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Georgia v. McCollum: An Unprincipled and Potentially Unjust Ending to the Peremptory Challenge Cases

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Georgia v. McCollum: An Unprincipled and Potentially Unjust Ending to the Peremptory Challenge Cases

I. INTRODUCTION

The peremptory challenge has traditionally been considered fundamental to the empaneling of a fair jury. Even so, because the peremptory challenge may be used in a racially discriminatory manner, its constitutionality has recently been examined by the United States Supreme Court. Between 1986 and 1992 the Supreme Court decided several cases involving alleged racial discrimination during the exercise of peremptory challenges. In the most recent peremptory challenge case, Georgia v. McCollum, the Supreme Court held that a criminal defendant’s exercise of a racially discriminatory peremptory challenge is unconstitutional. The Court indicated that McCollum merely follows precedents established in other peremptory challenge cases.

This note discusses the Court’s decision in McCollum. Part II summarizes the cases which precede McCollum and upon which the Court relied. Part III presents the specific facts of McCollum and examines the reasoning used by the Court in reaching its decision. Part IV analyzes the Court’s reasoning and focuses on two specific issues: the requirement of state action under the Equal Protection Clause of the Fourteenth Amendment.

1. In Georgia v. McCollum, 112 S. Ct. 2348 (1992), Justice Blackmun recognized the “very old credentials,” of the peremptory challenge and... the ‘long and widely held belief that the peremptory challenge is a necessary part of trial by jury.’ Id. at 2358 (citations omitted). Justice Scalia called the right to exercise the peremptory challenge an “ages-old right of criminal defendants... to secure a jury that they consider fair.” Id. at 2365 (Scalia, J., dissenting). See also Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 CORNELL L. REV. 1, 10-12 (1990) (giving a history of the use of peremptory challenges in the United States).


4. The term “criminal defendant” or “defendant” is used throughout this note to refer to the criminal defendant as well as the criminal defendant’s counsel.

5. McCollum, 112 S. Ct. at 2359.

6. Id. at 2352-53.
Amendment and the importance of the criminal defendant's Sixth Amendment right to a fair and impartial jury. This note concludes that *McCollum* was decided incorrectly; the holding is not supported by the Constitution and will work potentially unjust results for criminal defendants.

II. BACKGROUND

In 1880 the Supreme Court decided *Strauder v. West Virginia,* the first important case dealing with the interplay of race relations and the sitting of a jury. In *Strauder* an African-American, indicted for murder, was convicted and sentenced by an all-white jury. While the West Virginia Supreme Court affirmed the conviction, the United States Supreme Court reversed, holding that the West Virginia law that qualified only white persons for jury duty violated the defendant's right to equal protection under the Fourteenth Amendment.

Nearly a century later, in *Swain v. Alabama,* the Supreme Court focused on the specific issue of racial bias in the exercise of a peremptory challenge. This decision was the first in a line of decisions that could be called the peremptory challenge cases. *Swain,* an African-American, was convicted of rape and sentenced to death. Of the eight African-Americans on the venire, two were exempted and six were peremptorily struck by the prosecution. Notwithstanding the exclusion of the African-American jurors, the Supreme Court affirmed the conviction, holding that exclusion of African-Americans by the prosecution's peremptory challenges raised only an inference of discrimination. Before a defendant's constitutional rights could be shown to have been violated, a more extensive pattern of discrimination had to be demonstrated over a period of time.

7. 100 U.S. 303 (1880).
8. *Id.* at 304.
9. *Id.* at 310-12.
13. *Id.* at 205.
14. *Id.* at 227.
In *Batson v. Kentucky*\textsuperscript{15} the Supreme Court lessened the "discrimination over a period of time" requirement of *Swain*. *Batson* dealt with an African-American who had been "indicted... on charges of second-degree burglary and receipt of stolen goods.\textsuperscript{16} The prosecution peremptorily struck the four African-Americans on the venire and the defendant was subsequently convicted by an all-white jury.\textsuperscript{17} The Supreme Court remanded, holding that the defendant had made a timely objection to the peremptory challenges; therefore, if "the facts establish[ed] prima facie, purposeful discrimination," the burden shifted to the prosecution to come forward with a race-neutral explanation for the peremptory challenges.\textsuperscript{18} The Supreme Court extended the reach of the *Batson* decision in *Powers v. Ohio*\textsuperscript{19} by holding that a criminal defendant may object to the prosecution's race-biased peremptory challenges even if the defendant and the excluded juror are not of the same race.\textsuperscript{20}

*Edmonson v. Leesville Concrete Co.*\textsuperscript{21} shifted the Court's analysis to a civil dispute. In *Edmonson* an African-American construction worker sued Leesville Concrete for the alleged negligence of one of its employees.\textsuperscript{22} During voir dire the defendant eliminated two African-Americans from the venire.\textsuperscript{23} The plaintiff, citing *Batson*, requested a race-neutral explanation.\textsuperscript{24} The district court denied the request, holding that *Batson* did not apply to civil proceedings.\textsuperscript{25} On appeal, the Supreme Court reversed\textsuperscript{26} and held racially discriminatory pe-

\textsuperscript{15} 476 U.S. 79 (1986).
\textsuperscript{16} Id. at 82.
\textsuperscript{17} Id. at 83.
\textsuperscript{18} Id. at 100. Enforcement of this standard may highlight the very discrimination it is intended to eliminate. Albert Alschuler points out the difficulty of enforcing the *Batson* Court's standard: "[T]he Court posed issues whose resolution may require the judiciary to draw lines every bit as ugly and invidious as those that the Court condemned." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 169 (1989).
\textsuperscript{19} 111 S. Ct. 1364 (1991).
\textsuperscript{20} Id. at 1366.
\textsuperscript{22} Id. at 2080.
\textsuperscript{23} Id. at 2081.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 2089.
remptive challenges exercised by civil litigants to be unconsti-
tutional.27

This line of Supreme Court decisions regarding race-biased
remptive challenges left open the issue of peremptory chal-
lenges exercised by criminal defendants.28 McCollum closed
this gap when the Court disallowed race-biased peremptory
challenges by criminal defendants.29

III. GEORGIA V. MCCOLLUM

A. The Facts

The defendants in McCollum were white Americans in-
volved in an altercation with two African-Americans. The de-
fendants were indicted on counts of aggravated assault and
simple battery. The incident occurred in Dougherty County,
Georgia, where forty-three percent of the population is African-
American. The African-American community subsequently
urged residents not to patronize the defendants' business.30

Recognizing the volatile racial situation, the prosecution
moved the court to prohibit the defendants from exercising
anticipated discriminatory peremptory challenges.31 The mo-
tion was denied by the trial judge, and on appeal the Supreme
Court of Georgia affirmed the denial.32 The United States Su-
preme Court reversed and held that "the Constitution prohi-
bits a criminal defendant from engaging in purposeful discrimina-
tion on the ground of race in the exercise of peremptory chal-
lenges."33

27. Id. at 2080.
28. In Batson the Court reserved the issue of criminal defendants for a later
day. 476 U.S. 79, 89 n.12 (1986). The McCollum Court acknowledged this by grant-
ing certiorari "to resolve a question left open by our prior cases." Georgia v. 
29. McCollum, 112 S. Ct. at 2359.
30. Id. at 2381.
32. Id.
33. McCollum, 112 S. Ct. at 2359. Justice Blackmun delivered the opinion of
the Court in which Chief Justice Rehnquist, and Justices White, Stevens, Kennedy,
and Souter joined. Chief Justice Rehnquist filed a concurring opinion. Justice
Thomas filed an opinion concurring in the judgment. Justices O'Connor and Scalia
filed dissenting opinions.
B. The McCollum Court’s Reasoning

Drawing upon earlier cases, the McCollum Court proposed a four-part test to decide whether the Equal Protection Clause of the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges: (1) Does the case address the same harms as those addressed in Batson? (2) Does a criminal defendant’s peremptory challenge qualify as state action for purposes of the Fourteenth Amendment? (3) Does the state have standing to sue for the injured jury member? (4) Does the defendant have an overriding constitutional interest?34

1. Does McCollum address the same harms as those addressed in Batson?

In Batson the Court addressed both a public and a private harm. With regard to public harm, the Batson Court stated that the integrity of the court system would be questioned by the general public if courts allowed criminal prosecutors to exercise racially discriminatory peremptory challenges.35 The Court in McCollum believed that race-biased challenges exercised by a criminal defendant would be viewed by the public in virtually the same way as those in Batson. As a result, the Court concluded that the public harm addressed in McCollum is the same as the public harm addressed in Batson.36

In addition, the Court found the private harms comparable in both cases. With regard to private harm, the Batson Court stated that the discrimination would harm the dignity of the person who experiences the discrimination.37 Applying this consideration, the McCollum Court concluded that a race-biased peremptory challenge exercised by a criminal defendant would put the excluded juror to public shame. This public shame constitutes the same private harm to the dignity of the juror as it did in Batson.38 Because both cases involved similar harms, the McCollum Court concluded that the anticipated

34. Id. at 2353.
36. See McCollum, 112 S. Ct. at 2353-54.
37. Batson, 476 U.S. at 87.
38. McCollum, 112 S. Ct. at 2353.
racial discrimination in *McCollum* satisfied the public and the private harms addressed by *Batson*.

2. *Does a defendant's peremptory challenge qualify as state action?*

   The Court applied the *Lugar* test to decide if the criminal defendant's use of the peremptory challenge constituted sufficient state action for the application of Fourteenth Amendment constraints. The *Lugar* test first asks whether the action has its source in state power. The Court decided this element of the *Lugar* test was satisfied in *McCollum* because the peremptory challenges exercised by the criminal defendants in *McCollum* were authorized by the Georgia Code.

   The second part of the *Lugar* test asks if the party can adequately be described as a state actor. The Court's decision in *Edmonson* added three discrete factors to this portion of the *Lugar* test. The first *Edmonson* factor asks whether the party relied on governmental assistance or benefits. The *McCollum* Court decided this factor was satisfied since the peremptory challenges exercised in *McCollum* were equivalent to those in *Edmonson*—which were found to be under assistance of the government.

   The second *Edmonson* factor inquires whether the action being analyzed is a traditional governmental function. The *McCollum* Court decided this element was met. The Court felt the actions of the criminal defendant in securing a fair jury were equivalent to choosing a governmental body necessary to the process of justice. By being part of the process of choos-

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39. *Id.* at 2354.
40. The *Lugar* test comes from *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), in which the Court held a private litigant to be a state actor when participating in the seizure of property to which the litigant claimed a right.
42. *Lugar*, 457 U.S. at 939.
43. *McCollum*, 112 S. Ct. at 2354-55 (citing GA. CODE ANN. § 15-12-165 (1990)).
44. *Lugar*, 457 U.S. at 939, 941-42.
46. *Id.*
47. *McCollum*, 112 S. Ct. at 2355; see also *Edmonson*, 111 S. Ct. at 2083-84.
ing a governmental body, the criminal defendant is involved in what the McCollum Court believed to be a traditional governmental function.50

The final Edmonson factor asks whether the injury is aggravated by governmental authority.51 Because the peremptory challenge takes place in the courtroom—thus giving a form of governmental approval to the jury—the McCollum Court decided the injury is indeed aggravated by governmental authority.52 Thus, relying on the test founded in Lugar and expanded in Edmonson, the McCollum Court determined that the criminal defendant's exercise of the peremptory challenge constitutes state action for purposes of the applicable Fourteenth Amendment constraints.53

3. *Does the state have standing to sue for the injured juror?*

To decide if the state has standing to sue for the injured juror, the Court looked to the Powers test.54 The Powers test initially asks if a concrete injury exists.55 This question was already answered by the McCollum Court when it decided that race-biased peremptory challenges put the affected juror to public shame.56 However, Powers also asks if the suing party has a close connection to the injured third party.57 The McCollum Court determined this in the affirmative because a sufficiently close connection develops between the state and the juror during the process of voir dire.58

Finally, the Powers test requires that the injured third party be unable to protect himself or herself.59 The Court again felt this factor had been met because the injured juror would not have had the resources to bring a suit in this instance.60 Consequently the Court decided, under the Powers test, that the state has standing to sue for the injured juror.

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50. Id.
51. Edmonson, 111 S. Ct. at 2083.
52. McCollum, 112 S. Ct. at 2356.
53. Id.
54. Id. at 2357; Powers v. Ohio, 111 S. Ct. 1364, 1370-74 (1991).
55. Powers, 111 S. Ct. at 1370.
56. McCollum, 112 S. Ct. at 2357.
57. Powers, 111 S. Ct. at 1370.
58. McCollum, 112 S. Ct. at 2357.
60. McCollum, 112 S. Ct. at 2357.
4. *Does the defendant have an overriding constitutional right?*

Because no specific constitutional right to a peremptory challenge exists, the Court focused its analysis of overriding constitutional rights on the criminal defendant's Sixth Amendment right to a fair and impartial jury. Although the *McCollum* Court's holding limits the criminal defendant's use of the peremptory challenge, the Court believed the constitutional rights of the criminal defendant are not offended. The criminal defendant has other mechanisms with which to secure a fair jury. Accordingly, the Court concluded that limiting the criminal defendant's use of the peremptory challenge will not threaten the criminal defendant's right to be tried by a fair and impartial jury.

**IV. ANALYSIS**

This analysis of *McCollum* will focus on two specific issues before the Court: the requirement of state action under the Equal Protection Clause of the Fourteenth Amendment and the criminal defendant's Sixth Amendment right to an impartial jury. This focus is appropriate because the Court's decision turns upon these constitutional issues. Also, these constitutional issues become especially important when the rights of a criminal defendant are at stake. By focusing upon these two issues, this note will point out the *McCollum* decision's analytical strengths and weaknesses as well as the potentially unjust results it could work.

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61. *Id.* at 2358. The Court believed that even though there is no constitutional right to a peremptory challenge, the *McCollum* holding does not have to undermine the validity or usefulness of the peremptory challenge. However, the Court did acknowledge that if there were no way to remove race bias from the peremptory challenge, the Court would have to eliminate the peremptory challenge rather than allow such discrimination. *Id.*

62. *See* discussion *infra* part IV.B.

63. The Court did not mention a specific mechanism, but the challenge for cause could be one of the other state-created "mechanism[s] for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism." *McCollum*, 112 S. Ct. at 2358-59.

64. *Id.*

A. The Requirement of State Action

A finding of state action is necessary if the Court is going to prohibit the criminal defendant from exercising race-biased peremptory challenges. In other words, the actions of the criminal defendant are subject to Fourteenth Amendment equal protection constraints only if the criminal defendant is determined to be a state actor.\(^{67}\) To decide the state action requirement, the \textit{McCollum} Court relied heavily on the previous holdings in \textit{Lugar} and \textit{Edmonson}. Because the "source in state authority" requirement of the \textit{Lugar} test is satisfied by the specific language of the Georgia Code,\(^{68}\) the operative question regarding state action becomes "whether the private party charged with the deprivation can be described as a state actor."\(^{69}\) The Supreme Court expanded the "described as a state actor" requirement of the \textit{Lugar} test into the three prongs addressed in \textit{Edmonson}: (1) whether the party relied on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function, and (3) whether the injury is aggravated by governmental authority.\(^{70}\) These three areas of inquiry were used by the \textit{McCollum} Court as a guideline for determining whether the party involved can be adequately described as a state actor.

1. Reliance on governmental assistance and benefits

The \textit{McCollum} Court perfunctorily listed the Georgia statutes which provide the service of a jury to a criminal defendant and concluded that such state involvement satisfies the requirement of reliance on governmental assistance and benefits. The Court supported its finding by stating that the jury system "simply could not exist" without the 'overt and significant par-

\(^{66}\) See discussion supra part III.B.2.
\(^{67}\) Since the decision of this Court in the \textit{Civil Rights Cases} the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
\(^{68}\) The defendant's right of peremptory challenge is provided for by Georgia law. \textit{GA. CODE ANN.} \S 15-12-165 (1990 & Supp. 1999).
\(^{70}\) Id.
ticipation of the government.' 71 While it is true that the state makes the jury available to the defendant, it is questionable whether the defendant, when choosing the jury during voir dire, is actually "relying on governmental assistance and benefits" in the manner intended by Lugar.

In Lugar the party under state-action analysis brought a civil suit in state court and sought governmental assistance for a prejudgment attachment. 72 The party bringing suit willfully became involved with the government in the attachment proceeding and willfully relied on governmental assistance. The criminal defendant, on the other hand, is being haled into court by the state against his or her own will. The criminal defendant is being tried before a jury provided by the state, but in such an adversarial proceeding the criminal defendant is relying on governmental assistance only at the government's insistence.

To "rely" on the government, as it was found in Lugar, certainly requires more volition than that exercised by a criminal defendant. In Lugar the Court characterized a party who relies on the government as "a willful participant in joint activity with the State or its agents." 73 The distinction between the parties in Lugar and McCollum deserves closer analysis by the Court. That the criminal defendant is not a willful participant with the government, nor seeks governmental assistance, should be considered more fully before a showing of reliance on governmental assistance and benefits is found.

This prong of the test was met only because the Court was willing to overlook the specific language in Lugar regarding willful participation. If the Court does not examine a party's willful participation then the inquiry into reliance is the same as the inquiry into the source in state authority. The Lugar Court distinguished between these two inquiries. Such a distinction should not have been overlooked by the McCollum Court without further explanation as to why the state actor need not be a willful participant when relying on governmental assistance and benefits.

71. Id. (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2084 (1991)).
73. Id. at 941 (quoting United States v. Price, 383 U.S. 787, 794 (1966)).
2. Performing a traditional governmental function

The McCollum Court concluded that the criminal defendant’s participation in the seating of a jury by the exercise of peremptory challenges is a traditional governmental function. The Court believed the exercise of peremptory challenges should be viewed as the criminal defendant “assist[ing] the government in the selection of an impartial trier of fact.”\textsuperscript{74} While it is true that the criminal defendant can exclude certain persons from the jury with a peremptory challenge, the Court overstated the involvement of the defendant when it described the defendant as “selecting” the trier of fact. There is a marked difference between the actions of the state in providing a venire, the actions of the judge in questioning the venire, and the actions of the criminal defendant in exercising a limited number of peremptory challenges. The defendant does nothing more than agree or disagree with those persons called onto the venire. Such limited involvement by the criminal defendant does not rise to the standard enunciated by the McCollum Court as “choos[ing] a quintessential governmental body.”\textsuperscript{75}

The Court’s conclusion that a criminal defendant exercising a peremptory challenge is performing a traditional governmental function is further weakened by the obvious side-step of the Supreme Court’s earlier decision in Polk County v. Dodson.\textsuperscript{76} In Dodson the Court determined that “a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant.”\textsuperscript{77} In McCollum the Court danced around the Dodson holding by saying there are certain occasions where the criminal defendant can be considered a state actor and certain occasions where he or she cannot be considered a state actor. The exercise of the peremptory challenge is an occasion where the Court feels the criminal defendant does take on the guise of a state actor for purposes of the Fourteenth Amendment.

Justice O’Connor, in her dissent in McCollum, pointed out the inconsistency of the Court’s holding in this specific area: “The Court . . . spin[s] out a theory that defendants and their

\textsuperscript{74} McCollum, 112 S. Ct. at 2355 (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991)).

\textsuperscript{75} Id. at 2356.

\textsuperscript{76} 454 U.S. 312 (1981).

\textsuperscript{77} McCollum, 112 S. Ct. at 2356 (footnote omitted).
lawyers transmogrify from government adversaries into state actors when they exercise a peremptory challenge, and then change back to perform other defense functions.78 Justice O'Connor believed Dodson foreclosed the Court's decision in McCollum regarding state action and there was no need for further inquiry by the Court.79 Although Dodson may not rule out all further inquiry into state action on the part of the criminal defendant, it does weaken any analytical support for the McCollum Court's finding. By side-stepping Dodson, rather than overruling it, the Court provided only weak support for its finding of state action and little guidance for future interpretation of that finding.

3. Aggravation of harm by governmental authority

Because of the negative public perception of discrimination occurring in the courtroom, the McCollum Court concluded that the public injury is aggravated by governmental authority: "Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State."80 Such analysis focuses primarily on the aggravation of public harm. By limiting its analysis to the public harm, the Court passed over the private harm—a factor which was vital to the overall harm addressed by the Court in Batson.81

The private harm involved in a racially discriminatory peremptory challenge is a harm to the individual juror who experiences the discrimination. Such harm to the individual juror is not "aggravated" because it occurred in a courtroom. Discrimination is undesirable wherever it may occur—in the courtroom, at the club, or in school. The courtroom setting cannot be determined to categorically increase the personal injury of someone who experiences such discrimination. In fact, discrimination in the courtroom during peremptory challenges,

78. Id. at 2362 (O'Connor, J., dissenting).
79. Id.
80. Id. at 2356 (footnote omitted).
81. The Court acknowledged earlier in the opinion that there are injuries to both the public and the juror: "The experience of many state jurisdictions has led to the recognition that a race-based peremptory challenge, regardless of who exercises it, harms not only the challenged juror, but the entire community." Id. at 2354 n.6. Even so, the focus of the Court's analysis in this part of the opinion was on the public injury.
if it takes place, may not even be recognized by the juror as discrimination.\textsuperscript{82}

By focusing on the public harm, the Court avoided the issue of private harm to the juror. This is because the private harm is not aggravated by the courtroom setting. However, it is the injury to the individual citizen which goes to the heart of the protections guaranteed in the Fourteenth Amendment. The Court's focus under a Fourteenth Amendment analysis should be on the private harm and the juror's offended individual rights, not on the public image of the system of justice. Because the private injury is not increased by a courtroom setting, the analysis of the McCollum Court only marginally satisfies the "aggravated harm" prong of the state action test.

Careful analysis of the Lugar test shows that the elements of the test are not sufficiently satisfied by the facts of McCollum: the criminal defendant cannot be singled out as one who willfully relies on governmental assistance or benefits as did the plaintiff in Lugar; the criminal defendant has very limited involvement in the traditional governmental function of seating a jury; and the injury is aggravated only for purposes of public, not private, harm.

Given the gravity of the constitutional requirements that flow from a finding of state action, the Court should reconsider the weak showing which the facts of McCollum make under the Lugar test. Of course, if the requirement of state action is considered unsatisfied in the setting of criminal defendants, the Court would be unable to reach the Equal Protection Clause of the Fourteenth Amendment and hence unable to reach the alleged racial discrimination. Justice O'Connor commented on the role of the state action requirement of the Fourteenth Amendment at the end of her dissent: "That the Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom in the land is frustrating, to be sure. But such limitations are the necessary and intended consequence of the Fourteenth Amendment's state action requirement."\textsuperscript{83}

\textsuperscript{82} Indeed, it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors." \textit{Id}. at 2356 n.8. If the juror is unable to attribute the challenge to a certain party, then the racially motivated nature of the challenge may not be obvious to the juror.

\textsuperscript{83} McCollum, 112 S. Ct. at 2364 (O'Connor, J., dissenting).
B. Overriding Constitutional Interests of the Criminal Defendant

As a separate factor in determining its holding, the McCollum Court considered the overriding constitutional interests of the criminal defendant.84 Under this prong of the test, it considered the criminal defendant’s right to a peremptory challenge and the criminal defendant’s Sixth Amendment right to a fair and impartial jury.

Under an analysis of the criminal defendant’s right to a peremptory challenge, the Court acknowledged the long history and tradition of the peremptory challenge and the “widely held belief that the peremptory challenge is a necessary part of trial by jury.”85 The Court also reaffirmed its statement in Edmonson that “the role of litigants in determining the jury’s composition provides one reason for wide acceptance of the jury system and of its verdicts.”86 Even with the recognized importance of the peremptory challenge in seating a fair jury, the Court felt no constitutional constraints upon its power to limit the criminal defendant’s free exercise of the peremptory challenge: “[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury.”87

After discussing the peremptory challenge, the Court turned to an analysis of the criminal defendant’s constitutional rights under the Sixth Amendment. To be sure, this entailed a balancing of the Equal Protection Clause and the Sixth Amendment.88 The criminal defendant’s right to a fair and impartial jury lost. The Court quickly disposed of the criminal defendant’s right to an impartial jury by concluding that it is protected by other mechanisms through which the defendant

84. See discussion supra part III.B.4.
86. McCollum, 112 S. Ct. at 2358 (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)).
87. Id.
88. We do not believe that this decision will undermine the contribution of the peremptory challenge to the administration of justice. Nonetheless, “if race stereotypes are the price for acceptance of a jury panel as fair,” we reaffirm today that such a “price is too high to meet the standard of the Constitution.”

Id. (citation omitted).
may remove someone who is supposedly race-biased. The defendant's Sixth Amendment rights deserve further examination.\textsuperscript{89}

In his concurring opinion, Justice Thomas asserted his own arguments against the Court’s holding and did not join the dissent only because \textit{Edmonson} “requires the opposite conclusion” and the state did “not question \textit{Edmonson}.”\textsuperscript{90} Justice Thomas’s concurring opinion was motivated by his belief that \textit{McCollum} would work unjust results for future criminal defendants. Although in \textit{McCollum} the Court reached an instance of discrimination against an African-American juror by white American criminal defendants, Justice Thomas felt there will be cases in which an African-American criminal defendant wishes to have a fair and impartial jury. Because of the limitations upon the peremptory challenge, such a defendant may not be able to remove those whom he or she believes are unable to be race-neutral in their performance of jury duty. Adding punctuation to his feelings of potential injustice, Justice Thomas said: “I am certain that black criminal defendants will rue the day that this court ventured down this road . . .”\textsuperscript{91}

In the courtroom, the criminal defendant is aided greatly by the peremptory challenge in securing a fair jury. The right to challenge a juror who is suspected, for whatever reason, of being unable to render a fair verdict is one which is vital to the protection of the criminal defendant’s Sixth Amendment right to a fair jury. The Court should not lightly pass over this constitutional right, or conclude so quickly that it will not be affected by the ruling in \textit{McCollum}. It was the Sixth Amendment right to a fair jury that motivated the Court in the first in-

\textsuperscript{89} Because our criminal justice system gives certain advantages to the accused, the criminal defendant’s Sixth Amendment right to a fair and impartial jury may deserve added weight when being balanced against the Equal Protection Clause. \textit{See} Goldwasser, \textit{supra} note 41, at 821-26 (discussing the advantages which are given to the accused at trial). Even so, no presumption was given to the accused by the \textit{McCollum} Court when balancing the Sixth Amendment with the Equal Protection Clause.

\textsuperscript{90} \textit{McCollum}, 112 S. Ct. at 2359 (Thomas, J., concurring).

\textsuperscript{91} \textit{Id.} at 2360. Justice Thomas’s opinion is supported by the Supreme Court’s holding in \textit{Strauder v. West Virginia}, 100 U.S. 303 (1880). In \textit{Strauder} the Court acknowledged that “prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.” \textit{Id.} at 309.
stance to call the peremptory challenge a “necessary part of trial by jury.”\footnote{92. McCollum, 112 S. Ct. at 2358 (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).}

C. A Proposed Solution: Acknowledge the Fourteenth Amendment’s Inability to Reach the Criminal Defendant’s Peremptory Challenge

Professor Douglas L. Colbert has suggested the use of the Thirteenth Amendment to prohibit racial discrimination in the exercise of peremptory challenges.\footnote{93. Colbert, supra note 1.} Professor Colbert feels the Thirteenth Amendment would side-step the problem of state action required under the Fourteenth Amendment. Such a solution to the requirement of state action is no longer necessary, given the McCollum Court’s finding of state action on the part of the criminal defendant in exercising peremptory challenges. However, Colbert’s article forcefully points out the concerns criminal defendants should have now that the Supreme Court has reached the issue of discrimination in the criminal defendant’s exercise of peremptory challenges: “Criminal defendants generally rely on the peremptory challenge to assure that the selected jurors will be fair and impartial . . . . Although a juror’s bias, racial or otherwise, may be exposed during the voir dire, responses given during this process are unlikely to result in a successful challenge for cause.”\footnote{94. Id. at 121-22 (footnotes omitted).}

The holding of the Court in McCollum will have a direct effect on the ability of the criminal defendant to have a fair and impartial jury; taking away the peremptory challenge leaves the criminal defendant with only a challenge for cause. The total elimination of the peremptory challenge, which the Court has made a step toward in McCollum, would leave the criminal defendant with insufficient recourse against a race-biased jury.

The Court should have acknowledged the inability of the Fourteenth Amendment to reach the area of criminal defendants’ peremptory challenges. Although the problem of discrimination may continue, the laudable cause of eliminating such discrimination has been decidedly left to another forum. The way in which the Court stretched its analysis of state action to reach this area of potential discrimination attests of
the desire of the Court to stamp out any trace of race discrimi-
nation, but such actions should not be taken at the expense of
a criminal defendant’s constitutional right to a fair and impor-
tial jury. A criminal defendant—who may be facing the pros-
spect of extended incarceration or even the death penalty—has a
fundamental and important right to a fair and impartial jury.
Because the peremptory challenge is so vital to securing that
right, the Supreme Court should not have limited it upon such
a questionable showing of state action.

V. CONCLUSION

The McCollum Court interpreted the constraints of the
Fourteenth Amendment’s Equal Protection Clause to necessi-
tate holding as unconstitutional race-biased peremptory chal-
lenges exercised by a criminal defendant. The Court stretched
the requirement of state action in order to reach the criminal
defendant with such Fourteenth Amendment constraints. Con-
sidered analysis under the Lugar test shows that the criminal
defendant cannot fairly be described as a state actor when
exercising peremptory challenges and the Court should not
have reached a Fourteenth Amendment analysis in McCollum.

The McCollum Court also gave insufficient attention to the
criminal defendant’s Sixth Amendment right to a fair and im-
partial jury. That right is protected by the exercise of peremp-
tory challenges to remove unwanted jurors. The McCollum
holding puts what could become a formidable limitation on the
criminal defendant’s exercise of peremptory challenges and
ultimately a limitation on the criminal defendant’s right to a
fair and impartial jury. Such a limitation will work unjust
results for criminal defendants and therefore deserves greater
consideration when being balanced against possible racial dis-
crimination under the Equal Protection Clause of the Four-
teenth Amendment.

Eric E. Vernon

95. “Certainly, it is difficult to imagine anyone less a ‘state actor’ than a
criminal defendant.” Goldwasser, supra note 41, at 820.