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Equal Protection

tory challenges allowed under the present statute. This change, Judge Titone concluded, would still allow the prosecution and defense to exclude suspected prospective jurors, but reduce the opportunity for systematic exclusion of certain racial groups.[386]

People v. Kern[387]
(decided March 29, 1990)

Three defendants, two convicted of manslaughter, assault and conspiracy and one convicted of manslaughter and assault, contended that neither the state nor federal constitution prohibits a criminal defendant from exercising race based peremptory challenges.[388]Peremptory challenges, provided under section 270.25 of the state's Criminal Procedure Law,[389] allow both the defense and prosecution to exclude a prospective juror without having to supply a reason.[390] The issue was whether such challenges violated the equal protection clause[391] and/or the civil rights clause[392] of the state constitution. The court held that both clauses of the New York State Constitution prohibit racially based peremptory challenges.[393]

This appeal arises from the highly publicized "Howard Beach incident" where three white youths were arrested for attacking

386. *Id.* at 359, 552 N.E.2d at 625-26, 553 N.Y.S.2d at 89-90 (Titone, J., concurring).

387. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert denied,* Kern v. New York, 111 S. Ct. 77 (1990).

388. *Id.* at 648, 554 N.E.2d at 1239-40, 555 N.Y.S.2d at 651-52.

389. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

390. *See id.*

391. *Kern,* 75 N.Y.2d at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655. The equal protection clause states that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11.

392. *Kern,* 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653. The civil rights clause states that "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. CONST. art I, § 11.

393. *Kern,* 75 N.Y.2d at 650-51, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

three black men. During the jury selection process, the defense peremptorily challenged three black prospective jurors. The prosecution, believing the defense was systematically excluding blacks from jury service, raised a claim of race discrimination and moved that the defense attorney provide a race neutral explanation for the three challenges.[394] The trial judge denied the motion but later ruled that the defense must provide a race neutral explanation for future challenges of black prospective jurors. When the next round of jury selection resumed, the defense peremptorily challenged seven more black prospective jurors which led the trial judge to demand that the defense attorney provide a race neutral explanation for each excluded prospective juror.[395] When the defense failed to provide a race neutral explanation for one of the excluded prospective jurors, the trial judge ordered that the prospective juror be seated with the other accepted jurors.[396] The defendants appealed the ruling.

The court of appeals, in a unanimous decision, held that the equal protection clause and the civil rights clause of the state constitution prohibit the defense from invoking race based peremptory challenges.[397] This holding, according to the court, also prohibits the prosecution from use of such challenges.[398]

The equal protection clause of our state constitution, like the federal equivalent, prohibits acts of discrimination only by the government and therefore does not apply to private acts of discrimination. Private acts, nevertheless, can be subject to the command of either the state or federal equal protection clause if the challenged act is found to so significantly involve the state as to constitute "state action."[399]

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394. *Id.* at 647, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.

395. *Id.* While seven black prospective jurors were peremptorily challenged, the trial court demanded that the defense provide a race neutral explanation for six challenges. *Id.*

396. The court actually rejected three of the six race neutral explanations offered by the defense attorney, but two of these prospective jurors were excused for other reasons not related to race. *Id.* at 647-48, 554 N.E.2d at 1239, 555 N.Y.S.2d at 651.

397. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

398. *Id.* at 649, 554 N.E.2d at 1240, 555 N.Y.S.2d at 652.

399. In SHAD Alliance v. Smith Haven Mall, the court of appeals restated

The court, deciding the issue under the state constitution, ruled that race based peremptory challenges exercised by the defense are state action and therefore are subject to the equal protection clause.[400] The court found "that the State is inevitably and inextricably involved in the process of excluding jurors as a result of a defendant's peremptory challenges."[401] The court noted that the defendant's right to peremptory challenges is granted by the state legislature; the state summons prospective jurors for jury service and the trial judge, an agent of the state, has the duty to inform the prospective juror that he or she is excused.[402] The court, therefore, determined that the state had significant involvement with the peremptory challenge process as to constitute state action and concluded that the equal protection clause prohibits the defense, along with the prosecution, from use of race based peremptory challenges.[403]

Addressing the citizen's civil right to participate in jury service, the court noted that the civil rights clause, which enumerates race as an impermissible classification, bars both private and state discrimination and therefore applies to both the defense and prosecution. "The Civil Rights Clause is not self-executing, however, and prohibits discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statute, or common law."[404] The court found two provisions of the state consti-

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several factors that may constitute state action, which include:

> '[T]he source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person.'

66 N.Y.2d 496, 505, 488 N.E.2d 1211, 1217, 498 N.Y.S.2d 99, 105 (1985) (quoting Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976)).

400. *Kern*, 75 N.Y.2d at 657, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.

401. *Id.* at 656, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

402. *Id.* at 656-57, 554 N.E.2d at 1245, 555 N.Y.S.2d at 657.

403. *Id.*

404. *Id.* at 651, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653; *see* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949) (citing 4 Rev. Rec. of the Constitutional Convention of the State of New York, 2626-27 (1938) (statement of Del. H.E. Lewis)).

tution which protect blacks from discrimination of their civil rights in regard to race based peremptory challenges.

The first provision is enumerated in article I, section 11 of the state constitution[405] which prohibits discrimination in a citizen's civil rights. In *Kern* the court ruled that jury service is a privilege secured under this provision and, therefore, protected by the civil rights clause. The second provision that protects a citizen's right to serve on a petit jury is section 13 of the state's civil rights law.[406] This statute also prohibits peremptory challenges exercised solely on the basis of race. According to the court, this "statute leaves no doubt that service on the petit jury is a civil right in this State, and, this being so, it is the Civil Rights Clause of article I, § 11 of the Constitution which limits the defense exercise of it peremptories . . . ."[407]

Prior to *Kern*, the court of appeals decided possible instances of racial discrimination under the Federal Constitution following the United States Supreme Court decision in *Batson v. Kentucky*,[408] which prohibited the prosecution from exercise of race based peremptory challenges. Since the court of appeals has ruled in the past that the state's equal protection clause offers no more protection than the federal equivalent[409] and these prior claims involved only the prosecution's use of race based peremptory challenges, the court apparently believed that it was unnecessary to decide the issue under the state constitution. However, presented with an issue of whether the *defense* is prohibited from use of race based peremptory challenges, which had not been decided in *Batson*, the court departed from federal law and decided the issue under the state constitution. Under the state constitution, the court of appeals found that aside from the state's equal protection clause prohibiting the exercise of race based peremptory challenges, the civil rights clause also prohibits such instances of dis-

405. N.Y. CONST. art. I, § 11.

406. *Kern*, 75 N.Y.2d at 651-53, 554 N.E.2d at 1242-43, 555 N.Y.S.2d at 654-55.

407. *Id.* at 653, 554 N.E.2d at 1243, 555 N.Y.S.2d at 655.

408. 476 U.S. 79 (1986).

409. *See* Esler v. Walters, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1095, 452 N.Y.S.2d 333, 337-38 (1982).

crimination. Since the United States Supreme Court, in subsequent decisions, has not explicitly decided whether *Batson* applies to the criminal defendant's exercise of race based peremptory challenges,[410] the New York State Constitution and more specifically, under the civil rights clause, provides the unfairly excluded black prospective juror additional protection from instances of racial discrimination. Furthermore, aside from race, the civil rights clause also explicitly mentions color, creed and religion as impermissible classifications. Therefore any peremptory challenges exercised for such reasons should be prohibited as well. The court of appeals did not, however, discuss whether classifications not mentioned in the civil rights clause, such as gender, could be protected under this provision.

Forti v. New York State Ethics Commission[411]
(decided April 5, 1990)

Plaintiffs, all of whom are attorneys and former members of the executive branch, claimed that the implementation of the 1987 Ethics in Government Act[412] violated their equal protection and due process rights under the state[413] and federal[414] constitutions, as well as the state's separation of powers doctrine.[415] Plaintiffs based their equal protection claim on the fact that section 2 of the Ethics in Government Act[416] treated legisla-

410. In Edmonson v. Leesville Concrete Co., the United States Supreme Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race. 111 S. Ct. 2077, 2080 (1991). Furthermore, the Court stated that "the race-based exclusion violates the equal protection rights of the challenged jurors." *Id.*

411. 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (1990).

412. Ethics in Government Act, ch. 813, 1987 N.Y. Laws 1404 (McKinney).

413. N.Y. CONST. art. I, §§ 6, 11.

414. U.S. CONST. amend. XIV, § 1.

415. The separation of powers doctrine is not found in any explicit clause of the federal or state constitutions. Rather it is a doctrine derived from the enumeration of powers to the three separate branches of government found in both Constitutions. *See* J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW § 3.5, at 126-28 (4th ed. 1991).

416. Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404