment to require that jury selection for the *petit* and grand juries be made from a representative cross-section of the community. Coleman, *supra* note 8, at 1118. It was this case and the Jury Selection and Services Act of 1968, 28 U.S.C. sec. 1861 (1994), "which established the representative cross section rule for federal courts. The Act also prohibited exclusion of women from jury service in federal courts." *Id.* at 1119. Justice Coleman articulated that "[the] purpose for the cross-section rule is to ensure that the jury wheel, pools of names, and panels or venires from which jurors are drawn, do not systematically exclude distinctive groups in the community." *Id.* at 1118. Furthermore, the representative cross-section rule does not allow a juror to represent his or her race or ethnic group, but rather prevents bias. *Id.* at 1136.

[58]*See supra* note 35 (defining *petit* jury).

[59]380 U.S. 202 (1965).

[60]*Id.* at 223. The facts demonstrated that there had not been an African-American on a *petit* jury in the defendant's county since 1950. *Id.* at 205.

rape, argued that the prosecutor explicitly used peremptory challenges to keep African-American jurors off of the jury.[61]

The *Swain* majority was reluctant to place restrictions upon the prosecutor's use of peremptory challenges.[62] Although the Court conceded that the Constitution did not specifically provide for the use of peremptory challenges, the majority observed that the peremptory challenge was a tool used historically to ensure an impartial jury.[63] The Court further noted that the peremptory challenge, by nature, is used without explanation, and had traditionally been used to select jurors based on race.[64] Thus, the majority reasoned that in a particular case, all groups are subject to exclusion by a peremptory challenge.[65] The Court further concluded that the Equal Protection Clause of the Constitution did not require the prosecutor to explain his reasons for use of a peremptory challenge in a particular case.[66]

The defendant in *Swain* also asserted that the county prosecutor had consistently used peremptory challenges in past cases to strike African-Americans from *petit* jury panels.[67] The Court, however, concluded that the mere absence of African-Americans from the jury panel over a period of time did not create an inference that the prosecutor was using peremptory challenges in a discriminatory fashion.[68] As the Court indicated, the defendant could be as

---

[61] *Id.* at 205, 209. The defendant argued not only that the process of selecting the jury venire was discriminatory, but also that the process of selecting the *petit* jury panel was discriminatory. *Id.* The defendant was an African-American male prosecuted by an all white jury. Id. at 222-23. He argued that, although some African-Americans were selected for the jury venire, through the use of strikes (Alabama uses a system of strikes which is a form of the common law peremptory challenge), the prosecutor had prevented any from serving on a *petit* jury. *Id.*

[62] *Id.* at 218-19.

[63] *Id.*

[64] *Id.* at 220. The Court stated, "[f]or the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." *Id.* at 220-21.

[65] *Id.* at 222-23.

[66] *Id.*

[67] *Id.* at 223. The defendant, however, failed to demonstrate instances where the prosecutor used strikes to remove African-Americans. *Id.* at 224.

[68] *Id.* at 226. Although the Court found that, in the selection of the jury venire, a showing of total exclusion of African-Americans from the venire was sufficient to create a rebuttable inference of discrimination, it declined to apply that standard when considering whether

responsible for the striking of African-Americans as the prosecutor.[69] Hence the standard enunciated and followed for the next twenty years was that defendants carried the burden of showing that the prosecutor systematically, not only in the particular case at bar, used the peremptory challenge to strike African-Americans from the jury panel.[70]

In contrast to the majority, the *Swain* dissent supported the notion that a prima facie showing of discriminatory use of the peremptory challenge could be met with evidence of prolonged exclusion of African-Americans from the jury panel.[71] The dissent vehemently disagreed that the burden of proof necessary to show discrimination in the selection of the jury panel should be greater than that necessary to show discrimination in the selection of the jury venire.[72]

The dissent contended that it was appropriate to require the prosecution to offer an explanation for its use of peremptory challenges where a prima facie inference of discrimination was established.[73] Moreover, where a constitutional right is jeopardized, the dissent asserted that any nonconstitutional grants should be monitored to prevent such interference.[74] Accordingly, the dissent enunciated its own standard, opining that the defendant would have the original burden of

---

discrimination occurred during selection of the *petit* jury. *Id.* at 226-27.

[69]*Id.* at 224-25.

[70]*Id.* at 226.

[71]*Id.* at 232-33 (Goldberg, J., dissenting).

[72]*Id.* at 239 (Goldberg, J., dissenting). In support of this opinion, the Justice cited the Court in Patton v. Mississippi, 332 U.S. 463, 466 (1947), which held "that a prima facie case was made out when it was shown that 'no Negro had served on a criminal court grand or *petit* jury for a period of thirty years.'" *Id.* at 240 (Goldberg, J., dissenting). Justice Goldberg further quoted Hernandez v. Texas, 347 U.S. 475, 479, which asserted that "[t]he exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment." *Id.*

[73]*Id.* at 244-45 (Goldberg, J., dissenting). The dissenting Justice, considering that the state had more ready access to evidence necessary to determine if discriminatory behavior had occurred, pointed out that the defendant would only have information regarding his or her case. *Id.* The Justice then referred to the opinion in Stilson v. U.S., 250 U.S. 583, 586 (1919), where the Court held that Congress has the power to regulate the use of peremptory challenges, and nothing in the Constitution requires the grant of peremptory challenges. *Id.* at 244 (Goldberg, J., dissenting).

[74]*Id.* As the dissent indicated, it is, "settled beyond doubt that when a constitutional claim is opposed by a nonconstitutional one, the former must prevail." *Id.* (citing Marbury v. Madison, 5 U.S. 137 (1803)).

showing prima facie evidence of the state's discriminatory use of the peremptory challenge.[75] If satisfied, the burden would then shift to the state to provide a proper explanation for its peremptory challenges.[76]

It should be noted that the facts of *Swain* appeared to satisfy the burden, articulated by the majority, necessary to create an inference of discriminatory use of the peremptory challenge.[77] The majority, nevertheless, found the facts of this case to be insufficient.[78] Thus, it may be argued that the majority's decision may be viewed as more of a political opinion than a judicial opinion. Essentially, the Court did not want to affect the status of the peremptory challenge, but wanted to appear in support of the emancipation movement.[79]

---

[75]Id. at 244-45 (Goldberg, J., dissenting). The Court stated that this burden could be met by showing an absence of African-Americans from the *petit* jury over a period of time. *Id.* The dissent reasoned:

> where, as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facie case of the exclusion of Negroes from juries is then made out. . . .

Id.

[76]*Id.* at 245 (Goldberg, J., dissenting).

[77]*Id.* at 233 (Goldberg, J., dissenting).

[78]*Id.* at 225. The prosecutor testified that he had struck African-Americans based on their race in the past, on occasion asking the defense counsel if he wanted African-Americans on the jury, and striking them first if the defense counsel did not. *Id.* Further the prosecutor stated that "striking is done differently depending on the race of the defendant and the victim of the crime." *Id.*

[79]It would soon come to light that the *Swain* standard was virtually impossible to meet. *See* McCray v. Abrams, 750 F.2d 1113, 1120 (1984) (stating that "[n]ot until State v. Brown, 371 So.2d 751 (La. 1979), and State v. Washington, 375 So.2d 1162 (La. 1979), involving a prosecutor who admitted the practice of striking blacks and whose use of peremptory challenges had been repeatedly appealed by black defendants, did any court find the *Swain* burden satisfied."). The *McCray* Court further listed a string of cases in which challenges to the prosecutor's use of peremptory challenges were rejected. *Id.* (citations omitted). *See also*, Phyllis Novick Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673, 681 (1983) (stating that the burden necessary to overcome *Swain* was even more problematic due to the financial burden on defendant to research the statistics (which often were not available anyway) and time constraints to obtain such information).

Meanwhile, the dissent was willing to alter the states' use of peremptory challenges to prevent interference with the rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. These conflicting views continue to represent the crux of the arguments proposed today as it is difficult to find a compromise that will sustain the traditional usage of the peremptory challenge, yet prevent it from being used in a discriminatory fashion.[80]

Following *Swain*, the Court focused primarily upon discrimination in the selection of the jury venire. The Court continued to hold that although it was important for the jury venire to be composed of a "fair cross section" of the community, there was no guarantee of a completely representative *petit* jury.[81]

Ironically, one of the first indications that the Court was ready to re-examine *Swain* was its denial of *certiorari* in numerous cases challenging discriminatory

---

[80]As the dissent in *Swain* enunciated, the peremptory challenge has historically been held as a tool to protect defendants,

> in criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous.

Swain v. Alabama, 380 U.S. 202, 242 (1965) (Goldberg, J., dissenting) (quoting BLACKSTONE, 4 W. BLACKSTONE COMMENTARIES 353 (15th ed. 1809)). The dissent, therefore, was more inclined to allow limitations to the prosecutor's use of peremptory challenges to assure that they were not used in disfavor to the defendant. The majority, in contrast, referred to the practice in 1305 of allowing the prosecutor to request jurors to "stand by" after examination, thereby not being included in the jury. *Id.* at 213. *See supra* notes 37-42 and accompanying text. Therefore, the majority concluded that a proper trial should require peremptory challenges on both sides. *Swain*, 380 U.S. at 213.

[81]In Taylor v. Louisiana, 419 U.S. 522 (1974), the Court ruled on the Louisiana procedure for selecting the jury venire, which discriminated against women. Defendant, a man, successfully challenged the exclusion of women from the jury pool. Coleman, *supra* note 8, at 1130. The Court stated that, "in holding that *petit* juries must be drawn from a source fairly representative of the community we impose no requirement that *petit* juries actually chosen must mirror the community and reflect the jury of any particular composition." *Taylor*, 419 U.S. at 538 (quoting Fay v. New York, 332 U.S. 261, 284 (1947)). *Taylor* is also significant for the notion that pre-trial jury selection procedures are within the Sixth Amendment guarantees. Silverman, *supra* note 79, at 683. *But see*, Holland v. Illinois, 493 U.S. 474 (1990) (wherein the court held that the proper challenge to the discriminatory use of a peremptory strike relies on the rights provided by the Fourteenth Amendment, not the Sixth Amendment). *See also* Duren v. Missouri, 439 U.S. 357 (1979) (also relating to discrimination against women in the selection of the jury venire).

uses of the peremptory challenge.[82] In *McCray I*, the Court indicated that the *Swain* standard needed to be reformulated, however, it declined to do so until more state courts had reviewed the issue.[83] Essentially, the Court would later decide the issue based on the states' experiences.[84] In contrast, Justice Marshall's dissent criticized the *Swain* decision, emphasizing that the standard was formulated prior to the holding in *Duncan v. Louisiana*,[85] where the United States Supreme Court found that the Sixth Amendment guarantees apply to the states through the Fourteenth Amendment.[86]

Following the Court's denial of certiorari in *McCray I*, the defendant filed a writ of habeas corpus with the United States District Court for the Eastern District of New York.[87] The district court granted the petition, and the state appealed.[88] Although the United States Court of Appeals severely criticized *Swain*, the court could not explicitly overrule the decision.[89] Instead, the court

---

[82]McCray v. Abrams, 461 U.S. 961 (1983) [The Supreme Court's opinion denying *certiorari* pertains to numerous cases, however, for purposes of this paper this decision will be referred to as *McCray I*].

[83]*Id.* at 963. The Court referred to two state courts which used their state constitutions to create their own standard for use of the peremptory challenge. *Id.* at 962 (citations omitted). The Court was, therefore, encouraging state courts to look to their state constitutions and do the same. *Id.* at 963. *See also* Coleman, *supra* note 8, at 1123, referring to two cases which expressed that states are not limited by Supreme Court decisions from expanding individual liberties based on their state constitutions. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 679 (1982) (Brennan, J., concurring); Oregon v. Hass, 420 U.S. 714, 719 (1975)).

[84]*McCray I*, 461 U.S. at 963.

[85]391 U.S. 145 (1968).

[86]*McCray I*, 461 U.S. at 965-67 (Marshall, J., dissenting). At the time of this opinion, both the decisions in People v. Wheeler, 583 P.2d 748 (1978), and Commonwealth v. Soares, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), had been made. These were the first decisions which adopted new standards for showing a prima facie case of discriminatory use of the peremptory challenge based on review of state constitutional rights. Both the New Jersey Supreme Court and the United States Supreme Court eventually adopted a similar standard to that set forth in People v. Wheeler, 583 P.2d 748 (1978). *See infra* note 180 and accompanying text (discussing the *Wheeler* decision).

[87]576 F. Supp. 1244 (E.D.N.Y. 1983).

[88]McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984) [hereinafter *McCray II*].

[89]*Id.* at 1123. The court held that, whereas *Swain* was premised on a challenge to the Equal Protection Clause of the Fourteenth Amendment, its decision was based on the Sixth Amendment right to a trial by an impartial jury. *Id.* at 1123-24. Therefore, the court did

chose to distinguish the basis of its decision by relying on those rights provided by the Sixth Amendment rather than the Fourteenth Amendment.[90]

In doing so, the court set forth the requirements for establishing a prima facie case of discriminatory use of the peremptory challenge under the Sixth Amendment.[91] The requirements were two-fold: first, stricken jurors must be part of a cognizable group; second, there must be a substantial likelihood that the jurors were excluded because of their affiliation with that cognizable group.[92]

---

not restrict itself to the standard set forth in *Swain*. The court reasoned, that in other successful Sixth Amendment claims regarding the jury system, it granted relief to the defendant upon a showing that the "fair cross section" requirement had been violated. *Id.* at 1128. It was not necessary to demonstrate that the jury was in fact bias. *Id.* Thus, the *McCray II* court concluded that the Sixth Amendment requires the "possibility of a "cross sectional" *petit* jury." *Id.* at 1129. For further discussion of the definition of the "fair cross section" requirement, see *infra* note 57.

[90]*Id. But see*, Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding that the Sixth Amendment only guarantees that the jury venire be composed of a fair cross-section of the community, and does not affect the use of the peremptory challenge). In *Holland*, the defendant was accused of aggravated kidnapping, rape, deviate sexual assault, armed robbery and aggravated battery. *Id.* at 476. The state used two of its peremptory challenges to strike the only two African-American's on the jury venire. *Id.* Petitioner objected to the state's use of these challenges, and requested that the Court extend the fair-cross-section requirement of the Sixth Amendment to uses of peremptory challenges. *Id.* at 477. The Court indicated that all that is required to satisfy "the Sixth Amendment right to the 'fair possibility' of a representative jury . . . [is] the inclusion of all cognizable groups in the venire." *Id.* at 478 (citations omitted). Although the Sixth Amendment uses the words "impartial jury," the Court found that the fair-cross-section requirement is "derived from the traditional understanding of how an 'impartial jury' is assembled." *Id.* at 480. This case raises serious questions as to the validity of the *McCray II* decision, as well as other courts' standards which are based upon the Sixth Amendment guarantees rather than the Fourteenth Amendment or state constitutions. *See also* Broderick, *supra* note 3, at 395-96, for further discussion of the *Holland* decision.

[91]*McCray II*, 750 F.2d at 1131-32. The court adopted in part the standard set forth in Duren v. Missouri, 439 U.S. 357 (1979), for establishing prima facie evidence of a violation of the Sixth Amendment fair cross section requirement in selection of the jury venire. *McCray*, 750 F.2d at 1131.

[92]*Id.* at 1131-32. The court stated the requirements as such:

> the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

Id. Additionally, the court determined that the Sixth Amendment language applied to all

The dissent in *McCray II* supported the peremptory challenge in its traditional use. Indicating that it was appropriate for a prosecutor to exclude a certain race in a particular case, the dissent argued that by doing so, the attorney is merely performing his duties in selecting the best jury for his client and is not acting in a discriminatory manner.[93] In fact, the dissent reasoned that the traditional view of the peremptory challenge was necessary to the selection of an impartial jury.[94] The dissent further contended that an inference of discrimination can be found only upon a showing of a continued exclusion of race; asserting a challenge for the welfare of a client in a particular situation does not qualify.[95]

Despite *McCray II*, the peremptory challenge had essentially survived in its original form. Although a few cases arose which compelled a court to rule against the use of a peremptory challenge,[96] most federal and state courts were unwilling to put any restrictions upon the use of the peremptory challenge; New Jersey was no different.

B. THE PEREMPTORY CHALLENGE IN NEW JERSEY PRIOR TO *GILMORE*

The New Jersey right to a trial by jury is governed by Article I, Sections 5, 9, and 10 of the New Jersey Constitution.[97] The peremptory challenge is con-

---

criminal cases, thereby allowing a showing of discrimination in the use of peremptory challenges by evidence from only the case at hand. *Id.*

[93]*Id.* at 1140-41 (Meskill, J., dissenting).

[94]*Id.* The dissent referred to the case of United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), wherein the district court found that *Swain* was controlling in a Sixth Amendment challenge to the exercise of peremptory challenges. *Id.* at 1136 (Meskill, J. dissenting) (quoting *Danzey*, 476 F. Supp. at 1066). In that case, the prosecutor stated, "I make it a practice to attempt to exclude as best I can all jurors . . . of the same ethnic background as the defendant." *Id.* The second circuit affirmed the district court's opinion. *Id.* (citing United States v. Danzey, 620 F.2d 286 (2d Cir. 1980)). In the denial of a petition for rehearing, the concurrence stated that the "use of peremptory challenges based on a group bias assumption denies no cognizable legal rights 'in any particular case.'" *Id.* (quoting United States v. Danzey, 622 F.2d 1065, 1066 (2nd Cir.) (quoting *Swain*, 380 U.S. 202, 221 (1965)), *cert. denied*, 449 U.S. 878 (1980))).

[95]*Id.* at 1136 (citing *Danzey*, 622 F.2d at 1066 (stating that, "no relief is appropriate unless the offending pattern is sufficiently general and pervasive to support a clear inference of motivation or intent to discriminate against a particular racial or ethnic group.")).

[96]*See supra* note 79.

[97]Section 5 of Article 1 of the New Jersey Constitution states:

sidered by many to be vital to ensuring these guarantees.[98] As does the United States Constitution, the New Jersey Constitution fails to explicitly establish the right of peremptory challenges. Instead, the legislature has provided for the practice of such challenges.[99] Peremptory challenges are restricted only by the

---

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

N.J. CONST. art. 1, sect. 5 (1947). Section 9 states:

> The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

N.J. CONST. art. 1, sect. 9 (1947). Finally, Section 10 provides:

> In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

N.J. CONST. art. 1, sect. 10 (1947). New Jersey's first constitution was adopted on July 2, 1776 and provided the right to a jury trial in all major criminal cases and civil cases where the amount in controversy was greater than $20.00. *See* Coleman, *supra* note 8, at 1111. At this time, only white male property owners were permitted to serve on juries. *Id.* New Jersey adopted a second constitution in 1844 which guaranteed a jury trial in criminal and civil cases and guaranteed an impartial jury in criminal cases. *Id.* at 1113.

[98]*See* State v. Singletary, 80 N.J. 55, 81, 402 A.2d 203, 216 (1979) (Handler J., dissenting) (stating that "[t]he peremptory challenge by counsel serves as a complementary device used in conjunction with the court to produce a jury reasonably suited to try a particular case."); State v. Jackson, 43 N.J. 148, 162, 203 A.2d 1, 9 (1964) (acknowledging that, "[t]he defendants' right of rejection through the exercise of peremptory challenge was a valuable statutory incident to their right to trial by jury."); Wright v. Bernstein, 23 N.J. 284, 293, 129 A.2d 19, 24 (1956) (asserting that, "[o]ur Constitution guarantees that the right of trial by jury shall remain inviolate, Art. I, par 9, and the right to peremptory challenge is incident of that trial.").

[99]*See Singletary*, 80 N.J. at 62, 402 A.2d at 206 (citing *Jackson*, 43 N.J. at 158, 203 A.2d at 6 (1968) (stating that "[a]lthough not Constitutionally required to do so, *see* Brown v. State, 62 N.J.L. 666, 42 A. 811 (E&A 1899), the Legislature and its court have sought to

accused's right to be tried by an impartial jury.[100]

In early cases, New Jersey courts examined the parameters of the peremptory challenge, enunciating the belief that it is a substantial right necessary in order to provide a trial by an impartial jury as guaranteed under the state constitution.[101] In defining the peremptory challenge, New Jersey courts have traditionally characterized it as a right to reject.[102] Moreover, the courts recognize that the procedure for selecting the jury aims at striking a balance between the interests of defendants and prosecutors so as to obtain an impartial jury.[103] Thus, the peremptory challenge allows both the defendant and the prosecutor to exclude those individuals whom they feel would be partial to the other side.[104]

The accused's rights, however, have historically been considered more important in this respect.[105] As discussed earlier,[106] in the beginning stages of the jury

---

insure that the triers of fact will be 'as nearly impartial as the lot of humanity will admit' by providing defense counsel with twenty peremptory challenges.")). *Id.* N.J. STAT. ANN. § 2B:23-13 governs the number of peremptory challenges allocated to each party for each type of action. R. 1:8-1 is the New Jersey Court Rule which governs the use of peremptory challenges and challenges to the array. .

[100]*See* Brown v. State, 62 N.J.L. 666, 678, 42 A. 811, 814 (E&A 1899) (wherein the court stated with regard to challenges, "[t]hese subjects were left in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury.").

[101]Wright v. Bernstein, 23 N.J. 284, 295, 129 A.2d 19, 25 (1956) (asserting that to deny the use of the peremptory challenge is to deny a substantial right.).

[102]State v. Deliso, 75 N.J.L. 808, 811, 69 A. 218, 219 (1908). In *Deliso*, the court stated that it is a "fundamental principal that the right of challenge is a right to reject and not a right to select." *Id.* (citation omitted).

[103]State v. Jackson, 43 N.J. 148, 157-58, 203 A.2d 1, 6 (1964). The *Jackson* court declared that "the trial court should see to it that the jury is as nearly impartial 'as the lot of humanity will admit.'" *Id.* (quoting State v. White, 196 A.2d 33, 34 (1963)). Furthermore, the court noted, "[t]he parties to the action are entitled to have each of the jurors who hears the case impartial, unprejudiced and free from improper influences." *Id.* at 158, 203 A.2d at 6 (citing Panko v. Flintkote Co., 7 N.J. 55, 61, 80 A.2d 302, 305-06 (1951)). Moreover, "[t]he function of the peremptory challenge is 'to eliminate extremes of partiality on both sides . . . .'" State v. Brunson, 101 N.J. 132, 137, 501 A.2d 145, 147 (1985) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).

[104]*Jackson*, 43 N.J. at 157-58, 203 A.2d at 5-6 (declaring that, "[t]he jurors must be carefully selected with an eye towards their ability to determine the controverted issues fairly and impartially . . . .").

[105]*Deliso*, 75 N.J.L. at 811, 69 A. at 219 (stating that "[t]he essence of the right of challenge is that it shall afford an opportunity to every person to say that some particular jurors shall not try him . . . .").

trial, the King had much greater influence and power; in fact, the peremptory challenge was taken away from the King and left to the accused for precisely this reason.[107] Thus, practically since the inception of the peremptory challenge, the accused's rights to the challenge have been considered of paramount importance.[108]

Considering its historical importance, it is not surprising that New Jersey courts have been hesitant to tamper with the use of the peremptory challenge. In attempting to preserve the traditional use, New Jersey courts have focused not only on the significance of its use by the accused, but also on the more general concept that a jury should be impartial and that attorneys should not be required to disclose reasons for their use of peremptory challenges.

In considering whether discrimination tainted the jury selection process, New Jersey courts originally focused on the selection of the jury venire, rather than on the selection of the *petit* jury.[109] Objections to the jury selection process were initially premised upon the Equal Protection Clause of the Fourteenth Amendment. *State v. Stewart*[110] presented the New Jersey Superior Court Appellate Division with an early opportunity to examine discrimination in the selection of the jury venire. *Stewart* demonstrated New Jersey courts' special concern with preventing racial discrimination in the jury selection process.[111]

---

[106]*See supra* notes 37-43 and accompanying text.

[107]*Brunson*, 101 N.J. at 137, 501 A.2d at 147. The *Brunson* court acknowledged that, "[a]ccording to Blackstone, the common-law right of peremptory challenge was primarily for the benefit of defendants - 'a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.'" *Id.* (quoting 4 W. BLACKSTONE COMMENTARIES 353 (15th ed. 1809)).

[108]*Id.* "The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused . . . 'to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial.'" *Id.* (citing Pointer v. United States, 151 U.S. 396, 408 (1894)).

[109]*See supra* notes 10-11 and accompanying text.

[110]2 N.J. Super. 15, 64 A.2d 372 (App. Div. 1949).

[111]One of the earlier cases dealing with discrimination in the selection of the jury venire was Bullock v. State, 65 N.J.L. 557, 47 A.62 (1900). In *Bullock*, the defendant, an African-American, challenged his conviction for murder because there had been no African-Americans returned on the jury array. *Id.* In deciding the case, the court enunciated that the Fourteenth Amendment provides protection against acts of the state, not acts of persons. *Id.* at 563, 47 A. at 63. Thus the court held that if a state statute regarding juror qualifications is not discriminatory, the fact that no African-American appears on the array does not deny the defendant Fourteenth Amendment rights, unless it is shown that their exclusion was done by design. *Id.* at 563-64, 47 A. at 63-64.

In *Stewart*, the defendants made a motion to quash their indictments, claiming discrimination in the selection of the jury venire because there were no jurors of defendant's economic class or race.[112] The court first addressed the issue of discrimination against an economic class in selecting the jury venire. The court observed that the defendants failed to demonstrate actual prejudice, an element necessary for proving discrimination against an economic class.[113]

As to the issue of racial discrimination, however, the court decided differently. Holding that selection of the jury venire should be made "without systematic and intentional exclusion of any qualified juror,"[114] the court based its decision on consideration of the requirements under the Fourteenth Amendment, pertinent Acts of Congress and pertinent Acts of the state legislature.[115] While the court found the facts insufficient to support a finding of systematic and intentional discrimination in the case at bar, it failed to enunciate what facts, generally, would suffice to prove racial discrimination in the selection of the jury venire.[116] Notwithstanding this lack of guidance, the court took this opportunity to caution other courts to review and correct jury venire selection procedures.[117]

---

[112]*Stewart*, 2 N.J. Super. at 19, 64 A.2d at 373-74. The defendants claimed that exclusion from the grand jury panels of hourly-rate wage earners and African-Americans was discriminatory. *Id.* at 20, 24, 64 A.2d at 374-75, 376.

[113]*Id.* at 21, 64 A.2d at 374-75. The court declared that "irregularities therein are no ground of challenge, unless they are such as plainly operated to prejudice the challenging party." *Id.* (quoting State v. Biehl, 135 N.J.L. 268, 270, 51 A.2d 554, 556 (1947)). The court referred to the United States Supreme Court decision in Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), which held that jury venires should be selected without intentional exclusion of certain groups. *Id.* There, the United States Supreme Court rejected the requirement of a showing of actual prejudice in the exclusion of an economic group from the jury venire. *Id.* According to the New Jersey Superior Court Appellate Division, however, this decision did not apply to the states because it was not based on the Fourteenth Amendment, but rather was an administrative decision. *Id.*

[114]*Id.* at 21, 64 A.2d at 374-75. The court in *Stewart* found that defendants have "the unqualified protection that in the drawing of jury panels, grand or *petit*, there must be no intentional discrimination against persons because of their color." *Id.* (citations omitted).

[115]*Id.* at 24, 64 A.2d at 376.

[116]*Id.* at 26, 64 A.2d at 377. The defendants offered only statistical evidence, and failed to show any evidence of willful exclusion of individuals from the jury venire based on race. *Id.* at 25, 64 A.2d at 376.

[117]*Id.* This decision is consistent with the United States Supreme Court's decision in *Strauder* discussed *supra* notes 54-57 and accompanying text.

The decisions following *Stewart* continued to support and uphold the importance of the peremptory challenge, while demonstrating the unwillingness of the New Jersey courts to alter its use.[118] In particular, the requirement of "systematic exclusion" continued to be applied by the courts in review of discrimination in the selection of the jury venire, and also in review of discrimination in the use of peremptory challenges.[119]

Following the United States Supreme Court's decision in *Swain*, the New Jersey Supreme Court received one of its first opportunities to review the use of peremptory challenges.[120] In *State v. Smith*, the court reviewed peremptory challenges used to exclude the only three African-Americans called from a jury venire.[121] The court held that without a showing that the prosecutor "systematically excluded" African-Americans from the jury panel, the defendant's constitutional rights were not violated.[122] The court further demonstrated its adherence to the *Swain* decision by stating that exclusion of all African-Americans from one jury panel was insufficient to demonstrate exclusion based solely on race.[123] The court continued, holding that the New Jersey Constitution does not require inquiry into the prosecutor's use of peremptory challenges, and that to make such an inquiry would contradict the purpose of the peremptory challenge.[124]

Following *Smith*, New Jersey courts became even more adamant about preserving the peremptory challenge and its importance in the jury selection process. For example, in *State v. Singletary*,[125] the New Jersey Supreme Court again emphasized the importance of selecting an impartial jury, and observed

---

[118]*See* State v. Brunson, 101 N.J. 132, 501 A.2d 145 (1985); State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983); State v. Hoffman, 82 N.J. 184, 412 A.2d 120 (1980); State v. McCombs, 81 N.J. 373, 408 A.2d 425 (1979); State v. Singletary, 80 N.J. 55, 402 A.2d 203 (1979); State v. Smith, 55 N.J. 476, 262 A.2d 868 (1970); State v. Rochester, 54 N.J. 85, 253 A.2d 474 (1969); State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964); Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19 (1956).

[119]*See, e.g.*, State v. Smith, 55 N.J. 476, 262 A.2d 868 (1970).

[120]State v. Smith, 55 N.J. 476, 262 A.2d 868 (1970).

[121]*Id.* at 483-84, 262 A.2d at 871-72.

[122]*Id.*

[123]*Id.*

[124]*Id.* at 484, 262 A.2d at 871-72 (citing Swain v. Alabama, 380 U.S. 202, 220 (1965)).

[125]80 N.J. 55, 402 A.2d 203 (1979).

that the peremptory challenge serves a vital role in furthering this end.[126] This view was even more pronounced in a dissenting opinion by Justice Handler.[127] In particular, the Justice noted that because of a court's limited power, peremptory challenges, employed by attorney's in their client's best interests, are a vital function in the jury selection process.[128]

One of the last cases to be decided prior to the New Jersey Supreme Court decision in *Gilmore* was *State v. Brunson*.[129] In *Brunson*, the New Jersey Supreme Court reviewed the trial court's practice of peremptory challenges.[130] In particular, the judge ruled that because the defendant had twice as many peremptory challenges as the state, the defendant was required to use two of his

---

[126]*Id.* at 62, 402 A.2d at 206. The *Singletary* court announced that "[j]ury selection is an integral part of the process . . . ." *Id.* The defendant in this case challenged the court's refusal to excuse a juror "for cause" when he had been victim of a similar crime. *Id.* at 58, 402 A.2d at 204. The defendant argued that, by denying removal "for cause," he was forced to use one of his peremptory challenges to excuse the juror, and therefore was prejudiced. *Id.* The majority, although realizing the importance of providing defendant an opportunity to obtain an impartial jury, felt that this was not reversible error. *Id.* at 62, 402 A.2d 206. Resting on the theory that the trial judges have broad discretionary powers in this area, and decisions made using this discretion will not generally be turned over. *Id.*

[127]*Id.* at 71-83, 402 A.2d at 211-17 (Handler, J., dissenting). Disagreeing with the majority, Justice Handler reemphasized the importance of the peremptory challenge in our jury selection process. *Id.* at 79-83, 402 A.2d at 215-17 (Handler, J., dissenting).

[128]*Id.* Justice Handler stated that "[o]ur laws and rules are designed, albeit imperfectly, to assure the empanelling of a jury that, to the greatest extent possible and to the reasonable satisfaction of the parties, will reach its verdict solely on the evidence with complete fairness and impartiality." *Id.* at 80, 402 A.2d at 216 (Handler, J., dissenting). He continued, "the peremptory challenge by counsel serves as a complementary device used in conjunction with the court to produce a jury reasonably suited to try the particular case." *Id.* at 81, 402 A.2d at 216.

In State v. McCombs, 81 N.J. 373, 408 A.2d 425 (1979), the court reasoned that the jury selection process was so important, reversible error occurred in the trial court's decision to proceed with trial when the defendant was unrepresented during the jury selection process, even where the lack of representation was due to defendants own fault. *Id.* The court expressed its belief that the jury selection process was vital to securing an impartial jury. *Id.* at 376, 408 A.2d at 426-27 (stating that "[t]he persistence of peremptories, and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.").

[129]101 N.J. 132, 501 A.2d 145 (1985).

[130]*Id.* at 135, 501 A.2d at 146.

challenges for every one used by the state.[131] The defendant argued that this practice deprived him of his right to exercise a greater number of challenges at the end of the process.[132]

The court rejected this argument, demonstrating an unwillingness to dictate the way peremptory challenges are used in each courtroom.[133] Nevertheless, the court acknowledged the importance of the peremptory challenge as a substantive right and emphasized the prejudicial effects that would accompany the deprivation of this right.[134] The court further emphasized that the peremptory challenge did not require explanation.[135]

IV. FROM *BATSON* AND *GILMORE* TO THE PRESENT

A. *BATSON V. KENTUCKY* AND ITS PROGENY

On April 30, 1986, the United States Supreme Court decided *Batson v. Kentucky*,[136] essentially erasing twenty years of precedent.[137] In *Batson*, the Court reexamined the *Swain* decision and formulated a new standard regarding the use of the peremptory challenge. It should be noted, however, that prior to *Batson*, some courts had already begun to circumvent the *Swain* decision.. In particular, courts based their decisions on the Sixth Amendment of the United States Constitution and state constitutions, rather than on the Fourteenth

---

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* at 138, 501 A.2d at 148.

[135] *Id.* (declaring that "[t]he peremptory challenge, unlike challenges for cause, requires neither explanation nor approval by the court"). Thus the accused "may exercise that right without reason or for no reason, arbitrarily and capriciously." *Id.* at 137.

[136] 476 U.S. 79 (1986).

[137] *Id.* Justice Powell delivered the opinion of the court, and Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor joined. *Id.* Justices White, Marshall, Stevens and O'Connor each filed separate concurring opinions. *Id.* at 100-11. Chief Justice Burger filed a dissenting opinion which Justice Rehnquist joined. *Id.* at 112 (Burger, J. dissenting). Justice Rehnquist also filed a dissenting opinion with which Chief Justice Burger joined. *Id.* at 134 (Rehnquist, J. dissenting).

Amendment.[138] In *Batson*, however, the Court based its decision on the Equal Protection Clause of the Fourteenth Amendment.[139] The Court opined that the Fourteenth Amendment forbids the exclusion of a race from the *petit* jury for reasons other than impartiality to the particular facts at hand.[140]

The majority initially focused on the proof necessary to show discrimination in the selection of the jury venire,[141] then proceeded with a review of discrimination in the use of the peremptory challenge. In formulating a new standard for the use of the peremptory challenge, the Court pronounced that a defendant may rely on the fact that the peremptory challenge process is vulnerable to discrimination; the defendant, however, must show facts which indicate that the prosecutor used his or her peremptory challenges to exclude jurors because of their race.[142] In addition, the Court opined that the judge is required to review all

---

[138]*See supra* notes 88-95 and accompanying text. *See also, infra* Section VI.

[139]*Batson*, 476 U.S. at 89 (holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). Although the defendant raised both Fourteenth Amendment and Sixth Amendment claims, the Court expressed no views with regard to the Sixth Amendment claim. *Id.* at 84-85 n.4. The Court stated that "we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.'" *Id.* at 85-86 n.6 (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

[140]*Id.* at 91. Furthermore, the Court based its decision not on the defendant's right, but on the rights of the individual excluded from jury service. Coleman, *supra* note 3, at 1130. The Court stated, "[a]s long ago as *Strauder*, therefore, the Court recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. *Batson*, 476 U.S. at 87 (citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

[141]*Id.* at 93-94. The new test begins with the defendant's burden. *Id.* By demonstrating the totality of the facts which give rise to such a claim, the defendant must make a prima facie showing of discrimination. *Id.* at 94. Specifically, the defendant is required to show that he is a member of a racial group and that this group has been systematically excluded from selection for jury service over an extended period of time. *Id.* at 94. Further, this burden may be demonstrated by showing statistical underrepresentation on the jury venire, as compared to the percentage of the population which the racial group composes in the jurisdiction from which jurors are selected. *Id.* at 95. If this burden is met, the burden shifts to the state to show that the procedures for jury venire selection are neutral to race. *Id.* at 94.

[142]*Id.* at 96. The defendant must demonstrate that he or she is a member of the cognizable group which the prosecutor excluded. Id. The defendant must then demonstrate facts sufficient to create an inference that the prosecutor used his or her peremptory challenges to strike potential jurors because of their race. *But see* Powers v Ohio, 499 U.S. 400 (1991), discussed *infra* notes 162-64, and accompanying text (stating that defendant may allege dis-

relevant facts and use discretion in determining whether or not prima facie evidence of discrimination has been demonstrated.[143] Justice Powell noted that, if a court finds that prima facie evidence has been offered, the burden shifts to the state to offer a race neutral reason for its use of its peremptory challenges; this reason, however, need not be as strong as that required to challenge for cause.[144] The Court concluded by noting that the trial judge retains ultimate discretion in evaluating the validity of the prosecutor's explanations.[145]

Batson drastically changed the nature of the peremptory challenge. As a result, prosecutors may now be required to explain challenges that were unquestionable under prior law. As pronounced, the Court failed to delineate whether the standard would apply to a defendant's use of the peremptory challenge or to the use of the peremptory challenge in civil litigations.[146] Nevertheless, important inferences may be drawn from the decision. For example, it is certain that prosecutors will now be more aware of their reasons for using peremptory challenges. Moreover, they may think twice before using a peremptory challenge to exclude a juror who is a part of a racial group.[147]

The dissent in *Batson* is also notable as it was written by then Chief Justice Burger, and joined by Justice Rehnquist.[148] The Chief Justice expressed a deep concern for the majority's decision.[149] Chief Justice Burger contended that the peremptory challenge must remain either completely intact or be eliminated.[150] Being a strong advocate of the peremptory challenge, the Chief Justice chose the former.[151] In recognizing the rights guaranteed by the Four-

---

crimination even if not the same race as the excluded juror).

[143]*Batson*, 476 U.S. 79, 96-97 (1986).

[144]*Id.* at 97

[145]*Id.* at 98.

[146]Id. at 89 n.12. It appears that the *Batson* standard can be applied to cases which were on appeal at the time of this decision. Maureen Castellano, *3d Circuit Ruling Boosts Appeals in Pre-Batson Cases*, N.J.L.J., December 11, 1995, at 1.

[147]*Batson*, 376 U.S. at 96.

[148]*Id.* at 112 (Burger, J., dissenting).

[149]*Id.* at 118-22 (Burger, J., dissenting).

[150]*Id.* at 127 (Burger, J., dissenting).

[151]*Id.* The Chief Justice argued that "[a]nalytically, there is no middle ground: [a] challenge either has to be explained or it does not. It is readily apparent, then, that to permit

teenth Amendment, the Chief Justice agreed with the *Swain* decision.[152] Chief Justice Burger believed that in specific cases, the use of the peremptory challenge to excuse a racial minority because of a belief that the person may sympathize with a defendant of the same race is not discriminatory.[153]

Additionally, the Chief Justice differentiated between discrimination in the selection of the jury venire and discrimination in the use of the peremptory challenge.[154] The Chief Justice commented that exclusion of a racial group from the venire is essentially a statement from the government that a certain class of individuals are not fit to sit as jurors.[155] In contrast, Chief Justice Burger observed that peremptory challenges may be used to exclude all different groups equally, and therefore does not speak to a specific class of citizens.[156] Thus, the Chief Justice believed that the peremptory challenge should not be subjected to equal protection analysis, as any exercise of the challenge could be deemed in violation of the Equal Protection Clause.[157]

The Chief Justice took further note of the difficulty that trial judges would encounter in applying the ambiguous rule constructed by the majority. For example, Chief Justice Burger emphasized the difficulty in determining the veracity of a prosecutor's reason for excusing a racial minority.[158] The Chief Justice

---

inquiry into the basis for a peremptory challenge would force 'the peremptory challenge [to] collapse into the challenge for cause.'" *Id.* (quoting United States v. Clark, 737 F.2d 679, 682 (7th Cir. 1984)).

[152]*Id.* at 122 (Burger, J., dissenting).

[153]*Id.* at 125 (Burger, J., dissenting) (stating that "[p]eremptory challenges have long been viewed as a means to achieve an impartial jury that will be sympathetic toward neither an accused nor witnesses for the State on the basis of some shared factor of race, religion, occupation, or other characteristic").

[154]*Id.* at 122 (Burger, J., dissenting).

[155]*Id.* (citation omitted).

[156]*Id.* at 123 (Burger, J., dissenting). The dissent reasoned that "[t]o suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not." *Id.* (quoting United States v. Leslie, 783 F.2d 541, 554 (5th Cir. 1986) (en banc)).

[157]*Id.* at 124 (Burger, J., dissenting) (stating that "[i]n short, it is quite probable that every peremptory challenge could be objected to on the basis that, because it excluded a venireman who had some characteristic not shared by the remaining members of the venire, it constituted a 'classification' subject to equal protection scrutiny").

[158]*Id.* at 129-31 (Burger, J., dissenting).

also indicated that the majority's decision would have the effect of returning the issue of racial discrimination to every case.[159]

In short, the Chief Justice believed that the very nature of the peremptory challenge mandated that its exercise should never be questioned.[160] Emphasizing the need to prevent bias against the prosecutor as well as the defendant, Chief Justice Burger expressed the view that the majority destroyed the essence of the peremptory challenge by requiring inquiry into its use.[161]

Following *Batson*, there were numerous Court decisions clarifying and expounding the new standard for use of the peremptory challenge. In the first notable case, *Powers v. Ohio*,[162] the Court amended[163] the *Batson* standard to permit a defendant to challenge the discriminatory use of the peremptory challenge even if the defendant and juror are of different races.[164] Meanwhile, in *Edmonson v. Leesville*,[165] the Court expanded *Batson* to uses of peremptory

---

[159]*Id.* at 129-30 (Burger, J., dissenting).

[160]*Id.* at 126 (Burger, J., dissenting).

[161]*Id.* at 112 (Burger, J., dissenting).

[162]499 U.S. 400 (1991). Defendant, a white man, was convicted on two counts of aggravated murder and one count of attempted aggravated murder. *Id.* at 403. During jury selection, the prosecutor used six peremptory challenges to remove African-American venirepersons. *Id.* The trial court denied the defendants objections to these challenges. *Id.* The Court held that a defendant has standing to challenge discriminatory use of the peremptory challenge regardless of his race, stating "[t]o bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." *Id.* at 415.

[163]The Court indicated that its holding was not inconsistent with *Batson*'s emphasis that the defendant and the excused juror be of the same race, noting that, although this may be relevant to demonstrate bias, it is not necessary. *Id.* at 416.

[164]*Id.* at 411. In support of this holding, the court noted that the defendant is injured by discriminatory use of the peremptory challenge "because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process.'" *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)). *See also*, Broderick, *supra* note 3, at 396 for further discussion of the *Powers* decision.

[165]500 U.S. 614 (1991) [hereinafter *Edmonson*]. This case relates to a negligence action brought by Edmonson against Leesville Construction. J. Patrick McCabe, Casenote, *Fifth & Fourteenth Amendments—Equal Protection—The Use of Race-Based Peremptory Challenges in a Civil Trial to Exclude Potential Jurors During Voir Dire Violates the Equal Protection Rights of the Challenged Jurors*—Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), 2 SETON HALL CONST. L.J. 861, 862 (1991). Edmonson, an African-American used three peremptory challenges to remove white individuals and Leesville used two to remove African-American individuals. *Id.* at 863-64. Edmonson challenged Leesville's use of per-

challenges by both plaintiffs and defendants in civil actions.[166] As may have been anticipated, the Court later expanded the *Batson* test to apply to a criminal defendant's use of peremptory challenges in *Georgia v. McCollum*.[167]

---

emptory challenges, but the trial court denied his objections stating that *Batson* did not apply to civil cases. *Id.* On appeal the Court held that *Batson* applies to civil litigants as any discriminatory use of the peremptory challenges violates the Equal Protection Clause of the Constitution. *Id.* at 881. Thus the holding in this case was two fold, it extended *Batson* to civil trials and to use by civil defendants.

[166]*Edmonson*, 500 U.S. at 620. The Court began with a state action analysis. *Id.* (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). The Court reasoned that a claim of discriminatory use of the peremptory challenge results from a right given by state authority. *Id.* Secondly, the Court held that a private litigant is a government actor when exercising peremptory challenges. *Id.* at 621. In so doing, the Court analyzed "the extent to which the actor relies on governmental assistance and benefits . . .; whether the actor is performing a traditional governmental function . . .; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.* at 621-22. The Court further articulated that "[i]f a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality." *Id.* at 625. Finally, the Court acknowledged that a private civil litigant meets all three requirements for third-party standing if: 1) it is just as difficult for a civil juror to begin litigation for deprivation of serving on the jury as it is for a criminal juror; 2) the relationship between civil litigant and juror is the same as in criminal cases; and 3) the civil litigant can demonstrate prejudice from the improper exclusion. *Id.* at 629-30.

[167]Georgia v. McCollum, 505 U.S. 42 (1992) [hereinafter *McCollum*]. Three white defendants were accused of aggravated assault and simple battery upon two African-Americans. Salvatore Picariello, Note, *Fourteenth Amendment—Peremptory Challenges—Equal Protection Clause of the Fourteenth Amendment Prohibits a Criminal Defendant's Exercise of Racially Discriminatory Peremptory Challenges*—Georgia v. McCollum, 112 S. Ct. 2348 (1992), 23 SETON HALL L. REV. 1160, 1164 (1993). The prosecutor made a motion prior to jury selection to hold the defendant to the *Batson* standard. *Id.* The trial court denied the motion, but certified the issue for interlocutory appeal, following which the appellate court upheld the denial and the Georgia Supreme court denied reconsideration. *Id.* at 1167-68. On appeal the United States Supreme Court held that a defendant is a state actor with regard to jury selection and thus is bound by the *Batson* standard. *Id.* at 1167-1168.

As one commentator has indicated, *McCollum* may promote the opposite effect that it intends. Ira Mickenberg, *Court Clarifies Indefinite Issues in Criminal Cases*, NAT'L. L.J., August 31, 1992, at s6, (col.1). By not allowing minorities to strike majority race jurors, the jury panel may continue to be skewed toward the majority race. *Id.*

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justice Antonin Scalia, disagreed with this decision stating that, "[t]he peremptory is, by design, an enclave of private action in a government-managed proceeding." Marcia Coyle, *Not the Last Word on Juries, Gender Bias, Defense Strikes May be Next*, NAT'L. L. J. June 17, 1991, at 1 (col. 1).

There, the Court held that the Equal Protection Clause prohibits criminal defendants from using peremptory challenges in a racially discriminating way; further, the state has standing to challenge defendants' actions in this regard.[168]

Most recently, the Court opined as to what constitutes a valid explanation to refute an allegation of the discriminatory use of a peremptory challenge.[169] In *Purkett v. Elem*,[170] the Court validated an attorney's explanation for the removal of two African-Americans from the jury panel.[171] In so holding, the Court noted

---

[168]*McCollum*, 505 U.S. at 59. The Court analyzed four questions in making its holding. *Id.* at 48. First, it considered whether the criminal defendant's discriminatory use of the peremptory challenge created the harm *Batson* was intended to prevent. *Id.* at 48-50. Secondly, the Court considered whether the criminal defendant's use of the peremptory challenged constituted a state action. *Id.* at 50-55. Thirdly, the Court reviewed the prosecutor's standing to challenge defendant's use of the peremptory challenge. *Id.* at 55-56. Finally, the Court reviewed the constitutional rights of a criminal defendant to determine if applying the *Batson* standard would violate any of defendant's other rights. *Id.* at 57-59. After considering each of these, the Court found that the *Batson* standard must be applied to criminal defendants. *Id.* at 59.

Following *McCollum*, in 1994, the Court expanded the *Batson* standard to apply to the exercise of peremptory challenges on the basis of gender. J.E.B. v. Alabama, 511 U.S. 127 (1994). In a paternity suit brought by the mother of a minor child, the petitioner objected to the states use of nine of its ten peremptory challenges to remove potential male jurors. O. Drew Grice, Jr., Comment, J.E.B. v. Alabama*: A Critical Analysis of the Supreme Court's Latest Limitation on Peremptory Challenges*, 25 CUMB. L. REV. 355, 363 (1994-1995). The reasoning behind the Court's holding was its acknowledgment of the history of sexual discrimination in our country which has been "rivaled only by the country's past treatment of African Americans." *Id.* at 364. Furthermore, as Justice Coleman stated, both race and gender have historically been discriminated against, perhaps applying Batson to both will correct this past discrimination. Coleman, *supra* note 8, at 1131. Justice Coleman also expressed his prediction that in the future the Court will be urged to expand the Batson standard to apply to discrimination because of age and religion. *Id.*

[169]Purkett v. Elem, 115 S. Ct. 1769 (1995).

[170]*Id.*

[171]Respondent was convicted of second-degree robbery. *Id.* at 1770. During voir dire, the prosecutor used two peremptory challenges to remove African-American individuals from the jury panel and defendant objected based on *Batson*. *Id.* The prosecutor's explanations for these challenges were that one of the individuals had long, curly, unkempt hair and a mustache, and the other had a mustache and a goatee, and that they both looked suspicious because of their hair cuts and beards. *Id.* The prosecutor further expressed, that because one of the individuals had been robbed with a sawed-off shot gun pointed at him, he may believe that you need to have a gun to have a robbery. *Id.* The trial court accepted these explanations and the appellate court affirmed. *Id.* The respondent then filed a writ of habeas corpus which was appealed all the way up to the United States Supreme Court. *Id.* at 1770-71. The Court held that in *Batson*, when it expressed that an attorney must provide a

that a persuasive or plausible explanation is not required; instead, the explanation need only be one that does not deny equal protection.[172]

B. *STATE V. GILMORE* AND ITS PROGENY

Prior to *Batson*, New Jersey courts had already begun to formulate a new standard for the exercise of the peremptory challenge.[173] In *State v. Gilmore (Gilmore I)*,[174] then Judge Coleman of the Appellate Division of the New Jersey Superior Court, first pronounced this new standard. In analyzing the issues, Judge Coleman observed numerous court decisions which found that intentional discrimination of racial minorities in the jury selection process violated the Fourteenth Amendment.[175] Of particular significance, however, was the court's recognition that no New Jersey court had ever reviewed the use of the peremptory challenge in comparison to the rights guaranteed under the New Jersey Constitution to determine whether a more critical standard was required above and beyond *Swain*.[176]

"legitimate explanation," it meant only to "refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith." *Id.* at 1771. Justice Coleman believed that this holding will undermine the *Batson* standard, and make it ineffective. Coleman, *supra* note 8, at 1132-33. Differentiating the *Batson* standard from the *Gilmore* standard, Justice Coleman reasoned that although under *Gilmore*, hunch challenges are allowed, they must be "reasonably relevant to the particular case on trial or its parties or witnesses." *Id.* (quoting State v. Gilmore 103 N.J. 508, 538, 511 A.2d 1150, 1166 (1986)). The *Gilmore* standard is therefore stricter than that adopted by the United States Supreme Court in *Purkett*. *Id.*

[172]*Purkett*, 115 S. Ct. at 1771; *see also* Joan E. Imbriani, Survey, *Fourteenth Amendment, Section One, Equal Protection Clause-Prosecution's Explanation for Exercising Peremptory Challenge Need Only Be Race-Neutral, Not Persuasive or Plausible, Where Intentional Racial Discrimination is Alleged* - Purkett v. Elem, 115 S.Ct. 1769 (1995) *(Per Curiam)*, 6 SETON HALL CONST. L. J. 911 (1996).

[173]*See* State v. Gilmore, 199 N.J. Super. 389, 489 A.2d 1175 (App. Div. 1986) [hereinafter *Gilmore I*].

[174]*Id.* The defendant in this case was an African-American charged with three first degree robberies. *Id.* at 395, 489 A.2d at 1178. During the jury selection, the prosecutor used his peremptory challenges to excuse seven African-Americans selected from the jury venire. *Id.* Previously using two challenges for cause to excuse African-Americans, he was successful in obtaining an all white jury. *Id.* The court dismissed defendants motion for a mistrial, and the defendant was convicted on all counts. *Id.*

[175]*Id.* (citations omitted).

[176]*Id.* at 396, 489 A.2d 1178. Justice Coleman found that "it is now well established that we may look to our State Constitution to provide a higher level of protection of personal

In addressing this issue, the court observed that the New Jersey Constitution, through Article 1, Sections 5, 9 and 10, guarantees the "right to trial by a jury drawn from a representative cross section of the community" independent of the Sixth and Fourteenth Amendments of the United States Constitution.[177] Judge Coleman further opined that the New Jersey Constitution supports the use of the peremptory challenge, except when used to exclude jurors because of their association with a cognizable group.[178] The court interpreted the term "cognizable group" to be those persons protected by the Sixth Amendment of the United States Constitution, Article 1, Section 5 of the New Jersey Constitution, and the New Jersey Law Against Discrimination.[179]

Furthermore, the court adopted the theory expressed by the California court in *People v. Wheeler*.[180] *Wheeler* held that peremptory challenges are permis-

---

rights than those guaranteed by the federal constitution." *Id.* at 396-397, 489 A.2d 1178-79. *See also*, Coleman, *supra* note 8, at 1106, where Justice Coleman expressed, "[i]n 1985 my belief that our state constitution should be viewed as a 'living organism' influenced me to volunteer to write *Gilmore I*." *Id.* Justice Coleman further states that he "was determined more than ever to follow the teachings of Justices Brandeis and Brennan that judges should use state constitutions to afford citizens greater protection than accorded under the Federal Constitution." *Id.* at 1110 (citations omitted). Moreover, Justice Coleman expressed that "the federal Bill of Rights establishes a floor for fundamental rights, whereas state constitutions establish a ceiling." *Id.* at 1124 (*citing* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983)).

[177]*Gilmore I*, 199 N.J. Super at 399, 489 A.2d at 1180. *See supra* note 97 and accompanying text discussing Article I, sections 5, 9 & 10 of the New Jersey Constitution. *See also*, *supra* note 57 for a discussion of the "representative cross section" rule.

[178]*Gilmore I*, 199 N.J. Super. at 405, 489 A.2d at 1184.

[179]*Id.* at 406, 489 A.2d at 1184-85. "By cognizable group we mean those who are protected under the representative cross section rule by (1) the Sixth Amendment . . . (2) N.J. Const. (1947), Art.I, section 5, and (3) New Jersey Laws Against Discrimination, N.J.S.A. 10:5-1." *Id.; see also*, *supra* note 57 for further discussion of the "representative cross section" rule.

[180]583 P.2d 748 (1978). The *Gilmore I* court relied heavily on *Wheeler*, and therefore a brief summary would be helpful. The two defendants in *Wheeler* were African-Americans. *Id.* at 752. The prosecutor used his peremptory challenges to strike all African-Americans from the jury panel, and the defendants were eventually tried and convicted by an all white jury. *Id.* The court articulated the "specific bias" versus the "group bias" differentiation, and enunciated that although the peremptory challenge is one used without giving a reason, "it does not follow therefrom that it is an objection for which no reason need exist." *Id.* at 760-61. The court stated its test as such: 1) The defendant must make a timely objection, and then bears the burden of showing prima facie evidence of discrimination. *Id.* at 764. Included in this showing must be evidence that excluded jurors are members of a cognizable group, and that there is a strong likelihood that the prosecutor excluded those jurors because of their association with the cognizable group. *Id.* 2) If the defendant makes this prima fa-

sible when based on "specific bias," defined as that bias "concerning the particular case on trial or the parties or witnesses thereto."[181] In contrast, the court noted that peremptory challenges are impermissible when based on "group bias."[182] The court opined that challenges based on "group bias" view jurors in a certain way based on their affiliation with a particular group.[183]

Thus, *Gilmore I* established a new standard for reviewing the discriminatory exercise of peremptory challenges. First, a court must presume that the prosecutor used the peremptory challenges in a race neutral fashion.[184] The defendant must raise any objections to the challenges prior to the swearing-in of the jury.[185] The initial burden is on the defendant to demonstrate a "strong likelihood" that the prosecutor used the peremptory challenges improperly in excluding members of a cognizable group in violation of the "representative cross section rule."[186] Ultimately, the trial court retains discretion in determining the veracity of the prosecutor's explanation.[187]

Following *Gilmore I*, the New Jersey Supreme Court granted certification[188]

---

cie showing, the burden then shifts to the prosecutor to show that he did not exclude jurors based on assumed "group bias." *Id.* at 764-65. and 3) The court shall have discretion in making a determination if reasons given are justifiable; if not, the judge must dismiss all jurors and quash the entire venire. *Id.* at 765.

[181]*Gilmore I*, 199 N.J. Super. 389, 402, 489 A.2d at 1181-82 (App. Div. 1986) (quoting *Wheeler*, 583 P.2d at 760 (1978)).

[182]*Id.*

[183]*Id.* The New Jersey court reasoned that "[w]hen a party presumes that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds we may call this 'group bias'. . . ." *Id.* (quoting *Wheeler*, 583 P.2d at 761 (1978)).

[184]*Id.* at 407, 489 A.2d at 1185.

[185]*Id.* at 408, 489 A.2d at 1185.

[186]*Id.*, 489 A.2d at 1185-86. If a prima facie showing is achieved, then the burden shifts to the prosecutor to give a proper explanation for his use of the challenge. *Id.* This explanation does not have to be as great as that required to challenge for cause, but it must "show a genuine and reasonable ground" based on individual (or specific) bias. *Id.*, 489 A.2d at 1186.

[187]*Id.* at 408, 489 A.2d at 1184-85. The court then applied this standard to the facts of the case at hand. *Id.* at 409-14, 489 A.2d at 1186-89. The court found that the prosecutor used his peremptory challenges to systematically exclude all African-American jurors and thus reversed the convictions and remanded for a new trial. *Id.* at 394, 489 A.2d at 1177.

[188]State v. Gilmore, 101 N.J. 285, 501 A.2d 948 (1985).

and affirmed the lower court's holding.[189] In rendering the decision, the court reasoned that the New Jersey Constitution affords greater protection to individual rights than the United States Constitution.[190] In so holding, the court extended the "cross section" rule to apply not only to the jury venire, but also to the selection of the jury panel.[191] The court further expressed the view that

---

[189]State v. Gilmore, 103 N.J. 508, 519, 511 A.2d 1150, 1155 (1986) [hereinafter *Gilmore II*]. Writing for the court, Justice Garibaldi announced that peremptory challenges may be based on individual bias, however, Article I, sections 5, 9 & 10 of the New Jersey State Constitution prohibit exclusion based on group bias. *Id.* at 517, 511 A.2d 1154. All of the justices agreed with the decision of law, and the new standard set for review of discriminatory usage of the peremptory challenge. *Id.* Justice Clifford dissented because he did not agree on the specific finding made in this case in applying the new standard. *Id.* at 546, 511 A.2d at 1170 (Clifford, J. dissenting).

[190]*Id.* at 523, 511 A.2d at 1157. The action of the New Jersey court represents a demonstration of "New Federalism" which has been described as the:

> growing awareness in the state courts of the importance of state law, especially state constitutional law, as the basis for the protection of individual rights against state government . . . . New federalism is based on the premise that the federal Constitution establishes minimum, rather than maximum, guarantees of individual rights and that, in appropriate cases, state courts should independently determine, according to their own law (generally their own state constitutions), the degree to which individual rights will be protected within the state jurisdiction. Independent interpretation of the state's own constitution is part of the double security of having both federal and state bills of rights.

Lisa D. Munyon, Comment, *"It's a Sorry Frog Who Won't Holler In His Own Pond": The Louisiana Supreme Court's Response To The Challenges Of New Federalism*, 42 LOY. L. REV. 313, 314 (1996) (quoting Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 952 (1982)).

[191]*Gilmore II*, 103 N.J. at 526-27, 511 A.2d at 1159-60. "That is, the constitutional right to trial by an impartial jury—which of necessity is the right to trial by an impartial *petit* jury—is not merely the right to an impartial jury venire drawn from a representative cross-section of the community." *Id.* at 527, 511 A.2d at 1159-60.

For further discussion regarding "New Federalism," see generally, United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995); United States v. Lopez, 115 S.Ct. 1624, 1626 (1995); Michigan v. Long, 463 U.S. 1032, 1041 (1983) (indicating that when a state court rests its decision on state grounds, it needs to clearly express this with a plain statement, and if such statement is made, the Court will not review its decision); National League of Cities v. Usery, 426 U.S. 833 (1976); Suzanna Sherry, *Symposium: the New Federalism After United States v. Lopez Panel IV - The Barking Dog*, 46 CASE W. RES. L. REV. 877 (1996); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay On The New Federalism And The Original Understanding*, 94 MICH. L. REV. 615 (1995); Robert F. Nagel, *Symposium: Major Issues in Federalism Theoretical and Constitutional Issues*, 38

because the peremptory challenge is not a constitutional right, it must defer to those rights which are constitutionally granted.[192] The court opined that the legislature enacted the peremptory challenge to function coextensively with the representative "cross section" rule to create an impartial jury;[193] thus, the two rules should compliment, rather than interfere with, each other.[194] Accordingly, the court had no difficulty in permitting a party to question the use of a peremptory challenge, when discriminatory usage is suggested.[195] The court acknowledged the historical use and nature of the peremptory challenge, but found a change in the way the peremptory challenge is used was required, due to the evolution of society.[196]

The court eventually adopted a test which mirrored the holding in *Gilmore I*.[197] Under *Gilmore II*, the prosecutor is entitled to a rebuttable presumption that the peremptory challenge did not violate constitutional guarantees.[198] The defendant must then rebut this presumption by providing evidence that the

---

ARIZ. L. REV. 843 (1996).

[192]*Gilmore II*, 103 N.J. at 529, 511 A.2d at 1161.

[193]*Id.* at 530, 511 A.2d at 1161.

[194]*Id.* The court stated that when a prosecutor is allowed to use peremptory challenges to excuse on the basis of assumed bias of a cognizable group, it acts in direct conflict with the representative cross section rule and inhibits the ability to obtain an impartial jury. *Id.*

[195]*Id.* at 531-32, 511 A.2d at 1161-63.

[196]*Id.* The court stated that, "[b]etween the extreme poles of peremptory-arbitrariness and cause-rationality lies the wide range of reasonable prosecutorial discretion . . . ." *Id.* at 532, 511 A.2d at 1162.

[197]*Id.* at 535-539, 511 A.2d at 1164-67. As in *Gilmore I*, the court relied heavily on the *Wheeler* decision in its analysis and determination of the test to be used when considering possible discriminatory use of the peremptory challenge. *Id.* at 524-25, 511 A.2d at 1158. For further discussion of the *Wheeler* decision, see *supra* note 180 and accompanying text. In creating its standard, the court further relied on the test used in determining "disparate treatment" cases brought under Title VII of the Civil Rights Act of 1964." *Gilmore II*, 103 N.J. 508, 533, 511 A.2d 1150, 1163 (1986). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (providing further discussion regarding the test used in determining "disparate treatment" cases brought under Title VII of the Civil Rights Act of 1964).

[198]*Id.* at 535, 511 A.2d at 1164. The court expressed three reasons for allowing this presumption. *Id.* First courts assume that prosecutors will not shirk their responsibility to do justice. *Id.* Second, the peremptory challenge is historically important. *Id.* Last, the court gave deference to the legislature's intention that the peremptory challenge exists. *Id.*

prosecutor used the peremptory challenges on the premise of group bias against a cognizable group as defined by the representative "cross section" rules.[199] Unlike the original *Batson* rule, the defendant need not be a member of the group being discriminated against; he must, however, demonstrate a strong likelihood that the prosecutor used the challenge improperly, predicated on group bias.[200]

If the defendant is able to establish a prima facie case, the burden shifts to the prosecutor to express permissible reasons for the use of the challenges.[201] "To carry this burden, the State must articulate 'clear and reasonably specific' explanations of its 'legitimate reasons' for exercising each of the peremptory challenges."[202] The trial court must determine whether each party has carried their requisite burden.[203]

It should be noted that, as announced, the *Gilmore II* test applied only to prosecutorial challenges;[204] the decision did not articulate whether the test also applied to a defendant's use of the peremptory challenge, or to civil matters. Thus, some uncertainty remained in light of the court's holding. The importance of the decision, however, is underscored by the fact that it was based on the New Jersey Constitution.[205] In addition, by permitting courts to require

---

[199]*Id.* at 535-36, 511 A.2d at 1164-65.

[200]*Id.* The court further enunciated examples of such proof:

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all.

Id. at 536, 511 A.2d at 1165 (quoting People v. Wheeler, 583 P.2d 748, 764 (1978)).

[201]*Id.* at 537, 511 A.2d at 1165.

[202]*Id.* (citations omitted).

[203]*Id.* at 537-40, 511 A.2d at 1165-67.

[204]*Id.* at 532, n.6, 511 A.2d at 1163 n.6.

[205]As was expressed by the New Jersey Supreme Court, it is our job to interpret our constitution. *Worth Repeating, Protection Against State Evils*, N.J. LAW., September/October, 1991, at 52 (citing Greenberg v. Kimmelman, 99 N.J. 552, 562, 567-68, 569

explanations for a prosecutor's use of a challenge, the court effectively changed the way peremptory challenges are used in New Jersey.

Following *Gilmore II*, the New Jersey Supreme Court and appellate courts immediately began to codify and expound upon this new standard. In *State v. Ramseur*,[206] the New Jersey Supreme Court reviewed the actions of a trial court in dismissing two African-Americans from a grand jury.[207] In its holding, the court applied the standards set forth in both *Gilmore* and *Batson*, extending *Gilmore's* purview to actions by judges and to grand jury selection procedures.[208] The court also attempted to articulate the proofs necessary to establish a prima facie case of discrimination in violation of the "representative

---

(1985)). Furthermore,

> [b]y developing an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis, we meet that responsibility and avoid the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution.

Id.

[206]106 N.J. 123, 524 A.2d 188 (1987). The defendant's first claim in *Ramseur* was to the method used to pick the jury venire or jury pool which his grand and *petit* juries were drawn from. *Id.* at 227, 525 A.2d at 240. His claim was that African-American's did not make up the same percentage on the jury venire as they did in the community. *Id.* at 226, 524 A.2d at 239-40. Secondly, the defendant challenged the method used by the county assignment judges to select grand juries. *Id.* at 228, 524 A.2d at 240. The practice of the assignment judges in defendant's county was to interview potential jurors and then pick a grand jury that represented a fair mix of individuals. *Id.* at 229, 524 A.2d at 240. This method included intentional selections of individuals of different races in order to maintain a racial balance. *Id.* at 229 and 231, 524 A.2d at 240-41. The court held that the practices of the assignment judges violated statutory requirements and improperly disqualified jurors on the basis of race, however, it was a harmless error, as no underrepresentation of African-American's on grand juries in defendant's county was shown. *Id.* at 231-233, 524 A.2d at 241-42. The court next reviewed the specific act of the assignment judge in selecting the grand jury which indicted the defendant. *Id.* at 233, 524 A.2d at 242. The assignment judge dismissed two blacks from the defendant's grand jury. *Id.* The court reviewed the judge's actions under a *Batson* Equal Protection Clause analysis, and a *Gilmore* Sixth Amendment analysis. *Id.* at 234-235, 524 A.2d at 242. In both instances, the judge's actions were found to be erroneous, but not unconstitutional. *Id.* at 235-236, 524 A.2d at 243-44.

[207]*Id.* at 234, 524 A.2d at 243.

[208]*Id.* at 233-235, 524 A.2d at 242-44. With regard to applying *Gilmore* to grand jury selections, the court stated, "[w]e assume, without deciding, that this right is applicable to the grand jury stage as well as the *petit* jury stage." *Id.* at 235 n.49, 524 A.2d at 244, n.49.

cross-section" rule.[209] The court opined that the proofs need not go as far as to show a complete absence of a cognizable group.[210] Instead, the court stated that a defendant must show a reduction of minorities which creates an "impotence" in the group being discriminated against.[211]

In *State v. Watkins*, the court interpreted *Gilmore* as maintaining the attorney's use of "gut reactions" or "hunches" in making peremptory challenges.[212] The court, however, established a caveat, holding that the challenges must result in "good faith objections."[213] Thus, although concerned with maintaining the prosecutor's ability to excuse an unacceptable juror,[214] the court was un-

---

[209]*Id.* at 236, 524 A.2d at 244; *see also supra* note 57 (discussing the "representative cross section" rule).

[210]*Id.*

[211]*Id.* (citing Commonwealth v. Soares, 387 N.E.2d 499, 516 n.32, *cert. denied*, 44 U.S. 81 (1979)). *See also*, State v. Gilliam, 224 N.J. Super. 759, 541 A.2d 309 (1988) (upholding prosecutor's explanation for peremptory challenge of jury venireman because his eyes had been closed for "a very long, long time.").

[212]114 N.J. 259, 267, 553 A.2d 1344, 1348 (1988). Here, the defendant challenged a prosecutor's use of peremptory challenges to exclude the only three African-American veniremen. *Id.* at 261-62, 553 A.2d at 1345-46. In this case, the trial court did not find a prima facie showing of group bias in the prosecutor's use of peremptory challenges, and therefore did not require the prosecutor to give an explanation for his reasons, although he did state that they were not race related. *Id.* The New Jersey Supreme Court remanded for a *Gilmore* hearing to require explanation by the prosecutor for his use of peremptory challenges. *Id.* at 268, 553 A.2d at 1348. The New Jersey Supreme Court expressed the test to determine if defendant has established a prima facie case of discrimination: 1) the defendant must show that those excluded were part of a cognizable group; and 2) the defendant must demonstrate a "substantial likelihood" that the prosecutor's motives for use of this strikes was based on group bias. *Id.* at 265-66, 553 A.2d at 1347. The court also suggested a number of factors that the court may look to to determine if part two of this test has been satisfied: 1) most or all members of a "cognizable group" were struck; 2) the prosecutor used more challenges against the "cognizable group" them against other prospective jurors,; 3) the prosecutor struck members of a "cognizable group" without questioning them,; 4) the members in the "cognizable group" struck were as heterogeneous as the other jurors except for their membership in a "cognizable group,"; and 5) those stuck were members of the same "cognizable group" as the defendant. *Id.* at 266, 553 A.2d at 1347. The court indicated that "gut reaction" or "hunch" challenges may still be used, as long as they result in "good faith objections." *Id.* at 268, 553 A.2d at 1348.

[213]*Id.*

[214]*Id.* (stating that "[a] lawyer need not accept an otherwise unacceptable juror merely because the juror is a member of a 'cognizable group.'").

willing to sacrifice the defendant's constitutional rights.[215] The court summized that "[i]f the cost is some constraint on counsel's otherwise unbridled freedom in selecting jurors, we believe that it is a price worth paying."[216]

In subsequent decisions related to *Gilmore II*, the court held that the mere fact that a prosecutor uses a large number of challenges to exclude minorities does not necessarily indicate discrimination. [217] The court reasoned that the *Gilmore* rule is not violated as long as valid explanations are provided.[218]

In addition to the New Jersey Supreme Court decisions, the Appellate Division recently extended *Gilmore* to apply to civil actions. In *Russell v. Rutgers Health Plan*,[219] the New Jersey Superior Court Appellate Division reviewed the United States Supreme Court decision in *Edmonson* which held that the *Batson* test would apply to civil cases.[220] The *Russell* court opined that in regard to jury selection, a private litigant is considered a government actor, at least with respect to jury selection procedures.[221] Thus, the court asserted that a private litigant should be granted third-party standing to challenge the use of

---

[215]*Id.*

[216]*Id.*

[217]*See* State v. McDougald, 120 N.J. 523, 577 A.2d at 419 (1990). In *McDougald*, the court accepted the prosecutor's explanations for use of ten peremptory challenges excluding African-American jurors and one Latino juror. *Id.* at 537, 556, 577 A.2d at 426, 435-36. *Compare with*, State v. Bey, 129 N.J. 557, 610 A.2d 814 (1992) (finding that defendants prima facie burden was not met by showing prosecutor's exercise of one peremptory challenge against an African-American).

[218]*McDougald*, 120 N.J. at 556, 577 A.2d at 426.

[219]280 N.J. Super. 445, 453, 655 A.2d 948, 952 (App. Div. 1995) [hereinafter *Russell*]. Plaintiffs appealed from a no cause verdict in a malpractice action relating to the death of a young woman. *Id.* at 447-48, 655 A.2d at 948-49. During the jury selection, the defense attorney used a peremptory challenge to remove the only African-American on the venire. *Id.* at 449-50, 655 A.2d at 949-51. The trial judge required defense counsel to provide an explanation for his use of the peremptory challenge, which the judge found to be legitimate. *Id.* at 450-51, 655 A.2d at 950-51. The court upheld the trial judges decision to require the defense attorney to provide an explanation. *Id.* at 453-54, 655 A.2d at 952-53. Additionally, in State v. Harris, 282 N.J. Super. 409, 417, 660 A.2d 539, 543 (1995), the court held that the principles underlying *Gilmore* also pertain to the exercise of authority of a trial judge to change venue or impanel a foreign jury.

[220]*Id.* at 453, 655 A.2d at 952; *see supra* note 165-66 (discussing the United States Supreme Court decision in *Edmonson*).

[221]*Russell*, 280 N.J. Super. at 453, 655 A.2d at 952.

the peremptory strikes, as both the litigant and the juror are injured by its discriminatory use.[222]

Also notable in *Russell* is the fact that the action was based on the exclusion of only one minority.[223] Jurisdictions remain divided on whether or not the exclusion of only one minority is sufficient to create a prima facie showing of discrimination.[224] Accordingly, it appears more logical to make such a determination on a case-by-case basis rather than attempting to articulate how many challenges are sufficient to show prima facie discrimination. Despite the apparent confusion, it nevertheless appears clear that courts will not find error in a trial court's decision to require an explanation for an attorney's use of a peremptory challenge.

In a recent case, the court upheld the requirement of *Gilmore* that once discriminatory use of a peremptory challenge is determined by the trial judge, the entire panel and venire must be dismissed, and the selection process begun anew.[225]

V. ANALYSIS

The purpose of the peremptory challenge throughout history has been the

---

[222]*Id.*

[223]*Id.* at 449-50, 655 A.2d at 949-51.

[224]Judith Nallin, *State Digests - Appellate Division; Russell v. Rutgers Community Health Plan, Inc. et al.*, N.J.L.J., April, 3, 1995, at 65. To say that one challenge is never enough allows an attorney to use one peremptory challenge in every case in a discriminatory way. *Id.* To say that one will always be sufficient to show prima facie evidence of discrimination requires an explanation every time an attorney only excuses one member of a cognizable group. *Id.* For further discussion regarding this issue, see Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 368-69 (1990). *See also*, State v. Huff, 292 N.J. Super. 185, 678 A.2d 731 (holding that the exercise of one peremptory challenge in a discriminating way is sufficient to satisfy *Gilmore*).

[225]Samo v. Colfax, A-2538-94 (App. Div. 1996) (*per curiam*). The trial judge found that the last of four peremptory challenges by defense counsel used against minorities was discriminatory. Instead of dismissing the entire panel and venire, the judged disallowed the final juror to be excused, and continued with the trial. Following a no cause verdict, plaintiff appealed. On appeal the court held that the trial judge's actions were inconsistent with the requirements under the *Gilmore* standard, and thus reversed and remanded for a new trial. It is uncertain why this type of corrective measure by a trial judge would not be allowed. It would obviously save time and money. The offensive conduct would be corrected and the jury would be made up of a fair cross section of the community.

protection of a defendant's right to be fairly tried.[226] Unfortunately, although we have come a long way, prejudice is still alive in America. There are only so many laws that can be passed to prevent discrimination against minorities, the rest must be done through our social consciences. As this Comment has demonstrated, our legal system is not free from discrimination.[227]

The question is, how far can the law go in adjusting a jury system centuries old, that has survived numerous changes in society? Through *Gilmore* and other such decisions,[228] the legal system is being tested. The new and innovative standards set forth in these cases has drastically changed the way the peremptory challenge has been used since its inception in America.[229]

Many issues present themselves after careful review of the evolution of the peremptory challenge. To begin, New Jersey has yet to specifically hold that the *Gilmore* standard shall be applied to a criminal defendant's use of the peremptory challenge. In this sense, *Gilmore* is narrower in scope than the *Batson* standard which has been extended this far.[230] It will be interesting to see if New Jersey, in future cases, will follow the United States Supreme Court's lead and extend *Gilmore* to criminal defendants. Perhaps the New Jersey Supreme Court has not addressed this issue because of a lack of a proper forum, perhaps it is not ready to decide how *Gilmore* will apply to criminal defendants, or perhaps its silence on the issue is a message that it will not extend

---

[226]"The peremptory challenge has been described as 'one of the most important' of the criminal accused's privileges." Broderick, *supra* note 3 at 370 (quoting Frazier v. United States, 335 U.S. 497, 506 n.11 (quoting Pointer v. United States, 151 U.S. 396, 408 (1893))). *See also*, *supra* notes 37-43 and accompanying text. Furthermore, when the peremptory challenge was adopted in early America, it was unclear whether it applied to the government. Broderick, *supra* note 3 at 375. Some colonies adopted the "stand aside" procedure. *Id.*

[227]As Judge McMillian asserted, there are many ways in which minorities are prejudiced in our jury system, the worst of these is discriminatory use of the peremptory challenge. Theodore McMillian, Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 363 (1990). Judge McMillian continued with a review of several studies demonstrating discriminatory use of the peremptory challenge. *Id.*

[228]*See, e.g.*, People v. Wheeler, 583 P.2d 748 (1978) (discussed *supra* note 180 and accompanying text); Commonwealth v. Soares, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

[229]For a review of the *Batson* decision, see *supra* Section IV(a). For a review of the New Jersey Supreme Court's *Gilmore* decision, see *supra* Section IV(b).

[230]*See supra* notes 168-169 and accompanying text (discussing the United States Supreme Court's decision in *McCollum*, extending *Batson* to a criminal defendant's use of the peremptory challenge, and criticisms of that decision).

Gilmore in such a way.[231]

Furthermore, the *Gilmore* standard is far from perfect. The standard places great emphasis on the trial judge's discretion. The trial judge alone makes a determination as to whether a defendant has established a prima facie case of discriminatory use of the peremptory challenge, and whether an attorney's race neutral explanations are sincere.[232] In making these decisions, a judge must look to an attorney's actions and statements.[233] Thus, the standard has the tendency of eliciting inconsistent rulings.[234]

The recent United States Supreme Court case *of Purkett v. Elem*[235] further exemplifies this problem.[236] As Justice Coleman indicated, the ramifications of this decision are that federal trial judges no longer have any guidelines to

---

[231]Until the New Jersey Supreme Court decides this issue, challenges to a criminal defendant's use of peremptory challenges will be governed by the *Batson* standard as expanded by *McCollum*.

[232]*Gilmore II*, 103 N.J. 508, 537-40, 511 A.2d 1150, 1165-67 (1986).

[233]As indicated by Judge McMillian, the courts are having a difficult time differentiating between "legitimate reasons" and "mere excuses or pretexts." McMillian, *supra* note 7, at 369.

[234]If, for example, the judge favors maintaining the challenge in its traditional form, he may be less likely to find that defendant has established a prima facie showing of discrimination, and may be more accepting of prosecutors explanations. The reverse is also true. If a trial judge is predisposed to a belief that most challenges are discriminatory, he may find discrimination more often, costing the justice system time and money. As one commentator stated:

> [a]lthough no appellate court will admit it, most trial judges dislike peremptories not for arcane constitutional reasons, but because they are time consuming. The way many trial courts deal with this is to routinely deny even the most obvious challenges for cause, in order to force the lawyers to use up their peremptories as quickly as possible.

Mickenberg, *supra* note 167. Perhaps this is why the courts have been more willing to remand for failure to question the use of the challenge then for requiring an attorney to provide an explanation. *See, e.g.*, State v. Watkins, 114 N.J. 259, 553 A.2d 1344 (1988). Furthermore, Justice Marshall has also indicated that the *Batson* standard is easily maneuvered around. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[235]115 S. Ct. 1769, 1771 (1995) (holding that an attorney does not need to give a plausible explanation for his use of a peremptory challenge.).

[236]*See* Imbriani, *supra* note 172 at 916; *see also*, Coleman, *supra* note 8, at 1132-33.

follow in determining whether or not an attorney's explanations are sincere.[237] Justice Coleman, therefore, fears that the result of this decision will be to make *Batson* as obsolete as *Swain* was.[238]

Fortunately, the *Gilmore* standard still requires that an attorney's explanation be reasonably related to the case at bar.[239] However, the question remains whether New Jersey, in future cases, will follow the United States Supreme Courts lead and loosen its requirements. In attempting to predict the likelihood that New Jersey will follow this path, it is important to note that the *Gilmore* standard is based on the New Jersey Constitution which was determined to provide greater protection than the United States Constitution.[240] Furthermore, as was indicated earlier, the *Batson* standard is based solely on the Equal Protection Clause of the Fourteenth Amendment, not on those rights granted by the Sixth Amendment.[241] In contrast to *Batson*, *Gilmore* is based on Article I, sections 5, 9 and 10 of the New Jersey Constitution, which provide protection against discrimination, as well as the right to an impartial jury. Therefore, the *Gilmore*[242] standard is based on Fourteenth and Sixth Amendment principles;

---

[237]*See* Coleman, *supra* note 8, at 1132-33.

[238]*Id.* at 1133.

[239]State v. Gilmore, 103 N.J. 508, 537, 511 A.2d 1150, 1165 (1986); *see also*, Coleman, *supra* note 8, at 1133. *Gilmore* explanations, unlike the holding by the Supreme Court in *Purkett*, must be "reasonably relevant to the particular case on trial or its parties or witnesses." Russ Bleemer, *Coleman Criticizes U.S. Supreme Court For Backtracking on Jury Bias Rulings*, N.J.L.J., March 11, 1996, at 25.

[240]*Gilmore*, 103 N.J. at 523, 511 A.2d at 1157; *see supra* note 190 and accompanying text. Although based primarily on the New Jersey Constitution, Justice Coleman has labeled the *Gilmore* decision as a Sixth Amendment analysis. *See also* Coleman, supra note 8, at 1131.

[241]The Court explicitly expressed that the Sixth Amendment was an inappropriate forum to challenge discriminatory use of peremptory strikes. *See Holland v. Illinois*, 493 U.S. 474 (1990), discussed at *supra* note 89. *See also Batson*, 476 U.S. at 86-87 (recognizing that, as long ago as *Strauder* the Court held that excluding a juror because of race discriminates against the excluded juror; while discrimination in the selection of the jury venire denies the defendant his right to an impartial jury.). *See also*, Coleman, *supra* note 7, at 1130.

[242]The *Gilmore II* decision appears more concerned with the defendant's rights. *Gilmore II*, 103 N.J. at 526-27, 511 A.2d at 1159-60(expressing that the representative "cross section" rule must apply to selection of both the jury venire and the *petit* jury and declaring that a right to an impartial jury is the right to an impartial venire and *petit* jury). This also raises some questions as to the ramifications of *Holland* in relation to the *Gilmore* standard. For a further discussion of the *Holland* decision, see *supra* note 90.

however the New Jersey Supreme Court has interpreted these sections as providing greater protection than the United States Constitution.[243] Therefore, it appears logical to presume that New Jersey will hold fast to its standard, rather than follow in the path of the United States Supreme Court.

An additional problem which arises, due to the broad discretionary nature of the standard, is *Gilmore's* ability to be appealed.[244] Because the trial judge is using his discretion to make a factual finding, it is difficult for an appellate court to reverse its findings. The *Gilmore* standard, requiring that a prosecutor's explanations be reasonably related to the case at bar, leaves at least some leeway for the appellate court to recognize error. However, the new *Batson* revelations in *Purkett* leave an appellate court with virtually no powers to reverse, except on procedural grounds.[245] With limited ability to appeal, we are resting great responsibility upon our trial judges. Moreover, we are leaving the standard open to manipulation by advocates against it.

In light of these many deficiencies, it is not surprising that controversy has surrounded this new standard. These controversies focus not only on the validity of the *Gilmore* standard, but also on whether or not the peremptory challenge should exist at all.[246]

---

[243]*See* supra note 190 and accompanying text.

[244]Commentators have indicated that because following *Purkett*, *Batson* requires a credibility determination by a trial judge, it is very difficult to reverse such factual findings on appeal. Bleemer, *supra* note 239.

[245]*See supra* note 241; *see also* Coleman, *supra* note 8, at 1132-33.

[246]Many believe as Chief Justice Burger expressed in his dissent in Batson, that to alter the use of the challenge is to destroy it. See supra notes 148-161 and accompanying text. See also, Lisa Brennan, Peremptory Based on Race Is Ground for Civil Mistrial, NEW JERSEY LAW JOURNAL, August 26, 1996 at 1 (discussing trial attorney's views on the Gilmore standard). While others agree with Justice Coleman that Gilmore is just what the jury system needed. See generally Coleman, supra note 8. Still others believe that the peremptory challenge should be abolished completely. See McMillian, supra note 7, for a general discussion of why the peremptory challenge should be abolished. Specifically, see McMillian, supra note 7, at 367 discussing Justice Marshall's concurrence in Batson which expresses his belief that to eliminate discrimination completely the peremptory challenge must be abolished. (citing Batson v. Kentucky, 476 U.S. 79, 102-03 (1986)). Additionally, Judge McMillian expresses his belief that the peremptory challenge should be abolished, and voir dire questioning and challenges for cause expanded. Id. at 374. Furthermore, commentaries have expressed that the proper resolution to the problem of discrimination is to reduce the number of peremptory challenges to three for each side. Stuart Taylor, Jr., Closing Arguments, Jury System Needs Repair, Not Abolition, NEW JERSEY LAW JOURNAL, November 27, 1995, at 29 & 37. Justice Marshall, in his concurrence in the Batson decision, also pointed to decisions which expressed doubts with the peremptory challenge as well as other alternative solutions. Batson v. Kentucky, 476 U.S. 79, 106-07 (Marshall, J., concurring).

The peremptory challenge certainly has a long history and is an important tool in our jury system. The law and society are, however, dynamic and are constantly changing.[247] A stagnant legal system, that does not grow with society, will never survive. There is a fear that tampering with the gentle balance of the jury selection process will undo the work that has been done to ensure a trial by an impartial jury made up of a fair "cross section" of the community. Allowing discrimination in our legal system, however, will cause the same result. The *Gilmore* standard may not be the answer, but it is the best one the legal system has to offer. Perhaps someday discrimination will be a forgotten word but, until then, we must do the best that we can to stop it from infiltrating our justice system.

[247]As expressed by the majority in *Gilmore II*, 103 N.J. 508, 531-32, 511 A.2d 1150, 1161-63 (1986). This thought was also expressed by Justice Coleman. *See* Coleman, *supra* note 8, at 1106. It is clear that the dilemma surrounding the use of the peremptory challenge in New Jersey has not yet been resolved, but will continue to be challenged. *See generally*, Brennan, *supra* note 246.