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Recent Developments: Georgia v. McCollum: Criminal Defendants May Not Use Peremptory Challenges to Discriminate on the Basis of Race

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tion to that exclusive list especially in light of its earlier unwillingness to include the more explicitly protected constitutional right of free speech. *Id.*

In *Bray*, the United States Supreme Court clarified its current position on abortion and in so doing, rejected Pro-Choice's latest attempt to permanently enjoin Pro-Life demonstrators from blocking the entrances to abortion clinics. The Court found there was no latent conspiracy against women as a class behind the demonstrations, and further refused to recognize that a woman's constitutionally protected right of interstate travel was infringed upon by such demonstrations. While this decision is an apparent victory for Operation Rescue, the full impact of this decision may never materialize given the two recent shootings that injured one abortion doctor and killed another, coupled with the retirement of Justice White, who joined the majority in this opinion.

- John M. Oliveri

***Georgia v. McCollum*: CRIMINAL DEFENDANTS MAY NOT USE PEREMPTORY CHALLENGES TO DISCRIMINATE ON THE BASIS OF RACE.**

In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), the United States Supreme Court held that defendants in criminal cases may not use peremptory challenges to discriminate against potential jurors on the basis of race. In so ruling, the Court expanded its prohibition of racially discriminatory uses of peremptory strikes beyond the State and private litigants to encompass criminal defendants.

On August 10, 1990, two caucasian defendants were charged with the aggravated assault and simple battery of two African-Americans. Prior to jury selection, the prosecutor moved to prohibit the respondents from using peremptory challenges to discriminate against potential African-American jurors. Both the trial court and the Supreme Court of Georgia concluded that criminal defendants, unlike civil litigants and criminal prosecutors, were permitted to exercise peremptory strikes to racially discriminate, and thus keep African-Americans from serving on the jury. The United States Supreme Court granted certiorari to consider whether the prohibition against using peremptory strikes in a racially discriminatory manner applied to criminal defendants, as well as to the State and civil litigants.

The Court began its analysis by considering whether such use of peremptory challenges by criminal defendants inflicts the same harm on the juror and the community discussed in the *Batson* prohibition on discriminatory peremptory challenges by the prosecution. *Id.* at 2353 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). In concluding that similar harm would arise from the use of racially discriminatory peremptory strikes by criminal defendants, the Court noted that public discrimination undermines public confidence in the courts and the system as a whole. *Id.* at 2354. Furthermore, the

Court stressed the importance of public trust in the judicial system to maintain peace in the community, especially in race-related cases. *McCollum*, 112 S. Ct. at 2354. Whether the discrimination was exercised by the State or the defense, the Court concluded that the resulting antagonistic feelings towards the justice system were the same. *Id.*

The Court next addressed whether the use of peremptory challenges by criminal defendants constituted state action under the Equal Protection Clause, because state action is required under the Fourteenth Amendment in order to give rise to a Constitutional violation. *Id.* The Court first looked to its analysis in *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2082 (1991), which inquired into whether strikes arose from a right or privilege of state authority. *McCollum*, 112 S. Ct. at 2354. Observing that both the right to exercise the strikes and their scope were defined by state law, the Court determined that the use of peremptory challenges was a state right or privilege. *Id.* at 2355.

The Court next considered whether the defendants could be viewed as state actors, so that their actions would be considered state actions under the Equal Protection Clause. *Id.* The Court utilized the three prong analysis established in *Edmonson* which examined the following: (1) the extent to which the actor relied on governmental assistance and benefits, (2) whether the actor was performing a traditional governmental function, and (3) whether the injury caused was aggravated in a unique way by the incidents of governmental authority. *Id.* (citing *Edmonson*, 111 S. Ct. at 2083).

Concluding that the defendants were state actors, the Court applied the three prong test and noted that the criminal defendants had substantially relied on governmental assistance and benefits. *McCollum*, 112 S. Ct. at 2355. In addition, the pervasive nature of the government's involvement in jury selection through state statutes enabled the peremptory challenge system to ex-

ist. *Id.*

The Court also found that use of peremptory challenges was a traditional governmental function. The Court relied on its holding in *Edmonson* which stated that “[peremptory challenges’] sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact.” *Id.* (quoting *Edmonson*, 111 S. Ct. at 2083). The Court found the *Edmonson* reasoning especially persuasive because the selection of a jury for a criminal case represents a unique governmental function and is required by the Constitution. *McCullum*, 112 S. Ct. at 2355.

With regard to the third prong of the analysis, the Court found the injury to be aggravated by the incidents of governmental authority, further supporting the conclusion that a criminal defendant is a state actor. *Id.* at 2356. The Court emphasized the intensification of the harmful effects caused by the use of peremptory strikes in a criminal setting, because the removal of a juror is perceived to be an action of the State regardless of who actually exercised the strike. *Id.*

The Court rejected the respondents’ argument that a criminal defendant cannot be acting with governmental character when exercising peremptory challenges because of the adversarial relationship between the defendant and the prosecution. *Id.* The Court explained that peremptory challenges occur in the context of choosing the “quintessential governmental body . . . on which our judicial system depends.” *Id.* The Court added that “when a government confers on a private body the power to choose the government’s employees or officials, the private body will be bound by the constitutional mandate of race neutrality.” *Id.* (quoting *Edmonson*, 111 S.Ct. at 2085). In concluding that the defendants were state actors, the Court found that the use of racially discriminatory peremptory strikes by criminal defendants was a state action which violated the Equal Protection Clause. *McCullum*, 112 S. Ct. at 2356.

Having found the defendants’ ac-

tions to be a violation of the Equal Protection Clause, the Court then considered whether the State had third party standing to challenge discriminatory uses of peremptory strikes. *Id.* at 2357. In order to raise a claim on behalf of a third party, a litigant must have demonstrated that he has suffered a concrete injury, that he has a close relation to the third party, and that there exists some hindrance to the third party’s ability to protect its own interests. *Id.* (citing *Powers v. Ohio*, 111 S. Ct. at 1370-71 (1991)).

The Court concluded that the State has standing to assert a cause of action on behalf of the excluded juror. *McCullum*, 112 S. Ct. at 2357. In support of its finding, the Court noted that a State suffers a cognizable injury when the fairness of the judicial system is questioned. *Id.* The Court emphasized the difficulties facing excluded jurors seeking to defend themselves and the status of the State as the representative of its citizens as allowing additional reasons for the State to assert the rights of the excluded juror. *Id.*

Finally, the Court examined the broader issue concerning whether the interests of the criminal defendant

should prevail over the interests of excluded jurors and the integrity of the judicial system. *Id.* at 2358. In denying the defendants’ rights first priority, the Court emphasized that peremptory challenges are not constitutionally protected rights, but are created by the State to achieve an impartial jury. *Id.* Furthermore, the Court rejected the idea that a fair trial included a party’s right to racially discriminate against potential jurors. *Id.* The Court determined that the Sixth Amendment rights of a criminal defendant were not violated by prohibiting racially discriminatory uses of peremptory challenges. *Id.*

The *McCullum* decision extends the prohibition against the use of racially discriminatory peremptory challenges from prosecutors and private defendants to criminal defendants. Although *McCullum* may promote fairness in the jury selection process, the consequences of *McCullum* could include African-American criminal defendants losing the right to strike white jurors on the basis of race. As a result, African-Americans and other minorities may lose their ability to be judged by a jury which includes their peers.

- Susan Oliveri

