A Bellwether for Jury Selection Jurisprudence

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Introduction

The case of *Flowers v. Mississippi* recently reached a decision in the United States Supreme Court, and has implications for interpretation of both the Sixth and Fourteenth Amendments of the United States Constitution concerning discrimination and fair jury selection.[2] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn2) The outcome of this case has the potential to mark a profound shift in future state and federal rulings on intent of bias in jury selection. Curtis Flowers was tried and convicted of murder in Winona, Mississippi following an armed robbery of a furniture store in 1996.[3] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn3) Flowers was ultimately sentenced to death following his conviction for the murder of one of the employees of the store.[4] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn4) Flowers challenged the ruling on the grounds that his right to a fair trial had been violated as a result of evidence presented against him by three of the store employees.[5] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn5) The decision was reversed and remanded. Five more trials took place after Flowers was again convicted and sentenced to death, but Flowers challenged the subsequent rulings on the basis of racial discrimination in the jury selection process.[6] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn6)

Flowers' case was taken up by the United States Supreme Court following his conviction at his sixth trial, with his petition alleging violations of his Sixth and Fourteenth Amendment rights. The Sixth Amendment provides the accused with the procedural right to a trial by an impartial jury in all criminal prosecutions.[7] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn7) It represents an important check, placed in the hands of individual citizens, against arbitrary prosecution by the government.[8] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn8) The Fourteenth Amendment contains the Equal Protection Clause, which maintains that no state shall deprive any person within its jurisdiction of equal protection of the laws.[9] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn9) These amendments hold significant power in the determination of what is considered to be fair concerning jury selection in criminal law proceedings.

I. The History of Racially Motivated Peremptory Jury Strikes

Underlying the U.S. Supreme Court's decision is the question of whether the Mississippi Supreme Court erred in its application of *Batson v. Kentucky*.[10] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn10) In 1981, James Batson was arrested and charged with second-degree burglary and receipt of stolen goods in the state of Kentucky.[11] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn11) Batson, a black male, was put on trial in Jefferson Circuit Court in 1984, where the prosecutor used peremptory challenges to strike all four black persons on the venire.[12]

(applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn12) This left an all-white jury, which subsequently resulted in Batson's conviction for both charges. The decision was challenged by the defense, who argued that it violated Batson's Sixth Amendment right to an impartial jury and the Equal Protection Clause. The decision in the lower court was affirmed by the Kentucky Supreme Court, before reaching the Supreme Court of the United States in 1985. The case was decided in 1986, resulting in a 7-2 decision in favor of Batson, after determining that the prosecutor's actions had violated both Batson's Sixth and Fourteenth Amendment rights.[13] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn13)

The case of *Batson v. Kentucky* is particularly important, as it held that racially motivated peremptory jury strikes on the part of the prosecutor are unconstitutional.[14] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn14) Similarly, the case of *Strauder v. West Virginia*, a landmark decision, held that the exclusion of jurors on the basis of race was in violation of the Fourteenth Amendment.[15] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn15) At the time, West Virginia state law required juries to be composed solely of white males, and the U.S. Supreme Court determined that this requirement of composition provided an inherent advantage for white males.[16] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn16) These cases set powerful legal precedent for racial discrimination in jury selection and breadth of prosecutors' peremptory strikes.

While *Strauder* was particularly significant in reshaping the application of the Equal Protection Clause,[17] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn17) *Batson* was relevant not only for the application of the Equal Protection Clause, but also for its interpretation of impartiality in jury selection as it applied to the Sixth Amendment. These cases set the primary foundation for interpretation in relation to fair jury selection, particularly when concerns of racial discrimination in peremptory strikes arise. *Batson* also resulted in the provision of a three-step process used by courts for adjudicating claims that peremptory challenges were based on race.[18] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn18) This three-step process establishes that first, the defendant must provide a prima facie claim that a peremptory challenge has been raised on the basis of race; second, that if the first step has been met, the prosecution must provide a race-neutral reason for striking a juror; and third, the trial court must then decide if the defendant has shown purposeful discrimination.[19] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn19) Additionally, trial courts must take into consideration that discriminatory intent must be sustained unless the claim has been shown to be clearly erroneous.[20] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn20)

In recent cases, including *Miller-El v. Dretke*,[21] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn21) *Snyder v. Louisiana*,[22] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn22) and*Williams v. Louisiana*,[23] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn23) under both the Rehnquist and Roberts Courts, the United States Supreme Court has utilized precedent from *Batson*, stemming in part from the landmark decision in *Strauder*. This precedent has been used to reverse previous rulings on peremptory strikes and fairness in jury selection, serving as constitutional restrictions on discriminatory practices during voir dire. As has been made explicit, the Constitution of the United States forbids even a single juror from being struck as a result of discrimination.[24] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn24) The United States Supreme Court had previously ordered the Mississippi Supreme Court to reconsider its ruling which rejected the *Flowers* argument concerning fairness of jury selection, citing the decision in *Foster v. Chatman*. In *Foster*, Chief Justice Roberts wrote the majority opinion reversing the decision of the Supreme Court of Georgia and holding that the Supreme Court of Georgia had clearly erred in its decision that Foster failed to show purposeful discrimination in jury selection.[25] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn25)

II. The Implications of *Flowers* for Supreme Court Interpretations of the Sixth and Fourteenth Amendments

The decision in Flowers v. Mississippi provides a measuring stick for application of *J.E.B. v. Alabama* and its relevance for gender discrimination and jury selection under the current Supreme Court. In *J.E.B. v. Alabama*, the U.S. Supreme Court ruled 6-3 in favor of the petitioner that the Constitution of the United States guarantees equal protection to defendants on the basis of sex to an impartial jury, and that gender-based classifications are upheld by this protection under constitutional rights provided by the Equal Protection Clause of the Fourteenth Amendment. While the argument by the petitioner in Flowers pertains to racial discrimination violating the Sixth and Fourteenth Amendments, as opposed to gender discrimination violating the Fourteenth Amendment as in *J.E.B. v. Alabama*, the ruling in *Flowers v. Mississippi* has implications for how the current Supreme Court interprets gender discrimination as well.

In the Supreme Court ruling on *J.E.B. v. Alabama*, Justice Thomas ruled against the petitioner, as he had done in Foster v. Chatman, and joined in the dissents presented by Justice Rehnquist and Justice Scalia. Justice Rehnquist and Justice Scalia's dissents propose that racial groups can comprise numerous minorities, at times requiring a greater need of protection against the majority, while in contrast, the composition between men and women is almost numerically equal , and that the extension of the United States Supreme Court's ruling in Batson to sex will result in the onerous possibility that every case contains the potential for a sex-based claim of violation of Fourteenth Amendment rights. Dissenting opinions by Justices Rehnquist and Scalia in *J.E.B. v. Alabama* reflect interpretations of gender discrimination in jury selection as warranting different consideration than the precedent of racial discrimination established by Batson. The possibility that Justices Gorsuch and Kavanaugh could also view gender discrimination violations under the Fourteenth Amendment in a similar light to that of Justices Rehnquist and Scalia before them, once again creates a shift in Supreme Court rulings on violation of constitutional rights to equal protection in jury selection.

III. Potential Shifts in Interpretations of the Sixth and Fourteenth Amendments

What made *Flowers v. Mississippi* particularly noteworthy is the possibility that *Batson* may not have been upheld by the United States Supreme Court. If the current Supreme Court ultimately were to rule in favor of the Mississippi Supreme Court, we could have seen a shift in the application of *Batson*and the interpretation of the Sixth and Fourteenth Amendments as they apply to racial discrimination in jury selection. The U.S. Supreme Court has generally ruled in favor of petitioners, citing *Batson*as violating the Sixth and Fourteenth Amendments on the grounds of racial discrimination in jury selection. This has reflected the broad degree of power that the three-step process for determining discriminatory practice during voir dire has provided to the Supreme Court in reaching case decisions. However, with the appointments of Justice Gorsuch in 2017 and Justice Kavanaugh in 2018, *Flowers v. Mississippi* provided an opportunity to observe if previous interpretation of *Batson* shifts under the current Supreme Court.

Two major positions existed that could have been employed by Justices Gorsuch and Kavanaugh, which would have significant implications for shifting the Supreme Court interpretation of Sixth and Fourteenth Amendment rights of equal protection and impartial selection of jury members. The first possible shift in Supreme Court interpretation of Sixth and Fourteenth Amendment rights that could have arisen with the additions of Justice Gorsuch and Justice Kavanaugh pertains to state jurisdiction over procedural law. In Justice Thomas's dissent in the 7-1 Supreme Court ruling of *Foster*, he argued that the Supreme Court did not hold proper jurisdiction over the lower court ruling at the state level. Citing *Michigan v. Long*,[26] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn26) Justice Thomas argued that *Foster* should not have been taken up by the Supreme Court until a resolution had been reached concerning the jurisdiction of the federal court implicated in the Supreme Court of Georgia's ruling.[27] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn27) Justice Thomas's initial skepticism about the Supreme Court's interpretation that a case such as *Foster* raises a federal question, thus granting federal jurisdiction to the case, may reflect an ideological aversion to federal oversight of what is deemed to be a right of the state. If Justice Gorsuch or Justice Kavanaugh carried a similar ideological aversion, this could have readily affected their consideration of *Flowers v. Mississippi*, as well as future cases claiming Sixth and Fourteenth Amendment violations, by distancing themselves from taking action to reverse previously ordered state rulings.

The second major position, held by Justice Gorsuch or Justice Kavanaugh, that could have caused a meaningful shift in previous interpretations of racial discrimination in jury selection is that evidence of intentional discrimination is held to a higher degree of scrutiny by the Supreme Court. As has been noted by Justice Alito, the application of the final step of the three-step process established by *Batson*, in which the trial court must decide if the defendant has displayed intentional discrimination, has no exact formula and findings may ultimately be based primarily on intangible factors.[28] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn28) Since Supreme Court rulings on cases citing *Batson* in violation of Sixth and Fourteenth Amendment rights for intentional discrimination in jury selection are transparently subject to a greater degree of intangible consideration, paying special attention to the decisions of Justice Gorsuch and Justice Kavanaugh in *Flowers v. Mississippi* will allow for a clearer picture of how they approach their personal interpretation of what may display intentional discrimination in jury selection, how they apply this to *Flowers*, and how this can be applied to future cases citing *Batson* that are brought to the Supreme Court.

IV. Outcomes of the Supreme Court's Ruling in *Flowers*

In a 7-2 decision on June 21, 2019, the court ruled that the Mississippi Supreme Court had erred in the interpretation of *Batson*, and the lower court ruling was reversed.[29] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn29) Justice Kavanaugh, siding with the majority, wrote the Opinion of the court in the *Flowers* ruling. Justice Gorsuch, however, was one of two judges, along with Justice Thomas, who dissented in the ruling. The Court determined that four critical facts presented in the case led to the reversal of the lower court's ruling.[30] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn30) First, the court noted that in the six previous trials, 41 of the 42 prospective black jurors had been struck. Second, the most recent trial involved 5 of the 6 prospective black jurors on the venire being struck. Third, the most recent trial also involved "dramatically disparate" lines of questioning for prospective black jurors as compared to prospective white jurors.[31] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn31) Fourth, and finally, the court in the most recent trial struck a prospective juror, who was black, in spite of being situated similarly to other prospective jurors who were white.

Justice Kavanaugh asserted that the decision of the Court did not break new legal ground. Instead, he said that it simply reinforced the precedent that had been established in *Batson*.[32] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn32) Particularly striking in Justice Kavanaugh's opinion was the consideration of the State's line of questioning for prospective black jurors in comparison to prospective white jurors. Kavanaugh wrote that it is certainly reasonable for the State to ask follow-up questions for prospective jurors; however, he noted how white prospective jurors who said they knew Flowers or his family or who had been previously convicted of a crime were not questioned further, while black prospective jurors with similar backgrounds were questioned extensively.[33] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn33) Justice Gorsuch, as opposed to Justice Kavanaugh, dissented from the majority opinion, choosing to join in the written dissent from Justice Clarence Thomas. Justice Thomas contended that the Court had ignored the race-neutral reasons taken into account at the trial for Curtis Flowers, such as the State striking prospective black jurors who had been related to Flowers or who had been known by his family.[34] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn34) The dissent by Justice Thomas asserted that the Court had sought to overstate evidence of racial discrimination, while diminishing the presence of what he viewed to be race-neutral evidence to support the decision reached by the lower court.[35] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftn35) A significant outcome did indeed occur from the ruling in *Flowers*, as Justice Kavanaugh displayed a different interpretation of *Batson* than Justice Gorsuch.

Conclusion

The United States Supreme Court's decision of *Flowers v. Mississippi*held important insight into the interpretation of racial discrimination in jury selection under the Sixth and Fourteenth Amendments with the additions of Justices Gorsuch and Kavanaugh. It also provided further understanding of the future trajectory of Supreme Court rulings on cases citing *Batson* concerning claims of racial discrimination and possibly even *J.E.B. v. Alabama* concerning gender discrimination in jury selection. Justice Kavanaugh's decision to side with the majority in reversing the lower court ruling will strengthen precedent set by *Batson* with respect to applying standards of review for discrimination in jury selection. While Justice Gorsuch's opposition to the Court's ruling and subsequent decision to join in the dissent penned by Justice Thomas reflects a contrasting interpretation that Justice Kavanaugh, it did not show a significant shift in historical interpretation of the Court, particularly with a 7-2 outcome reversing the lower court's ruling. Careful observation of the decision in *Flowers v. Mississippi*, particularly concerning the positions taken by Justice Gorsuch and Justice Kavanaugh, provided a clearer understanding of how fairness in jury selection is interpreted, and what leverage is provided to challenge peremptory strikes under the Sixth and Fourteenth Amendments.

The outcome of Justice Kavanaugh siding with the majority, and writing the opinion of the court, and Justice Gorsuch joining in the dissent written by Justice Thomas reflects the divergent paths taken by the Justices concerning their interpretation of the Sixth and Fourteenth Amendments. Additionally, this displays a difference in Justice Kavanaugh's and Justice Gorsuch's consideration of judicial review applied by to the Court's scrutiny of discrimination following *Batson*. The precedent for judicial review of discrimination in jury selection was not significantly altered as a result of Justice Kavanaugh agreeing with the majority to reverse the lower court ruling; however, a possible ruling for a case involving gender discrimination, as opposed to racial discrimination, may result in a different outcome. While discrimination on the basis of race requires strict scrutiny under the Equal Protection Clause, gender

requires intermediate scrutiny. The result of *Flowers* shows that the historical precedent set by *Batson* should remain intact for years to come; however, the prospect of a case involving gender discrimination in jury selection could once again bring about the possibility of a shift in Supreme Court interpretations of gender discrimination in jury selection.

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[3] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref3) Flowers v. Mississippi, 588 U.S. ___ (2019) (slip op., at 1).

[4] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref4) *Id.*

[5] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref5) *Id.*

[6] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref6) *Id.* at 2.

[7] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref7) U.S. Const. amend. VI.

[8] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref8) *See* Brittany L. Deitch, *The Unconstitutionality of Criminal Jury Selection*, 26 Wm. & Mary Bill Rts. J. 1059, 1061 (2018).

[9] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref9) U.S. Const.amend. XIV.

[10] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref10) Batson v. Kentucky, 476 U.S. 79 (1986).

[11] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref11) Brief for Petitioner at 2, Batson v. Kentucky, 106 S. Ct. 1712 (1986).

[12] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref12) *Id.*

[13] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref13) *Batson*, 476 U.S. at 79 (1986).

[14] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref14) *See* Melynda J. Price, *Expanding Reach: The Importance of Batson v. Kentucky Thirty Years On*, 105 Ky. L. J. 609, 612 (2017).

[15] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref15) Strauder v. West Virginia,100 U.S. 303, 312 (1880).

[16] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref16) *See* Mark L. Josephs, *Fourteenth Amendment--Peremptory Challenges and the Equal Protection Clause*, 82 J. Crim. L. & Criminology 1000, 1001 (1992).

[17] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref17) *See* Sanford Levinson, *Why Strauder v. West Virginiais the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 St. Louis Univ. L. Rev. 603, 604 (2018).

[18] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref18) *See* Snyder v. Louisiana, 552 U.S. 472, 476 (2008).

[19] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref19) *Id.*

[20] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref20) Hernandez v. New York, 500U.S. 352, 369 (1991).

[21] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref21) Miller-El v. Dretke, 545 U.S. 231, 231 (2005).

[22] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref22) *Snyder*, 552 U.S. at 472.

[23] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref23) Jabari Williams v. Louisiana, 136 S. Ct. 2156 (2016).

[24] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref24) *Snyder*, 552U.S. at 478.

[25] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref25) Foster v. Chatman, 136 S. Ct. 1737, 1747–55 (2016).

[26] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref26) Michigan v. Long, 463U.S. 1032, 1038 (1983).

[27] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref27) *See Foste*r, 136 S. Ct. at 1761 (Thomas, J., dissenting).

[28] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref28) *See id.* at 1756–61 (Alito, J., concurring).

[29] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref29) *See supra* note 3.

[30] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref30) *Id.* at 2.

[31] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref31) *Id.*

[32] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref32) *Id.* at 3.

[33] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref33) *Id.* at 24–25.

[34] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref34) *Id.* at 2 (Thomas, J. dissenting.).

[35] (applewebdata://2FF50142-F7CC-46FF-94B9-D7A3750EE2C9#_ftnref35) *Id.* at 3 (Thomas, J. dissenting.).

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