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## Racial Discrimination in Jury Selection: The Urgent Need for Sixth Amendment Protections for Black Capital Defendants

Claire Austin

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# **RACIAL DISCRIMINATION IN JURY SELECTION: THE URGENT NEED FOR SIXTH AMENDMENT PROTECTIONS FOR BLACK CAPITAL DEFENDANTS**

**By: Claire Austin\***

## **ABSTRACT**

In the U.S., death row is made up of a disproportionate number of black persons. In capital trials, black defendants often face all-white juries. The deep-rooted racial discrimination in the justice system impacts jury selection because prosecutors use peremptory strikes to remove black jurors from the jury panel. As the law stands today, the Sixth Amendment guarantee of an impartial jury made up of a fair representation of the jury applies only to the pool of jurors called in for jury service, not those who are actually selected to hear the case.

This comment analyzes the Supreme Court decision, *Holland v. Illinois* 493 U.S. 474 (1990), which held that the Sixth Amendment does not prevent prosecutors from striking potential jurors based on their race. In doing so, the Court missed an opportunity to provide meaningful relief to black capital defendants who faced all-white juries. This comment argues for the reversal of *Holland*, extension of Sixth Amendment protections, and a change in the framework for questioning the use of peremptory challenges to remove black jurors.

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## INTRODUCTION

Between the Summer of 2020 and early 2021, as the Presidency turned over from Donald Trump to Joe Biden, the nation experienced the unprecedented execution of thirteen federal prisoners.<sup>1</sup> Orlando Cordia Hall was one of the persons sentenced to death amidst the chaos of the COVID-19 pandemic and the aftermath of the 2020 election.<sup>2</sup> Hall was forty-nine years old at the time of his death; however, he was in a prison for a crime committed when he was just twenty-three years old.<sup>3</sup> This means that at the time of his execution, Hall had spent more than half of his life behind bars.<sup>4</sup> What is more alarming is that Hall, a black man, was found guilty by an all-white jury.<sup>5</sup>

In 1995, Hall was one member of a group charged with kidnapping resulting in death of a minor after a marijuana deal had gone wrong.<sup>6</sup> The prosecutor who tried Hall's case removed all of the black jurors from the jury panel.<sup>7</sup> A few years later in a different case the Supreme Court would find this same prosecutor to have removed jurors based solely on their race.<sup>8</sup> This is one of many jarring examples of the unconstitutional treatment of black capital defendants.<sup>9</sup>

This Comment argues that the Supreme Court decision Holland v. Illinois 493 U.S. 474 (1990), which held that the Sixth Amendment right to a jury made up of a fair cross-section of the community does

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<sup>1</sup> Michael Tarm & Michael Kunze, *Trump Administration Carries Out 13<sup>th</sup> and Final Execution*, ASSOCIATED PRESS (Jan. 15, 2021), <https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50> [<https://perma.cc/9AQF-PKWT>].

<sup>2</sup> Petition for Writ of Certiorari, at 1, *Hall v. Barr*, No. 20-5340 (D.C. Cir. 2020), No. 20-688, 2020 WL 6743080.

<sup>3</sup> Hailey Fuchs, *Justice Dept. Executes Man for 1994 Kidnapping and Murder*, THE NEW YORK TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/20/us/orlando-cordia-hall-execution.html> [<https://perma.cc/4986-BLQH>].

<sup>4</sup> *Id.*

<sup>5</sup> Petition for Writ of Certiorari, *Hall*, No. 20-5340 (D.C. Cir. 2020), No. 20-688, *supra* note 2, at 8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Fuchs, *supra* note 3.

<sup>9</sup> *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, EQUAL JUST. INITIATIVE (2021), <https://ej.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country> [<https://perma.cc/8CFP-44GR>] (“Congress passed the Civil Rights Act of 1875, which outlawed race-based discrimination in jury selection. The Fourteenth and Fifteenth Amendments...respectively, guaranteed Black men the right to vote and serve on juries and provided legal protections against racial discrimination.”).

not prevent prosecutors from using peremptory strikes to dismiss black jurors, must be reversed.<sup>10</sup> A reversal will provide meaningful relief for black capital defendants whose sentences were decided by an all-white jury, and will replace the current, ineffective tools of relief for these defendants. The Court has interpreted protections against jury discrimination to fall squarely under the Fourteenth Amendment and takes the firm stance that the Sixth Amendment does not guarantee a right to a representative jury. This framework does not work in practice as black capital defendants continue to be subject to rampant discrimination in jury selection.

Part I of this Comment provides a historical background of discrimination in jury selection and its disproportionately harmful effects on black capital defendants and gives an overview of *Holland v. Illinois*. Part II of this Comment analyzes the Sixth Amendment right to an impartial jury made up of a fair cross-section of the community and explores the relationship between these two components. Finally, Part III of this Comment proposes an extension of the interpretation of the Sixth Amendment and an accountability mechanism for prosecutors who abuse their power to dismiss jurors based on race.

## I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AS INTERPRETED IN *HOLLAND*, THE USE OF PEREMPTORY CHALLENGES, AND THE IMPACT ON BLACK CAPITAL DEFENDANTS.

### A. Overview: Jury Bias in America

Racial bias, capital punishment, and the Sixth Amendment right to a jury trial are all intertwined. Each concept affects the other because of America's long history of racial discrimination and the use of imprisonment as a means of perpetuating racial oppression.<sup>11</sup>

Persons facing the death penalty are disproportionately black.<sup>12</sup> As of October 1, 2022, forty-one percent of death row prisoners were black,<sup>13</sup> but only 13.6% of the United States population is black.<sup>14</sup> In Washington state, black defendants are three times more likely to be

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<sup>10</sup> *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

<sup>11</sup> *Race and the Death Penalty*, AM. C.L. UNION, (Feb. 26, 2003) <https://www.aclu.org/other/race-and-death-penalty> [https://perma.cc/69YV-89LN] (“The color of a defendant and victim’s skin plays a crucial and unacceptable role in deciding who receives the death penalty in America.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 4, 2023), <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> [https://perma.cc/XH2U-4N4T].

<sup>14</sup> *QuickFacts*, U.S. CENSUS BUREAU (2020), <https://www.census.gov/quickfacts/fact/table/US/PST045221> [https://perma.cc/ZG64-ZXFJ].

recommended for the death penalty than white defendants facing the same charges.<sup>15</sup> In California, defendants charged with killing a white person are three times more likely to be sentenced to death than cases in which the victim is a black person.<sup>16</sup> Of the persons executed for committing interracial murder, over 300 were black defendants with white victims, while only twenty-one were white defendants with black victims.<sup>17</sup>

These discriminatory outcomes are directly linked to jury bias and racism in the courtroom and represent a larger threat to the justice system.<sup>18</sup> In the courtroom, juror biases either go undetected or are tolerated by attorneys and judges.<sup>19</sup> Prosecutors abuse their power to strike black jury members despite the illegality of such practices.<sup>20</sup> Litigants abuse of the tools and strategies available to them in the courtroom to discriminate against jury members is a rampant problem that must be addressed by courts.<sup>21</sup>

## 1. Jury Bias in Criminal Procedure

The danger of bias against a defendant begins before the defendant gets to trial.<sup>22</sup> Before the defendant has their arraignment in federal court, the government brings evidence of a felony charge before a grand jury to determine if there is enough proof to charge the defendant.<sup>23</sup> The purpose of these proceedings is to determine if there is probable cause that the defendant committed the crime.<sup>24</sup> In grand jury proceedings, sixteen to twenty-three jurors are presented evidence from the government attorneys to determine if there is enough evidence for the defendant to stand trial.<sup>25</sup> If the grand jury finds there is sufficient evidence to go to trial, a group of potential jurors (known as the venire jury) is selected from the community and

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<sup>15</sup> *Facts about the Death Penalty*, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Ella Wiley, *How Racism in the Courtroom Produces Wrongful Convictions and Mass Incarceration*, LEGAL DEFENSE FUND (July 20, 2022), <https://www.naacpldf.org/judicial-process-failures/> [<https://perma.cc/JS97-A54N>] (“There have been countless cases where a person of color was convicted of a crime, and it was later discovered that one or more jurors responsible for determining their innocence were racist.”).

<sup>19</sup> *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Steps in the Federal Criminal Process*, OFFS. U.S. ATT’YS, DEP’T. JUST. (last accessed Aug. 2023), <https://www.justice.gov/usao/justice-101/steps-federal-criminal-process> [<https://perma.cc/B9LN-J2FS>].

<sup>24</sup> *Id.*

<sup>25</sup> *Types of Juries*, U.S. CTS. (last accessed Aug. 2023), <https://www.uscourts.gov/services-forms/jury-service/types-juries> [<https://perma.cc/9ZDJ-R29U>].

a group of six to twelve jurors (known as the petit jury) is picked to hear the case.<sup>26</sup>

### a. The Grand Jury

When the grand jury meets, Federal Rule of Criminal Procedure 6(c) states that the court must appoint a grand jury foreperson.<sup>27</sup> This creates an additional point at which discrimination can occur.<sup>28</sup> As an example, over one-third of the population of Monroe County, Alabama is black; over a period of fourteen years, only one black person was chosen as a foreperson of a grand jury.<sup>29</sup> A judge in this county confirmed that he only picked grand jury forepersons that he “liked.”<sup>30</sup> Judges’ racial discrimination in the selection of a foreperson is not only unchallenged, but accepted as a practice.<sup>31</sup> Judges cite to education, income, language skill, or subjective views of “leadership” skill.<sup>32</sup> This emphasizes how deeply discrimination is embedded in the jury selection system, and that this problem results in a deprivation of the rights of the defendant.<sup>33</sup>

### b. The Trial Jury

In addition to grand juries, black persons are overwhelmingly excluded from serving on juries at trial.<sup>34</sup> The Equal Justice Initiative (EJI) analyzed patterns of jury selection across multiple states including Alabama, Arkansas, Georgia, South Carolina, Louisiana, and Tennessee.<sup>35</sup> The EJI found that nearly 80% of black persons called to jury service were excluded from the jury.<sup>36</sup> In fact, they found that in some states prosecutors are trained on how to conceal their biases in removing persons of color from the jury so that they will not be challenged.<sup>37</sup> Black persons were removed by prosecutors for having “low intelligence,” for wearing glasses, for being married, for being deemed too old for jury service at the age of forty-three, and for being deemed too young for jury service at the age of twenty-

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<sup>26</sup> *Id.*

<sup>27</sup> Fed. Rules Cr. Proc. Rule 6, 18 U.S.C.A., FRCRP RULE 6.

<sup>28</sup> Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty*, 4 AFR.-AM. L. & POL’Y REP. 74, 78 (1999).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, *supra* note 9.

<sup>32</sup> *Id.*

<sup>33</sup> *See id.*

<sup>34</sup> *Race and the Death Penalty*, *supra* note 11.

<sup>35</sup> *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUST. INITIATIVE 4, 4 (Aug. 2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/GWU6-MZL8>].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*



eight.<sup>38</sup> Prosecutors present these removals as “race neutral,” which the justice system continues to tolerate.<sup>39</sup>

### i. The Venire Jury

Before a jury is even selected, a venire, a panel of around twenty potential jury members, is drawn from voting registration records within the jurisdiction.<sup>40</sup> Attorneys on both sides use challenges for cause and peremptory challenges to strike venire members from the jury.<sup>41</sup> A challenge for cause is a request to strike a venire jury member based on a specific bias or prior involvement with the parties or material of the case that would prevent the venire juror from being impartial.<sup>42</sup> In contrast, a peremptory challenge does not require a justification as to why the juror is being dismissed.<sup>43</sup> In cases of capital punishment, the peremptory strike is a tool for the prosecution to eliminate jurors who may be unwilling to vote for the death sentence.<sup>44</sup> Peremptory challenges are a widely abused tool to remove black venire jurors.<sup>45</sup> For example, a District Attorney in Mississippi struck black jurors at nearly 4.5 times the rate of white jurors.<sup>46</sup> This attorney is just one example of prosecutors using peremptory challenges to deprive defendants of their Sixth Amendment right to an impartial jury.<sup>47</sup>

### c. Jury Selection in Capital Trials

The repercussions of black defendants sentenced to death by all-white juries threatens the integrity of the justice system and

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> David C. Baldus et. al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 11 (2001).

<sup>41</sup> *Id.*

<sup>42</sup> *Challenge for cause*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/challenge\\_for\\_cause](https://www.law.cornell.edu/wex/challenge_for_cause) (last visited Dec. 8, 2022) [<https://perma.cc/H4HS-QH6F>].

<sup>43</sup> *Swain v. State*, 275 Ala. 508, 515 (1963); *aff'd*, 380 U.S. 202 (1965).

<sup>44</sup> Baldus et al, *supra* note 40, at 29.

<sup>45</sup> Matt Haven, *Reaching Batson's Challenge Twenty-Five Years Later: Eliminating the Peremptory Challenge and Loosening the Challenge for Cause Standard*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 97 (2011).

<sup>46</sup> Wiley, *supra* note 18; Doug Evans, *the District Attorney Who Prosecuted Curtis Flowers Six Times, Retires*, DEATH PENALTY INFO. CTR. (Jul. 12, 2023), <https://deathpenaltyinfo.org/news/doug-evans-the-district-attorney-who-prosecuted-curtis-flowers-six-times-retires> [<https://perma.cc/ZSX5-TRLCL>] (this same District Attorney prosecuted Curtis Flowers, whose death sentence was overturned in *Flowers v. Mississippi*, 139 S.Ct. 2228, 2235 (2019) after the Court found that the prosecutor had unconstitutionally struck black venire jurors).

<sup>47</sup> Wiley, *supra* note 18

enforcement of the Constitution.<sup>48</sup> It is common for black defendants with charges that allow for the death sentence to face an all-white jury.<sup>49</sup> When the death sentence is involved there is an extra layer to screening potential jurors' biases.<sup>50</sup> The first layer is whether the jurors have racial biases, and the second is the venire jurors' attitudes towards capital punishment in general.<sup>51</sup> The inquiry into whether a person opposes the death penalty blanketly is more complex because it is a polarizing topic across the country.<sup>52</sup>

In a dissenting opinion in *Uttecht v. Brown*, 551 U.S. 1, 35 (2007), Justice Stevens wrote that a fair cross section of any community includes people who both support and oppose the death penalty.<sup>53</sup> However, the inquiry is not whether the person opposes or supports the death penalty as a matter of policy, but rather if they are able to set aside their own personal beliefs and make a decision based on the evidence presented.<sup>54</sup> This is where racial bias comes into play.<sup>55</sup> Multiple studies show that white jurors are more likely to think that a black defendant should receive capital punishment than a white defendant who is charged with the same crime.<sup>56</sup> As shown, adding the layer of capital punishment makes the inquiry into jury bias more complex while much more is at stake.

#### d. Judicial Interpretation of the Peremptory Challenge

The peremptory challenge is frequently used by prosecutors to strike venire jury members based on race.<sup>57</sup> Courts are aware of the use of peremptory challenge as a vehicle for exclusion of black persons from juries as it has been the subject of multiple landmark Supreme Court cases.<sup>58</sup> The EJI found that in Houston County, Alabama between 2005 and 2009, prosecutors used peremptory strikes to remove eighty percent of black persons from the jury.<sup>59</sup> The EJI also reported that in Jefferson Parish, Louisiana prosecutors used peremptory strikes to exclude black jurors in eighty percent of

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<sup>48</sup> J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1114 (2014).

<sup>49</sup> See Friedman, *supra* note 28, at 86-87.

<sup>50</sup> Sullivan, *supra* note 48, at 1127.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1128.

<sup>53</sup> *Id.* at 1130 (quoting *Uttecht v. Brown* 551 U.S. 1, 35 (2007) (Stevens, J., dissenting)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1134.

<sup>56</sup> *Race and the Death Penalty*, *supra* note 11.

<sup>57</sup> Baldus et al., *supra* note 40, at 10.

<sup>58</sup> *Id.* at 29-31.

<sup>59</sup> *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, *supra* note 35, at

criminal cases.<sup>60</sup> Most alarming is that many of the defendants in the EJI's study were facing capital punishment.<sup>61</sup>

The first modern case on the use of peremptory challenges to exclude black persons from juries was in the 1965 decision *Swain v. Alabama*, 380 U.S. 202 (1965).<sup>62</sup> It wasn't until over two decades later that the Court issued the landmark decision on peremptory challenges in *Batson v. Kentucky*, 476 U.S. at 79, 83 (1986).<sup>63</sup>

In *Batson* the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment the defendant can use the following to make a prima facie case: statistics of the prosecutor's history of striking black jurors, differences in questions asked to black and white venire jurors, and circumstantial evidence to create an inference of discrimination.<sup>64</sup> If the court finds the defendant made a prima facie case, the burden shifts to the prosecution to provide a race-neutral explanation for the removal of the juror.<sup>65</sup> Lastly, the court must determine if the defendant met its burden of proving purposeful discrimination.<sup>66</sup> While *Batson* was a landmark case in considering the abuse of the peremptory challenge, no judge or scholar has ever argued that *Batson* was successful in reducing the number of peremptory strikes used to remove black persons from the venire jury.<sup>67</sup> Thus, the Sixth Amendment should be considered as an alternative means to achieve the goal of eliminating discrimination against jurors.

## B. Analysis of *Holland v. Illinois*

In *Holland v. Illinois*, the Supreme Court addressed whether the Sixth Amendment is a viable means for defendants to challenge the prosecution's exclusion of jurors based on race.<sup>68</sup> In this case the defendant was convicted of aggravated kidnapping, rape, deviant sexual assault, and armed robbery.<sup>69</sup> It is important to note that the defendant was white, so he would not have standing under the

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Swain v. State*, 380 U.S. 202, 208 (1965) (holding that the Sixth Amendment does not require "the jury roll nor the venire [to] be a perfect mirror of the community or accurately reflect the proportionate[d] strength of every identifiable group.").

<sup>63</sup> *Baldus, et al., supra* note 40, at 30.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 80.

<sup>66</sup> *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy, supra* note 35, at 28.

<sup>67</sup> *Baldus, et al., supra* note 40, at 34 ("There is a substantial body of literature addressing the effectiveness of *Batson* and its progeny in reducing the level of race and gender discrimination in the use of peremptories. To our knowledge, no one has made the case or even argued that the goal of prohibition has been achieved.").

<sup>68</sup> *Holland v. Illinois*, 493 U.S. 474, 476 (1990).

<sup>69</sup> *Id.*

Fourteenth Amendment *Batson* framework; however, the Court found that white defendants do have standing to challenge the guarantees of the Sixth Amendment.<sup>70</sup> At trial the State used peremptory challenges to strike the only two black venire jury members.<sup>71</sup> After the case was appealed to the Illinois Supreme Court, the Supreme Court granted certiorari to determine whether the Sixth Amendment protects against excluding jurors based on race.<sup>72</sup> In a majority opinion delivered by Justice Scalia, the Court held that the Sixth Amendment provides no protection to defendants from peremptory challenges used to exclude certain groups from the petit jury.<sup>73</sup>

The Court drew distinctions between challenges under Fourteenth Amendment Due Process and the Sixth Amendment by referencing back to *Batson*.<sup>74</sup> In *Batson*, the Court found that a defendant can bring a Due Process claim for discriminatory jury selection when they can show the following: (1) membership in the racial group being excluded from the jury, (2) the jury member was removed based on their race, and (3) circumstances that support an inference that the jury member was excluded based on their race.<sup>75</sup> However, the *Holland* Court limited its interpretation of the Sixth Amendment by reasoning that the requirement of a “fair-cross section” calls for an impartial jury, not a representative jury.<sup>76</sup> Because the Court found that a jury is not required to “mirror the community,” it ruled that the Sixth Amendment only protects the right to an impartial jury.<sup>77</sup>

One of the Court’s hesitations in extending the interpretation of the Sixth Amendment to include a guarantee of a representative petit jury was that under the Sixth Amendment any person has standing to challenge a violation of their rights.<sup>78</sup> While under *Batson* only persons of a cognizable racial group could bring a challenge of exclusion of members of that same group.<sup>79</sup> The Court declined to extend the Sixth Amendment protections because it would essentially expand the number of claims that could already be brought under the Fourteenth Amendment so that white persons could then challenge the use of peremptory challenges as racial discrimination.<sup>80</sup>

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<sup>70</sup> *Id.* at 477.

<sup>71</sup> *Id.* at 476-77.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 478.

<sup>74</sup> *Id.*

<sup>75</sup> *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

<sup>76</sup> *Holland*, 493 U.S. at 480.

<sup>77</sup> *Id.* at 483.

<sup>78</sup> *Id.* at 486-87.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

In Justice Marshall's dissent, he criticized the majority's conclusion that the Sixth Amendment can only protect the right to an impartial jury or a jury that mirrors the community.<sup>81</sup> Marshall cited to *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975), which interpreted the Sixth Amendment to include an "impartial jury drawn from a fair cross section of the community."<sup>82</sup> Marshall reasoned that following *stare decisis* the majority was incorrect to define impartial and a "fair cross section" as mutually exclusive because it directly contradicts what the Court held in *Taylor*.<sup>83</sup> Lastly, Marshall argued that *Batson* proved that preventing juror dismissal based on race is possible and critiqued the majority for using the Sixth Amendment as a way to perpetuate racial discrimination in jury selection.<sup>84</sup>

Justice Stevens joined in dissent to explain that the purpose of juries is to serve justice through a fair and accurate representation of the community.<sup>85</sup> Without upholding this principle, public confidence in the fairness of the justice system will be lost.<sup>86</sup> Stevens argues that included in the Sixth Amendment is the defendant's entitlement to a jury chosen without discrimination so that not only the venire jury will represent the community, but the petit jury as well.<sup>87</sup> He clarifies that the Sixth Amendment does not entitle any racial group to be present on a petit jury, but rather the fair cross-section requirement mandates that a neutral selection tool free from discrimination be used.<sup>88</sup> As emphasized by the dissenting Justices, the ruling in *Holland* enabled discrimination in jury selection, thus insulating the petit jury from the fair cross-section requirement.

### C. The Two Components of the Sixth Amendment as Interpreted in *Holland*

The two components of the Sixth Amendment are the right to an impartial jury and a jury drawn from a fair cross section of the community.<sup>89</sup> Contrary to the interpretation of the majority in *Holland*, fifteen years earlier in *Taylor v. Louisiana*, the Court held that the right to a jury made up of a fair cross-section of the community is a "fundamental" part of the Sixth Amendment.<sup>90</sup>

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<sup>81</sup> *Id.* at 493.

<sup>82</sup> *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975).

<sup>83</sup> *See Holland*, 493 U.S. at 494.

<sup>84</sup> *Id.* at 500, 503.

<sup>85</sup> *Id.* at 508-09.

<sup>86</sup> *Id.* at 507.

<sup>87</sup> *Id.* at 514.

<sup>88</sup> *Id.* at 512 ("The fair-cross-section requirement mandates the use of a neutral selection mechanism to generate a jury representative of the community. It does not dictate that any particular group or race have representation on a jury.").

<sup>89</sup> *Taylor v. Louisiana*, 419 U.S. 522, 536 (1975) ("Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community.").

<sup>90</sup> *Id.* at 530.

The majority interprets *Taylor* to mean that only the venire jury must meet the fair cross-section *and* impartial standards of the Sixth Amendment, reasoning that the fair cross-section requirement is dropped for the petit jury.<sup>91</sup> In dissent, Justice Marshall accuses the majority of playing “semantic games” and suffering from “selective amnesia” to reach this conclusion.<sup>92</sup> In fact, *Taylor v. Louisiana* quotes Congress in 28 U.S.C. § 1861 stating it is “the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”<sup>93</sup> As such, following *stare decisis* and the plain language of the *Taylor* opinion, Justice Marshall is correct that the Court previously interpreted the fair-cross section and impartial jury requirements as separate standards of the Sixth Amendment.<sup>94</sup>

### 1. The Right to an Impartial Jury

The Sixth Amendment protects a defendant’s right to a jury trial made up of impartial jurors drawn from a fair cross-section of the community.<sup>95</sup> An impartial jury “has no opinion about the case at the start of the trial and bases its verdict on competent legal evidence.”<sup>96</sup> The Supreme Court interpreted a jury made up of a fair cross section of the community to mean that no groups of persons are systematically excluded from jury service.<sup>97</sup> The Court limits these guarantees to only the petit jury, not the venire jury.<sup>98</sup> This leaves much room for discrimination by litigants and requires recognition by courts to uphold defendants’ Sixth Amendment rights.<sup>99</sup>

### 2. The Right to a Jury Made up a Fair Cross-Section of the Community

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<sup>91</sup> *Holland*, 493 U.S. at 480.

<sup>92</sup> *Id.* at 497, 500.

<sup>93</sup> *Taylor*, 419 U.S. at 529.

<sup>94</sup> *Holland*, 493 U.S. at 494-95.

<sup>95</sup> *Taylor*, 419 U.S. at 536.

<sup>96</sup> *Jury*, BLACK’S LAW DICTIONARY (18th ed. 2005).

<sup>97</sup> *Taylor*, 419 U.S. at 531 (“We are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women...if they are systematically eliminated from jury panels, the Sixth Amendment’s fair-cross-section requirement cannot be satisfied.”); *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (holding that the systematic exclusion of women from jury service is a violation of the Sixth Amendment right to a jury made up of a fair cross section of the community).

<sup>98</sup> *Holland*, 493 U.S. at 483.

<sup>99</sup> *Id.* at 497, 503-04.

The requirement that a jury be made up of a fair cross-section of the community is not actually in the text of the Sixth Amendment but is derived from the traditional understanding of what it means to assemble an “impartial” jury.<sup>100</sup> Although the representative jury requirement has become inextricably linked to the fundamental understanding of the Sixth Amendment, in *Holland* the Court reasons that because it is not a constitutional guarantee, the petit jury is not required to be representative of the community.<sup>101</sup> The Court points to the long history of interpreting the fair cross-section requirement to only apply to the venire jury.<sup>102</sup> In practice, this just means that people of all races must be considered eligible for jury service.<sup>103</sup> The reasoning in *Holland* states that as long as persons of color are brought into the courtroom on the venire jury, it does not matter if peremptory challenges are used to strike every person of color from the venire.<sup>104</sup> So, in practice, the *Holland* decision makes the fair cross-section language that is paramount to the Sixth Amendment largely symbolic.<sup>105</sup>

## II. THE LIMITATIONS OF CHALLENGING JUROR REMOVAL AS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT AND THE DISPARATE IMPACT ON BLACK DEFENDANTS

### A. Reconciling Peremptory Challenges with the Right to an Impartial Jury

The peremptory challenge is viewed as a means to achieve the goals of the Sixth Amendment; however, the peremptory challenge is not itself protected by the Constitution.<sup>106</sup> The Supreme Court has made clear that peremptory challenges are not derived from the Constitution, but established through judicial interpretation.<sup>107</sup> Specifically, the Court said that the erroneous use of a peremptory challenge does not indicate a deprivation of the Sixth Amendment right to an impartial jury.<sup>108</sup> Peremptory challenges are viewed as a means to achieve the constitutional goal of an impartial jury, rather

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<sup>100</sup> *Id.* at 480 (“The fair-cross-section venire requirement is obviously not explicit in [the Constitution], but is derived from the traditional understanding of how an ‘impartial jury’ is assembled.”).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 478-79.

<sup>103</sup> *Id.* at 509.

<sup>104</sup> *See id.* at 478.

<sup>105</sup> *See also id.*

<sup>106</sup> *U.S. v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (“We have long recognized, as well, that [peremptory] challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.”).

<sup>107</sup> *Id.* at 311.

<sup>108</sup> *Id.* at 310-11.

than a constitutional issue itself.<sup>109</sup> However, the Court's decision in *Holland* further separated peremptory challenges and the right to an impartial jury.<sup>110</sup> The Court decided *Holland* under the Sixth Amendment and held that an impartial jury does not necessarily require an accurate representation of the community.<sup>111</sup> This begs the question of how a convicted defendant can receive meaningful redress if their conviction was decided by a biased, unrepresentative jury.

### **B. The Lasting Effects of the *Holland* Reasoning through Defendants Failures to Challenge Abuse of the Peremptory Challenge**

Appellate courts across the country have grappled with identifying the proper issue on appeal for defendants challenging their convictions based on jury discrimination.<sup>112</sup> In *Powers v. Ohio*, 499 U.S. 400 (1991) when a white defendant challenged his murder conviction, the Court was faced with the question of whether the defendant had standing under the Sixth or Fourteenth Amendment.<sup>113</sup> Throughout the opinion the Court cited to *Holland* to reaffirm that objection to the exclusion of a juror with a peremptory challenge based on race is protected under the Fourteenth Amendment rather than the Sixth Amendment.<sup>114</sup> In holding that white defendants can challenge the use of peremptory challenges used for race-based reasons, *Powers* was a win for the Equal Protection Clause, but left the *Holland* reasoning untouched.<sup>115</sup>

In *United States v. Savage*, 970 F.3d 217 (3d Cir. 2020), the Third Circuit held that the defendant did not establish a prima facie violation of his Sixth Amendment right to an impartial jury using statistical analysis of disparities between black persons on the jury and in the community.<sup>116</sup> The Court acknowledged that the Constitution guarantees at the very minimum a petit jury drawn from a representative cross-section of the community, citing to *Holland* and *Taylor*, but rather than focusing on the guarantee of a representative cross-section, the Court focused on statistical threshold showings of representation on the jury wheel.<sup>117</sup>

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<sup>109</sup> *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988).

<sup>110</sup> *Holland*, 493 U.S. at 478 (“We reject petitioner’s fundamental thesis that a prosecutor’s use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the ‘fair possibility’ of a representative jury.”).

<sup>111</sup> *Id.*

<sup>112</sup> *Baldus, et. al., supra* note 40, at 34-35.

<sup>113</sup> *Powers v. Ohio*, 499 U.S. 400, 403-04 (1991).

<sup>114</sup> *Id.* at 409.

<sup>115</sup> *See id.*

<sup>116</sup> *United States v. Savage*, 970 F.3d 217, 252 (3d Cir. 2020).

<sup>117</sup> *Id.* at 252-53.



In the present, courts around the country continue to cite the *Holland* reasoning in determining if defendants state a claim of a violation of the right to a jury drawn from a fair cross-section of the community under the Sixth Amendment.<sup>118</sup> In *State v. Veal*, 972 N.W.2d 728 (Iowa 2022), the defendant challenged his murder conviction based on the fact that the trial venire jury contained five black persons but there were no black persons on the petit jury.<sup>119</sup> Here, the defendant was challenging the use of for-cause strikes and the Iowa Supreme Court emphasized the *Holland* reasoning that neither peremptory nor for-cause strikes fall under the Sixth Amendment.<sup>120</sup> Further, the court also cited to the *Holland* discussion specifying that the fair cross-section guarantee does not extend to the petit jury.<sup>121</sup>

As demonstrated by courts' continued review of convictions based on discrimination in jury selection under the Sixth Amendment, it is clear that this is an issue that needs to be further addressed.<sup>122</sup>

### C. A Sixth Amendment Appeal Is Stronger Than a Fourteenth Amendment Appeal Because the Sixth Amendment Was Designed to Protect Defendants at Trial

Although the Court ruled that defendants can challenge the removal of jurors under the Equal Protection Clause regardless of their race in *Powers v. Ohio*,<sup>123</sup> the ease with which prosecutors use peremptory strikes to remove black venire jurors shows that a stronger remedy than *Batson* and Fourteenth Amendment protections is necessary.<sup>124</sup> The EJI found that peremptory challenges are “a cloak for discrimination,” in a report cited by the Washington State Appellate Court, which noted that “in over [forty] cases since *Batson*, Washington appellate courts have never reversed a conviction based on a trial court’s erroneous denial of a *Batson* Challenge.”<sup>125</sup>

*Batson* did not end racial discrimination in jury selection and the Supreme Court’s reasoning in *Holland* put limits on a defendant’s ability to appeal their conviction under the Sixth Amendment.<sup>126</sup> A fair jury is a cornerstone of the American judicial system, and the

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<sup>118</sup> E.g., *State v. McKnight*, 522 P.3d 1013 (Wash. App. Div. 2 2023), review denied, 528 P.3d 363 (Wash. 2023).

<sup>119</sup> *State v. Veal*, 972 N.W.2d 728, 731 (Iowa 2022).

<sup>120</sup> *Id.* at 734.

<sup>121</sup> *Id.* at 734-35.

<sup>122</sup> See *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, *supra* note 9.

<sup>123</sup> *Powers v. Ohio*, 499 U.S. 400, 403-04 (1991).

<sup>124</sup> Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1901 (2015).

<sup>125</sup> *State v. Saintcalle*, 178, Wash.2d 34, 45-46 (2013).

<sup>126</sup> Tetlow, *supra* note 124, at 1901.

threat of racial discrimination continues to loom heavily over the jury selection process.<sup>127</sup> While all defendants have the right to a jury that is both impartial and a fair cross section of the community at the venire stage, this set of rights should be extended to the petit jury by reversing the *Holland* majority and adopting the propositions in the dissent.<sup>128</sup>

#### D. Achieving an Impartial Jury with a Fair Cross-Section of the Community: The Untapped Potential of *Holland*

In *Holland*, the majority rejected the opportunity to extend the Sixth Amendment to make a stride towards achieving the constitutional goal of a fair and representative jury.<sup>129</sup> The majority reasoned that the Court has never applied the Sixth Amendment requirement of a fair cross section of the community to the petit jury.<sup>130</sup> Justice Scalia wrote, “the constitutional goal of ‘an impartial jury’ would positively be obstructed by a petit jury fair-cross section requirement, which would cripple the peremptory challenge device.”<sup>131</sup> Scalia argues that race was not relevant to the issue before the Court because the petitioner was white.<sup>132</sup> However, race was important in *Holland* not because of the individual defendant, but because of the integrity of the Sixth Amendment and the systematic exclusion of black persons from juries.<sup>133</sup>

The dissents written by Justice Marshall and Justice Stevens give a roadmap for revisiting the *Holland* decision by a future court. Justice Marshall first suggests that the correct interpretation of the Sixth Amendment is to ensure both an impartial jury and fair cross section of the community in both the venire *and* petit jury because each secures its own separate protections.<sup>134</sup> Marshall also points out that to promote public confidence in the jury system the fair cross section requirement must apply to both the venire and petit jury.<sup>135</sup> Finally, Marshall says that this issue is important not just to individual defendants but because the current justice system gives the impression that courts are stacking the deck against black

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<sup>127</sup> See *id.* at 1902.

<sup>128</sup> *Id.* at 1903.

<sup>129</sup> *Holland v. Illinois*, 493 U.S. 474, 478 (1990).

<sup>130</sup> *Id.* at 482-83.

<sup>131</sup> *Id.* at 475.

<sup>132</sup> See *id.* at 487.

<sup>133</sup> *Id.* at 495. (“Had the majority in this case acknowledged that the fair-cross section requirement serves these purposes, it would have been hard pressed to deny that the exclusion of Afro-Americans from petit juries on the basis of their race violates the Sixth Amendment.”).

<sup>134</sup> *Id.* at 493-94.

<sup>135</sup> *Id.* at 499-500.

defendants by allowing for the removal of black venire jurors.<sup>136</sup> By acknowledging the weight of the fair cross-section requirement on its own, the exclusion of a juror based on their race becomes a violation of the Sixth Amendment.<sup>137</sup> Marshall keeps in mind the larger goal of promoting an inclusive system to prevent racial discrimination in petit juries, concluding his dissent by stating: "The elimination of racial discrimination in our system of criminal justice is not a constitutional goal that should lightly be set aside."<sup>138</sup>

Justice Stevens took a different approach in his dissent, arguing that the majority's refusal to extend the Sixth Amendment is a violation of the Equal Protection Clause because under *Batson*, the systemic exclusion of black jurors from the petit jury is unconstitutional.<sup>139</sup> He concluded that any form of discrimination in jury selection cannot result in an impartial jury and a "neutral" selection of the jury to achieve the goals of the Sixth Amendment.<sup>140</sup> Justice Stevens focuses largely on expanding protections of the Sixth Amendment using the same framework as *Batson* and the Equal Protection Clause.<sup>141</sup> However, he emphasizes the fact that even when prosecutors give facially neutral reasons for dismissing black jurors, there is still an equally harmful violation of the Sixth Amendment.<sup>142</sup> Ultimately Justice Stevens recognizes that regardless of where the Court falls on the fair cross-section issue, a jury selected with racial animus cannot be impartial.<sup>143</sup>

Both dissenting Justices write opinions with meaningful analysis and in-depth reasoning to extend the fair cross-section requirement to the petit jury and address the pervasive racial discrimination in the justice system.<sup>144</sup> Neither dissenting Justice seems concerned about the crumbling of the peremptory challenge system if the Sixth Amendment were extended,<sup>145</sup> thus opening the door for realistic conversations on alternatives to eradicate discrimination in jury selection.<sup>146</sup>

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<sup>136</sup> *Id.* ("Public confidence is undermined by the appearance that the government is trying to stack the deck against criminal defendants and to remove Afro-Americans from jury service solely because of their race.").

<sup>137</sup> *Id.* at 505-06.

<sup>138</sup> *Id.* at 503-04.

<sup>139</sup> *Id.* at 516.

<sup>140</sup> *Id.* at 512.

<sup>141</sup> *Id.* at 520.

<sup>142</sup> *Id.* at 517.

<sup>143</sup> *Id.* at 506.

<sup>144</sup> *Id.* at 490, 508.

<sup>145</sup> *Id.* at 503, 519.

<sup>146</sup> See Debra L. Dippel, *Holland v. Illinois: Sixth Amendment Fair Cross Section Requirement Does Not Preclude Racially Based Peremptory Challenges*, 24 AKRON L. REV. 177, 195 (1990).

### III. REWORKING THE PEREMPTORY CHALLENGE, REPEAL OF *HOLLAND*, AND A BROAD INTERPRETATION OF THE SIXTH AMENDMENT: OPTIONS TO DECREASE THE OVERREPRESENTATION OF BLACK DEFENDANTS ON DEATH ROW

#### A. Proposal to Change the Peremptory Challenge System

The *Holland* majority claims that extending the right to a fair cross-section to the petit jury would require the absolute elimination of the peremptory challenge.<sup>147</sup> The opinion argues that this would allow the defendant to claim that any juror who was dismissed on a peremptory challenge was part of a minority group.<sup>148</sup> Some scholars argue that because of biases, both conscious and unconscious, it is impossible to decrease jury selection discrimination without the total elimination of the peremptory challenge system.<sup>149</sup> While recognizing the drastic effects the elimination of the peremptory challenge would have on the litigation system, proponents of this approach argue that it is the only way to prevent prosecutors from improperly striking venire jurors.<sup>150</sup>

There is merit to the argument that eliminating the peremptory challenge is not a useful solution and would likely cause needless confusion and chaos to criminal procedure and trial administration.<sup>151</sup> The absolute elimination of the peremptory challenge threatens the defendant's right to an impartial jury by allowing persons with blatant bias to remain on the petit jury.<sup>152</sup> This issue presents implications that threaten both peremptory challenges and the Sixth Amendment, which has made it a popular topic amongst scholars who propose various hybridizations and solutions to the issue.<sup>153</sup>

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<sup>147</sup> See *Holland*, 493 U.S. at 484.

<sup>148</sup> *Id.*

<sup>149</sup> Haven, *supra* note 45, at 119; William T. Pizzi et. al., *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1432 (2001) (arguing that elimination of the peremptory challenge can be done without any constitutional implications).

<sup>150</sup> Haven, *supra* note 45, at 119.

<sup>151</sup> See *Holland*, 493 U.S. at 486.

<sup>152</sup> Dippel, *supra* note 146, at 193.

<sup>153</sup> See *id.* (A popular theory amongst scholars and judges is to eliminate the peremptory challenge and substitute Batson's test with a challenge for cause); see also David Zonana, *The Effect of Assumptions About Racial Bias on the Analysis of Batson's Three Harms and the Peremptory Challenge*, 1994 ANN. SURV. AM. L. 203, 223 (1995) (proposing three alternatives to the current peremptory system including random selection after challenges for cause are completed, required comparison against the community demographics, and race-based peremptory challenges only permitted for the defendant).

## 1. A Presumption of Discrimination Framework to Reform the Use of Peremptory Challenges

In *Holland* the defendant asked the Court to extend the prima facie standard used to establish a violation of the Sixth Amendment.<sup>154</sup> The defendant proposed the following framework: first, the defendant objects to the use of the peremptory challenge to exclude black persons from the jury; then, the burden would shift to the prosecutor to propose a race neutral explanation for the exclusion of black jurors.<sup>155</sup> If the prosecutor is unable to do so, then there would be a violation of the Sixth Amendment.<sup>156</sup>

My proposal for a framework to establish a violation of the Sixth Amendment takes the prima facie case proposed by the defendant in *Holland* a step further by adopting a presumption of discrimination that the prosecution must overcome.<sup>157</sup> A blanket approach of eliminating the peremptory challenge will not be effective because it will eliminate a tool that can be legitimately used to achieve the Constitutional goal of an impartial jury.<sup>158</sup> Rather, there should be a higher bar that prosecutors must overcome when their motives for using a peremptory challenge are questioned and these issues should be evaluated on a case-by-case basis.<sup>159</sup>

Adopting a presumption of discrimination approach would take the framework proposed by the defendant in *Holland* and enhance it to protect against elimination of black venire jurors and deter prosecutors from using their peremptory challenges for discriminatory reasons.<sup>160</sup> A presumption of discrimination framework would allow defendants to challenge peremptory challenges by producing evidence of the prosecutor's exclusion of black venire jurors and that particular prosecutor's history of exclusion of jurors based on race.<sup>161</sup> If the defendant meets this burden, then the prosecution would have to meet a burden of persuasion that they dismissed jurors for race neutral reasons.<sup>162</sup> By

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<sup>154</sup> *Holland*, 493 U.S. at 478.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975) (previous approaches by the Court focused on identifying systemic exclusions of minority groups by comparing the percentage of the group in the community to the percentage selected for the venire jury looking for a gross discrepancy that would violate the Sixth Amendment).

<sup>158</sup> See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986).

<sup>159</sup> See *People v. Smith*, 463 Mich. 199, 204 (2000) (adopting a case-by-case approach to analyzing racial representation in jury selection).

<sup>160</sup> *Holland*, 493 U.S. at 503 (criticizing the majority for failing to take steps to eliminate racial discrimination).

<sup>161</sup> *Id.* at 478.

<sup>162</sup> *Id.* at 516 ("The peremptory challenge procedure, when it is used to remove members of a particular racial group, is no longer presumed to serve the State's interest in obtaining a fair and impartial jury.").

putting a higher burden on the prosecution to justify their use of peremptory challenges, courts will take a step closer to eliminating the racial discrimination in jury selection and protecting the Sixth Amendment rights of defendants.<sup>163</sup>

## B. Extension of the Sixth Amendment

A large problem with the *Holland* decision was that it narrowed the interpretation of the Sixth Amendment to eliminate the possibility of fair cross-section representation at the petit jury stage.<sup>164</sup> By reversing the *Holland* decision and alternatively holding that the exclusion of black persons from the petit jury violates the fair cross section requirement of the Sixth Amendment, defendants and jurors alike would have a constitutional protection of their rights at trial.<sup>165</sup>

Some argue that extending the Sixth Amendment fair cross-section guarantee to the petit jury will create an impossible standard for courts to uphold because the Sixth Amendment protects all defendants, not just those in cognizable racial groups.<sup>166</sup> These critics argue that an extension of the fair cross-section requirement cannot fit in with the random jury wheel selection system and will produce over-representation of minorities on petit juries.<sup>167</sup> While it is true that defendants are not entitled to any particular jury composition,<sup>168</sup> the fear of formulaic jury make-up is overshadowed by the dire necessity to address the deeply-rooted racial discrimination in the criminal justice system.<sup>169</sup>

## C. The Necessity to Broaden Sixth Amendment Protections for Black Capital Defendants

There is a sense of urgency to provide grounds of relief for future black defendants on trial for charges that carry the death penalty and for black defendants on death row to appeal their convictions; without strong Sixth Amendment protections, many do not have options for appeal.<sup>170</sup> Black persons facing capital trial have multiple

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<sup>163</sup> *Id.* at 495.

<sup>164</sup> *Id.* at 475.

<sup>165</sup> *Id.* at 503.

<sup>166</sup> Alice Biedenbender, *Holland v. Illinois: A Sixth Amendment Attack on the Use of Discriminatory Peremptory Challenges*, 40 CATH. U. L. REV. 651 665-66 (1991).

<sup>167</sup> *Id.* at 676.

<sup>168</sup> *Holland*, 493 U.S. at 483.

<sup>169</sup> *Id.* at 503.

<sup>170</sup> See *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005)) (“Because racially-motivated jury selection is still prevalent

factors working against them. As illustrated, they are less likely to have a jury drawn from a fair cross-section of the community,<sup>171</sup> and they are more likely to receive the death penalty than their white counterparts.<sup>172</sup>

Just a few years ago in *Flowers v. Mississippi*, 139 S.Ct. 2228 (2019), the Supreme Court recognized this problem but has done little to combat it.<sup>173</sup> In banning the use of peremptory strike based on racial discrimination, Justice Kavanaugh wrote for the majority saying, “The State’s relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury.”<sup>174</sup> While this language in theory addresses the exact problem with the Court’s previously narrow interpretations of the Sixth Amendment, the opinion ends up as a regurgitation of *Batson*.<sup>175</sup>

To adequately address the continuing problem of racial discrimination in jury trials, especially capital trials, the Court must enforce a presumption of discrimination when defendants challenge the use of peremptory challenges. Further, the reversal of *Holland* to extend the Sixth Amendment will grant more protection to defendants and create grounds for appeal. This will be more effective, rather than restating cases with merely symbolic language that have shown to be ineffective in eradicating racial discrimination in jury selection.

A significant problem with the Supreme Court’s interpretations of impartiality and fair cross-section is that they do not recognize the real-world individuals who their decisions are harming. The overrepresentation of black defendants on death row convicted by a white jury show that these issues are necessarily intertwined.<sup>176</sup> Therefore, these issues need to be discussed together because creating juries made up of a fair cross section of the community in capital trials requires addressing people’s attitudes towards the

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twenty years after *Batson* was handed down and because this case evinces an effort by the State to exclude African Americans from jury service, we agree that it is ‘necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.’”).

<sup>171</sup> Baldus, *supra* note 40.

<sup>172</sup> List of Federal Death Row Prisoners, DEATH PENALTY INFO. CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> (last visited Aug 22, 2023) [<https://perma.cc/SB2Z-HA29>] (Of the 44 prisoners currently on death row, 17 (41.5%) are black).

<sup>173</sup> See *Flowers v. Mississippi*, 139 S.Ct. 2228, 2235 (2019) (prosecuting defendant multiple murders in Mississippi. Through appeal and remands, the defendant went through six trials regarding these charges. In four of the trials the prosecution removed all thirty-six black venire jurors from the panel); See also *Doug Evans, the District Attorney Who Prosecuted Curtis Flowers Six Times, Retires*, *supra* note 46.

<sup>174</sup> *Flowers*, 139 S.Ct. at 2246.

<sup>175</sup> See *id.* (The majority cited to *Batson* dozens of times throughout the opinion. This case essentially applied the exact reasoning and steps of *Batson* three decades later).

<sup>176</sup> See *Race and the Jury: Illegal Racial Discrimination in Jury Selection*, *supra* note 9.

death penalty specifically as it relates to the execution of black persons.

## CONCLUSION

Racial discrimination is pervasive throughout the entire justice system at every step of jury trials. The people most susceptible to this discrimination are black capital defendants. A critical part of capital defendants' trial is jury selection, which has become rampant with bias that go tolerated or undetected. The peremptory strike is one of the methods most widely used to perpetuate racial discrimination against venire jurors. In *Holland* the Supreme Court had the opportunity to make strides towards ending racial discrimination in jury selection; however, it ignored the rampant issue and further separating the issues of peremptory challenges and the Sixth Amendment. By extending the Sixth Amendment, defendants, specifically black capital defendants, will have greater protection from racial discrimination in jury selection and courts will produce more equitable outcomes.