



1990

Recent Developments: *Gray v. State*: Court Upheld Trial Judge's Discretion in Refusing to Require a Prosecutor to Testify or Be Cross-Examined for Alleged Discrimination in Selecting Jurors

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Recommended Citation

Swain, Gregory J. (1990) "Recent Developments: *Gray v. State*: Court Upheld Trial Judge's Discretion in Refusing to Require a Prosecutor to Testify or Be Cross-Examined for Alleged Discrimination in Selecting Jurors," *University of Baltimore Law Forum*: Vol. 20 : No. 2 , Article 7.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol20/iss2/7>

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codified this constitutional requirement in laws specifically designating the defendant's age as a mitigating factor in capital cases. Moreover, the determinations required by juvenile transfer statutes to certify a juvenile for trial as an adult ensure individualized consideration of the maturity and moral responsibility of sixteen and seventeen year-old offenders before they are even held to stand trial as adults.

Id. at 2978.

Similarly, the Court rejected Stanford's reliance on public opinion polls, the views of public interest groups and the positions of professional associations as indicia of a national consensus, declaring them insufficient foundations on which to rest constitutional law. "A . . . national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and application of laws) that the people have approved." *Id.* at 2979.

Finally, the Court deemed it unnecessary to conduct a proportionality test: to examine whether "there is a disproportion between the punishment imposed and the defendant's blameworthiness." *Id.* at 2980. This test is used only where there is objective evidence of a societal consensus against the penalty; no such evidence existed in this case. *Id.*

In a strong dissent, Justice Brennan criticized the Court's reliance on legislative enactments to determine that the capital punishment of sixteen or seventeen year old offenders did not offend "evolving standards of decency." *Id.* at 2982 (quoting *Trop v. Dulles*) This approach returned to the task of defining eighth amendment protection to the very political majorities the framers sought to deny such power. "One's right to life, liberty, and property, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* at 2987 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Furthermore, the dissent indicated that the plurality's discussion of state laws was distorted since it failed to account for the fifteen states (and the District of Columbia) which do not authorize capital punishment at all. *Id.* at 2982-83.

Justice Brennan also characterized the Court's review of legislative enactments to establish a national consensus as incomplete. He argued that the rare application of the death sentence for youthful offenders, the decisions of respected organizations in relevant fields that the

penalty was unacceptable, and its rejection by governments around the world, were strong indications that the execution of adolescents violated contemporary standards of decency and should have been included in the Court's analysis. *Id.* at 2984-85.

The dissent criticized the plurality's refusal to conduct proportionality analysis. "There can be no doubt at this point in our constitutional history that the eighth amendment forbids punishment that is wholly disproportionate to the blameworthiness of the offender." *Id.* at 2987. The dissent noted that in American society, juveniles are treated differently from adults. As a class, they do not have the level of maturation and responsibility presumed in adults. "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* at 2988 (quoting *Thompson v. Oklahoma*, 487 U.S. ___, 108 S. Ct. 2687, 2699 (1988)). In Brennan's view, "[j]uveniles very generally lack that degree of blameworthiness that is . . . a constitutional prerequisite for the imposition of capital punishment under our precedents concerning the eighth amendment proportionality principle." *Id.* at 2992.

In a plurality opinion, the United States Supreme Court ruled that the imposition of the death penalty on offenders who were sixteen or seventeen years old at the time they committed their crimes did not violate the eighth amendment's prohibition against cruel and unusual punishment, because such penalty was not considered cruel and unusual at the time the Bill of Rights was adopted, and no national consensus against the execution of such youthful offenders had been established.

—Mary Jo Murphy

Gray v. State: COURT UPHELD TRIAL JUDGE'S DISCRETION IN REFUSING TO REQUIRE A PROSECUTOR TO TESTIFY OR BE CROSS-EXAMINED FOR ALLEGED DISCRIMINATION IN SELECTING JURORS

In *Gray v. State*, 317 Md. 250, 562 A.2d 1278 (1989), the Court of Appeals of Maryland held that a prosecutor is not required to testify under oath or be subjected to cross-examination when offering non-discriminatory explanations for the striking of black venirepersons from the jury panel.

Isaac Gray, a black male, was tried in the Circuit Court for Howard County for the first degree rape of a white woman.

Upon completion of the jury selection process, Gray moved for a mistrial, alleging that since the prosecutor had used four of his peremptory challenges to strike black jurors from the panel, the state must advance an explanation for these challenges. *Id.* at 252-53, 562 A.2d at 1279. Relying on *Swain v. Alabama*, 380 U.S. 202 (1965), the trial judge held that a prosecutor was not required to give explanations for the exercise of peremptory challenges. *Gray*, 317 Md. at 253 n.2, 562 A.2d at 1279 n.2. Despite the court's ruling, the prosecutor volunteered a non-discriminatory reason for one of his strikes and noted that the jury, as impaneled, included one black juror and one black alternate juror. *Id.* at 253, 562 A.2d at 1280. The trial judge denied the defendant's motion and Gray was subsequently convicted.

Gray filed a motion for a new trial. At the hearing, Gray argued that *Batson v. Kentucky*, 476 U.S. 79 (1986), decided after Gray's trial on the merits, was applicable to the facts of his case. *Gray*, 317 Md. at 253, 562 A.2d at 1280. *Batson* held that where the totality of the circumstances surrounding a prosecutor's exercise of peremptory challenges established a prima facie case of racial discrimination, the burden was on the state to justify the challenges with a non-discriminatory explanation. Gray argued that a prima facie showing had been established and, therefore, the state was required to provide a racially neutral reason for the challenge. The prosecutor denied the allegations of discrimination and stated his reasons for striking each of the black jurors. The trial judge denied the motion for a new trial, based on his belief that *Batson* was not meant to be applied retroactively, and that, notwithstanding *Batson*, the ratio of black jurors to the other jurors exceeded the ratio of blacks to all persons living in the county at that time. *Id.* at 253-54, 562 A.2d at 1280.

On appeal, the court of special appeals vacated the judgment and remanded the case for a determination of whether Gray had established a prima facie showing of racial discrimination, and, if so, whether the state had sufficiently rebutted the showing, in accord with the two-part test of *Batson*. *Id.* at 254, 562 A.2d at 1280. At this hearing, counsel for the defendant requested, pursuant to a witness subpoena which had been served on the prosecutor, that the prosecutor be placed under oath before giving his reasons for his jury strikes and that while under oath, he be subject to cross-examination. Gray argued that there was a guaranteed right to an adversarial hear-

ing under the principles of due process, equal protection and effective assistance of counsel. *Id.* The prosecution replied that the purpose of the hearing was to permit the state to explain its use of the challenges and that under these circumstances it was not necessary to require an oath or cross-examination. The trial judge agreed and quashed the subpoena. *Id.*

The trial judge ruled that no prima facie case of racial discrimination had been established. *Id.* In the interest of prudence, however, the court addressed the second step of the *Batson* test (that the state must proffer a non-discriminatory explanation for the exercise of the challenge) and found the prosecutor's explanation would have been sufficient if a prima facie showing had been made. *Id.*

Gray again appealed, and this time the court of special appeals upheld the lower court, finding that Gray had not shown that the ruling of the trial court had been clearly erroneous. Gray petitioned the court of appeals for certiorari, raising two issues: 1) whether "[t]he trial court erred in ruling that the defense failed to establish a prima facie showing of racial discrimination in the prosecutor's exercise of peremptory challenges"; and 2) whether "[t]he trial court erred in refusing to require the prosecutor to testify under oath and be subject to cross-examination." *Id.* at 255, 562 A.2d at 1281.

Initially, the Court of Appeals of Maryland assumed that the defendants had established a prima facie case of racial discrimination and, therefore, moved directly to the second issue: whether the prosecutor should be required to testify under oath and be subject to cross-examination. *Id.* at 256, 562 A.2d at 1281. The court noted that in *Batson* the Supreme Court refused to specify procedures to be followed when a defendant objected to a prosecutor's challenges. *Id.* at 256-57, 562 A.2d at 1281. The majority of courts that have faced the issue, however, left the procedure to the trial judge's discretion. The *Gray* court deemed this to be the better view, especially in light of the broad variety of circumstances under which a prosecutor may be required to offer an explanation and that the trial judge is to be accorded broad discretion in conducting a trial. *Id.* The court noted, however, one limitation on the discretion of the trial judge: only a "compelling justification" would justify an ex parte proceeding sufficient to meet the dictates of *Batson*; under "normal" circumstances an adversary proceeding should be utilized to consider *Batson* challenges. *Id.* at 257-58, 562 A.2d at 1282.

The court held the justifications offered by the defense in support of administration of an oath to the prosecutor were insufficient to remove the decision from the discretion of the trial judge. All attorneys are officers of the court, bound by Maryland Lawyers' Rules of Professional Conduct and "[a] trial judge calling upon the prosecutor to explain his challenges has every right to expect total candor without resorting to the administration of an oath." *Id.* at 258, 562 A.2d at 1282.

Examining the defendant's right to cross-examine the prosecutor, the court noted "[i]n our adversary system of justice, cross-examination enjoys an exalted position." *Id.* at 258-59, 562 A.2d at 1282. The court held that a judge faced with a request for a cross-examination in a *Batson* situation has the discretion to grant the request, but only after a careful weighing of all the relevant factors in that particular case. *Id.* at 259, 562 A.2d at 1282. The court, however, made clear that the favored procedure under these circumstances is not a formal adversary proceeding but rather a relatively informal proceeding similar to that which occurs during the voir dire examination of a juror at the bench. *Id.*

Finally, the court opined that in a post-trial hearing, as opposed to a hearing at the trial level, factors such as the passage of time and impairment of memory may require an explanation under oath and cross-examination. *Id.* at 261, 562 A.2d at 1284. On the facts before the court, however, the court held that the actions of the trial court did not amount to an abuse of discretion. *Id.*

The decision of the court of appeals in *Gray* has left the door open for trial judges to use the formalities and additional safeguards afforded by a formal adversarial proceeding when it is faced with a *Batson* allegation of discrimination in the selection of a jury. More importantly, the *Gray* decision preserves the discretionary power of the trial judge to determine the proceeding that is best suited to the circumstances of the particular case before the court.

—Greg Swain

Baltimore Sun Co. v. Goetz: PRESS HAS COMMON LAW RIGHT OF ACCESS TO AFFIDAVIT SUPPORTING SEARCH WARRANTS BETWEEN EXECUTION OF WARRANTS AND INDICTMENT

In *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit

held that the press's common law right of access to a sealed affidavit supporting search warrants during the interval between execution of the warrants and indictment was within the sound discretion of the judicial officer. As a result, in certain circumstances, the press may force the government to unseal warrant papers which could expose continuing criminal investigations.

On January 27, 1988, a federal magistrate issued three search warrants based on the affidavit of an FBI agent, and then sealed the papers. After execution of the warrants, the magistrate unsealed the warrants and the returns, but left the affidavit sealed. On May 4, 1988, the Baltimore Sun Company (Sun) petitioned to unseal the affidavit. However, the magistrate denied the Sun's petition concluding that the public interest in the investigation of crime would not be best served by allowing the Sun to publish the affidavit. The Sun then sought a writ of mandamus from the United States District Court for the District of Maryland to compel the magistrate to unseal the affidavit. The government offered to disclose a redacted version of the affidavit, but the district court declined. Without examining the affidavit, the district court agreed with the magistrate's conclusion and denied the Sun's petition. However, while the Sun's appeal of the district court's decision was pending, the magistrate unsealed the affidavit after indictments were returned.

After deciding that the affidavit was a judicial record, the court noted the superior distinction between the first amendment and common law rights of access. Only upon a showing of a "compelling government interest" and proof that the denial is "narrowly tailored to serve that interest" may a court deny the first amendment right of access. *Id.* at 64 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)). On the other hand, a court may at its discretion deny the common law right to access. *Id.*

The court began its analysis with the question of whether the Sun had a first amendment right of access to the affidavit. The court noted that the test for making such a determination is: "1) 'whether the place and process have historically been open to the press and general public,' and 2) 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise v. Superior Court*, 478 U.S. 1, 8-10 (1986)). The court held that the Sun's claim failed the first prong of the test