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Constitutional Law - Racial Discrimination on Juries

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CONSTITUTIONAL LAW — RACIAL DISCRIMINATION ON JURIES

Defendant, a Negro, was indicted for first degree murder as the result of a stabbing altercation. The jury found defendant guilty. Defendant claimed that Negroes were wilfully and systematically barred from the jury in violation of the "equal protection of the laws" clause of the Fourteenth Amendment. The trial court excluded defendant's evidence showing that no Negro had been a member of a criminal grand or petit jury in the county for the past thirty years. On appeal, *held,* reversed and remanded. The U. S. Constitution does not require proportional representation, but does necessitate a fair jury selected without regard to race. The defendant must prove a purposeful discrimination, but when shown that no Negro had served on the jury for thirty years, the burden shifted to the State to show that this was not due to racial discrimination. *Bailey v. Commonwealth,* 191 Va. 510, 62 S. E. 2d 28 (1950).

Exclusion of Negroes from the jury trying a Negro is a fertile ground for appeal in the South. After slavery was abolished, the Fourteenth Amendment was adopted in 1868 largely to protect the Negro from inequality.[1] In 1879 an appeal from the Virginia courts afforded the U. S. Supreme Court an opportunity to uphold this purpose. It did so by declaring that the "equal protection" clause guaranteed to any colored man that upon selection of jurors to pass upon his life, liberty, or property, there could be no intentional exclusion of his race, and no discrimination against him because of his color.[2] The court explained that this did not mean defendant's race was entitled to proportional representation on each jury[3] or even that on any particular jury could he require the presence of a member of his race. Thus in that case defendant's allegation that he was a Negro, and that there were no Negroes on the jury trying him for the murder of a white man, was held insufficient as a matter of law to warrant interference with the state court proceedings.

The defendant must prove[4] intentional exclusion[5] of his race, and this may be an insurmountable task, at least in a state or lower federal court. For example, in *Binyon v. U. S.*,[6] the Court of Appeals was unimpressed with a showing that in a district heavily populated with Negroes, no member of that race had served on a grand jury for four years or on a petit jury for three years. In *Watkins v. State,*[7] there was a showing that while 42% of the population were Negroes, only 1.8% (44 out of 2,493) were included in the jury box from which the trial jury was drawn. Noting that the requirement placed upon the commissioners was the picking

of men of "uprightness and intelligence" and that as a matter of common knowledge illiteracy among Negroes exceeded that among whites, the Georgia Court found no violation of the Fourteenth Amendment. Generally, the proof is sufficient if defendant shows that there have been no Negroes on the jury for many years and that there were a substantial number of Negroes qualified for jury service.[8]

Where the jury commissioners continually over a considerable period of time place a lone Negro on each jury, this should be evidence of discrimination against Negroes in the selection of white persons for the remaining eleven, just as much as continual complete exclusion constitutes such evidence, but here it has been more difficult for the defendant to prove such discrimination to the satisfaction of the courts.[9]

Yet several recent Supreme Court cases have been liberal in favor of the Negro. In *Cassell v. Texas*,[10] the court found discriminatory the practice of selecting one, but only one, Negro for each grand jury. The court gave no weight to the statement of the commissioners that they knew of no Negroes qualified to serve, asserting that upon appointment it became their duty to acquaint themselves with qualifications of members of the community. In a more extreme decision of this year[11] the court reversed *per curiam* a judgment of the Supreme Court of Florida on the grounds that the method of jury selection discriminated against the Negro race although Negro jurors were selected in proportion to the number of Negro and white voters, and there was one Negro on the grand jury which indicted the appellant.

Intentional inclusion of all Negroes on the jury has been held not to discriminate against a Negro defendant and thus not to violate the Fourteenth Amendment.[12]

The decision of the *Bailey* case is in accord with the law as expressed in decisions of the U. S. Supreme Court. Yet the language used by the court, "the Constitution requires a fair jury selected without regard to race," is broad enough to indicate that there can be neither deliberate exclusion or inclusion of any kind. It is submitted that this more nearly concurs with the impartiality originally intended by the Fourteenth Amendment.

In Virginia the Code requires a jury for a criminal case to be obtained in the following manner. The judge of the circuit court appoints as jury commissioners for one year, not less than two, nor more than five persons out of those qualified for jury service.[13] Such qualified persons are, in brief, those who are twenty-one years

of age, residents of the State for at least one year and of the locality six months preceding call,[14] excluding idiots and lunatics, certain types of criminals, inmates of charitable institutions,[15] and certain persons specified by statute.[16] After appointment each of the jury commissioners must take an oath to the effect that he will honestly perform his duties without favor or prejudice, will select only persons having a reputation for intelligence and honesty, who have not requested selection and who will endeavor to promote only the impartial administration of justice.[17] The jury commissioners must soon after appointment prepare a list of not less than 100 nor more than 300 names, certain specified cities being allowed up to 1,000.[18] Commissioners must fold or roll up each name so that it is not visible on the outside and then deposit it in a locked box.[19] The clerk or his deputy must draw 24 names from this box in the presence of the judge or, if absent, then a commissioner in chancery and a reputable citizen, or if the commissioner is absent, then in the presence of two reputable citizens.[20]

Two points in the selection of a jury are most open to attack as discriminatory: Making the jury list and drawing the jurors' names. In view of the growing watchfulness of the Supreme Court, now recognized by our Virginia Supreme Court of Appeals in the *Bailey* case, it is submitted that a sufficiency of caution, lest guilty defendants secure continued reversals on the grounds of discrimination, may dictate the appointment of a Negro commissioner in areas having a history of few Negroes on jury service. Such a commissioner would be more familiar with qualified members of his own race. If this is not considered feasible, then the presence of a reputable Negro at the drawing of names may save later reversals on constitutional grounds.

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FOOTNOTES

1. Slaughterhouse Cases, 16 Wall. 36 (1872); Maxwell v. Dow, 176 U. S. 581 (1900).
2. Virginia v. Rives, 100 U. S. 313 (1879).
3. *Accord,* Lawrence v. Commonwealth, 81 Va. 484 (1886); Akins v. Texas, 325 U. S. 398 (1945).
4. Martin v. Texas, 200 U. S. 316 (1906); Patterson v. Commonwealth, 139 Va. 589, 123 S. E. 657 (1924); Clark v. Commonwealth, 167 Va. 472, 189 S. E. 143 (1937).
5. Bullock v. State, 65 N. J. Law 557, 47 A. 62 (1900).

6. 4 Ind. T. 642, 76 S. W. 265 (1903).
7. 199 Ga. 81, 33 S. E. 2d 325 (1945).
8. Norris v. Alabama, 294 U. S. 587 (1935). Pierre v. Louisiana, 306 U. S. 354 (1939); Hill v. Texas, 316 U. S. 400 (1942).
9. Thomas v. State, 49 Tex. Cr. R. 633, 95 S. W. 1069 (1906); Akins v. Texas, 325 U. S. 398 (1945).
10. 339 U. S. 282 (1949).
11. 71 S. Ct. 549 (1951), *reversing* 46 So. 2d 880 (1950).
12. Haraway v. Arkansas, 203 Ark. 912, 159 S. W. 733, *Cert. denied,* 317 U. S. 648 (1942).
13. VA. CODE ANN. § 8-180 (1950).
14. VA. CODE ANN. § 8-174 (1950).
15. VA. CODE ANN. § 8-175 (1950).
16. VA. CODE ANN. § 8-178 (1950).
17. VA. CODE ANN. § 8-181 (1950).
18. VA. CODE ANN. § 8-182 (1950).
19. VA. CODE ANN. § 8-184 (1950).
20. VA. CODE ANN. § 8-187 (1950).
21. VA. CODE ANN. § 19-173 (1950).