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Recent Developments: Richmond v. Croson Co.: Supreme Court Invalidates Set-Aside Plan Designed to Provide Jobs for Minorities

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the compelled execution of consent forms authorizing foreign banks to disclose records of the defendant's accounts did not infringe upon the fifth amendment privilege, because neither the consent form nor its execution communicated any factual assertion. The Court explained that "to be testimonial, an accused's communication must itself, explicitly or implicitly, relate an actual assertion or disclose information [because] [o]nly then is a person compelled to be a 'witness' against himself." *Id.*

Similarly, in *United States v. Campos-Serrano*, 430 F.2d 173 (7th Cir. 1970), the court found a violation of the fifth amendment privilege when a defendant was coerced into producing a forged alien registration card. The court ruled that, in producing the card, the defendant implicitly admitted the existence, location and control over the card and so was "compelled to produce the crime itself." *Id.* at 176.

The Court of Appeals of Maryland recognized, in the case *sub judice*, that Bouknight had a reasonable apprehension of prosecution if, in accordance with the court's order, she produced Maurice or revealed his whereabouts, and the information disclosed that the child had suffered further abuse or was even dead. If a crime has been committed upon Maurice's person, Bouknight, by disclosing the demanded information, would be incriminating herself. The court ruled that such communication, whether in the form of the compelled act of production or verbal disclosure, is implicitly a testimonial communication and so falls within the contemplation of the fifth amendment privilege.

The court also addressed the State's argument that Bouknight waived her fifth amendment privileges when she told the court that Maurice was in Texas. The court noted that Bouknight was not a witness when she imparted this information, nor was she under oath, and the inaccurate information she revealed was not directly incriminating. Thus, the court ruled that Bouknight's fifth amendment privilege remained intact.

The State's alternative contention that the public right to protect its children, as manifested by the Juvenile Causes Act, Md. Cts. & Jud. Proc. Code Ann. §§ 3-801—3-836 (1984), outweighs Bouknight's fifth amendment privilege was rejected by the court. Although the court recognized the validity of the State's argument that applying the constraints of the fifth amendment in cases of child abuse would afford a parent "carte blanche to conceal any negative information about the child's status and thereby strip the Juvenile Court of its ability to protect children suspected of being abused," it

held that case law does not favor statutory requirements over constitutional protection when there is a strong possibility of incrimination. *Maurice M.* at 408, 550 A.2d at 1143. Under the circumstances of this case, where the risk to Bouknight of prosecution is so substantial, the court could not totally expunge Bouknight's fifth amendment rights. Thus, the court vacated the civil contempt order.

In a strong dissent, Judge McAuliffe stated that by producing Maurice, Bouknight would implicitly admit that 1) the child is Maurice, and that 2) she has sufficient control and dominion over the child to produce him. Although these facts might be used against Bouknight in a criminal prosecution, Judge McAuliffe argued that communications which can be classified as foregone conclusions or as self-evident information are of minimal testimonial significance, and consequently should not be afforded fifth amendment protection. Since Maurice could be identified solely by the scope of his injuries, and since evidence of who had control and dominion over the child furnishes no evidence of who had control over him at the time of his injuries, no significant evidence which merits fifth amendment protection can be gleaned from the production of Maurice.

The Court of Appeals of Maryland vacated a civil contempt order of the Juvenile Court by which a mother suspected of child abuse was directed to produce the juvenile before the court or disclose his whereabouts. Under the circumstances of the case, the court decided that the mother's act of producing the child had testimonial implications that could incriminate her in the event of a criminal prosecution. Thus, the mother's claim of privilege under the fifth amendment was upheld.

— Mary Jo Murphy

Richmond v. Croson Co.: SUPREME COURT INVALIDATES SET-ASIDE PLAN DESIGNED TO PROVIDE JOBS FOR MINORITIES

The United States Supreme Court struck down a city ordinance that channeled 30% of public funds to minority-owned construction companies because it violated the fourteenth amendment's equal protection clause. *Richmond v. Croson Co.* 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989). For the first time, a majority of the Court has adopted strict scrutiny as the standard for equal protection review of race-conscious legislation.

The Richmond City Council adopted

the Minority Business Utilization Plan ("the Plan"), a minority set-aside program that required prime contractors of city construction projects to subcontract at least 30% of the dollar amount of the contract to Minority Business Enterprises (MBEs). The Plan was modeled after the congressional program in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which was held constitutional. The Plan's proponents claimed, *inter alia*, that although Richmond's general population was 50% black, only .67% of the city's prime construction contracts had been awarded to MBEs in a five-year period. Thus, the plan was declared "remedial."

A facial challenge to the ordinance was brought in 1983 by J.A. Croson Co. ("Croson"), a white-owned plumbing company which lost a \$126,000 contract to provide plumbing fixtures for the city jail. Croson, the sole bidder on the project, tried to comply with the set-aside requirement but was unable to obtain any MBEs to subcontract for the job. Croson sought waiver of the set-aside requirement, indicating that the MBEs contacted were either unqualified, unresponsive, or unable to quote a bid. *Id.* at 4436. Richmond denied Croson's request and decided to rebid the project. *Id.*

Because the Plan was patterned after the program in *Fullilove*, both the federal district court and the Court of Appeals for the Fourth Circuit relied on the *Fullilove* precedent and upheld the Plan. Croson sought certiorari; the Supreme Court vacated the court of appeal's decision and remanded the case in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). On remand, the court of appeals struck down the Plan because it violated both prongs of strict scrutiny under the equal protection clause.

In an opinion written by Justice O'Connor, the Court held that strict scrutiny was the proper standard of review, and that the Plan failed both prongs of that test: (1) that the state had a compelling interest; and (2) that its Plan was narrowly tailored to achieve that interest. As to the first prong of the test, the Court held that the city failed to "demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race" because it adduced no evidence of "any identified discrimination in the Richmond construction industry." *Croson* at 4142. Although Richmond argued that it was attempting to remedy various forms of past discrimination, it did not offer specific acts of discrimination, but rather it relied on general assertions of past discrimination coupled with the similar inference drawn from various statistical disparities. Richmond

relied on much of the same evidence found in *Fullilove*, congressional investigations of nationwide discrimination in the industry, as well as its own evidence of discrimination in the local industry. The Court, however, dismissed the congressional evidence as irrelevant, and deemed the local evidence nonspecific and of limited probative value in establishing identified discrimination which would warrant remedial action. Such "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy," and is too amorphous to support an unyielding racial quota. *Id.* at 4140. The Court conceded that "[w]hile there is no doubt that the sorry history of... discrimination in this country contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." *Id.*

Similarly, the statistical disparity between the number of prime contracts awarded to minority firms and the minority population of Richmond was deemed to be misplaced, because the statistic did not identify any specific discrimination. The Court found it factually significant that the city did not even "know how many MBEs in the relevant market were qualified to undertake prime or subcontracting work in public construction projects." *Id.* at 4141.

The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a prima facie case of discrimination... If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.

Id. Thus, Richmond had to identify specific discrimination before it enacted a race-conscious remedy. Although Congress had not identified specific discrimination in *Fullilove*, that program was valid because section five of the fourteenth amendment broadened Congress' powers to deal with such discrimination. *Id.* at 4142. States, however, were held to a stricter standard of identifying a specific discrimination before remedial measures could be taken. *Id.* Because Richmond did not identify a specific act of past discrimination, it failed to establish a compelling interest for its Plan.

The Plan failed the second prong of the

test because it was not narrowly tailored to remedy the effects of specific past discrimination: "The gross overinclusiveness of [the Plan] strongly impugns the city's claim of residential motivation." *Id.* Since the Plan was "not linked to identified discrimination in any way," the Court could not assess whether it was "narrowly tailored to remedy prior discrimination." *Id.* The Court noted an absence of any race-neutral means to increase minority participation in city contracting. It suggested that a "race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation." *Id.* The Court also deemed it significant that there was an absence of any evidence that Richmond had considered any alternatives to a race-based quota.

Moreover, the Court held that the 30% quota was not "narrowly tailored to any goal, except outright racial balancing." *Id.* It reasoned that "[s]ince the city must already consider bids on a case-by-case basis, it is difficult to see the need for a rigid numerical quota." *Id.* at 4143. Furthermore, the Plan was distinguished from the scheme in *Fullilove* because that program provided waiver of the set-aside provisions where an MBE's higher price was not attributable to the effects of past discrimination. The *Croson* court viewed the quota system as an attempt by Richmond to avoid the "bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination [and] cannot justify a rigid line drawn on the basis of a suspect classification." *Id.* Finally, the Plan was overbroad because it included such racial groups as Indians, Orientals and Eskimos, against whom there was no evidence of discrimination. Consequently, the Plan's 30% quota could not realistically be tied to any injury suffered by anyone and was overinclusive.

A plurality of the Court distinguished *Croson* from *Fullilove* because Congress passed the legislation in *Fullilove*. Citing *Fullilove*, the Court held that section five of the fourteenth amendment gave Congress unique and broad remedial powers. *Id.* at 4139. Congress did not have to demonstrate any specific prior discrimination—as required by states—in order to pass such legislation. The Court expounded that Congress enforces the fourteenth amendment and it has "the power to define situations which Congress determines threaten principles of equality and to adopt rules... to deal with those situations." *Id.* at 4138. Claiming that the Civil War amendments "worked a dramatic change in the balance between congressional and state power over matters of race," the Court emphasized that the fourteenth amendment was actually intended to limit

the powers of states and enlarge the powers of Congress. "That Congress may identify and redress the effects of society-wide discrimination does not mean that... the States... are free to decide that such remedies are appropriate." *Id.*

The Court conceded that the state had the "authority to eradicate the effects of private discrimination within its own legislative jurisdiction," but that this right must be "exercised within the constraints of §1 of the Fourteenth Amendment," which required Richmond to identify specific discrimination before it could enact remedial relief. *Id.* at 4138. The Court noted that the rights created by section one of the fourteenth amendment were guaranteed to the individual and the rights established are personal rights. *Id.* at 4138-39 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). The Richmond plan breached those "personal rights" because it denied "certain citizens the opportunity to compete for a fixed percentage of public contracts, based solely upon their race." *Id.* at 4139. Strict scrutiny was, therefore, necessary to determine which classifications were "benign" or "remedial," or which classifications were motivated by illegitimate prejudices of race. "The test also ensures that the means chosen 'fit' the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

Thus, if Richmond had evidence that non-minority contractors were discriminating against minority businesses, it could eradicate that discrimination. Even if Richmond could demonstrate a significant statistical disparity between the "number of qualified MBEs and the number of MBEs actually hired by the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id.* at 4143. In such circumstances, the "city could dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race." *Id.* "In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.*

In a cogent dissent, Justice Marshall claimed the Court had imposed a "daunting standard" that would discourage states from "contemplating the use of race-conscious measures to eradicate the present effects of past discrimination." *Id.* at 4156. The result of which "marks a deliberate and giant step backward in this Court's affirmative action jurisprudence." *Id.* at 4149. Justice Marshall accused the Court of trivializing Richmond's evidence by examining it piecemeal, and not in the context of the national pattern of discrimination revealed by Congress in *Fullilove*.

Unable to distinguish *Croson* from *Fulli-*

love, Justice Marshall asserted a less stringent test for race-based legislation: (1) that remedial goals must serve important governmental objectives; (2) and must be substantially related to the attainment of those goals. *Id.* at 4150. Justice Marshall discerned two of Richmond's remedial goals: to eradicate the effects of past racial discrimination, and to refrain from perpetuating the effects of that discrimination. *Id.* at 4150-51. This discrimination was based on a "varied body of evidence." *Id.* at 4152. A national pattern of discrimination had been set, from which Richmond did not deviate. Set in this context, Justice Marshall argued "Richmond's reliance on localized, industry-specific findings is a far cry from the reliance on generalized 'societal discrimination' which the majority decries as a basis for remedial action." *Id.* He accused the majority of disingenuously "disaggregating Richmond's local evidence, attacking it piecemeal, and thereby conclude that no single piece of evidence...standing alone...suffices to prove past discrimination." *Id.* at 4153. Justice Marshall concluded that the fourteenth amendment did not impose "such onerous [evidentiary] obligations upon states...once the reality of past discrimination is apparent." *Id.* at 4154.

Secondly, the Plan was valid because "it is substantially related to the interests it seeks to serve in remedying past discrimination..." *Id.* at 4145. He pointed out that the majority overlooked the fact that Richmond had a previous antidiscrimination statute and race-neutral legislation that had virtually no effect on the eradication of the past discrimination. As to the majority's claim that the 30% target could not be narrowly tailored to any state goal, he proclaimed that the Court ignored the fact that the 30% figure was patterned directly on the *Fullilove* precedent.

Justice Marshall concluded by denouncing the majority's adoption of the strict scrutiny standard for review of race-conscious remedial measures. He argued that remedial classifications warranted a different standard of review from "brute and repugnant state-sponsored racism" and that the Court's holding indicated "that it regards racism as a phenomenon of the past." *Id.* at 4155.

The Court has adopted the rigid standard of strict scrutiny as the standard of review for benign and remedial discrimination measures. The Court's holding expressed that laws favoring blacks over whites must be judged by the same constitutional standard as laws favoring whites over blacks. The result could be the undoing of many affirmative action programs nationwide, and will serve to discourage the enactment of future affirmative action

legislation.

— Peter T. McDowell

McAvoy v. State: A SUSPECT STOPPED FOR DRIVING WHILE INTOXICATED IS NOT ENTITLED TO MIRANDA ADVICE PRIOR TO A FIELD OR CHEMICAL SOBRIETY TEST.

A suspect who has been detained on suspicion of driving while intoxicated is not entitled to Miranda advice before being asked to perform field or chemical sobriety tests according to the Court of Appeals of Maryland. *McAvoy v. State*, 314 Md. 509, 551 A.2d 875 (1989). In so doing, the court of appeals upheld the decisions of both the lower court and the Court of Special Appeals of Maryland.

Joseph McAvoy was stopped by police for failing to obey a sign which prohibited right turns on a red light. After McAvoy was stopped, the officer and McAvoy engaged in a discussion over whether such a sign existed. To resolve the dispute, both men returned to the intersection where the alleged infraction occurred. While there, they confirmed the existence of the sign in question, and at that point the officer then recognized signs of intoxication on McAvoy. As a result, the officer requested McAvoy to perform various field sobriety tests. McAvoy failed the tests and was arrested for driving while intoxicated.

Shortly after the arrest, McAvoy was read a standard form DR-15, Advice of Rights to a Chemical Test. This form advised him of rights and obligations under Maryland's implied consent law (Maryland Transp. Code Ann. § 16-205.1), but did not advise him of his right to counsel. McAvoy elected to take a breathalyzer test, which determined that he had .20 percent by weight of alcohol in his blood. After the test, McAvoy was arrested for driving under the influence and advised of his Miranda rights. At trial McAvoy contended that the evidence produced from these tests was obtained by custodial interrogation and therefore not admissible without a prior Miranda warning.

A custodial interrogation is defined in *Miranda v. Arizona*, 384 U.S. 436 (1966) as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. To counter the "inherently compelling pressures" of custodial interrogation, the Supreme Court in *Miranda* held that a suspect in custody must be advised of certain constitutional rights and may only then voluntarily waive them if he so chooses. *Id.* at 467.

McAvoy argued, and the court rejected, that at the time of the field sobriety test he was in custody. Even though the officer invited McAvoy to return to the scene of the infraction, and even though he had subjectively decided to detain McAvoy when he detected his intoxication, the court held that neither element was enough to elicit a custodial interrogation under *Miranda*.

In further support of its position that McAvoy was not in custody, the court of appeals examined *Berkemer v. McCarty*, 468 U.S. 420 (1984). The Supreme Court held that a temporary detention in connection with an ordinary traffic stop would not constitute custody in order to require *Miranda* advice. To remain temporary the stop must be brief, in a public place and the suspect must not be told that the stop would not be brief. Accordingly, a formal arrest would not result under *Berkemer* if "[a] single police officer asked a respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists." *McAvoy*, 314 Md. at 516, 551 A.2d at 878 (quoting *Berkemer*, 468 U.S. at 434). Therefore, since McAvoy was stopped in a public place, never told that his detention would not be brief, and the stop was in fact brief, he was not in custody according to *Berkemer* and the court of appeals. Furthermore, during the stop, the officer only asked McAvoy to perform some field tests and did not interrogate him in any manner. *McAvoy*, 314 Md. at 517, 551 A.2d at 879.

After completion of the field sobriety test, however, McAvoy was formally arrested, taken into custody and asked to submit to a breathalyzer test. Nonetheless, the court held that McAvoy was still not entitled to *Miranda* advice because "[t]he breath taken from [him] was physical evidence and was not testimonial within the meaning of the Fifth Amendment protection against self-incrimination." *Id.* at 518, 551 A.2d at 879. This fifth amendment protection "bars the State only from compelling 'communications' or 'testimony'. Since a blood [or breath] test was 'physical or real' evidence rather than testimonial..." it is not protected. *South Dakota v. Neville*, 459 U.S. 553, 559. McAvoy therefore had no right to *Miranda* advice prior to the breathalyzer test.

The court of appeals further dismissed the argument that the officer's simple request of McAvoy to take a chemical sobriety test constituted an interrogation within the meaning of *Miranda*. *Id.* at 518, 551 A.2d at 879. According to the identical holding in *Neville, supra.*, the police inquiry "is highly regulated by state law, and is presented in virtually the same