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The Effect of Racial Discrimination in the Indictment Stage

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RECENT CASES

The Effect of Racial Discrimination in the Indictment Stage

A colored citizen convicted of murder in a state court in Texas by a petit jury admittedly chosen without racial discrimination, sought a reversal of his conviction on the theory that colored citizens were purposefully discriminated against in the selection of the grand jury that indicted him. It appeared that although 15.5 per cent of the population of the county were Negroes, only one colored person had served as a juror on any of the twenty-one consecutive grand juries called during the period of five and one-half years preceding the indictment in the instant case. The grand jury commissioners in explaining the situation stated that they knew no available Negroes who were qualified; but they also stated that they chose jurymen only from those persons with whom they were personally acquainted. The inescapable conclusion would appear to be that Negroes are not those with whom white people are personally acquainted in Texas! *Held,* that the conviction must be reversed because the equal protection clause of the 14th Amendment had been violated through discrimination in selecting the grand jury. *Cassell v. State of Texas,* —U.S.—, 70 Sup. Ct. 629, 94 L. Ed. 563 (1950). Justice Douglas did not participate, and Justice Jackson was the only dissenter.

The decision indicated several schools of thought among the justices. Reed, J., with whom Vinson, Ch. J., and Black, J., concurred, found discrimination in the fact that the jury commissioners failed to familiarize themselves with the qualifications of eligible Negroes. Joined by Burton and Minton, J. J., Frankfurter, J., found that discrimination existed by reason of the fact that never more than one Negro had sat on twenty-one consecutive grand juries, the jury commissioners believing mistakenly that the mere presence of one Negro at some time or other satisfied the constitutional prohibition against discrimination. These justices emphasized the unbroken line of Supreme Court decisions supporting the majority decision.

Jackson, J., dissented on the theory that no substantial error had in fact been committed, inasmuch as a fair trial was subsequently had. Clark, J., was inclined to agree with the dissenter if it had been an original issue, but because of reluctance to break with long established precedent concurred with the majority, lining up in this respect with Justices Frankfurter, Minton and Burton.

The question before the court was not new. The first cases, decided in 1879, reached similar conclusions upon like states of fact.[1] The following year, the Supreme Court of the United States reversed a conviction

1. Rives v. Virginia, 100 U.S. 313, 25 L. Ed. 667 (1879); Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879).

where it was shown that in 1870 and 1880, there were respectively, 20,000 and 26,000 Negroes out of a total population of approximately 150,000 in Delaware, yet during the aforementioned decade not one Negro had been called for grand jury service.[2] This factual situation, said the Court, was alone sufficient to warrant a finding of an unconstitutional discrimination.

Through the years the question did not rest, but constantly arose and as constantly was affirmed.[3] In 1939 it was revealed in a Louisiana case[4] that during the 40 years from 1896 to 1936, no Negro had ever served on a grand jury in the Parish of Saint John the Baptist, yet in the 1930 census the Negroes accounted for 49.3 per cent of the population in the parish, 70 per cent of the Negroes being literate. In 1940 in a case originating in Texas, the United States Supreme Court declared another method of keeping Negroes off grand juries unconstitutional:[5] between 1931 and 1936, 18 Negroes and 494 Whites had been summoned for grand jury service in the county where the case arose, but by putting the Negroes' names last and methodically selecting the first 12 names, only 5 Negroes together with 379 White persons served during the aforementioned period of time. Yet in that county the colored (half of whom were poll-tax-payers) accounted for 20 per cent of the population.

All the constitution requires is that color not be used as a criterion for selecting a grand jury.[6] Proportional representation according to the number of Negroes paying poll-taxes will not do,[7] the vice of such a system being the use of a color line in any way as a determining factor. Color as a keystone is unconstitutional.[8] The burden of proof is on the defendant in a criminal case to allege and prove the existence of discrimination.[9]

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2. Neal v. Delaware, 103 U.S. 370, 26 L. Ed. 567 (1880).
3. Bush v. Kentucky, 107 U.S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354 (1883) a statute declared unconstitutional for denying Negroes the right to sit on grand juries; Carter v. Texas, 177 U.S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839 (1900); Rogers v. Alabama, 192 U.S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417 (1904); Norris v. Alabama, 294 U.S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074 (1935) a Scottsboro boy; Hollins v. Oklahoma, 295 U.S. 394, 55 Sup. Ct. 784, 79 L. Ed. 1500 (1936); Hale v. Kentucky, 303 U.S. 613, 58 Sup. Ct. 753, 82 L. Ed. 1050 (1938); Pierre v. Louisiana, 306 U.S. 354, 59 Sup. Ct. 536, 83 L. Ed. 757 (1939); Smith v. Texas, 311 U.S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940); Hill v. Texas, 316 U.S. 400, 62 Sup. Ct. 1159 (1942); Patton v. Mississippi, 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 76 (1948).
4. Pierre v. Louisiana, supra note 4.
5. Smith v. Texas,, 311 U.S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940).
6. See notes 1, 2, 3 supra.
7. Cassell v. Texas, —U.S.—, 70 Sup. Ct. 629, 94 L. Ed. 563 (1950).
8. See notes 1, 2, 3, 7 supra.
9. In the following cases the defendant failed to prove the discrimination: Gibson v. Mississippi, 162 U.S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075 (1896); Smith v. Mississippi, 162 U.S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082 (1896); Murray v. Louisiana, 163 U.S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87 (1896); Williams v. Mississippi, 170 U.S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012 (1898); Tarrance v. Florida, 188 U.S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572 (1903); Brownfield v. South Carolina, 189 U.S. 426, 23 Sup. Ct. 513, 47 L. Ed. 882 (1903); Martin v. Texas, 200 U.S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497 (1906); Thomas v. Texas, 212 U.S. 278, 29 Sup. Ct. 393, 53 L. Ed. 512 (1908); Franklin v. South Carolina, 218 U.S. 161, 30 Sup. Ct. 640, 54 L. Ed. 980 (1910); Akins v. Texas, 325 U.S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945).

Upon a surface analysis, no substantial error was committed in the instant case, for it was admitted that the defendant had a fair trial and that no discrimination was practiced in the selection of the petit jury. If the case had arisen in a state with a comparatively small Negro population, like Wyoming, few would take issue with the dissent; in fact it is unlikely that the question would have been raised. The United States Supreme Court since 1880 has considered 21 different cases in which such discrimination has been asserted, and all 21 cases originated in southern or border states.[10]

The conclusion of the majority represents the repeated holding of the U. S. Supreme Court; eight times[11] in the last fifteen years the highest tribunal arrived at the same conclusion under similar states of fact. The decision appears sound in the light of judicial history, and is representative of the particular regard which the Supreme Court has in recent years manifested toward personal rights.

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10. See notes 3, 7, 9 supra.
11. See note 3, cases 4-10 supra.