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Criminal Procedure - United States v. De Gross: The Ninth Circuit Expands Restrictions on a Criminal Defendant's Right to Exercise Peremptory Challenges

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CRIMINAL PROCEDURE

UNITED STATES v. DE GROSS: THE NINTH CIRCUIT EXPANDS RESTRICTIONS ON A CRIMINAL DEFENDANT'S RIGHT TO EXERCISE PEREMPTORY CHALLENGES

I. INTRODUCTION

In *United States v. De Gross*,¹ the Ninth Circuit held that a criminal defendant's exercise of a peremptory challenge² based solely on the gender of the venireperson violates the potential juror's rights to equal protection under the Due Process Clause of the Fifth Amendment.³

The Ninth Circuit's decision represents a step forward in restraining purposeful discrimination in the exercise of peremptory challenges. In *De Gross*, the court expanded upon the reasoning of the United States Supreme Court's decision in *Batson v. Kentucky*.⁴ The court recognized that the Fifth Amendment's

1. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992) (per Wallace, C.J.; the other panel members were Hug, J., Tang, J., Schroeder, J., Alarcon, J., Nelson, J., Reinhardt, J., Beezer, J., Wiggins, J., Rymer, J., and Fernandez, J.).

2. A peremptory challenge is the method whereby a litigant can exercise his or her right to challenge a juror without assigning, or being required to assign, a reason for the challenge. FED. R. CRIM. P. 24.

3. U.S. CONST. amend. V, provides in part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law"

The fifth amendment does not contain the "explicit safeguard" of an equal protection clause, as does the fourteenth amendment. Nevertheless, equal protection principles have been consistently derived from the fifth amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

4. 476 U.S. 79 (1986). See *infra* notes 49-63 and accompanying text discussing the *Batson* decision holding that the Constitution forbids peremptory challenges based solely on the race of the venireperson and setting forth a new evidentiary standard that a

equal protection principles regulate only state action and not private conduct.⁵ Reasoning that a criminal defendant becomes a state actor⁶ by invoking the authority of the state when exercising governmental peremptory challenges,⁷ the court concluded that the Fifth Amendment prohibits a criminal defendant's exercise of discriminatory peremptory challenges.⁸

The Ninth Circuit further held that the government has standing⁹ to object to a discriminatory peremptory challenge, based on its own injury¹⁰ as well as the injury to the potential juror.¹¹ The Ninth Circuit also held that equal protection principles effectively prohibit discriminatory peremptory challenges based solely on the gender of the venireperson.¹²

II. FACTS

Juana Espericueta De Gross was convicted of aiding and abetting the transportation of an alien within the United States.¹³ During voir dire,¹⁴ De Gross exercised her first seven

criminal defendant must meet in order to establish a prima facie case of purposeful discrimination against the prosecution's peremptory challenge.

5. "In determining whether an action complained of constitutes 'state action' within purview of [Fifth] Amendment, the court must examine whether a sufficiently close nexus exists between state and challenged action so that the action may fairly be treated as that of the state itself." *Denver Welfare Rights Org. v. Public Util. Comm'n*, 547 P.2d 239, 243 (Colo. 1976).

6. See *infra* notes 90-108 and accompanying text for a discussion of criminal defendants as state actors.

7. *De Gross*, 960 F.2d at 1440-42.

8. *Id.* at 1440.

9. *Id.* at 1436-37.

10. *Id.* at 1436. The government has a legitimate interest in having its criminal prosecutions tried before a jury most likely to produce a fair result. *Singer v. United States*, 380 U.S. 24, 36 (1965). Hence, it follows that the government is injured when the defendant endeavors to secure a partisan jury through discriminatory peremptory strikes. See *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (a defendant is denied due process by circumstances that create the likelihood or the appearance of bias).

11. *De Gross*, 960 F.2d at 1436. Generally, a party must assert his or her own legal rights as another has no standing to raise those interests for the aggrieved. *Powers v. Ohio*, 111 S. Ct. 1364, 1370 (1991). However, a third party may promote the rights of another if the third party's ability to protect his or her own interest will be hindered otherwise. *Id.* at 1371-72.

12. *De Gross*, 960 F.2d at 1438. In reaching this conclusion, the *De Gross* court drew from recent United States Supreme Court decisions holding that the Constitution forbids discriminatory peremptory challenges based solely on the race of the potential juror. See *Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986).

13. *United States v. De Gross*, 960 F.2d 1433, 1435 (9th Cir. 1992). 8 U.S.C. § 1324

peremptory challenges to strike male venirepersons.¹⁵ When De Gross attempted to exercise her eighth peremptory challenge to strike Wendell Tiffany, yet another male venireperson, the government objected, contending that De Gross' pattern of striking males established her discriminatory intent.¹⁶ The government argued that such discriminatory challenges violate the male venireperson's constitutional rights to equal protection of the laws.¹⁷

The district court held that the government established a prima facie case of intentional discrimination, and required that De Gross furnish a non-discriminatory justification for the challenge.¹⁸ When De Gross offered no explanation for the challenge, the court disallowed her peremptory challenge and empaneled Tiffany.¹⁹

After De Gross' challenge of Tiffany, the government peremptorily challenged Herminia Tellez, the only Hispanic on the venire.²⁰ In turn, De Gross objected to this peremptory challenge made by the prosecution, claiming the challenge violated Tellez's constitutional rights under the Fifth Amendment.²¹ The district court likewise required the government to justify its challenge because De Gross had established a prima facie case of discrimination.²² Government counsel explained that the purpose of its peremptory challenge was to attempt to achieve "a more representative community of men and women on the jury."²³ The district court accepted the government's grounds

(1983), prohibits a United States citizen from facilitating the transportation of an alien within the United States.

14. "Voir dire" is the designated phrase for the preliminary examination the court and attorneys make of prospective jurors to determine their competence and qualifications to serve as jurors. Peremptory challenges or challenges for cause may result from such examination. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

15. *De Gross*, 960 F.2d at 1435-36. "Venireperson" is the term designating potential jurors in the jury pool, or the "venire."

16. *Id.* See *infra* notes 109-18 and accompanying text for discussion of discriminatory intent.

17. *Id.* at 1436.

18. *Id.* See *infra* notes 57-59 and accompanying text setting forth the elements of the prima facie case of intentional discrimination under *Batson v. Kentucky*.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* At that point, ten women and two men had been empaneled on the jury, and

for the challenge as non-discriminatory and excused Tellez.²⁴

III. BACKGROUND

A. THE PEREMPTORY CHALLENGE SYSTEM

The Constitution does not guarantee the right to peremptory challenges.²⁵ However, state and federal statutes provide for peremptory challenges in the majority of jurisdictions,²⁶ and courts have long recognized the peremptory challenge as an integral part of the jury selection procedure.²⁷ The United States Supreme Court has stressed the vital role of peremptory challenges in the trial by jury process, stating that the challenge is "one of the most important of the rights secured to the accused."²⁸ The purpose of the peremptory challenge is "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."²⁹

the remainder of the venire consisted of six women and one man. *Id.* n.3.

24. *Id.*

25. *Batson v. Kentucky*, 476 U.S. 79, 91 (1986) (citing *Stilson v. United States*, 250 U.S. 583, 586 (1919)).

26. In the federal system, each litigant is entitled to 20 peremptories in capital cases. In a felony trial the defendant may exercise 10 peremptory challenges and the prosecution is entitled to 6, while in a misdemeanor case each litigant is entitled to three peremptory challenges. FED. R. CRIM. P. 24(b). In the majority of state jurisdictions, similar provisions are found with the prosecution and defense having the same number of peremptory challenges. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 22(d) (2nd ed. 1992).

27. See Paul H. Schwartz, Note, *Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. REV. 1533 (1991) (providing a detailed account of the history of the peremptory challenge); see generally *Swain v. Alabama*, 380 U.S. 202, 218-21 (1965); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (discussing the history of the peremptory challenge in civil voir dire proceedings).

28. *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)).

29. *Swain*, 380 U.S. at 219. Certain commentators have suggested that a fundamental basis for the existence of the peremptory challenge is that it is "a means of satisfying litigants that their case is being determined by an impartial group of laypeople." Comment, *The Right of Peremptory Challenge*, 24 U. CHI. L. REV. 751, 762 (1957).

The peremptory challenge serves important functions. It exemplifies the notion that a jury is the proper mode for deciding matters because the litigants choose the jurors, thus guarding against faction. Additionally, it serves "as a shield for the exercise of the challenge for cause," because during voir dire questioning, the lawyer may have so alienated the venireperson that it becomes necessary to strike him, although pursuant to the challenge for cause the lawyer has not established any basis for removal. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552-55

Historically, litigants could exercise the peremptory challenge without justification. This is unlike the challenge for cause³⁰ which requires that the party seeking elimination satisfy an objective disqualification standard.³¹ Because the trial court must, by definition, scrutinize a litigant's grounds and motives for the exercise of a challenge for cause, there is little risk that the challenge will be allowed if exercised for improper reasons such as race or gender discrimination. There are, however, no such inherent safeguards against the misuse of the peremptory challenge.³² Therefore, courts have imposed limits on the use of the peremptory challenge so that the constitutional rights of all parties can be protected.³³

B. CASES CHALLENGING THE EXERCISE OF RACIALLY-BASED DISCRIMINATORY PEREMPTORY CHALLENGES AS VIOLATIVE OF EQUAL PROTECTION PRINCIPLES

As early as 1879, the United States Supreme Court held that prohibiting blacks from serving on juries was a violation of the Equal Protection Clause.³⁴ However, it was not until 1965, in

(1975).

30. The challenge for cause is a request from a litigant to the court that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons. 28 U.S.C. § 1870 (1988).

31. Failure to meet the statutory qualifications for jury duty, evidence of bias, and relationship to one of the litigants are grounds for challenging a potential juror for cause. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 22.3(c) (2nd ed. 1992). Additionally, if the prospective juror is found to have a state of mind that will prevent her from acting with impartiality, this constitutes actual bias, requiring the challenge for cause be granted. *Id.*

This is not to suggest that any isolated statement by a venireperson necessitates granting the challenge. In *Patton v. Yount*, 467 U.S. 1025, 1032-33 (1984), the Court held that the determination is essentially one of credibility, and therefore of demeanor. The trial judge has discretion to believe or dismiss those statements, depending on the surrounding circumstances, such as leading questions.

32. See Joseph F. Lawless, Jr., *Prosecutorial Misconduct* 409 (1985), claiming that "the exercise of a peremptory challenge is virtually uncontrolled and completely discretionary by both parties. These challenges may be abused by those . . . who would seek to exercise them to obtain conviction-prone or racially unbalanced juries"

33. *Lewis v. United States*, 146 U.S. 370, 376 (1892).

The peremptory challenge has been the subject of much criticism, and there are those who advocate eliminating the whole peremptory challenge system. See Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 *CORNELL L. REV.* 1026 (1987).

34. *Strauder v. West Virginia*, 100 U.S. 303 (1879). In *Strauder*, the United States Supreme Court determined that the fourteenth amendment, ratified eleven years earlier,

Swain v. Alabama,³⁵ that the Court addressed the question of whether the discriminatory exercise of peremptory challenges to exclude minorities from juries violated equal protection principles.³⁶

In *Swain*, the United States Supreme Court acknowledged that discriminatory use of the peremptory challenge could violate a venireperson's equal protection rights under the Fourteenth Amendment of the Constitution.³⁷ There, Robert Swain, a black man, was convicted of rape and sentenced to death.³⁸ Swain sought to strike the trial jury which convicted him, alleging the prosecution had intentionally discriminated against him on the basis of race by peremptorily striking all black venirepersons at his trial.³⁹ The Court rejected Swain's argument, holding that the prosecutor's peremptory challenges were not subject to scrutiny on constitutional grounds.⁴⁰ The Court presumed that the state's challenges were intended only to obtain a fair and impartial jury,⁴¹ explaining that any other presumption would "establish a rule wholly at odds with the peremptory challenge system as we know it."⁴²

The Court recognized that the Fourteenth Amendment claim takes on added significance whenever members of a racial group are systematically excluded from jury service.⁴³ However,

was adopted to "assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states." *Id.* at 306. Thus, the Court held that the state statute prohibiting blacks from serving on juries was violative of the fourteenth amendment. *Id.* at 308.

35. 380 U.S. 202 (1965).

36. *Id.* at 204.

37. *Id.*

38. *Id.* at 203.

39. *Id.* at 203-05.

40. *Id.* at 222.

41. *Id.* The Court announced that it was permissible to insulate from inquiry the peremptory strikes of black venirepersons on the "assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved, and the particular crime charged." *Id.* at 223.

42. *Id.* at 222.

43. *Id.* at 223. The United States Supreme Court declared that in circumstances where the prosecutor was regularly removing qualified black jurors with peremptory challenges, "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purpose of the peremptory challenge [is] being perverted. If the state has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." *Id.*

in order to rebut the presumption and establish a prima facie case against the prosecution, the defendant was required to demonstrate a systematic pattern of purposeful discriminatory peremptory strikes.⁴⁴ The defendant would be compelled to demonstrate that this methodical exclusion had deprived black persons of the right to serve, not only at his own trial, but on juries in all cases.⁴⁵ Although Swain contended that the state had systematically and consistently excluded blacks from juries in previous cases,⁴⁶ the Court found that Swain had not overcome the imposing evidentiary standard.⁴⁷

Swain was the first United States Supreme Court decision to restrict the prosecution's use of peremptory challenges. Nevertheless, its impact on trial procedures was limited because few defendants were able to overcome the presumption of fairness as announced by the Court.⁴⁸ Not until the 1986 decision of *Batson v. Kentucky*⁴⁹ did the United States Supreme Court relax the evidentiary standard necessary for a criminal defendant to establish a prima facie case of discrimination against the prosecution's peremptory challenges.

In that case, *Batson*, a black man, was indicted and convicted on charges of burglary and receipt of stolen goods.⁵⁰ The prosecution exercised its peremptory challenges to strike the only four black venirepersons from the jury pool, and selected a

at 223-24.

44. *Id.* at 224.

45. *Id.*

46. *Id.* at 223. Petitioner's argument was not only that all black venirepersons were peremptorily stricken from his jury, but that "there ha[d] never been a Negro on a petit jury in either a civil or criminal case in Talladega County . . ." *Id.* at 222-23.

47. *Id.* at 224. The Court acknowledged that "there [had] not been a Negro on a jury in Talladega County since about 1950." *Id.* at 226. However, Swain was unable to sustain his burden of proving that the absence of black jurors in Talladega County was due entirely to discriminatory peremptory strikes exercised by the prosecution.

48. Among those courts that employed the *Swain* standard to analyze the potential misuse of the peremptory challenge, it appears that defendants were seldom able to overcome the overwhelming burden of proof required to effectively contest the exclusion of venirepersons. *Batson v. Kentucky*, 476 U.S. 79, 104 (Marshall, J., concurring). An example where the *Swain* standard was satisfied is *State v. Washington*, 375 S.2d 1162 (La. 1979), where a black defendant was convicted by a jury in which all but one black venireperson was peremptorily stricken. The court sustained the defendant's claim of discrimination because the prosecutor conceded that he considered blacks, as a group, too unintelligent to sit on the jury. *Id.* at 1164.

49. 476 U.S. 79 (1986).

50. *Id.* at 82.

jury composed exclusively of white persons.⁵¹ Counsel for the defendant moved to discharge the jury, asserting that the prosecutor's removal of black venirepersons violated the defendant's rights under the Fourteenth Amendment to equal protection of the laws.⁵² On appeal, the Kentucky Supreme Court refused to uphold Batson's objection since he failed to establish a consistent pattern of intentional discrimination by the prosecution, as was then required under *Swain v. Alabama*.⁵³

The United States Supreme Court held that proof of the prosecution's pattern of intentional discrimination, demonstrated by repeatedly striking blacks from jury venires, was unnecessary to establish a violation of the Equal Protection Clause.⁵⁴ The Court noted that this interpretation of *Swain* placed a staggering burden of proof on criminal defendants,⁵⁵ resulting in prosecutorial use of peremptory challenges in ways that were "largely immune from constitutional scrutiny."⁵⁶

The *Batson* Court announced a new standard of evidentiary proof necessary for defendants to meet when alleging purposeful discrimination by the prosecution in the exercise of peremptory challenges. *Batson* allowed a criminal defendant to establish a prima facie case of purposeful discrimination based "solely on evidence concerning the prosecutor's exercise of peremptory challenges at [that particular] defendant's trial."⁵⁷ The Court held that all relevant circumstances would be considered in determining whether the defendant has made the requisite showing of discrimination.⁵⁸ For instance, the prosecutor's questions

51. *Id.*

52. *Id.* Defense counsel also objected to the prosecution's removal of black venirepersons on the ground that defendant's sixth amendment right to a jury drawn from a cross-section of the community was being violated. The judge, reasoning that the cross-section requirement only applied to selection of the venire, and not to the jury itself, denied defendant's motion, stating that the parties were entitled to use their challenges to "strike anybody they want to."

53. *Id.* at 83.

54. *Id.* at 92.

55. *Id.*

56. *Id.* at 92-93.

57. *Id.* at 96. In order to establish a prima facie case of intentional discrimination, the defendant must prove that he is a member of a cognizable racial group, that the prosecution has peremptorily stricken members of the defendant's race from the venire, and that the encompassing facts and circumstances suggest that the prosecution excluded the venirepersons on account of their race.

58. *Id.*

and statements to black venirepersons, and the accompanying peremptory challenges might suggest purposeful discrimination.⁵⁹

Once the defendant establishes a prima facie case, the burden shifts to the state to justify its challenge of minority venirepersons with a racially neutral reason for seeking to remove the juror.⁶⁰ However, the prosecution may not offer as explanation its assumption that the challenged venireperson would be biased due to a shared ethnicity or race with the defendant.⁶¹ Additionally, the *Batson* Court held the Equal Protection Clause⁶² forbids exclusion of minority jurors on the assumption that the minority members, as a group, are unfit to serve as jurors.⁶³

C. QUESTIONS UNANSWERED

In *Batson v. Kentucky*⁶⁴ and *Swain v. Alabama*,⁶⁵ the United States Supreme Court limited the prosecution's use of

59. *Id.* at 97. The Court explained that trial judges, experienced in supervising voir dire procedures, would be best able to discern if a prima facie case of discrimination had been established.

60. *Id.* The Court emphasized that while the requirement of a justification for a challenge diminishes its historic peremptory character, the prosecution's explanation need not rise to the level demanded for a challenge for cause. *See supra* notes 30-31 and accompanying text for a discussion of the challenge for cause.

61. *Id.*

62. *Batson v. Kentucky*, 476 U.S. 79 (1986), involved a state defendant and therefore the equal protection clause of the fourteenth amendment is applicable. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992), involved a federal defendant, thus the equal protection principles of the fifth amendment apply.

The fourteenth amendment to the United States Constitution prohibits any state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954). The Constitution contains no textual authority for prohibiting the federal government from denying individuals equal protection. However, it has been held that the due process clause of the fifth amendment imposes comparable restrictions on the actions of the national government. *Id.* at 499.

63. *Batson*, 476 U.S. at 97. The United States Supreme Court in *Batson* purposely limited its holding to discriminatory peremptory challenges on the basis of race. However, Chief Justice Burger, in his dissent, suggested that the Court's decision would open the floodgates for objections to peremptory challenges "on the basis of not only race, but also sex, age, religious or political affiliation, mental capacity, number of children, living arrangements, and employment in a particular industry or profession." *Id.* at 124 (Burger, C.J., dissenting).

64. 476 U.S. 79 (1986).

65. 380 U.S. 202 (1965).

discriminatory peremptory challenges. However, the Court had not yet expressed an opinion on whether equal protection principles similarly limit a criminal defendant's exercise of peremptory challenges.⁶⁶ Furthermore, the Court had not explored the issue of whether the Constitution prohibits discriminatory peremptory strikes on the basis of gender.

In *United States v. De Gross*,⁶⁷ the Ninth Circuit addressed both of these issues, further extending the constitutional constraints on the exercise of discriminatory peremptory challenges.

IV. THE COURT'S ANALYSIS

In *United States v. De Gross*,⁶⁸ the Ninth Circuit reversed De Gross' conviction of aiding and abetting the transportation of an alien within the United States due to the prosecution's use of a discriminatory peremptory challenge. The court held that the Fifth Amendment's equal protection principles prohibit a criminal defendant's peremptory challenge based on the gender of the venireperson.⁶⁹

66. The *Batson* majority purposely declined to express its views on whether the Constitution limits defendant's peremptory challenges. 476 U.S. at 89 n.12. However, Chief Justice Burger, in his dissent, stated that since prosecutors are limited in their challenges, it is irrational to hold that defendants are not. *Id.* at 126 (Burger, C.J., dissenting). Burger further stated that "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited." *Id.* at 89 n.6 (quoting *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986)).

At the time the *De Gross* opinion was written, no United States Supreme Court case had confronted the issue of equal protection restraints on criminal defendants' peremptory challenges. However, the Court's recent decision in *Georgia v. McCollum*, 112 S. Ct. 2348 (1992), does address this issue, and holds that a criminal defendant is limited by the Constitution. *McCollum* was decided after *De Gross*, and is thus not discussed in the background section of this article. See *infra* notes 139-49 for a discussion of *McCollum* and its applicability to the instant case.

67. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992).

68. *United States v. De Gross*, 960 F.2d 1433, 1443 (9th Cir. 1992).

69. *Id.* at 1438. 28 U.S.C. § 1861 (1988) et seq., provides that a litigant is entitled to a trial by jury in which the jury selection process is free from discrimination or bias. "A defendant may establish a prima facie case of improper . . . jury selection under the constitutional standard by establishing absolute exclusion or systematic underrepresentation of a cognizable, distinct class." *United States v. Gruberg*, 493 F. Supp. 234, 245 (S.D.N.Y. 1979).

The major problem raised by defendant's assertion that the jury selection process has been tainted by discrimination lies in defining "cognizable" groups. *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y. 1972), set forth the standard for determining whether a group is cognizable. The defendant must show that the group is defined and

The Ninth Circuit confronted three issues raised in *De Gross*: first, whether the government had standing to object to the defendant's peremptory challenge; second, whether equal protection principles forbid gender-based discrimination in a criminal defendant's peremptory challenge; and third, if equal protection principles do prohibit such challenges, whether *De Gross* exercised her peremptory challenge with discriminatory intent.⁷⁰

A. STANDARD OF REVIEW

Whether the Fifth Amendment's equal protection principles forbid a party from peremptorily striking venirepersons on the basis of gender is a question of law that the Ninth Circuit reviewed *de novo*.⁷¹

B. THE GOVERNMENT'S STANDING TO OBJECT TO DE GROSS' CHALLENGE

The Ninth Circuit rejected *De Gross*' argument that the government lacked the requisite standing to object to her peremptory challenge.⁷² The government maintained that it had standing based on its own injury, as well as the injury to the challenged juror.⁷³ The court announced that "racial discrimination in the jury selection process casts doubt on the integrity of the judicial process and the fairness of the criminal proceeding."⁷⁴ Therefore, when a criminal defendant endeavors to se-

limited by some factor, that a common thread or basic similarity in attitudes or ideas or experience runs through the group, and that there is a community of interest among members such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. *Id.* at 143-44.

70. *De Gross*, 960 F.2d at 1436.

71. *Id.* See also *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984).

72. *De Gross*, 960 F.2d at 1436.

73. *Id.* For further discussion, see *supra* notes 9-11 and accompanying text.

74. *Id.* at 1437 (citing *Powers v. Ohio*, 111 S. Ct. 1364, 1371 (1991)). The court also noted that discriminatory practices in jury selection create the appearance of prejudice in the decision of individual cases, while increasing the danger of actual bias as well. *De Gross*, 960 F.2d at 1436 (citing *Peters v. Kiff*, 407 U.S. 493, 502-03 (1972)). Additionally, the court explained that excluding cognizable groups from jury service effectively restricts community participation in the administration of the criminal justice system; "participation which is critical to public confidence in the fairness" of that system. *Id.* (citing *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

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cure a partisan jury through the exercise of discriminatory peremptory challenges, the government suffers injury as a result of the perceived and actual deterioration of the criminal justice system.

The Ninth Circuit further held that the government has standing to object to the defendant's discriminatory peremptory challenge by asserting the excluded venireperson's equal protection rights.⁷⁵ A venireperson who has been excluded by a discriminatory peremptory challenge may face several obstacles to asserting his or her own constitutional rights.⁷⁶ Unless the potential juror is aware of the challenging party's pattern of peremptorily striking members of a cognizable group, the venireperson may not realize that he or she is the victim of discrimination.⁷⁷ Additionally, it is unlikely the excluded venireperson will bring a constitutional challenge on his or her own behalf due to the prohibitive cost of litigation and the small financial stakes.⁷⁸ Thus, the Ninth Circuit concluded the government has standing to object to the peremptory challenge exercised by De Gross.

C. GENDER-BASED PEREMPTORY CHALLENGES

The Ninth Circuit expanded on the Supreme Court's rulings in *Batson v. Kentucky*⁷⁹ and *Swain v. Alabama*⁸⁰ by stating that equal protection principles prohibit not only racially-based discriminatory peremptory challenges,⁸¹ but gender-based challenges as well.⁸² Although the Constitution will tolerate gender-based discrimination when an important governmental objective is being served,⁸³ the peremptory challenge cannot be based

75. *De Gross*, 960 F.2d at 1437. See *supra* note 11 for discussion of situations in which the rights of a party may be raised by another.

76. *Id.*

77. *Id.*

78. *Id.*

79. 476 U.S. 79 (1986).

80. 380 U.S. 202 (1965).

81. *Batson*, 476 U.S. at 93.

82. *De Gross*, 960 F.2d at 1437-38.

83. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender-based classifications must be substantially related to the achievement of important governmental objectives to withstand constitutional scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (administrative ease and convenience are not sufficiently important objectives to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates).

solely on the gender of the potential juror.⁸⁴

The *Batson* Court held that striking a potential juror on the basis of his or her race harms the excluded venireperson, undermines public confidence in the judicial system, and stimulates community prejudice.⁸⁵ Deciding that these symptoms are just as likely to occur as a result of gender-based discrimination, the Ninth Circuit held that equal protection principles prohibit gender-based discriminatory peremptory challenges.⁸⁶

84. *De Gross*, 960 F.2d at 1439.

85. *Batson*, 476 U.S. at 87. The *Batson* Court announced that “[p]urposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” *Id.* at 86. See also *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879), stating that the purpose of the jury is to be composed of the peers or equals of the accused so as to afford him a tribunal free of the prejudices that often exist against certain classes in the community. A jury of peers operates to preserve the defendant’s enjoyment of the full protection of the laws.

86. *De Gross*, 960 F.2d at 1438. This conclusion is not unanimously supported by all the circuit courts of appeals. The Fourth Circuit, in *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), held that the government could offer as a neutral justification for its peremptory challenge a gender-based explanation. The *Hamilton* court stated that while it did not applaud the striking of jurors for any reason relating to group classification, there was no authority to support an extension of *Batson*’s equal protection principles to situations other than racial discrimination. *Id.* at 1042.

Compare *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), where the United States Supreme Court held that the systematic exclusion of women from jury venires violated the potential juror’s rights under the equal protection clause of the fourteenth amendment. In that case, the Court found a Louisiana jury selection procedure to be unconstitutional because a woman could not be selected for jury service unless she had previously filed an application requesting consideration for jury service. *Id.* at 523. The net effect of this system was that disproportionately few women, as compared with the number available in the community, were ever called for jury service. *Id.* at 525. This case is distinguishable from *Hamilton* because in *Hamilton* there had been no claim that women were systematically excluded from jury service. *Hamilton*, 850 F.2d at 1042.

For a thoughtful examination of gender-based peremptory challenges, see S. Alexandria Joe, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L. J. 1305, 1327-28 (1991), which asserts that racial and gender classifications are analogous in three respects: first, both groups have historically suffered discriminatory treatment due to membership in an identifiable group; second, race and gender are both immutable characteristics, which cannot be changed; and third, minority members as well as females have traditionally been politically powerless. Based on these grounds, courts have conventionally treated race and gender classifications with special care. *Id.* at 1327. See also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (holding that the requirements of a quasi-suspect class are historical discrimination, immutable traits, and political powerlessness).

1. *The Government's Peremptory Challenge*

A prosecutor's gender-based discriminatory peremptory challenge violates the Fifth Amendment's equal protection principles.⁸⁷ As is the case with racially-based challenges, sexually discriminatory peremptory challenges are premised on the stereotypical notion that a particular group of people are unfit to serve as jurors.⁸⁸ While a venireperson may be successfully challenged due to the prosecution's perception that the particular juror is unable to serve on the jury, gender-based challenges imply that the group, as opposed to the individual, is unqualified. The Fifth Amendment forbids this type of group discrimination.⁸⁹

2. *The Defendant's Peremptory Challenge: The Question of State Action*

While *Batson v. Kentucky* held that the prosecution's exercise of discriminatory peremptory challenges deprives a defendant of equal protection of the laws,⁹⁰ the decision did not address whether a criminal defendant's peremptory challenge is similarly limited by the Constitution. In *De Gross*, the Ninth Circuit addressed this question, and answered it in the affirmative, drawing from and expanding upon recent United States Supreme Court decisions.

The Ninth Circuit noted that equal protection principles are directed at state action,⁹¹ and that a criminal defendant's peremptory challenge is an exercise of state action.⁹² Thus, under the Ninth Circuit's reasoning, the Fifth Amendment must

87. *De Gross*, 960 F.2d at 1439.

88. *Id.*; see also *Batson*, 476 U.S. at 86.

89. *De Gross*, 960 F.2d at 1439.

90. *Batson*, 476 U.S. at 89.

91. *De Gross*, 960 F.2d at 1440. See also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

92. Although the Ninth Circuit held that a criminal defendant's exercise of a peremptory challenge is state action, the opposite conclusion has been reached by other tribunals. The Supreme Court of New York, in *Holtzman v. Supreme Court*, 526 N.Y.S.2d 892 (Sup. 1988), held that because a criminal defendant's exercise of peremptories is not compelled by the legislature or the courts, the state could not be held accountable for the manner in which the defendant exercised his challenges. *Id.* at 898. However, this decision has since been overruled by *People v. Kern*, 555 N.Y.S.2d 647 (1990).

prohibit a criminal defendant's exercise of a discriminatory peremptory challenge.⁹³

The Ninth Circuit followed the reasoning of the United States Supreme Court in the recent decision of *Edmonson v. Leesville Concrete Co.*⁹⁴ In *Edmonson*, the Supreme Court articulated the following three-prong test to determine whether a litigant's conduct constitutes state action: 1) the extent to which the actor relies on governmental assistance and benefits; 2) whether the actor is performing a traditional governmental function; and 3) whether the injury caused is aggravated by the incidents of government authority.⁹⁵ Applying these criteria to the facts of *Edmonson*, the Supreme Court held that a defendant in a civil action was a state actor.⁹⁶

In *De Gross*, the Ninth Circuit stated that the *Edmonson* Court's reasoning pertained equally to a situation involving a criminal defendant rather than a civil litigant.⁹⁷ Applying the

93. *De Gross*, 960 F.2d at 1440.

94. 111 S. Ct. 2077 (1991). Thaddeus Donald Edmonson, a black man, sued defendant, Leesville Concrete Company, for negligence. *Id.* at 2079. Leesville Concrete Company exercised two of its three peremptory challenges to remove black venirepersons. *Id.* Citing *Batson v. Kentucky*, 476 U.S. 79 (1986), plaintiff Edmonson urged the court to require Leesville Concrete Co. to set forth a race-neutral justification for its challenge. The district court denied Edmonson's request, stating that *Batson* did not apply to civil cases. On appeal the Fifth Circuit reversed the district court's ruling. The Fifth Circuit held that defendants become state actors when they exercise peremptory challenges, and that limiting *Batson* to criminal cases "would betray *Batson's* fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violates the Equal Protection Clause." *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1308, 1314 (5th Cir. 1989). On rehearing en banc, the Fifth Circuit remanded the case to trial. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990). The United States Supreme Court granted certiorari and reversed the court of appeals.

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

96. *Id.* at 2083-87. With respect to the first inquiry of the *Edmonson* test, the Court noted that a private party could not exercise its peremptory challenges without the overt, significant assistance of the court. The Supreme Court further stated that the assistance of the judge, in enforcing the discriminatory challenge, has not only made the court a party to the biased act, but has placed its power, property and prestige behind the discrimination. Addressing the second prong of the test, the Court held that a traditional function of government was evident. The Court explained that the peremptory challenge is used in selecting an "entity that is a quintessential governmental body, having no attributes of a private actor." *Id.*

Finally, the Court held that racial discrimination in the official forum of the courtroom raises serious questions as to the fairness of the proceedings conducted there, thus compounding the injury due to the incidents of government authority.

97. *De Gross*, 960 F.2d at 1440.

first of the criteria set forth in *Edmonson* to the facts of *De Gross*, the Ninth Circuit held that a criminal defendant wholly relies on governmental assistance and benefits when exercising peremptory challenges.⁹⁸ The court declared:

[w]ithout the overt, significant participation of the government, the . . . entire jury system, including peremptories, could not exist or operate. The government sets up the panel selection procedures. Peremptory challenges are not self-executing. A party seeking to exercise discriminatory peremptory challenges must necessarily rely upon the court to call citizens to serve as jurors, to begin the voir dire in a judicial proceeding, and to excuse challenged venirepersons. We conclude, as the Supreme Court did, that a party could not exercise its peremptories without significant government assistance.⁹⁹

The second prong of the *Edmonson* test focuses on whether the peremptory challenge involves the performance of a traditional governmental function. The Ninth Circuit maintains that a criminal defendant's exercise of a peremptory challenge does involve a customary governmental function.¹⁰⁰ The court acknowledged that a jury is a governmental body whose purpose is to carry out governmental functions.¹⁰¹ Jury selection and voir dire proceedings are similarly exercises of governmental authority: although the prosecution and defendant retain a degree of control over the process, the court maintains constant control and supervision.¹⁰² Citing *Edmonson*,¹⁰³ the court observed that "[t]he fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised."¹⁰⁴

Finally, applying the third prong of the *Edmonson* test, the Ninth Circuit noted that since the discriminatory peremptory challenge was exercised in the public federal courthouse, the in-

98. *Id.*

99. *Id.*

100. *Id.* at 1441.

101. *Id.*

102. *Id.*

103. 111 S. Ct. at 2086.

104. *De Gross*, 960 F.2d at 1441.

jury suffered by the challenged venireperson is aggravated.¹⁰⁵ The occurrence of the discriminatory incident within the confines of a federal courthouse effectively intimates that the trial judge has “abdicat[ed] his duty not to discriminate.”¹⁰⁶

The Ninth Circuit recognized no meaningful distinction between a criminal or a civil case, and held that a criminal defendant exercising peremptory challenges is a state actor.¹⁰⁷ Because the Fifth Amendment’s equal protection principles regulate state action, the court reasoned that a criminal defendant’s exercise of discriminatory peremptory challenges must be prohibited since the defendant is acting under authority of the state.¹⁰⁸

D. PEREMPTORY CHALLENGE EXERCISED WITH DISCRIMINATORY INTENT

1. *The Prosecution’s Challenge of Tellez*

De Gross established a prima facie case of purposeful discrimination against the government for striking Tellez,¹⁰⁹ using the test articulated in *Batson v. Kentucky*.¹¹⁰ The prosecution explained that it wanted to “achieve a more representative community of men and women on the jury.”¹¹¹ The district court accepted the government’s justification as being based on neutral grounds.¹¹² The Ninth Circuit disagreed with the district court, stating that this explanation automatically established a prima facie case of gender discrimination.¹¹³ Under *Batson*, the

105. *Id.*

106. *Id.*

107. *Id.* at 1441-42. This conclusion is supported by the United States Supreme Court decision in *Polk County v. Dodson*, 454 U.S. 312 (1981). In that case, the Court held that a person acts under color of state law only when he is exercising power possessed solely by virtue of state authority. *Id.* at 317-18. Thus, the Court found that an attorney, although an officer of the court, is not a state actor for purposes of representing a client since that is essentially a private function. *Id.* at 319.

108. *De Gross*, 960 F.2d at 1442.

109. *Id.*

110. 476 U.S. 79 (1986).

111. *De Gross*, 960 F.2d at 1436.

112. *Id.*

113. *Id.* at 1443. The court “sympathize[d] with the prosecutor’s predicament in [that] case. Faced with a female defendant who was systematically excluding males from the jury, the prosecutor made an understandable effort to balance the gender composition of the jury. However . . . we cannot find that the prosecutor’s admission constituted a neutral explanation.” *Id.* at 1443 n.14.

prosecution's challenge of Tellez violates De Gross' Fifth Amendment right to equal protection of the laws.¹¹⁴ Hence, the district court improperly struck Tellez from the jury.¹¹⁵

2. *De Gross' Challenge of Tiffany*

Under the *Batson* Court's analysis, the government similarly established a prima facie case of intentional discrimination against De Gross.¹¹⁶ The burden then shifted to De Gross to justify her challenge with a gender-neutral explanation.¹¹⁷ Since De Gross failed to provide an explanation for her challenge, the Ninth Circuit held that the district court was correct in disallowing her challenge and permitting Tiffany to serve on the jury.¹¹⁸

E. THE CONCURRING OPINION

Judge Reinhardt concurred with the Ninth Circuit's ultimate holding in *De Gross* that the conviction be reversed.¹¹⁹ The concurring opinion differs strongly, however, with the majority's conclusion that the criminal defendant is a state actor.

The majority identified the defendant as a state actor because he or she invokes the authority of the state when exercising the governmental function of peremptory challenges.¹²⁰ The concurrence contends that a criminal defendant, "the quintessential adversar[y] of the state," cannot be characterized as a state actor.¹²¹ The concurrence proposes that the *Edmonson* test is inapplicable to a situation involving a criminal defendant,

114. *Id.* at 1443. See *Batson*, 476 U.S. at 85-87, holding that the equal protection clause guarantees a defendant the right to be tried by a jury selected in a non-discriminatory manner. The *Batson* Court also noted that intentional discrimination in jury selection proceedings violates the defendant's right to equal protection of the laws. *Id.*

115. *De Gross*, 960 F.2d at 1433.

116. *Id.* See *supra* notes 57-59 and accompanying text for further discussion.

117. *De Gross*, 960 F.2d at 1442.

118. *Id.*

119. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992).

The concurrence asserts that because De Gross' peremptory challenge to Tiffany did not involve state action, the district court should not have permitted the government to assert a *Batson* objection. Thus, the fact that Tiffany was empaneled despite De Gross' peremptory challenge is sufficient to require reversal of De Gross' conviction. *Id.* at 1447.

120. *Id.* at 1440.

121. *Id.* at 1443.

asserting:

[it] cannot be disputed that a criminal defendant's relationship to the state is fundamentally different from that of a private litigant in a civil case [I]n the ordinary context of civil litigation in which the government is not a party, an adversarial relationship does not exist between the government and a private litigant. By contrast, a criminal defendant has perhaps the most adversarial relationship possible with the state.¹²²

The concurrence further asserts that a prosecutor adopts the mission of the state in attempting to convict the criminal defendant.¹²³ Judge Reinhardt concludes that because the criminal defendant's sole objective is to thwart the prosecutor's efforts at trial, this presents an impossible conflict, dispositive of the state action question.¹²⁴

The concurrence states that since criminal defendants cannot be characterized as state actors, their actions cannot violate the Constitution.¹²⁵ Therefore, the government is not entitled to assert a *Batson* objection to a discriminatory peremptory challenge.¹²⁶

V. CRITIQUE

United States v. De Gross raised the issue of whether a criminal defendant's exercise of a gender-based discriminatory peremptory challenge, as well as the prosecution's exercise of the same, violates the Constitution's equal protection principles.¹²⁷ The Ninth Circuit wisely extended the constitutional protection

122. *Id.* at 1444-45.

123. *Id.* at 1445.

124. *Id.* at 1446. The concurrence likens the majority's reasoning to a stanza from a play by "those well-respected commentators on the absurdities found in our legal system," Gilbert and Sullivan:

A paradox, A paradox,
A most ingenious paradox!
How quaint the ways of paradox!
At common sense she gaily mocks!

Id. at 1447.

125. *Id.*

126. *Id.*

127. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992).

afforded to racially discriminatory peremptory challenges by *Swain* and *Batson* to gender-based peremptory challenges as well.¹²⁸ Nevertheless, the court's conclusion that a prosecutor and a criminal defendant are equally restrained by the Constitution is troubling.

A. CRIMINAL DEFENDANT'S PEREMPTORY CHALLENGE SUBJECT TO EQUAL PROTECTION RESTRAINTS

It is well settled that the Constitution limits only state action.¹²⁹ Thus, a criminal defendant will only be subject to equal protection restraints if he or she is considered a state actor. The eleven-member panel of the Ninth Circuit was sharply divided on the issue of whether or not De Gross' exercise of a peremptory challenge as a criminal defendant constituted state action.¹³⁰

The concurring opinion reasoned that a criminal defendant cannot be deemed a state actor, since the defendant is wholly at odds with the governmental system.¹³¹ Indeed, it does seem counterintuitive to suggest that a criminal defendant acts under the state's authority when exercising peremptory challenges, considering the state is contemporaneously using that same power to incarcerate or possibly even execute that defendant. The notions of equality and fairness inherent in due process and equal protection principles would seem to demand that a criminal defendant must be given every opportunity to utilize the peremptory challenge system without being subject to the constitutional restraints imposed on the state.¹³²

128. *Id.* at 1439.

129. The United States Constitution, with the notable exception of the thirteenth amendment, limits only state action. The thirteenth amendment, ratified December 6, 1865, provides that neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction. U.S. CONST. amend. XIII, § 1. This individual amendment, passed to facilitate the reconstruction of the southern states, applies to private conduct as well as state action.

130. The panel split 6-5.

131. *De Gross*, 960 F.2d at 1443.

132. The logic of considering a criminal defendant a state actor can be summarized as follows: The state develops a formalized suspicion that the defendant is involved in criminal activity. The defendant is summoned into court where she will be given the opportunity to demonstrate her innocence. Although the defendant must be deemed innocent until the state meets its burden of evidentiary proof, the defendant will be considered a state actor and limited by the Constitution's equal protection principles, effec-

The concurrence additionally finds fault with the majority's application of the *Edmonson* analysis to the instant facts.¹³³ The majority stressed the significance of the peremptory challenge taking place in a governmental setting, noting that "the injury caused by discriminatory peremptories is exacerbated by the fact that the government allows it to occur in the courthouse—a traditional symbol of government authority."¹³⁴ Judge Reinhardt, author of the concurrence, insists that this part of the court's analysis must be confined to civil proceedings because only in civil proceedings are the government's and private litigants' interests harmonious with regard to *voir dire*.¹³⁵ Conversely, it is clear that in criminal actions the prosecutor's and defendant's interests are in direct conflict at every stage, including jury selection. Therefore, despite the fact that both civil and criminal proceedings take place within government buildings, it "cannot be disputed that a criminal defendant's relationship to the state is fundamentally different from that of a private litigant."¹³⁶ The majority seems to have ignored this inevitable conflict in finding state action.¹³⁷

tively undermining her ability to use whatever means to prevail at trial.

133. *De Gross*, 960 F.2d at 1443-44. See *supra* notes 95-108 for the *Edmonson* inquiries and their application to *De Gross*.

134. *Id.* at 1441 (citing *Edmonson*, 111 S. Ct. at 2087).

135. *Id.* at 1444.

136. *Id.* at 1444-45. Judge Reinhardt further noted:

It is hard to imagine a more palpable example of the exercise of state power than a criminal prosecution. But, that state power is wielded by the prosecutor against the criminal defendant—not by the defendant on his own behalf. . . . Far from wielding state power, a criminal defendant attempts to thwart that power at every stage of the proceedings.

Id. at 1445.

137. In *Polk County v. Dodson*, 454 U.S. 312, 319-21 (1981), the Court found that a public defender could not be considered a state actor because their actions could not be "attributable to the government." A public defender's duty is to oppose the state's mission in criminal trials: to enter "not guilty" pleas, move to suppress state's evidence, object to evidence at trial, cross-examine state's witnesses, and to altogether oppose the interests of the state.

By this same rationale, a criminal defendant should not be characterized as a state actor. Certainly the defendant's position is even farther removed from the interests of the state than is the public defender's. The criminal defendant does not "assume an obligation to the mission of the state," and under no circumstances can he or she fairly be said to be acting on behalf of the state. *De Gross*, 960 F.2d at 1446. In fact, Judge Reinhardt submits that the only distinction between a criminal defendant and his counsel is that the public defender acts under a constitutional obligation rather than a sense of self-preservation. *Id.* at 1447 n.5.

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Although logic seems to suggest that a criminal defendant cannot be characterized as a state actor, the majority of courts have held that because the court must actively enforce a criminal defendant's peremptory challenge, the defendant's actions do rise to the level of state action.¹³⁸ Because a criminal defendant faces possible incarceration at the hands of the state does not necessarily mean that he or she may not occupy the role of state actor for the limited purpose of exercising peremptory challenges. Support for this proposition can be found in the United States Supreme Court decision of *Georgia v. McCollum*.¹³⁹

In *McCollum* the Court addressed the question of whether equal protection principles prohibit a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.¹⁴⁰ The Court held that the Constitution does proscribe the exercise of racially-based discriminatory peremptory challenges by criminal defendants as well as civil defendants.¹⁴¹ In so holding the Court provided a basis for reconciling *Edmonson v. Leesville Concrete* with the Ninth Circuit's decision in *De Gross*, thereby abandoning the distinction between civil and criminal litigants in the exercise of peremptory challenges.¹⁴²

In its decision to apply the rationale of *Edmonson* to the facts of *McCollum*, the court confronted the issue of whether a

138. See *United States v. De Gross*, 960 F.2d at 1433 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

139. 112 S. Ct. 2348 (1992). In *McCollum*, respondents were charged with assaulting two African-Americans. *Id.* at 2351. Before jury selection began, the prosecution moved to prohibit respondents from exercising racially discriminatory peremptory challenges. *Id.* The state theorized that the victim's race was a factor in the alleged beating. *Id.* Relying on *Batson v. Kentucky*, the state sought an order mandating that respondents provide a racially neutral justification for the peremptory challenges if the prosecution established a prima facie case of purposeful discrimination. *Id.* at 2351-52.

The trial judge denied the motion, *id.*, and the state supreme court affirmed, distinguishing *Edmonson v. Leesville Concrete* because *Edmonson* involved private civil litigants, not criminal defendants. *State v. McCollum*, 405 S.E.2d 688, 689 (1991).

The United States Supreme Court overruled the state supreme court decision, holding that criminal defendants are subject to equal protection restraints as well as civil litigants. *McCollum*, 112 S. Ct. at 2348. See *infra* notes 139-47 discussing the *McCollum* decision.

140. *McCollum*, 112 S. Ct. at 2348.

141. *Id.*

142. *Id.*

criminal defendant's exercise of peremptory challenges constitutes state action for the purposes of equal protection principles.¹⁴³ Employing the three-prong test of *Edmonson*,¹⁴⁴ the Court found that a criminal defendant was a state actor when exercising peremptory challenges.¹⁴⁵

The *McCullum* Court provided a thoughtful insight on the issue which disturbed the concurring judges in *De Gross*: whether a criminal defendant, motivated by a private desire to protect his interest against the state, can be considered a state actor as well.¹⁴⁶ The Court noted:

[T]he fact that a defendant exercises a peremptory challenge to further his interest in acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision. Indeed, . . . the private party's motive underlying the exercise of a peremptory challenge may be to protect a private interest.¹⁴⁷

This logic suggests that the "state" which the criminal defendant is at odds with is distinguishable from the "state" from which he derives his authority when exercising peremptory challenges. As the majority in *De Gross* explained, if there were no distinction between the state as administrator of the justice system and the prosecution acting as agent of the state, there would always be a potential conflict in criminal trials.¹⁴⁸ The court further maintained that a criminal defendant's interests are diametrically opposed to those of only the prosecutor, not to those of the government.¹⁴⁹

The majority opinion in *De Gross* was consistent with the established case law. Accordingly, the court was justified in concluding that *De Gross* invoked the authority of the state when exercising her peremptory challenges, and thus subjected herself

143. *Id.* at 2359.

144. *See supra* notes 95-108 and accompanying text.

145. *McCullum*, 112 S. Ct. at 2358.

146. *Id.*

147. *Id.*

148. *De Gross*, 960 F.2d at 1441.

149. *Id.*

to the restraints of the Fifth Amendment's equal protection principles.

Once the state action issue is established, the Ninth Circuit's decision to restrict discriminatory practice in jury selection by both the defense as well as the prosecution is sound.

B. GENDER-BASED DISCRIMINATORY PEREMPTORY CHALLENGES PROHIBITED BY EQUAL PROTECTION PRINCIPLES

The *De Gross* court held that the Constitution prohibits intentional discrimination on the basis of gender as well as race. The Ninth Circuit reasoned that the Fifth Amendment's equal protection principles must restrain state actors from discriminating on the basis of gender because the same harm results as would if the discrimination were based on the venireperson's race.¹⁵⁰

While the Ninth Circuit's conclusion that equal protection principles will not abide gender-based discrimination is sound, the court was somewhat conclusory in analogizing sexual discrimination to racial discrimination. Racial and gender classifications have historically been afforded disparate treatment.¹⁵¹ However, there are undeniable similarities between racial and gender classifications that would seem to warrant similar treatment for purposes of the peremptory challenge: both groups have historically endured discrimination due to membership in an identifiable group; race and gender are immutable characteristics which cannot be altered; and minority members and females have traditionally been politically powerless.¹⁵²

150. See *supra* notes 79-89 and accompanying text for discussion of gender-based discrimination and the resulting harm.

151. Joe, *supra* note 86, at 1327. Historically, gender groups have been categorized as quasi-suspect classes, requiring an intermediate scrutiny standard of review. *Id.* See also *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that gender classifications standard of review is satisfied only where an important governmental purpose is being furthered).

Alternatively, racial classifications have traditionally been categorized as suspect classes demanding a strict level of scrutiny. See Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 141-42 (1989) (maintaining that racial classifications violate equal protection principles unless they are necessary to further a compelling state interest).

152. Joe, *supra* note 86, at 1327. *Cf.* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

At an intuitive level the extensions of the *Batson* prohibition against racially discriminatory peremptory challenges to gender-based challenges seems logical. However, any simple analogy between gender and racial classifications is ineffective and conclusory.¹⁵³ Nevertheless, the Ninth Circuit wisely extended equal protection to gender-based peremptory challenges.

VI. CONCLUSION

*United States v. De Gross*¹⁵⁴ establishes that a criminal defendant's exercise of peremptory challenges constitutes state action for the purposes of the Fifth Amendment's equal protection principles. Hence, the challenges cannot be exercised in a discriminatory manner so as to offend the Constitution. While the logic of such a proposition may offend traditional notions of equality, the conclusion is probably sound as it is supported by the majority of precedent.

Additionally, *De Gross* prudently extends the established equal protection rights afforded to racial discrimination to gender-based peremptory challenges. *De Gross* represents an important step forward in preserving the constitutional rights of potential jurors, and should serve as a beacon for other circuit courts faced with a similar situation.

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These cases held, respectively, that mentally retarded persons and elderly persons are not quasi-suspect classes because they do not satisfy the criterion of membership in an identifiable group, immutable characteristics, and political powerlessness, *inter alia*.

153. See, e.g., Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other - Isms)*, 1991 DUKE L. J. 397, 404, asserting that:

[t]o analogize gender to race, one must assume that each is a distinct category . . . [however], this division is not possible. Whenever it is attempted, the experience of women of color, who are at the intersection of these categories and cannot divide themselves to compare their own experiences, is rendered invisible. Analogizing sex discrimination to race discrimination makes it seem that all the women are white and all the men are African-American.

154. *United States v. De Gross*, 960 F.2d 1433 (9th Cir. 1992).

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