6-26-1986

06-26-1986 Justice Marshall, Dissenting

Thurgood Marshall
US Supreme Court Justice

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

HAB

STYLISTIC CHANGES THROUGHOUT

From: **Justice Marshall**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

EARL ALLEN *v.* STEPHEN L. HARDY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85–6593. Decided June ——, 1986

JUSTICE MARSHALL, dissenting.

On all too many occasions in recent years, I have felt compelled to express my dissatisfaction with this Court's readiness to dispose summarily of petitions for certiorari on the merits without affording the parties prior notice or an opportunity to file briefs. See, *e. g.*, *City of Los Angeles* v. *Heller*, 475 U. S. ——, —— (1986) (MARSHALL, J., dissenting); *Cuyahoga Valley R. Co.* v. *Transportation Union*, 474 U. S. ——, —— (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting). "[B]y deciding cases summarily, without benefit of oral argument and full briefing, and often with only limited access to, and review of, the record, this Court runs a great risk of rendering erroneous or ill-advised decisions that may confuse the lower courts: there is no reason to believe that this Court is immune from making mistakes, particularly under these kinds of circumstances." *Harris* v. *Rivera*, 454 U. S. 339, 349 (1981) (MARSHALL, J., dissenting).

The circumstances are even less propitious in this case. Generally when this Court summarily disposes of a petition for certiorari, we have at least benefited from the tendency of both petitioners and respondents to focus excessively on the merits of the question they ask the Court to consider. Here, because the petition was filed prior to our decision in *Batson* v. *Kentucky*, 476 U. S. —— (1986), petitioner never had the opportunity to address whether that decision should be applied retroactively to those seeking collateral review of their convictions, and respondent chose to devote but a single sentence to the issue. In addition, that issue has not been ad-

dressed by lower courts in this case or any other. See *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 271 (1982) (BLACKMUN, J., dissenting). We write on a clean slate in this case—a position we ordinarily take great pains to avoid.

I believe that the Court's opinion today reflects the unseemly haste with which the important question presented here has been resolved. Like the Court, *ante* at ——, I believe that the impact of a "new constitutional rule" on the accuracy of a trial should be a critical concern in any inquiry into whether that rule should be applied retroactively to cases pending on collateral review; indeed, I think that factor should generally be decisive. See *Williams* v. *United States*, 401 U. S. 646, 666 (1971) (MARSHALL, J., concurring in part and dissenting in part). However, I am not at all persuaded by the majority's conclusion that the rule announced in *Batson* lacks "such a fundamental impact on the integrity of factfinding as to compel retroactive application," *ante*, at 4. The Court is surely correct to note that the rule "serves other values" besides accurate factfinding. *Ibid.* "The effect of excluding minorities goes beyond the individual defendant, for such exclusion produces 'injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *McCray* v. *New York*, 461 U. S. 961, 968 (1983) (MARSHALL, J., dissenting from denial of certiorari). A rule that targets such discriminatory practices will thus provide redress to citizens unconstitutionally struck from jury panels. That criminal defendants will not be the only beneficiaries of the rule, however, should hardly diminish our assessment of the rule's impact upon the ability of defendants to receive a fair and accurate trial. Moreover, I do not share the majority's confidence that "other procedures" in place prior to our decision in *Batson* "creat[e] a high probability that the individual jurors seated in a particular case were free from bias," *ante*, at 4. When the prosecution uncon-

stitutionally uses its peremptory strikes to remove blacks and Hispanics from the jury, the threat to the truthfinding process is not cured by measures designed merely to ensure that white jurors permitted to serve satisfy the legal standard for impartiality.

> "When any large and identifiable segment of the community is excluded form jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, 407 U. S. 493, 503–504 (1972) (opinion of MARSHALL, J.).

Certainly, one need not assume that the exclusion of *any* distinctive group from the venire will affect the integrity of the factfinding process to believe, as I do, that where the prosecution uses its peremptory challenges to cull black and Hispanic jurors from the jury empaneled for the trial of a black defendant, the threat to the accuracy of the trial is significant and unacceptable. See *Batson*, *supra*, at ——, n. 8 ("For a jury to perform its intended function as a check on official power, it must be a body drawn from the community").

The other considerations that the Court finds to counsel against retroactivity here are similarly unpersuasive. While *Batson* overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965) by changing the burden of proof imposed upon both defendants and prosecutors, *ante*, at 5, the Court seriously overestimates the "reliance interest of law enforcement officials" in the old regime. This is not a case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on account of their race violated the Equal Protection Clause.

All *Batson* did was give defendants a means of enforcing this prohibition. Even if the Court is willing to consider prosecutors to have relied on the effective unenforceability of the pronouncements in *Swain*, it should at least give some thought as to whether that reliance should be deemed legitimate.

Finally, the Court observes that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice." *Ante*, at 5. Perhaps this is true; perhaps it is not. Certainly, the papers before us in this case allow us no basis for making any estimate of how many defendants pursuing federal habeas relief have preserved a *Batson* claim in the State courts. In this inquiry, perhaps more than in any other aspect of the case, the need for further briefing, and perhaps the participation of interested *amici*, is compelling, and the majority's readiness to act on its own uninformed assumptions, disturbing.

I would grant the petition for certiorari and set the case for briefing on the merits and oral argument next Term.