

COMMENT

SIX TRIALS & TWENTY-THREE YEARS LATER: CURTIS FLOWERS AND THE NEED FOR A MORE EXPANSIVE *BATSON* REMEDY*

ABSTRACT

Racial discrimination during jury selection is a form of prosecutorial misconduct with very real consequences for criminal defendants. Despite being prohibited by the Supreme Court in the well-known 1986 case of *Batson v. Kentucky*, racial discrimination during jury selection by prosecutors remains a prominent form of racial bias affecting criminal defendants and their constitutional rights. This is exceptionally true for Curtis Flowers, a man who spent twenty-three years in prison while being tried six times by the same prosecutor who was ultimately found, by the Supreme Court, to have racially discriminated during the venire of all six trials. *Flowers v. Mississippi* exemplifies how the existing procedure for safeguarding the rights of criminal defendants impacted by racial discrimination during jury selection is desperately lacking because it allows prosecutors to commit repeated acts of racially motivated misconduct over the course of countless trials with little recourse for the defendant. This Comment examines the many trials of Curtis Flowers and proposes how a more expansive remedy could help protect the rights of criminal defendants in similar situations.

* J.D. Candidate, University of Houston Law Center, 2022. This Comment received the Beck Redden LLP Most Outstanding Paper in the Area of General Litigation Award by the *Houston Law Review*. The Author would like to thank Professors Sandra Guerra Thompson and Emily Berman of the University of Houston Law Center for their guidance and encouragement, the editing team of the *Houston Law Review* for their exceptional work, and Beck Redden LLP for their recognition and support.

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I. INTRODUCTION

In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many. . . . Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process.¹

—Supreme Court, *Flowers v. Mississippi*

In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause prohibits jury discrimination on the basis of race.² When a prosecutor commits prosecutorial misconduct by violating *Batson*, the sole remedy for a criminal defendant on appeal is the reversal of the conviction and a new trial.³ If the

1. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241–42 (2019) (summarizing the holdings and principles of *Batson v. Kentucky*).

2. *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986).

3. See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 787–89, 788 n.294 (1999).

appellate court grants a reversal and a new trial, the same prosecutor who engaged in the misconduct and racially discriminated during jury selection retains the power to retry the defendant.⁴ The prosecutor's opportunity to maintain control creates the possibility that *Batson's* mandate may be chronically violated, as courts and bar associations rarely reprimand prosecutors for such misconduct.⁵ Meanwhile, the criminal defendant faces trial after trial by the same lead prosecutor committing the misconduct.⁶

For Curtis Flowers, this cycle continued for twenty-three years while the same prosecutor tried his criminal case a total of six times in Mississippi state court.⁷ Four of the six trials resulted in a conviction and two ended in mistrials.⁸ The Mississippi Supreme Court overturned three of the four convictions on appeal due to various charges of prosecutorial misconduct, including racial discrimination during jury selection.⁹ After each conviction was overturned, the same prosecutor was permitted to try the case again.¹⁰ Curtis's case culminated at the Supreme Court, which found that the prosecution had racially discriminated during the venire of all six trials.¹¹

Prosecutorial misconduct was present throughout all of Curtis's six trials.¹² Only after the Supreme Court issued its opinion did the prosecutor recuse himself and the misconduct stop.¹³ Curtis remained imprisoned during the entire course of the six trials—nearly half of his life.¹⁴ Considering the racial disparities within the American criminal justice system,¹⁵ it is

4. See *Flowers*, 139 S. Ct. at 2234–35.

5. See Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 32–35, 37 (2008).

6. See *Flowers*, 139 S. Ct. at 2234–35.

7. *Id.*

8. *Id.* at 2235.

9. *Id.*

10. *Id.* at 2234–35.

11. *Id.* at 2251 (“[T]he State’s pattern of striking [B]lack prospective jurors persisted from Flowers’ first trial through Flowers’ sixth trial.”).

12. See *id.* at 2236–38, 2251.

13. See *infra* Section IV.D.

14. Parker Yesko, *Mississippi to Pay Curtis Flowers \$500,000 for His Decades Behind Bars*, APM REPS. (Mar. 2, 2021), <https://www.apmreports.org/story/2021/03/02/mississippi-to-pay-curtis-flowers-500000-settlement-for-decades-behind-bars> [https://perma.cc/8GHR-5W3F].

15. See BESIKI KUTATELADZE ET AL., DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES 17 (2012) (“[P]rosecutorial decision making is associated with racial and ethnic disparities in case outcomes.”); AM. SOCIO.

alarming that court-confirmed racial discrimination during jury selection does not stop a prosecutor from retrying a defendant or call into question the prosecutor's ethical handling of the case as a whole.

Part II begins by providing an overview of the fundamental relationship between a defendant's constitutional rights and prosecutorial misconduct. Part III reviews the history and function of peremptory challenges and the process of raising a *Batson* violation. Part IV summarizes the six trials of Curtis Flowers and reflects on the impact of his decades-long legal saga. Part V analyzes the issues brought to light by *Flowers v. Mississippi* and posits that harmful patterns of repeated racial discrimination are likely to occur when a prosecutor commits a *Batson* violation, warranting a heightened need for protection of the defendant's rights under the Equal Protection and Due Process Clauses.

Consequently, Part V argues that a more expansive remedy should exist for defendants after a *Batson* violation occurs to prevent similar injustices caused by recurring prosecutorial misconduct. Specifically, the Supreme Court could address this abuse as it has with other violations of criminal defendants' constitutional rights, like the exclusionary rule. Part V concludes by examining a potential lockstep remedy the *Flowers* Court could have proffered to bar prosecutors from retrying a case after a felony conviction has been overturned on a *Batson* violation, instead of leaving the issue to be solved by state legislative reform measures.

II. A DEFENDANT'S RIGHTS AND A PROSECUTOR'S DUTY

A criminal defendant is constitutionally guaranteed the right to a fair trial by an impartial jury.¹⁶ However, the Supreme Court has clarified that a criminal "defendant is [only] entitled to a fair trial[,] not a perfect one."¹⁷ A defendant's right to a fair trial is violated when there is a "failure to observe that fundamental

ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 5 (2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> [https://perma.cc/GK2Q-MUU3] (describing the racial and ethnic disparities in the criminal justice system in the United States, specifically that young Black males from inner cities and low-income communities are the most vulnerable population when it comes to the effects of racial discrimination in criminal justice policies and practices).

16. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. VI; *Massey v. Moore*, 348 U.S. 105, 108 (1954) ("The requirement of the Fourteenth Amendment is for a fair trial.").

17. *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

fairness essential to the very concept of justice.”¹⁸ A defendant is also entitled to due process under the Constitution, meaning that the government may not “deprive [an] individual[] of life, liberty, or property without reason or explanation.”¹⁹ When the absence of “fundamental fairness” fatally infects the trial, such that the resulting conviction becomes unreliable, the defendant has been denied due process.²⁰

In addition to zealously seeking a conviction, a prosecutor must ensure that the above-described constitutional protections are afforded to criminal defendants.²¹ In *Berger v. United States*, the Supreme Court expounded on the duties of a prosecutor when it held that a prosecutor “may strike hard blows, [but] . . . is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”²² This imperative to guarantee a defendant receives a fair trial requires a prosecutor to serve in a quasi-judicial role²³ and leads to prosecutors carrying considerable executive authority and responsibility within the criminal justice system.²⁴

Prosecutors are involved in almost every aspect of the legal process and regularly exercise unilateral authority.²⁵ They coordinate with police on investigations, decide whom to charge with what crimes, convene and maintain control over grand jury proceedings, negotiate plea bargains, choose strategies for pretrial and trial proceedings, and greatly influence sentencing.²⁶ They also bear responsibility for the procedural legality of searches, confessions, cooperating witnesses, eyewitness statements,

18. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

19. U.S. CONST. amend. XIV, § 1; Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1024–25 (1989).

20. *Lisenba*, 314 U.S. at 236 (“In order to declare a denial of [due process, the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.”).

21. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecution’s] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405 (2006).

22. *Berger*, 295 U.S. at 88.

23. Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 244 (2017).

24. See Davis, *supra* note 5, at 25–26 (“Prosecutors are the most powerful officials in the criminal justice system.”); Joy, *supra* note 21, at 408 (discussing the enormous power that prosecutors wield in the criminal justice system).

25. See Fish, *supra* note 23, at 260; Davis, *supra* note 5, at 26.

26. See Joy, *supra* note 21, at 408; Fish, *supra* note 23, at 259–62.

introducing lab reports, and the use of jailhouse informants.²⁷ Due to their substantial level of involvement, a “prosecutor is the first line of defense against many of the common factors that lead to wrongful convictions.”²⁸

Prosecutorial misconduct occurs when a “prosecuting attorney over-step[s] the bounds of that propriety and fairness which should characterize the conduct” of a prosecutor.²⁹ Prosecutors’ failures to uphold ethical and professional responsibilities undermine defendants’ constitutional right to due process.³⁰ Common examples of prosecutorial misconduct include the failure to disclose exculpatory evidence (also known as a *Brady* violation);³¹ introducing false or misleading evidence; using improper arguments, evidence or witness tampering; and discriminating in jury selection (also known as a *Batson* violation).³² Unfortunately, but not unexpectedly, considering the immense power a prosecutor wields, prosecutorial misconduct is one of the most common factors contributing to wrongful convictions.³³

Since 1989, 729 wrongfully convicted defendants have been exonerated in cases involving prosecutorial misconduct,³⁴ and racial disparities are evident in these cases.³⁵ Black people convicted of murder are approximately 50% more likely to be innocent than other non-Black convicted murderers, and this likelihood increases if the victim is White.³⁶ Although prosecutorial misconduct is endemic in the American justice

27. *Joy*, *supra* note 21, at 406.

28. *Id.* at 407.

29. *Berger v. United States*, 295 U.S. 78, 84 (1935).

30. *See Joy*, *supra* note 21, at 407.

31. *See Brady v. Maryland*, 373 U.S. 83 (1963) (White, J., separate opinion); Jessica Brand, *The Epidemic of Brady Violations: Explained*, APPEAL (Apr. 25, 2018), <https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800> [<https://perma.cc/5D23-2NA6>].

32. *Batson v. Kentucky*, 476 U.S. 79, 139 (1986); *see Fish*, *supra* note 23, at 255 (providing examples of different ways a prosecutor can violate a defendant’s rights); Davis, *supra* note 5, at 34 (discussing the various forms of prosecutorial misconduct).

33. *See Joy*, *supra* note 21, at 403.

34. Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, INNOCENCE PROJECT (Nov. 11, 2020), <https://innocenceproject.org/gen-anderson-michael-morton-prosecutorial-misconduct-jail> [<https://perma.cc/ET5D-65DX>].

35. *See* NAT’L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 27–29 (Samuel R. Gross ed., 2020).

36. NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 3–5 (Samuel R. Gross ed., 2017).

system, prosecutors generally face no real threat of sanctions, public ridicule, or disciplinary measures.³⁷ Accountability by state bar organizations tasked with governing their conduct and protecting the public remains virtually nonexistent.³⁸ Prosecutors are less likely to be disciplined than private attorneys, are rarely admonished by the courts, and seldom have their indiscretions publicized.³⁹

The Supreme Court has held that prosecutors enjoy absolute immunity from suit by wronged individuals, regardless of whether their conduct was egregious.⁴⁰ This immunity means that a prosecutor could falsify evidence, coerce witnesses, and withhold exculpatory evidence with no option for compensatory redress by those affected.⁴¹ Criminal law has also been a historically ineffective means of policing prosecutorial misconduct because courts are reluctant to view the errors as immoral or intentional.⁴² Very few prosecutors have ever served jail time for misconduct that led to a wrongful conviction.⁴³ These deliberate protections afforded to prosecutors and inadvertent failures in the systems

37. See Davis, *supra* note 5, at 32–33, 37.

38. See, e.g., Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 650 (2017) (“Unfortunately, in practice, the standard mechanism for review [of prosecutorial misconduct]—bar discipline—has proven ineffective.”); Jeff Adachi & Peter Calloway, *One Simple Way to Hold Bad Prosecutors Accountable*, APPEAL (Mar. 21, 2019), <https://theappeal.org/prosecutorial-misc>
 onduct-jeff-adachi-commentary [<https://perma.cc/9ZKC-NPAY>] (“State bar organizations have the power to discipline prosecutors, but they studiously ignore bad behavior.”); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 3, 54–61 (2010) (summarizing a study of prosecutorial misconduct in California from 1997 to 2009, which found that out of 707 instances where a judge ruled that a prosecutor committed misconduct, less than 1% resulted in public sanction by the state bar).

39. See Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 890–92 (2015); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1066–69 (2009).

40. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 227 (2012).

41. See KATIE MCCARTHY & KIAH DUGGINS, NAT’L POLICE ACCOUNTABILITY PROJECT, ABSOLUTE IMMUNITY FOR PROSECUTORS (2020), <https://www.nlg-npap.org/wp-content/uploads/2020/07/Absolute-Immunity-Fact-Sheet-vF.pdf> [<https://perma.cc/27GR-LUPY>].

42. See Thompson, *supra* note 38, at 652.

43. Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html> [<https://perma.cc/V5F6-7DBF>]; Selby, *supra* note 34.

intended to regulate them have produced a hotbed for unimpeded prosecutorial misconduct.⁴⁴

III. PEREMPTORY CHALLENGES AND *BATSON* VIOLATIONS

A. *Peremptory Strikes: A Brief History*

Peremptory challenges are a mechanism used during voir dire to allow parties to remove a prospective juror based solely on suspicion of bias.⁴⁵ Unlike strikes “for cause,” the striking party does not have to show sufficient support of this bias.⁴⁶ Peremptory challenges in the American judicial system originated from English common law and existed before ratification.⁴⁷ The Constitution and subsequent amendments did not include any guarantee of peremptory challenges when drafted and ratified; instead, their use and legality were steadily codified and expanded throughout the nineteenth century.⁴⁸ While peremptory challenges may arguably be a valuable tool for parties attempting to select an impartial and favorable jury, these challenges are inherently arbitrary, capricious, and ripe for misuse.⁴⁹

The Supreme Court has protected the special province of peremptory strikes even though they lack a constitutional basis and create a high risk of racial discrimination.⁵⁰ The Court’s

44. See Davis, *supra* note 5, at 33–35 (describing how the Supreme Court’s assumption that state bar authorities would police prosecutorial misconduct has proven incorrect, and the various forms of immunity the Court has afforded to prosecutors have likely emboldened them to engage in misconduct).

45. See William H. Burgess & Douglas G. Smith, *The Proper Remedy for a Lack of Batson Findings: The Fall-Out from Snyder v. Louisiana*, 101 J. CRIM. L. & CRIMINOLOGY 1, 5–6 (2011).

46. See *id.* at 5.

47. See April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners’ Trial Manuals*, 16 STAN. J.C.R. & C.L. 1, 17 (2020).

48. See *id.* at 17–20. The Supreme Court has consistently stated that the Constitution does not guarantee a right to peremptory challenges. See, e.g., *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948) (“The [peremptory challenge] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guarantees of ‘an impartial jury’ and a fair trial.”); *Rivera v. Illinois*, 556 U.S. 148, 157 (2009) (“[T]here is no freestanding constitutional right to peremptory challenges.”).

49. See Burgess & Smith, *supra* note 45, at 5–6; 4 WILLIAM BLACKSTONE, COMMENTARIES *352–53.

50. See *Swain v. Alabama*, 380 U.S. 202, 220–22 (1965).

rulings in *Swain v. Alabama*⁵¹ and *Batson v. Kentucky*⁵² demonstrate its evolving effort to maintain the practice of peremptory challenges while safeguarding constitutional rights.

In *Swain v. Alabama*, the Court found that the nature and purpose of the challenge would be thwarted if a prosecutor's reasoning for exercising a particular peremptory challenge was subject to examination, even if it was alleged that a party made the strike on the basis of race.⁵³ The *Swain* Court held that a prosecutor's use of peremptory challenges may be impermissible if, and only if, a defendant could show an established history of the prosecutor excluding Black jurors.⁵⁴ This exceedingly high burden of proof consequentially created a very narrow exception for finding a Fourteenth Amendment violation based on racial discrimination via peremptory challenges.⁵⁵

Two decades later, in *Batson v. Kentucky*, the Supreme Court overruled *Swain* and held that a prosecutor must not discriminate on the basis of race when exercising peremptory strikes.⁵⁶ The Court determined the Equal Protection Clause protects a defendant's right to be tried by a jury "selected pursuant to nondiscriminatory criteria," and purposeful racial discrimination during jury selection violates this right.⁵⁷

51. *Id.* at 221–22.

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

53. *See Swain*, 380 U.S. at 220–22 ("In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case."); *see also* Henning, *supra* note 3, at 782 ("*Swain* accepted the potential for discriminatory exercise of the peremptory challenge because close scrutiny of the prosecutor's motives would do more than change the nature of the challenge.>").

54. *See Swain*, 380 U.S. at 223–24; George Bundy Smith, *Swain v. Alabama: The Use of Peremptory Challenges to Strike Blacks from Juries*, 27 HOWARD L.J. 1571, 1575 (1984) ("[The *Swain* Court] did leave open one avenue of challenge to a defendant. [It] concluded that where the exclusion of Blacks from petit juries by means of the peremptory challenge had occurred over a long period of time, a violation of the Fourteenth Amendment could be shown.>").

55. *See* Annie Sloan, "What to Do About *Batson*?": *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 238 (2020); Smith, *supra* note 54, at 1577.

56. *Batson*, 476 U.S. at 97–98, 100 ("[T]he Equal Protection Clause . . . forbids the States to strike [B]lack veniremen on the assumption that they will be biased in a particular case simply because the defendant is [B]lack. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.>").

57. *Id.* at 85–86.

The *Batson* Court reasoned that its holding would not undermine the purpose or use of peremptory challenges and that public policy considerations, specifically the history of peremptory challenges being used to discriminate against Black jurors and the nearly complete prosecutorial immunity created by *Swain*, required *Swain* to be overruled.⁵⁸ *Batson*'s holding made a necessary adjustment to the "crippling burden of proof" evidentiary standard that *Swain* imposed, and it allowed courts to examine individual instances of racial discrimination via peremptory challenges.⁵⁹

B. *Batson Challenges*

The ultimate question at issue when raising a *Batson* challenge during jury selection is one of fact: did the party exercising the peremptory challenge engage in intentional discrimination on the basis of race, ethnicity, or gender?⁶⁰ To contest a peremptory challenge that a party alleges violates *Batson*'s standard, the party must initiate a *Batson* challenge and establish a prima facie case of purposeful discrimination given all relevant circumstances.⁶¹ Once a prima facie showing has been made, the burden shifts to the alleged violator who must offer a race-neutral reason for striking the juror.⁶² The trial court examines the evidence and makes a ruling as to whether or not the challenger has successfully shown purposeful discrimination.⁶³ When a party makes a *Batson* challenge and obtains a favorable ruling from the trial court before the trial has started, the judge may either disallow that exercise of the peremptory challenge or require that the parties start jury selection over.⁶⁴ In contrast, if a

58. See *id.* at 85, 92–93.

59. See *id.* at 92–93.

60. See *id.* at 95; David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 IOWA L. REV. 1425, 1429 (2012). In 1994, the Supreme Court extended its prohibition of discrimination through peremptory challenges to the area of gender. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 146 (1994).

61. See *Batson*, 476 U.S. at 96–97; Burgess & Smith, *supra* note 45, at 8; Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (noting that all circumstances are relevant when presenting a prima facie case for a *Batson* challenge).

62. See *Batson*, 476 U.S. at 97; Burgess & Smith, *supra* note 45, at 8–9.

63. See *Batson*, 476 U.S. at 96–98; Burgess & Smith, *supra* note 45, at 8–9.

64. See Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 734 (2018); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 266 (2003).

defendant can prove on appeal that a prosecutor has violated *Batson* and the trial court ruled incorrectly, the only available remedy is granting the defendant a reversal and new trial.⁶⁵

Despite providing more protection than *Swain*, *Batson* has been widely criticized and deemed ineffective by legal scholars since its inception in 1986.⁶⁶ In his *Batson* concurrence, Justice Marshall correctly predicted that the majority's framework would not prevent racial discrimination during jury selection.⁶⁷ He reasoned that a prima facie showing could prove difficult, but even if challenging parties met that burden, the alleged violator could easily proffer a facially neutral reason for the strike that courts would be quick to accept.⁶⁸ Effectively, prosecutors may easily offer a seemingly legitimate reason for striking the prospective juror when their true motive is racial.⁶⁹ An experiment conducted to test the effectiveness of *Batson's* assumption that intentional racial discrimination during jury selection could be reduced by requiring attorneys to explain suspicious peremptory strikes found that "decision-makers are remarkably facile at recruiting race-neutral characteristics to justify jury selection judgments, and this

65. See Henning, *supra* note 3, at 788 n.294; Sloan, *supra* note 55, at 253 ("A *Batson* violation, grounded in equal protection, is a structural error that results in reversal."). The significant difference in remedies has been described in baseball terms as hitting a single (a successful *Batson* challenge at trial) versus a homerun (a successful *Batson* challenge on appeal). See Abel, *supra* note 64, at 734.

66. See Sloan, *supra* note 55, at 239–40 n.35 (listing various authorities who have criticized *Batson* for failing to effectively prevent intentional discrimination in jury selection); Drew Findling, *Beyond Batson: Challenging Systemic Racism at Every Level*, CHAMPION, July 2019, at 5, 5, <https://www.nacdl.org/Article/July2019-FromthePresidentBeyondBatsonChallengingSy> [<https://perma.cc/5PKT-RT86>] ("The problems and limitations that exist within *Batson* challenges are undeniable."); Baldus et al., *supra* note 60, at 1427, 1432 ("The jurisprudence that has developed in the last twenty-five years under *Batson v. Kentucky* may be fairly described as indeterminate, unprincipled, and generally ineffective. Scholarly literature points to a variety of reasons for this state of affairs." (footnote omitted)).

67. See *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring); Sloan, *supra* note 55, at 239–40.

68. See *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring); Sloan, *supra* note 55, at 239–40 ("[S]triking parties have wide latitude to provide race-neutral explanations, which courts are quick to accept. For example, courts commonly allow strikes based on a prospective juror's demeanor, such as failure to make eye contact; reasons that disproportionately affect prospective jurors of color, such as having an arrest record; and explanations with potentially vague connections to the case, such as a juror's place of employment. Judges may be hesitant to question neutral reasons provided by a party, particularly when the case involves an attorney who often appears before the judge." (footnotes omitted)).

69. See Abel, *supra* note 64, at 719–20 ("Anyone with even a modicum of savvy can choose a justification that is not observable on the record . . . thereby making it impossible for trial judges, and later appellate judges, to disprove the justification.").

tendency poses a threat to current restrictions on peremptory use.”⁷⁰

Others have similarly posited that *Batson* is ineffective because the act of accusing another of intentional discrimination is uncomfortable.⁷¹ Requiring an attorney to call out her opponent for intentional racial discrimination and asking a judge to find the party did intentionally violate the Equal Protection Clause is a severe result “that no judge wants to reach lightly.”⁷² This discomfort leads to a reluctance by attorneys to initiate *Batson* challenges and for courts to rule that the proffered race-neutral explanation is a subterfuge for intentional discrimination.⁷³

Concerns regarding *Batson*’s ineffectiveness are well-founded, as racial discrimination in jury selection remains a serious and alarming problem in the U.S. justice system.⁷⁴ Many suggestions for *Batson* reform have been offered, such as requiring the court to apply a strict scrutiny analysis.⁷⁵ Other proposals to transform the

70. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 263, 272 (2007). More broadly, their research suggested “that the very idea of using self-report measures to assess and curtail the influence of race on legal judgment is untenable.” *Id.* at 272.

71. See Jeffrey Robinson, Deputy Legal Dir. for the Nat’l ACLU, *History of Racism, Part 1*, YOUTUBE (Dec. 5, 2017), <https://www.youtube.com/watch?v=0-AxOR0ms0A> [<https://perma.cc/CEZ6-H9K4>] (“[I]n my opinion, one of the reasons that *Batson v. Kentucky* has been so ineffective is that it essentially requires a judge to call a lawyer a racist. And it requires the lawyer making the *Batson* challenge to say, ‘my opponent is doing something deliberately racist.’”); Abel, *supra* note 64, at 720–21 (“[T]he awkwardness of branding the prosecutor racist raises the stakes for all involved and is another impediment to finding a *Batson* violation.”); Sloan, *supra* note 55, at 240 n.40.

72. See Henning, *supra* note 3, at 787; Robinson, *supra* note 71.

73. See Henning, *supra* note 3, at 787–88.

74. See, e.g., Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164 (2014) (“Prosecutors continue to strike disproportionate numbers of prospective African American jurors from serving on criminal juries. Judges continue to let them. Black and [B]rown defendants continue to be tried by all-[W]hite or largely [W]hite juries in twenty-first century America.”); Bryan Stevenson, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, A.B.A. HUM. RTS. MAG., Fall 2010, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol37_2010/fall2010/illegal_racial_discrimination_in_jury_selection/ [<https://perma.cc/9D9E-TL53>] (“While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today there continues to be indifference to racial bias in jury selection.”); EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 4–7, 14 (2010) (“Today in America, there is perhaps no arena . . . where racial discrimination is more widespread, apparent, and seemingly tolerated than in the selection of juries.”).

75. See L. Darnell Weeden, *Mississippi Allows Peremptory Challenges for Fake, Race-Neutral Reasons in Violation of Batson’s Equal Rights Rationale*, 53 SUFFOLK U. L. REV. 159, 174 (2020) (“The Supreme Court uses the strict scrutiny standard when it is serious about providing an effective judicial remedy to combat racial discrimination.

peremptory procedure include “moving to blind voir dire or . . . creating race-conscious affirmative voir dire.”⁷⁶ Additional ideas focus on dissuading attorneys from discriminating via peremptory strikes by increasing implicit bias training or imposing stricter sanctions on violators.⁷⁷ Many scholars support, as Justice Marshall did in his *Batson* concurrence, that peremptory challenges should be eliminated entirely because of their “inherent potential . . . to distort the jury process by permitting the exclusion of jurors on racial grounds.”⁷⁸

IV. THE CASES OF CURTIS FLOWERS

A. *The Crime*

On the morning of July 16, 1996, the owner and three employees of a furniture store in Winona, Mississippi, were shot and killed while working at the store.⁷⁹ Winona is a small town in north-central Mississippi with a population of about 5,000; roughly 53% is Black, and 46% is White.⁸⁰ Investigators found little evidence, no murder weapon, and determined no clear motive but were under immense pressure to solve the crime.⁸¹ Police eventually questioned Curtis Flowers, a Black man and prior

Because exercising peremptory strikes in a criminal trial where there is an allegation of racial discrimination is not subject to a strict scrutiny analysis, is it clear the Supreme Court is not serious about providing an effective judicial remedy to end discrimination against jurors on the basis of race.”).

76. Sloan, *supra* note 55, at 241 (footnote omitted).

77. *See id.*

78. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); *see, e.g., Smith, supra* note 74, at 1183–84; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 871 (1997); Weeden, *supra* note 75, at 173. This call to action isn’t unprecedented; the English parliament abolished the use of peremptory challenges in the Criminal Justice Act of 1988. *See Hoffman, supra*, at 822 & n.66.

79. *See Parker Yesko, The Tardy Furniture Store Murders: What Happened that Morning in July ’96?*, APM REPS. (May 1, 2018), <https://www.apmreports.org/story/2018/05/01/tardy-furniture-murders-what-happened> [<https://perma.cc/9RTM-CNDE>]. Three of the four murder victims were White and one was Black. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2236 (2019).

80. *See Flowers*, 139 S. Ct. at 2236. Winona has a long history of racial discrimination and tensions between White and Black residents. *See Parker Yesko, Letter from Winona*, APM REPS. (May 1, 2018), <https://www.apmreports.org/story/2018/05/01/winona-a-town-at-the-crossroads> [<https://perma.cc/V8FY-CABP>].

81. *See Yesko, supra* note 79; Sharyn Alfonsi, *How Curtis Flowers, Tried Six Times for the Same Crime, Was Saved from Death Row*, CBS NEWS (July 25, 2021), <https://www.cbnews.com/news/curtis-flowers-in-the-dark-60-minutes-2021-07-25/> [<https://perma.cc/4RH N-QJRA>].

employee of the furniture store.⁸² Curtis was arrested six months later on the theory that he robbed the store, murdered the store owner as retaliation for being fired, and then shot the other three employees to eliminate the witnesses.⁸³

B. *The Trials*

The State of Mississippi initially tried Curtis for the murder of the furniture store owner in October of 1997.⁸⁴ The jury pool consisted of thirty-six total prospective jurors, thirty-one White and five Black.⁸⁵ The State used its peremptory challenges to strike all five Black prospective jurors.⁸⁶ An all-White jury found Curtis guilty and sentenced him to death.⁸⁷ Curtis appealed, citing *Batson* and various other prosecutorial misconduct and procedural issues.⁸⁸ The Mississippi Supreme Court found that numerous acts of prosecutorial misconduct resulted in a denial of Curtis's right to a fair trial and reversed the conviction without reaching Curtis's *Batson* argument.⁸⁹

In March of 1999, before the Mississippi Supreme Court announced its ruling concerning the first conviction, the prosecution tried Curtis for the murder of one of the furniture store employees.⁹⁰ The jury pool consisted of thirty total

82. See Jerry Mitchell, *Is Curtis Flowers Innocent? Pathologist Thinks Multiple Killers Behind Quadruple Murder*, MISS. CLARION LEDGER, <https://www.clarionledger.com/story/news/2018/08/02/curtis-flowers-innocent-pathologist-thinks-multiple-killers-behind-quadruple-murder/813262002> [<https://perma.cc/3CJ5-LR26>] (Aug. 3, 2018, 9:45 AM); In the Dark, *Season 2, Episode 9: Why Curtis?*, APM REPS. (June 19, 2018), <https://www.apmreports.org/episode/2018/06/19/in-the-dark-s2e9> [<https://perma.cc/4UQM-K3P4>]. For the remainder of this Comment, it is the Author's preference to refer to Curtis Flowers solely by his first name, Curtis.

83. See E.J. Dickson, *Curtis Flowers Has Been Granted Bail After 23 Years in Prison*, ROLLING STONE (Dec. 16, 2019, 6:47 PM), <https://www.rollingstone.com/culture/culture-news/curtis-flowers-granted-bail-in-the-dark-podcast-927929> [<https://perma.cc/7JWX-FLPU>]; Maurice Possley, *Curtis Flowers*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5808> (Sept. 4, 2021) [<https://perma.cc/53EW-97V9>].

84. *Flowers v. State*, 773 So. 2d 309, 313 (Miss. 2000); *Flowers v. State*, 842 So. 2d 531, 535 (Miss. 2003). The lead prosecutor for the state through all six trials was Doug Evans, a White male. See Parker Yesko, *Will Doug Evans Face Accountability?*, APM REPS. (Oct. 14, 2020), <https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability> [<https://perma.cc/8SNN-CVX4>].

85. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2236 (2019).

86. *Id.*

87. *Id.*

88. See *Flowers*, 773 So. 2d at 315–17.

89. *Flowers*, 139 S. Ct. at 2236; *Flowers*, 773 So. 2d at 327.

90. See *Flowers v. State*, 842 So. 2d 531, 535 (Miss. 2003).

prospective jurors, twenty-five White and five Black.⁹¹ Again, the State attempted to use its peremptory challenges to strike all five Black prospective jurors, but the trial judge sustained one *Batson* challenge and seated the juror.⁹² A jury of eleven White jurors and one Black juror reached a guilty verdict and sentenced Curtis to death.⁹³ On appeal, the Mississippi Supreme Court reversed the conviction, finding that the prosecution engaged in much of the same misconduct it did in the first trial.⁹⁴

At the third trial, this time for all four murders, the jury pool consisted of forty-five total prospective jurors, twenty-eight White and seventeen Black.⁹⁵ One Black juror was struck for cause, leaving sixteen Black prospective jurors subject to peremptory strikes.⁹⁶ The prosecution used all fifteen of its peremptory strikes on fifteen of the sixteen Black potential jurors.⁹⁷ The trial court found no *Batson* violation.⁹⁸ Curtis was convicted and sentenced to death by a jury of eleven White jurors and one Black juror.⁹⁹ On appeal, the Mississippi Supreme Court reversed the third conviction, finding that the prosecution had violated *Batson* by engaging in racially discriminatory practices during jury selection and the trial court erred in upholding the racially motivated strikes.¹⁰⁰

At the fourth retrial, the jury pool consisted of thirty-six total prospective jurors, twenty were White and sixteen were Black.¹⁰¹ The prosecution exercised a total of eleven peremptory strikes, all against Black prospective jurors.¹⁰² Due to the higher percentage of Black prospective jurors in the jury pool, the prosecution did not have enough peremptory challenges to strike the remaining Black prospective jurors.¹⁰³ The jury, consisting of seven White jurors

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

92. *Id.*

93. *Id.*

94. *See id.*; *Flowers*, 842 So. 2d at 538.

95. *Flowers*, 139 S. Ct. at 2236; *Flowers v. State*, 947 So. 2d 910, 915 (Miss. 2007).

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

97. *Id.*

98. *Id.* at 2236–37.

99. *Id.* at 2237.

100. *See id.* (“[T]he State had again violated *Batson* by discriminating on the basis of race in exercising all 15 of its peremptory strikes against 15 [B]lack prospective jurors.”); *Flowers*, 947 So. 2d at 939.

101. *Flowers*, 139 S. Ct. at 2237.

102. *Id.*

103. *See id.*

and five Black jurors, was deadlocked.¹⁰⁴ The proceeding ended in a mistrial.¹⁰⁵

At the fifth retrial, a jury of nine White jurors and three Black jurors deadlocked when they failed to reach a verdict, resulting in a second mistrial.¹⁰⁶

In 2010, thirteen years after being arrested, the State tried Curtis a sixth time.¹⁰⁷ The jury pool consisted of twenty-six total prospective jurors, twenty White and six Black.¹⁰⁸ The State used five of its six peremptory strikes on five of the six Black prospective jurors.¹⁰⁹ The trial court found no *Batson* violation.¹¹⁰ A jury of eleven White jurors and one Black juror found Curtis guilty and sentenced him to death.¹¹¹ On appeal, the Mississippi Supreme Court ruled in favor of the State and affirmed the trial court's finding that no *Batson* violation had occurred.¹¹² The court believed that the prosecutor's "race-neutral reasons were valid and not merely pretextual."¹¹³ The Supreme Court granted Curtis's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of its decision in *Foster*.¹¹⁴ On remand, the Mississippi Supreme Court nevertheless ruled in a 5-4 decision that no *Batson* violation had

104. *Id.*

105. *Id.*

106. *Id.* No information is available regarding this jury pool's racial makeup. *Id.*

107. *See* Possley, *supra* note 83.

108. *Flowers*, 139 S. Ct. at 2237.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Flowers v. State*, 158 So. 3d 1009, 1058 (Miss. 2014).

114. *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016). This decision was ruled on without hearing oral arguments or issuing a written opinion discussing the case on its merits, as is typical of a "GVR." *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711, 717 (2009). In *Foster v. Chatman*, the Supreme Court held that the prosecution's peremptory strikes of two Black prospective jurors in a defendant's capital murder trial were motivated in substantial part by discriminatory intent and thus violated *Batson*. *Foster v. Chatman*, 136 S. Ct. 1737, 1748, 1755 (2016). The Court noted that a side-by-side comparison of the jurors showed the prosecution accepted White jurors who had the same traits or were similarly situated to the Black jurors it struck, and further that there was evidence of the prosecutor's intent, including "shifting explanations, . . . misrepresentations of the record, and [a] persistent focus on race" in documents in the prosecution's file. *Id.* at 1754–55.

occurred and upheld the conviction from the sixth trial.¹¹⁵ The Supreme Court granted certiorari a second time.¹¹⁶

*Summary of the Prosecution’s Peremptory Strikes from All Six Trials*¹¹⁷

Trial	Prospective Jurors		Total Strikes Allowed	Strikes Against Black Prospective Jurors	Black Jurors Seated	Trial Outcome
	White	Black				
1	31	5	12	5	0	Conviction
2	25	5	7	4*	1	Conviction
3	28	16**	15	15	1	Conviction
4	20	16	11	11	5	Mistrial
5	<i>Unknown</i>				3	Mistrial
6	20	6	6	5	1	Conviction

* The prosecution attempted to strike all five Black prospective jurors, but one was seated following a Batson challenge.

** The jury pool initially consisted of seventeen Black prospective jurors, but one was removed for cause.

C. The Supreme Court Opinion

The Court disagreed with the Mississippi Supreme Court and overturned Curtis’s conviction from the sixth trial.¹¹⁸ It found that the prosecutor violated *Batson* by engaging in racial discrimination against the Black prospective jurors, citing four critical pieces of evidence.¹¹⁹

First, the Court analyzed the prosecution’s historical pattern of excluding Black prospective jurors.¹²⁰ It held that in the first four trials alone, the prosecution “employed its peremptory strikes to remove as many [B]lack prospective jurors as possible” and

115. *Flowers v. State*, 240 So. 3d 1082, 1082, 1134–35 (Miss. 2017). In his dissent, Justice King stated that he could not “conclude that Flowers received a fair trial” or “that prospective jurors were not subjected to impermissible discrimination.” *Id.* at 1172 (King, J., dissenting).

116. *Flowers*, 139 S. Ct. at 2238.

117. See *supra* Section IV.B; Joint Appendix Volume 1 at 35, *Flowers v. Mississippi*, 139 S. Ct. 2228 (No. 17-9572) (2019).

118. See *Flowers*, 139 S. Ct. at 2251.

119. See *id.* at 2244.

120. See *id.*

“proceed[ed] as if *Batson* had never been decided.”¹²¹ Throughout all six trials, the prosecution struck forty-one of the forty-two Black prospective jurors subject to peremptory challenges.¹²² The Court decided it could not ignore that history.¹²³

Second, the Court turned solely to the venire of the sixth trial.¹²⁴ It found the prosecution’s use of peremptory challenges to strike five out of the six Black prospective jurors was evidence the prosecution was substantially motivated by discriminatory intent.¹²⁵ It refused to consider the prosecution’s acceptance of the lone Black juror seated on the jury as evidence that a *Batson* violation had not occurred.¹²⁶ The Court suggested that the prosecution may have accepted the juror purely “to obscure the otherwise consistent pattern of opposition to’ seating [B]lack jurors.”¹²⁷

Third, the Court found strong support that the prosecution was motivated by discriminatory intent because the prosecution questioned Black prospective jurors and White prospective jurors at a severely disproportionate rate at the sixth trial.¹²⁸ Specifically, the prosecution asked the White seated jurors an average of one question per juror, while it asked struck Black prospective jurors an average of twenty-nine questions per juror.¹²⁹ The majority opinion noted that the “difference in the State’s approaches to [B]lack and [W]hite prospective jurors was stark,” and the disparity in questioning seemed designed to help the prosecution find a pretextual, non-race related reason to “justify what [was] in reality a racially motivated strike.”¹³⁰

Lastly, the Court pointed to the prosecution’s strike in the sixth trial of at least one Black prospective juror similarly situated to other White prospective jurors whom the prosecution did not strike.¹³¹ The prosecution claimed it struck the Black prospective juror because of her connections to witnesses and Curtis’s family;

121. *Id.* at 2246.

122. *Id.* at 2251.

123. *See id.* at 2246.

124. *See id.*

125. *See id.*

126. *See id.*

126. *See id.*

127. *See id.* (quoting *Miller-El v. Dretke*, 545 U.S. 231, 250 (2005)).

128. *See id.* at 2246–48.

129. *See id.* at 2246–47.

130. *See id.* at 2247–48.

131. *See id.* at 2248–49.

however, there were at least three White prospective jurors to whom the prosecution did not ask any follow-up questions, or strike, who also knew many of the witnesses and had ties to Curtis's family.¹³² The prosecutor also made multiple false statements to justify the peremptory challenges made against four out of the five Black prospective jurors.¹³³ The Court noted that “[w]hen a prosecutor misstates the record in explaining a strike, that misstatement can be another clue showing discriminatory intent.”¹³⁴

The Court concluded that the prosecutor's “pattern of striking [B]lack prospective jurors persisted from Flowers' first trial through Flowers' sixth trial.”¹³⁵ The exclusion of the Black prospective juror who was similarly situated to other White prospective jurors and a side-by-side comparison of the prosecution's treatment of Black prospective jurors and White prospective jurors generally, in conjunction with the other evidence, led the Court to find that the trial court clearly erred in finding that the prosecution was not substantially motivated by discriminatory intent.¹³⁶ The Court reversed the judgment of the Mississippi Supreme Court and remanded the case.¹³⁷ In accordance with the opinion, the Mississippi Supreme Court reversed the conviction and remanded the case for a new trial.¹³⁸

D. Six Trials and Twenty-Three Years Later

Only after the Supreme Court's ruling and surrounding publicity did the prosecutor, Doug Evans, recuse himself from the case and request that the state attorneys' office handle the prosecution.¹³⁹ In December of 2019, the state released Curtis on bail for the first time since his arrest.¹⁴⁰ On September 4, 2020, the

132. *See id.* at 2249.

133. *See id.* at 2250.

134. *Id.*

135. *Id.* at 2251.

136. *See id.* at 2250–51.

137. *Id.* at 2251.

138. *Flowers v. State*, 287 So. 3d 905, 905 (Miss. 2019).

139. *See* Parker Yesko, *Evans Quits the Case: Mississippi Prosecutor Doug Evans Takes Himself Off the Curtis Flowers Case*, APM REPS (Jan. 6, 2020), <https://www.apmreports.org/episode/2020/01/06/doug-evans-recusal-curtis-flowers-case> [<https://perma.cc/M3K4-9SVS>].

140. *See* Dan Mangan, *Curtis Flowers—Black Man Tried Six Times for Same Murders—Released on Bail After Supreme Court Reversed Case Detailed in Podcast*, CNBC, <https://www.cnbc.com/2019/12/16/bail-set-for-curtis-flowers-in-murder-case-overturned-by-supreme-court.html> [<https://perma.cc/WDD2-82BN>] (Dec. 16, 2019, 5:13 PM).

Mississippi Attorney General's office announced that, due to lack of evidence and the interest of justice, an unprecedented seventh trial would not be pursued against Curtis.¹⁴¹ The State of Mississippi dismissed all indictments with prejudice.¹⁴²

Curtis was initially charged in 1997 and spent twenty-three years of his life imprisoned, shifting from a defendant on trial in the local jail to a prisoner on death row.¹⁴³ After release, Curtis discussed how the conditions he faced in prison were unacceptably poor, including being subjected to solitary confinement, extreme heat, and the presence of rats and raw sewage.¹⁴⁴ He watched those around him commit suicide and be led to their execution.¹⁴⁵

Curtis and his family maintained his innocence throughout all six trials; however, Curtis could not celebrate his release with his mother, who passed away shortly before his case reached the Supreme Court.¹⁴⁶ In March of 2021, the State of Mississippi awarded Curtis \$500,000 as compensation for being wrongfully imprisoned.¹⁴⁷ This amount only compensates Curtis for ten of the twenty-three years he spent in prison, as Mississippi law provides \$50,000 for each year of wrongful imprisonment with a limit of ten years or \$500,000.¹⁴⁸

141. Motion of the State of Mississippi to Dismiss the Indictment Against Curtis Giovanni Flowers, *Flowers v. Mississippi*, No. 2003-0071-CR (Miss. Cir. Ct. Montgomery Cnty. Sept. 4, 2020).

142. Order of Dismissal of Indictment with Prejudice, *Flowers v. Mississippi*, No. 2003-0071-CR (Miss. Cir. Ct. Montgomery Cnty. Sept. 4, 2020); Motion of the State of Mississippi to Dismiss the Indictment Against Curtis Giovanni Flowers, *supra* note 141. The motion to dismiss stated, in part, that

[a]s the evidence stands today, there is no key prosecution witness that incriminates Mr. Flowers who is alive and available and has not had multiple, conflicting statements in the record. . . . Moreover, the Court was made aware of alternative suspects with violent criminal histories, as well as possible exculpatory evidence not previously considered.

Motion of the State of Mississippi to Dismiss the Indictment Against Curtis Giovanni Flowers, *supra* note 141, at 2.

143. See In the Dark, *Season 2, Episode 20: Curtis Flowers*, APM REPS. (Oct. 14, 2020), <https://www.apmreports.org/episode/2020/10/14/in-the-dark-s2e20> [<https://perma.cc/TA49-Q6HP>].

144. See *id.*

145. See *id.* at 20:20.

146. See Yesko, *supra* note 139; Parker Yesko, *It's Over: Charges Against Curtis Flowers Are Dropped*, APM REPS. (Sept. 4, 2020), <https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped> [<https://perma.cc/7SVL-NQVV>]; Madeleine Baran, *Lola Flowers Dies, Mother and Source of Spiritual Support to Son, Curtis, Imprisoned on Death Row*, APM REPS. (July 14, 2018), <https://www.apmreports.org/story/2018/07/14/lola-flowers-dies> [<https://perma.cc/WC5S-RETS>].

147. See Yesko, *supra* note 14.

148. *Id.*

Curtis attributes the outcome of his case to his faith, support from his family, his legal team, and most notably the press and exposure his case received from the investigative journalism podcast *In The Dark*, which began airing in May of 2018 and discovered serious issues in the prosecution's case.¹⁴⁹ The journalists interviewed several of the prosecution's key witnesses who admitted that their testimony was false, admitted that they were pressured by the prosecution or offered something in exchange for their testimony, and explicitly recanted on tape.¹⁵⁰ The investigators also found evidence pointing to an alternate suspect and compiled an analysis of the prosecutor's history of racial discrimination in jury selection.¹⁵¹ Several of the podcast's findings were cited by Curtis's defense attorneys and supporting amicus briefs to the Supreme Court.¹⁵²

District Attorney Doug Evans remains the chief prosecutor of seven Mississippi counties, and no sanctions have been issued by the Mississippi Bar Association.¹⁵³ In November of 2019, the Central Mississippi Branch of the NAACP and several Black

149. See *In the Dark*, *supra* note 143; *In the Dark, Season 2, Episode 1: July 19, 1996*, APM REPS. (May 1, 2018), <https://www.apmreports.org/episode/2018/05/01/in-the-dark-s2e1> [<https://perma.cc/86BX-T9QM>]; Yesko, *supra* note 146; Andy Kruse, *Curtis Flowers: Press Release Breaking: After Six Trials and over 23 Years Since His Arrest, the Charges Against Curtis Flowers, Subject of "In the Dark" Podcast, Are Finally Dismissed*, APM REPS. (Sept. 4, 2020), <https://features.apmreports.org/documents/?document=7203814-Curtis-Flowers-Press-Release-Dismissal-Final-9-4> [<https://perma.cc/9QLH-RNHB>].

150. See Parker Yesko, *Clemmie Fleming Becomes Second Major Witness to Recant in Curtis Flowers Case*, APM REPS. (July 2, 2019), <https://www.apmreports.org/story/2019/07/02/clemmie-fleming-recants-curtis-flowers-witness-testimony> [<https://perma.cc/U5XG-6LP2>]; Dave Mann, *Recanted Testimony, Subjective Science Helps Put Curtis Flowers on Death Row*, MISS. CLARION LEDGER, <https://www.clarionledger.com/story/news/2018/05/27/curtis-flowers-jailhouse-informants-recant-ballistics-unscientific/641464002> [<https://perma.cc/MJ3W-XT5G>] (May 29, 2018, 11:41 AM); Dan Reilly, *'In the Dark' Podcast Host Madeleine Baran on Curtis Flowers' Release, Season Three, and Funding Investigative Journalism*, FORTUNE (Jan. 28, 2020, 9:00 AM), <https://fortune.com/2020/01/28/in-the-dark-podcast-madeleine-baran-curtis-flowers-case> [<https://perma.cc/TU2X-NFZS>].

151. See Parker Yesko, *Was There a Brady Violation in the Curtis Flowers Case – and Why Does It Matter?*, APM REPS. (June 26, 2018), <https://www.apmreports.org/story/2018/06/26/brady-violation-curtis-flowers-case> [<https://perma.cc/4R65-CFWK>]; Will Craft, *Mississippi D.A. Doug Evans Has Long History of Striking Black People from Juries*, APM REPS. (June 12, 2018), <https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries> [<https://perma.cc/78DH-CFZK>]; Yesko, *supra* note 146.

152. See Reilly, *supra* note 150; Melissa Locker, *How a Podcast Helped Get Curtis Flowers's Conviction Overturned by the U.S. Supreme Court*, FAST CO. (June 21, 2019), <http://www.fastcompany.com/90367631/curtis-flowers-supreme-court-conviction-overturned-podcast> [<https://perma.cc/JZG7-SE9Z>]; Yesko, *supra* note 146; Aja Romano, *Curtis Flowers Was Tried 6 Times for the Same Crime. The Supreme Court Just Reversed His Conviction.*, VOX, <https://www.vox.com/culture/2018/11/6/18064430/curtis-flowers-scotus-decision-conviction-overturned-in-the-dark-podcast> [<https://perma.cc/HX6U-B5DY>] (June 21, 2019, 2:09 PM).

153. See Yesko, *supra* note 84.

constituents filed a civil rights suit against Evans, asking the federal court to stop his office from discriminating against Black prospective jurors.¹⁵⁴ The suit was intended to “create a blueprint for prosecutorial accountability” but was ultimately dismissed by the federal district court citing the abstention doctrine.¹⁵⁵

In September of 2021, Curtis filed a federal civil suit against Doug Evans and three other law enforcement officials involved in the investigation.¹⁵⁶ The complaint includes a detailed account of the asserted misconduct and wrongdoing of the defendants throughout the investigation and trials.¹⁵⁷ The suit alleges that the defendant’s actions violated Curtis’s rights under the U.S. and the Mississippi Constitutions and “constitute[d] the state law torts of malicious prosecution, abuse of process, and false imprisonment.”¹⁵⁸

V. THE NEED FOR A MORE EXPANSIVE REMEDY

While the concern that *Batson* itself is an insufficient protection because it lacks teeth is an important discussion, this Comment focuses on a separate issue. Particularly, when a defendant can actually accomplish the seemingly impossible feat of securing an appellate court ruling that a *Batson* violation has occurred,¹⁵⁹ the remedies available to the defendant are severely insufficient.

Prosecutors who have violated *Batson* rarely face any form of penalty or professional sanctions and are permitted to retry the same defendant multiple times; this is evident from Curtis Flowers’s case.¹⁶⁰ Allowing racial discrimination during jury selection to transpire with no consequence for the prosecutor other than the opportunity to retry the defendant and employ the same

154. See Parker Yesko, *Judge Dismisses Lawsuit Against DA Doug Evans*, APM REPS. (Sept. 11, 2020), <https://www.apmreports.org/story/2020/09/11/judge-dismisses-lawsuit-aga-inst-doug-evans> [<https://perma.cc/AM83-SUMW>].

155. *Id.* The abstention doctrine allows a federal court to decline exercising jurisdiction over a case when it “is faced with an unclear issue of state law whose resolution might avoid or modify a federal constitutional question.” See Martha A. Field, *Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977).

156. Complaint at 1, 4–5, *Flowers v. Evans*, No. 4:21cv110-MPM-JMV (N.D. Miss., Sept. 3, 2021). The four defendants are being sued in their individual capacity. *Id.*

157. See *id.* at 13–26.

158. *Id.* at 27.

159. See Abel, *supra* note 64, at 733 (“*Batson* appellate claims are extremely difficult to win. . . . It is hard enough to prevail on a *Batson* claim at trial, but the ‘great deference’ that appellate courts must give to trial court *Batson* determinations makes it even more difficult.”).

160. See *supra* Section IV.D.

tactics does the opposite of deterring prosecutorial misconduct: it normalizes and encourages it.¹⁶¹ Moreover, when a prosecutor has racially discriminated during jury selection, *Flowers* illustrates that the prosecutor is likely to do so again in subsequent trials.¹⁶² Allowing repeated trials by the same prosecutor who is prone to commit further *Batson* violations is not a sufficient remedy as the defendant's constitutional right to a fair trial and impartial jury remains in jeopardy.¹⁶³

In addition to repeated misconduct in trials of the same defendant, there is a broader pattern of racially discriminatory prosecutorial misconduct against different defendants in other trials. For example, the prosecutor in charge of Curtis's case struck Black prospective jurors from jury service via peremptory challenges at a rate of 6.7 times more than comparable White prospective jurors throughout his overall career; a statistic that demonstrates the prosecutor has a general policy and custom of racially discriminatory jury selection.¹⁶⁴

Courts will cite a prosecutor's history of racial discrimination generally and in trials of other defendants to support a finding of a *Batson* violation.¹⁶⁵ In *Miller-El v. Dretke*, the Supreme Court found a documented history of racial discrimination by a prosecutor's office in Dallas County, Texas, that exposed a policy and culture of systematic exclusion, including formal training to strike minorities during jury selection.¹⁶⁶ A criminal appeals court

161. See Joy, *supra* note 21, at 417, 427–28 (“[B]y failing to hold prosecutors responsible for prosecutorial misconduct, we tell prosecutors that their misconduct does not matter.”). While the cost of retrial to the state has traditionally been considered an effective deterrent device, its efficacy is questionable. See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 89, 94–95 (2005) (“When reversal is imposed to deter prosecutorial misconduct . . . economic waste ensues. Rather than imposing the costs of the misconduct directly on the offending prosecutor, these costs are indirectly transferred to society . . .”).

162. See *supra* Part IV.

163. See Henning, *supra* note 3, at 788 (“This remedy is unlike those granted for most constitutional violations, which incorporate a harmless error analysis to one degree or another, or even those violations resulting in automatic reversal of the conviction because of doubt about the integrity of the proceeding due to a structural defect.”).

164. See Class Action Complaint for Declaratory Judgment and Injunctive Relief at 2–3, *NAACP v. Evans*, No. 4:19-CV-167-DMB-JMV, 2020 WL 5351075 (N.D. Miss. Sept. 4, 2020); see also Craft, *supra* note 151.

165. See *Miller-El v. Dretke*, 545 U.S. 231, 263–65 (2005); Baldus et al., *supra* note 60, at 1446 (discussing the Supreme Court's analysis of the prosecutor's history of discrimination in the *Miller-El* cases).

166. See *Miller-El*, 545 U.S. at 263–65; Sheri Lynn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 81–82 (2014).

found the two prosecutors who conducted the jury selection in the *Miller-El* trial had “engaged in improper racial discrimination in the selection of juries in other cases during the same period of the mid-1980’s.”¹⁶⁷

It is also reasonable to presume, and such a presumption should exist, that a prosecutor who engages in one form of prosecutorial misconduct, like a *Batson* violation, is also engaging in other types of prosecutorial misconduct.¹⁶⁸ The prosecutor handling Curtis’s case was found to have committed numerous types of prosecutorial misconduct throughout the trials.¹⁶⁹ Likewise, a prosecutor willing to purposefully discriminate based on race during jury selection may racially discriminate in other aspects of the judicial process.

Therefore, a *Batson* violation brings into question the integrity of the overall prosecution and investigation and should subject the prosecutor to heightened scrutiny. Given a prosecutor’s critical role in the process and the likelihood of recurrent misconduct, a failure to abstain from racial discrimination during jury selection should lead to further scrutiny of the prosecution to confirm that racially motivated discrimination is not pervading the handling of a defendant’s overall case and violating the defendant’s right to a fair trial. A finding of prosecutorial misconduct, specifically a *Batson* violation that results in the reversal of a felony conviction, should trigger a formal investigation by state bar authorities, internal conviction integrity units, and the Department of Justice Civil Rights Division.¹⁷⁰

167. Linda Greenhouse, *Justices Give Second Hearing in a Texas Death Row Case*, N.Y. TIMES (Dec. 7, 2004), <https://www.nytimes.com/2004/12/07/us/justices-give-second-hearing-in-a-texas-death-row-case.html> [<https://perma.cc/G6K2-A8NU>].

168. Examples of repeated and wide-ranging prosecutorial misconduct are plentiful. See, e.g., Gershowitz, *supra* note 39, at 1071–74 (providing an account of two different prosecutors who committed various forms of prosecutorial misconduct over the span of their careers); NAT’L REGISTRY OF EXONERATIONS, *supra* note 35, at 134 (recounting the story of prosecutor Ken Anderson and his routine practice of engaging in various forms of misconduct); Adachi & Calloway, *supra* note 38 (discussing the repeated and varied prosecutorial misconduct committed by prosecutor Benjamin Mains, who was eventually fired but never disciplined by the state bar).

169. See *supra* Section IV.B.

170. See Joy, *supra* note 21, at 427; Eric Hatfield, Comment, *Six Wrongs Take Away a Right: The Odyssey of Curtis Flowers and the Prosecutorial Misconduct that Caused It*, 47 S.U. L. REV. 347, 380 (2020). Conviction Integrity Units are divisions of a prosecutor’s office aimed at “prevent[ing], identify[ing], and remedy[ing] false convictions”; however, the majority of prosecutor’s offices do not have Conviction Integrity Units. See *Conviction Integrity Units*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/specialexoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/A6TJ-MF8U>] (last

A. *Existing Suggestions for Reform*

Increasing prosecutorial accountability in the face of *Batson* violations and misconduct is one of the many broad suggestions for reform suggested by legal scholars.¹⁷¹ Developing more effective ethical rules for prosecutors is a first step in this potential area of proposed change.¹⁷² The reform would entail overhauling the American Bar Association Model Rules to include a clear and comprehensive list of what courts deem prosecutorial misconduct and more accurately express the ethical obligations of prosecutors.¹⁷³ Similarly, increasing court sanctions and professional discipline by bar associations have been suggested as a means of deterring prosecutorial misconduct, although such propositions have been criticized as unlikely solutions to the problem.¹⁷⁴

While such reform measures have merit and are worthy of consideration by state legislatures, they focus on disciplining a prosecutor instead of remedying the harm done to the criminal defendant and guaranteeing protection from future misconduct. Allowing a prosecutor to retry a defendant after intentionally discriminating during jury selection is inherently unfair and

visited Oct. 17, 2021). The Criminal Section of the U.S. Department of Justice Civil Rights Division investigates and prosecutes cases involving interference with constitutional liberties and deprivation of rights. *Civil Rights Division: Criminal Section*, U.S. DEPT OF JUST., <https://www.justice.gov/crt/criminal-section> [<https://perma.cc/2NRX-854T>] (last visited Oct. 2, 2021).

171. See, e.g., Geoffrey Cockrell, *Batson Reform: A Lottery System of Affirmative Selection*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 351, 370–71 (1997); Brown, Jr., *supra* note 64, at 312–15; Hatfield, *supra* note 170, at 380.

172. See Joy, *supra* note 21, at 415–17; Thompson, *supra* note 38, at 651 (“Perhaps the reason that professional ethics boards have done little to regulate prosecutorial misconduct can be traced to the fact that professional rules are not tailored to the prosecutor’s unique set of responsibilities.”).

173. See Joy, *supra* note 21, at 415–17 (explaining that the current rules require amendment because they are unclear, “send mixed signals” to prosecutors, and don’t fully consider what constitutes prosecutorial misconduct); Sullivan & Possley, *supra* note 39, at 940. Although the ABA does not itself discipline attorneys, it is an appropriate first step for these rules to be reworked as many states have adopted or use the ABA Model Rules as a guide for their own ethical regulations. See Brown, Jr., *supra* note 64, at 272 n.247.

174. Compare Henning, *supra* note 3, at 828–30 (suggesting that courts should sanction prosecutors directly to police prosecutorial misconduct), and Joy, *supra* note 21, at 427 (“Bar disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and, when they deem it appropriate, conduct investigations or recommend discipline.”), with Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1517 (2009) (positing that direct sanctions against prosecutors or professional discipline by bar associations will not stop prosecutorial misconduct).

violates the defendant's right to a fair trial by an impartial jury.¹⁷⁵ Not only is there a risk that the prosecutor could develop resentment towards the defendant and be less likely to think impartially about the case but it is also ethically unsound to force a defendant to repeatedly face the same prosecutor who committed the racial discrimination.

Other remedies for constitutional violations protect the defendant and deter misconduct,¹⁷⁶ but the current remedy for a *Batson* violation accomplishes neither of those goals.¹⁷⁷ If state reform measures fail to hold prosecutors accountable for racial discrimination and the problem of recurring *Batson* violations persists, the Supreme Court should step in to protect the defendant's constitutional rights. This is especially necessary with capital cases where the defendant may potentially be sentenced to death.¹⁷⁸

B. *Creating a New Rule to Protect Criminal Defendants*

One way to offer this protection would be for the Supreme Court to create a rule as it did with the exclusionary rule. In *Mapp v. Ohio*, the Supreme Court held that a criminal defendant's constitutional protection from unreasonable search and seizures without a warrant should be interpreted as creating an exclusionary rule.¹⁷⁹ If the government illegally obtained evidence in such a manner, it would be excluded from evidence at trial.¹⁸⁰ The exclusionary rule is not mandated by the Constitution as a remedy for this constitutional violation but rather is a judicially created mechanism.¹⁸¹ It serves as a deterrent device intended to protect the defendant's rights under the Constitution and

175. See Hatfield, *supra* note 170, at 379 (discussing how a case poisoned by misconduct should not lead to the state having unlimited "bite[s] at the apple" because the defendant "is unlikely to receive a fair and impartial administration of due process" and indicates that the state is unable to lawfully secure a conviction).

176. See *infra* note 182 and accompanying text.

177. See *supra* Parts III–IV.

178. See Davis, *supra* note 5, at 35 ("When misconduct occurs in a capital case . . . the stakes are the highest because an innocent person might be sentenced to death.").

179. See *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

180. See *id.*

181. Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & C.R.L. REV. 29, 45–46 (2010) ("The Constitution . . . does not mandate exclusion to remedy constitutional violations.").

incentivize the government to obtain evidence lawfully and in accordance with the Fourth Amendment.¹⁸²

The *Flowers* Court could have created a similar mechanism aimed not only at deterring racial discrimination by prosecutors but, most importantly, protecting a defendant's rights. The mechanism could function as follows: if a felony conviction is overturned because a prosecutor violated *Batson*, that prosecutor is barred from prosecuting that defendant again, and a new prosecutor within the same office may be appointed to retry the case. However, if a second felony conviction is overturned because the same prosecutor's office violated *Batson* again, a special prosecutor must be appointed (as eventually occurred in *Flowers*).¹⁸³ If a third felony conviction is overturned due to a *Batson* violation by the special prosecutor, the appellate court should order that the case be dismissed with prejudice.¹⁸⁴

This method escalates the removal of power from the prosecutor's office in steps, eventually leading to a special prosecutor independently evaluating the case.¹⁸⁵ The order to appoint a new prosecutor is also consistent with the remedy for ineffective assistance of counsel claims. When a defendant demonstrates ineffective assistance of counsel by showing that his attorney's performance at trial "fell below an objective standard of reasonableness," and there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," the remedy includes the appointment of new counsel.¹⁸⁶

A lockstep approach creates a balanced remedy that does not offend the criminal justice system by creating an immediate windfall to guilty defendants.¹⁸⁷ Instead, a dismissal with

182. See *Mapp*, 367 U.S. at 657–59; *Holland*, *supra* note 181, at 45–46 (explaining that the exclusionary rule is a "judicially created remedy designed to safeguard . . . constitutional rights through deterrence.").

183. See *supra* Section IV.D.

184. The "three strikes rule" is a concept that has previously been suggested as a remedy to address and deter prosecutorial misconduct. *Hatfield*, *supra* note 170, at 378–80.

185. See *id.* at 376–77 ("The introduction of a prosecutor from outside of the office of the offending prosecutor allows a new perspective of the facts of the case at issue, independent, in principle, of the office originally responsible for the prosecution.").

186. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Ineffective Assistance of Counsel Overview*, WILLIAM G. YARBOROUGH ATT'Y AT L. (June 23, 2021), <https://www.wgylaw.com/blog/2021/06/ineffective-assistance-of-counsel-overview/> [<https://perma.cc/6CE4-UJCM>].

187. See *Henning*, *supra* note 3, at 717 ("[P]unishing a prosecutor by granting the defendant relief, such as excluding evidence or dismissing charges, does not necessarily

prejudice would require three *Batson* violations and three reversals. While a dismissal with prejudice may seem like a severe remedy,¹⁸⁸ three reversals of a felony conviction show that a defendant has been and continues to be prejudiced by racial discrimination and prosecutorial misconduct and that further trials would not be conducted fairly. This assumption prevents egregious harm to a criminal defendant (such as six trials by the same prosecutor continuing to commit racial discrimination) from going unremedied, deters prosecutors from such misuses of authority, and encourages trial judges to take *Batson* challenges seriously when they can be remedied prior to trial instead of on appeal.

VI. CONCLUSION

The *Flowers* Court stated that “one racially discriminatory peremptory strike is one too many” and “[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process.”¹⁸⁹ It asserted that “*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all [B]lack prospective jurors in cases involving [B]lack defendants” and that “[b]y taking steps to eradicate racial discrimination from the jury selection process, *Batson* sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.”¹⁹⁰ But “a

vindicate the interests of the community. Instead, it may produce a windfall for the defendant. . . . Nevertheless, finding improper intent without meting out punishment gives the impression that the courts are powerless in the face of prosecutorial misuse of authority.”).

188. See *id.* at 820 (“When a defendant has not been prejudiced specifically by the prosecutorial misconduct, or if a second trial could be conducted fairly, it is not clear why a court should order dismissal of the charges based solely on the prosecutor’s misconduct that prohibits any determination of guilt for the charge, regardless of the defendant’s actual culpability. Relief that is not responsive to the direct prejudice arising from a violation, or that can be granted regardless of the ability to cure a defect by ordering a second proceeding, appears to furnish a windfall to defendants without any real gain to the criminal justice system.”); Hatfield, *supra* note 170, at 369 (“The dismissal with prejudice of criminal charges, precluding further prosecution, is a remedy rarely seen in criminal law, even for constitutional violations. However, ‘reverse and remand’ opinions with the effect of dismissal or the affirmation of dismissal of state criminal charges by the United States Supreme Court is not entirely unprecedented. While such a dismissal by the nation’s highest court would be an extraordinary action, the circumstances of the *Flowers* case, and the accompanying prosecutorial misconduct, are similarly extraordinary.” (footnotes omitted)).

189. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2241–42 (2019).

190. *Id.* at 2242.

right without a remedy is not a legal right; it is merely a hope or a wish.”¹⁹¹

Flowers demonstrates that the current remedy for a *Batson* violation does not adequately safeguard a defendant’s constitutional rights nor does it deter or prevent discriminatory peremptory strikes from occurring repeatedly to the same defendant by the same prosecutor. Curtis’s story illustrates that racial discrimination within the criminal justice system is an issue that must be addressed, and a more expansive remedy could be crafted to end the abuse criminal defendants face at the hands of prosecutors who are allowed to commit repeated *Batson* violations and continue retrying them.

This Comment differs from most criticisms on this topic by proposing a substantive lockstep remedy intended to not only deter *Batson* violations but also to prevent repeated racial discrimination by the same prosecutor against a defendant. It advocates for a more expansive remedy hinged on the fact that prosecutorial misconduct in the form of racial discrimination during jury selection remains a serious epidemic, and criminal defendants, especially those facing felony charges and the death penalty, must have their constitutional rights protected. If state reform measures like model rule reform or stricter sanctions refuse to address the problem, the Supreme Court should put a mechanism in place as it did with the exclusionary rule.

Curtis’s case was one in which prosecutorial misconduct and racial discrimination were allowed to flourish for decades. Fortunately, Curtis had a team of investigative journalists working to find the truth, a team of top-notch attorneys who eventually took his case and then advocated tirelessly on his behalf, supporters who heard his story and believed in his innocence, an incredibly supportive family, and a strong faith that allowed him to continue fighting throughout twenty-three years of injustice.¹⁹² The culmination of these conditions, plus a dash of pure luck, helped Curtis reach the Supreme Court and eventually obtain dismissal of his charges.¹⁹³ Some may contend that Curtis’s

191. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987).

192. See Yesko, *supra* note 146; In the Dark, *supra* note 143.

193. See Yesko, *supra* note 146 (“People get exonerated from death row because of a combination of relentless persistence, good lawyering, strong evidence that they didn’t do it and just plain luck. . . . You can’t line up those elements. They happen or they don’t. You’re struck by providence.” (quoting Robert Dunham, Executive Director, Death Penalty Info. Ctr.)).

case was an outlier, a rare occurrence unlikely to happen again.¹⁹⁴ It is also plausible, given the statistics on racial bias and prosecutorial misconduct, that other criminal defendants have likely been in or will be in similar circumstances.¹⁹⁵ What if their stars do not align like Curtis's did? A remedy should exist to protect their constitutional rights. If such a remedy had existed for Curtis, it is unlikely he would have spent twenty-three years, or nearly half of his life, in prison.

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194. See *Flowers*, 139 S. Ct. at 2251 (Alito, J., concurring) (“[T]his is a highly unusual case. Indeed, it is likely one of a kind.”).

195. See Yesko, *supra* note 84 (“Curtis Flowers is not the only person this has happened to. It’s happened before and it’s going to keep happening Accountability matters, because there is another Curtis Flowers that . . . [hasn’t yet been] discover[ed].” (quoting Angela J. Davis, Professor, Am. Univ. Wash. Coll. of L.)).