CONSTITUTIONAL LAW—Equal Protection Clause Prohibits Criminal Defendants from Using Peremptory Strikes to Exclude Jurors on the Basis of Race—*Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

I. INTRODUCTION

On August 10, 1990, Thomas, William, and Ella McCollum (Defendants) were indicted for the aggravated assault and simple battery of two African-Americans.[1] Following the indictment, leaflets were circulated among local African-American residents naming the white defendants and reporting the alleged assault.[2] This publicity prompted the State to move that the defense be prohibited from using its peremptory challenges[3] in a racially discriminatory manner.[4] According to the prosecution, defense counsel had indicated an intention to use peremptory strikes to exclude all potential African-American jurors because of the racially charged nature of the case.[5] The trial judge held, however, neither the state nor the federal constitution prohibited a criminal defendant from using peremptory strikes in a racially discriminatory manner.[6]

The ruling was immediately certified to the Supreme Court of Georgia and was affirmed in a four to three decision.[7] The Georgia high court recognized the United States Supreme Court had recently held that civil litigants could not use peremptory strikes in a racially discriminatory manner, but concluded this decision did not extend to criminal defendants.[8]

The State of Georgia appealed and the United States Supreme Court granted certiorari.[9] The Supreme Court, in a seven to two decision, *held*, reversed and remanded.[10] The Equal Protection Clause prohibits criminal defendants from using peremptory strikes to exclude jurors on the basis of race. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

II. HISTORY

McCollum is the most recent in a long line of cases dealing with the right of African-Americans to sit on juries. The Court first dealt with the issue of juries and race in the case of *Strauder v. West Virginia*.[11] In *Strauder*, the Court found a state law prohibiting African-Americans from serving on juries violated the Equal Protection Clause of the Fourteenth Amendment.[12] The Court dealt

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1. Georgia v. McCollum, 112 S. Ct. 2348, 2351 (1992).
2. *Id.*
3. *Id.* Georgia law allows 20 peremptory challenges to a defendant who is indicted for an offense providing a penalty of four or more years. GA. CODE ANN. § 15-12-165 (Harrison 1990).
4. Georgia v. McCollum, 112 S. Ct. at 2351.
5. *Id.*
6. *Id.* at 2352.
7. State v. McCollum, 405 S.E.2d 688, 689 (Ga. 1991).
8. *Id.* (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991)).
9. Georgia v. McCollum, 112 S. Ct. 2348, 2352 (1992).
10. *Id.* at 2359.
11. Strauder v. West Virginia, 100 U.S. 303 (1879).
12. *Id.* at 310, 312.

again with the issue in *Swain v. Alabama*.[13] In *Swain*, the Court held that the striking of African-Americans in a particular case was not necessarily a denial of equal protection of the laws.[14] The Court explained that a presumption existed that the prosecutor acts on acceptable considerations when exercising peremptory strikes.[15] The Court was willing to recognize, however, that the total absence of African-Americans serving on petit juries could be a Fourteenth Amendment violation, provided the defendant could rebut this presumption by offering proof supporting a reasonable inference the African-Americans were excluded for reasons wholly unrelated to the outcome of the particular case on trial.[16] The Court did not address this possible violation in *Swain*, though, because it stated the record was not sufficient to demonstrate such an inference.[17]

The Court finally reconsidered the "important" status of peremptory challenges in *Batson v. Kentucky*.[18] In *Batson*, the Court determined, "Once the defendant makes a prima facie showing [of purposeful discrimination], the burden shifts to the State to come forward with a neutral explanation for challenging black jurors."[19] The *Batson* Court, in rejecting the evidentiary formulation of *Swain*,[20] reasoned that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[21] Therefore, the *Batson* Court limited the otherwise uninhibited ability of a prosecutor to exercise peremptory challenges by forbidding challenges based solely on the basis of race.[22]

The most recent case decided by the Court dealing with this issue was *Edmonson v. Leesville Concrete Co.*[23] In *Leesville Concrete*, the Court extended the reach of its jurisprudence concerning juries and race into the civil context.[24] The Court in *Leesville Concrete* held civil litigants could not use peremptory strikes to exclude jurors on the basis of race,[25] finding the price of a fair jury too high when based on racial stereotypes in a multiracial democracy.[26] The Court stated, "Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test."[27]

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13. Swain v. Alabama, 380 U.S. 202 (1965).
14. *Id.* at 221.
15. *Id.* at 223.
16. *Id.* at 223-24.
17. *Id.* at 224-25.
18. Batson v. Kentucky, 476 U.S. 79, 98 (1986).
19. *Id.* at 97.
20. *Id.* at 98-99.
21 *Id.* at 87.
22. *Id.* at 89.
23. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).
24. *Id.* at 2087.
25. *Id.* at 2087-88.
26. *Id.* at 2088.
27. *Id.*

III. THE MAJORITY OPINION

The *McCollum* majority divided the analysis into four issues.[28] The first issue was whether the harm caused by discriminatory use of peremptory challenges was present in the context of a criminal proceeding.[29] The second issue was whether a criminal defendant's use of peremptory challenges constituted state action.[30] The third issue was whether the state had standing to bring the challenge before the Court.[31] The final issue was whether the usual prohibition against using peremptory challenges in a discriminatory manner was outweighed by other rights afforded to criminal defendants.[32]

A. *The Threat of Harm*

The Court first analyzed the issue of whether the harm created by the prosecution's use of peremptory challenges in a racially discriminatory manner was also present when the defense used discriminatory strikes.[33] The harm caused by racially discriminatory strikes was addressed in *Batson*:[34]

> Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."[35]

In *McCollum*, the Court concluded the harm caused when a defendant practiced discriminatory jury selection was no different than the harm caused when the State practiced such discrimination.[36] Repeating a theme articulated in *Batson*, the Court concluded the harm caused by discriminatory jury selection was pervasive.[37] The Court reasoned that purposeful exclusion subjected the juror "to open and public racial discrimination."[38] Additionally, "[s]election procedures that purposefully exclude African-Americans from juries undermine . . .

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28. Georgia v. McCollum, 112 S. Ct. 2343, 2353 (1992). Justice Blackmun wrote the majority opinion. *Id.* at 2351. Chief Justice Rehnquist and Justice Thomas filed concurring opinions. *Id.* at 2359-61. Justices O'Connor and Scalia dissented in separate opinions. *Id.* at 2361-65.

29. *Id.* at 2353.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Batson v. Kentucky, 476 U.S. 79, 87-88 (1986); *see supra* text accompanying notes 18-22.

35. Batson v. Kentucky, 476 U.S. at 87-88 (citation omitted) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

36. Georgia v. McCollum, 112 S. Ct. at 2353.

37. *Id.* at 2353-54.

38. *Id.* at 2353.

public confidence"[39] because such practices cast doubt on whether the verdict is "given in accordance with the law by persons who are fair."[40]

B. *The Presence of State Action*

The Court next examined the issue of whether state action was involved when a criminal defendant used peremptory challenges.[41] In deciding the issue, the Court used the two-pronged state action test set forth in *Lugar v. Edmondson Oil Co.*[42] In *Edmonson v. Leesville Concrete Co.*,[43] the Court used the *Lugar* test to determine if the private civil litigants were state actors for purposes of the Equal Protection Clause.[44] The first prong of the *Lugar* test asks whether the alleged constitutional deprivation resulted from the exercise of a right or privilege that is based on state authority.[45] The test's second prong asks whether the party against whom the deprivation is alleged can fairly be considered a state actor.[46]

The Court in *Leesville Concrete* had no trouble finding the first prong of the *Lugar* test was satisfied because the source of peremptory challenges was a state statute.[47] "Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury."[48] The Court found the situation in *McCollum* analogous to *Leesville Concrete* in that the source for the peremptory challenge was a Georgia statute.[49]

The second prong of the *Lugar* test applies three factors to determine if the litigant using the challenge is a state actor.[50] The three factors the second prong examines are: "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 in a unique way by the incidents of governmental authority.'"[51]

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39. *Id.* at 2354.
40. *Id.* at 2353-54.
41. *Id.* State action is a necessary component of any claim based on the Fourteenth Amendment because of the Amendment's command that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883).
42. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). In *Lugar*, the Court held state action was present when private parties were permitted, under state law, to obtain prejudgment attachments of private property. *Id.* at 939-42.
43. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).
44. *Id.* at 2082-83.
45. Lugar v. Edmondson Oil Co., 457 U.S. at 937.
46. *Id.*
47. Edmonson v. Leesville Concrete Co., 111 S. Ct. at 2083.
48. *Id.*
49. Georgia v. McCollum, 112 S. Ct. 2348, 2355 (1992).
50. *Id.* (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991)).
51. *Id.* (quoting Edmonson v. Leesville Concrete Co., 111 S. Ct. at 2083).

For the first factor, the Court found, as it did in *Leesville Concrete*, the peremptory challenge not only relied on the state for governmental assistance and benefit, it owed its existence to a state statute.[52]

Applying the second factor, the Court, again following the reasoning of *Leesville Concrete*, found peremptory challenges perform a traditional governmental function.[53] The Court reasoned that, compared to civil trials, peremptory challenges had heightened importance in a criminal context "because the selection of a jury in a criminal case fulfills [the] unique and constitutionally compelled governmental function" of providing jury trials to criminal defendants.[54]

Finally, the Court determined the use of peremptory challenges in a courtroom setting intensified those harmful effects that naturally flowed from excluding jurors on the basis of race.[55] As the Court noted, regardless of whether the discriminatory challenge was exercised by prosecution or defense counsel, "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."[56]

Defendants argued that "the adversarial relationship between the defendant and the prosecution negates the governmental character of the peremptory challenge."[57] Defendants cited *Polk County v. Dodson*[58] in support of their contention.[59] In *Dodson*, a defendant brought suit against his public defender for failing to adequately represent him.[60] The suit was brought under 42 U.S.C. section 1983, which requires an action under color of state law.[61] The Court in *Dodson* held the public defender could not be considered a state actor in the context of his representation of a criminal defendant.[62] The *McCollum* Court rejected this argument, however, noting *Dodson* did not say a public defender was outside the category of state actor simply because he acted as defense counsel.[63] Rather, the Court concluded, the issue was whether he was a state actor in light of "the nature and context of the function" he was performing.[64] The Court distinguished the exercise of a peremptory challenge from other duties a defendant's attorney might undertake on behalf of his client.[65] The Court emphasized that the use of peremptory challenges involved the power to choose a jury, an instrument the Court characterized as a "quintessential governmental body."[66]

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52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 2356.
56. *Id.*
57. *Id.*
58. Polk County v. Dodson, 454 U.S. 312 (1981).
59. Georgia v. McCollum, 112 S. Ct. at 2356.
60. Polk County v. Dodson, 454 U.S. at 314.
61. *Id.*
62. *Id.* at 325.
63. Georgia v. McCollum, 112 S. Ct. 2348, 2356 (1992).
64. *Id.*
65. *Id.*
66. *Id.*

For the Court, this power was sufficient to make the party using the challenge a state actor.[67]

C. *Standing*

The Court next turned to the standing issue. In *McCollum*, the State claimed third-party standing on behalf of African-American jurors who the respondents excluded using peremptory strikes.[68] The Court applied the test articulated in *Powers v. Ohio*[69] to resolve the issue of standing.[70] The *Powers* test allows a party to maintain an action on behalf of a third party if three requirements are met: (1) they would suffer a concrete injury, (2) they had a close relation to the third party, and (3) the third party was for some reason obstructed from protecting its own interests.[71]

The Court again analogized the case to *Leesville Concrete* and applied a three-part test.[72] First, the Court reasoned that the State suffered concrete injury from racially discriminatory juror selection because "the fairness and integrity of its own judicial process [was] undermined."[73] Second, the Court concluded the state was the "logical and proper party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial."[74] Finally, in applying the third part of the test, the Court referred to the "daunting" barriers an excluded African-American juror faced in bringing suit on his own behalf.[75] One such barrier mentioned by the *Powers* Court was the lack of an opportunity to be heard when jurors are excluded because they are not parties to the selection process.[76] Another barrier was the difficulty an excluded juror would have in showing the discrimination was likely to recur.[77] The Court in *McCollum* found the barriers facing a juror excluded by defense counsel were no less formidable than those described in *Powers*.[78] The Court, having found the elements of the *Powers* test satisfied, held the State had standing to bring suit on behalf of the excluded jurors.[79]

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67. *Id.*
68. *Id.* at 2357.
69. Powers v. Ohio, 499 U.S. 400 (1991). In *Powers*, the Court held a criminal defendant had third-party standing to raise a constitutional challenge on behalf of jurors excluded on the basis of race. *Id.* at 415.
70. Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992).
71. Powers v. Ohio, 499 U.S. at 411.
72. Georgia v. McCollum, 112 S. Ct. at 2357. In *Leesville Concrete*, the Court used the third-party standing test to find civil litigants had standing to raise a constitutional challenge on behalf of jurors excluded because of their race. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991); *see supra* text accompanying notes 23-27.
73. Georgia v. McCollum, 112 S. Ct. at 2357.
74. *Id.*
75. *Id.* (citing Powers v. Ohio, 499 U.S. 400, 414 (1991)).
76. Powers v. Ohio, 499 U.S. at 414 .
77. *Id.* at 415 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105-10 (1983)).
78. Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992).
79. *Id.*

D. *The Rights of the Accused*

Finally, the Court considered whether the rights of a criminal defendant outweighed the constitutional dilemma posed by allowing defendants to use peremptory challenges in a racially discriminatory manner.[80] The Court concluded peremptory challenges, although historically important in jury selection, were creatures of state law, not federal constitutional law.[81] The Court reasoned that prior cases repeatedly held the right to use peremptory challenges could be withheld completely without treading on constitutional guarantees.[82] The Court concluded racial stereotyping was too high a price to pay for unbridled use of the challenge.[83]

The Court further recognized the important role the peremptory challenge played in the selection of a fair and impartial jury.[84] The Court determined, however, precluding criminal defendants from using the challenge in a racially discriminatory manner would not undermine its role.[85] The right to a fair trial and effective counsel, the Court concluded, did not include the right to use racial discrimination.[86]

IV. THE THOMAS CONCURRENCE

Justice Thomas concurred with the judgment of the majority, but wrote a separate opinion.[87] Thomas appeared troubled by the majority's finding of state action when a defendant used peremptory challenges in a racially discriminatory manner.[88] He stated, however, that he felt the Court was compelled to find state action because of the *Leesville Concrete* decision.[89] Justice Thomas also expressed concern that the majority decision eroded the principles of *Strauder*, and stated, "[B]lack criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory

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80. *Id.* at 2357-58.

81. *Id.*

82. *Id.* (citing Frazier v. United States, 335 U.S. 497, 505 n.11 (1948); United States v. Wood, 299 U.S. 123, 145 (1936); Stilson v. United States, 250 U.S. 583, 586 (1919); Swain v. Alabama, 380 U.S. 202, 219 (1965)).

83. *Id.* (citing Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991)).

84. *Id.* at 2358-59.

85. *Id.* at 2359.

86. *Id.* at 2358.

87. *Id.* at 2359 (Thomas, J., concurring). Chief Justice Rehnquist also wrote a one-paragraph concurrence. *Id.* (Rehnquist, C.J., concurring). The Chief Justice stated he disagreed with the state action portion of the analysis, but concurred because he believed precedent contained in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991), forced the conclusion state action was present in this case. Georgia v. McCollum, 112 S. Ct. at 2359 (Rehnquist, C.J., concurring). Two Justices, O'Connor and Scalia, dissented based on the state action portion of the analysis. *Id.* at 2361-64 (O'Connor, J., dissenting); *id.* at 2364-65 (Scalia, J., dissenting). Both Justices argued the state action analysis of *Leesville Concrete* should be overruled. *Id.* at 2361-64 (O'Connor, J., dissenting); *id.* at 2364-65 (Scalia, J., dissenting).

88. Georgia v. McCollum, 112 S. Ct. at 2359 (Thomas, J., concurring).

89. *Id.* (Thomas, J., concurring); *see supra* text accompanying notes 23-27.

strikes."[90] Justice Thomas argued criminal defendants had more to gain than to lose by prohibiting the discriminatory use of peremptory challenges because African-American criminal defendants could no longer use the challenges to exclude white jurors who might harbor "racial animus [that would] affect the verdict."[91]

The Thomas concurrence has a certain simple logic. He forgets, however, that a probing and skillful lawyer during voir dire should be able to expose any underlying racial prejudice in a potential juror. When this prejudice can be demonstrated through voir dire, the subsequent peremptory strike will be based not on the excluded juror's race, but on his attitude. Voir dire is a more effective tool for weeding out racist jurors, and it does not have the same potential for harm as racially discriminatory peremptory strikes.

V. CONCLUSION

The majority decision was a well reasoned and logical extension of the *Batson* line of cases. Racial tension in this country seems to mount by the year, and the holding helps move the Court's jurisprudence along the path of equal justice. Although the Court's finding of state action may not be strongly grounded in constitutional jurisprudence, it has a firm basis in reality. The Los Angeles riots in April 1992 serve as a particularly poignant example of the reality of our system of criminal justice. The conventional wisdom was that those riots were spurred, at least initially, by the perception of injustice following the acquittals of four Los Angeles police officers on charges they had used unnecessary force during the arrest of Rodney King, an African-American motorist.[92] That perception challenged the integrity of the criminal justice system.

Peremptory challenges that discriminate on the basis of race also threaten the integrity of our system of criminal justice, regardless of who makes those challenges. When African-Americans are removed from juries because of their race, the perception is that the system is defective and racist. This perception will operate even when a defendant's attorney is making the strike. The Court's opinion in this case acknowledged this perception; the dissenters did not address it. The dissent also failed to counter the majority's argument that the State passively condones this discrimination by allowing it to occur. Yet this is the reality of our criminal justice system. The *McCollum* decision takes that reality into account and, therefore, is a step down the road to a system of justice that is a little more just.

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90. Georgia v. McCollum, 112 S. Ct. at 2360 (Thomas, J., concurring).

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

92. *See* George J. Church, *L.A. In Flames*, TIME, May 11, 1992, at 20-25. The case received widespread publicity when the national news media broadcast an amateur videotape of the arrest. *Id.* The tape showed King being kicked and beaten with nightsticks by Los Angeles police officers. *Id.*