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Constitutional Law - Due Process - State Procedure for Attacking the Composition of Grand Juries

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CONSTITUTIONAL LAW—DUE PROCESS—STATE PROCEDURE FOR ATTACKING THE COMPOSITION OF GRAND JURIES—Defendant Michel, a Negro, was indicted by a grand jury for rape on February 19, 1953. On March 2, the same day that the term of the grand jury expired, he was arraigned and counsel was appointed.[1] One week (five judicial days) later, motion was made to quash the indictment on grounds of discrimination against Negroes in impaneling the grand jury. The trial court ruled that the objection had been waived because Louisiana law requires that it be raised within three judicial days after the expiration of the term of the grand jury.[2] The defendant was convicted, and the Louisiana Supreme Court affirmed.[3] Defendant Poret, also a Negro, was indicted for rape on December 12, 1950, by a grand jury whose term expired in March 1951. He fled and was not returned and arraigned until October 1952. In November 1952 he moved to quash the indictment on similar grounds. The trial court ruled the objection waived and the defendant was convicted. The state supreme court affirmed.[4] On certiorari, *held,* affirmed, three justices dissenting.

1 One principal point in the case was whether counsel actually was appointed at this time, or, as the defendant contended, three days later, when the attorney received formal notice of his appointment. The evidence showed that the counsel was in the court that day and had asked for a continuance of the defendant's case and that it was common local practice to make appointment without sending formal notice. The state court decided against the defendant, and the Supreme Court refused to overturn that fact determination without a more substantial basis than counsel's assertion.

2 La. Rev. Stat. (1950) tit. 15, §202, as interpreted in State v. Wilson, 204 La. 24, 14 S. (2d) 873 (1943), app. dismissed 320 U.S. 714, 64 S.Ct. 202 (1943).

3 225 La. 1040, 74 S. (2d) 207 (1954).

4 226 La. 201, 75 S. (2d) 333 (1954).

The Louisiana rule is valid on its face and in its application. *Michel v. Louisiana,* 350 U.S. 91, 76 S.Ct. 158 (1955).

Defendant Reece, an illiterate Negro charged with rape, was indicted by a grand jury before he was represented by counsel. The grand jury's docket did not list him as one against whom a case would be presented. Seven days later he moved to quash the indictment on grounds of discrimination against Negroes in the selection of the grand jury. The trial court held such objection waived since Georgia law requires that it be made before the indictment is brought.[5] The Georgia Supreme Court affirmed.[6] On certiorari, *held,* reversed. Whether or not the Georgia rule of procedure is valid on its face, its application to the facts of the case deny the defendant due process of law. *Reece v. Georgia,* 350 U.S. 85, 76 S.Ct. 167 (1955).

It is a well recognized principle of constitutional law that Negroes may not be discriminated against in the selection of grand or petit juries.[7] The decision of the Supreme Court in the *Michel* case does not represent renunciation of this principle, but, rather, adherence to the equally well recognized principle that failure to follow prescribed procedure in raising an objection results in the waiver of that objection.[8] But procedure may not be prescribed indiscriminately. In the case of state courts, the limitations are the shadowy reaches of the due process clause of the Fourteenth Amendment.[9] These bounds defy concise definition and so must be marked out empirically, case by case, with particular regard to what is fair, fundamental, and necessary to "ordered liberty."[10] Consequently, two main considerations control each decision, the facts and the philosophy of the court which views them.[11] The two principal cases are excellent

5 Williams v. State, 69 Ga. 11 (1882).

6 211 Ga. 339, 85 S.E. (2d) 773 (1955). A first conviction was reversed on other grounds. 210 Ga. 578, 82 S.E. (2d) 10 (1954). Before his second trial the defendant again moved to quash, and again the trial court held the objection waived.

7 Strauder v. West Virginia, 100 U.S. 303 (1880); Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667 (1954); 52 A.L.R. 919 at 920 (1928).

8 "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. . . . While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts. . . ." Yakus v. United States, 321 U.S. 414 at 444, 64 S.Ct. 660 (1944). *Accord:* Herndon v. Georgia, 295 U.S. 441, 55 S.Ct. 794 (1935); Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953). Cf. Central Union Telephone Co. v. Edwardsville, 269 U.S. 190, 46 S.Ct. 90 (1925).

9 See Packet Co. v. Sickles, 19 Wall. (86 U.S.) 611 (1873); Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330 (1934); Scott, "The Supreme Court's Control Over State And Federal Criminal Juries," 34 IOWA L. REV. 577 (1949).

10 Palko v. Connecticut, 302 U.S. 319 at 325, 58 S.Ct. 149 (1937); Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884); Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908). See also Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947).

11 Rarely has the Court looked beyond the facts and held such a state regulation invalid on its face. See, e.g., Carter v. Texas, 177 U.S. 442, 20 S.Ct. 687 (1900). The Texas Code of Criminal Procedure [now Tex. Code Crim. Proc. (Vernon, 1954) art. 358] provided that a challenge to the grand jury must be made before it was impaneled. The grand

examples of the importance of these considerations. In the first case, the majority and the dissent differ on both grounds. The initial disagreement is over what the facts prove,[12] but the basic difference is in the interpretation of the concept of due process. The dissent in the *Michel* case sees freedom from discrimination as a right too exalted to be lost by the operation of a mere rule of procedure, while the majority believes that both the freedom-from-discrimination and waiver principles are supported by policy factors of equal weight.[13] In the *Reece* case, the Court agreed unanimously that the defendant's low mentality and lack of counsel, together with the concealment of the indictment, produced a result which was unfair from any viewpoint. In both cases it was assumed that the Supreme Court has the power to regulate state procedure for attacking the composition of a grand jury.[14] The differences have been and will continue to be in the particular fact situations and in the philosophies brought to bear on these situations.

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jury which indicted had been impaneled before the offense for which the defendant was indicted had been committed. Despite such an extreme limitation on the right to challenge, the Supreme Court in reversing did not declare the provision invalid, but stated only that in its application the defendant had been denied a federally guaranteed right.

[12] In addition to the question of when counsel was appointed, other vital problems concerned the capability of such counsel and the reasonableness of the period of time within which objections were allowed.

[13] The dissent implied that there is a class of federally protected rights which are excepted from the normal operation of procedural rules. Only very clear and flagrant abuses of procedure would justify forfeiture of such favored rights, according to these justices. Undoubtedly their determination of the facts influenced their position somewhat, and viewed solely from the standpoint of preventing discrimination such a position has appeal. But in so interpreting due process they fail to keep the two conflicting principles in proper perspective. Justice Black questions whether a flight such as Poret's might not later be held to forfeit the right to counsel or trial by an unbiased judge. Michel case at 103. But Justice Clark's majority opinion recognizes the essential interrelationship of these two principles by weighing the evidentiary problems which would be raised by the passage of five years after Poret's indictment against the effect of the alleged discrimination. Michel case at 99.

[14] See Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814 (1955); 52 A.L.R. 919 (1928); Scott, "The Supreme Court's Control Over State and Federal Criminal Juries," 34 IOWA L. REV. 577 (1949).