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Fourteenth Amendment--Peremptory Challenges by Defendants and the Equal Protection Clause

Michele A. Gemskie

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FOURTEENTH AMENDMENT—PEREMPTORY CHALLENGES BY DEFENDANTS AND THE EQUAL PROTECTION CLAUSE

Georgia v. McCollum, 112 S. Ct. 2348 (1992)

I. INTRODUCTION

In *Georgia v. McCollum*,[1] the United States Supreme Court held that a criminal defendant may not exercise a peremptory challenge in a racially discriminatory manner. The Court extended the reach of *Batson v. Kentucky*,[2] which precluded a state prosecutor from exercising peremptory challenges in a racially discriminatory manner, and *Edmonson v. Leesville Concrete Co.*,[3] which precluded civil litigants from exercising peremptory challenges in a racially discriminatory manner, to encompass defendants in criminal cases as well.

This Note examines the use and limitations of peremptory challenges and argues that the Court reasonably protected the equal protection rights of the juror to a greater extent than it protected the defendant's statutory right to exercise unfettered peremptory challenges. After summarizing the facts and opinions of the case, this Note discusses how *Georgia v. McCollum* is consistent with post-*Batson* caselaw. The Note then critiques and ultimately agrees with the Court's reasoning in *McCollum*, specifically the Court's analysis of whether a defendant really is and should be considered a state actor; whether the State has standing to challenge a defendant's use of peremptory challenges; and whether a juror's constitutional right to equal protection should outweigh a defendant's statutory right to exercise peremptory challenges. Furthermore, this Note analyzes the implications of *Georgia v. McCollum* on future uses of peremptory challenges, particularly when a minority defendant challenges a non-minority juror.

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[1] 112 S. Ct. 2348 (1992).

[2] 476 U.S. 79 (1986).

[3] 111 S. Ct. 2077 (1991).

II. HISTORICAL BACKGROUND

The United States Supreme Court first dealt with the issue of racial discrimination in jury selection over a century ago in *Strauder v. West Virginia*.[4] At issue in that case was a West Virginia statute, which allowed only "white male persons who are [at least] twenty-one years of age . . . to serve as jurors."[5] Strauder, an African-American male, had been convicted and sentenced for murder by an all-Caucasian jury.[6] Strauder objected to the all-Caucasian venire[7] and argued that he had the same constitutional right as Caucasians to a jury of his racial peers.[8]

The Supreme Court held that the West Virginia statute denied African-American defendants their equal protection rights when African-Americans were precluded from the jury venire.[9] The Court recognized that prejudices often exist in a community, and it reasoned that African-Americans had the same right as Caucasians to a jury drawn from a panel that includes racial peers.[10]

The Supreme Court did not deal with racial discrimination at the juror peremptory stage until *Swain v. Alabama*.[11] The prosecutor in *Swain* struck all six African-Americans on the jury venire using peremptory challenges.[12] The African-American defendant alleged that the prosecutor violated the Fourteenth Amendment by using peremptory challenges to obtain an all-Caucasian jury.[13] The trial court denied all of the defendant's motions, which were "based on alleged invidious discrimination in the selection of jurors," and the defendant was convicted.[14] The Alabama Supreme Court affirmed the conviction on appeal.[15]

The United States Supreme Court affirmed the lower court conviction, placing a heavy burden on the defendant.[16] In order to successfully challenge a prosecutor's use of peremptory challenges, the Supreme Court held that a defendant had to prove that the prosecutor systematically exercised peremptory challenges against African-

4 100 U.S. 303 (1879).
5 *Id.* at 305.
6 *Id.* at 304.
7 The jury venire is the group of citizens from which a jury is chosen in a given case. The petit jury is the group of persons selected for the trial of a criminal or civil action.
8 *Strauder*, 100 U.S. at 304.
9 *Id.* at 310.
10 *Id.* at 309.
11 380 U.S. 202 (1965).
12 *Id.* at 210.
13 *Id.*
14 *Id.* at 203.
15 *Id.*
16 *Id.* at 227-28.

Americans over a period of time.[17] Since Swain only focused on the discrimination of the prosecutor at his own trial, Swain was unable to meet this strict test.[18]

The Supreme Court removed this strict evidentiary burden nineteen years later in *Batson v. Kentucky*.[19] In *Batson*, the trial court denied the African-American defendant's motion to discharge the petit jury, following the prosecutor's use of his peremptory challenges to remove all potential African-American jurors.[20] Rather than requiring proof of systematic use of peremptory challenges against African-Americans over a period of time, the Supreme Court held that a defendant could establish a prima facie case of racial discrimination in a prosecutor's use of peremptory challenges in the defendant's case alone.[21] The Court stated that once the defendant established that this discrimination occurred during the jury selection of his own trial, the burden then shifted to the State to establish a race-neutral reason for excluding the jurors in question.[22]

The Court extended the reach of *Batson* in *Powers v. Ohio*.[23] A Caucasian defendant in *Powers* objected to the prosecution's use of peremptory challenges to exclude African-American venirepersons.[24] Emphasizing the equal protection rights of jurors, the Court held that a criminal defendant can object to race-based peremptory challenges, regardless of whether the defendant and the excluded juror were of the same race.[25] As a preliminary issue, the Court held that the petitioner had standing to raise the equal protection rights of the excluded jurors who were not parties to the case.[26]

In the same term, the Supreme Court addressed the issue of race-based peremptory challenges during civil proceedings in the case of *Edmonson v. Leesville Concrete Co.*[27] Relying on *Batson*, an African-American civil litigant argued that opposing counsel was required to articulate a race-neutral reason for excluding two African-Americans from the prospective petit jury. The Court recognized that protection of individual liberty and equal protection applied

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17 *Id.* at 227.
18 *Id.* at 224.
19 476 U.S. 79 (1986).
20 *Id.* at 83.
21 *Id.* at 92-95.
22 *Id.* at 97.
23 111 S. Ct. 1364 (1991).
24 *Id.* at 1367.
25 *Id.* at 1366.
26 *Id.* at 1370-74.
27 111 S. Ct. 2077 (1991).

historically only to government actions.[28] Thus, as a dispositive issue, the Court determined that a civil litigant acted as a state actor when the litigant exercised peremptory challenges.[29] As in *Powers*, the Court also found that a civil litigant had standing to raise excluded jurors' equal protection rights.[30] Thus, civil litigants could utilize the same approach to establish a prima facie case of racial discrimination during peremptory challenges as criminal defendants in *Batson*.[31]

Batson dealt with prosecutorial use of peremptory challenges, and *Edmonson* dealt with the use of peremptory challenges by civil litigants. After these two cases, the constitutionality of race-based peremptory challenges by criminal defendants remained unsettled. The Supreme Court resolved this issue in the present case, *Georgia v. McCollum*.[32]

III. FACTUAL AND PROCEDURAL HISTORY

On August 10, 1990, a Dougherty County, Georgia, grand jury returned a six-count indictment that charged the Caucasian respondents with beating and assaulting an African-American couple.[33]

Before jury selection began, the prosecution claimed that defense counsel intended to strike African-Americans from the petit jury due to the racially charged nature of the case.[34] The State filed a pretrial motion to prevent defense counsel from exercising its peremptory challenges in a racially discriminatory manner, despite defense counsel's contention that the nature of the case gave defense the right to intentionally exclude African-Americans.[35]

The State contended that Dougherty County's population at the time was 43% African-American.[36] Accordingly, the State argued that a statistically representative jury panel of forty-two members would contain eighteen African-Americans.[37] Since respondents had twenty peremptory challenges, respondents could potentially eliminate all possible African-Americans jurors.[38] Rely-

28 *Id.* at 2082 (citing Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)).
29 *Id.* at 2082-87.
30 *Id.* at 2087-88.
31 *Id.* at 2088-89.
32 112 S. Ct. 2348 (1992).
33 *Id.* at 2351.
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*

ing on *Batson v. Kentucky*,[39] the Sixth Amendment,[40] and the Georgia Constitution, the State sought an order requiring respondents to articulate a race-neutral explanation for its peremptory challenges, once the State established a prima facie racial discrimination case.[41]

The trial court denied the State's motion, stating that neither federal law nor Georgia law prohibited criminal defendants from using peremptory challenges in a racially discriminatory manner.[42] The issue was certified for immediate appeal.[43]

The Georgia Supreme Court affirmed the trial court's ruling in a 4-3 decision.[44] The court distinguished *Edmonson v. Leesville Concrete Co.*,[45] which prohibited civil litigants from exercising peremptory challenges in a racially discriminatory manner, from the present case, which dealt with a criminal defendant.[46] Three justices dissented, arguing that *Edmonson* and other decisions by the Supreme Court established that racially based peremptory challenges violated the Constitution.[47] The Georgia Supreme Court denied a motion for reconsideration.[48]

The United States Supreme Court granted certiorari to determine "whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges."[49]

IV. Supreme Court Opinions

A. THE MAJORITY OPINION

Justice Blackmun, writing for the Court,[50] reversed the decision of the Georgia Supreme Court and held that the Constitution pro-

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39 476 U.S. 79, 95 (1986) ("[A] defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely of the facts concerning its selection *in his case*.").

40 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . ." U.S. Const. amend. VI.

41 *McCollum*, 112 S. Ct. at 2351-52.

42 *Id.* at 2352.

43 *Id.*

44 State v. McCollum, 405 S.E.2d 688 (Ga. 1991).

45 111 S. Ct. 2077 (1991).

46 *McCollum*, 405 S.E.2d at 689.

47 *McCollum*, 112 S. Ct. at 2352 (citing *McCollum*, 405 S.E.2d at 689 (Hunt, J., dissenting); *McCollum*, 405 S.E.2d at 690 (Benham, J., dissenting); *McCollum*, 405 S.E.2d at 693 (Fletcher, J., dissenting)).

48 *McCollum*, 112 S. Ct. at 2352.

49 *Id.*

50 *Id.* at 2351. Chief Justice Rehnquist and Justices White, Stevens, Kennedy, and Souter joined in the opinion. Chief Justice Rehnquist also filed a concurring opinion. Justice Thomas filed an opinion concurring in judgment. Justice O'Connor and Justice Scalia each filed dissenting opinions.

hibits a criminal defendant from engaging in purposeful discrimination on the basis of race when exercising peremptory challenges.[51]

Justice Blackmun began by presenting the chain of cases that abolished race as a factor for jury selection.[52] In *Strauder v. West Virginia*,[53] the Court held unconstitutional a state statute which allowed only Caucasian men to serve on juries.[54] Nearly a century later, in *Swain v. Alabama*, the Court recognized that systematic exclusion of African-Americans over a period of time could constitute a violation of equal protection; nonetheless, the Court did not find a violation in that case.[55] The Court discarded *Swain*'s "evidentiary formulation" in *Batson v. Kentucky*[56] and instead held that a prima facie case of discrimination could be established simply from the peremptory challenges of the prosecutor at the defendant's own trial.[57] In *Powers v. Ohio*,[58] the Court extended *Batson* by holding that a prosecutor was prohibited from excluding African-American jurors on the basis of race in the criminal trial of a Caucasian defendant.[59] Finally, in *Edmonson v. Leesville Concrete Co.*,[60] the Court held that civil litigants could not exercise their peremptory challenges in a racially discriminatory manner.[61]

Taking elements from each of the prior cases, Justice Blackmun then established a four-part inquiry to determine whether criminal defendants should be prevented from exercising their peremptory challenges in a racially discriminatory manner.[62] First, the Court must inquire whether the criminal defendant's exercise of peremptory challenges in a racially discriminatory manner causes the same harms addressed by *Batson*.[63] Second, the Court must decide whether the exercise of peremptory challenges by a criminal defendant constitutes state action.[64] Third, the Court must examine whether prosecutors have standing to raise this constitutional is-

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51 *Id.* at 2359.

52 *Id.* at 2352-53.

53 100 U.S. 303 (1879).

54 *McCollum*, 112 S. Ct. at 2352 (citing Strauder v. West Virginia, 100 U.S. 303 (1879)).

55 *Id.* (citing Swain v. Alabama, 380 U.S. 202 (1965)).

56 476 U.S. 79 (1986) (holding that a prosecutor may not act in a racially discriminatory manner when exercising peremptory challenges).

57 *McCollum*, 112 S. Ct. at 2352-53.

58 111 S. Ct. 1364 (1991).

59 *McCollum*, 112 S. Ct. at 2353.

60 111 S. Ct. 2077 (1991).

61 *McCollum*, 112 S. Ct. at 2353.

62 *Id.*

63 *Id.* (referring to Batson v. Kentucky, 476 U.S. 79 (1986)).

64 *Id.*

sue.[65] Finally, the Court must decide whether the constitutional rights of criminal defendants nonetheless preclude the extension of precedents to this case.[66]

1. Does a criminal defendant's exercise of racially discriminatory peremptory challenge cause the same harms addressed by Batson?

In the first inquiry, Justice Blackmun reasoned that a criminal defendant who exercised racially discriminatory peremptory challenges inflicted the same harms that were addressed by *Batson*.[67] When a defendant excludes jurors based on race, individual jurors are harmed by being potentially subjected to "open and public racial discrimination."[68] Furthermore, whether discriminatory challenges are raised by the prosecution or the defense, excluding jurors on account of race undermines public confidence in the American judicial system, especially in race-related crime cases.[69] Justice Blackmun concluded that public confidence in the criminal justice system is undermined by the use of racially discriminatory peremptory challenges when an acquittal is obtained, just as much as when a conviction is obtained.[70]

2. Does a criminal defendant's exercise of peremptory challenges constitute state action?

In deciding whether the exercise of peremptory challenges by a criminal defendant constitutes a state action, the Court applied the two-prong test it stated in *Edmonson v. Leesville Concrete Co.*[71] According to *Edmonson*, the first inquiry is "whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority."[72] As in *Edmonson*,[73] the *McCollum* Court found that peremptory challenges satisfy this requirement since state laws provide the right and scope of peremp-

65 *Id.*

66 *Id.*

67 *Id.* at 2353-54.

68 *Id.* at 2353.

69 *Id.* at 2354. ("In such cases, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is essential for preserving community peace in trials involving race-related crimes.")

70 *Id.*

71 111 S. Ct. 2077, 2082-87 (1991) (holding that the exercise of peremptory challenges by civil litigants constituted state action for purposes of the Equal Protection Clause). The Court adopted the test from Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982), which held that a corporate creditor and its president acted under color of state law in depriving debtor of property through state action.

72 *Edmonson*, 111 S. Ct. at 2082-87 (quoting *Lugar*, 457 U.S. at 939).

73 *Id.* at 2083.

tory challenges.[74]

The second inquiry is "whether the private party charged with the deprivation can be described as a state actor."[75] In deciding whether a defendant is a state actor, the Court relied on three factors: 1) "the extent to which the actor relies on governmental assistance and benefits;" 2) "whether the actor is performing a traditional government function," and 3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[76]

As to the first factor, Justice Blackmun determined that the criminal defendant in *McCollum* relied on "governmental assistance and benefits" which were equivalent to the assistance and benefits provided to the civil litigants in *Edmonson*.[77] Justice Blackmun stated that the *Edmonson* Court determined that by enforcing a racially discriminatory peremptory challenge in a civil context the Court has chosen to place its " 'power, property and prestige behind the [alleged] discrimination.' "[78] The Court would similarly enforce peremptory challenges in a criminal context, even those raised by criminal defendants.

Furthermore, in examining whether the actor is performing a traditional government function, the Court found that the selection of a jury in a criminal case "fulfills a unique and constitutionally compelled government function."[79] The Sixth Amendment mandates an impartial jury for criminal defendants.[80] Thus, peremptory challenges in a criminal case perform a more compelling traditional function than peremptory challenges in civil cases. Furthermore, Justice Blackmun concluded that the State cannot avoid its constitutional responsibility to ensure an impartial jury by delegating an essentially public function to private parties.[81]

Finally, the Court analyzed whether the injury caused by the private party is aggravated by the incidents of governmental authority. The Court found that the injury to a juror, who is challenged on

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74 Georgia v. McCollum, 112 S. Ct. 2348, 2355 (1992).

75 *Id.* (quoting *Lugar* , 457 U.S. at 941-42).

76 *Id.* (citing *Edmonson*, 111 S. Ct. at 2083).

77 *Id.* The Court in *Edmonson* determined that the "government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. . . . Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose." *Edmonson*, 111 S. Ct. at 2184-85.

78 *Id.* (quoting *Edmonson*, 111 S. Ct. at 2084 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

79 *Id.*

80 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .").

81 *McCollum*, 112 S. Ct. at 2355-56.

the basis of race, is intensified in the courtroom setting because the actions will be attributed to the state, no matter who excused the jurors.[82]

The Court reasoned that the holding in *Polk County v. Dodson*,[83] which stated that a public defender does not qualify as a public actor when engaged in the general representation of a criminal defendant, did not preclude a finding of state action.[84] Rather, when performing a peremptory challenge, the defendant, though a private body, is still choosing a jury, which is "a quintessential government body."[85] As in *Edmonson*, a private body must be held to the "constitutional mandate of race neutrality" when the government has conferred the power to choose the jury onto it.[86] Furthermore, the Court found that the defendant's private interest in being acquitted does not conflict with a finding of state action.[87]

3. Do prosecutors have standing to raise a constitutional challenge to a defendant's action?

Once the Court found that *McCollum* involved the same harm as *Batson* and that the actions of the defendant constituted a state action, the Court turned to the question of whether the prosecution had standing to raise a constitutional challenge to the defendant's actions on behalf of the excluded jurors.[88] The Court used the three-prong test from *Powers v. Ohio*[89] to determine that the State had standing to sue as a third party.[90] The three prongs were: 1) whether the State has suffered a concrete injury; 2) whether the State has a close relationship to the excluded juror; and 3) whether the excluded juror was hindered from protecting his or her own

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82 *Id.* at 2356. In *Edmonson*, the Court noted that "[f]ew places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. . . . Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991) (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979)). The Court in *Powers* likewise noted that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." Powers v. Ohio, 111 S. Ct. 1364 (1991).

83 454 U.S. 312 (1981).

84 *McCollum*, 112 S. Ct. at 2356.

85 *Id.*

86 *Id.* (quoting *Edmonson*, 111 S. Ct. at 2085).

87 *Id.* at 2355-57.

88 *Id.* at 2357.

89 111 S. Ct. 1364, 1370-71 (1991) (holding that a Caucasian criminal defendant has standing to raise the equal protection rights of potential African-American jurors excluded from a jury on account of race).

90 *McCollum*, 112 S. Ct. at 2357.

interests.[91]

The Court found that the State met all three prongs of the *Powers* test.[92] First, the State suffered a concrete injury since the fairness and integrity of its own judicial process was undermined.[93] Second, the Court found a close relationship existed between an excluded juror and the State. For example, during *voir dire*, a relationship is forged between the juror and the State.[94] Furthermore, the State is the representative of its citizens and hence the logical party to assert a violation of constitutional rights.[95] Finally, the Court found that the barriers for excluded jurors to bring a claim to court were as daunting as the barriers for jurors in *Powers*[96] or *Edmonson*.[97] Since a suit requires an immense expenditure of time and money, and does not guarantee a favorable outcome in return for the juror's effort, the excluded jurors would be effectively hindered from protecting their own interests. Given that the State satisfied all three prongs of the *Powers* test, the Court held that the State had standing to raise a constitutional challenge to the defendant's actions.[98]

4. Do the constitutional rights of criminal defendant's preclude extension of precedents?

In deciding whether the interests served by *Batson* should give way to a defendant's rights, the Court first established that peremptory challenges are not guaranteed constitutional rights; rather, they are "but one state-created means to the constitutional end of an im-

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91 *Id.*

92 *Id.*

93 *Id.* The *McCollum* Court did not explain exactly how the judicial process was undermined. However, in *Powers*, the Court found that the "purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict or conviction is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Powers*, 111 S. Ct at 1372.

94 *McCollum*, 112 S. Ct. at 2357 (quoting *Powers*, 111 S. Ct. at 1372). The *Powers* Court further noted that a "rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard." *Powers*, 111 S. Ct. at 1372.

95 *McCollum*, 112 S. Ct. at 2357.

96 *Powers*, 111 S. Ct. at 1364. The *Powers* Court found that the barriers for a juror to bring suit included difficulty in obtaining declaratory or injunctive relief when discrimination occurs; difficulty in "showing a likelihood that discrimination against him in the *voir dire* state will recur;" and the great economic burdens of litigation versus the small financial stake involved. *Id.* at 1373.

97 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that a civil litigant has standing to raise the equal protection rights of potential African-American jurors excluded from a jury on account of race).

98 *McCollum*, 112 S. Ct. at 2357.

partial jury and fair trial."[99] Furthermore, the right to a peremptory challenge may be withheld without impairing the constitutional guarantee of an impartial jury and fair trial.[100] Therefore, Justice Blackmun argued, the *McCollum* decision would not impede the administration of justice, nor violate a defendant's Sixth Amendment rights.[101] While the Court recognized the importance of peremptory challenges, it argued that defense counsel is limited to "legitimate, lawful conduct."[102] Moreover, the Court argued that it is an "affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based on their race."[103] The Court also found that a prohibition on race-based peremptory challenges does not violate a defendant's right to effective assistance of counsel.[104] Since defense counsel can usually explain the reason for exercising a peremptory challenge without revealing strategy, the prohibition on racially motivated peremptory challenges would not impair an attorney's defense tactics.[105]

Finally, the Court held that prohibiting race-based peremptory challenges does not violate a defendant's Sixth Amendment right to a fair trial by an impartial jury.[106] Justice Blackmun distinguished between challenging a juror solely on account of race, which is unacceptable discrimination, and challenging a juror who harbors racial prejudice, which is a legitimate use of the peremptory challenge for cause.[107] Assumptions of partiality based on race are not a legitimate basis to disqualify a potential juror.[108] To decide otherwise, the Court would be accepting "as a defense to racial discrimination the very stereotype the law condemns."[109] Hence, the Court reaffirmed that a peremptory challenge should not be based on either the race of the juror or the racial stereotypes held by the challenging party.[110]

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99 *Id.* at 2357-58.
100 *Id.* at 2358 (citing Frazier v. United States, 335 U.S. 497, 505 n.11 (1948)).
101 *Id.*
102 *Id.* (quoting Nix v. Whiteside, 475 U.S. 157, 166 (1986)).
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 2358-59.
108 *Id.* at 2359.
109 *Id.* (quoting Powers v. Ohio, 111 S. Ct. 1364, 1370 (1991)).
110 *Id.* at 2359.

B. THE CONCURRING OPINIONS

1. Chief Justice Rehnquist's Concurrence

Chief Justice Rehnquist joined in the opinion of the Court, but also filed a short concurring opinion,[111] reaffirming his dissent in *Edmonson v. Leesville Concrete Co.*[112] Though he continued to believe that *Edmonson* was wrongly decided, Chief Justice Rehnquist believed that *Edmonson* controlled the disposition of this case on the issue of "state action" under the Fourteenth Amendment.[113]

2. Justice Thomas' Concurrence

In his separate opinion, Justice Thomas also concurred in the judgment of the Court, agreeing with Chief Justice Rehnquist that *Edmonson* governed this case.[114] Justice Thomas, however, believed that the Court was getting too involved in limiting peremptory challenges.[115] Justice Thomas looked back to *Strauder v. West Virginia*,[116] in which the Court struck down a statute that prohibited African-Americans from sitting on juries.[117] Part of the Court's rationale behind striking down the statute was the belief that jurors could, and did, harbor prejudices. Thomas argued that peremptory challenges could have helped prevent that potential problem.[118] He argued that the departure from that belief has had negative consequences.[119]

First, Justice Thomas argued that the majority decision exalted the right of jurors to sit on a trial over the right of a defendant who faced imprisonment or even death.[120] While Justice Thomas recognized that the decision protected jurors, he also argued that defendants were left unprotected against racial animus.[121] Second, Justice Thomas characterized this decision as a slippery slope toward eliminating peremptory challenges altogether.[122] He predicted that in

111 *Id.* (Rehnquist, C.J., concurring).

112 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting). Chief Justice Rehnquist joined the dissent of Justice O'Connor, who argued that a peremptory strike by a private litigant is fundamentally a private choice and not state action.

113 *McCollum*, 112 S. Ct. at 2359 (Rehnquist, C.J., concurring).

114 *Id.* (Thomas, J., concurring).

115 *Id.* (Thomas, J., concurring).

116 100 U.S. 303 (1879).

117 *McCollum*, 112 S. Ct. at 2359-60 (Thomas, J., concurring).

118 *Id.* at 2360 (Thomas, J., concurring).

119 *Id.* (Thomas, J., concurring).

120 *Id.* (Thomas, J., concurring).

121 *Id.* (Thomas, J., concurring) ("Unless jurors actually admit prejudices during *voir dire*, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict.").

122 *Id.* (Thomas, J., concurring).

the future the Court may have to decide whether African-American defendants may strike Caucasian venirepersons, or whether parties may exercise peremptory challenges based on sex.[123] Justice Thomas concluded that whatever benefits the Court had previously found for having members of a criminal defendant's race on his or her jury[124] had evaporated with this decision.[125]

C. THE DISSENTING OPINIONS

1. Justice O'Connor's Dissent

Justice O'Connor dissented primarily on the ground that criminal defendants are not state actors, and thus, the Constitution does not prevent defendants from acting in a racially discriminatory manner while performing a traditional trial function.[126] Therefore, according to Justice O'Connor, the State's claim should have been rejected.[127]

Justice O'Connor accepted the two-part test announced in *Lugar v. Edmondson Oil Co.*,[128] but argued that a criminal defendant cannot be deemed a state actor.[129] She referred to *Polk County v. Dodson*,[130] in which the Court reasoned that public defenders performing traditional defense functions were not state actors because they were acting as defense attorneys in other relevant respects.[131] She pointed out the absurdity of having defendants and their counsel "transmogrify" from governmental adversaries into state actors when they exercised peremptory challenges, and then back again into non-state actors when they performed other defense functions.[132]

Furthermore, while Justice O'Connor reasserted her dissent in

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123 *Id.* at 2360-61 (Thomas, J., concurring). Justice Thomas did not predict the outcomes of such cases.

124 Justice Thomas referred to the *Strauder* decision where the Court found that, due to prejudices in a community, compelling an African-American to "submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone," was a denial of equal protection. Strauder v. West Virginia, 100 U.S. 303, 309-10 (1879).

125 *McCollum* 112 S. Ct. at 2361 (Thomas, J., concurring).

126 *Id.* (O'Connor, J., dissenting). Justice O'Connor dissented for similar reasons in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2089-95 (1991) (O'Connor, J., dissenting).

127 *McCollum*, 112 S. Ct. at 2361 (O'Connor, J., dissenting).

128 457 U.S. 937 (1982).

129 *McCollum*, 112 S. Ct. at 2361-63 (O'Connor, J., dissenting).

130 454 U.S. 312 (1981).

131 *McCollum*, 112 S. Ct. at 2361-62 (O'Connor, J., dissenting).

132 *Id.* at 2362 (O'Connor, J., dissenting).

the *Edmonson*[133] decision, she still found the present case distinguishable.[134] During the jury selection process, she reasoned, civil litigants do not have an adversarial relationship and they work toward the same end.[135] However, this is not true in criminal cases. A criminal defendant seeks to strike jurors predisposed to convict, while the State seeks to strike jurors who are predisposed to acquit.[136]

Justice O'Connor further argued that the result sought by the majority may, in fact, backfire. Rather than achieving nondiscriminatory criminal justice, the loss of peremptory challenges may decrease the chance to secure minority representation on the jury.[137] In support of her assertion, Justice O'Connor referred to the NAACP amicus brief, which argued that the only way for a minority defendant to ensure adequate minority representation was to use peremptory challenges to strike members of the majority race.[138]

2. *Justice Scalia's Dissent*

Justice Scalia delivered a separate dissent, in which he agreed with Justice O'Connor that a criminal defendant does not act on behalf of the state.[139] He differed from her reasoning in that he did not believe *Edmonson* was distinguishable in principle.[140] Justice Scalia further asserted that the "activist, 'evolutionary' constitutional jurisprudence" did not promote greater individual rights, but instead, destroyed the "ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair."[141]

V. ANALYSIS

With the *McCollum* decision, the Supreme Court has further limited the statutory right to exercise peremptory challenges. The Court began its attack on peremptory challenges by finding that the exercise of a peremptory challenge by a criminal defendant is con-

133 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2089 (1991) (O'Connor, J., dissenting).

134 *McCollum*, 112 S. Ct. at 2363 (O'Connor, J., dissenting).

135 *Id.* (O'Connor, J., dissenting) (quoting *Edmonson*, 111 S. Ct. at 2086).

136 *Id.* (O'Connor, J., dissenting).

137 *Id.* at 2364 (O'Connor, J., dissenting).

138 *Id.* (O'Connor, J., dissenting) (quoting Brief of the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae Seeking Reversal, 9-10, Georgia v. McCollum, 112 S. Ct. 2348 (1992) (No. 91-372) [hereinafter Brief for NAACP]).

139 *Id.* at 2364-65 (Scalia, J., dissenting).

140 *Id.* at 2365 (Scalia, J., dissenting).

141 *Id.* (Scalia, J., dissenting).

sidered a state action.[142] The majority correctly extended prior decisions which had established that the exercise of peremptory challenges constituted state action when exercised by prosecutors[143] and civil litigants.[144] The Court also properly found that a prosecutor has standing to bring a suit on behalf of jurors, by extending prior decisions which had granted standing to defendants[145] and civil litigants[146] on behalf of the jurors challenged on the basis of race. Finally, the Court sealed the fate of peremptory challenges when it found that a juror's constitutional right to equal protection trumps a criminal defendant's statutory right to exercise a peremptory challenge without any restrictions.[147] Essentially, the Court, in balancing the jurors' rights to equal protection with the defendant's Sixth Amendment right to a fair trial, found that a fair trial does not include a right to unfettered peremptory challenges.[148] As a result of the limitations on peremptory challenges permitted by the Court in *McCollum*, this Note argues that the Court is apt to further limit the exercise of peremptory challenges in the future.

A. THE COURT CORRECTLY DECIDED THAT THE EXERCISE OF A PEREMPTORY CHALLENGE BY A DEFENDANT IS A STATE ACTION

The Equal Protection Clause of the Constitution[149] applies only to government actions.[150] Racial discrimination, though offensive in other ways, violates the Constitution only when it is attributed to state action.[151] As a dispositive issue, the Court needed to inquire whether the exercise of a peremptory challenge was, in fact, a state action.

The landmark *Batson*[152] decision did not expressly address the state-action issue since it appeared self-evident that a prosecutor

142 *Id.* at 2355-57.
143 Batson v. Kentucky, 476 U.S. 79 (1986).
144 *See Edmonson*, 111 S. Ct. 2077.
145 *See Batson*, 476 U.S. 79.
146 *Edmonson*, 111 S. Ct. 2077 (1991).
147 Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992).
148 *Id.* at 2359.
149 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
150 Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Id.* at 191 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).
151 *Id.*; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).
152 Batson v. Kentucky, 476 U.S. 79 (1986).

was a state actor. In contrast, the defendant in *McCollum* acted on his own behalf and in his own defense. It is not as self-evident that in this context the defendant's act of exercising a peremptory challenge constitutes state action within the same meaning.

On the surface, the Court's conclusion that the criminal defendant in *McCollum* was a state actor seems disingenuous. However, the Court was bound by its prior decision in *Edmonson.*[153] The *McCollum* Court essentially held that the mere exercise of the peremptory challenge constituted state action.[154] In the civil case of *Edmonson,* the Court used the two-prong *Lugar*[155] test to conclude that a state action exists when a civil litigant exercises a peremptory challenge.[156] The emerging focus was thus on the excluded juror, rather than the litigant. The *McCollum* Court followed the *Edmonson* decision, utilizing the *Lugar* two-part analysis,[157] and found that the exercise of a peremptory challenge by a criminal defendant was likewise a state action.

The majority easily satisfied the first inquiry, namely that the exercise of the right to a peremptory challenge had its source in state authority.[158] As in *Edmonson,* the Court found that the legislature both authorized and limited the use of peremptory challenges.[159] Furthermore, peremptory challenges exist only in the courtroom and are only permitted when the government, by statute or decisional law, deems it appropriate to allow parties to exclude otherwise qualified persons from the jury.[160] Thus, the majority logically analogized the peremptory challenge in a civil case, such as *Edmonson,* to a peremptory challenge exercised in a criminal case.

The Court then met the second inquiry, that the defendant can be described as a state actor, by following the three principles applied in the civil case of *Edmonson.*[161] In her dissent, however, Jus-

153 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082-87 (1991) (holding that civil litigants are state actors when exercising peremptory challenges).

154 Georgia v. McCollum, 112 S. Ct. 2348, 2354-57 (1992).

155 Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1991) ("The first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as 'state actors.' "). *See supra* notes 71-87 and accompanying text.

156 *Edmonson,* 111 S. Ct. at 2082-87.

157 *See* Mark L. Josephs, *Fourteenth Amendment—Peremptory Challenges and the Equal Protection Clause,* 82 J. CRIM L. & CRIMINOLOGY 1000, 1012-18 (1992), for a comparison and critique of the various possible state action tests.

158 Georgia v. McCollum, 112 S. Ct. 2348, 2355 (1992).

159 *Edmonson,* 111 S. Ct. at 2083.

160 *Id.*

161 *McCollum,* 112 S. Ct. at 2355.

tice O'Connor strenuously argued that the majority could not square this decision with *Polk County v. Dodson*.[162] In *Dodson*, the Court held that a public defender does not act under color of state law when performing a lawyer's traditional function in representing an indigent defendant in state criminal proceedings.[163] Justice O'Connor found it hard to believe "that defendants and their lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions."[164] The majority in *McCollum* correctly countered that the *Dodson* court did not hold that a public defendant never acts as a state actor.[165] According to the majority, the specific actions of the public defendant in *Dodson* were adversarial; when exercising a peremptory challenge, however, a public defender is acting as a state actor.[166] It is conceivable that when participating in different parts of a trial, a lawyer may perform different functions.

Justice O'Connor's attempts to distinguish the civil *Edmonson* case from the present *McCollum* criminal case also fail because the governmental benefits and authority require a finding of state action. She correctly points out that the interests of the criminal defendant and the State are at odds during a criminal trial.[167] While the defendant seeks to strike jurors predisposed to convict, the State seeks to strike jurors predisposed to acquit.[168] Justice O'Connor correctly reasoned that the defense and the State's motives and interests differ. However, after the *Edmonson*[169] decision, the Court was bound to find that a challenge is still a state action when exercised by any party to a criminal or civil case.

B. THE COURT PROPERLY EXPANDED STANDING IN EQUAL PROTECTION CLAIMS TO INCLUDE ALL RELEVANT PARTIES IN CRIMINAL AND CIVIL TRIALS

The Court in *Batson* did not decide the issue of non-party standing since the defendant raised his own equal protection rights to prevent the prosecutor from exercising a racially discriminatory per-

162 *Id.* at 2361-62 (O'Connor, J., dissenting) (citing Polk County v. Dodson, 454 U.S. 312 (1981)).

163 *Dodson*, 454 U.S. at 320-25.

164 *McCollum*, 112 S. Ct. at 2362 (O'Connor, J., dissenting).

165 *Id.* at 2356.

166 *Id.*

167 *Id.* at 2362-63 (O'Connor, J., dissenting).

168 *Id.* at 2363 (O'Connor, J., dissenting).

169 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2082-87 (1991).

emptory challenge.[170] In *McCollum*, the Court had to decide if the government had standing to raise the Fourteenth Amendment equal protection rights of the excluded jurors. This Note argues that the Court properly relied on *Powers v. Ohio*[171] and *Edmonson v. Leesville Concrete Co.*[172] to award the government standing.

In *Powers*, a criminal defendant successfully sought standing to assert the excluded jurors' equal protection rights.[173] In *Edmonson*, the Court likewise found that a civil litigant had standing to bring a claim on behalf of excluded jurors.[174] Both cases demonstrate the Court's emerging focus on jurors' rights. The Court continued this emphasis in *McCollum*. Although both *Powers* and *McCollum* dealt with a non-government party, the three-part *Powers*[175] test should be applicable to the government by analogy. The *McCollum* Court properly found that the State had met the three prongs of *Powers* since: 1) the State had suffered a concrete injury, in that the fairness and integrity of the judicial process were undermined; 2) the State had a close relationship to the excluded juror; and 3) the excluded jurors were hindered from protecting their own interests and thus properly relied on the State to protect their rights.[176]

The *McCollum* decision did not depart from the Court's recent decisions about standing in peremptory challenge cases. The radical departure from the standing doctrine occurred in *Powers v. Ohio*,[177] in which a Caucasian defendant raised the equal protection rights of excluded African-Americans. This approach reached beyond prior cases such as *Batson*, which dealt with the equal protection rights of the defendant himself. The Court in *Powers* determined that the "cognizable injury" to the defendant was the perceptions of unfairness in the judicial process.[178] Justice Scalia, in his dissent in *Powers*, criticized the majority's tenuous findings and argued that the perception of unfairness was not an "injury in fact" to the defendant.[179] He argued that the defendant has suffered a cognizable injury only because the Court "made it true by saying so."[180] Yet, once the *Powers* decision departed from the historical

170 Batson v. Kentucky, 476 U.S. 79 (1986).
171 111 S. Ct. 1364 (1991).
172 111 S. Ct. 2077 (1991).
173 *Powers*, 111 S. Ct. at 1370-73.
174 *Edmonson*, 111 S. Ct. at 2087-88.
175 *Powers*, 111 S. Ct. at 1370-71. The three-part test is taken directly from Singleton v. Wulff, 428 U.S. 106 (1976).
176 Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992).
177 111 S. Ct. 1364, 1366 (1991).
178 *Id.* at 1371.
179 *Id.* at 1379 (Scalia, J., dissenting).
180 *Id.* at 1380 (Scalia, J., dissenting).

standing doctrine by attenuating the "injury-in-fact" requirement, the Court did not have to wander far to find standing for the defendant in *McCollum*. Whether or not the Court was correct in *Powers*, the Court clearly indicated its intention to be consistent in *McCollum*.

The reasons the Court found standing for a criminal defendant in *Powers* and a civil litigant in *Edmonson* are even stronger for the State in *McCollum*. The State suffers a greater injury than a criminal defendant since the State's judicial process is undermined if citizens, and jurors in particular, question the system's integrity. Furthermore, the State has a closer relationship with the jurors than do the defendants or civil litigants since both the jury and the State are supposed to represent citizens as a whole.[181] Finally, the barriers for a juror to bring his own suit are as daunting as the majority claims.[182] There is little chance that a juror would expend the time and energy to bring a suit for being struck from jury duty.[183]

C. THE COURT ELEVATES A JUROR'S EQUAL PROTECTION RIGHTS OVER A CRIMINAL DEFENDANT'S STATUTORY RIGHT TO EXERCISE PEREMPTORY CHALLENGES

The Sixth Amendment guarantees a criminal defendant the right to a fair and impartial jury.[184] *Batson* protected criminal defendants by disabling prosecutors from exercising peremptory challenges with discriminatory intent.[185] The Court held that the defendant had the right to ask that a prosecutor give a race-neutral reason for excluding a juror so that the defendant could be satisfied that an impartial jury had been chosen.[186] In *McCollum*, the criminal defendant did not complain about the lack of a fair trial; rather the State alleged that the defendant was improperly excluding jurors.[187]

The criminal justice system places fairness at a premium for the criminal defendant. Justice Thomas aptly argued that the defendant is the one who faces an extended jail term and perhaps even death.[188] Thus, the defendant typically gets the benefit of the doubt in a criminal trial. For instance, the State must carry the burden of proving a defendant is guilty beyond a reasonable doubt. The sys-

181 Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992).
182 *Id.*
183 However, a juror who is repeatedly stricken during the peremptory challenge stage on account of race may be angered enough to bring a civil suit.
184 U.S. CONST. amend. VI.
185 Batson v. Kentucky, 476 U.S. 79 (1986).
186 *Id.*
187 Georgia v. McCollum, 112 S. Ct. 2348, 2351 (1992).
188 *Id.* at 2360 (Thomas, J., concurring).

tem would rather acquit a guilty person than convict an innocent person.[189] Through such criminal procedures, the system often protects the defendant.

In contrast, the rights of jurors are not as well-protected. The Constitution does not guarantee a juror the right to sit on a particular petit jury.[190] Over a century ago, the Supreme Court held it unconstitutional to prevent African-Americans from participating in jury service after a defendant sought to maintain representation of his race on the jury in order to overcome potential racial bias.[191] The *Strauder* decision emphasized that racial bias often exists in juries and can harm a criminal defendant.[192] Justice Thomas argued that the majority's decision in *McCollum* would lead to negative consequences by disregarding the *Strauder* findings.[193] A defendant no longer has the unfettered right to challenge a juror whom he or she feels may harbor racial animus.[194] The result could harm criminal defendants in that jurors who harbor racial prejudice against the defendant may not be automatically struck from the jury.[195]

Justice Scalia, in his dissent in *Powers,* argued that the basis for prior equal protection cases "was that the State had violated the *defendant's* right to equal protection, because it had excluded jurors of *his* race."[196] The Court changed the emphasis from the defendant to the juror, when it allowed standing for the defendant in *Powers,* and now *McCollum,* to raise the equal protection rights of excluded jurors.

The Court balanced the equal protection rights of the jurors against the statutory rights of defendants to exercise peremptory challenges and correctly found that the jurors' rights should prevail. Although the potential injury is greater to a defendant than to an

189 "[T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

190 Holland v. Illinois, 493 U.S. 474 (1989) (venire, not petit jury, must represent fair cross section of the community).

191 Strauder v. West Virginia, 100 U.S. 303 (1879) (The State denies an African-American equal protection when put on trial before a jury from which members of his race have been purposely excluded).

192 *Id.* at 309.

193 Georgia v. McCollum, 112 S. Ct. 2348, 2360 (1992) (Thomas, J., concurring).

194 Although the defendant may challenge a juror for cause if the juror expresses racial prejudice, jurors often do not vocalize such prejudice. The defendant no longer has the "luxury" of using peremptory challenges freely to remove jurors suspect of harboring racial prejudice. Rather, the defendant now has the more difficult burden of proving cause or vocalizing a race-neutral reason for exercising a peremptory challenge.

195 *McCollum,* 112 S. Ct. at 2360 (Thomas, J., concurring).

196 Powers v. Ohio, 111 S. Ct. 1364, 1375 (1991) (Scalia, J., dissenting).

improperly excluded juror, the Court properly heeded the Fourteenth Amendment command that persons are entitled to equal protection under the law.[197] Racial discrimination is not to be tolerated by state actors. Jurors do not expect to be discriminated against, especially in a court of law. Even when the defendant excludes a juror, it appears that the State and the court are condoning the challenge because the challenge occurs in a courtroom and the judge orders the juror to leave. This constitutes significant participation on the part of the State, contrary to Justice O'Connor's contention in her *Edmonson* dissent.[198] If a peremptory challenge is exercised on the basis of race, the action is logically attributed to the criminal justice system, regardless of who exercised the challenge. The entire legitimacy of the criminal system thus is questioned.

D. THE COURT WILL LIKELY EXTEND THE *McCOLLUM* DECISION TO COVER MINORITY DEFENDANTS AS WELL

In its amicus brief, the NAACP urged that *McCollum* be limited to the facts of the case.[199] The NAACP argued that in situations where the defendant is a minority, the defendant should have the right to strike jurors of the majority race.[200] Cases of minority defendants striking jurors of the majority race may come again to the Court's attention.[201]

Several reasons exist for limiting the decision of this case to

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197 The Fourteenth Amendment states in part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

198 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2090 (1991) (O'Connor, J., dissenting) (federal government's participation in the peremptory process does not indicate that government is responsible for the potential discrimination).

199 Brief for NAACP, *see supra* note 138, at 5.

200 *Id.* at 11-12.

201 Since the *McCollum* decision, the United States Supreme Court has already granted certiorari in such a case. Georgia v. Carr, 113 S. Ct. 30 (1992). The Georgia Supreme Court had previously allowed its decision in State v. McCollum, 405 S.E.2d 688 (Ga. 1991), to control its decision to allow minority defendant to use race-based peremptory challenges against Caucasians. State v. Carr, 413 S.E.2d 192 (Ga. 1992), *cert. granted*, 113 S. Ct. 30 (1992) (No. 91-1493). The United States Supreme Court vacated the lower court's decision and remanded the case to the Supreme Court of Georgia for further consideration in light of *Georgia v. McCollum*. *Carr*, 113 S. Ct. 30 (1992). Furthermore, in applying *Georgia v. McCollum* to a similar case with Caucasian jurors, the Supreme Court of Louisiana held that the constitutional prohibition against exercise of racially-based peremptory challenges does extend to African-American defendants who challenge prospective Caucasian jurors. State v. Knox, 609 So. 2d 803 (La. 1992). Further appeals in these or other similar cases could potentially lead to the United States Supreme Court.

Caucasian defendants only. First, racial prejudice against minorities still exists in our society. Second, it is much easier, logistically, for a party to strike all minority jurors than all majority jurors. Third, as Justice O'Connor pointed out in her dissent, racism can affect how white jurors perceive minority defendants and the facts at trial.[202] For example, attorneys often rely on "seat of the pants instinct" in choosing when to exercise a peremptory challenge.[203] Such instincts are ordinarily insufficient to prove cause.[204] As Justice Blackmun argued in the majority opinion, if a juror blatantly admits prejudice, then he or she is excused for cause.[205] However, seldom is a juror so forthcoming. Most importantly, inquisition by the Court into a venireperson's racial prejudices is *not* constitutionally mandated.[206] As a result, a criminal defendant may be left with few tools to choose a petit jury that he or she feels is completely impartial.

Justice Scalia argued in *Edmonson v. Leesville Concrete Co.* that prohibiting a defendant from exercising peremptory challenges based on race would result in a "net loss" for all minority litigants.[207] The practical effect of such a decision, for example, could be to prevent minority defendants from seating jurors of their own race.[208] In cases where a minority defendant faces a venire in which his racial group is under-represented, the defendant may need to strike jurors of the majority race in order to maintain minority representation on the jury.[209] It is important to remember, however, that while the Constitution mandates an impartial jury for a criminal defendant, it does not entitle a criminal defendant to a partial jury in his or her favor. The Court has repeatedly stated that it is a false assumption that African-Americans as a group are not qualified to serve as jurors,[210] and it would be consistent for the Court to make the same conclusions regarding Caucasians as a group.

There is little reason to believe, however, that the Supreme

202 Georgia v. McCollum, 112 S. Ct. 2348, 2364 (1992) (O'Connor, J., dissenting).

203 Batson v. Kentucky, 476 U.S. 79, 138 (1986) (Rehnquist, J., dissenting).

204 *Id.* at 105-07 (Marshall, J., dissenting).

205 *McCollum*, 112 S. Ct. at 2358-59.

206 Ristaino v. Ross, 424 U.S. 589 (1975) (*Voir dire* questioning directed to racial prejudice is not constitutionally required).

207 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting) ("[T]he minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible.").

208 *Id.* (Scalia, J., dissenting).

209 Brief for the NAACP, *see supra* note 138, at 9-11.

210 *See* Powers v. Ohio, 111 S. Ct. 1364, 1367 (1991); Batson v. Kentucky, 476 U.S. 79, 86 (1986); Norris v. Alabama, 55 U.S. 587, 599 (1935).

Court will retreat from the precedents of *Batson*,[211] *Powers*,[212] *Edmonson*,[213] and now *McCollum*.[214] In preventing prosecutors from using race-based peremptory challenges against minorities, the Court in *Batson* claimed it was following its "unceasing efforts to eradicate racial discrimination in the *procedures* used to select the venire from which individual jurors are drawn."[215] The decision in *Powers*, to extend *Batson* to prevent striking minority jurors in criminal trials of Caucasian defendants, implied that it is the juror's right to equal protection—not the defendant's—that is of primary concern. The *Powers* Court held that "[a]n individual juror does not have the right to sit on a particular jury, but he or she does possess the right not to be excluded from one on account of race."[216] This tenet was referred to in the majority opinion of *McCollum* as well.[217]

Despite the potential harms to the minority defendant, comments from Supreme Court justices indicate the Court is likely to extend the *McCollum* decision to cases with minority defendants. Justice Scalia, in his dissent in *Edmonson*, predicted that the *Edmonson* decision would extend to minority defendants in criminal trials.[218] Likewise, Justice Thomas, in a footnote in his dissent in *McCollum*, recognized the NAACP's arguments but stated that "it is difficult to see how the result could be any different if the defendants here were black."[219] The majority decision of *McCollum* argued that "it is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race."[220] Though McCollum involved a Caucasian defendant, the Court's reasoning would apply no matter what race the defendant is, for to do otherwise would be to discriminate against Caucasians based on race.[221]

VI. CONCLUSION

The *McCollum* Court addressed an important issue left open by

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211 *Batson*, 476 U.S. 79.
212 *Powers*, 111 S. Ct. 1364.
213 *Edmonson*, 111 S. Ct. 2077.
214 Georgia v. McCollum, 112 S. Ct. 2348 (1992).
215 *Batson*, 476 U.S. at 85 (emphasis added).
216 *Powers*, 111 S. Ct. at 1370.
217 *McCollum*, 112 S. Ct. at 2353.
218 Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2095 (1991) (Scalia, J., dissenting).
219 *McCollum*, 112 S. Ct. at 2360 n.2 (Thomas, J., dissenting).
220 *Id.* at 2358 (Thomas, J., dissenting).
221 The Supreme Court may soon decide whether or not parties to civil and criminal cases may exercise peremptory challenges based on gender; currently, the circuits are split on this issue. This issue, however, is beyond the scope of this Note.

the Court in *Batson v. Kentucky*. The issue required a balancing of a juror's equal protection rights and a defendant's right to a fair trial. *McCollum* has now essentially placed the juror's right to equal protection above the rights of a criminal defendant. This Note argues that the majority's decision to extend *Batson* and *Edmonson* will have great implications for future criminal and civil cases. For example, the exercise of peremptory challenges by any party to a criminal or civil trial will now be considered a state action, and all parties in both civil and criminal trials will have standing to bring a claim on behalf of jurors. Furthermore, limits on the use of peremptory challenges will likely be extended in the future, to include cases where the defendant is a racial minority and the jurors are Caucasian. Though this decision may potentially harm defendants, the Court acted properly in preserving the integrity of the criminal trial by prohibiting a court from condoning discrimination.

MICHELE A. GEMSKIE