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Recent Developments: Chisom v. Roemer: Judicial Elections Covered within Meaning of "Representatives" in Voters' Rights Act

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Apostoledes argued that the State would be precluded from a retrial because to do so would force the State to prove conduct for which she was previously tried. *Id.* at 1123. However, the court of appeals stated, " [n]owhere in its opinion did the *Grady* Court suggest that the Double Jeopardy Clause protects against multiple trials when one or more counts are left unresolved following an initial trial due to jury deadlock, the grant of a new trial, or reversal on appeal." *Id.* at 1123. The court asserted, rather, that the holding in *Grady* applied to cases in which the State failed to bring and join for trial all charges arising from a single episode in a single proceeding. By initially bringing all criminal charges against Ms. Apostoledes in a single proceeding, the State conformed exactly to *Grady*'s new double jeopardy " same conduct" test, thereby avoiding the double jeopardy problems at issue in *Grady*. *Id.*

Judge McAuliffe concurred in the ruling with the exception of the majority's interpretation of double jeopardy in *Grady*. He opined that the Supreme Court did not limit *Grady* to successive prosecutions only, but may have intended it to apply to multiple punishments as well. Finding the *Blockberger* " same offense" test a rather sterile approach, McAuliffe stated, " [t]he *Grady* modification utilizes a case-oriented approach, adding flesh to the bare bones of each essential element the conduct used to prove that element, and then comparing the list of elements so defined." *Id.* at 1124 (citing *Blockberger v. United States*, 284 U.S. 299 (1932)). He concluded, though, that even if *Grady* did apply to multiple punishments, the result in this case would not have changed because conspiracy and murder are not the same offense. 593 A.2d at 1126.

In its review of double jeopardy challenges, the court ruled that former jeopardy/acquittal, collateral estoppel, and the recent *Grady* " same conduct" test did not preclude the State from retrying the case for second degree murder despite a prior conspiracy acquittal. This decision is significant as it gives the State the opportunity for a retrial in cases of acquittal or jury deadlock and provides insight into how *Grady* should be interpreted.

- Karl Phillips

Chisom v. Roemer: JUDICIAL ELECTIONS COVERED WITHIN MEANING OF " REPRESENTATIVES" IN VOTERS' RIGHTS ACT.

The Supreme Court of the United States settled a statutory interpretation conflict among federal courts of appeals in deciding *Chisom v. Roemer*, 111 S. Ct. 2354 (1991). In *Chisom*, the Supreme Court held that the use of the term " representatives" in the Voters' Rights Act of 1965, as amended in 1982, covers judicial elections as well as legislative elections. This holding overturned the interpretation of Section 2 by the United States Court of Appeals for the Fifth Circuit.

The petitioners in *Chisom* represented a class of approximately 135,000 African-American registered voters in Orleans Parish, Louisiana. The petitioners brought their suit against various state elected officials challenging the electoral process of judges to the Supreme Court of Louisiana.

The Supreme Court of Louisiana consists of seven members. Two are elected from one multi-member supreme court district. The remaining five members are elected in single-member supreme court districts. The one multi-member district consists of four parishes, one of which is the Orleans Parish. In the Orleans Parish more than one-half of the registered voters are African-American, whereas three-fourths of the registered voters in the other three parishes are white.

The petitioners alleged that the Louisiana method of electing judges impermissibly diluted the voting strength of African-Americans in violation of Section 2 of the Voters Rights Act of 1965 by broadening the populace of voters, thus frustrating efforts by African-Americans to elect an African-American judge. *Id.* The United States District Court for the District of Louisiana dismissed the petitioners' claim holding that judges are not " representatives," and thus judicial elections are not covered under Section 2 of the Voters' Rights Act. *Id.* at 2359.

On appeal, the court of appeals reversed and remanded the case finding that the term " representatives" within the Voters' Rights Act included anyone elected by a popular election from a field of candidates. The court thus held that judges were included within the meaning of " representatives." *Id.* On remand the district court concluded that insufficient evidence existed to establish a violation of Section 2 of the Voters' Rights Act and the petitioners appealed once again to the court of appeals. *Id.* at 2360. Following the *en banc* decision in a similar case, the court of appeals remanded *Chisom*, and the petitioners appealed. *Id.* at 2361.

While the petitioners' appeal was pending, the Court of Appeals for the Fifth Circuit decided *League of United Latin-American Citizens Council v. Clements*, 914 F.2d 620 (1990) (hereinafter "*LULAC*"), a case similar to *Chisom* involving the interpretation of " representative" within Section 2 of the Voters' Rights Act of 1965. *Chisom*, 111 S. Ct. 2360. The *LULAC* court reasoned that, because public opinion is irrelevant in the role of the judiciary, judges do not serve in a representative capacity and are not included within the meaning of " representative" in interpreting Section 2 of the Voters' Rights Act. *Id.*

The Supreme Court granted certiorari and consolidated *LULAC* and *Chisom* for determining the test to be applied in deciding whether a violation of the Voters' Rights Act of 1965 exists in judicial and other elections. *Id.* at 2362.

The Court began its analysis by setting out the text of Section 2 of the

Voters' Rights Act of 1965 as amended in 1982. The Act in part states that,

> [a] violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect 'representatives' of their choice.

Chisom, 111 S. Ct. at 2364 (quoting Voters' Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. 1973).

The Court then reviewed *LULAC* and rejected the respondent's claim that Congress' use of the word " representatives" in Section 2(b) of the Voters' Rights Act was evidence of congressional intent to exclude judicial elections from coverage. *Id.* at 2364. The Court noted the *LULAC* court's distinction of Section 2(b) providing two separate protections of minority voting rights. *Id.*

The Court reasoned that the *LULAC* majority created two tests. One test was to be applied when the right of individuals to participate in the political process was frustrated, such as by time and location disincentives that result in depriving a class of people of the opportunity to vote. *Id.* at 2365. The second part of the *LULAC* Section 2(b) test involved the denial of the voters' " opportunity to elect representatives of their choice." *Id.* at 2364 (quoting *LULAC*, 914 F.2d at 625.)

In rejecting the dual reading of Section 2(b), the Court reasoned that to substitute the word " or" for the word " and" in interpreting Section 2 would destroy the plain meaning of the sentence. *Id.* at 2365. The Court determined that such a radical reconstruction would be necessary to separate the opportunity to participate in the political process from the opportunity to elect representatives. *Id.*

The Court referred to its analysis in *White v. Regester*, 412 U.S. 755 (1973) and *Whitcomb v. Chavis*, 403 U.S. 124 (1971) in identifying the language from which Section 2 is patterned. *Chisom*, 110 S. Ct. at 2365. In both of these cases, the Court found the opportunity to participate in the political process inextricably connected to the opportunity to elect representatives. *Id.*

The Court opined that further support for their interpretation of "representatives" as including judicial elections was evidenced by Congress' replacing the word " legislators" with " representatives" when adopting the language of the Court in *White v. Regester*. *Chisom*, 110 S. Ct. at 2366. The Court reasoned that the substitution of " representatives" for " legislators" indicates that Congress intended the phrase to cover more than legislative elections. *Id.*

The Court next likened the inclusion of sheriffs, prosecutors, state treasurers, and other elected officials chosen by popular elections as " representatives" to judges who are chosen by popular elections. *Id.* The Court determined that the word " representative" refers to someone who prevails in a popular election, within which judicial elections exist. *Id.*

Lastly, the Court found their interpretation of Section 2 consistent with the broad remedial purpose of ridding the country of racial discrimination in voting, upon which the Voters' Rights Act of 1965 was enacted. *Id.* at 2368. In applying the Voters' Rights Act, the Court noted its policy statement in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), providing that the Act should be broadly read to combat discrimination. *Chisom*, 110 S. Ct. at 2368.

The decision in *Chisom* is significant as it disallows race based voter dilution or " gerrymandering" of electoral districts in judicial elections through narrowly interpreting Section 2 of the Voters' Rights Act of 1965. *Chisom* is also important as it represents the Court's continuation of the liberal application of the test for finding a violation of the Voters' Rights Act of 1965.

- Daryl D. Jones

Masson v. New Yorker Magazine:
ABSENT MATERIAL CHANGE IN STATEMENT'S MEANING, DELIBERATE ALTERATION OF SPEAKER'S WORDS BY AUTHOR NOT ACTUAL MALICE.

In *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991), the United States Supreme Court held that an author's alteration of a speaker's statements did not amount to actual malice for defamation purposes unless such an alteration resulted in a material change in the statement's meaning. Thus, the Court rejected the argument that any alteration of a speaker's words beyond those made for grammar or syntax proved knowledge of falsity or reckless disregard for the truth.

Plaintiff, Jeffrey Masson, claimed he was defamed by article author Janet Malcolm when she used quotation marks to attribute to Masson comments he alleged he did not make. Malcolm interviewed Masson, a noted psychoanalyst and former Projects Director of the Sigmund Freud Archives, for an article she was writing about him for The New Yorker magazine. Prior to the publication of the article, Masson expressed concern to the fact-checking department of the magazine about a number of errors in several passages. Despite these concerns, the article appeared in the magazine as a two-part series in 1983, and in 1984 Respondent, Alfred A. Knopf, Inc., published the entire series as a book.

Masson brought a libel action against Malcolm, New Yorker Magazine, and Alfred Knopf, Inc. under California libel law in the United States District Court for the Northern District of California. The parties agreed that Masson was a public fig-