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Sixth and Fourteenth Amendments--The Lost Role of the Peremptory Challenge in Securing an Accused's Right to an Impartial Jury

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SIXTH AND FOURTEENTH AMENDMENTS—THE LOST ROLE OF THE PEREMPTORY CHALLENGE IN SECURING AN ACCUSED'S RIGHT TO AN IMPARTIAL JURY

Ross v. Oklahoma, 108 S. Ct. 2273 (1988).

I. INTRODUCTION

The United States Supreme Court in *Ross v. Oklahoma*[1] severely weakened the role of the peremptory challenge[2] as a procedural safeguard to the sixth amendment right to an impartial jury.[3] The Court reasoned that a defendant's loss of a peremptory challenge in a capital[4] trial caused by the trial court's error in failing to remove a venireman[5] for cause[6] did not constitute a violation of the accused's sixth amendment rights.[7] The Court refused to apply literally to the facts of *Ross* the rule set forth in *Gray v. Mississippi*.[8] Rather, the Court concluded that, as long as no proof of partiality existed as to

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1 108 S. Ct. 2273 (1988).

2 A peremptory challenge is the mechanism used by either plaintiff's or defendant's counsel to excuse potential jurors who would not otherwise be excluded for cause by the court. *See infra* note 6. A peremptory challenge is "exercised without a reason stated, without inquiry, and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1964).

3 The sixth amendment provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

4 A capital trial is one in which the "death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 189 (5th ed. 1979).

5 A venireman is a member of the venire, the pool from which the eventual members of the jury are drawn. *Id.* at 1395.

6 A challenge "for cause" is a mechanism used by the court to exclude potential jurors from becoming part of a jury. The court exercises "for cause" challenges when a potential juror is seen by the court as incapable of following the law and adhering to his/her duty as a juror. Jurors can only be excluded in this fashion on "a narrowly specified, provable and legally cognizable basis of partiality." *Swain*, 380 U.S. at 220.

7 *Ross*, 108 S. Ct. at 2278.

8 107 S. Ct. 2045 (1987)(addressing the issue of forfeiture of peremptory challenges caused by trial court error).

the jurors who actually sat, the defendant's loss of a peremptory challenge caused by trial court error did not violate the sixth amendment.[9]

The Court further weakened the stature of the peremptory challenge mechanism by proclaiming that the rules for the exercise of peremptory challenges should be governed solely by state law.[10] The majority opinion declared that only a state court is able "to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."[11] In so ruling, the Court, in essence, stated that it could not, on sixth amendment grounds, strike down a state scheme implementing peremptory challenges. As long as a defendant was receiving all of "that which state law provides," the Supreme Court could not object to any state scheme.[12]

This Note considers the *Ross* opinions and concludes that the majority decision needlessly jeopardizes both the role and the value of the peremptory challenge in the trial process in a manner totally inconsistent with the prior Court ruling in *Gray*.[13] This Note argues that the *Ross* decision conflicts with precedent because it fails to consider, even cursorily, the analytical framework previously established for determining when trial court error may be considered harmless and, therefore, not an infringement upon an accused's right to an impartial jury. Moreover, this Note argues that the majority, in hastily concluding that state-created rules governing the exercise of peremptory challenges are not subject to judicial review,[14] fails to consider sufficiently the potential burden that an unmonitored state scheme might place upon an accused's right to an impartial jury. Finally, this Note concludes that the majority's attempt in *Ross* to limit federal influence upon state peremptory schemes ignores both the existence and the value of prior Supreme Court involvement in that sphere, such as federal abolition of state peremptory schemes which promote racial discrimination in the jury selection process. Supreme Court involvement should be encouraged and expanded to protect an accused whose very life is at stake.

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9 *Ross v. Oklahoma*, 108 S. Ct. 2273, 2278 (1988).

10 *Id.* at 2279.

11 *Id.*

12 *Id.*

13 *See infra* note 125 and accompanying text.

14 *Ross*, 108 S. Ct. at 2279. The majority stated, "the 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides." *Id.* at 2279 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).

II. Factual Background and Procedural History

While robbing a motel in Elk City, Oklahoma, petitioner, Bobby Lynn Ross, killed a police officer.[15] Ross was subsequently charged with first degree murder, a capital offense in Oklahoma.[16]

The jury selection process for the trial of petitioner Ross began with the drawing of twelve names from the 150 person venire.[17] Once twelve jurors were "provisionally" seated, the parties then used their peremptory challenges alternately and beginning with the prosecution, to remove additional jurors.[18]

Under Oklahoma law, both parties in capital trials are afforded nine peremptory challenges.[19] In the jury selection process for Ross' trial, the above process was repeated until each side had exercised or waived its peremptory challenges.[20]

After the defense used its fifth peremptory challenge, venireman Darrell Huling was drawn to replace the juror just excused.[21] During voir dire, Huling initially stated that, under the proper circumstances, he would be willing to consider imposing a life sentence upon petitioner Ross.[22] However, upon further examination by defense counsel, Huling stated he would vote to impose the death penalty if the jury found Ross guilty.[23] The defense moved to have Huling removed for cause, arguing that Huling would not be able to adhere to the law at the penalty phase.[24] However, the trial court denied the motion and provisionally seated Huling.[25] As a result of the court's ruling, defense counsel was compelled to exer-

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15 *Id.* at 2275.

16 Okla. Stat. Ann. tit. 21, § 701.7(B) (West 1983) provides in pertinent part: "A person . . . commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson." Okla. Stat. Ann. tit. 21, § 701.9(A) (West 1983), provides that "[a] person who is convicted or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

17 *Ross*, 108 S. Ct. at 2275. Both counsel and the Court individually questioned each of the twelve arbitrarily selected veniremen, as is customary in such proceedings. Whenever the Court excused a potential juror for cause, the Court would call in another venireman to replace him or her. *Id.* at 2275-76.

18 *Id.* at 2275-76. When a juror was struck, a replacement juror was selected, questioned in the above manner, and provisionally seated for further questioning by both parties. *Id.* at 2275.

19 Okla. Stat. Ann. tit. 22, § 655 (1969).

20 *Ross*, 108 S. Ct. at 2276.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* Defense counsel objected to Huling because Huling indicated his unwillingness to consider all possible penalties if Ross were found guilty. *Id.*

25 *Id.*

cise its sixth peremptory challenge to remove Huling.[26] The defense ultimately used all nine of its peremptory challenges, while the prosecutor exercised only five challenges and waived the remaining four.[27]

Defense counsel did not challenge for cause any of the twelve jurors ultimately selected.[28] At the close of jury selection, however, the defense objected "to the composition of the twelve people, in that there were no black people called as jurymen in this case and the defendant [who is black] feels he is denied a fair and impartial trial by his peers."[29] The trial court overruled the objection and the trial began.[30]

At trial, the jury found petitioner guilty of first degree murder.[31] At the penalty phase, the same jury found five aggravating circumstances and sentenced the petitioner to death.[32]

Defense counsel appealed the decision, arguing that the trial court had committed reversible error in failing to remove venireman Huling for cause.[33] The Oklahoma Court of Criminal Appeals accepted defense counsel's argument that a venireman possessing beliefs such as those expressed by venireman Huling at the voir dire phase should be removed for cause by a trial court; however, the appellate court refused to reverse the trial court decision on the grounds that no evidence was presented to suggest that any juror who actually sat during Ross' trial was objectionable.[34]

The United States Supreme Court granted certiorari to consider the sixth and fourteenth amendment implications of the trial

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26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* An aggravating circumstance is a "circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." BLACK'S LAW DICTIONARY 60 (5th ed. 1979). The aggravating circumstances found by the jury were that Ross knowingly created a risk of death to more than one person, OKLA. STAT. tit. 21 § 701.12(2) (1981), that the murder was especially heinous, attrocious, or cruel, OKLA. STAT. tit. 21 § 701.12(4) (1981), that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, OKLA. STAT. tit. 2 § 701.12(5) (1981), that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, OKLA. STAT. tit. 21 § 701.12(7) (1981), and that the victim of the murder was a peace officer, OKLA. STAT. tit. 1 § 707.12(8) (1981). Brief for Petitioner at 8, Ross v. Oklahoma, 108 S. Ct. 2273 (1988)(No. 86-5309).

33 *Ross*, 108 S. Ct. at 2276.

34 Ross v. Oklahoma, 717 P.2d 117, 120 (Okla. Crim. App. 1986).

court's failure to remove Huling for cause and petitioner's subsequent use of a peremptory challenge to strike Huling.[35]

III. THE MAJORITY DECISION IN ROSS

Chief Justice Rehnquist delivered the opinion of the Court.[36] The majority rejected the notion that petitioner Ross' rights under the sixth and the fourteenth amendments had been abridged[37] and affirmed the trial court's decision.[38]

Chief Justice Rehnquist rejected petitioner's argument that a loss of one of his peremptory challenges constituted a violation of the right to an impartial jury.[39] Chief Justice Rehnquist conceded that the trial court, in failing to excuse Huling for cause, erroneously deprived petitioner of the beneficial exercise of one of his peremptory challenges.[40] However, the focus of the inquiry, according to the majority, should not have been whether the trial court erred but whether that error actually affected the outcome of the trial by threatening the jury's impartiality.[41]

Chief Justice Rehnquist's analysis of the sixth amendment argument rested, not upon petitioner's opportunities lost as a result of the trial court's error, but upon the composition of the jury members "who ultimately sat."[42] First, Chief Justice Rehnquist noted that the controversy over venireman Huling was irrelevant to the consideration presently before the Court because "Huling was, in fact, removed and did not sit."[43] As for the twelve jurors who actually sat, petitioner challenged none for cause; furthermore, Chief Justice Rehnquist noted that petitioner "never suggested that any of the twelve was not impartial."[44] While petitioner "at the close of jury selection . . . did assert that the jury was not fair and impartial, this claim was based upon the absence of blacks from the jury panel."[45] Thus, the majority concluded that there was neither evidence tending to indicate doubt as to the impartiality of the actual

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35 *Ross*, 108 S. Ct. at 2276. The fourteenth amendment provides in pertinent part: "[n]or shall any State deprive any person of life, liberty, or propery, without due process of law . . . ." U.S. CONST. amend. XIV.

36 *Ross*, 108 S. Ct. at 2275. Associate Justices White, O'Connor, Scalia, and Kennedy joined the Chief Justice in the opinion.

37 *Id.* at 2277.

38 *Id.* at 2280.

39 *Id.* at 2279-2280.

40 *Id.* at 2280.

41 *Id.* at 2278.

42 *Id.* at 2277.

43 *Id.* at 2278.

44 *Id.* at 2277.

45 *Id.*

jurors nor legitimate allegations of non-impartiality advanced by defense counsel against the actual jurors at the time of jury selection.[46] Without these elements, the impartiality of the jury that actually sat could not legitimately be called into question.[47]

Chief Justice Rehnquist also rejected the assertion that the Court's earlier case, *Gray v. Mississipppi*,[48] mandated reversal of the decision in the instant case on sixth amendment grounds.[49] The petitioner argued that, under *Gray*, any error affecting jury composition mandates reversal.[50] While the majority conceded that "the failure to remove Huling may have resulted in a jury panel different from that which would otherwise have decided the case," they declined to accept a literal application of the *Gray* ruling.[51] The Court distinguished the facts in *Gray* from the present case in that, in *Gray*, an uncertainty existed as to whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror.[52] In *Ross*, however, the Court said "there is no need to speculate whether Huling would have been removed absent the erroneous ruling by the trial court; Huling was, in fact, removed and did not sit."[53] Thus, according to Chief Justice Rehnquist, the events in *Ross* disposed naturally of any uncertainty as to the impartiality of the actual jury.[54] Because the Court concluded that *Gray* was inapplicable, and as no legitimate reason for doubting the impartiality of the jury was presented, Chief Justice Rehnquist held that there was no violation of petitioner's right to an impartial jury under the sixth amendment.[55]

The second major point of the majority opinion considered and subsequently rejected the notion that petitioner's fourteenth amendment rights had been violated.[56] Petitioner argued that his right to due process was abridged by "arbitrarily depriving him of the full complement of nine peremptory challenges allowed under Oklahoma law."[57] Yet, the majority rejected this argument by reciting Oklahoma law and by declaring that the petitioner had received

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46 *Id.* Chief Justice Rehnquist stated: "[w]e conclude that petitioner has failed to establish that the jury was not impartial." *Id.*

47 *Id.*

48 107 S. Ct. 2045 (1987).

49 *Ross*, 108 S. Ct. at 2277.

50 *Id.* at 2278.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 2277.

56 *Id.* at 2278.

57 *See supra* note 19 and accompanying text.

all that was "due [him] under Oklahoma law."[58] Chief Justice Rehnquist's argument concerning the fourteenth amendment rested upon the fundamental precept that "peremptory challenges are a creature of statute and are not required by the Constitution."[59] While Chief Justice Rehnqist stated that " 'the right to exercise peremptory challenges is one of the most important of the rights secured to the accused,' "[60] he qualified this statement with the assertion that "it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."[61]

Thus, according to Chief Justice Rehnquist, determining whether petitioner's right to due process was violated necessitated an inquiry into whether petitioner received all he was entitled to under Oklahoma law.[62] The majority cited the laws of Oklahoma in determining that petitioner had, indeed, received all of that to which he was entitled.[63] Chief Justice Rehnquist stated:

> it is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.[64]

As Oklahoma law required counsel to remedy a court's error in

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[58] *Id.* at 2280. In making this remark about Oklahoma Law, Chief Justice Rehnquist cited two Oklahoma cases. In the first, *Ferrel v. State*, 475 P.2d 825 (Okla. Crim. App. 1970), the Oklahoma Court of Criminal Appeals stated:

> error in overruling a proper challenge to a juror becomes grounds for reversal when the defendant is forced to use one of his peremptory challenges on said juror and that defendant exhausted all his peremptory challenges, and that by reason of this an incompetent juror was forced upon him.

Id. at 828. While not stated explicitly, one might intuit, as does Chief Justice Rehnquist in *Ross*, that grounds for reversal exist only when an incompetent juror is forced upon a defendant, even though the court fails to state this explicitly. *Ross*, 108 S. Ct. at 2279.

In *Stott v. State*, 538 P.2d 1061 (Okla. Crim. App. 1975), the Oklahoma Court of Criminal Appeals did use more precise language: "[e]rror in overruling a proper challenge to a juror, only becomes ground for reversal when the defendant is forced to use one of his peremptory challenges on said juror . . . and, that by reason of his having been forced to do this, an incompetent juror was forced upon him." *Id.* at 1065.

[59] *Ross*, 108 S. Ct. at 2279. Chief Justice Rehnquist supported this statement with citations to *Gray* and to Swain v. Alabama, 380 U.S. 202 (1965). The relevant portion of *Swain* cited by the Chief Justice states: "[t]here is nothing in the Constitution of the United States which requires the Congress (or the states) to grant peremptory challenges." *Swain*, 380 U.S. at 219 (citing Stilson v. United States, 250 U.S. 583, 586 (1919)).

[60] *Ross*, 108 S. Ct. at 2278 (quoting *Swain*, 380 U.S. at 219).

[61] *Ross*, 108 S. Ct. at 2279.

[62] *Id.*

[63] *Id.*

[64] *Id.*

denying a removal for cause by exercising a peremptory challenge, the petitioner had not been deprived of any rights under Oklahoma law.[65] Consequently, concluded the Court, his claim of a violation of his due process right lacked merit.[66]

IV. The Dissent

Justice Marshall delivered the dissenting opinion.[67] Unlike the majority opinion, the dissent addressed almost exclusively the petitioner's sixth amendment argument of the right to an impartial jury. However, it addressed both the sixth and the fourteenth amendment arguments of the majority opinion by declaring the fundamental unconstitutionality of a state's ability to enact laws which arbitrarily deprive a defendant of peremptory challenges and, thus, place an impermissible burden upon a defendant's right to an impartial jury.[68]

In rejecting the majority view on the sixth amendment issue presented in *Ross*, Justice Marshall focused upon the majority's misinterpretation of the *Gray* holding.[69] The test established in *Gray* for determining whether a trial court's ruling must be overturned due to that court's error in the jury selection process, according to Justice Marshall, is "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error."[70] While Chief Justice Rehnquist perceived no significant effect upon the composition of the jury caused by the trial court's error in *Ross*, Justice Marshall's view was to the contrary.[71] The petitioner had been deprived of the beneficial use of his challenges by having to use one to correct court error.[72] "That deprivation," according to Justice Marshall, " 'could possibly have . . . affected' the composition of the jury panel under the *Gray* standard because the defense might have used the extra peremptory challenge to remove another juror and because the loss of a peremptory might have affected the defense's strategic use of its remaining peremptories.[73] Justice Marshall further stated that " 'a prosecutor with fewer peremptory

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65 *Id.* at 2280.

66 *Id.*

67 *Id.* at 2275 (Marshall, J., dissenting). Justices Brennan, Blackmun, and Stevens joined Justice Marshall.

68 *Id.* at 2284 (Marshall, J., dissenting).

69 *Id.* at 2280 (Marshall, J., dissenting).

70 *Id.* (Marshall, J., dissenting)(quoting *Gray v. Mississippi*, 107 S. Ct. at 2055 (1987)(emphasis added)).

71 *Ross*, 108 S. Ct. at 2280 (Marshall, J., dissenting).

72 *Id.* (Marshall, J., dissenting).

73 *Id.* at 2281 (Marshall, J., dissenting)(quoting *Gray*, 107 S. Ct. at 2055).

challenges in hand may be willing to accept certain jurors whom he would not accept given a larger reserve of peremptories.' "[74]

Justice Marshall saw no justification for the majority view that the *Gray* standard is "too sweeping to be applied literally" and perceived the *Gray* ruling as protecting a defendant's "right to a jury selection procedure untainted by constitutional error."[75] Consequently, Justice Marshall argued that *Ross* could not, as the majority claimed, be distinguished from *Gray* merely on the facts.[76] Moreover, while Justice Marshall agreed with Chief Justice Rehnquist that no solid proof existed for the allegation that the jury which actually sat was not impartial, Justice Marshall further stated that "because it is impossible to be sure that an erroneous ruling by the trial court did not tilt the panel against the defendant, a death sentence returned by such a panel cannot stand."[77]

For Justice Marshall, then, if the question of whether a court's error during jury selection in a capital case altered the jury's composition cannot be definitively resolved, this uncertainty must be decided in favor of reversal of the judgment.[78] The absence of solid evidence as to the jurors' lack of impartiality does not ultimately render a trial court's error harmless.[79] For Justice Marshall, the magnitude of the proceedings in a capital case cannot allow for a presumption of jury impartiality in the face of court error.[80] Where a man's life is at stake, "we should not be playing games,"[81] and deprivation of the petitioner's right to a peremptory challenge through constitutional error by the court must be considered a violation of the petitioner's sixth amendment right to an impartial

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74 *Id.* (Marshall, J., dissenting).

75 *Ross*, 108 S. Ct. at 2281-2282 (Marshall, J., dissenting). Justice Marshall stated that, under the *Gray* ruling, the only court errors requiring automatic reversal of a conviction would be "constitutional error[s]." *Id.* According to Justice Marshall, errors requiring a trial court to start the jury selection process anew would not be grounds for reversal under a literal application of the *Gray* standard, despite Justice Scalia's argument to the contrary in the *Gray* dissent. *Gray*, 107 S. Ct. at 2061 (Scalia, J., dissenting). This Marshallian delineation between "constitutional error" and harmless court error is discussed in greater detail *infra* notes 121-25 and accompanying text.

76 *Ross*, 108 S. Ct. at 2282 (Marshall, J., dissenting).

77 *Id.* (Marshall, J., dissenting).

78 *Id.* at 2284 (Marshall, J., dissenting).

79 *Id.* A harmless error test was constructed by the Supreme Court in Chapman v. California, 386 U.S. 18 (1967). Under the *Chapman* rule, "before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. While neither the majority nor the minority opinions in *Ross* explicitly applied this test, the *Chapman* standard was used as an important tool in the Court's rendering of the *Gray* decision.

80 *Ross*, 108 S. Ct. at 2280 (Marshall, J., dissenting).

81 *Id.* (Marshall, J., dissenting).

jury.[82]

Justice Marshall then attacked Oklahoma common law on sixth amendment grounds.[83] Justice Marshall noted that "the state's requirement that a defendant employ a peremptory challenge in order to preserve a sixth amendment claim arising from a trial court's erroneous for cause ruling burdens the defendant's exercise of his sixth amendment right to an impartial jury."[84] Citing *United States v. Jackson*[85] and *Brooks v. Tennessee*[86], Justice Marshall stated further that "legislative schemes that unnecessarily burden the exercise of federal constitutional rights cannot stand."[87] Accordingly, he advocated the abrogation of the Oklahoma scheme as violative of the Constitution.[88]

Through his perception of the arbitrary deprivation of a defendant's right to a peremptory challenge as a "heavy and avoidable burden"[89] upon the defendant's sixth amendment right to an impartial jury, Justice Marshall rendered moot the issue of whether petitioner received all that was due him under state law.[90] For Justice Marshall, the majority's attempt to justify the trial court's error on due process grounds only served to cloud the central issue of the right to an impartial jury.[91]

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82 *Id.*(Marshall, J., dissenting).

83 *Id.* at 2282-83 (Marshall, J., dissenting).

84 *Id.* at 2282 (Marshall, J., dissenting).

85 390 U.S. 570 (1968). In *Jackson*, the Court found that a provision of the Federal Kidnapping Act, which rendered eligible for the death penalty only those defendants who invoked their right to trial by jury, imposed an "impermissible burden upon the exercise of a constitutional right." *Id.* at 572. While the Court recognized that Congress had a legitimate goal in enacting such a statute, the Court nonetheless stated that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Id.* at 583.

86 406 U.S. 605 (1972). In *Brooks*, the Court declared unconstitutional a state law that required a defendant who wished to testify on his own behalf to be the first defense witness presented. The Court stated that the statute "exacts a price for his silence [protected by defendant's fifth amendent right against self-incrimination] by keeping him off the stand entirely unless he chooses to testify first." *Id.* at 610. Accordingly, the Court ruled that the statute was "not a constitutionally permissible means of ensuring his [the defendant's] honesty [because it] . . . casts a heavy burden upon a defendant's otherwise unconditional right not to take the stand." *Id.* at 610-11.

87 *Ross*, 108 S. Ct. at 2283 (Marshall, J., dissenting).

88 *Id.*(Marshall, J., dissenting).

89 *Id.*(Marshall, J., dissenting).

90 *Id.* (Marshall, J., dissenting). Justice Marshall flatly stated that "the Oklahoma scheme cannot stand." *Id.* Obviously, for Justice Marshall, then, what the accused was entitled to under state law was immaterial if that state law violated the accused's constitutional rights.

91 *Id.* at 2284 (Marshall, J., dissenting).

V. ANALYSIS

By ignoring the harmless error test established in *Chapman v. California*,[92] and the implementation of that test in *Gray*, the *Ross* majority arrived at the incorrect conclusion that the trial judge's failure to remove venireman Huling for cause, though admittedly an error, did not adversely affect the petitioner's constitutional right to trial by an impartial jury. Furthermore, in ruling that the implementation of peremptory challenges is delegated exclusively to state law and is not subject to federal review, the Supreme Court provided no means by which to curb a state peremptory challenge system which might impermissibly burden an accused's right to an impartial jury. Consequently, the Court has called the validity of the entire peremptory challenge mechanism into question.

A. HARMLESS ERROR AND THE RIGHT TO AN IMPARTIAL JURY

In arriving at the conclusion that the trial court committed error under prior Court rulings by failing to exclude Huling, the majority nonetheless failed to classify the error under the harmless error criterion established in *Chapman*. Quoting the decision of *Wainright v. Witt*,[93] the Court stated: " 'the proper standard for determining when a prospective juror may be excused for cause because of his or her views on capital punishment . . . is whether the juror's view would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.' "[94] During voir dire, Huling declared that if the jury found petitioner Ross guilty, he would automatically vote to impose the death penalty.[95] The majority conceded that Huling, under the *Witt* test, should have been excluded for cause and that, had Huling actually sat on the jury that had delivered Ross' sentence, the sentence would have to be reversed.[96] However, the majority further stated that, as Huling did not sit on the jury, and as none of the twelve jurors who actually sat were either challenged for cause or suggested not to be impartial by petitioner, the petitioner's right to an impartial jury was not violated by the trial court's error.[97]

Though the logic of this decision appears intuitively sound, it fails to consider with careful scrutiny the test for determining the

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92 386 U.S. 18 (1967). *See supra* note 79 and accompanying text for a discussion of the harmless error test.

93 469 U.S. 412, 424 (1985).

94 *Ross*, 108 S. Ct. at 2276 (quoting *Witt*, 469 U.S. at 424).

95 *Id.* at 2276.

96 *Id.* at 2277.

97 *Id.*

magnitude of a constitutional error specifically required by *Chapman*. In *Chapman*, the debate focused upon determining when a constitutional error may be considered harmless and therefore not automatic grounds for reversal of a conviction.[98] The Court arrived at the conclusion that "before a federal constitutional error can be held harmless, the court must be able to clarify a belief that it was harmless beyond a reasonable doubt."[99]

It is notable that the *Ross* majority failed to mention the *Chapman* harmless error test in its decision. Moreover, the *Ross* Court ignored that portion of the *Gray* decision explicitly applying the *Chapman* test to the facts of that case, facts similar to those in *Ross*. In so doing, the Court carved out a new set of constitutional errors that are to be construed harmless. This new category of non-harmless constitutional errors is, however, inconsistent with the prior *Gray* ruling.

During the jury selection process in *Gray*, the State was forced to use several of its twelve peremptory challenges to remove jurors opposed to the death penalty when those jurors should have been removed for cause under the *Witherspoon* test.[100] In *Gray*, after the prosecutor had used all of his peremptory challenges, prospective juror Bounds stated that, although she was opposed to the death penalty, she could vote to impose it under appropriate circum-

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98 *Chapman*, 386 U.S. at 20. In *Chapman*, the petitioners were convicted after a California state criminal trial, during which the prosecutor, as then permitted by a state constitutional provision, extensively and critically commented upon the petitioners' failure to testify. *Id.* at 19. The trial judge also instructed the jury that they could draw adverse inferences from this failure to testify. *Id.* After the trial, but before the petitioners' appeal was considered, the state provision was invalidated by the Supreme Court. *Id.* In reversing the conviction, the Court determined that the petitioners had been denied their constitutional rights and that the prosecutor's unconstitutional inferences had impaired the petitioners' sixth amendment rights. *Id.* at 24.

99 *Id.*

100 *Gray v. Mississippi*, 107 S. Ct. 2045, 2049 (1987). In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court examined the constitutionality of an Illinois statute that stated: "[i]n trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.' " *Witherspoon*, 391 U.S. at 512 (quoting ILL. REV. STAT., ch.38, para. 743 (1959)). Stating that the statute violated an accused's right to an impartial jury and due process of law, the Court then established its standard: "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. The *Witherspoon* ruling, therefore, directly addressed the issue of when a prospective juror cannot be removed for cause and created a specific test that endures today. *Witherspoon* also tangentially addressed the issue of proper grounds for *removal* of venireman. *Id.* at 522 n.21. However, the case that directly addressed the issue of proper grounds for exclusion of jurors, and the standard used today for resolving that issue, is *Witt*. *See infra* note 114 for a discussion of that ruling and its relevance to *Ross*.

stances.[101] In attempting to correct its prior error in failing earlier to remove jurors for cause, the trial court then erroneously excused Bounds for cause. The jury ultimately seated sentenced Gray to death.[102]

The prosecutor argued that the court error of excluding Bounds was "harmless" under *Chapman* because, if the original court error of failing to remove earlier jurors for cause had been rectified, the prosecutor would still have possessed a peremptory challenge necessary to oust Bounds from the jury. Yet, the majority in *Gray* rejected this argument and stated: "if the court had granted one or more of his [the prosecutor's] earlier motions to remove for cause, the prosecutor may have used his peremptory challenges on other jurors whom he did not strike when he had fewer peremptories to exercise."[103] Thus, the Court stated that, had the trial court not made the prior error which subsequently proved detrimental to the prosecutor, the prosecutor still might not have had a peremptory challenge available by the time Bounds came before the court.

Moreover, the majority refused to base the harmless error analysis upon whether a particular prospective juror was excluded from the jury. "[R]ather, the relevant inquiry is 'whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error.' "[104] Not knowing what the prosecutor's strategy would have been earlier had he been rightfully restored his peremptory challenges, the Court could not state definitively which jurors the judge and prosecutor would have struck and which would have remained. In fact, the Court finally stated in broad fashion that "the nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion is harmless."[105]

Chief Justice Rehnquist attempted to avoid applying the *Gray* harmless error ruling to *Ross* in two ways. First, he stated that the broad language of the *Gray* Court was too sweeping to be applied literally.[106] The Chief Justice based this notion upon Justice Scalia's dissent in *Gray*. Justice Scalia's dissent posited that the inconsistency in the *Gray* holding was the factor preventing the *Gray* test from being applied literally.[107] He pointed out that the majority would have allowed the trial judge in *Gray* to remedy his prior erro-

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101 *Gray*, 107 S. Ct. at 2049.

102 *Id.* at 2050.

103 *Id.* at 2055.

104 *Id.* (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir.) (Goldberg, J., specially concurring opinion), *cert denied*, 458 U.S. 1111 (1982)).

105 *Gray*, 107 S.Ct. at 2055.

106 *Ross v. Oklahoma*, 108 S. Ct. at 2273,2278 (1988).

107 *Gray*, 107 S. Ct. at 2061 (Scalia, J., dissenting).

neous rulings by dismissing the entire venire and starting the jury selection process anew.[108] Surely, according to Justice Scalia, the creation of an entirely new venire would affect the "composition of the jury panel as a whole" more significantly than if the trial judge corrected his prior error merely by removing Bounds.[109] For Justice Scalia, therefore, and for the majority in *Ross*, the *Gray* majority's inconsistent application of its "composition" standard limited the *Gray* ruling to its facts.[110]

Second, Chief Justice Rehnquist attempted to limit *Gray* to its facts by noting that in *Gray* there was uncertainty as to whether the prosecution could and would have used a peremptory challenge to remove prospective juror Bounds.[111] In *Ross*, however, no speculation was necessary because Huling was removed and did not sit on the ultimate jury.[112]

Yet, neither of the Chief Justice's attempts to discredit the *Gray* ruling's applicability to *Ross* succeeds. First, while the *Gray* language is sufficiently broad to encompass the facts in *Ross*, it is not so sweeping as to render it necessarily susceptible to applications suggested by Justice Scalia in his *Gray* dissent. *Gray*, contrary to Justice Scalia's interpretation, stated a broad ruling with explicitly defined parameters: that "the nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless."[113] Those parameters would not allow the majority in *Gray* to accept that an erroneous *Witherspoon* exclusion, such as the erroneous exclusion of venireman Bounds, could be considered a harmless error. Furthermore, using the same argument, the Court in *Ross* should have reasoned that an erroneous application of the *Witt* standard,[114] the failure to remove venireman Huling for

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108 *Gray*, 107 S. Ct. at 2061 (Scalia, J., dissenting).

109 *Id.* (Scalia, J., dissenting).

110 *Ross*, 108 S. Ct. at 2278.

111 *Id.*

112 *Id.*

113 *Gray*, 107 S. Ct. at 2055.

114 Wainwright v. Witt, 469 U.S. 412 (1985). In *Witt*, the Court clarified its decision in *Witherspoon* and reaffirmed its ruling in *Adams* that the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's view would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The *Witt* ruling expanded upon *Witherspoon* in that "the court's holding [in *Witherspoon*] focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon*'s facts it was unnecessary to decide when they *could* be." *Id.* at 422 (emphasis in original). The trial court error in *Ross* was the failure to remove venireman Huling when the venireman should have been removed for cause. The standard enunciated in *Witherspoon*, as it only discussed when a venireman "could not be excluded," is applicable to the facts in *Gray*

cause when his views concerning the death penalty "would substantially impair the performance of his duties as a juror in accordance with his instruction and his oath,"[115] could never be considered harmless error.

Yet, this standard enunciated by the Court in *Gray*, which should have obliged the Court to reverse the decision of the lower court in *Ross*, does not apply to any and all incidents affecting the composition of a jury as a whole. Rather, it only applies to those incidents involving "constitutional error."[116] While a trial court's failure to adhere to the standards enunciated in the *Witherspoon-Witt* decisions involves just such a constitutional error, Justice Scalia's example of a trial court's decision to start the entire venire process anew after making an erroneous for cause ruling does not.[117] Justice Scalia's example of a trial court error and an erroneous *Witherspoon-Witt* exclusion are distinguishable under *Gray*. The reason for creating this constitutional error distinction, as suggested by Justice Marshall's dissent in *Ross*, is that errors caused by failure to apply standards enacted to safeguard constitutional rights, such as the *Witherspoon-Witt* standard, create the possibility of a "tilt" in the jury composition against the defendant.[118] A trial court error based upon an erroneous *Witt* exclusion removes a juror who, while faithfully adhering to "his duties as a juror in accordance with his instruction and his oath"[119] is likely to be sympathetic toward the accused. That juror will most likely be hesitant in condoning the death penalty, except in extreme situations. Further, a court making such an error will most likely replace that juror with one who has no reservations about capital punishment and is willing to apply the death penalty in a far less restrictive manner. While neither juror, under Supreme Court standards, is unfit for jury duty, systematic or even one-time exclusion by the court of a juror hesitant about applying the death penalty will unfairly bias the jury against the accused.

In contrast, trial court mistakes which do not discount court-established safeguards to constitutional rights, do not create a tilt in the jury panel against a defendant and, therefore, do not require reversal of a judgement.[120] Justice Scalia's suggestion of a trial court correcting its own error by starting the entire jury selection

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but not to those in *Ross*. In contrast, the *Witt* standard, based upon the ruling in *Adams*, is directly applicable to *Ross*.

115 *Witt*, 469 U.S. at 424.

116 *Ross*, 108 S. Ct. at 2282 (Marshall, J., dissenting).

117 *See supra* note 75 and accompanying text.

118 *Id.* (Marshall, J., dissenting).

119 *Witt*, 469 U.S. at 424.

120 *Ross*, 108 S. Ct. at 2282 (Marshall, J., dissenting).

process anew is just such an example of a trial court error which does not tilt the jury against the accused. As all veniremen are removed and new ones are chosen in this scenario, there is little likelihood that the jury will be unfairly weighted against the accused. While certainly the possibility still exists, after completely reselecting the jury, that the final members of the jury may possess free-wheeling attitudes concerning the use of the death penalty, that possibility of bias has not been cultivated, encouraged, or made more likely by the court error. And *this* is what distinguishes Justice Scalia's example from an erroneous *Witherspoon-Witt* exclusion. As such, Justice Scalia's example would not be grounds for reversal under the *Gray* standard.[121] Indeed, the language of the *Gray* ruling is sufficiently narrow to be applied literally, while simultaneously avoiding such far-reaching applications as those envisioned by Justice Scalia.

Secondly, the fact that venireman Huling was removed in *Ross* does not erase the uncertainty as to whether "the composition of a jury panel as a whole"[122] was affected by the court's failure to exclude Huling for cause. Had petitioner not used his sixth peremptory challenge on Huling, he could have removed one of the jurors who ultimately sat on the jury that convicted him.[123] Whether the petitioner would have removed another juror and whether, if he did so, that new juror would have affected the composition of the jury is uncertain. Yet, that uncertainty should have inhibited the Court, as it did in *Gray*, from declaring the trial court error "harmless beyond a reasonable doubt"[124] under the *Chapman* standard. That the *Chapman* standard was never mentioned in the majority opinion further demonstrates the majority's fundamental unwillingness to respect the Court's decision in *Gray*, which reflected the Court's thorough consideration of the *Chapman* standard before making its ruling.[125]

Perhaps Chief Justice Rehnquist believed the trial court's error was indeed harmless beyond a reasonable doubt, although he never

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121 *See id.* at 2281 (Marshall, J., dissenting).

122 *Gray v. Mississippi*, 107 S. Ct. 2045, 2055 (1987).

123 *Ross*, 108 S. Ct. at 2281 (Marshall, J., dissenting).

124 *Chapman v. California*, 386 U.S. 18, 24 (1967).

125 In *Gray*, the state urged the Court to apply the harmless error analysis formulated in *Chapman*. *Gray*, 107 S. Ct. at 2055. However, the Court responded:

> [b]ecause the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." The right to an impartial adjudicator, be it judge or jury, is such a right.

Gray, 107 S. Ct. at 2056, 2057 (citing and quoting *Chapman*, 386 U.S. at 23).

explicitly stated this, because none of the twelve jurors who actually sat were challenged for cause by the petitioner, and, moreover, the petitioner never argued to the trial court that any of the twelve was less than impartial.[126] Yet, the mere fact that the petitioner never challenged the jurors for cause does not necessarily imply that he would not have exercised a peremptory challenge to remove one of them. In *Swain*, the Court stated: "[w]hile challenges for cause permit rejection of jurors on a narrowly specified, provable, and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable."[127] Thus, a peremptory challenge can be used when an attorney suspects, but cannot prove to the court, that a juror is biased.

In the case at bar, it is conceivable that the petitioner perceived a certain bias, detrimental to his position, in one of the twelve jurors. Yet, he might also have believed that any attempt to prove this bias on reasonable grounds to the judge would have proven futile. Accordingly, a possible scenario exists, due to the very lack of requirements for exercising a peremptory challenge, in which the petitioner might have exercised a peremptory if he possessed one, without ever having attempted to remove the juror for cause. The fact that the petitioner in *Ross* never challenged any of the twelve jurors for cause does not erase the uncertainty under the harmless error test, and that test should have compelled the majority to hold that the trial court's error unconstitutionally jeopardized the petitioner's sixth amendment right to an impartial jury.[128]

B. THE PEREMPTORY CHALLENGE AND THE SIXTH AND FOURTEENTH AMENDMENTS

On numerous occasions prior to *Ross*, the Court specifically stated that peremptory challenges are not of constitutional dimension.[129] Yet, the Court has simultaneously, and just as consistently stated that the peremptory challenge is "one of the most important of the rights secured to the accused."[130] Indeed, even Chief Justice

126 *Ross*, 108 S. Ct. at 2277.

127 *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

128 *See supra* note 121 and accompanying text for a discussion of harmless error in relation to *Ross*.

129 In *Stilson*, the Court stated that "[t]here 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." *Stilson v. United States*, 250 U.S. 585, 586 (1919). In *Swain*, 380 U.S. at 219, the Court restated the *Stilson* analysis. In *Gray*, 107 S. Ct. at 2054, the majority opinion stated that "[p]eremptory challenges are not of constitutional origin."

130 *Swain*, 380 U.S. at 219 (citing *Pointer v. United States*, 151 U.S. 396, 408 (1894)(pro-

Rehnquist, in a prior dissent, quoted language stating that the peremptory challenge is "a necessary part of trial by jury."[131] The Court in *Ross*, then, was forced to determine just how much status the peremptory challenge was to be accorded in light of these two seemingly contradictory views of the mechanism.

The majority opinion responded by leaving the status and implementation of the peremptory challenge completely at the mercy of state law. Chief Justice Rehnquist labelled the peremptory challenge "a creature of statute" and stated that "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise."[132] The "right" to a peremptory challenge is " 'denied or impaired' only if the defendant does not receive that which state law provides."[133] In so stating, the Court foreclosed any argument that a party could be deprived of the right to an impartial jury through the arbitrary deprivation of a peremptory challenge as long as the trial court abided by state law.

By constructing a ruling that rendered the peremptory challenge exclusively the child of state law, thereby subjecting it to every whim of state courts, the Supreme Court devalued the peremptory in its role as the dominant safeguard of the accused's constitutional right to an impartial jury. If the ruling in *Ross* was in any way intended to maintain the historical stature of the peremptory challenge in the jury selection process, it failed to do so. If, as in *Ross*, a defendant must surrender one of his peremptory challenges in order to correct trial court error, even when such error is recognized by the United States Supreme Court, then certainly the value of the peremptory in its ability to eliminate subtle prejudices against a defendant, not detectable by the Court in "for cause" proceedings, is accorded no importance whatsoever.

In contrast, Justice Marshall's dissenting opinion maintains the stature of the peremptory challenge within the jury selection process while refraining from labelling the peremptory challenge as a constitutionally guaranteed right. It is important to note that Justice Marshall, in his dissent, never states that Ross had been deprived of due process through the arbitrary deprivation of one of his peremptory challenges. Indeed, Justice Marshall could not have argued this

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ceedings which allow an accused to be brought face to face with potential jury members before being compelled to exercise his peremptory challenges are considered "regular" proceedings)).

131 *Batson v. Kentucky*, 476 U.S. 79, 137 (1985)(Rehnquist, J., dissenting).

132 *Ross v. Oklahoma*, 108 S. Ct. 2273, 2279 (1988).

133 *Id.* (quoting *Swain*, 380 U.S. at 219).

point because peremptory challenges themselves, as discussed previously, are not constitutionally guaranteed.[134] Rather, Justice Marshall's opinion embraces the notion that the implementation of the peremptory challenge should be delegated to the states, but that delegation does not condone the construction of capricious state rules insensitive to the value of the peremptory challenge as "one of the most important rights secured to the accused."[135] Commenting upon *Jackson*[136] and *Brooks*,[137] Justice Marshall stated that "legislative schemes that unnecessarily burden the exercise of federal constitutional rights cannot stand."[138] The Oklahoma ruling was one such scheme because it blatantly discredited the role of the peremptory challenge in safeguarding the accused's sixth amendment right to an impartial jury by forcing the defendant to give up "procedural parity"[139] with the prosecution through useless forfeiture of peremptories.

Justice Marshall's opinion, if accepted by the majority, would have provided the Court a means by which to defend the historical integrity of the peremptory challenge while simultaneously resisting the notion to overturn precedent and label the challenge a constitutional right. Justice Marshall's opinion could have provided the Court with a moderate and workable approach. While the peremptory challenge is not a constitutionally protected mechanism in and of itself, and, therefore remains under state court jurisdiction, state laws, subject to federal scrutiny, must implement the mechanism on an efficient and conscientious basis, with an awareness to the role that the peremptory has played in safeguarding the sixth amendment right to an impartial jury.

Such an interpretation of the constitutional dimensions of the peremptory challenge would enable the Court to declare unconstitutional particular state laws which impede the efficient use of peremptory challenges beyond reasonable limits, while still according the states autonomy to determine the number of peremptory challenges granted as well as the general manner in which the challenges will be exercised. In *Ross*, this rule would have given the

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134 *See supra* note 121.

135 *Pointer v. United States*, 151 U.S. 396, 408 (1894). In discussing the impact of the Oklahoma peremptory scheme on the Petitioners sixth amendment rights in *Ross*, Justice Marshall stated, "The burden on petitioner's Sixth Amendment rights is thus both heavy and avoidable. Our cases accordingly mandate the conclusion that the Oklahoma scheme cannot stand." *Ross*, 108 S. Ct. at 2283 (Marshall, J., dissenting).

136 *See supra* note 85 for an explanation of the *Jackson* holding.

137 See *supra* note 86 for an explanation of the *Brooks* holding.

138 *Ross*, 108 S. Ct. at 2283 (Marshall, J., dissenting).

139 *Id.* (Marshall, J., dissenting).

Court the freedom to declare the Oklahoma scheme unconstitutional on sixth amendment grounds without forcing a re-evaluation of present state rulings regarding peremptory challenges. Such a ruling would have allowed the courts to continue treating the peremptory challenge as merely a procedural device, while at the same time ensuring the courts' ability to monitor the implementation of a device which the Court considers "one of the most important of the rights secured to the accused."[140]

Justice Marshall's view is not entirely novel. In both *Swain v. Alabama*,[141] and *Batson v. Kentucky*,[142] the Supreme Court addressed the issue of the fourteenth amendment's equal protection clause in relation to racial discrimination in the use of peremptory challenges. In *Batson*, the Court declared that peremptory challenges could not be used to exclude veniremen from a jury solely on account of their race, and it constructed a federal scheme to safeguard the peremptory challenge mechanism from such abuse.[143] In so doing, it emphatically proclaimed that peremptory challenges are not merely

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[140] *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

[141] In *Swain*, the petitioner, a black man, was indicted and convicted of rape in Talladega County, Alabama and sentenced to death. Although petit jury venires in criminal cases in Talladega County included an average of six to seven blacks, no black had served on a petit jury in the County since approximately 1950. In *Swain*, of the eight blacks on the venire, two were exempted and the other six were peremptorily struck by the prosecutor. In its affirmation of the Alabama conviction, the Court stated:

> even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment [equal protection clause] we think that it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County.

Swain, 380 U.S. at 224.

[142] In *Batson*, a black man was convicted in a criminal trial in which all four black persons on the venire were peremptorily challenged and removed by the prosecutor, and the jury which ultimately convicted the defendant was composed only of white persons. In reversing the conviction, the Court rejected the portion of the *Swain* decision that held that a defendant could make out a prima facie case of purposeful discrimination only upon proof that the peremptory challenge system as a whole was being perverted. The Court then said:

> [t]hese principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor uses that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

[143] *See supra* note 142 for discussion of the federal scheme established in *Batson*.

"creatures of statute"[144] subject only to state regulation. On the contrary, the *Batson* ruling laid explicit ground rules for state implementation of peremptory challenges.[145] Thus, the argument that the states should maintain unmonitored control over peremptory challenges, as Chief Justice Rehnquist has stated in *Ross*, ignores prior federal intervention as exemplified in *Batson*.

Ironically, it was Justice Marshall who unequivocally stated in his dissent in *Batson* that "[t]he inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the court to ban them entirely from the criminal justice system."[146] In *Ross*, Justice Marshall did not completely contradict his prior opinion in *Batson* but, rather, tempered his view with the notion that peremptories could be maintained *provided* that state implementation of the mechanism is monitored.[147] The ruling in *Batson* reflects this absolute need to allow federal intervention into state implementation of peremptory challenges when the state scheme has unnecessarily burdened an individual's constitutional rights. While the state abuse of the peremptory in *Batson* was perhaps more obviously reprehensible than that in *Ross*, as it centered upon racial discrimination, racial discrimination is only one example of the need for federal supervision over state peremptory schemes. Justice Marshall's dissent in *Batson* serves as a reminder of state abuse of peremptories which have jeopardized an accused's constitutional rights in the past. Unfortunately, the majority in *Ross* has ignored the warning of *Batson* and has now left the door open for further state abuse of the peremptory challenge mechanism. In so doing, the Court has unnecessarily jeopardized a defendant's sixth amendment right to an impartial jury.

VI. CONCLUSION

The majority opinion in *Ross* virtually ignored the Court's prior ruling in *Chapman* and the rationale behind the *Gray* decision. Consequently, the Court seriously jeopardized the role of the peremptory challenge in securing the accused's sixth amendment right to an impartial jury by declaring a trial court's error in failing to excuse a venireman for cause, and the subsequent loss of a peremptory challenge, in effect, harmless constitutional error. By declaring the

144 *Ross*, 108 S. Ct. at 2279.
145 *See supra* note 142.
146 *Batson*, 476 U.S. at 107 (Marshall, J., dissenting).
147 *See supra* note 90.

implementation of the peremptory challenge to be solely under the jurisdiction of state law, the opinion eliminated a defendant's ability to declare, under any state system, that he has been unconstitutionally deprived of his right to a peremptory challenge. In distancing the peremptory challenge from sixth amendment rights, the Court, whether intending to do so or not, has placed the value and the validity of the entire mechanism into question.

Permitting federal review of state peremptory schemes which allegedly burden impermissibly an accused's right to an impartial jury would not have relegated the peremptory challenge to such a diminutive role. This presumably would have been a positive factor, assuming the Court's sincerity in its praise, throughout the years, of the peremptory challenge as a sentinel of sixth amendment rights. Such a ruling would have permitted federal intervention into the realm of state rules on peremptory challenges only when necessary and would not have elevated the peremptory consistently to federal question status. The Supreme Court's refusal to allow such federal review paves the way for future state abuse of the mechanism and of an accused's constitutional rights.

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