SUPREME COURT OF THE UNITED STATES

No. 96–1584

TERRY CAMPBELL, PETITIONER *v.* LOUISIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

[April 21, 1998]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I fail to understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free. Yet, in *Powers* v. *Ohio,* 499 U. S. 400 (1991), the Court held that a white criminal defendant had standing to challenge his criminal conviction based upon alleged violations of the equal protection rights of black prospective jurors. Today's decision, rather than merely reaffirming *Powers'* misguided doctrine of third-party standing, applies that doctrine to a context in which even *Powers'* rationales are inapplicable. Because *Powers* is both incorrect as an initial matter and inapposite to the case at hand, I respectfully dissent from Part III of the Court's opinion. I join Parts I, II, IV, and V and concur in the judgment reversing and remanding to the Louisiana Supreme Court.

Powers broke new ground by holding for the first time that a criminal defendant may raise an equal protection challenge to the use of peremptory strikes to exclude jurors of a different race. See *id.*, at 422 (SCALIA, J., dissenting) (explaining that *Powers* was inconsistent with "a vast body of clear statement" in our precedents). Recognizing that the defendant could not claim that his own equal protection rights had been denied, the Court held

that the defendant had standing to assert the equal protection rights of veniremen excluded from the jury. *Id.*, at 410–416. The Court concluded that the defendant had such "third party standing" because three criteria had been met: he had suffered an "injury in fact"; he had a "close relation" to the excluded jurors; and there was "some hindrance" to the jurors' ability to protect their own interests. *Id.*, at 410–411.

Powers distorted standing principles and equal protection law and should be overruled.[1] As JUSTICE SCALIA explained at length in his dissent, the defendant in *Powers* could not satisfy even the first element of standing––injury in fact. *Id.*, at 426–429 (dissenting opinion). The defendant, though certainly displeased with his conviction, failed to demonstrate that the alleged discriminatory use of peremptory challenges against veniremen of another race had any effect on the outcome of his trial. The Court instead found that the defendant had suffered a "cognizable" injury because racial discrimination in jury selection "'casts doubt on the integrity of the judicial process'" and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Id.*, at 411–412. But the severity of an alleged wrong and a perception of unfairness do not constitute injury in fact. Indeed, "[i]njury in perception' would seem to be the very *antithesis* of 'injury

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[1] As I have explained elsewhere, the entire line of cases following *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (holding that the Equal Protection Clause applies to the use of peremptory strikes), including *Powers*, is a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges. The *Batson* doctrine, rather than helping to ensure the fairness of criminal trials, serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races. See *Georgia* v. *McCollum*, 505 U. S. 42, 60–62 (1992) (THOMAS, J., concurring in judgment).

in fact.'" *Id.*, at 427 (SCALIA, J., dissenting). Furthermore, there is no reason why a violation of a third party's right to serve on a jury should be grounds for reversal when other violations of third-party rights, such as obtaining evidence against the defendant in violation of another person's Fourth or Fifth Amendment rights, are not. *Id.*, at 429 (SCALIA, J., dissenting).

Powers further rested on an alleged "close relation[ship]" that arises between a defendant and veniremen because *voir dire* permits them "to establish a relation, if not a bond of trust," that continues throughout the trial. *Id.*, at 411, 413. According to the Court, excluded veniremen share the accused's interest in eliminating racial discrimination because a peremptory strike inflicts upon a venireman a "profound personal humiliation heightened by its public character." *Id.*, at 413–414. But there was simply no basis for the Court's finding of a "close relation[ship]" or "common interest," *id.*, at 413, between black veniremen and white defendants. Regardless of whether black veniremen wish to serve on a particular jury, they do not share the white defendant's interest in obtaining a reversal of his conviction. Surely a black venireman would be dismayed to learn that a white defendant used the venireman's constitutional rights as a means to overturn the defendant's conviction.[2]

Finally, *Powers* concluded that there are substantial obstacles to suit by excluded veniremen, including the costs of proceeding individually and the difficulty of establishing a likelihood of recurrence. *Id.*, at 414–415. These obstacles, though perhaps often present in the *Batson* context, are alone insufficient to justify third-party standing.

Even if the *Powers* justifications were persuasive, they

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[2] Of course, the same sense of dismay would arise if the defendant and the excluded venireman were of the same race.

would still be wholly inapplicable to this case, which involves neither peremptory strikes nor discrimination in the selection of the petit jury. The "injury in fact" allegedly present in *Powers* is wholly absent from the context at hand. *Powers* reasoned that repeated peremptory strikes of members of one race constituted an "overt wrong, often apparent to the entire jury panel," that threatened to "cas[t] doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause." *Powers*, 499 U. S., at 412. Here, in contrast, the judge selected one member of the grand jury venire to serve as foreman, and the remaining members of the grand jury were selected at random. Even if discriminatory, the judge's selection (rather than exclusion) of a single member of the grand jury could hardly constitute an "overt" wrong that would affect the remainder of the grand jury proceedings, much less the subsequent trial. The Court therefore resorts to emphasizing the seriousness of the allegation of racial discrimination (as though repetition conveys some talismanic power), but that, of course, cannot substitute for injury in fact.

In this case, unlike *Powers*, petitioner's allegation of injury in fact is not merely unsupported; it is directly foreclosed. There is no allegation in this case that the composition of petitioner's *trial* jury was affected by discrimination. Instead, the allegation is merely that there was discrimination in the selection of the grand jury (and of only one member). The properly constituted petit jury's verdict of guilt beyond a reasonable doubt was in no way affected by the composition of the grand jury. Indeed, to the extent that race played any part in the composition of petitioner's petit jury, it was by petitioner's own actions, as petitioner used five of his twelve peremptory strikes to eliminate blacks from the petit jury venire. Petitioner's attempt to assert that he was injured by the alleged exclu-

sion of blacks at the grand jury stage is belied by his own use of peremptory strikes against blacks at the petit jury stage.

It would be to no avail to suggest that the alleged discrimination in grand jury selection could have caused an indictment improperly to be rendered, because the petit jury's verdict conclusively establishes that no reasonable grand jury could have failed to indict petitioner.[3] Nor can the Court find support in our precedents allowing a defendant to challenge his conviction based upon discrimination in grand jury selection, because all of those cases involved defendants' assertions of *their own* rights. See, *e.g., Rose* v. *Mitchell*, 443 U. S. 545 (1979); *Cassell* v. *Texas*, 339 U. S. 282 (1950). Although we often do not require a criminal defendant to establish a cause-and-effect relationship between the procedural illegality and the subsequent conviction when the defendant asserts a denial of his own rights, see 499 U. S., at 427–428 (SCALIA, J., dissenting) (noting that the government generally bears the burden of establishing harmlessness of such errors), even the *Powers* majority acknowledged that such a showing is the foremost requirement of third-party standing, as evidenced by the lengths to which it went in an attempt to justify its finding of injury in fact.

The Court's finding of a close relationship (an ambient fraternity of sorts) between petitioner and the black veniremen whose rights he seeks to vindicate is likewise unsupported. The Court, of course, never identifies precisely whose rights petitioner seeks to vindicate. Is it all veni-

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[3] For this reason, it is unlikely that petitioner ultimately will prevail on the merits of his due process claim. However, I agree with the Court's conclusion that petitioner has standing to raise that claim because petitioner asserts *his own* due process right. I join Part IV of the Court's opinion because it addresses only standing and does not address "the nature and extent" of petitioner's due process right. *Ante*, at 7.

remen who were not chosen as foreman? Is it all nonwhite veniremen? All black veniremen? Or just the black veniremen who were not ultimately chosen for the grand jury? Leaving aside the fact that the Court fails to identify the rights-holders, I fail to see how a "close relationship" could have developed between petitioner and the veniremen. Even if a "bond," *Powers* v. *Ohio, supra,* at 413, could develop between veniremen and defendants during *voir dire,* such a bond could not develop in the context of a judge's selection of a grand jury foreman––a context in which the defendant plays no role. Nor can any "common interest," between a defendant and excluded veniremen arise based upon a public humiliation suffered by the latter, because unlike the exercise of peremptory strikes, Evangeline Parish's process of selecting foremen does not constitute "overt" action against particular veniremen. Rather, those veniremen not chosen (all but one) are simply left to take their chances at being randomly selected for the remaining seats on the grand jury.

Finally, there are ample opportunities for prospective jurors whose equal protection rights have been violated to vindicate those rights, rather than relying upon a defendant of another race to do so for them. In contrast to the *Batson* line of cases, where an allegation may concern discrimination in the defendant's case alone, in this case petitioner alleges systematic discrimination in the selection of grand jury foremen in Evangeline Parish. Such systematic discrimination provides a large class of potential plaintiffs and the opportunity for declaratory or injunctive relief to prevent repeated violations.

For these reasons, I would hold that petitioner– who does not claim that he was discriminated against or that the alleged discrimination against others had any effect on the outcome of his trial––lacks standing to raise the equal protection rights of excluded black veniremen. Accordingly, I join Parts I, II, IV, and V of the Court's opinion and concur in the judgment.