Discrimination and Death in Dallas: A Case Study in Systematic Racial Exclusion

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I. Introduction

In *Swain v. Alabama*,[1] the Supreme Court recognized that prosecutors are entitled to a presumption that they exercise their peremptory strikes in order "to obtain a fair and impartial jury."[2] The Court held that a defendant could overcome that presumption by a prima facie showing that a prosecutor's peremptory strikes were exercised in a racially discriminatory manner. In order to establish a prima facie case, the defendant must come forward with "[s]uch proof [that] might support a reasonable inference that [blacks] are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny [blacks] the same right and opportunity to participate in the administration of justice enjoyed by the white population."[3] Over thirty years later, the United States Court of Appeals for the Fifth Circuit has yet to grant *Swain* relief in a single case. To appreciate the significance of this fact, consider that the Fifth Circuit, until its split in 1981, encompassed Texas, Mississippi, Louisiana, Georgia, Alabama, and Florida, and continues to hear appeals from federal courts in Texas, Mississippi and Louisiana. Officially-sanctioned racial discrimination in jury selection was more prevalent in these states than in any others in the union. The jury selection practices employed by the present and former Fifth Circuit states during the *Swain* era have been exposed and condemned as racially discriminatory in dozens, if not hundreds, of federal and state lawsuits.[4]

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1. 380 U.S. 202 (1965).
2. *Id.* at 222.
3. *Id.* at 224.
4. *See, e.g.*, Amadeo v. Zant, 486 U.S. 214, 217-18 (1988) (revealing that Georgia jury commissioner complied with local District Attorney's Office request that African Americans and women be underrepresented by a margin just short of that required to trigger *Swain* scrutiny); Castaneda v. Partida, 430 U.S. 482, 499 (1977) (holding that plaintiff had established, and State had not attempted to rebut, prima facie claim based on jury-selection practices resulting in significant underrepresentation of Hispanics on grand jury in a Texas county with a Hispanic majority); Alexander v. Louisiana, 405 U.S. 625, 627-28, 630-31 (1972) (finding racial discrimination in Louisiana case in which non-race neutral selection process led to all white grand jury despite the fact that county was 21% black); Carter v. Jury Comm'n, Greene County, 396 U.S. 320 (1970) (finding "overwhelming proof" of discrimination in grand-jury selection when, in 65% African American county, jury selection procedures led to representation of African Americans on grand juries as low as 4%); Jordan v. State, 293 So.2d 131, 133 (Fla. Dist. Ct. App. 1974) (finding Sarasota County, Florida, jury selection procedures led to significant underrepresentation of minority jurors); *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 899 (1982) (noting that one demand of Alabama civil rights protesters was "selection of blacks for jury duty").

Given this history, the absence of a single case granting *Swain* relief in the Fifth Circuit deserves consideration.[5] There are only two possible explanations. First, the racial discrimination, so clear in the beginning stages of the jury selection process, suddenly and inexplicably vanishes at the end of the process, when the prosecution exercises its peremptory challenges. Second, the discrimination is equally prevalent at the end of the process, but is merely cloaked by the discretion prosecutors enjoy in making peremptory challenges and by the *Swain* burden of proof, which the Supreme Court later describes as "crippling."[6] Obviously, the second explanation is correct. The Supreme Court recognized as much, observing that the *Swain* formulation rendered the prosecutions' peremptory challenges "largely immune from constitutional scrutiny."[7] Unfortunately, *Batson* came much too late for thousands of criminal defendants in Dallas County, who were tried, convicted, and sentenced sometimes to death by juries from which the prosecutor had intentionally removed all African American jurors. As this Article establishes, the Dallas County District Attorney's Office consistently struck all African Americans from criminal petit juries in Dallas County. The practice lasted well into the 1980s, and may well continue to this day. What is especially disheartening about the discrimination practiced by Dallas County is how open it was. Not only did Dallas County prosecutors discriminate, they saw no particular need to hide the fact, for they knew that there was no entity above them that had both the power and the desire to stop the practice.

II. Evidence of Discrimination

In 1986, Dallas County District Attorney Henry Wade stepped down after an extraordinary thirty-six years in office.[8] While Mr. Wade was District Attorney, the established practice of his office was to allow as few minorities as possible, especially African Americans, onto criminal juries. This policy proved remarkably resistant to public scrutiny and judicial oversight.

A. Supreme Court Scrutiny of Dallas County Jury Selection Procedures

Racial discrimination in the jury selection process in Dallas County became an issue of public concern at least as early as the 1930s, when African Americans

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5. *See* United States v. Childress, 715 F.2d 1313, 1316 (8th Cir. 1983) (noting that court's research had, to that date, found only two cases decided since 1965 in which defendants received relief under *Swain*).

6. Batson v. Kentucky, 476 U.S. 79, 92 (1986).

7. *Id.* at 92-93.

8. *See* Bobette Riner, *Dallas Legend: He's a Tough Act to Follow*, NAT'L L.J., Jan. 29, 1990, at 28 (noting one district judge's comment that Mr. Wade's power was such that "'[n]o one could make a move in the courthouse without consulting him,'" and that most of the lawyers and trial and appellate judges interviewed for the article requested anonymity in their discussions of Mr. Wade even though he had been retired for almost four years when it was written).

gained attention by demanding to be allowed onto juries.[9] In 1940, the United States Supreme Court decided *Smith v. Texas*.[10] In *Smith*, the Court considered Harris County's application of Texas' "key man" system of grand jury selection.[11] This procedure involved the appointment of three grand jury commissioners, who in turn selected sixteen grand jurors from a list of the county assessment rolls.[12] The first twelve available jurors from this list would be chosen to sit.[13] Smith presented evidence that, from 1931-38, of the 384 individuals who served on Harris County grand juries, only five were African American.[14] African Americans then constituted twenty percent of the population of Harris County, and ten percent of the tax-paying population.[15] Smith, an African American who had been convicted of rape, contended that the obvious discrimination in the selection of the grand jury that indicted him violated the Fourteenth Amendment.[16] The Supreme Court agreed:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. . .. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.[17]

The Court held that the key man system was not facially unconstitutional but that its implementation had been clearly unconstitutional in this case.[18] The Court brushed aside the grand jury commissioners' declarations that they had not intentionally excluded African Americans, noting that, regardless of the motive, "the Fourteenth Amendment prohibits . . . racial discrimination in the selection of

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9. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALLAS MORNING NEWS, Mar. 9, 1986, at 1A (noting that riots were narrowly averted when "blacks appeared at the [Dallas County] courthouse, insisting they be considered for jury service" and that an African American university president had been thrown down the courthouse stairs when he refused to leave the central jury room).

10. 311 U.S. 128.

11. *Id.* at 131 n.5 (describing system).

12. *Id.*

13. *Id.* at 129.

14. *Id.* at 128-29.

15. *Id.*

16. *Id.* at 129.

17. *Id.* at 130.

18. *Id.* at 131-32. The Court noted that, in an apparent attempt to hide the discrimination, the grand jury commissioners had indeed placed the names of African Americans on some grand jury lists, but had often put them in the 16th position, meaning that they would be chosen only in the unlikely event that a grand jury of 12 could not be selected from the first 15 jurors. *Id.* at 131. The court opined that "chance and accident [could not] have been responsible for the combination of circumstances" that so often led to this ordering of the names. *Id.*

grand juries."[19]

Smith, of course, merely reaffirmed a rule announced by the Supreme Court more than sixty years earlier in *Neal v. Delaware*,[20] and which had been continually upheld in an "unbroken line of case law."[21] If it was a clarion call to Texas grand jury commissioners, Dallas County did not hear it. Two years after *Smith*, the Court turned its attention to Dallas County, where the evidence of discrimination in grand jury selection was even more stark. Although African Americans constituted fifteen percent of the population of Dallas County, and twelve percent of the tax-paying population, *not a single member* of that race had ever been given a citation to serve as a grand juror within the memory of any of the attorneys who testified at an evidentiary hearing.[22] Again the Court unanimously denounced the practice in the strongest terms:

> [N]o state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. . . . Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand.[23]

After this rebuke, Dallas County grand jury commissioners decided to allow one and only one African American onto grand juries.[24] The Supreme Court upheld this practice, noting that the grand jury commissioner's decision belied any assertion that Dallas County the jury commissioner had "deliberately and intentionally" excluded black jurors.[25] Two Justices dissented without opinion, and Justice Murphy joined them, asserting that "[r]acial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause."[26]

After *Akins*, Dallas County authorities gave the least possible scope to the Supreme Court's decisions. The twenty-one grand jury lists generated after *Akins* contained one, *and only one*, member of African American descent.[27] Revisiting

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19. *Id.* at 132.
20. 103 U.S. 370, 397 (1880).
21. Vasquez v. Hillery, 474 U.S. 254, 261 (1986). *See also* Neal, 103 U.S. at 397 (collecting cases).
22. Hill v. Texas, 316 U.S. 400, 403 (1942).
23. *Id.* at 406.
24. Akins v. Texas, 325 U.S. 398, 405 (1945) (reprinting one Dallas County grand jury commissioner's remark that "[w]e had no intention of placing more than one negro on the panel") *Id.* at 406.
25. *Id.* at 407.
26. *Id.* at 408 (Murphy, J., dissenting).
27. Cassell v. Texas, 339 U.S. 282, 286 (1950).

the Dallas County grand jury system for the third time in eight years, the Court reversed its earlier determination that Dallas County's policy of limiting African American representation on grand juries to one member was constitutionally acceptable: "If . . . commissioners should limit proportionally the number of Negroes selected for grand-jury service, such limitation would violate our Constitution. Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race."[28] In fact, the Court imposed on the commissioners a positive duty to "familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color."[29]

B. Dallas County Jury Selection During the 1960s and 1970s.

1. Evidence from *Mr. Miller-El v. State* and the *Dallas Morning News* Article

The Honorable Jack Hampton, then Presiding Judge of the 283rd District Court of Dallas County, told the Dallas Morning News about an incident that had occurred when he worked for Henry Wade in the late 1950s. Judge Hampton had allowed an African American woman to serve on a jury hearing a DWI case. When the jury hung because of the woman's reluctance to find the defendant guilty, Henry Wade personally reprimanded Hampton, warning him: "If you ever put another nigger on a jury, you're fired."[30] Hampton never put another African American on a jury for the remainder of his tenure at the DA's office.[31] The *Dallas Morning News* articles appeared during pretrial proceedings in the March 1986 death penalty trial of Thomas Joe Miller-El in Dallas. Miller-El's attorneys, noting that the prosecution had struck ten of eleven otherwise qualified African American jurors with peremptory challenges during jury selection, filed a challenge under *Swain* (*Batson* was not decided until a month later). During a pretrial hearing on the *Swain* claim, Miller-El's attorneys called several judges, defense attorneys, and current and former prosecutors to testify concerning racial discrimination in Dallas jury selection.[32] Hampton reaffirmed the story about Wade's command to him under oath during the hearing.[33] Hampton also testified about the office policy concerning peremptory strikes:

> Q. If there were one or more blacks in the first thirty-two [jurors called], what do [sic] you do as a felony prosecutor for Henry Wade?

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28. *Id.*

29. *Id.* at 289.

30. McGonigle & Timms, *supra* note 9. When asked for comment by the reporters, Wade said: "That didn't happen, so far as I'm concerned." *Id.*

31. *Id.*

32. *See* Pretrial Hearing at 30-147, Miller-El v. State, No. F85-78660 (Criminal Dist. Ct. No. 5, Dallas County, Texas, Mar. 12, 1986) (hereinafter "*Miller-El Hearing*"). This document is on file with the author.

33. *See id.* at 59-60.

A. We usually got them off, used the peremptory challenges.

Q. Do you know whether or not other felony prosecutors—let me back up. Do you know whether or not other misdemeanor prosecutors were doing the same thing that you were doing with respect to getting blacks off of juries when you were in misdemeanor courts?

A. I think we all handled it about the same way, we didn't talk much about it, but from observation that is what happened.

Q. Would the same be true with respect to getting blacks off of felony juries for the couple of years that you were in felony court?

A. The same would be true.

Q. And when a black did not—was not challenged for cause and that cause was sustained, the only other way that you got that black juror off was to peremptorily challenge him?

A. That's the only way.[34]

Hampton further testified that in the 80-100 felony cases he had tried in his nineteen years of private practice before taking the bench, the number of black jurors actually seated at these trials was "considerably small."[35]

John Stauffer, a lawyer in private practice at the time of Mr. Miller-El's trial, worked for the Dallas County DA from 1964 until 1979.[36] He prosecuted at least three or four capital murder cases.[37] He remembered with pride a 1971 case, called the "Blitz Bandit" case, that he helped prosecute.[38] The victim in that case was an older white woman, and the defendant was a young black male.[39] The State allowed an African American man to sit on the jury, and the jurors elected him foreman.[40] The jury deliberated for eleven hours to decide on the defendant's guilt, but took only one hour to decide that he should receive the electric chair.[41] The reason Stauffer remembered this trial so well is telling:

It was my understanding that that—when this black man was taken as a juror in the [Blitz Bandit] case . . . that I had the distinction at

34. *Id.* at 61.
35. *Id.* at 62.
36. *Id.* at 117.
37. *Id.* at 120.
38. *Id.* at 121.
39. *Id.*
40. *Id.*
41. *Id.* at 122.

> that time of being the first prosecutor in the state trying a death penalty case—not just here but anywhere in the state—wherein the accused citizen was a black person and the victim was a white person, wherein a black person ended up on the jury. I sort of wear that proudly.[42]

Stauffer admitted that, on the other capital murder cases he had tried, there might not have been any black jurors.[43]

Larry Baraka, who at the time of Mr. Miller-El's trial was the Judge of Criminal District Court No. 2, began working for the Dallas County DA's office in 1976.[44] He recalled that he was the only African American prosecutor in Dallas County's ninety-person DA's office.[45] In 1978, he became the first black attorney to be promoted to the felony courts.[46] During his years in the criminal courts, he recalled that juries were mostly white.[47] He agreed with Mr. Miller-El's defense counsel that the Dallas County DA's office had engaged in "systematic exclusion of blacks by the State from juries."[48] This opinion was based on his observation of the operation of the criminal justice system from the perspective of the prosecution, the defense, and the bench.[49] He stated that he had thought the DA's office had begun to be more inclusive with jury selection since around 1980, but that he was "in shock" to read that the *Dallas Morning News* study revealed that little progress had taken place.[50]

Ralph Tait, a Public Defender of Dallas County when Mr. Miller-El was tried, testified concerning his many years of experience trying criminal cases in Dallas. While working in the DA's office as a misdemeanor prosecutor from 1966 until 1968, Tait noted that, during his tenure at the DA's office, "there was no school, or training, or handbook."[51] He recalled no official policy of excluding black jurors from service.[52] However, he noted that several individual prosecutors felt that it was very important to exclude African Americans from juries.[53] After leaving the DA's office, Tait practiced as a private criminal defense lawyer.[54] In approximately 250 criminal trials in which he was involved, only about fifteen to twenty were tried by juries that contained even one black juror.[55] Tait testified that,

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42. *Id.* at 123.
43. *Id.* at 121.
44. *Id.* at 73.
45. *Id.* According to the Dallas Morning News article, Dallas attorney Carl Gaines became the second African American hired by the Dallas County DA's office in 1975. *See* McGonigle & Timms, *supra* note 9.
46. *Miller-El* hearing, *supra* note 32, at 73.
47. *Id.* at 74.
48. *Id.* at 76.
49. *Id.*
50. *Id.* at 75.
51. *Id.* at 85.
52. *Id.*
53. *Id.* at 85-86.
54. *Id.* at 86-87.
55. *Id.* at 87.

like many Dallas criminal defense attorneys, he never "wasted" a defense strike on minority jurors, no matter how undesirable to the defense, because he relied on the "assumption that the State would strike the black and Hispanic jurors."[56]

2. Evidence from the Challenge to Dallas County's Practices in *Ex Parte Haliburton*

Another valuable source of information on Dallas County's jury selection practices is *Ex parte Haliburton*.[57] Charlie Joe Haliburton was convicted of aggravated robbery in Dallas County in 1980.[58] He filed an Application for a Writ of Habeas Corpus in 1987, alleging that his conviction was unconstitutional because the representatives of the Dallas County DA's office routinely used peremptory strikes against African Americans in violation of *Swain*.[59] On November 30, 1987, the CCA remanded Haliburton's petition to the trial court and ordered that counsel be appointed for him so that he could provide evidence in support of his *Swain* claim.[60] He offered a great deal of evidence to the effect that the Dallas County prosecutor's office routinely used its peremptory challenges against African American jurors.[61] The CCA, adopting Federal Circuit Court precedent, chose to impose upon Haliburton the burden of proving not only that the DA's office had a systematic practice of excluding prospective black jurors, but also that this practice "*continued unabated in petitioner's trial.*"[62] The trial court found, however, that the prosecutor in Haliburton's case used only seven of his allotted ten peremptory challenges, and that all the jurors so struck were white.[63] Because he could not establish a necessary component of his claim, the CCA did not decide whether the evidence proffered at his evidentiary hearing demonstrated systematic discrimination in Dallas County.[64] However, the court did reprint the substance of the evidence in a large footnote, declaring that the information "aids in understanding [the] applicant's claim."[65]

This footnote (which spans two pages) contains other valuable information about the practices of the Dallas County DA's office. Larry Mitchell, a "board

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56. *Id.*; *see also* McGonigle & Timms, *supra* note 9 ("The practice of prosecutors excluding blacks is so commonplace that defense lawyers say they routinely incorporate it into their trial strategy, rarely dismissing even prosecution-minded blacks, anticipating that prosecutors will use one of their peremptory challenges to do the job for them.").

57. 755 S.W.2d 131 (Tex. Crim. App. 1988).

58. *Id.* at 136.

59. *Id.* at 132. Haliburton also sought relief under *Batson*, but was foreclosed from doing so because his conviction had become final prior to the decision. *Id.* at 132 n.1. *See* Allen v. Hardy, 478 U.S. 255, 260 (1986) (holding that *Batson* should not be applied retroactively to cases which became final before it was decided).

60. *Id.* at 132.

61. *Id.* at 133 n.4.

62. *Id.* at 134 (quoting Evans v. Cabana, 821 F.2d 1065, 1068 (5th Cir. 1987) quoting in turn Willis v. Zant, 720 F.2d 1212, 1220 (11th Cir. 1983) (emphasis in original).

63. *Id.* at 132 n.3.

64. *Id.* at 135.

65. *Id.* at 133 n.4.

certified criminal law specialist and former judge," participated in 150-200 felony trials in Dallas County.[66] He declared that "the Dallas County district attorney's office systematically excluded blacks through the use of peremptory challenges and that when blacks did serve on juries, it was extremely unusual and token representation."[67] The Sparling Memo,[68] a document prepared by the District Attorney's Office advocating the removal of minorities and Jews from criminal juries, was well known, and the behavior he saw in court day in and day out confirmed that the memo "was pretty much followed as the policy of the District Attorney's office."[69] Fred Tinsley, also a former judge and criminal law specialist, had a clientele composed primarily of African American criminal defendants. He agreed that the Dallas County DA's office "systematically excluded blacks from juries," especially when the victim was white.[70] He related that individual Dallas prosecutors had informed him that they systematically struck African American jurors, but that it was not the official policy of the DA's office to do so.[71]

Ron Goranson, another Dallas County criminal defense attorney, echoed the perceptions of Mitchell and Tinsley. Goranson maintained that it was an "informal" policy of the Dallas County DA's office to strike all prospective black jurors.[72] Goranson himself remembered never seeing an African American juror on any panel in Dallas County until 1980.[73] Confirming the *Dallas Morning News* article's observation, Goranson observed that he never bothered to strike even pro-State African American jurors because he knew the State would do so regardless.[74] Goranson noted that prosecutors generally denied that there was ever an official "policy" recommending the striking of minorities, but declared that debates about whether striking minorities was a "policy" of the DA's office missed the point:

> I don't know how long Mr. Sparling's article stayed in the so-called "prosecutors' manual." I am aware—and this is going to be based on my opinion—that it was passed on from prosecutor to prosecutor as they were learning how to try cases; that if you wanted to get "guilties" and get promoted you struck minorities, and it's that simple, and that system seemed to survive past the time [the mid-1970s] in which minority prosecutors began [to be hired]; I mean, the

66. *Id.*
67. *Id.*
68. After it was written, this memo was incorporated into a larger manual distributed to most Dallas County prosecutors. A version of the memo was introduced as a defense exhibit in the *Miller-El* pretrial hearing. It is paginated from page 301-18, reflecting its inclusion in a larger volume. This version of the memo will be referred to throughout this Article.
69. Statement of Facts, In the Matter of Charlie Joe Haliburton, Jr., Writ No. W-80-1312-QA, at 12 (Dist. Ct. of Dallas County, 204th Judicial Dist. of Texas, March 3-4, 1988) (hereinafter *"Haliburton Hearing"*). This document is on file with the author.
70. *Haliburton*, 755 S.W.2d at 133 n.4.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

> same time the blacks started coming in, the same time women started becoming prosecutors, too.[75]

Richard Anderson, who had practiced in Dallas county since 1973, agreed that "the [D]istrict [A]ttorney's office had an unwritten policy of excluding blacks solely for racial reasons."[76] Peter Lesser, a Dallas County defense attorney, stated that prosecutors "readily acknowledged" to him that the DA's office used "peremptory challenges to exclude blacks from juries."[77] Michael Byck, who had represented Mr. Haliburton at trial, also declared that in his experience, "the Dallas County [D]istrict [A]ttorney's office systematically excluded blacks from jury panels during 1979-1981."[78]

Prosecutors also testified during the *Haliburton Hearing*. As might be expected, one of the prosecutors who convicted Haliburton, James Jacks, testified that he did not engage in racial discrimination while picking Haliburton's jury.[79] He further observed that it was not a policy of the DA's office systematically to exclude African American veniremembers.[80] Ron Wells, a fellow prosecutor, confirmed that exclusion of African Americans was not the policy of the DA's office. He did note that, shortly after he joined the DA's office in 1980, he was given a copy of the standard prosecutor's manual, which at that time contained the memorandum written by John Sparling, advising Dallas County prosecutors to exercise their peremptory challenges against minority jurors.[81] This account confirmed Larry Mitchell's testimony that he had seen a prosecutor's manual containing the memo in question in 1979-1981.[82]

One of the most intriguing portions of the *Haliburton Hearing* was not included in the CCA's opinion. Richard Allen Anderson, an experienced Dallas criminal defense attorney, testified about a case he tried in 1979. In January and February of 1979, he represented a white man named James Edward Nolan in a capital murder case which involved the abduction, rape, and killing of a Mary Kay cosmetics executive.[83] The case was unusual in that the prosecution allowed two African Americans to serve on a death penalty jury.[84] One of those jurors, an

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75. *Haliburton Hearing* at 30-31. *See also Miller-El Hearing* at 61 (reprinting Judge Jack Hampton's comment that there was never an official "policy" of striking minorities but that "we all handled it about the same way [i.e. by removing all minorities with peremptory challenges], we didn't talk much about it, but from observation that is what happened.").

76. *Haliburton*, 733 S.W.2d at 133-34 n.4.

77. *Id.*

78. *Id.*

79. *Haliburton Hearing*, at 33-34.

80. *Id.* at 35.

81. *Id.*

82. *Haliburton*, 755 S.W.2d at 133 n.4.

83. *Haliburton Hearing* at 57. The name of the case does not appear in the *Haliburton* hearing or in the printed case. The author learned the name of the defendant and the basic circumstances of the crime through a telephone conversation with Mr. Anderson held on February 8, 1997.

84. *Id.* at 58, 65 ("[I]t was extremely unusual to have two blacks on a jury in 1979.").

African American man, held out at the punishment phase, resulting in a mistrial.[85] The entire case thus had to be retried, which was considered a waste and an embarrassment to the Dallas County DA's office.[86] Mr. Anderson testified that the Nolan case did not adversely affect the careers of the prosecutors involved, but that it was seen as a violation of the "general rule [that] the most [blacks] you ever put on a capital jury was one."[87]

3. Internal Jury-Selection Instruction Manuals Prepared by and for the Dallas County District Attorney's Office

In 1963, a treatise on jury selection in criminal cases was written by one of Henry Wade's top aides, Bill Alexander. "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."[88] Alexander, who since then had become a federal prosecutor, did not squarely deny having written the memo: "I just won't take responsibility for that," he told the *Dallas Morning News* reporters.[89] Soon after the Alexander memo was written, then-Assistant District Attorney Jon Sparling wrote the now-infamous Sparling memorandum.[90] Entitled "Jury Selection in a Criminal Case," the memo contains "one prosecutor's ideas on some things that need to be said to the panel, and some things to look for in a juror."[91] The general tone of the contents is hinted at on its front page, in which Sparling advises prosecutors that "[w]ho you select, and what you qualify the panel on will depend on the type of crime, the age, *color* and sex of the Defendant . . . the personality of the defense attorney, and your own individual style and judgement [sic]."[92] After a few preliminary comments about stating the law in the manner most favorable to the State and preparing the jurors for any weaknesses in the prosecution's case, Sparling begins giving specific suggestions. "You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused."[93] "You can often spot the showoffs and liberals by how and to whom they are talking."[94] "Look for physical afflictions. These people

85. *Id.* at 59. *See* Padgett v. State, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986) (noting that a hung jury at the punishment phase of a capital murder required the declaration of a mistrial before 1981).

86. *Haliburton Hearing* at 62, 66 (referring to accusatory questions: "who put the black on the jury, who hung the jury on the death penalty case, even though the defendant was white?" and noting that there were "general conversations" all over the courthouse and among the prosecutors about the Nolan case).

87. *Id.* at 66.

88. McGonigle & Timms, *supra* note 9. *See also* Batson v. Kentucky, 476 U.S. 79, 104 n.3 (Marshall, J., concurring) (quoting newspaper article).

89. McGonigle & Timms, *supra* note 9.

90. *Sparling Memo*, *supra* note 68 at 301-18.

91. *Id.* at 301.

92. *Id.* (emphasis added).

93. *Id.* at 303.

94. *Id.*

usually sympathize with the accused."[95] "I don't like women jurors because I can't trust them."[96] Sparling then suggests remarkably that "'women's intuition' can help you if you can't win your case with the facts."[97] "It is impossible to keep women off your jury," Sparling notes regretfully, "but try to keep the ratio at least seven to five in favor of men."[98]

Sparling soon returns to the theme of race, hammering home the point that "[m]inority races almost always empathize with the Defendant."[99] The memo then moves on to less controversial topics, advising how to present legal issues in the case to the jury and how to evaluate jurors' attitudes toward minimum and maximum punishments in the case.[100] On page 315, under the heading of "Questioning the veniremen individually," Sparling returns to juror-specific advice. He advises prosecutors to take jurors from small towns and rural areas, and warns that people "from the east or west coasts often make bad jurors."[101] "Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State's jurors."[102] Sparling advises that working women are "preferable to other women because they have had a glimpse of the cruel, hard world."[103] After directing prosecutors to ask venirepersons about their religious preference, Sparling declares: "Jewish veniremen generally make poor State's jurors. Jews have a history of oppression and generally empathize with the accused."[104]

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95. *Id.* at 304.
96. *Id.*
97. *Id.*
98. *Id.* at 305.
99. *Id.*
100. *Id.* at 305-15.
101. *Id.* at 315.
102. *Id.* at 316-17.
103. *Id.* at 317.
104. *Id.* Sparling's reasoning—that all ethnic and religious minorities who have been subjected to "oppression" should be struck by the state—is ironic. The Supreme Court has often stated the truism that being excluded wholesale from juries because of crude ethnic and religious stereotypes *is itself* a form of oppression, and that inclusion of members of those groups serves as a powerful tool to *prevent* oppression by the state. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 85 (1986) ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure."); *id.* at 86 n.8 ("By compromising the representative quality of the jury, discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'" (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting)).

The purportedly "race neutral" component of Sparling's reasoning, the notion that he is not suggesting that minorities be struck solely on their skin color but rather on their presumed beliefs, has been squarely rejected by the Supreme Court on any number of occasions: "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." *Batson*, 476 U.S. at 89; *see also* Powers v. Ohio, 499 U.S. 400, 410 (1990) ("Race cannot be a proxy for determining juror bias or competence. We may not accept as a defense to racial discrimination the very stereotype the law condemns.") (citations omitted); Neal v. Delaware, 103 U.S. 370, 397 (1880) (characterizing the practice of "uniform exclusion" of minorities as implying a "violent presumption" that "the black race . . . [is] utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries"). The Court of Criminal Appeals,

By 1986, Sparling had become a judge and was also a candidate for the Republican nomination to succeed Henry Wade as Dallas District Attorney.[105] The memo he had written seventeen years ago had become a campaign issue. His opponent for the Republican nomination, John Vance (who eventually won the race) read the most inflammatory sections of the memo to a February 1986 Dallas County Republican Men's Club meeting and then declared: "I've disagreed with everything I've read to you .... This is a piece of trash. It wasn't right in 1969, it isn't right now, and it won't be right tomorrow."[106] Sparling, who was present, defended himself, asserting that the memo might have been the "prevailing wisdom of the day" in 1969, but that "[t]imes have changed, people have changed and I've changed."[107]

Sparling testified at the *Miller-El* hearing concerning the circumstances attending the memo's creation. He testified that he wrote it in 1969, when he was a felony prosecutor.[108] It was part of Sparling's duties to give a Saturday morning talk to misdemeanor prosecutors.[109] He created the memo to go with that talk and distributed it to the misdemeanor section.[110] It was subsequently incorporated into a larger manual to be handed out to all Dallas County District Attorney's Office personnel.[111] John Stauffer testified that he was an Assistant District Attorney in Dallas County from 1964 until 1979.[112] In the late 1960s, the DA's office decided to set up a training program for prosecutors.[113] The training consisted of an experienced prosecutor giving a talk and a written handout to younger colleagues.[114] The DA's office eventually collected these handouts into a manual for prosecutors.[115] In 1971, the DA's office received a grant from the federal government to establish an official training program, and John Stauffer was made the Director of this program.[116] The training programs gained such a reputation that the Attorney General's Office requested that Dallas County allow prosecutors from other counties to attend. Throughout the 1970s, this training program became

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commenting on this memorandum, conceded that the article demonstrated that "Sparling probably struck venirepersons on grounds irrelevant to legal proceedings." *Ex Parte* Haliburton, 755 S.W.2d 131, 134 n.4 (Tex. Crim. App. 1988) (citing Swain v. Alabama, 380 U.S. 202, 220 (1965).

105. Melinda Henneberger, *GOP Candidates Clash over Jury Selection Paper*, DALLAS MORNING NEWS, Feb. 28, 1986, at 31A.

106. *Id.* Assuming that John Vance vigorously tried to eliminate intentional racial discrimination when he took the helm of the Dallas County District Attorney's Office in 1986, he failed. Virtually all of the many *Batson* reversals of Dallas County convictions occurred in post-1986 trials.

107. *Id.* As the testimony from the *Haliburton Hearing* reveals, the memo was still being circulated to young Dallas District Attorneys as late as the early 1980s. *See Ex Parte Haliburton*, 755 S.W.2d at 134 n.4.

108. *Miller-El Hearing*, *supra* note 32, at 29.

109. *Id.*

110. *Id.*

111. *Id.* at 30.

112. *Id.* at 117.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 118.

progressively more popular, eventually drawing prosecutors from as many as 220 different Texas counties.[117] Apparently Sparling's memo was circulated in these sessions as well.[118]

In 1973, the *Texas Observer* published an article about the Dallas County District Attorney's Office.[119] The *Observer* had also obtained a copy of the Sparling memo, and featured excerpts from it in a sidebar to the article. The *Observer* introduced the excerpts thus: "The following is an excerpt from a book titled *Prosecution Course* put out by the Dallas County District Attorney's Office. The book was developed as part of a course for new prosecuting attorneys in this state."[120] The *Observer* article apparently caught the eye of *Time* Magazine, for they also excerpted Sparling's memo in their June 4, 1973 issue.[121] The Sparling memo excerpts appeared underneath a cartoon depicting a jury of hooded Klansmen in the background. In the foreground, a defense attorney whispered to his client: "I don't like the look of this at all."[122] *Time*, while noting that defense attorneys "pull out every stop and follow every stereotype" to get a sympathetic jury, described the memo as containing "astonishingly frank assessments of what a prosecutor should look for" in order to obtain "vengeance-minded jurors."[123] *Time* then provided accurate excerpts from the memo, grouped under the headings "Attitudes," "Observation," "Women," and "Dress."[124] The excerpts include the remarks about women and minorities, as well as remarks indicating a troubling attitude toward justice.[125]

The national scrutiny devoted to the jury-selection practices of the Dallas County DA's office caused some consternation. Shortly before the *Time* article, Sparling had confessed to John Stauffer, director of the Dallas County training program, that he was uneasy about the article. Stauffer related that Sparling said "he would like to take it out because he thought maybe some people didn't understand, maybe they would be offended."[126] Stauffer reassured Sparling that "[there] was not anything to be ashamed of in that paper," and successfully "encouraged" Sparling to allow the article to remain in the manual.[127] A few months later, the *Time* article appeared. Stauffer described the reaction: "About that time, Time Magazine came out with a big article about him [Sparling], rather

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117. *Id.* at 119-120.

118. *See id.* at 125 (reflecting that the article was included in the manual in 1973, and thereafter).

119. *See* J.D. Arnold, *Wretched Excess in Dallas*, TEXAS OBSERVER, May 11, 1973, at 9.

120. *Id.*

121. *See Women, Gimps, Blacks, Hippies Need Not Apply*, TIME, June 4, 1973, at 67.

122. *See id.*

123. *Id.*

124. *Id.*

125. "You are *not looking for a fair juror*, but rather a strong, *biased*, and sometimes hypocritical individual who believes that defendants are different in kind, rather than degree." *Id.* at 67; "It is possible that 'women's intuition' can help you *if you can't win your case with the facts.*" *Id.*

126. *Miller-El Hearing*, *supra* note 32, at 125.

127. *Id.*

derogatory, and I remember I kidded him. I said, 'See, you did what I told you and now you are world famous,' and he didn't think that was very funny."[128]

Apparently, at some time during the 1970s, the Sparling memo was revised. What is particularly telling is which parts of it were cleaned up and which parts were not. The memo that Mr. Miller-El's lawyers entered into evidence during his 1986 trial evidently differs from that circulating in 1973, when the *Texas Observer* and *Time* articles were written. In 1973, subsection III.A.1. of the memo, entitled "What to look for in a juror: Attitude," read as follows: "You are not looking for a fair juror, but rather a strong, biased, and sometimes hypocritical individual who believes that Defendants are different from them [sic] in kind, rather than degree."[129] The same section in the version of the memo introduced in 1986 reads: "You are looking for a strong, stable, [sic] individual who believes that Defendants are different from them [sic] in kind, rather than degree."[130] However, the very next section of the memo—the controversial racial exclusion section exposed to nationwide publicity in the 1973 *Time* article—remained unchanged, as did all other advice.[131]

4. The 1976 Texas Judicial Council Capital Murder Study

Branch v. Texas, a companion case to *Furman v. Georgia*,[132] struck down the Texas death sentencing scheme as unconstitutional. The legislature quickly moved to enact a new scheme, which became effective on June 14, 1973. In 1976, the Texas Judicial Council conducted a study of all the capital murder cases that had gone to trial under the new statute.[133] With responses from all 254 Texas counties, the study's authors were able to gather substantial information on the seventy-four capital murder trials held since June 14, 1973.[134] Included in that study were data for the eleven Dallas County capital murder cases.[135] The data reflected that the eleven Dallas County cases had many aspects in common. The victim was white in all cases,[136] and the defendant received the death penalty in all

128. *Id.*

129. Arnold, *supra* note 119,at 9; *Women, Gimps, Blacks, Hippies Need Not Apply*, *supra* note 121, at 67.

130. *Sparling Memo*, *supra* note 68, at 303.

131. *Compare* Arnold, *supra* note 119, at 9 *with Sparling Memo*, *supra* note 68, at 303. (both reading: "You are not looking for any member of a minority group which may subject him to oppression—they almost always empathize with the accused.").

132. 408 U.S. 238 (1972).

133. Texas Judicial Council, Capital Murder Study: June 14, 1973 - February 4, 1976 (This report is on file with author).

134. *See id.* at 3-4.

135. *See id.* at 12-16.

136. As of November 1985, the Dallas County District Attorney's office had prosecuted twenty-seven capital murder cases. *See* Jim Henderson & Jack Taylor, *Killers of Dallas Blacks Escape the Death Penalty*, DALLAS TIMES HERALD, Nov. 17, 1985, at 1A. Every one of those twenty-seven cases involved a white victim. *Id.* at 17A. The *Times* study evaluated the 198 capital murder charges filed by the Dallas police from 1977 to 1984. *Id.* Based on its analysis of the data, the *Times* concluded that a person who murdered a white Dallasite had an 8.5% chance of being

cases.[137] Data as to the ethnicity of the jurors were collected for six of the cases. In each of the cases in which the jury composition was known, the jury was all-white.[138]

C. *Discriminatory Practices of the Dallas County DA's Office in the 1980s*

1. Evidence from the Pretrial Hearing in *State v. Miller-El*

During the late 1970s and early 1980s, the Supreme Court noted mounting concern about persistent blanket exclusion of racial minorities through prosecution peremptories, concern which led some states to alter the *Swain* proof burden in an attempt to stamp out the practice.[139] In Texas,[140] however, as in Dallas County,[141]

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sentenced to death for the crime, whereas a person who murdered an African American in Dallas had no chance of going to death row. *Id.* The *Times* presented several profiles of Dallas County murders of minorities which, because they occurred during rapes or robberies, could have been prosecuted as capital murder. *See id.* at 16. None of these was ultimately prosecuted as a death penalty case. *Id.*

137. *See* TEXAS JUDICIAL COUNCIL, *supra* note 133, at 12-16.

138. *Id.*

139. During the past five years, two state supreme courts have held that a criminal defendant's rights under state constitutional provisions are violated in some circumstances by the prosecutor's use of peremptory challenges to exclude members of particular racial, ethnic, religious, or other groups from the jury.

McCray v. New York, 461 U.S. 961, 962 (1983) (opinion respecting denial of certiorari by Stevens, J., joined by Blackmun & Powell, JJ.) (citing People v. Wheeler, 583 P.2d 748 (1978); Commonwealth v. Soares, 387 N.E.2d 499 (1979)). Justice Marshall, joined by Justice Brennan, noted that *Swain* had been subjected to "almost universal and often scathing criticism" since it was enacted, and that its crippling burden rendered the Supreme Court's strict requirement that jury venires be fairly composed virtually irrelevant: "There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges." *Id.* at 964, 968.

140. Texas' Court of Criminal Appeals rejected a petitioner's challenge to Harris County's jury selection practices in Ridley v. State, 475 S.W.2d 769 (Tex. Crim. App. 1972). Erwin Ernst, then a Harris County Assistant District Attorney, denied that there was any "practice" of excluding black jurors, but did note that "he considered use of the peremptory strike to eliminate prospective Negro jurors from the panel when the accused was black and the victim white a matter of common sense." *Id.* at 770. The court characterized the petitioner's evidence as principally establishing that Harris County struck African Americans mostly in cases with black defendants and white victims, and characterized this kind of exclusion as an example of "rejection for a real or imagined partiality" approved by the Supreme Court in *Swain*. *Id.* at 771. To accept the petitioner's *Swain* challenge, the court argued, would entail "abolishing our peremptory challenge practice." *Id.* at 772. *See also* Hardin v. State, 475 S.W.2d 254, 257 (1972) (denying Jefferson County *Swain* challenge on basis that proof of systematic exclusion was insufficient and that race of prospective juror is not an irrelevant consideration in black-defendant/white-victim cases).

141. Attorneys for African American capital murder defendant Ronald Curtis Chambers alleged that the prosecution had engaged in systematic racial exclusion in his 1978 Dallas County capital murder trial, and complained on appeal that the trial court judge prevented them from offering evidence to bolster their claim. Chambers v. State, 568 S.W.2d 313, 328 (Tex. Crim. App. 1978). The Court of Criminal Appeals dismissed this claim in a short paragraph, citing *Ridley*. *Id.* His conviction was eventually overturned because a Dr. James Grigson (known as "Dr. Death" for the frequency with which he testified for the state in death penalty sentencing proceedings) administered an uncounselled pretrial competency examination to Chambers, then later testified during the punishment phase of his trial that Chambers represented a future danger to society. Ex Parte

it was business as usual. The testimony of judges sitting in Dallas County criminal district courts when Mr. Miller-El was tried, confirmed that racial discrimination was still common in the 1980s. Harold Entz, who testified at Mr. Miller-El's pretrial hearing, was judge of the County Criminal Court No. 4 when Mr. Miller-El was tried.[142] Within the past three or four years, he related, he had granted a prosecutor's request to shuffle (i.e. randomly change the seating order of) a venire panel.[143] As the jurors were reseating themselves in accordance with the shuffle, "the State volunteered the information that they requested a shuffle because a predominant number of the first six, eight or ten jurors were blacks."[144]

Ed Kinkeade was judge of the 194th District Court at the time of Mr. Miller-El's trial. He called attention to himself by giving an interview to the *Dallas Morning News* in which he commented on the evidence of systematic discrimination the paper had unearthed.[145] According to the reporters, "*The News'* investigation confirmed [Kinkeade's] observation that prosecutors systematically exclude blacks."[146] Kinkeade determined that local criminal district judges should take the initiative in attempting to eliminate the practice: "I think we need to tell them, 'I don't want people being struck that you haven't even talked to based on their race, and if you do, you're going to have to explain your reasons on the record.'"[147] Although Kinkeade acknowledged that he had no authority to dictate the conduct of other judges, he promised to recommend during the next weekly meeting that "judges instruct prosecutors that they will not tolerate the exclusion of minority jurors solely for racial reasons."[148]

Kinkeade was called to the stand during the *Miller-El* pretrial hearing and invited to expand on his comments. His comments on the stand were obviously carefully chosen and hesitant, perhaps because he realized the problem posed by a sitting judge's admission that he had observed racial discrimination in his own courtroom, yet, at least for some time, had done nothing about it. Nevertheless, he confirmed under oath everything he had told the *Morning News* reporters:

> Q. Judge Kindeade [sic], did you have an opinion with respect to whether or not prosecutors were systematically excluding blacks from participating in jury trials, in your court at least?

Chambers, 688 S.W.2d 483, 484-85 (Tex. Crim. App. 1984) (en banc) (noting that this practice was condemed as a violation of the Fifth and Sixth Amendments in Estelle v. Smith, 451 U.S. 454 (1981)). Chambers was retried in 1985. Again, Dallas County prosecutors struck all African American jurors from his panel, and again his attorneys complained of this practice on appeal. This time, they prevailed—the Court of Criminal Appeals, applying *Batson*, found that Chambers' prosecutors had engaged in intentional racial discrimination in their use of peremptory challenges. *Id.*

142. *Miller-El Hearing*, *supra* note 32, at 101.

143. *Id.* at 103-04.

144. *Id.* at 104.

145. *See* Steve McGonigle & Ed Timms, *Judge Plans to Urge Action to End Jury Selection Bias*, DALLAS MORNING NEWS, Mar. 11, 1986, at A6.

146. *Id.*

147. *Id.*

148. *Id.*

A. I had an opinion about it.

Q. What was your opinion, sir?

A. That it had occurred, but I had not had a defense lawyer raise it.

Q. Okay. And after you read the articles in the *Dallas Morning News*, did your reading of those articles confirm what your opinion had been?

A. Well, I mean—I mean, I watch jury selection in my own court, I didn't need a newspaper article.

. . .

A. I watch the juries and I see them during the trial, I know who gets on the jury and who doesn't. I didn't need a newspaper article to know. And the prosecutor I have now doesn't do that, but I have been fortunate.[149]

Kinkeade also reaffirmed his decision to attempt to influence the conduct of his fellow judges. When asked whether he had come to a decision regarding what to do about "the exclusion of minority jurors solely for racial reasons," he responded that it "[s]hould not be tolerated *now*."[150] To his credit, Kinkeade took affirmative steps to remedy the problem, though this was not mandated by any existing appellate decision.[151]

Larry Baraka, another judge who testified at the hearing, provided additional confirmation that the Dallas County prosecutors' office had seen no reason to change its jury selection practices in the 1980s. He recounted a recent episode in which he barred a prosecutor whom he believed to be misusing his peremptory strikes:

Q. Well, as a Criminal District Judge have you had occasion to talk with prosecutors, and exclude prosecutors from your court as a result of systematically excluding blacks?

A. Well, I only had one occasion where I excluded a prosecutor from conducting voir dire in my court.

Q. Would you tell the Court the reason that you did that?

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149. *Miller-El Hearing*, *supra* note 32, at 112-13.

150. *Id.* at 108 (emphasis added).

151. *Id.* at 110-11 (reflecting that Judge Kinkeade had resolved to require the lawyer to provide race neutral explanations for the strikes whenever either the defense or prosecution appeared to be systematically excluding minority venirepersons).

> A. Well, from observing the voir dire and listening to the responses of the voir dire panel, and seeing about, I guess, maybe ten blacks struck; in my mind I didn't see a just cause for it and my perception was they did it because they were black.
>
> Q. You say "they did it," who did it?
>
> A. The prosecutor.
>
> Q. The prosecutor. And that prosecutor was barred from your court; is that correct?
>
> A. Correct. Well, not barred from my court. He and I worked out an understanding: He could try cases in my court any time he wanted to. I just advised him that if he chose to practice law in terms of picking juries in the manner that he chose to do, that he could not do it in my court.[152]

This incident occurred in 1985.[153] Notwithstanding this incident, Judge Baraka had been under the impression that, since around 1980, the situation in Dallas County was improving and more African Americans were being allowed to sit on Dallas County juries.[154] The results of the *Dallas Morning News* study, however, convinced him that the problem was still severe.[155]

2. Evidence from the *Dallas Morning News' 'Race Bias'* Article

To this point, the main evidence has been anecdotal. However, a statistical analysis, whose numerical conclusions were never disputed by any member of the Dallas County District Attorney's Office, also shows unmistakable evidence of racial bias in the Dallas County DA's use of peremptory challenges. Two reporters for the *Dallas Morning News*, Steve McGonigle and Ed Timms, randomly selected 100 felony jury trials held in Dallas County during 1983 and 1984.[156] The reporters summarized the major conclusions of the study on the front page of the *News*:

> While blacks comprise eighteen percent of Dallas County's population, the *News*' analysis of 100 randomly selected felony trials found that fewer than 4 percent of jurors were black. In fact, the chance of a qualified black serving on a jury was 1-in-10, compared to a 1-in-2 chance for a qualified white.

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152. *Id.* at 74-75.
153. *Id.* at 77.
154. *Id.* at 76.
155. *Id.* at 75-76.
156. McGonigle & Timms, *supra* note 9.

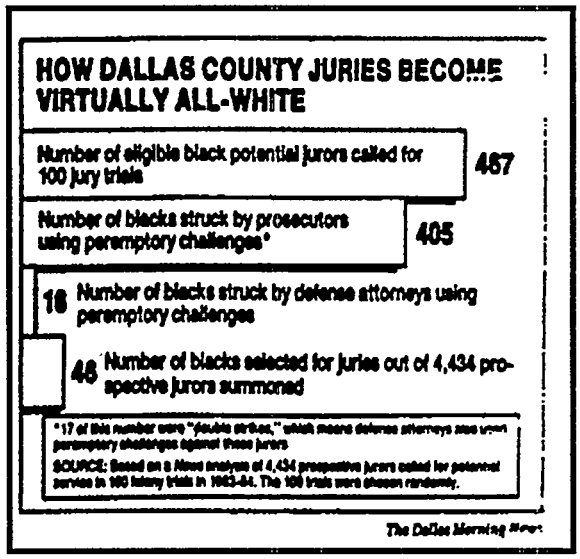

Figure 1

Of those blacks struck from juries by peremptory challenges, the study found, ninety-two percent were barred by prosecutors. Blacks were excluded from juries at almost five times the rate of Anglo jury candidates and twice as often as Hispanic candidates.[157] The study, which took eight months to complete, analyzed court records relating to 4,434 prospective jurors in order to determine the race of the jurors, whether they were excluded from jury service, how, and by whom.[158] A bar graph appearing next to the first page of the article (*See* Fig. 1) revealed that of the 467 prospective African American jurors who were qualified to serve on Dallas County juries in the 100 cases studied, fully *405* were struck by the prosecution using peremptory challenges.[159] Out of the 4,434 jurors summoned for service, 467 African Americans eventually qualified to serve, and only forty-six of these were finally allowed to serve.[160] Seventy-two of the 100 trials were heard by juries who had no black members.[161] Only two of the fifty-four black male defendants involved in the study were tried by juries that had any black males on them.[162] Ninety-two percent of the African Americans struck by peremptory challenges were removed by the State; four percent removed by the defense, and the remaining four percent by "double strikes."[163] Forty-seven Hispanic jurors and forty-six African American jurors were selected for service, even though the number of African Americans summoned for jury service was *five times* greater than the number of Hispanics.[164] A chart presented on page 28A of the article demonstrates the constant narrowing effect of the Dallas County jury selection procedures, which excluded twelve percent of the original 16 percent of

157. *Id.*
158. *Id.*
159. *Id.* The article notes that 17 of these challenges were "double strikes," meaning that defense attorneys used peremptory challenges against these jurors as well (emphasis added).
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (emphasis added).

the venire that was African American, and which resulted in 85.5 percent (47 of 55) of African American defendants in the random sample being tried by all-white juries. The *News* article generated a great deal of controversy and won numerous awards.[165]

These data are not equivocal or inconclusive. Even in the absence of the Sparling memo, and the testimony from judges and experienced lawyers, discrepancies this large strongly implicate intentional racial discrimination. Various Dallas County DA's office personnel proffered hesitant alternative explanations for these numbers: "[Then-Dallas County DA Henry] Wade suggested that the high rate of black dismissals revealed in *The News'* study might stem from a disproportionately large number of blacks who express doubts about assessing maximum punishments or who have personal knowledge of criminal cases."[166] Other Dallas County DA's, who remained unnamed, echoed these assertions: "Prosecutors maintain that blacks themselves are partly responsible for their underrepresentation on felony juries because many disqualify themselves by saying they cannot judge others or consider a life sentence in cases where state law provides such punishment upon conviction."[167] There is no expression of surprise in any of the prosecutors' responses to these numbers, nor is there any denial that the study's results accurately reflected jury makeup in Dallas County.

3. Statistical Evidence of Bias in Capital Cases Tried in the 1980s

On December 21, 1986, the *Dallas Morning News* published a follow-up to its original article detailing racial discrimination in felony cases in general. For the December article, the *News* studied the fifteen capital murder cases tried in Dallas County between 1980 and December 1986.[168] The article began boldly: "For all 15 men tried for capital murder in Dallas County since 1980, prosecutors got what they wanted: the death penalty and overwhelmingly white juries."[169] The

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165. The series of articles written by Steve McGonigle and Ed Timms concerning race bias in Dallas County criminal jury selection won the Gavel Award from the State Bar Association of Texas, the Headliners Club of Austin award for investigative journalism, the Katie Award for investigative journalism from the Press Club of Dallas, and the Emery A. Brownell Award from the National Legal Aid and Defender Association. *See Three* News *Reporters Receive Awards from Bar Association*, DALLAS MORNING NEWS, Nov. 15, 1986, at 42A; *Ten* News *Staffers Win Headliners Journalism Awards*, DALLAS MORNING NEWS, Feb. 8, 1987, at 34A; *The* News *Takes 17 Awards in Dallas Press Club Contest*, DALLAS MORNING NEWS, Nov. 16, 1986, at 33A; 2 News *Reporters to Get Award for Series on Juries*, DALLAS MORNING NEWS, Oct. 24, 1986, at 31A.

166. McGonigle & Timms, *supra* note 9.

167. *Id.* In Texas criminal trials, jurors in non-capital trials are examined in large groups. Typically the examination consists of the prosecution and defense briefly skimming juror information questionnaires, and asking the assembled groups of jurors questions such as "Has anyone here ever been in trouble with the law"? Those who do not respond to such questions may never be questioned individually by either side. The prosecutor's excuse quoted above, of course, is dependent on individual African American jurors actually being asked questions.

168. Ed Timms & Steve McGonigle, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, DALLAS MORNING NEWS, Dec. 21, 1986, at A1.

169. *Id.*

underlying statistics fully bore out the claims.[170]

Of the 180 jurors who sat in the fifteen trials, only five, or 2.8 percent, were of African American descent.[171] Out of the 62 African American jurors qualified to serve, the prosecution struck 56, or *90.3 percent*, with peremptory challenges.[172] (*See* Fig. 2, reprinting graph from page 21A). Five cases out of the fifteen involved an African American defendant. Of those five, *four* were tried by all-white juries.[173] Mr. Miller-El's was the only jury to have any African American members at all, and he had only one.[174] In the fifteen cases tried between 1980 and 1986, African Americans had a one in twelve chance of being selected to serve on a death penalty case, while Hispanic jurors had a one in four chance, and whites a one in three chance.[175] Frank Williams, a criminologist at Sam Houston State University, estimated that the probability that the pattern of exclusion arose by chance was 1 in 10,000.[176]

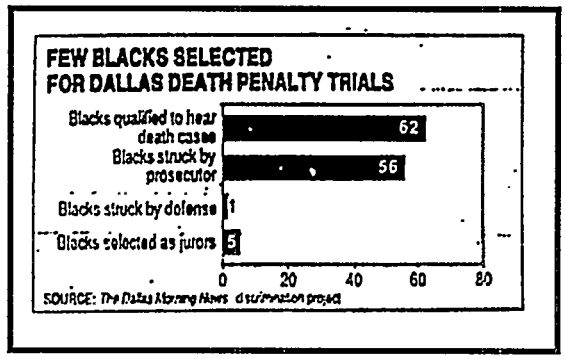

Figure 2

The findings came as no surprise to persons within the Dallas criminal justice system who were willing to discuss them:

> State District Judge Larry Baraka, Dallas' first black felony prosecutor, said *The News'* findings confirm his conclusions that race is a primary reason prosecutors use peremptory challenges to bar blacks. "Knowing Dallas County and knowing the DAs' practices, I know that's what they are doing."[177]

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170. A sidebar article to *Blacks Rejected* explains the methodology both of that article and of the March article. The *News* examined records of 1,983 registered voters summoned for service in the 15 capital trials. *Computer Analyzed Jury Selection Data*, DALLAS MORNING NEWS, Dec. 21, 1986, at 22A. The race of the juror was established by "matching their full names and dates of birth with computerized driver's license data on file with the Texas Department of Public Safety in Austin." *Id.* Jurors whose race could not be determined by this method were contacted by telephone. *Id.* Their disposition as potential jurors was determined by studying court records. *Id.* The project had begun in June of 1985. *Id.*

171. Timms & McGonigle, *supra* note 168.

172. *Id.* (emphasis added).

173. *Id.* (emphasis added).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

Once again, the response to the damning statistics from District Attorney's Office personnel was nonchalant: "Henry Wade . . . said he did not know the specific reasons his prosecutors excluded blacks in capital cases. Wade speculated these blacks were not seated as jurors because prosecutors believed them to be sympathetic toward defendants."[178] Incredibly, Wade wheeled out the time-honored stereotype that blacks are likely to favor defendants even though that notion had just been fiercely rejected by the Supreme Court in *Batson*.[179] Assistant DA Norman Kinne, a veteran of eleven capital cases (and, no doubt, at least as many all-white juries), denied discrimination, asserting that the pattern was "just the way things fell."[180] The study did note that thirty-three of the fifty-six African American jurors "voiced reservations about the death penalty," but even the 23 who did not were struck.[181]

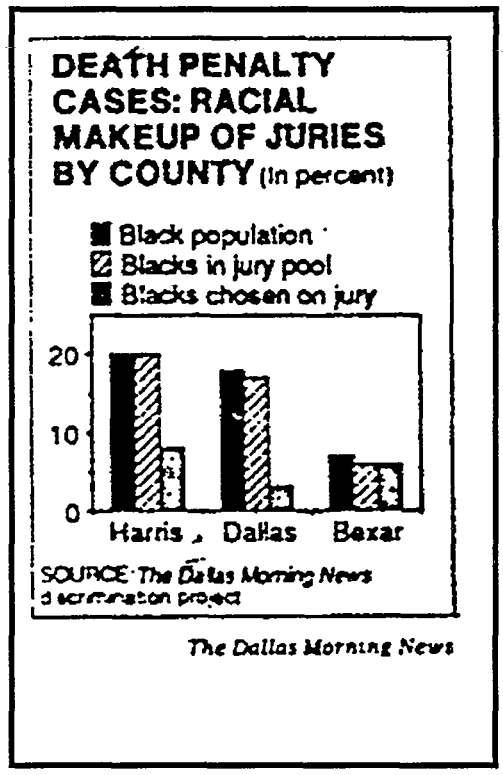

Figure 3

The comparison to other Texas counties was likewise striking. As Fig. 3 shows, compared to their representation in the eligible jury pool of the community, a far smaller percentage of African Americans were selected to sit on Dallas death penalty cases than in other large metropolitan counties such as Harris and Bexar county.[182] In Bexar county, the number of African Americans eligible to serve on juries and the number that were actually chosen appears nearly

178. *Id.*

179. *See supra* note 103.

180. Timms & McGonigle, *supra* note 168.

181. *Id.* A sidebar article reported the results of a survey of 210 African Americans in Dallas and Houston who had been summoned to serve in death penalty juries over the past ten years. Although some were suspicious of the racial uniformity of the death sentencing process in Texas, almost half of them favored the death penalty and a majority endorsed beliefs that would render them eligible to serve on capital cases in Texas. *See* Steve McGonigle & Ed Timms, *Half of Blacks Back Death Penalty, Survey Finds*, DALLAS MORNING NEWS, Dec. 21, 1986 at 22A.

182. *Id.*

identical.[183] A table on page 20A of the article demonstrates that, although the difference in the number of eligible African American jurors in the community in Dallas and Harris counties was only three to four percent, eighty percent of African American defendants in Dallas County death penalty trials from 1980 to 1986 were tried by all-white juries, whereas only 32.4 percent of African American defendants in Harris County were. A three-member core group of senior District Attorneys was involved in most of these high-profile cases, and often participated in the voir dire.[184] Thus, the pattern of racial exclusion displayed in these cases can be traced in large part to Norman Kinne, Paul Macaluso, and Rider Scott.[185] Macaluso personally was found to have engaged in intentional racial discrimination in the 1985 capital murder trial of Ronald Curtis Chambers.

4. The Rash of *Batson* Reversals of Dallas County Criminal Cases in the Late 1980s

After the "crippling" burden of proof imposed by *Swain v. Alabama* was lowered by *Batson*, the Fifth District Court of Appeals of Dallas, as well as the CCA, found discrimination in numerous cases tried in Dallas County in the mid-to-late 1980s. These cases suggest two things. First, they confirm previously cited evidence that the discriminatory use of peremptory challenges was a widespread phenomenon in the Dallas County prosecutor's office, but that the difficulty of mounting legal challenges to it had exempted it from scrutiny. If widespread discrimination were being cloaked by a "crippling" standard of proof, one would expect a rash of reversals once that burden is lowered. This is precisely what happened. Also, an analysis of the State's proffered race neutral reasons and other techniques used by the prosecutors confirms that whether or not it was actually presented to the prosecutors who tried these specific cases, the Sparling Memo's advice was being followed well into the 1980s.

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183. *Id.*

184. *Id.*

185. According to the "Appearances" section of the statement of facts from these trials and to the "Counsel" section of the reported appellate affirmances, Norman Kinne, who is now the First Assistant District Attorney of Dallas County, participated in at least seven of the fifteen trials (Larry Smith, Fletcher Thomas Mann (718 S.W.2d 741 (1986)), Stephen Ray Nethery; Ricky Eugene Morrow; David Wayne McKay; Thomas Joe Miller-El, Harold Joe Lane (743 S.W.2d 617 (1987)). Paul Macaluso, who is now an Assistant United States Attorney for the Northern District of Texas, personally voir dired many of the jurors in these cases, including Danny Lee Barber, Ramon Montoya, Thomas Joe Miller-El, and David Wayne McKay. *See* Statements of Facts, Barber v. State, 737 S.W.2d 824 (Tex. Crim. App. 1987); Montoya v. State, 744 S.W.2d 15 (1987); and McKay v. State, 707 S.W.2d 23 (Tex. Crim. App. 1985). Rider Scott was involved in the prosecution of David Wayne McKay, Johnny Dean Pyles, Ricky Eugene Morrow, Stephen Ray Nethery, and Larry Smith. The statements of facts confirm that he personally examined many jurors in each case except Smith. Macaluso, in proceedings connected with the *Chambers* and *Miller-El* cases, testified that he specialized in helping less-experienced Assistant District Attorneys select death penalty juries. Macaluso joined the District Attorney's Office in 1973, and by 1986 had been involved in at least ten death penalty trials. His role was usually limited to jury selection. When he collaborated with an Assistant District Attorney with less death penalty experience, Macaluso had the final say in which jurors would be struck.

In reviewing these cases, two things should be kept in mind. First, the trial court's finding that there was no discrimination in the use of the prosecution's peremptory challenges is a finding of fact which may be reversed only if the appellate court finds it to be "clearly erroneous."[186] Thus, the record is to be viewed in the light most favorable to the trial court's finding, and should only result in reversal if the reviewing court is left with the "definite and firm conviction" that the trial court made a mistake.[187] Second, these cases are selected only from a narrow universe of potential *Batson* claims, since no clear authority existed in Texas from 1986 to 1991 which allowed white defendants to bring *Batson* challenges. When *Batson* was handed down, the Texas Legislature codified its holding and set out procedures for raising *Batson* claims in TEX. CRIM. PRO. CODE art. 35.261 (Vernon's 1989). Those procedures were thought by many Texas appellate courts to incorporate *Batson*'s apparent requirement that the defendant alleging discrimination be of the same race as the excluded jurors.[188] As the *Oliver* court recognized, the point was largely rendered moot by the Supreme Court's decision in *Powers v. Ohio*[189] establishing that criminal defendants could raise challenges to the racially discriminatory use of peremptory challenges even if they did not share the race of the excluded jurors.[190] Although the *Oliver* court, following *Powers*, read out of art. 35.261 any same-race requirement, it acknowledged that the legislative history and language of art. 35.261 might well have led it to the opposite conclusion had *Powers* not been decided. [191]

Therefore, (1) the following reversals almost all involve a finding that the trial court's decision was clearly erroneous; and (2) because virtually all of these cases were tried before *Oliver* and *Powers* were decided, they came about at a time when the exclusion of minority jurors was not clearly challengeable when the defendant was white or a member of a different minority group than the defendant.[192] What follows is a brief summation of the relevant aspects of the

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186. *See, e.g.*, Whitsey v. State, 796 S.W.2d 707, 728 (Tex. Crim. App. 1989).

187. *Id.* at 721, 728.

188. *See* State v. Oliver, 808 S.W.2d 492, 494-96 (Tex. Crim. App. 1991) (finding that two Texas appellate courts had so held, but that other courts had concluded that defendants could raise challenges under art. 35.261 even if they were of a different race from the excluded jurors) (citing Seubert v. State, 749 S.W.2d 585 (Tex.App.--Houston [1st] 1988) (must be of same race); Carrion v. State, 802 S.W.2d 83 (Tex.App.--Austin 1990) (same); Oliver v. State, 787 S.W.2d 170 (Tex. App.—Beaumont 1990) (may be of different races); Atuesta v. State, 788 S.W.2d 382 (Tex.App.--Houston [1st Dist.] 1990) (same)).

189. 499 U.S. 400 (1991).

190. *Oliver*, 808 S.W.2d at 494.

191. *Id.* at 495 ("[O]ur interpretation of Article 35.261 might have been different prior to delivery of *Powers*.").

192. *See, e.g.*, Frierson v. State, 839 S.W.2d 841, 853 (Tex. App.—Dallas 1992) (noting that Dallas trial court, in pre-*Powers* trial, refused to assume that white male defendant could lodge *Batson* challenge, but allowed him to try to prove up discrimination anyhow) ; Ramirez v. State, 862 S.W.2d 648, 650 (Tex. App.—Dallas 1993) (referring to an earlier disposition, in which the appeals court, "based on the state of the law at the time, determined that [defendant] could not challenge the State's strikes against members of minority races other than his own"); Crouch v. State, 1993 WL 265424 (Tex. App.—Dallas 1993) (reflecting that Dallas trial court originally held that *Batson* did not apply to defendant, a "male Caucasian," appellate court reversed and remanded after *Powers*, and

cases. The Sparling Memo and remarks from First Assistant District Attorney Norman Kinne's off-the-cuff observations concerning the characteristics of good State's jurors will be cited when relevant.

- *Chivers v. State.*[193] The State struck five African American veniremembers with peremptory challenges.[194] Juror Number Eight was struck because the prosecutor wanted "older or more established" people,[195] and because the prosecutor wanted more educated jurors to understand the "circumstantial case."[196] Juror Number Ten, Stone, was struck because he was also insufficiently "established in the community," having lived in the county for only five years, and because he was an operator for Dallas Area Rapid Transit, which did not indicate "any type of education level."[197] The appellate court found the intelligence explanation not to be race neutral because the State failed to question Stone enough to establish his intelligence, inappropriately relying only on his occupation category.[198] The "established in the community" reason was rejected because the white juror the State referred to in order to prove this reason was race neutral was 25, had only lived in Dallas County for six weeks, and was unemployed. The struck veniremember, Stone, was 35, and had lived in Dallas County and held a job for 5 years.[199]

- *Dewberry v. State.*[200] On initial appeal, the Fifth District Court of Appeals ruled that the appellant had failed to establish a prima facie case of racial discrimination.[201] In reversing the case, the CCA held that appellant had established a prima facie case, and remanded for an inquiry into whether the prosecution had offered race neutral reasons for striking the African American jurors. The State struck five of six African American venirepersons with peremptory challenges.[202] The court found that the explanations offered by the State for striking venireman Douglas were pretextual. First, the state's voir dire was "perfunctory," thus providing it with little concrete basis for any strikes.[203] Second, the State's unremarkable seventeen-word exchange with Douglas (in which it asked him where he

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trial court found impermissible discrimination after *Batson*). *Id.* at *1-2.

193. 796 S.W.2d 539 (Tex. App.—Dallas 1990).

194. *Id.* at 541.

195. Sparling Memo at 315

196. *Id.*

197. *Id.*

198. *Id.* at 542-43.

199. *Id.* at 543.

200. No. 05-86-00626-CR, slip op. (Tex. App.—Dallas, Jan. 4, 1990). This opinion was originally designated for publication. *See* slip op. at 7. It withdrawn on March 6, 1990, apparently due to an agreed dismissal of the case. A copy of this opinion is on file with the author.

201. Dewberry v. State, 743 S.W.2d 260 (Tex. App.—Dallas 1987).

202. *Id.* at 2.

203. *Id.* at 4.

worked) provided no evidence at all of the claimed "hostility" in the way he answered questions.[204] Finally, Douglas "possessed the characteristics that the State said it sought in a juror: he was older, he was married, and he was in a professional occupation."[205] (*Compare* Sparling Memo at 305, 316). White jurors who had been divorced and who were younger than Douglas had been accepted, as had white jurors with similar white-collar occupations.[206]

- *Young v. State.*[207] On initial appeal, appellant Young was denied the opportunity to proffer a comparative analysis of white and black jurors in support of his *Batson* claim, because he had failed to do so at the trial level.[208] In reversing, the CCA held that such a comparative analysis could be raised for the first time on appeal.[209] On remand, the court considered the prosecutor's purportedly race neutral reasons, which included the fact that two of the three struck African American jurors had relatives who had trouble with the law, one was inattentive, and another had a back problem.[210] The court accepted all three explanations as facially race neutral, but noted that the strike of one African American juror whose "uncle . . . was arrested a long time ago," was pretextual, since the prosecutor did not strike a white venireman whose brother was charged with an offense.[211]

- *Ramirez v. State.*[212] On original submission to the Court of Appeals, Ramirez claimed that the prosecution had exercised its peremptory strikes on one Hispanic juror as well as five African Americans.[213] The Court of Appeals overruled his claim on the Hispanic juror and determined that he could not raise a point of error regarding the other minority veniremembers because they were not of his race.[214] The CCA then granted his petition for discretionary review and reversed the Court of Appeals' decision that Ramirez could not challenge the exclusion of the five minority veniremembers who were not Hispanic.[215] The CCA remanded to the Court of Appeals for consideration of the exclusion of minority veniremembers.[216] The prosecutor recited race neutral explanations for three of the excused African American veniremembers claiming that each had relatives who were

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204. *Id.*
205. *Compare* Sparling Memo at 318.
206. *Id.* at 5-6.
207. 848 S.W.2d 203 (Tex. App.—Dallas 1992).
208. Young v. State, No. 05-89-00571-CR, slip op. at 7 (Tex. App—Dallas, March 5, 1990).
209. *Young*, 848 S.W.2d at 204.
210. *See id.* at 209.
211. *Id.*
212. 862 S.W.2d 648 (Tex.App.— Dallas 1993).
213. *Id.* at 650.
214. *Id.*
215. *Id.* at n.2.
216. *Id.* at 650.

in trouble with the law.[217] Ramirez, however used comparative analysis to demonstrate that the prosecutor had not excused similarly situated non-minority veniremembers. The Court of Appeals held that five white veniremembers were similarly situated to the struck African Americans, but were not excused by the prosecutor.[218] Based upon this record, the Court of Appeals held that the peremptory strikes of the African American jurors were racially motivated and therefore cause for a new trial under *Batson*.[219]

- *Hill v. State*.[220] On appeal by the State from a reversal in the Court of Appeals, the CCA held that the prosecutor improperly exercised a peremptory strike on an African American venire member on the basis of race.[221] After Hill objected to the prosecution's strike of a black male veniremember, the prosecutor explained that the veniremember was struck "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."[222] The CCA, citing *Whitsey v. State*,[223] explained that the Appellant must show that the prosecutor's other, race neutral explanations for a strike are pretextual.[224] The CCA found the prosecution's examination at voir dire perfunctory. The exchange consisted of the prosecutor asking about the venireman's occupation, how long he had worked there, and whether he felt that he would be fair and impartial in the case.[225] The CCA also mentioned that the voir dire questioning by the defense suggested that the venireman was a well-qualified juror.[226] Based on the perfunctory nature of the prosecution's voir dire, the CCA held that the prosecutor's explanation that he did not like the way the venireman answered questions was pretextual and therefore affirmed the Court of Appeals' finding of a *Batson* violation.[227]

- *C.E.J. v. State*.[228] On direct appeal from a juvenile conviction of capital murder, the Court of Appeals held that the State had improperly exercised its peremptory strikes based on race.[229] The prosecutor used fifty percent of available peremptory strikes on black females.[230] The Court of Appeals

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217. *Id.* at 651. *Compare* Sparling Memo at 318.
218. *Id.* at 653.
219. *Id.*
220. 827 S.W.2d 860 (Tex. Crim. App.) (en banc), *cert. denied*, 506 U.S. 905 (1992).
221. *Id.* at 862.
222. *Id. Compare* Sparling Memo at 303, 305.
223. 796 S.W.2d 707, 726 (Tex. Crim. App. 1989).
224. *Hill*, 827 S.W.2d at 869.
225. *Id.*
226. *Id.* at 870.
227. *Id.*
228. 788 S.W.2d 849 (Tex.App.— Dallas 1990).
229. *Id.* at 851.
230. *Id.* at 853.

reviewed the explanations for the striking of three veniremembers.[231] The first venire member was challenged because she was divorced, was not paying attention at voir dire, and had read about the case in the newspaper.[232] This was found to be a proper strike because of the veniremember's knowledge of the case from the newspaper.[233] The second veniremember was excused because she had no children and was not paying attention at voir dire.[234] The Court of Appeals rejected the prosecutor's explanation that the veniremember had no children, citing five empaneled white veniremembers who also had no children.[235] The Court of Appeals also rejected the prosecutor's argument that the veniremember was not paying attention because the prosecutor didn't ask any questions of the challenged veniremember.[236] Citing the perfunctory nature of the prosecutor's examination as well as the disparate treatment of the veniremember compared to whites, the Court of Appeals held that this veniremember was excused improperly.[237] The third venire member was challenged because she was not paying attention and she did not make eye contact with the prosecutor.[238] The record revealed the same facts concerning the inattentiveness as in the previous veniremember.[239] The court described the eye contact explanation offered by the prosecutor as an "elusive, intangible reason."[240] Holding that the eye contact explanation was not objectively verifiable from the record, the court found that the prosecutor's striking of the third veniremember was improper.[241] The conviction was reversed and remanded for a new trial.

- *Vann v. State*.[242] At trial, the prosecution used its peremptory strikes to strike six out of nine African American veniremembers.[243] The trial judge conducted a *Batson* hearing. The State explained that it had struck four of the veniremembers because they appeared "conservative" and therefore may not have believed States' witnesses who were involved with drugs.[244] One black veniremember was thought to be "conservative" because he worked in a bank.[245] However, the prosecutor did not strike a white juror who

231. *Id.* at 853-58.
232. *Id.* at 856.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id* at 857.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 858.
242. 788 S.W.2d 899 (Tex. App.— Dallas 1990).
243. *Id.* at 904.
244. *Id.* at 904.
245. *Id.*

worked at a commercial real estate firm.[246] The second juror was seen as conservative based upon his general appearance.[247] This was rebutted by the fact that several conservatively dressed white veniremembers were not struck.[248] The other two were conservative because they were elderly, both in their sixties.[249] This explanation was rebutted by the fact that two white jurors in their mid-fifties were not struck.[250] The Court of Appeals further noted the prosecutor's statements during voir dire implying that he did not think conservative blacks, as a whole, could impartially consider the State's case.[251] The Court of Appeals found a *Batson* error and reversed.

- *Reich-Bacot v. State.*[252] Only one of the prosecuter's use of peremptory strikes against African Americans was considered by the Court of Appeals.[253] The prosecutor explained that it struck an African American veniremember because she worked in a halfway house and may have dealt with criminals.[254] A review of the record revealed that the venire member expressly denied working with criminals.[255] The Court of Appeals found a *Batson* violation and reversed.

- *Miller-El v. State.*[256] The prosecution used five strikes to remove all African American venirepersons not previously excused for cause.[257] Ms. Miller-El's defense counsel vigorously contested the State's action and demanded a *Batson* hearing.[258] In response, the prosecutor explained his *Batson* strikes: one *Batson* juror had a beard, three had illegitimate children and spotty employment histories, and one had a young child at home and had just started her job.[259] The State contended that it had exercised a peremptory challenge against this last woman on some vaguely humanitarian basis.[260] This explanation provoked utter scorn from Ms. Miller-El's defense counsel:

  This woman [the excluded juror] did not ask for an excuse. She *wanted* to serve on this jury and he [the prosecutor] struck her

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246. *Id.* at 905.
247. *Id.* at 904.
248. *Id.* at 905.
249. *Id.* at 904.
250. *Id.* at 905.
251. *Id.* at 905.
252. 789 S.W.2d 401 (Tex. App.—Dallas 1990).
253. *Id.* at 403 n.1.
254. *Id.* at 403.
255. *Id.*
256. 790 S.W.2d 351 (Tex. App.—Dallas 1990).
257. *Id.* at 353.
258. *Id.* at 354-55.
259. *Id.*
260. *Id.* at 355 ("I struck her really because of the young child at home, widowed, and the two and a half months [of work].").

> because she is black. Five out of ten strikes were black people and the basis for those are illegitimate children. Now, here's one who has legitimate children, but he's telling the Court that he struck her because she had children at home.... There are other people on this panel that have children at home and they weren't struck, but those people are white.[261]

The prosecutor noted defensively that he was sure the defense counsel was "not pleased" with the rationale behind his strikes, but that there was "nothing I can do about it."[262] The Dallas Court of Appeals found that the State made no objection to the seating of four white female jurors with children, three of whom also had jobs.[263] One of the women with children had been on the job for only two weeks at the time of the trial.[264] The appellate court also found that several jurors had asked for hardship relief and had been granted such, and that one juror who requested hardship relief was denied.[265] Nevertheless, African American juror Clay, who had never requested hardship relief, was excused by the State.[266] The court concluded that the reasons for striking Clay constituted a sham or pretext and that "the prosecutor struck her because of her race."[267]

- *Crouch v. State*.[268] The defendant, a white male, was originally denied the opportunity to challenge the exclusion of African American venirepersons by the trial court.[269] The Court of Appeals, after *Powers*, remanded for a hearing on whether the defendant could make out a prima facie case and whether the prosecution could rebut the case with race neutral explanations.[270] The State offered three reasons for its strikes: first, several of the jurors displayed an "attitude," several had relatives with felony convictions (*compare* Sparling at 318), and some had left blank spaces on their juror information cards.[271] The court held that all three reasons (characterizing the "attitude" reason as an objection to the juror's appearance or demeanor) were facially race neutral.[272] However, the court agreed with the trial court's finding that the explanations were pretextual.[273]

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261. *Id.* at 355 (emphasis added).
262. *Id.* at 355.
263. *Id.* at 357.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* (citation omitted).
268. 1993 WL 265424, slip op. (Tex. App.—Dallas, 1993) (unpublished).
269. *Id.* at *1.
270. *Id.*
271. *Id.* at 3.
272. *Id.*
273. *Id.* at 4.

It noted that the State had never even questioned one venireperson who it described as having an "attitude," and had allowed several white venirepersons to serve who had left blank spaces on their juror information cards.[274]

5. *Chambers v. State*

Chambers v. State[275] was a Dallas case involving an African American defendant convicted and sentenced to death by an all-white jury which had been purged of all African American jurors by intentional racial discrimination on the part of the prosecutor. It is especially interesting not only for the gravity of the sentence, but also for the insight it provides into an odd prerogative of Texas prosecutors. The Dallas County District Attorney prosecuting the case converted into a means of removing African American jurors without using vital peremptory challenges. Ronald Curtis Chambers was convicted of capital murder and sentenced to death in Dallas County Court at Law No. 4 in late 1985.[276] On direct appeal, Mr. Chambers pointed out to the CCA that the prosecutors in his case had struck all three qualified African American jurors from the jury using peremptory challenges. Even though the trial was held before *Batson* was handed down, Chambers' trial counsel presciently noted the race of each allegedly improperly-excluded African American venireman, asked for a racially-neutral explanation of the State's challenge, and asserted that, were he given a chance to examine the prosecutors, he could prove that the strikes were racially-motivated.[277] While Chambers' case was pending on appeal, the Supreme Court decided *Batson.* Because Mr. Chambers' counsel had perfected his Fourteenth Amendment challenge, the CCA remanded his case to allow an evidentiary hearing to be held in accordance with *Batson* procedures.[278]

Paul Macaluso, whose participation in selecting death penalty juries in Dallas County has already been noted, selected Chambers' jury. At the hearing, Mr. Chambers' attorneys put Macaluso on the stand and requested race neutral explanations for his peremptory challenges.[279] The trial court found that the prosecutor had not rebutted the prima facie case and recommended that Ronald Curtis Chambers' conviction be reversed because of the State's denial of his Fourteenth Amendment rights.[280] Rather than issue an opinion itself, the CCA chose to simply reprint the trial court's findings and conclusions.[281] They provide

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274. *Id.*

275. 742 S.W.2d 695 (Tex. Crim. App. 1988).

276. *See* Statement of Facts, State v. Chambers, No. F-85-99385-PK, at 32 (Dist. Ct. of Dallas County, Criminal Dist. Ct. No. 4, Mar. 3, 1988) [hereinafter *Chambers* hearing] (reflecting that voir dire in the *Chambers* case occurred from November-December of 1985). A copy of this Statement of Facts is on file with the author.

277. *Chambers*, 742 S.W.2d at 696.

278. *Id.*

279. Chambers v. State, 784 S.W.2d 29, 31 (Tex. Crim. App. 1989) (*"Chambers II"*).

280. *Id.* at 32.

281. *Id.* at 30-32.

a revealing and critical look at Paul Macaluso's jury-selection strategies. First, the trial court laid out the facts. Sixteen potential African American jurors had been called in Mr. Chambers' trial.[282] Eleven were successfully challenged for cause by the State.[283] One remaining African American juror was excused by agreement, the basis of which was not in the record, and another claimed a statutory exemption.[284] This left three remaining African American prospective jurors, each of whom was struck with one of the State's peremptory challenges.[285] Mr. Chambers was tried by an all-white jury.[286] Mr. Chambers' attorney objected to the State's use of its peremptory challenges, and asked to be allowed to cross-examine Messrs. Macaluso and Andy Beach, the other DA, on the reasons for the strikes.[287] Paul Macaluso defended his use of peremptory challenges in the Chambers trial. He declared that he had no independent recollection of the trial, but that he had reviewed the voir dire of the disputed jurors.[288] He remembered that, although he himself only exercised one peremptory challenge, he did have "some input" into the decision of whom to exercise the State's peremptory challenges against.[289] As a veteran prosecutor with a great deal of experience picking capital murder juries, Mr. Macaluso directed the voir dire. Although he and Andy Beach conferred before exercising each peremptory challenge, if there had been any disagreement over whether to strike a juror, Macaluso would have prevailed.[290]

Macaluso's attempted race neutral explanations were extraordinarily vague. He declared that he "had never stricken a potential juror solely on the basis of race."[291] He also maintained, in terms so laughably vague that the trial court itself used italics to mock them, that "*in general* he found certain answers in the [disputed jurors'] *voir dire* and the juror questionnaires which were of such a nature as would, in most, if not all cases, result in his striking similarly situated jurors in other trials."[292] The trial court starkly disagreed, finding "[t]he State's *voir dire* questions of members of the accused's race were in no way distinctive, nor did they elicit any information which would, on its face, justify the use of a peremptory challenge on the jurors."[293] The court, after "[s]pecifically" considering Mr. Macaluso's testimony and evaluating his credibility, held that the State had not rebutted the defendant's prima facie case of racial discrimination.[294] The trial

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282. *Id.* at 30.
283. *Id.*
284. *Id.* at 30-31.
285. *Id.* at 31.
286. *Id.* at 32.
287. *Id.* at 31.
288. *Id.*
289. *Id.* at 31-32.
290. *See Chambers* Hearing at 89, 156.
291. *Chambers*, 784 S.W.2d at 31. *Compare* Purkett v. Elem, 115 S. Ct. 1769, 1771 (1995) (explaining that *Batson* was intended to send a warning that "a prosecutor could [not] satisfy his burden of [producing evidence that his strikes were race neutral] by merely denying that he had a discriminatory motive or by merely affirming his good faith").
292. *Id.* at 31.
293. *Id.* at 32.
294. *Id.*

court's Finding of Fact Number 12 is especially intriguing:

> In addition to the black potential jurors stricken by the State peremptorily, the State successfully challenged two black potential jurors (Thomas Johnson & Sharon E. Curtis) and unsuccessfully attempted to challenge a third potential black juror (Loretta Rooks) on the basis that they would not consider the *minimum* punishment in the event Appellant was convicted of the lesser included offense of murder. The State made no corresponding effort to challenge potential white jurors on the basis of their willingness to consider the minimum punishment for a lesser included offense.[295]

In Texas, the State is entitled to challenge jurors who are biased "against any phase of the law upon which the State is entitled to rely for conviction or punishment."[296] More unusually, the State is also entitled to challenge for cause any juror who is biased against any phase of the law *the defendant* is entitled to rely on, even if the juror is acceptable to the defendant.[297] This quirk in the law results from the presumption that the State submits jurors for cause only in order to obtain "fair and impartial jurors, in accord with our legal system's basic tenet to insure that every defendant is accorded a fair and impartial trial."[298]

In Texas, a jury must find that a particular aggravating circumstance, such as murder in the course of a felony, or murder of more than one person in the same criminal transaction, elevated the defendant's criminal wrongdoing from murder to capital murder before the death penalty can be imposed.[299] Should a jury not find the aggravating circumstance, the defendant can be convicted only of murder. Simple, or non-capital murder (which is simply called "murder") is a first degree felony.[300] When Mr. Miller-El was tried, the range of punishment for first degree felonies was five years' probation; the maximum was a life sentence and a $10,000 fine.[301] Each side in a Texas capital murder trial is entitled to tell prospective jurors to assume that the State has failed to prove the aggravating circumstance in a particular capital murder trial, meaning that the defendant can be convicted only of murder. After the juror has accepted this assumption, the lawyer may examine them to see whether or not they are biased against the minimum or maximum punishment for that crime.[302] A prospective juror in a capital case must be able to consider the possibility that five years could be an appropriate sentence for the

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295. *Id.* at 31 (citations to record omitted).

296. TEX. CODE. CRIM. PROC. art. 35.16(b)(3) (Vernon's 1989).

297. *See* Moore v. State, 542 S.W.2d 664, 669 (Tex. Crim. App. 1976).

298. Nethery v. State, 692 S.W.2d 686, 691 (Tex. Crim. App. 1985).

299. *See* TEX. PENAL CODE § 19.03(a)-(b) (providing that the crime of murder may be elevated to "a capital felony" by the presence of any one of eight aggravating circumstances) (Vernon's 1994); Fearance v. State, 771 S.W.2d 486, 494 (Tex. Crim. App. 1988).

300. TEX. PENAL CODE ANN. § 19.02(c) (Vernon's 1994).

301. TEX. PENAL CODE ANN. § 12.32 (Vernon's 1994).

302. Allridge v. State, 850 S.W.2d 471, 482 (Tex. Crim. App. 1991).

crime of intentional murder, and be able to assess that punishment in a proper case.[303]

Therefore, the *State* is allowed to challenge for cause jurors who could not consider and assess the *minimum* punishment for murder.[304] The defendant is not granted the reciprocal right to submit jurors with pro-defendant views for cause.[305] The inconsistency of these two rules has not gone unnoticed by the defense bar and the Court of Criminal Appeals.[306] The Court of Criminal Appeals, asked to defend this inconsistency, often sounds somewhat defensive:

> The State seeks, or should seek, to uphold the integrity of the jury system. Therefore, the State is permitted to challenge a juror who cannot be fair and impartial because he will not consider the full range of punishment. Whether the State later urges the jury to assess the minimum or maximum is of no moment.[307] The primary duty of all prosecuting attorneys is not to convict but to see that justice is done. This includes, at the least, the duty to see that the innocent are not convicted and, where appropriate, that the minimum punishment is assessed.[308]

The court then reaffirmed its conclusion that while prosecutors may have legitimate

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303. *Id.*

304. The State may also ask for the exclusion of jurors who would automatically consider the defendant to have acted "deliberately" for the purposes of the first Texas special issue if they had convicted the defendant of capital murder, Gardner v. State, 730 S.W.2d 675, 684 (Tex. Crim. App. 1987) and jurors who would automatically find that a multiple murderer had killed deliberately, Caldwell v. State, 818 S.W.2d 790, 794-95 (Tex. Crim. App. 1991).

305. McCoy v. State, 713 S.W.2d 940, 954 (Tex. Crim. App. 1986).

306. *See, e.g.*, Moore v. State, 542 S.W.2d 664, 670 (Tex. Crim. App. 1976) (conceding that "it is difficult to see why the State would challenge the prospective juror on [the minimum punishment] basis," but refusing to consider it error); Huffman v. State, 450 S.W.2d 858, 861 (Tex. Crim. App. 1970) (conceding that it "may seem hard to believe" that the State should be concerned about a juror's ability to consider a two-year sentence in a case in which the State seeks the death penalty, but allowing the State to strike on that basis nonetheless). The *Huffman* court, although conceding that it was unusual for the State to claim this prerogative, reasoned that the State was "entitled to rely" on the juror's ability to consider the minimum punishment, since that is clearly a phase of the law provided for in the statute. *Id.* The court also reasoned, not very convincingly, that in the possibility that the jury ended up disbelieving the State's witnesses, the State might wish to have jurors who would "be willing to settle for a two-year term rather than a mistrial because of a hung jury." *Id.* at 862. In later decisions, the CCA abandoned the difficult task of trying to perceive why the State might be anxious to exclude jurors who could not assess the minimum punishment and straightforwardly held that "harm to the State is not a prerequisite for the exercise of a challenge for cause based upon a juror's inability to follow the law." Phillips v. State, 701 S.W.2d 875, 885 (Tex. Crim. App. 1985).

307. *Compare* Sparling Memo at 311 ("[a] case is never won unless a jury returns more time than you offer on a plea of guilty"; "Tell the jury that the State intends to ask the jury a sentence for 'life' (or a substantial number of years, etc.) at the close of testimony . . . because it gives the jury time to get used to the idea of a high verdict.").

308. Morrow v. State, 910 S.W.2d 471, 474 (Tex. Crim. App. 1995) (citations and quotations omitted).

reasons for wishing to exclude those who favor its side of the case, the defense can never have such reasons.[309] The State is, in effect, allowed to perform the defendant's job for him by proving up the fact that a particular juror has pro-state attitudes and then removing him or her for cause. Given the many topics (e.g., presumption of innocence, indictment as evidence of guilt, attitude toward non-testifying defendant, attitude toward parole, ability to consider and assess minimum punishment) the State may strike jurors on, it appears to have at least twice as much leeway as the defense attorney has to make challenges for cause, allowing it to conserve its invaluable peremptory strikes. Obviously, the notion that someone who intentionally takes another human being's life without any legal excuse or justification might deserve a punishment of as little as five years' confinement often proves difficult for jurors to understand. Because many jurors are reluctant to consider a five year penalty (thus opening themselves to defense challenge), the Sparling Memo advises prosecutors to examine every juror concerning his or her attitude toward the minimum sentence.[310]

Although the State is allowed to strike jurors on minimum-punishment grounds by Texas law, the trial court in *Chambers* obviously felt that the State's peculiar and persistent attempts to disqualify *only African American* jurors on the ground that they may be too favorable *to the State's position* was compelling inferential evidence of discrimination.[311] The practice of the prosecution striking prospective jurors for cause based on their inability to consider the minimum punishment became an issue in numerous Dallas County death penalty cases, some of which also involved allegations of discrimination.[312]

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309. *Id.* In *Morrow*, the defense asked that a juror be excused for cause because he would have held the State to a higher burden than proof beyond a reasonable doubt. *Id.* What's sauce for the goose, Morrow claimed, must be sauce for the gander--conviction upon proof beyond a reasonable doubt, but no more convincing than that, must be a "phase of the law" upon which a defendant may rely, in the same sense as the minimum punishment is a phase upon which the State may rely. *Id.* The CCA denied this privilege to defense attorneys, protesting that allowing this would be "against the very tenets upon which our system is structured." *Id.* The CCA pronounced that no defense attorney could ever have a legitimate motive for striking jurors for their pro-defendant beliefs: this would "essentially be permitting defense attorneys to challenge veniremembers to the detriment of their clients." *Id.* In essence, therefore, prosecutors are allowed to strike jurors who possess pro-State biases because they are prosecutors, and defense attorneys are not allowed to strike jurors with pro-defendant biases because they are defense attorneys.

310. *See* Sparling Memo at 312 ("The minimum punishment, especially probation, is fertile ground for the defense disqualifying a juror for cause. *Since you talk to the panel first, you can prevent the disqualification of a strong juror.*") (emphasis added).

311. *Chambers*, 784 S.W.2d at 31-32.

312. *See, e.g.*, Camacho v. State, 864 S.W.2d 524, 528 & nn. 2 & 3 (Tex. Crim. App. 1993) (reflecting that the State attempted to strike an African American venireman based on the fact "that he could not consider assessing the minimum punishment for the crime, that he would automatically answer Special Issue No. One in the affirmative, and that he could not presume the appellant to be innocent"; that all three attempted challenges for cause were denied, and that the State finally struck him with a peremptory challenge); Hogue v. State, 711 S.W.2d 9, 16 (Tex. Crim. App. 1986) (reflecting that State challenged four venirepersons for reluctance to assess minimum punishment); Nethery v. State, 692 S.W.2d 686, 691-92 (Tex. Crim. App. 1985) (State challenged three venirepersons for reluctance to assess the minimum punishment); Smith v. State, 683 S.W.2d 393, 398-99 (Tex. Crim. App. 1984) (State challenged one venireperson for refusal to assess minimum

III. Conclusion

As the evidence presented in this Article establishes, the Dallas County District Attorney's Office decided to simply ignore the requirements of the Constitution and federal statutes, and got away with it for years. Congress passed 18 U.S.C. § 243, outlawing all forms of racial discrimination in jury selection, as part of the Civil Rights Act of 1875.[313] The Supreme Court shortly afterward took up the cause of eliminating racial discrimination in jury selection, issuing opinion after opinion denouncing the practice in scorching terms.[314] Dallas County ignored the call, provoking near-riots by its African American residents[315] and forcing the Court to turn its attention to Dallas County in the 1940s. When the high Court insisted that the county end its policy of excluding all African Americans from grand jury service, Dallas County authorities grudgingly complied to the least extent possible, allowing *one* token African American to serve on each grand jury; and forcing the Supreme Court to step in again to drag Dallas County unwillingly into the twentieth century.[316] When the Supreme Court in *Swain* reaffirmed the principle that systematic racial discrimination in the use of peremptory strikes was unlawful and repugnant to the Constitution, Dallas brushed the Court's warning aside, and continued its policy of implacable, blanket exclusion of African Americans. In the 1970s, the manner, but not the fact, of the discrimination changed. When changes in state law[317] began bringing more African Americans into the courtroom, the DA's office began using peremptory challenges to exclude them.[318]

In the 1980s, when the issue of racial discrimination in the use of peremptory challenges began to attract more and more attention, the Dallas County DA's Office was unfazed. The numbers prove that its personnel kept excluding the overwhelming majority of qualified African American prospective jurors in case after case. Finally, and perhaps most damningly, they continued the practice even after *Batson* was decided. The DA's office struck African Americans regardless

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punishment); Chambers v. State, 568 S.W.2d 313, 318 (Tex. Crim. App. 1978) (reflecting State's successful challenge of *seventeen* venirepersons for bias against the minimum punishment); Moore v. State, 542 S.W.2d 664, 668-69 (Tex. Crim. App. 1976) (excusal of three jurors on minimum punishment grounds). The Author of this piece has alleged, in a pending habeas corpus petition, that the prosecution manipulated the minimum-punishment issue in order to disqualify African American veniremembers during the March 1986 Dallas County death penalty trial of Thomas Joe Miller-El. *See* Amended Petition for Writ of Habeas Corpus, Miller-El v. Johnson, No. 3:96-CV-1992-H, at 61-119 (N.D. Tex August 11, 1997).

313. Powers v. Ohio, 499 U.S. 400, 408 (1990).

314. *See supra* note 103.

315. *See* McGonigle & Timms, *supra* note 9.

316. *See supra* Section II.A.

317. *See* McGonigle & Timms, *supra* note 9 (noting legal changes that made jury pools more inclusive).

318. *Id.*

of their profession and regardless of their length of residence in the county.[319] When asked to explain the damning statistics, DA's office personnel generally resorted to what the Supreme Court dismissed as "the very stereotype the law condemns"[320]—the notion that African Americans, as a group, are prone to identify with criminals and are thus incapable of fairly considering the state's case.[321]

The most surprising aspect of the Dallas County situation may not be that prosecutors routinely discriminated against racial minorities in jury selection, but the fact that the practice survived so many attempts to extinguish it. A myriad factors likely contributed to the persistence of discrimination in Dallas County. Nevertheless, a few may be singled out as especially relevant. The first, of course, is the attitude of the prosecuting agencies. When asked whether his assistants were systematically barring black Dallasites from jury service, Wade responded "maybe."[322] When asked to comment on the controversy evoked by the Jon Sparling's candidacy for District Attorney, Wade said that Sparling "was once considered my best jury selector."[323] James Rolfe, a prosecutor in the Dallas County District Attorney's Office from 1969 to 1973, said, according to the Dallas Morning News, that "Sparling's paper and similar jury-selection critiques probably reflected the sentiments of 'the overwhelming majority' of prosecutors who worked in Dallas County from 1900 to 1970."[324] When the *Time* article briefly exposed Dallas County's blatant discrimination to the public in 1973, the Dallas County District Attorney's Office simply did not care, as is shown by John Stauffer's assurance to Jon Sparling that there was nothing to be ashamed of in the memo, and by the fact that the memo was kept in the prosecutor's manual until the early 1980s.[325]

Of course, prosecutors would not have been able to display such nonchalance toward their own practices had they been fought at every turn by skillful, adequately-funded defense attorneys. There were many defense attorneys in Dallas who were deeply concerned about the constitutional rights of their clients and who argued forcefully that the systemic discrimination they perceived was intolerable.[326] They must be commended. Nevertheless, Dallas County, like most

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319. *See id.* ("The *News* witnessed prosecutors repeatedly dismissing black professionals in favor of blue-collar whites, even though the whites may not have lived in the county as long. The practice was particularly pronounced when the defendant was black.").

320. *Powers*, 499 U.S. at 410.

321. *See* McGonigle & Timms, *supra* note 9 (reprinting speculation from District Attorney Henry Wade and others that African Americans are underrepresented because they are more reluctant to judge others, are hesitant to give maximum sentences, and have "personal knowledge of criminal cases.").

322. Steve McGonigle & Ed Timms, *Judge Plans to Urge Action to End Jury Selection Bias*, DALLAS MORNING NEWS, Mar. 11, 1986, at 6A.

323. *Id.*

324. *Id.*

325. *See supra* note 80 (noting testimony of former Dallas County DA Ron Wells).

326. The case of Ronald Curtis Chambers is notable. In the 1978 opinions affirming his original conviction for capital murder, the defense preserved for review the issue of the prosecution's systematic exclusion of African Americans by peremptory challenges, despite adverse precedent from the Court of Criminal Appeals. *See supra* note 140. During his 1985 retrial, his attorneys, long

Texas counties, relies primarily on private court-appointed attorneys to represent indigent criminal defendants, even in capital cases.[327] This is unusual for large metropolitan areas, the majority of which employ public defender agencies.[328] Fees for representation are limited, as are fees for investigation.[329] Further, an appointive indigent defense system gives rise to an unhealthy cronyism between trial judges, who control the appointments, and private criminal defense attorneys, who need the work. One experienced Texas criminal defense attorney described the appointment system in Harris County, Texas (the county in which Houston is located) thus:

> The mindset of a lot of court-appointed lawyers is to please the judge, to curry favor with the judge by getting a quick guilty plea from the client. Then everybody's happy. The judge has the case off the docket. The prosecutor doesn't have to mess with it. The defendant is off to wherever he's going. And the lawyer has made a relatively decent fee: about $150 for basically an hour of his time. That's much more economical for a lawyer who's earning a living off of court appointments than to reset the case, go out and investigate, probably not get paid for his time, have to do a bunch of work, and

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before *Batson* had been handed down, went to extraordinary lengths to preserve the issue for appellate review:

> In the instant case, appellant perfected the record by noting the race of each venireman. In each instance where the State exercised a peremptory challenge to excuse a black venireman, appellant objected, asked for a racially neutral explanation of the State's challenge, and obtained an adverse ruling from the trial judge. Finally, appellant proffered that if he could examine the prosecutor, he expected to prove that each challenge was racially motivated.

Chambers, 742 S.W.2d at 695. Chambers' lawyers were, of course, eventually successful in proving their claim of discrimination. *See supra* Part II.C.5.

327. *See* Paul Calvin Drecksel, *The Crisis in Indigent Defense*, 44 ARK. L. REV. 363, 402-03 (1991) (reporting that 248 of Texas' 254 counties rely on court appointments to provide representation to indigent defendants). Many other states, unlike Texas, have recognized that general-practice criminal defense attorneys often lack the specialized experience necessary to provide effective asssistance in death penalty cases, and have established specialized capital public defender agencies. *See* Louis D. Bilionis & Robert Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1321-26 (1997).

328. *See* Mark Ballard & Richard Connelley, *Gideon's Broken Promise*, TEX. LAW., Aug. 28, 1995, at 18 (noting that "most urban counties, in fact 68 percent of all Americans, are served by public defender offices"). Recognizing that most criminal defense attorneys often lack the specialized experience necessary to render effective representation in death penalty cases, many states have created "special public defender offices for capital cases or created special capital units within existing public defender offices." Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1323 (1997). *See also id.* at 1322-26 (describing states' attempts to insure consistently high-quality representation in the defense of indigent capital clients).

329. Until the law was amended in 1995, defense counsel in Texas death penalty cases were authorized to spend no more than $500 for *all* investigative and expert expenses, and were required to spend the money before applying for reimbursement. *See* Lackey v. State, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982) (discussing TEX. CODE CRIM. PROC. art. 26.05 (Vernon's 1980). That cap has now been lifted by TEX. CODE CRIM. PROC. art. 26.052 (Vernon's Supp. 1998).

maybe aggravate the judge by keeping the case on the docket.[330]

In addition to keeping the judge's docket moving briskly, defense attorneys reward judges for work by contributing to their campaigns for office.[331]

These financial and ideological disincentives to aggressive, sophisticated defense advocacy probably explain why the appointive system of indigent defense in Texas achieves poor results when compared to Texas cases in which privately retained lawyers defend clients, and to other metropolitan areas in which indigent defense is handled by well-funded public defender agencies.[332] Larry Mitchell, a former appeals court judge who practiced indigent criminal defense in Dallas County in the 1970s and 1980s, was asked during the Haliburton hearing why, if the prosecution's discrimination was so apparent during that time, defense lawyers did not complain about it. He replied that the "common practice" among defense attorneys in pre-*Batson* times was not to even bother to object to the obvious racial discrimination going on around them, since the *Swain* burden required "detailed statistical analyses . . . [and] pervasive countywide research" that no judge would pay for in appointed cases.[333] The injustice of routine discrimination was not brought to light in the vast majority of cases, not because of some shadowy conspiracy, but simply because its discovery would have cost money that the trial judge was not willing to pay, and that private-practice lawyers were not able or

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330. Steve McVicker, *Defending the Indefensible: Do Court-Appointed Attorneys Serve Their Clients or the Courts?*, TEX. OBSERVER, Apr. 22, 1994, at 8, 12 (quoting Houston attorney Randy Schaffer).

331. *See* Ballard & Conelley, *supra* note 328, at 18 (observing that "sharp increases in the amounts spend on appointed counsel" by Harris County judges have occurred in "every election year since 1981," a fact which critics say demonstrate judges' dependence on contributions from defense lawyers).

332. *See id.* (finding that appointed defense lawyers in Harris County pled out more cases than retained attorneys, and that their clients were convicted more often, sent to prison more often, and received longer sentences than clients who had retained counsel); Professor David Dow compared the results of the public defender system in death penalty cases in Dade County, Florida (in which the city of Miami is located), to the appointive system in death penalty cases in Harris and Dallas counties in Texas. Both Dade County and the Texas counties had approximately 100 capital trials which reached the punishment phase. Fewer than one in ten of the trials in Dade County resulted in death sentences, over eighty percent of the trials in the Texas counties did. *See* David Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L. Q. 23, 66-70 (1991). Professor Dow found significant differences in the outcomes of death penalty cases in many other states which correlated closely with whether the states used an appointive or public-defender system. *See id.* at 60-72. He hypothesized that public defenders raise the quality of indigent representation relative to private attorneys because public defenders are more likely to be "ideologically committed" to their jobs, more likely to have been hired after a highly competitve selection process, and more likely to have "the enormous advantage" of having dedicated investigative and expert resources at their command. *Id.* at 61-62. Harris County, spurred by several stories highlighting humiliating flaws in the appointive system for providing indigent defense in capital cases, briefly contemplated creating a public defender agency in 1991, but shelved the idea in the face of strong opposition from judges and defense attorneys. Ballard & Connelley, *supra* note 328, at 18. Dallas County has a public defender agency, but it handles only a tiny fraction of the indigent-defense cases in Dallas.

333. *Haliburton Hearing* at 10.

willing to spend.

The final link in the chain, of course, is judges. Even if defense attorneys were denied the resources to document the pervasive discrimination in Dallas County cases adequately, Dallas County criminal trial judges could have taken the lead and proactively banned such practices. To their credit, some judges took steps in that direction via informal discussions and rulings.[334] However, most other judges remained silent, and one, District Judge Ron Chapman, affirmatively stated that he would not allow any questioning of the prosecution's motives until he was ordered to do so by a higher court: "As a practical matter, unless they (the prosecutors) admit it, there's no way I'm going to allow them to be questioned about why they struck a particular juror."[335] Many commentators have noted the political pressure on Texas criminal judges to appear tough on crime and hand down law and order rulings, especially in capital cases, and their willingness to do just that.[336] Until Texas reforms its judicial system, it is simply too much to expect

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334. *See, e.g.*, text accompanying nn. 146 & 147, *supra*. District Judge Ed Kinkeade told the *Dallas Morning News*: "Literally, the buck stops with the judge to see that the defendant receives a fair trial. . . . We need to decide whether we are going to be part of the solution to this or are they [other Dallas County judges] going to let somebody else be part of the solution." Steve McGonigle & Ed Timms, *Judge Plans to Urge Action to End Jury Selection Bias*, DALLAS MORNING NEWS, Mar. 11, 1986, at A6.

335. Steve McGonigle, *Bar to Seek Jury-Selection Changes*, DALLAS MORNING NEWS, Mar. 23, 1986, at 36A (quoting Chapman).

336. *See, e.g.*, McVicker, *supra* note 330, at 12 (noting Harris County Criminal Defense attorney David Jones' view that the "present climate" Texas judges "see themselves as enforcers of law against the bad guys" and that they've "lost their sense of neutrality."); Brent E. Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty, 1972-1994*, TEX. FORUM ON CIV. LIBERTIES & CIV. RTS., Spring 1994, at 1, 23-24 (noting that most Texas trial judges are former prosecutors and documenting several instances of egregious misconduct by Texas judges in capital cases); Dow, *supra* note 332, at 57-59 (observing that "unbecoming conduct" is not uncommon among Texas trial judges in capital cases and documenting instances in which judges treated execution date settings with nonchalance or levity).

Texas judges regularly run for elective office based on specific promises of pro-state rulings in death penalty cases. Republican Stephen Mansfield, for example, bolstered his bid for a seat on Texas' highest criminal court by promising to use the death penalty more frequently, to find more constitutional errors harmless, and to sanction lawyers who file "frivolous" appeals on behalf of Texas death row inmates. *See* Janet Elliott & Richard Connelley, *Mansfield: The Stealth Candidate: His Past Isn't What it Seems*, TEX. LAW., Oct. 3, 1994, at 1. Mansfield was elected in spite of pre-election reports showing that he had "misrepresented his prior background and experience, that he had been fined for practicing law without a license, and that . . . he had virtually no experience in criminal law." Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 321-22 (1997) (citing numerous sources). Harris County Judge Jeannine Barr recently ran a campaign advertisement touting her past as a prosecutor, promising to give "no probation without victim approval" and, most extraordinarily, featuring the following endorsement from the parents of the murder victims in a recent highly-publicized death penalty case: "Judge Jeannine Barr has demonstrated a long time commitment to victim's [sic] rights as a prosecutor and Judge." Advertisement, HOUSTON CHRONICLE, Tuesday, Mar. 10, 1998, at A5. Harris County District Judge Ted Poe left his bench to give punishment-phase evidence for the state in a death penalty trial being held in another courtroom. Poe, who had participated in the prosecution of the co-defendants in the case, gave victim-impact testimony concerning the effect that the defendant's crime had on him as a prosecutor (Poe was not related to any of the victims of the crime). Janecka v. State, 937 S.W.2d

that most Texas criminal judges will go out of their way to expand, or in some cases, even enforce the constitutional rights of criminal defendants unless they are literally directed to do so.

This observation leads naturally to the one Court capable of such direction: the Supreme Court of the United States. In 1983, the issue of blanket exclusion of minorities from criminal juries was squarely presented to the Court in *McCray v. Abrams*.[337] Justices Marshall and Brennan voted to grant certiorari, and an opinion written by Justice Marshall harshly attacked the *Swain* burden of proof and argued that defendants who can prove that the prosecution removed minority jurors from their trial on the basis of race should be entitled to relief without having to make *Swain*'s systematic showing:

> Since *every* defendant is entitled to equal protection of laws and should therefore be free from the invidious discrimination of state officials, it is difficult to understand why several must suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object.[338]

Justices Stevens, Blackmun and Powell were more circumspect. Although they agreed with Justice Marshall about "the importance of the underlying issue," they also declared that it would be a "sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."[339] Their opinion reflected an optimistic confidence in the good faith of state court systems that, at least in the case of Dallas County, was wholely unwarranted. With minor exceptions that prove the rule, there is no indication that Dallas County prosecutors and judges felt any inclination to "study" the problem of systematic discrimination, much less do anything about it.

Justices Powell, Blackmun, and Stevens erred on the side of caution, as the cases of Michael Wayne Evans, Larry Smith, John Fearance Jr., and Ramon Montoya prove. Each of these minority defendants was tried in Dallas County before *Batson*, when racial discrimination was nearly universal in peremptory challenges , especially in cases involving minority defendants. Each was almost certainly tried by a jury tainted by prosecutorial discrimination -- a constitutional violation which the Supreme Court has declared "casts doubt upon the integrity of

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456, 473 (Tex. Crim. App. 1996). He told the jury that he had kept a photograph of one of the victims on his desk for years, first as a prosecutor, then as a judge. *Id.* The Court of Criminal Appeals conceded that the judge's testimony "had no relevance to any issues at trial," but held the error harmless nonetheless. *Id.* For more evidence of political pressures tainting judicial decisions in death penalty cases, see Stephen Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

337. 461 U.S. 961 (1983).

338. *Id.* at 964-65.

339. *Id.* at 961, 963.

the judicial proceedings,"[340] "places the fairness of a criminal proceeding in doubt,"[341] and "invites cynicism respecting the jury's neutrality."[342] Each has since been executed by lethal injection.[343]

The next time the Supreme Court recommends that state court systems "study" clear constitutional violations they have shown no particular desire to correct, it should consider whether valor can sometimes be the better part of discretion.[344]

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340. Rose v. Mitchell, 443 U.S. 545, 556 (1979).

341. *Powers*, 499 U.S. at 411.

342. *Id.* at 412.

343. *See* JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS 1923-1990 at 222 (1994) (Michael Wayne Evans executed Dec. 4, 1986); *id.* at 223 (Larry Smith executed Aug. 22, 1986); *see also* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DEATH ROW INMATE STATUS REPORT (noting John Fearance's execution on June 20, 1995 and Ramon Montoya's execution on March 25, 1993).

344. This identical pattern of Supreme Court Justices timorously urging state courts to implement fundamentally fair criminal procedure reforms, while refraining from forcing the issue is repeating itself now. In Simmons v. South Carolina, 512 U.S. 154 (1994), the Court heard the appeal of a South Carolina capital defendant who, at trial, had repeatedly urged that he be allowed to inform his sentencing jury that he would be ineligible for parole if sentenced to life in prison. *Id.* at 156-57. Citing South Carolina law prohibiting discussions of parole in criminal cases, the judge rejected the defendant's request, and refused to inform the jury of the defendant's parole ineligibility even when the jury sent a note during punishment deliberations asking whether Simmons would be parole eligible if sentenced to life. *Id.* at 160. Simmons appealed, claiming that the Court's Eighth and Fourteenth Amendment jurisprudence gave him the right to rebut the prosecution's future dangerousness arguments with truthful, relevant evidence, including the fact that he would never be eligible for parole if sentenced to life in prison. The Court agreed, holding that, when the defendant's future dangerousness is at issue during the sentencing phase of a death penalty trial, the sentencing jury must be informed that if they sentence the defendant to life in prison rather than death, the defendant will have to serve a true life-without-parole (LWOP) sentence. *Id.* at 164. A plurality of the Court emphasized that its decision was limited to cases like the one before it, in which the alternative to the death sentence was truly LWOP. *Id.* at 178 (O'Connor, joined by Kennedy, J., and Rehnquist, C.J., concurring in the judgment).

In Texas, future dangerousness is literally the central issue in every death sentencing trial, because the Texas death sentencing scheme requires the jury to determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 37.071(b)(1). Death penalty defendants who are sentenced to life in prison during the punishment phase of death penalty trials must serve at least "forty calendar years" in prison before becoming parole-eligible. TEX. CODE CRIM. PROC. ANN., Art. 42.18, § 8(b)(2) (Vernon Supp.1997). Attempts to increase the sentencing alternative to LWOP have been successfully lobbied against by Texas prosecutors, who oppose this reform because they believe it will lead to fewer death penalties being assessed. *See* Kathy Walt, *Should Tucker Be Executed?*, HOUSTON CHRONICLE, Feb. 1, 1998, at 1 (noting that Harris County District Attorney Johnny Holmes has opposed attempts to institute LWOP as a sentencing option in capital cases in Texas: "As a practical matter," Holmes said, "it would be real, real hard to get 12 people to say, 'This person should die,' when as an alternative you could lock them up forever. That's going to be a cold jury."). Holmes is correct: surveys consistently reveal that Americans believe the true length of life in prison during death penalty sentencing proceedings is extremely important information, that criminals sentenced to "life" in prison customarily end up serving a small fraction of that sentence (generally around ten to fifteen years), and that "jurors who believe that the alternative to death is a relatively short time in prison [tend to impose death]." Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7 (1993). *See generally id.*; *see also Simmons*, 512 U.S. at 159, 169-70 (collecting other sources).

In Texas death penalty trials, jurors may not be told what the meaning of a "life sentence" is beyond being instructed to rely on the customary meaning of the term. Smith v. State, 898 S.W.2d 838, 852 (Tex. Crim. App. 1995) (citing Boyd v. State, 811 S.W.2d 105, 111-112 (Tex. Crim. App. 1991)). Further, they may not be told how parole would affect a life sentence in death penalty cases, and they are requested not to speculate about parole during sentencing. *Id.* The Texas Court of Criminal Appeals, asked in *Smith* to apply *Simmons* to Texas, seized upon the fact that Texas' death sentencing statute did not provide an LWOP alternative to the death sentence, and thereby denied Texas capital defendants the right to inform the jury what a "life" sentence would mean. *Id.* at 858-59. The Texas court has maintained that position consistently since, even in cases in which the jury signals that it is improperly considering parole issues by sending a note to the judge asking what a life sentence means and inquiring when the defendant will become parole-eligible. *See, e.g.*, Colburn v. State, 1998 WL 76237 (Tex. Crim. App. Feb. 25, 1998) (request to inform jurors of meaning of life sentence denied despite jury note asking "Given a life sentence, is there a possibility of parole in this case?"); Willingham v. State, 897 S.W.2d 351, 360 (Tex. Crim. App. 1995) (Overstreet, J., dissenting) (jurors asked whether defendant would become parole eligible and whether parole could be denied; no error found in refusal of defense's request to give jurors truthful answers to these questions).

Four members of the United States Supreme Court recently labeled Texas' law preventing jurors from being told the true nature of life sentences in capital cases "troubling" and "perverse]," and in "obvious tension" with *Simmons*. Brown v. Texas, 118 S. Ct. 355, 356 (1997) (opinion respecting denial of certiorari of Stevens, J., joined by Souter, Ginsburg and Breyer, JJ.). Texas' rule, they observed "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." *Id.* The Justices pointed to studies indicating that jurors' attitudes toward the propriety of a death sentence are strongly influenced by when they believe defendants will be released on parole, and that jurors are significantly less likely to sentence defendants to death when they are informed that the defendants will never be paroled from prison if sentenced to life. *Id.* at 356 n.2. Ironically, however, the four Justices refused to grant certiorari. Instead, repeating the formulation of *McCray* (and, in fact, citing it repeatedly), the Justices commended the question to the "further study" of other tribunals, presumably Texas courts. *Id.* at 357. Nowhere in the *Brown* memorandum do the Justices even acknowledge that the Texas Court of Criminal Appeals has already repeatedly addressed -- and emphatically rejected -- the notion that Texas' rule is in any "tension" with *Simmons*. *McCray* should teach these Justices a lesson in political reality: if they believe Texas sentencing procedures are unfair, as they seem to, they would be foolhardy to rely on Texas courts to remedy the situation.