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Johnson v. California: The Supreme Court Invades the States' Authority to Establish Criminal Procedures

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JOHNSON V. CALIFORNIA: THE SUPREME COURT INVADES THE STATES' AUTHORITY TO ESTABLISH CRIMINAL PROCEDURES

I. INTRODUCTION

In *Johnson v. California*, the United States Supreme Court held that California's procedure for evaluating a defendant's objections to the prosecution's peremptory challenges placed too high of a burden for the defendant to establish a prima facie case of racial discrimination.[1] California's criminal procedure required the defendant to establish a prima facie case by a preponderance of the evidence that the peremptory challenges were impermissibly based on race.[2] The defendant appealed and the California Court of Appeals set aside his conviction, ruling that the trial judge had applied an overly burdensome standard to the defendant's objections.[3] The State appealed to the California Supreme Court, and the court reinstated the defendant's conviction.[4]

In an eight-to-one decision, the Supreme Court ruled that California's "more likely than not" standard is incompatible with the prima facie inquiry mandated by *Batson v. Kentucky*.[5] The majority opinion focused solely on the first step in the three-step procedure established in *Batson*.[6] The narrow issue for the Court to decide was whether *Batson* allowed California to require the party objecting to a peremptory challenge to show that it is more likely than not that the other party's peremptory challenge, if unexplained, was based on an unconstitutional group bias.[7] The Court determined that

[1] Johnson v. California, 125 S. Ct. 2410, 2419 (2005).
[2] *Id.*
[3] *Id.* at 2414-15.
[4] *Id.*
[5] *Id.* at 2413, 2419.
[6] *Id.* at 2416 (citing Baston v. Kentucky, 476 U.S. 79 (1985)).
[7] *Id.*

California's standard failed to comply with the procedure for analyzing a prima facie case set forth in *Batson*.[8]

The Supreme Court incorrectly held that California's standard was inconsistent with the *Batson* ruling. The *Johnson* majority evaluated whether California's procedure was identical to the *Batson* procedure,[9] rather than determining whether California's procedure for evaluating objections to peremptory challenges was constitutional under the Fourteenth Amendment. In doing so, the *Johnson* majority erroneously concluded that California's procedure was impermissible.

The *Batson* decision did not establish a specific procedure that the states were constitutionally required to follow. Rather, the Court explicitly left the decision to the states to determine the best procedure to implement the holding in *Batson*, giving the states flexibility in responding to objections to racially discriminatory peremptory challenges.[10] Thus, under *Batson*, California had the power to create its own procedure for trial judges to employ when evaluating a defendant's objection to a peremptory challenge on the grounds of racial discrimination. The *Johnson* majority has changed the Court's position from offering one possible solution to dictating how states are to proceed. This holding oversteps the Court's authority and allows the Court to legislate state criminal procedures.

The Court did not have the authority to overrule California's chosen procedure unless the procedure went beyond the bounds of the Fourteenth Amendment.[11] The *Johnson* majority did not consider whether California's procedure was permissible under the Fourteenth Amendment. California's requirement that a defendant prove his prima facie case by a preponderance of the evidence did not exceed the limits of the Fourteenth Amendment. Thus, the Court overstepped its authority to review state criminal proceedings by demanding that state courts apply the exact procedure outlined in *Batson*. The Court reached the incorrect holding in *Johnson* and instead should have affirmed the California Supreme Court's ruling.

II. HISTORICAL BACKGROUND

A. THE PEREMPTORY CHALLENGE

During jury selection, attorneys may utilize either challenges for cause or peremptory challenges to strike members of the venire who may favor

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[8] *Id.*

[9] *Id.*

[10] *Batson*, 476 U.S. at 99.

[11] *See infra* Part II.E.

the opposing side.[12] A challenge for cause requires the striking party to explain a specific reason for removing the potential juror, and the judge must determine whether the reason provides sufficient cause.[13] In contrast, an attorney generally may use a peremptory challenge without giving any reason at all.[14] Peremptory challenges allow a litigant to remove a potential juror for reasons that would not be sufficient to uphold a challenge for cause.[15] The peremptory challenge has existed in American common law since the colonial courts adopted the English right of a defendant to exercise peremptory challenges.[16] Although the peremptory challenge has long been recognized as "one of the most important of the rights secured to the accused,"[17] peremptory challenges are not guaranteed by the Constitution.[18] Rather, state and federal statutes provide the specific number and form of peremptory challenges allowed in criminal and civil cases.[19]

B. CALIFORNIA'S PROCEDURE: *PEOPLE V. WHEELER*

In *People v. Wheeler*,[20] decided prior to *Batson*, the California Supreme Court addressed the issue of whether a defendant is denied his right to an impartial jury when the prosecution eliminates all of the African-American prospective jurors with its peremptory challenges.[21] The court held that the use of peremptory challenges to eliminate prospective jurors because of a "group bias" violated the defendant's right to jury representing a cross-section of the community under the California Constitution.[22]

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[12] Judith H. Germano, *Preserving Peremptories: A Practitioner's Prerogative*, 10 ST. JOHN'S J. LEGAL COMMENT. 431, 432 (1995).

[13] Edward V. Byrne, *The Demise of the Peremptory Challenge, Evisceration of an Ancient Privilege*, 42 U. KAN. L. REV. 15, 16 (1994).

[14] *Id.*

[15] *Id.* at 17.

[16] Judith A. Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada*, 16 LOY. L.A. INT'L & COMP. L. REV. 201, 212-13 (1993).

[17] William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49, 49 (1999) (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)).

[18] *Id.* at 50.

[19] Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517, 522-23 (1992).

[20] 583 P.2d 748 (Cal. 1978).

[21] *Id.* at 752.

[22] *Id.* at 761-62. The California Supreme Court defined "group bias" as identifiable groups distinguished on the basis of race, religion, ethnicity, or similar grounds. *Id.* at 761.

The court recognized that the statute permitting peremptory challenges does not require a party to explain the peremptory strike.[23] However, the court also stated that a party would undermine the representative cross-section requirement of the California Constitution if the peremptory strikes were based on group bias.[24] The court's conclusion required the court to address the difficult question of remedy in circumstances where a peremptory challenge might be impermissibly based on a group bias.[25] Thus, the *Wheeler* court established a three-step procedure for courts to evaluate objections to peremptory challenges on the basis of group bias.[26]

The first step required the party in question to object in a timely fashion and establish a prima facie case that the prosecutor's peremptory challenges discriminate.[27] The court explained that the objecting party must meet three requirements to make a prima facie case: 1) the party should make a complete record of the events taking place at his trial;[28] 2) the party must establish that the prosecutor is excluding members of a "cognizable group within the meaning of the representative cross-section rule";[29] and, 3) the party must show a "strong likelihood" that the prosecutor is challenging the jurors because of a group bias.[30]

The trial judge must determine whether the objecting party has made a prima facie case.[31] If the party meets his burden, the second step of the process shifts the burden to the challenging party.[32] At this point, the challenging party must prove that the peremptory challenge was not based on a group bias.[33] Though the justification does not have to satisfy a challenge for cause, the reasons must be relevant to the case, parties, or

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[23] *Id.* at 760.

[24] *Id.* at 761-62.

[25] *Id.* at 762.

[26] *Id.* at 764-65.

[27] *Id.* at 764.

[28] *Id.*

[29] *Id.*

[30] *Id.* The court's application of the "strong likelihood" standard for the defendant's prima facie case is the root of the problem addressed by the court in *Johnson*. The court's language in laying out the first step of the procedure led to confusion for courts applying the method. The court required that the defendant make a prima facie case showing a "strong likelihood" that the peremptory challenge is impermissibly based on a group bias. *Id.* However, later in the opinion, the court stated that the trial judge must decide whether the defendant has raised a "reasonable inference" that the peremptory challenge is based on group bias. *Id.* These two different standards created the controversy that arose following the *Wheeler* decision, and which the California court tried to remedy in *Johnson*.

[31] *Id.* at 764-65.

[32] *Id.* at 764.

[33] *Id.* at 765.

witnesses.[34] The final step in the process requires the trial judge to weigh the evidence by both parties and determine whether the challenging party has met its burden.[35]

C. *BATSON V. KENTUCKY*

In *Batson*,[36] the United States Supreme Court reexamined its holding in *Swain v. Alabama*[37] regarding the evidentiary burden on a defendant to challenge the State's use of a peremptory challenge.[38] In *Swain*, the Court decided that a defendant must show multiple, past occurrences of discriminatory exclusion of African-Americans from the jury process to prove a violation of the Equal Protection Clause.[39] The *Batson* Court held that a defendant may establish a prima facie case of purposeful discrimination during the selection of the petit jury by relying solely on evidence concerning the peremptory challenges at the defendant's trial.[40]

The Court determined that the State's use of peremptory challenges to remove individual jurors is subject to the Equal Protection Clause, despite the fact that parties are not usually required to explain the rationale behind a peremptory challenge.[41] Therefore, the Court found that a prosecutor violates the Equal Protection Clause if he challenges prospective jurors solely because of their race.[42] The Court then turned to the issue of determining whether the defendant had met the burden of proving that the prosecution purposefully discriminated in violation of the Equal Protection

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[34] *Id.*

[35] *See id.* If the trial judge determines that the challenging party did not meet its burden, the judge is required to dismiss the jurors selected up to that point in the trial. *Id.* Further, the court must dismiss the venire and select an entirely new venire before continuing with the jury selection process. *Id.* California's choice of remedies would be burdensome on the trial court. The dismissal of a sitting jury, as well as the entire venire, can create administrative difficulties and waste time. The practical effect of such a remedy is that trial judges will be reluctant, whether consciously or subconsciously, to grant an objection under the *Wheeler* procedure. However, the California Supreme Court considered other remedies and determined that the rights of the defendant require such a remedy. *Id.* at 97 n.29.

[36] 476 U.S. 79 (1985).

[37] 380 U.S. 202 (1965).

[38] *Batson*, 476 U.S. at 82.

[39] *Swain*, 380 U.S. at 223-24.

[40] *Batson*, 476 U.S. at 96.

[41] *Id.* at 89.

[42] *Id.* The Court did not address the issue of whether the Constitution also limited the use of peremptory challenges by defense counsel. *Id.* at 89 n.12. However, the Court would later revisit this issue in *Georgia v. McCollum*. 505 U.S. 42, 49-55 (1992) (holding that when making peremptory challenges, defense counsel was also limited by the Equal Protection Clause).

Clause.[43] The Court concluded that the *Swain* holding had placed too high of a burden on the defendant.[44] Under *Swain,* many lower courts had required the defendant to establish proof that the prosecutor repeatedly removed African-Americans over a number of cases before the court would find a violation of the Equal Protection Clause.[45] Reasoning that this interpretation placed a "crippling burden of proof" on the defendant, the Court rejected the *Swain* analysis for assessing a prima facie case under the Equal Protection Clause.[46]

After finding that the *Swain* holding was no longer applicable to these objections, the Court turned to establishing a new procedure for handling objections to peremptory challenges.[47] The majority opinion proceeded to describe a three-step process for the defendant to challenge a prosecutor's peremptory challenges that the defendant believes are based on impermissible racial discrimination.[48] First, the defendant must establish a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose."[49] The Court stated that, during this stage, the defendant may rely on the fact that peremptory challenges permit an attorney to discriminate if he wants.[50] The Court gave deference to trial judges to decide, under the circumstances of individual cases, whether the objecting party has made a prima facie case.[51]

If the trial judge finds that the defendant has made a prima facie case, the burden shifts to the prosecutor and the prosecutor must explain the peremptory challenge by offering race-neutral justifications.[52] Though the Court did not elaborate on what constitutes a race-neutral explanation,[53] it did articulate that the explanation does not need to meet a justification for a challenge for cause.[54] Further, the party making the peremptory challenge must provide more justification than simply stating that his grounds for the strike were not based on race.[55] Finally, the court must then decide whether

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[43] *Batson*, 476 U.S. at 93.

[44] *Id.* at 92-93.

[45] *Id.* at 92.

[46] *Id.* at 92-93.

[47] *See id.* at 93. In doing so, the Court cited to its disparate treatment cases under Title VII for guidance in implementing the new procedure. *Id.* at 94 n.18.

[48] *Id.* at 96-98.

[49] *Id.* at 94.

[50] *Id.* at 96.

[51] *Id.* at 97.

[52] *Id.*

[53] *See infra* Part VI.A.2.b.

[54] *Batson*, 476 U.S. at 97.

[55] *Id.*

the defendant has proved purposeful racial discrimination.[56] The Court concluded its opinion by explicitly stating that the *Batson* holding was not formulating specific procedures for states to apply.[57] Likewise, the opinion was not meant to instruct states how to implement the holding in *Batson*.[58]

D. THE CONSTITUTION AND PEREMPTORY CHALLENGES

A criminal defendant has the right to an impartial jury under the Sixth Amendment.[59] The guarantee of an impartial jury extends to the procedure used by states to select a jury panel.[60] The Supreme Court has interpreted the Sixth Amendment to require an impartial jury, but not a representative jury;[61] that is, a defendant does not have a constitutional right to a jury that includes members of the defendant's race.[62]

The Court has held that the use of a peremptory challenge does not violate a defendant's right to an impartial jury.[63] Rather, the Court has applied the Equal Protection Clause of the Fourteenth Amendment to analyze whether a peremptory challenge is racially discriminatory.[64] The *Batson* opinion relied on an equal protection argument under the Fourteenth Amendment, rather than a fair cross-section analysis under the Sixth Amendment.[65] By doing so, the Court grounded the review of

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[56] *Id.* at 98.

[57] *Id.* at 99.

[58] *Id.* at 99 n.24. The Court went on to explain that states would need to determine the appropriate remedy if the trial judge found that discrimination had occurred in the use of peremptory challenges. *See id.* The Court noted two possible solutions that states may choose to employ. *See id.* One possible solution would be for the trial court to discharge the venire and select an entirely new pool of jurors. *Id.* (citing Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985)). Another alternative would be for the trial court to simply sustain the objection and not allow the party to strike the juror from the venire. *Id.* (citing United States v. Robinson, 421 F. Supp. 467, 474 (D. Conn. 1976)). In *Wheeler*, California chose to employ the first method suggested by the Court. *See supra* note 35.

[59] U.S. CONST. amend. VI.

[60] Alice Beidenbender, Holland v. Illinois: *A Sixth Amendment Attack on the Use of Discriminatory Peremptory Challenges*, 40 CATH. U. L. REV. 651, 651 (1991).

[61] Holland v. Illinois, 493 U.S. 474, 478 (1990) (holding that a defendant did not have a valid constitutional argument under the Sixth Amendment to challenge the use of peremptory challenges as discriminatory).

[62] *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (explaining that the Sixth Amendment does not require petit juries to reflect the various distinctive groups in the community).

[63] *Holland*, 493 U.S. at 478. On the contrary, the Sixth Amendment is often cited as a basis for the use of peremptory challenges. *See, e.g.*, Beidenbender, *supra* note 60, at 653.

[64] Batson v. Kentucky, 476 U.S. 79 (1985).

[65] *Id.* at 82. In fact, the defendant in *Batson* raised a Sixth Amendment argument, but did *not* raise a Fourteenth Amendment argument. *Id.* at 84-85 n.4. The Court ignored the Sixth

discriminatory peremptory challenges in an equal protection analysis rather than finding that a racially discriminatory peremptory challenge violates a defendant's constitutional right to an impartial jury.[66]

E. REVIEW OF STATE CRIMINAL PROCEDURES BY THE UNITED STATES SUPREME COURT

The United States Constitution established the Supreme Court to hold the judicial power,[67] while establishing the Congress to legislate federal laws.[68] Thus, the Supreme Court does not have the power to promulgate federal law; rather, that is the realm of the Congress.[69] Even further removed from the Supreme Court is the power to promulgate *state* criminal law. The Supreme Court has recognized that the states have the "primary authority for defining and enforcing the criminal law."[70]

Thus, states have the authority to establish their own criminal laws and procedures. The Supreme Court has the power to review these laws for constitutionality, but the Court cannot dictate state criminal procedures.[71] The Supreme Court does not have supervisory power over the states' judicial proceedings.[72] The Supreme Court may only evaluate a state's criminal procedure for any violations of the United States Constitution.[73] If the Court finds that a state's law is unconstitutional, the Court has the authority to overrule the state.[74] However, absent a finding of unconstitutionality, the Court does not have the power to overturn a state's laws.[75]

Amendment argument and based its conclusion on the Fourteenth Amendment. *Id.*

[66] *See* Robert W. Rodriguez, Batson v. Kentucky: *Equal Protection, the Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 EMORY L.J. 755, 763 (1988).

[67] U.S. CONST. art. III, § 1.

[68] *Id.* at art. I, § 1.

[69] *Id.*

[70] Brecht v. Abrahamson, 507 U.S. 619, 635 (1992) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)). The Court went on to note that "[i]n criminal trials [the states] also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.*

[71] Dickerson v. United States, 530 U.S. 428, 438 (2000) (stating that the Court's authority over state courts is limited to enforcing the Constitution); Smith v. Phillips, 455 U.S. 209, 221 (1982) (explaining that the federal courts may only intervene in state judicial proceedings to correct violations of the Constitution).

[72] *Phillips*, 455 U.S. at 221.

[73] *See Dickerson*, 530 U.S. at 438; *Phillips*, 455 U.S. at 221.

[74] *See Dickerson*, 530 U.S. at 438; *Phillips*, 455 U.S. at 221.

[75] *Dickerson*, 530 U.S. at 438; *Phillips*, 455 U.S. at 221.

III. FACTS OF THE CASE

Jay Shawn Johnson, a black male, was tried in a California trial court for assault on a white nineteen-month-old child, resulting in death.[76] During jury selection, the attorneys for the prosecution and defense used challenges for cause to reduce the pool of prospective jurors to forty-three.[77] At this point, three eligible African-American jurors remained in the pool.[78] The prosecutor used three peremptory challenges to remove the remaining prospective African-American jurors.[79] After the second of these peremptory challenges, the defense counsel objected that the prosecutor was unconstitutionally striking jurors on the basis of their race.[80]

The trial judge did not request an explanation of the prosecution's rationale for his peremptory strike.[81] Rather, the judge determined that the defendant had not established a prima facie case for racial discrimination.[82] The judge applied the governing state precedent of *Wheeler*, finding "that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than individual basis."[83] Nevertheless, at this point, the judge warned the prosecutor that "we are very close."[84]

The following day, the prosecutor struck the only remaining prospective black juror with a peremptory strike.[85] In response, the defense made another objection on the basis that the prosecutor's challenges constituted a "systemic attempt to exclude African-Americans from the jury panel."[86] Again, the trial judge did not ask the prosecutor to explain his challenges.[87] The judge examined the record for himself and determined that the prosecutor's strikes could be justified by race-neutral reasons.[88] The judge stated that the African-American members of the venire had provided equivocal or confusing answers to written questionnaires.[89]

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[76] Johnson v. California, 125 S. Ct. 2410, 2414 (2005).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* (citing People v. Johnson, 71 P.3d 279, 272 (2003), *rev'd*, 125 S. Ct. 2420 (2005)) (emphasis omitted).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

According to the judge, the answers on the questionnaires were a sufficient basis for the strikes even though the court would not have granted challenges for cause.[90] Although the prosecutor had stricken all of the prospective African-American jurors, the judge ruled that the defendant had failed to establish a prima facie case of racial discrimination.[91] The final selected jurors, including alternates, were all white.[92] The defendant was convicted of second-degree murder.[93]

IV. PROCEDURAL HISTORY

A. THE CALIFORNIA COURT OF APPEAL

The defendant appealed his conviction to the California Court of Appeal, arguing in part that the trial judge had incorrectly overruled the defendant's objections to the peremptory challenges by the prosecution.[94] The court found that the defendant had established a prima facie case for discrimination and reversed the trial court's ruling.[95] Examining the relevant federal and state case law, the court found that many California state courts required the defendant to show a "strong likelihood" pursuant to *Wheeler*, while the Ninth Circuit required only a "reasonable inference" under *Batson*.[96]

The appellate court determined that California could not apply a more stringent evidentiary standard than what the United States Supreme Court outlined in *Batson*.[97] Therefore, since the *Batson* procedure only required a reasonable inference, the California procedure could also require only a reasonable inference.[98] The court determined that the "strong likelihood" standard was an unconstitutional standard to apply to an objecting party's prima facie case against a peremptory challenge.[99] Thus, the appellate court determined that the trial judge improperly required the defendant to show a "strong likelihood" of racial discrimination in the peremptory strikes.[100]

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] People v. Johnson, 105 Cal. Rptr. 2d 727, 729 (Cal. Ct. App. 2001), *rev'd* 71 P.3d 270 (Cal. 2003), *rev'd*, Johnson v. California, 125. S. Ct. 2410 (2005).

[95] *Id.*

[96] *Id.* at 730-31.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 741.

The appellate court ruled that the trial judge should have only required sufficient evidence to support an "inference" of discrimination.[101] The majority went on to apply the "reasonable inference" standard, concluding that the defendant had established a prima facie case of group bias.[102]

B. THE CALIFORNIA SUPREME COURT

The State appealed the decision to the California Supreme Court.[103] On appeal, Johnson argued that the "strong likelihood" standard was a higher standard than was permitted by *Batson*.[104] The California Supreme Court held that under both *Batson* and *Wheeler*, the prima facie case must show that it is "more likely than not" that the peremptory challenges were impermissibly based on race, if the challenging party cannot explain the peremptory challenge with a race-neutral explanation.[105]

The court addressed whether the "strong likelihood" standard was inconsistent with the *Batson* ruling.[106] The court briefly discussed the issues raised by the appellate court regarding the confusing case law in California and federal courts.[107] The court stated that the "strong likelihood" and "reasonable inference" standards were, in fact, the same standard.[108] The court rejected the Ninth Circuit and California appellate court's findings that the "strong likelihood" standard placed a lower level of scrutiny on the party making the peremptory challenge.[109] The California

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[101] *Id.*

[102] *Id.*

[103] People v. Johnson, 71 P.3d 270 (Cal. 2003), *rev'd*, Johnson v. California, 125. S. Ct. 2410 (2005).

[104] *Id.* at 272. The defendant also challenged the California Supreme Court's prohibition against "comparative juror" analysis. *Id.* This argument is not particularly pertinent to this Note, and will not be addressed.

[105] *Id.* In its review of *Batson*, the California Supreme Court noted that the *Batson* opinion referenced the disparate treatment analysis under Title VII. *Id.* at 275. Under Title VII cases, the party alleging racial discrimination maintains the ultimate burden of persuasion throughout the analysis. *Id.* (citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981)); *see infra* Part VI.B. Likewise, the burden of persuasion remains with the objecting party under a *Batson* procedure. Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("As in any equal protection case, the 'burden is, of course' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'") (citations omitted). The court then discussed the portion of *Batson* that specifically allowed state courts to establish the standards for evaluating the sufficiency of a defendant's prima facie case. *Johnson*, 71 P.3d at 277.

[106] *Johnson*, 71 P.3d at 279.

[107] *Id.* at 280.

[108] *Id.*

[109] *Id.* at 277.

court determined that the *Batson* opinion allowed for lower courts to determine the quantum of proof required for a prima facie case.[110]

The California Supreme Court found that the "strong likelihood" standard, while substantial, was not overly burdensome.[111] The court determined that the high standard was important so that a party could not abuse the peremptory challenge system, but could make a case where racial discrimination had in fact occurred.[112] The court concluded that the "strong likelihood" standard requires the objecting party to provide proof by a preponderance of the evidence.[113] The court went on to examine the record and apply this standard to the facts of the case.[114] Although the court found it suspicious that the prosecutor had stricken all of the African-American prospective jurors, the majority opinion deferred to the trial judge's ruling.[115]

V. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In *Johnson v. California*, the Supreme Court held, in an eight-to-one decision authored by Justice Stevens, that California's "more likely than not" standard is incompatible with the prima facie inquiry mandated by *Batson*.[116] The majority opinion focused solely on the first step in the three-

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[110] *Id.* According to the majority opinion, the standard applied by California was no more burdensome than the test applied in *Batson*. *Id.* at 278. Again, the court turned to Title VII cases to support its decision. *Id.* Looking at Title VII cases, the California Supreme Court determined that the Title VII analysis requires that the adverse employment actions are more likely than not based on discrimination. *Id.* (citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978)). The court went on to review other decisions using the same language, as well as decisions using "preponderance of evidence" as the standard. *Id.* The California Supreme Court found support by looking to other courts applying the same analysis to *Batson*. *Id.* In Connecticut, the state Supreme Court required a preponderance of evidence at the first stage of a *Batson* challenge. *Id.* at 279 (citing State v. Gonzalez, 538 A.2d 210, 213 (Conn. 1988) (finding that the defendant must establish a prima facie case by a preponderance of the evidence under *Batson*)). The Maryland Court of Appeals reached the same conclusion. *Id.* (citing Mejia v. State, 616 A.2d 356, 361 (Md. 1992) (finding that the objecting party must establish a prima facie case by a preponderance of the evidence under *Batson*)).

[111] *Id.* at 279.

[112] *Id.*

[113] *Id.* The court noted that the law of evidence in California sets the default burden of proof at a preponderance of the evidence unless otherwise provided by law. *Id.* (citing CAL. EVID. CODE, § 115 (West 2006)).

[114] *Id.* at 287.

[115] *Id.*

[116] 125 S. Ct. 2410, 2419 (2005).

step procedure established in *Batson*.[117] The narrow issue for the Court to decide was whether *Batson* allowed California to require the objecting party to show by a preponderance of the evidence that the peremptory challenge, if unexplained, was based on an unconstitutional group bias.[118] The Court recognized that the states had flexibility to develop proper procedures that would comply with *Batson*.[119] However, the Court determined that California's standard failed to comply with the procedure for analyzing a prima facie case as set forth in *Batson*.[120]

The Court found no support in the *Batson* opinion for California's standard.[121] Specifically, the Court noted that *Batson* allowed the defendant to offer a variety of evidence, which needed only to give "rise to an inference of discriminatory purpose."[122] The Court went on to clarify the *Batson* holding, stating that the first step should not be so burdensome that a defendant would have to demonstrate that the prosecutor's challenge was more likely than not based on purposeful discrimination.[123] Rather, the *Batson* decision required only sufficient evidence to allow the trial judge to draw an inference that the prosecutor discriminated in his peremptory challenges.[124]

The Court rejected California's argument that a standard requiring the defendant to prove the ultimate facts by a preponderance of evidence is proper under the *Batson* test.[125] The Court explained that California's test placed the burden on the defendant at the wrong stage.[126] The defendant carries the "burden of persuasion" under the *Batson* analysis, but it is not until the third step of the analysis that the persuasiveness of the evidence is at issue.[127] At step two, the prosecution may offer any justification, even if it is "frivolous or utterly nonsensical."[128] Once this justification has been offered, the inquiry proceeds to step three.[129] Thus, the first two steps are the production steps, while the third step is where persuasiveness is

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[117] *Id.* at 2416.
[118] *Id.* at 2413.
[119] *Id.* at 2416.
[120] *Id.*
[121] *Id.*
[122] *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).
[123] *Id.* at 2417.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 2418.
[127] *Id.* at 2417-18.
[128] *Id.* at 2417.
[129] *Id.*

evaluated.[130] The Court held that California's standard was too onerous for the defendant to meet at the first stage.[131]

Based on the comments of the trial judge and the California Supreme Court's opinion, the majority determined that the defendant raised an inference of discrimination and, therefore, established a prima facie case for discrimination.[132] The Court reversed the decision of the California Supreme Court and remanded the case for further proceedings.[133]

B. DISSENTING OPINION

Justice Thomas wrote the lone dissenting opinion.[134] Thomas argued that *Batson* granted the states flexibility in developing appropriate procedures that would comply with the Court's holding in *Batson*.[135] Despite this promised flexibility, the *Johnson* Court told California exactly how to comply with the prima facie inquiry established by *Batson*.[136] Thomas described the *Batson* approach as a "prophylactic framework" that would police impermissible race discrimination in jury selection.[137]

Since the *Batson* ruling did not establish an independent constitutional command, the states should have wide discretion to develop a workable process.[138] Thomas argued that the states have the flexibility to develop their own procedure so long as it met the minimum requirements of the Fourteenth Amendment.[139] In his opinion, California crafted a procedure that fell within its broad discretion under the Fourteenth Amendment and should have been permitted by the Court to develop its own rules of criminal procedure.[140]

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[130] *Id.* at 2418.

[131] *Id.* Again, the Court referenced the Title VII burden-shifting framework in understanding the procedure established in *Batson*. *Id.* at 2418 n.7. The Court further justified its holding by examining the purposes of the procedure established in *Batson*. *Id.* at 2418. According to the majority, the *Batson* procedure was intended to answer "suspicions and inferences" of discrimination in jury selection. *Id.* The process allows for the trial court to make a prompt ruling without causing delay or disruption in the jury selection process. *Id.*

[132] *Id.* at 2419.

[133] *Id.*

[134] Justice Breyer filed a one-sentence concurrence. *Id.* (Breyer, J., concurring). In that concurrence, he maintained the position he had explained in his concurring opinion in *Miller-El v. Dretke*. *Id.* (Breyer, J., concurring) (citing Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (arguing for the Court to abolish the peremptory challenge system as a whole)).

[135] *Id.* (Thomas, J., dissenting).

[136] *Id.* (Thomas, J., dissenting).

[137] *Id.* (Thomas, J., dissenting).

[138] *Id.* (Thomas, J., dissenting).

[139] *Id.* (Thomas, J., dissenting).

[140] *Id.* (Thomas, J., dissenting).

VI. ANALYSIS

The *Johnson* majority, instead of determining whether California's procedure for evaluating objections to peremptory challenges was constitutional under the Fourteenth Amendment, evaluated whether California's procedure was identical to the *Batson* procedure. In doing so, the *Johnson* majority exceeded the constitutional authority of the Supreme Court and erroneously concluded that California's procedure was impermissible. Such a conclusion has no basis in the Court's prior rulings, or in the United States Constitution. Therefore, the Court should have affirmed the California Supreme Court's decision.

The *Batson* opinion did not indicate that the three-step procedure was a constitutional requirement that the states were obligated to follow. Rather, the *Batson* majority merely offered one solution for states to employ, while declining to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges."[141] The Court thus provided the states flexibility in responding to objections to racially discriminatory peremptory challenges.[142] Therefore, California had the power to create its own procedure for trial judges to employ when evaluating a defendant's objection to a peremptory challenge on the grounds of racial discrimination.

The Supreme Court only had the authority to overrule California's chosen procedure if the procedure violated the Constitution.[143] However, the *Johnson* majority never determined whether California's procedure went so far as to breach the constitutional rights of the defendant. The *Batson* ruling, along with subsequent decisions by the Court, clearly established that the Equal Protection Clause of the Fourteenth Amendment governs racially discriminatory peremptory challenges.[144] The *Johnson* majority did not examine whether California's procedure exceeded the limits of the Fourteenth Amendment. The Court should have found, as Justice Thomas noted in his dissent,[145] that California did not place such an onerous burden on defendants so as to violate the Fourteenth Amendment. Thus, the Court overstepped its authority to review state criminal

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[141] Batson v. Kentucky, 476 U.S. 79, 99 (1985).

[142] *Id.*

[143] *See supra* Part II.E. As *Batson* was not a constitutional requirement, the Court should have limited its review of the California procedure to determining whether the procedure violated the Constitution independent of the *Batson* ruling. Therefore, the Court's failure to analyze whether California's procedure violated the Constitution led to an incorrect ruling that the procedure was impermissible.

[144] *Batson*, 476 U.S. at 89; *see also* Holland v. Illinois, 493 U.S. 474 (1990).

[145] *Johnson*, 125 S. Ct. at 2419 (Thomas, J., dissenting).

proceedings by demanding that state courts apply the exact procedure outlined in *Batson*.

As a result of its opinion in *Johnson*, the Court has stripped the states of their ability to experiment with solutions to racially discriminatory peremptory challenges under the Fourteenth Amendment.[146] One of the principle goals of federalism is to allow states the flexibility to address issues in public policy with a variety of solutions.[147] Yet, the *Johnson* majority has dictated a single, inflexible solution that all states are required to follow. Further, the majority's decision establishes a precedent that allows the Court to promulgate state criminal procedure, a clear violation of the Court's authority under the Constitution. The Court has opened the door to allowing future justices to draft criminal procedures and instruct the states exactly how to employ those procedures.

A. THE COURT INCORRECTLY COMPARED CALIFORNIA'S PROCEDURE TO THE *BATSON* PROCEDURE

The *Johnson* majority transformed the *Batson* procedure into a constitutional requirement that states must now use without the slightest deviation. The Court had established the *Batson* procedure as a prophylactic remedy for the states to experiment with implementation, providing just enough guidance for the states to employ the procedure while leaving enough room for the states to address difficult policy questions with different solutions. Although the Court now requires states to use the procedure described in *Batson*, the Court did nothing to provide guidance to the states in areas in which the *Batson* opinion left the states room to maneuver.

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[146] It remains to be seen whether this decision will also limit the states' ability to experiment in other areas of criminal law.

[147] *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 273 (2000) (describing the Court's established practice of allowing states "wide discretion" under the Fourteenth Amendment to experiment with answers to problems in policy). The Court's holding in *Robbins* relied on a long-established principle that the Court provides the states wide discretion to develop procedures that answer difficult legal problems. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting) (discussing the states' ability to experiment with solutions to novel legal problems); Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (explaining that the task of crafting appropriate procedures is entrusted to the states); Spencer v. Texas, 385 U.S. 554, 563-64 (1967) (stating that the Constitution does not provide the Court with authority to promulgate state rules of criminal procedure); Griffin v. Illinois, 351 U.S. 12, 24 (1956) (explaining that states have wide discretion under the Constitution to choose means of effecting policy). Based on these cases, the states are not bound by the exact frameworks established in judicial opinions, but may experiment within the limits of the Constitution.

Without justification, the *Johnson* Court transformed the *Batson* procedure from a prophylactic remedy into a constitutional rule. The terms "constitutional rule" and "prophylactic rule" can be confusing terms when interpreting Supreme Court cases. An oversimplified explanation is that a violation of a constitutional rule is a violation of the Constitution, while a violation of a prophylactic rule may *not* necessarily be a violation of the Constitution.[148] However, a more important distinction to this Note is whether a state is bound to follow prophylactic rules established by the Court. Although the final answer is still unclear, the Court has provided some indication that states are not bound to follow prophylactic rules precisely as the Court writes them.[149] Thus, if the procedure described in *Batson* is not a constitutional requirement,[150] then the Court was only offering a prophylactic solution that states were not required to follow.

Neither *Batson* nor the Constitution offers any support to the Court's conclusion that the *Batson* procedure is a constitutional requirement. The *Batson* opinion did not itself attempt to label the procedure as a

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[148] *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985).

[149] *See generally Robbins*, 528 U.S. at 273. The Court established a procedure for protecting an indigent defendant's right to appellate counsel in cases where the appeal is not frivolous in the case of *Anders v. California*. 386 U.S. 738, 744 (1967). In *Robbins*, the Court had to determine whether California's procedure, which was different from the one established in *Anders*, was permissible under the Constitution. *Robbins*, 528 U.S. at 265. The Court had previously noted that the *Anders* procedure was only a prophylactic one, rather than one establishing a constitutional command. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). The Court held that states may adopt different procedures from the prophylactic procedure offered by the Court *if* those procedures sufficiently protect the right that the Court offered the prophylactic procedure to protect. *Robbins*, 528 U.S. at 265. Further, the Court never suggested that the Constitution required that states use the *Anders* procedure or that it was the only procedure that would protect the defendant's right to counsel. *Id.* at 273. The majority in *Robbins* declined to impose "a single solution on the States from the top down." *Id.* at 275. For this reason, the Court reviews state procedures "one at a time, as they come before [the Court]." *Id.* (citing Murray v. Giarratano, 492 U.S. 1, 14 (1989) (O'Connor, J., concurring)). Therefore, the majority held that the *Anders* procedure was only one method of protecting an indigent defendant's right under the Constitution, and states were permitted by the Constitution to develop procedures that were equally sufficient. *Id.* at 276.

[150] The clearest example of where the Court has established a constitutional rule is in *Miranda v. Arizona*, 384 U.S. 436 (1966). Though the *Miranda* opinion did not explicitly say that a constitutional rule had been developed, the Court later returned to the issue in *Dickerson v. United States*, 530 U.S. 428 (2000) (addressing whether Congress has constitutional authority to supersede *Miranda*). In *Dickerson*, the Court made it clear that *Miranda* had established a constitutional rule. *Id.* at 435. In the present case, the Court appeared to transform *Batson* into a constitutional rule through *Johnson* without explicitly saying so. However, the language of the two cases does not support such a reading. *See infra* Part VI.A.1.a.

constitutional rule.[151] Further, the *Johnson* majority did not support its conclusion with any reference to the Constitution. Yet, the *Johnson* majority treated the *Batson* procedure as constitutionally mandated by using it as a yardstick to measure California's procedure. Therefore, the *Johnson* majority improperly evaluated California's procedure with regard to *Batson*, finding it unconstitutional merely because California applied a slightly different procedure, rather than analyzing whether California's procedure violated the Constitution independent of the *Batson* procedure.

1. Batson *Did Not Establish a Constitutional Rule*

The *Johnson* majority incorrectly determined that *Batson* had established a constitutional rule, rather than a prophylactic remedy. In *Batson*, the Supreme Court did not have the authority to mandate a criminal procedure for the states to use,[152] nor did the Court ever indicate that it was doing so. The *Batson* Court recognized that the *Swain v. Alabama* holding had been interpreted by lower courts to place a heavy burden on a defendant to prove that a peremptory challenge was racially discriminatory.[153] With that in mind, the Court overruled *Swain* and offered a prophylactic framework for courts to use in evaluating objections to peremptory challenges on the basis of racial discrimination.[154] Although the Court certainly intended for the framework to provide guidance for states to develop their own procedures, the Court did not hold that a procedure different from the one articulated in *Batson* would violate the Constitution.

The *Batson* opinion itself gives several strong indications that states were not required to follow the procedure to the letter. First, the language of the majority opinion assured the states that the new procedure was not a requirement.[155] Second, the nature of the majority opinion made it clear that individual courts would not only be able to determine how the procedure would be applied, the individual courts would *have* to do so.[156] By determining the validity of California's procedure in light of the *Batson* procedure, the *Johnson* majority improperly overruled a state's criminal

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[151] *See, e.g.*, Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1043 (2001) (discussing how the Court created a prophylactic rule in *Batson v. Kentucky* to protect Fourteenth Amendment rights).

[152] *See supra* Part II.E.

[153] Batson v. Kentucky, 476 U.S. 79, 92-93 (1986).

[154] *Id.* at 93-98.

[155] *Id.* at 99 ("We decline [] to formulate particular procedures to be followed . . . .").

[156] *Id.* at 99 n.24 ("[W]e make no attempt to instruct these courts how best to implement our holding today.").

procedure without determining whether the procedure violated the Constitution.

a. The Language in *Batson* States that the Procedure Was Not Required

The fact that the *Batson* opinion did not indicate that the holding was establishing a constitutional rule is perhaps the most telling evidence that the procedure was not a constitutional command. The Court did note that the "Constitution prohibits all forms of purposeful racial discrimination in selection of jurors."[157] The Court concluded that the Equal Protection Clause of the Fourteenth Amendment limits the use of peremptory challenges for racially discriminatory purposes.[158] However, the Court did not suggest that the Constitution requires the precise procedure laid out in *Batson*. Rather, the *Batson* Court explicitly stated that the opinion was not formulating "particular procedures to be followed."[159] The *Batson* ruling created a stir in the legal community between those who felt the Court was abolishing an important tool in the peremptory challenge and those who felt the Court did not go far enough.[160] The Court, seeming to understand the impact of such a radical change, allowed the states to absorb the new procedure in a way that would not destroy the peremptory challenge scheme.[161]

The majority in *Johnson*, likewise, did not interpret the language of the *Batson* holding to indicate that the procedure was a constitutional requirement. Justice Stevens defined the issue in *Johnson* to be whether *Batson* permits California's higher evidentiary standard of "more likely than not."[162] The Court did not discuss whether the *Constitution* permits California to require a preponderance of evidence. Moreover, the *Johnson* majority did not refer to any constitutional grounds supporting the *Batson* procedure as a constitutional rule. In his opinion, Justice Stevens makes few references to the Constitution. The arguments put forth by Justice Stevens instead rely heavily on the language of *Batson*, while none of the arguments are based on the Fourteenth Amendment, or any other section of

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[157] *Id.* at 88.

[158] *Id.* at 89.

[159] *Id.*

[160] *See, e.g.*, Byrne, *supra* note 13; Germano, *supra* note 12. *But see* Bray, *supra* note 19; Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997).

[161] The Commonwealth of Kentucky argued that the Court's procedure would pose administrative difficulties. *Batson*, 476 U.S. at 99. In response, the Court stated that the majority opinion was not instructing courts how to implement the *Batson* holding. *Id.*; *see supra* note 58.

[162] Johnson v. California, 125 S. Ct. 2410, 2416 (2005).

the United States Constitution. One would thus have a difficult time arguing that the opinion in *Johnson* was a "constitutional ruling." Despite the Court's failure to interpret *Batson* as a constitutional requirement, the majority went on to evaluate California's procedure as though *Batson* was a constitutional requirement. The *Johnson* Court, therefore, interpreted the *Batson* procedure to be a constitutional rule without explicitly stating their intent, and with no constitutional basis for doing so.

The language of the *Batson* and *Johnson* decisions can be contrasted to *Miranda v. Arizona*[163] and its progeny of cases. The line of cases beginning with *Miranda* and ending with *Dickerson v. United States*[164] is a clear example of where the Court has established a constitutional rule. In *Miranda*, the Court addressed the admissibility of statements made in police custody and procedures that would protect an individual's Fifth Amendment privilege against self-incrimination.[165] The Court set out to establish "concrete constitutional guidelines for . . . courts to follow."[166] The Court's ruling in *Dickerson* established *Miranda* as a constitutional rule. The *Dickerson* Court held that the *Miranda* decision was applicable to both state and federal courts.[167]

In contrast to the language in *Miranda*, the *Batson* opinion gives no indication that it is establishing a constitutional rule.[168] Instead, the Court explained that the procedure was open to improvement and changes by the state trial courts.[169] Under *Batson*, a prosecutor may not challenge a juror solely on the basis of race, but the Court has never held that the use of peremptory challenge is per se unconstitutional. This analysis is vastly

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[163] 384 U.S. 436 (1966).

[164] 530 U.S. 428 (2000) (addressing whether Congress has constitutional authority to supersede *Miranda*).

[165] *Miranda*, 384 U.S. at 439.

[166] *Id.* at 442. The guidelines provided by the Court were not, in the majority's opinion, an addition to jurisprudence. *Id.* Rather, the guidelines were merely an application of established constitutional principles. *Id.* Those constitutional privileges include the privilege against self-incrimination. *Id.* at 458. Finding the privilege firmly rooted in precedent, the Court also found that the privilege was applicable to the states under the Fifth Amendment. *Id.* at 465. Then, the Court went on to establish guidelines for states to employ when interrogating suspects in criminal proceedings. *Id.* at 469-73.

[167] *Dickerson*, 530 U.S. at 432. Though the Court noted that its supervisory authority over federal courts allowed the Court to prescribe binding rules and procedures, the Court acknowledged that this supervisory power was only available in absence of a congressional act. *Id.* at 437. Thus, the Court had to determine whether the *Miranda* opinion was exercising the supervisory power or establishing a constitutional rule. *Id.* The *Dickerson* majority concluded that *Miranda* had established a constitutional rule that Congress could not supersede through legislation. *Id.* at 444.

[168] *See infra* Part VI.A.1.b.

[169] Batson v. Kentucky, 476 U.S. 79, 99 (1986).

different from the approach applied in *Miranda* where the Court sought to protect the specific privilege against self-incrimination.

The weak language used by the *Johnson* opinion, when compared to the *Dickerson* language, further supports this conclusion. The *Johnson* majority did not explain that *Batson* established a constitutional rule, nor did it discuss how the Fourteenth Amendment required states to employ the *Batson* procedure. Rather, the Court only discussed the "constitutional interests" and public policies that *Batson* sought to protect.[170] Though these interests were certainly important, the *Batson* majority did not claim that the outlined procedure was the *only* procedure that could protect those interests.[171] Thus, unlike in *Miranda* and *Dickerson* where the Court explicated a precise constitutional standard, in *Johnson* there is no support for the Court's treatment of the *Batson* procedure as a constitutional rule.

b. The *Batson* Majority Opinion Did Not Sufficiently Explain Its Procedure

The Court's goal in *Batson* was not to establish a finely detailed procedure and dictate that the states were required to follow it.[172] The Court's lack of detailed explanation in the *Batson* holding indicates that the Court did not expect states to follow the procedure precisely. The shift from *Swain* to *Batson* was a significant change in ways for a trial court to evaluate a defendant's objections to a peremptory challenge on the basis of racial discrimination. Despite this drastic shift, the *Batson* majority did not outline the particular details of each step in the procedure. Instead, the Court left it to the states to determine the specifics of the procedure.[173]

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[170] *Johnson*, 125 S. Ct. at 2418. The Court explained that *Batson* sought to protect the rights of criminal defendants and potential jurors. *Id.* While *Batson* established a procedure that would help protect these rights, the *Johnson* Court did not explain how California's procedure failed to do so as well. The Court did not elaborate on the specific rights that *Batson* sought to protect. In no way did the Court establish that requiring a preponderance of the evidence at the first stage of the *Batson* procedure would violate a constitutional right of the defendant.

[171] While it is true that *Batson* sought to solve problems of public policy, *see generally* Batson, 476 U.S. at 87 (discussing the problem of racial discrimination in the selection of jurors), the policies addressed in *Batson* are not the only policies at issue. California developed a procedure that worked within the existing structure of its criminal procedure. Without a constitutional violation, the Court should not have imposed a specific procedure for states to use.

[172] The purpose of the *Batson* opinion was to overturn the *Swain* ruling, which made it very difficult for defendants to object to the use of racially discriminatory peremptory challenges. Although the *Batson* procedure was offered to help reach this goal, the Court did not expect the states to use this precise procedure.

[173] *Batson*, 476 U.S. at 99.

The Court's description of the procedure proposed in *Batson* left many remaining questions for courts to answer for themselves.[174] First, the Court did not fully explain the different ways that a defendant may make his prima facie case. Though the Court describes what elements constitute a prima facie case,[175] the opinion did not detail what kind of evidence would support those elements.[176] Rather, the Court merely stated that the trial judge "should consider all relevant circumstances."[177] Therefore, each state would need to determine what forms of evidence would be used in objections to peremptory challenges.[178]

Second, the *Batson* opinion does not give any insight into the meaning of a "race-neutral explanation" required from the prosecution once the defendant makes his prima facie case.[179] The Court did not clarify in

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[174] *See* Bray, *supra* note 19, at 533-49 (arguing that the *Batson* standard provided little guidance to lower courts on how to implement the ruling). Bray specifically noted that *Batson* left open the question of "what sort of evidence fulfilled the prima facie case requirements." *Id.* at 537-38.

[175] *Batson*, 476 U.S. at 96. The Court required that the defendant show: 1) he is a member of a cognizable racial group; 2) the prosecutor has used a peremptory challenge to remove a potential juror of the defendant's race; and 3) the facts and other relevant circumstances raise an inference that the peremptory challenge was motivated by the race of the defendant. *Id.* In doing so, the defendant could rely on the fact that peremptory challenges allow a prosecutor to discriminate if he chooses to do so. *Id.*

[176] The Court did provide examples of what evidence constitutes "other relevant circumstances." *Id.* at 97. The opinion discussed examples such as a pattern of strikes against a race or group, and questions or statements by the prosecutor during *voir dire*. *Id.* However, the Court clearly stated that these were only examples and left it to the trial judges to determine whether the defendant made a prima facie case based on the relevant circumstances. *Id.*

[177] *Id.* at 96.

[178] The issue of evidence in support of a prima facie case for a *Batson* motion becomes a complicated policy matter for states to solve through trial and error. Evidence that supports a prima facie case will differ from case to case. Likewise, different forms of evidence will be given different weight by the states. An objection under *Batson* will take place in a setting where the objecting party may not have access to a variety of evidence. Therefore, the states should have flexibility to determine exactly what constitutes evidence in this type of motion, and the weight given to that evidence. In *Wheeler*, the California Supreme Court examined the different forms of evidence that the defendant may use to make a prima facie case. People v. Wheeler, 583 P.2d 748, 764 (Cal. 1978). Examples included evidence that the prosecutor had struck all prospective jurors of the defendant's race. *Id.* The defendant may also show evidence that the prosecutor did not ask the stricken jurors any questions, or if the prosecutor did ask them questions, their answers did not vary from jurors who were not of the defendant's race and were not stricken from the venire. *Id.*

[179] *Batson*, 476 U.S. at 97. The Court did comment that the race-neutral explanation does not have to be sufficient to support a challenge for cause. *Id.* At the other end of the scale, the prosecutor must do more than just deny that his peremptory challenge was based on race. *Id.* at 98. The Court would later address the requirements of a race-neutral explanation in *Purkett v. Elem*, 514 U.S. 765 (1995). There, the Court explained that the

Batson what forms of race-neutral explanations would be sufficient to overcome the prima facie case. Further, the Court did not answer the question of whether the responding party must offer any evidence to support the explanation, and, if so, what level of evidence would rebut the prima facie case.

Finally, the Court dealt with the third step of the process in a single sentence without elaborating more than to say that the trial judge's decision will rest on the credibility of the lawyers.[180] The third step, which is not really a step at all, is the point where the judge weighs the objecting party's prima facie case against the responding party's race-neutral explanation.[181] However, the Court did not clearly explain whether the judge should, or can supplement this decision with a request for more information from the parties.[182] This was another area in which the states could make their own decisions regarding the implementation of the *Batson* procedure.

In addition to little explanation of each step in the process, and perhaps most importantly, the Court did not elaborate on the burden of proof placed on both parties.[183] The Court explained that the *Batson* procedure mirrors

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race-neutral explanation does not have to be persuasive, or even plausible. *Id.* at 768. The persuasiveness of the explanation does not become an issue until the third step of the *Batson* procedure. *Id.*; *see also* Tracy M.Y. Choy, *Branding Neutral Explanations Pretextual Under* Batson v. Kentucky: *An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577 (1997).

[180] *Batson*, 476 U.S. at 98 n.21.

[181] *Id.* at 98.

[182] The issue here is whether the *Batson* procedure leaves room for the trial courts to supplement the procedure with an additional step. The reference to Title VII indicates that a fourth step may be possible. *See infra* Part VI.B. Without an additional step, it is unclear whether the third step includes additional arguments by the parties at the discretion of the trial judge. For example, if the judge is unclear regarding the responding party's race-neutral explanation, can he ask the party to elaborate? On the other hand, if the race-neutral explanation raises points not addressed by the objecting party's prima facie case, may the objecting party respond with additional evidence? If not, may the party make another motion to challenge the race-neutral explanation proffered by the responding parties? These questions are outside the scope of the *Batson* decision and were also not addressed in the *Johnson* opinion. Therefore, the states must have some latitude in applying the *Batson* procedure. These questions become particularly important when dealing with the burden of proof carried by each party, which the Court also failed to address. *See infra* Part VI.B.

[183] The most guidance that the states received from the *Batson* majority regarding the burden-shifting framework to apply came in the form of a reference to Title VII analysis of disparate treatment cases. The Court first referenced the burden-shifting approach to analyzing Title VII cases in *Batson*. *Batson*, 476 U.S. at 94 n.18. When the Court examined California's procedure in *Johnson*, the majority opinion once again referred to the burden-shifting framework employed by Title VII cases. Johnson v. California, 125 S. Ct. 2410, 2418 n.7 (2005). However, the Court's consistent references to Title VII provide little guidance to states employing the *Batson* procedure. *See infra* Part VI.B.1.

other equal protection analyses in that the party alleging discrimination carries the burden to prove purposeful discrimination.[184] Yet, the Court did not elaborate on the evidentiary standard that trial courts should use to analyze whether the defendant has met his burden of persuasion. The only evidentiary burden that the Court noted is that the defendant must only raise an inference to establish a prima facie case.[185] The *Batson* opinion did not define the evidentiary burden that will satisfy the burden of persuasion.[186]

The burden of proof on the parties was specifically at issue in *Johnson*, but the majority in *Johnson* also fails to provide a satisfactory answer. While the *Johnson* Court acknowledges that the defendant carries the burden of persuasion,[187] it stresses that the persuasiveness of the evidence does not become relevant until the final step of the procedure: the step in which the judge makes a ruling.[188] Even with the Court's discussion of the burden of persuasion in *Johnson*, the Court once again fails to explicitly state the defendant's evidentiary burden for proving the facts. Instead, the Court refers to the burden-shifting framework under Title VII analysis.[189]

Despite the guidance lacking in the *Batson* opinion, the *Johnson* majority transformed the *Batson* procedure into a constitutional requirement to which states must adhere. Yet, the *Johnson* opinion does not answer any of the questions left open for the states to solve through experimentation. The Court's vague explanations in *Johnson*, combined with the lack of explanation of the other steps, forces the states to employ a procedure that is incomplete and problematic. The *Batson* Court did not imagine that states would be forced to employ the three-step procedure exactly as the Court laid it out. Rather, the *Batson* opinion recognized that states would have to iron out the details over time as states adjusted to the new measure. Therefore, the Court incorrectly held that *Batson* established a constitutional command that States had to employ without change.

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[184] *Batson*, 476 U.S. at 93.

[185] *Id.* at 96.

[186] The Court does not seem to have dealt much with the third step of the process, the point at which the trial judge must determine whether the defendant met his burden of persuasion. A review of the cases subsequent to *Batson* does not answer the question regarding the level of burden placed on the defendant. *See also* Choy, *supra* note 179.

[187] Johnson v. California, 125 S. Ct. 2410, 2417 (2005).

[188] *Id.*

[189] *Id.* at 2418 n.7. Unfortunately, the Court did not take this opportunity to clarify or expand on how the burden-shifting framework in *Batson* relates to Title VII. *See infra* Part VI.B.1.

2. *The Court Applied the Wrong Analysis in* Johnson

The *Johnson* majority incorrectly analyzed California's criminal procedure under *Batson*. The Court applied the *Batson* procedure as though it were a constitutional requirement, and determined whether California correctly applied the procedure. The *Batson* majority did not establish the procedure as a constitutional requirement, but rather created a procedure for trial courts to evaluate whether a peremptory challenge was purposefully discriminatory. The *Batson* opinion neither states nor implies that the Fourteenth Amendment requires the procedure described by the Court.[190] The states had no obligation under the Constitution to apply the exact procedure that the Court detailed in *Batson*. In fact, the *Batson* opinion did not provide enough guidance for states to do so.

The states have the authority to experiment with the procedure, so long as the states remain within the limitations of the Fourteenth Amendment.[191] In other cases involving states' criminal procedures, the Court has analyzed the procedures on a case-by-case basis.[192] The Court has a long-standing principle that states may experiment with different procedures to answer complicated problems.[193] When the Court reviews these procedures, the Court does so by determining whether the procedure exceeds the limits imposed by the Constitution.[194] Even if the Court has suggested a prophylactic remedy in these cases, the Court does not strictly evaluate a

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[190] The Supreme Court does not have the authority to dictate a state's criminal procedure. Instead, the Supreme Court may only determine whether a given criminal procedure is valid under the Constitution. *See supra* Part II.E. If the Constitution, under the Fourteenth Amendment, required the exact procedure outlined in *Batson*, the Court would have the authority to dictate to states how to employ the procedure as it did in *Dickerson v. United States*, 530 U.S. 428, 438 (2000). However, because the Fourteenth Amendment does not require the *Batson* procedure to satisfy the Equal Protection Clause, the Court was limited to reviewing California's procedure for violations of the Constitution.

[191] *See* Smith v. Robbins, 528 U.S. 259, 272 (2000) (discussing the Court's established practice of permitting states to experiment with difficult questions of policy within the limitations of the Constitution). The *Batson* opinion determined that the Equal Protection Clause of the Fourteenth Amendment governs the use of peremptory challenges. Batson v. Kentucky, 476 U.S. 79, 89 (1986). The Court should have, at the most, determined whether California's procedure was permissible under the Fourteenth Amendment. Under the Fourteenth Amendment, the Court has generally given states more latitude in experimenting with criminal procedures. *See* Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (explaining that the Court has more authority under its supervisory power than it does over state courts in interpreting the Fourteenth Amendment).

[192] *See, e.g.*, *Robbins*, 528 U.S. at 275 (explaining that the Court evaluates state procedures one at a time, rather than imposing a single solution for all of the states to employ).

[193] *See supra* note 147.

[194] *See Robbins*, 528 U.S. at 275.

state's procedure by comparing the procedure to the recommended prophylactic.[195]

This being the case, the Court should have, at the most, determined whether California's procedure was permissible under the Fourteenth Amendment. Although the Court could have compared California's procedure to the general principles of the *Batson* ruling, the ultimate conclusion should have turned on the Fourteenth Amendment analysis. However, the *Johnson* Court failed to even mention the Fourteenth Amendment, or any other part of the Constitution, in its analysis of California's procedure.[196]

Unfortunately, the *Johnson* majority went further than the *Batson* Court intended by requiring California to apply a specific procedure, rather than reviewing California's criminal procedure under the Fourteenth Amendment. The Court stripped the states of their ability to experiment with different forms of the procedure to apply by insisting that California's procedure function exactly as the *Batson* opinion indicated. Rather than reviewing the procedure to determine whether the proceeding applied by the California trial court violated the defendant's rights under the Fourteenth Amendment, the majority merely determined whether the proceeding applied in the criminal trial was the same proceeding as described by the Court in *Batson*. By doing so, the Court overstepped its authority to review a state's criminal proceeding. Therefore, the Court reached an incorrect conclusion in ruling that California's requirement that the defendant make a prima facie case by a preponderance of the evidence was impermissible under *Batson*.

B. CALIFORNIA'S PROCEDURE DID NOT VIOLATE THE FOURTEENTH AMENDMENT.

Justice Stevens incorrectly stated that the issue in *Johnson* was whether *Batson* permits California to require the objector to show that the peremptory challenge was more likely than not based on an impermissible group bias. As discussed above, the Court's approach to *Johnson* transformed *Batson* into a constitutional rule that was binding on states. The real issue in *Johnson* should have been whether the Fourteenth Amendment permitted California to require that the defendant make his prima facie case by a preponderance of the evidence.[197] This issue requires

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[195] *Id.*

[196] *See supra* note 161.

[197] The difference between the two is the analysis that the Court would have applied. If the Court had considered whether the Fourteenth Amendment permitted California's procedure, the question would have turned on whether requiring a preponderance of the

a simple analysis under the Equal Protection Clause of the Fourteenth Amendment. If the majority had applied this analysis, the Court would have determined that California's procedure did not exceed the bounds of the Fourteenth Amendment. Therefore, the Court should not have overruled the Supreme Court of California's decision

States have wide latitude under the Fourteenth Amendment to develop criminal procedures.[198] While the Equal Protection Clause prohibits the exclusion of a juror for discriminatory reasons,[199] the Equal Protection Clause does *not* prohibit California from requiring the defendant to make a prima facie case by a preponderance of the evidence. The Supreme Court has repeatedly used the preponderance of the evidence standard when analyzing racial discrimination under Title VII.[200]

The Title VII analysis was referenced first in *Batson* and again in *Johnson*.[201] Both times, the Court indicated that the burden-shifting framework employed in the Title VII analysis would provide guidance to state courts employing the *Batson* procedure.[202] In *Batson*, the Court noted that disparate treatment decisions explained how the burden of proof rules worked for a prima facie case.[203] The majority opinion did little to elaborate on the similarities between the new procedure established in *Batson* and the procedures established in Title VII disparate treatment cases. The reference to Title VII cases in *Johnson* does not shed any new light on this comparison. Following the Court's explanation that the burden of persuasion does not become important until the third step of *Batson*, the majority opinion noted that the explanation "comports with our interpretation of the burden-shifting framework in cases arising under Title VII."[204] The Court has not addressed the defendant's burden of persuasion sufficiently to indicate that a preponderance of the evidence is inappropriate under the Fourteenth Amendment.

The Supreme Court has used a long-established burden-shifting procedure for evaluating Title VII discriminatory-treatment cases. In *St.*

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evidence violates the Equal Protection Clause of the Fourteenth Amendment.

[198] *See Robbins*, 528 U.S. at 273 (describing the Court's established practice of allowing states "wide discretion" under the Fourteenth Amendment to experiment with answers to problems in policy); Mu'Min v. Virginia, 500 U.S. 415, 424 (1991) (explaining that the Court has more authority under its supervisory power than it does over state courts in interpreting the Fourteenth Amendment).

[199] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[200] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

[201] Johnson v. California, 125 S. Ct. 2410, 2418 n.7 (2005); *Batson*, 476 U.S. at 94 n.18.

[202] *Johnson*, 125 S. Ct. at 2418 n.7; *Batson*, 476 U.S. at 94 n.18.

[203] *Batson*, 476 U.S. at 94 n.18.

[204] *Johnson*, 125 S. Ct. at 2418 n.7.

Mary's Honor Center v. Hicks,[205] the Court explained how courts should analyze cases under Title VII.[206] Unlike the *Batson* procedure, which only requires courts to proceed through three steps, the Title VII procedure involves four steps.[207] In a Title VII case, the plaintiff must first establish a prima facie case showing that the employer discriminated on the basis of race.[208] The plaintiff must make his prima facie case by a preponderance of the evidence.[209] If the plaintiff can establish a prima facie case, this creates a presumption that the employer discriminated against the employee.[210] Once the presumption is created, the court must find that the employer discriminated *in the absence of an explanation.*[211] Therefore, the presumption shifts the burden of production to the defendant, who must produce a legitimate explanation for the adverse employment actions to rebut the prima facie case.[212] However, though the burden of production shifts to the defendant, the ultimate burden of persuasion remains with the plaintiff at all times.[213]

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[205] 509 U.S. 502 (1993).

[206] *Id.* at 506-11.

[207] *Id.*

[208] *Id.* at 506.

[209] *Id.*

[210] *Id.*

[211] *Id.* The language used by the Court in addressing the issue in *Johnson* resembles this particular portion of the Title VII analysis. The Court describes the defendant's prima facie case as one that will prove the peremptory challenge was racially discriminatory, *if unexplained.* Johnson v. California, 125 S. Ct. 2410, 2416 (2005).

[212] *Hicks*, 509 U.S. at 506-07.

[213] *Id.* at 507. Under *Batson*, the objecting party has the initial burden of production and maintains the burden of persuasion throughout the procedure. Batson v. Kentucky, 476 U.S. 79, 96 (1986). There are two questions to be answered here. First, what evidentiary standard is applied at the initial stage for the defendant to shift the burden of production to the prosecutor? Second, what evidentiary standard applies to the defendant's burden of persuasion? As to the first question, the *Batson* procedure indicates that the defendant need only raise an inference of purposeful discrimination. *Id.* at 96. However, for the second question, the Court never explicitly stated the evidentiary burden on the defendant to meet his burden of persuasion. In *Johnson*, the majority merely stated that the persuasiveness does not become relevant until the third step of the process, the step at which the judge determines whether the defendant has shown purposeful discrimination. 125 S. Ct. at 2418. The *Batson* procedure only requires the defendant to offer evidence at the first stage when he makes a prima facie case. 476 U.S. at 96. In effect, the defendant must make his entire case at the first stage without the opportunity to offer more evidence after the prosecutor responds. As this is the case, the defendant should also be required to carry his entire burden of persuasion at the first stage. California's procedure requires the defendant to meet his initial burden of production by a preponderance of the evidence, mirroring the evidentiary standard of the Title VII analysis. *See* People v. Johnson, 71 P.3d 270, 272 (Cal. 2003), *rev'd*, Johnson v. California, 125 S. Ct. 2410 (2005). If the defendant makes his prima facie case, the burden shifts to the prosecutor to offer a race-neutral explanation that rebuts the

Title VII cases analyze racially discriminatory action, just as the *Batson* procedure. The Supreme Court's consistent reference to Title VII cases in *Batson* and *Johnson* indicates that California's standard of a preponderance of the evidence is not overly burdensome, since the Fourteenth Amendment clearly does not prohibit the preponderance standard when requiring a party to prove a prima facie case of racial discrimination.[214] Therefore, California's standard of a preponderance of the evidence did not exceed the bounds of the Fourteenth Amendment.

In *Batson*, the Court held that the Fourteenth Amendment governs the use of peremptory challenges in criminal cases.[215] The Court determined that racially discriminatory challenges would violate the Equal Protection Clause.[216] The fact that California's procedure required the defendant to make his prima facie case by a *preponderance* of the evidence is not a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court requires parties to make a prima facie case by a preponderance of the evidence in Title VII cases. The Court referenced Title VII cases in establishing the *Batson* procedure. Though the *Batson* majority did not require the defendant to prove his prima facie case by a preponderance of the evidence, the majority also did not state that such an evidentiary burden would violate the Constitution. Since it does not, California's procedure as established in *People v. Wheeler* is well within the bounds of the Fourteenth Amendment. Therefore, the Supreme Court should have upheld California's procedure and affirmed the decision of the California Supreme Court.

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prima facie case. The trial judge could then determine whether the defendant has provided sufficient evidence to meet his burden of persuasion.

[214] Of course, the real issue is whether it makes any constitutional difference that California's procedure places the burden on the defendant at the first stage, rather than the third. However, the answer is no different when one examines Title VII cases. The burden placed on the plaintiff at the initial stage in Title VII cases is preponderance of the evidence. *Hicks*, 509 U.S. at 506. The Fourteenth Amendment does not prohibit such a burden at the initial stage of the *Batson* procedure. One may argue that California's procedure places too high of a burden for a criminal case. However, California did not require the defendant to prove his prima facie case beyond a reasonable doubt, or even through clear and convincing evidence. A preponderance of the evidence is not too high of a standard, even in a criminal case in which the rights of a defendant must be carefully protected.

[215] *Batson*, 476 U.S. at 89.

[216] *Id.*

C. THE *JOHNSON* MAJORITY ESTABLISHED A DANGEROUS PRECEDENT BY ALLOWING THE COURT TO PROMULGATE STATE CRIMINAL PROCEDURE.

The holding in *Johnson* is an instance in which the Supreme Court has improperly interfered with state criminal procedures, an area that has traditionally been left to the states to develop. The *Johnson* opinion, on its face, may seem to be a rather harmless decision by the Court, especially given the fact that the majority was an overwhelming eight-to-one.[217] The Court certainly portrayed the case as one dealing with a narrow issue in one particular set of cases. However, the consequences of the opinion in *Johnson* could be much more troublesome in future cases involving state criminal procedures. While it is true that the *Johnson* opinion only substantively discussed the first step of the *Batson* procedure, the Court's decision could potentially alter the way that the Court analyzes other state criminal procedures in the future.

The majority in *Johnson* went beyond the authority granted to the Supreme Court by the Constitution. In doing so, the majority established a dangerous precedent that allows the Supreme Court to promulgate criminal procedure on the state level. At the most extreme, the Court could begin developing criminal procedures and dictating how the states employ those procedures. Such a precedent violates the constitutional authority of the Supreme Court and invades the states' power to create criminal law.[218] The Court has allowed itself to become a super-legislative body above the states, determining the best procedures to satisfy problems in policy. The *Johnson* decision was decided not on constitutional grounds, but to satisfy an issue of public policy that the elected government of California should have been able to decide on its own. By giving itself the power to establish

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[217] The Court has long held that the states may decide the best procedure to employ following the Court's ruling in *Anders v. California*. *See supra* note 148. However, the *Johnson* opinion allows for a future Court to revisit the issue and mandate the procedure that states will use to meet the constitutional requirements of *Anders*. The fact that the opinion was supported by an eight-to-one majority only adds to the weight the opinion will carry in the future. This begs the question of why the Court would establish such a precedent. The most likely explanation is that the justices examined the particular facts of the case and decided that the California state courts ruled incorrectly. In order to remedy the error, the majority looked for a constitutional justification for overruling the California Supreme Court. In particular, the underlying facts indicate that the prosecutor excused the only three African-Americans in the jury pool. Striking all jurors of a specific racial group is strong evidence that the peremptory challenges were based on racial bias. While it is probably true that the California Supreme Court should have affirmed the appellate court's decision to overturn the conviction, the United States Supreme Court has created a bad precedent in its attempt to correct California's mistake.

[218] *See supra* Part II.E.

what criminal procedure is appropriate for the states to use, the Court has determined that it is the best judge of the procedures that should be applied in *every* state. Clearly, this should be left to the individual states and their elected legislatures.

The majority did not cite any constitutional authority for overruling California's criminal procedure in *Johnson*, nor did the majority overturn the procedure based on the Constitution.[219] Essentially, the Court took a prophylactic remedy laid out in *Batson* and converted it into a constitutional requirement twenty years later. Yet, the Court did not clarify questions that have been left to the states to answer in those twenty years.[220] The *Johnson* opinion did not alter or clarify the three-step procedure, and the states are apparently required to employ the procedure without differentiation. In *Johnson*, the Court struck down California's procedure because it applied a different burden of proof at the initial stage. The Court did not state that this burden of proof was itself in violation of the Fourteenth Amendment. Instead, the Court compared California's procedure to *Batson*, found that the two were different, and struck down the California procedure.[221]

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[219] The *Johnson* opinion goes much further than the *Dickerson* opinion, in which the Court established Miranda rights as a constitutional requirement. In *Dickerson*, the majority clearly stated its purpose and went on at length to explain why *Miranda* established a constitutional requirement on the states and Congress. Dickerson v. United States, 530 U.S. 428, 435 (2000). However, the *Johnson* majority does not explicitly say that *Batson* is to be considered a constitutional requirement, nor does the opinion give any reasons why *Batson* should be a constitutional rule. If the Court is truly treating *Batson* as a constitutional requirement, Congress would also be unable to establish a new criminal procedure for the federal courts to employ. *See id.* at 437 (explaining that Congress may not legislatively supersede decisions of the Supreme Court interpreting and applying the Constitution).

[220] *See* Bray, *supra* note 19, at 533-49.

[221] The Court has effectively said that any state's procedure that is different from *Batson* is automatically unconstitutional without review by the Court. In terms of other states' procedures, the outcome of *Johnson* will have at least two impacts. First, courts that have interpreted *Batson* to permit the requirement of a preponderance of the evidence at the first step will now have to change the procedure to fit under *Johnson*. *See supra* note 110. On the other hand, and perhaps more importantly, courts that want to expand the procedure to allow defendants an opportunity to rebut the race-neutral explanation will not be able to do so. If the Court is treating the *Batson* procedure as a constitutional rule, it does not appear that states would be able to add a fourth step (one similar to the third step in Title VII analysis). Therefore, a defendant would not be able to offer any additional evidence beyond what was provided at the initial stage of the procedure. No matter what race-neutral explanation the prosecution applies, the defendant will not have the opportunity to respond, because the *Batson* procedure provides no place for him to do so. *See supra* note 182.

VII. CONCLUSION

In *Johnson*, the Supreme Court incorrectly held that California's procedure, which required the defendant to make his prima facie case by a preponderance of the evidence, was inconsistent with the *Batson* ruling. California has the authority to develop its own criminal procedures so long as those procedures do not violate the Constitution. With regard to a state's criminal procedure, the Supreme Court does not have the constitutional authority to dictate the kind of procedure a state must employ.

Batson did not establish a constitutional rule that the states were required to follow without deviation. By evaluating California's procedure against the *Batson* procedure, the majority transformed the *Batson* procedure into such a rule without explicitly stating its intention to do so. Prior to the *Johnson* ruling, states had leeway under the Fourteenth Amendment to develop a variety of procedures to help solve the problem of racially discriminatory peremptory challenges. By converting *Batson* into a constitutional rule, the Court stripped the states of their ability to experiment with different solutions.

Without a constitutional rule requiring the states to employ a particular procedure, the Court did not have the authority to overrule California's chosen procedure unless the procedure went beyond the limits of the Constitution. In *Batson*, the Court grounded a defendant's objection to racially discriminatory peremptory challenges in the Fourteenth Amendment. Thus, the *Johnson* majority should have analyzed California's procedure to determine whether it was valid under the Equal Protection Clause of the Fourteenth Amendment.

However, the *Johnson* majority did not consider whether California's procedure was permissible under the Fourteenth Amendment. If the majority had done so, the Court should have determined that California did not place such an onerous burden on defendants to violate the Fourteenth Amendment. Thus, the Court overstepped its authority to review state criminal proceedings by demanding that state courts apply the exact procedure outlined in *Batson*.

While it is hard to say what the exact consequences of this holding will be, some of them are obvious. The Court has declared that any procedure used by state or federal courts that is different from the three-step procedure explained in *Batson* is now unconstitutional. States may no longer adapt the *Batson* procedure to fit with procedures already developed, or to solve policy issues that the *Batson* opinion did not consider. Further, the Court has established a precedent that could allow the Court to develop criminal procedures and require the states to follow them precisely. The Court has transformed itself into a legislative body in the realm of criminal procedure.

For all of these reasons, the Court reached the incorrect holding in the *Johnson* case, and the California Supreme Court's decision should have been affirmed.

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