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CONSTITUTIONAL LAW-EQUAL PROTECTION-USE OF PROPERTY AND POLL TAX LISTS FOR SELECTION OF JURORS

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CONSTITUTIONAL LAW—EQUAL PROTECTION—USE OF PROPERTY AND POLL TAX LISTS FOR SELECTION OF JURORS—Brown, a Negro, was convicted of a capital offense in Forsyth County, North Carolina. Having exhausted his state remedies, he petitioned the federal district court for a writ of habeas corpus alleging, inter alia, systematic discrimination against Negroes serving on grand and petit juries.[1] This discrimination was claimed to result from the use of property and poll tax lists as sources from which to draw jury panels. The district court denied his petition and was affirmed by the court of appeals.[2] On certiorari to the United States Supreme Court, *held,* affirmed. The use of property and poll tax lists as sources of jury panels does not establish unconstitutional discrimination against Negroes serving on juries and does not require reversal of a conviction obtained under that system. *Brown v. Allen,* (U.S. 1953) 73 S.Ct. 397.

Beginning with *Strauder v. West Virginia* in 1879,[3] more than twenty Supreme Court opinions have established the principle that discrimination against Negroes serving on grand or petit juries constitutes a denial of equal protection to Negroes tried under such circumstances and requires a reversal of the conviction or a quashing of the indictment so obtained.[4] However, Negro defendants are not entitled to have members of their race sitting on juries and any attempt at proportional representation on jury panels according to population is as invalid as total exclusion.[5] The principle is that race is not to be considered at all in the selection of jury panels. The Court has treated the question of discrimination as one of fact and, over the years, has developed a significant presumption to help determine that fact. A showing of long continued exclusion of Negroes from jury panels creates a strong presumption of discrimination which is difficult, if not impossible, to overcome by testimony on the part of those charged with the duty of selecting jury panels.[6] In this case, however, it appeared that (1) the legislature had expanded the basis of the jury pool, formerly limited to those who had paid their previous years' taxes, to include all persons on the county poll and property tax lists, and (2) the jury commissioners in Forsyth County had, in 1949, purged their jury panel lists and selected a new panel from the property and poll tax lists. Evidently, these changes were the

[1] Brown v. Crawford, (D.C. N.C. 1951) 98 F. Supp. 866.

[2] Brown v. Allen, (4th Cir. 1951) 192 F. (2d) 477.

[3] 100 U.S. 303 (1879).

[4] Supreme Court cases on this subject are cited in annotation, 94 L.Ed. 856, 857 (1949).

[5] Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629 (1950). See 49 MICH. L. REV. 759 (1951).

[6] In Neal v. Delaware, 103 U.S. 370 (1880), an uncontroverted allegation that no Negroes had ever served on juries was held to raise a "prima facie" case showing racial discrimination. A similar statement appears in Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579 (1934). And the same allegation was, when proved, held to create a "strong presumption" of discrimination in the more recent case of Patton v. Mississippi, 332 U.S. 463, 68 S.Ct. 184 (1947). See 8 LA. L. REV. 548 (1948) and 18 FORDHAM L. REV. 278 (1949) for analysis of proof problems. The application of the doctrine in the state of Arkansas is described in 3 ARK. L. REV. 201 (1949).

result of a 1948 Supreme Court decision which invalidated a Forsyth County conviction because of discrimination in the jury system.[7] In the earlier case, the evidence showed that separate lists had been used for Negro and white jurors, that the jury pool contained two per cent Negroes and that 12 Negroes had been called to jury duty in the preceding ten years. Under the revised system, initial selection of the jury pool was made by a five year old child who publicly drew slips containing the names of property owners and voters from a box. Thus, in 1950, at the time of this trial, Negroes constituted 33 per cent of the population, 16 per cent of the property and poll tax payers of Forsyth County and from 9 to 17 per cent of persons drawn for jury service. These changes in the method of selection of jurors were held to destroy the presumption of discrimination which had led the Court to reverse the earlier conviction.[8] Petitioner's basic argument was that, because of economic and educational discrimination, the proportion of Negroes who were voters and property owners would, as in this case, be less than the percentage of Negroes in the population and that this fact made the system of selection invalid. Justice Reed, writing for the six man majority, recognized this fact but held it insufficient to invalidate the system. He qualified his conclusion that the use of poll and property tax lists as the sources of jury panels was constitutional by assuming that (1) the lists were non-discriminatory as to race and (2) that the taxes were reasonable. Beyond racial discrimination, he said, states are constitutionally free to select their potential jurors as they see fit, so long as the source reflects a cross-section of the community in terms of character and intelligence.[9] Justices Black and Douglas dissented on

[7] Brunson v. North Carolina, 333 U.S. 851, 68 S.Ct. 634 (1948), reversed, per curiam, the state court decision in 227 N.C. 558, 43 S.E. (2d) 82 (1947) which, in turn, was a per curiam decision relying on State v. Koritz, 227 N.C. 552, 43 S.E. (2d) 77 (1947). The latter case upheld a jury selection system which included separate lists of Negro and white jurors. See 26 N.C. L. REV. 185 (1948), for analysis of state court decisions in North Carolina prior to the Brunson case.

[8] The effect of the changed method of selecting jurors as rebutting the presumption of discrimination is more clearly pointed out in Speller v. Allen, (U.S. 1953) 73 S.Ct. 397, a companion case decided in the same opinion as the principal case The Speller case involved a death sentence in another North Carolina county. Defendant showed that no Negroes had served on Vance County juries for a number of years and that this case was the first one in recent years on which Negroes had been summoned. The Court held that since this jury panel was the first one picked after the change in the system as outlined in the text of this note, the history of discrimination was not conclusive. "Past practice is evidence of past attitude of mind. That attitude is shown to no longer control the action of officials by the present fact of colored citizens' names in the jury box." Speller v. Allen, (U.S. 1953) 73 S.Ct. 397 at 419. The point was virtually assumed by the majority in the principal case at 416.

[9] In the Speller case, note 8 supra, a unique problem was presented when the jury commissioner's clerk testified that he had filled the jury box involved with the names of persons from the tax list who had "the most property." No objection was taken to this by the defense at any stage in the proceedings and therefore the majority did not consider it. The language of the majority opinion indicates that if an objection had been properly raised, it would have been sustained. Speller v. Allen, (U.S. 1953) 73 S.Ct. 397 at 420. And see Justice Black's dissent at 433. On the question of economic discrimination, see Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S.Ct. 984 (1946); Fay v. New York, 332 U.S. 261, 67 S.Ct. 1613 (1947); and 32 MINN. L. REV. 297 (1948).

the grounds that "partial abandonment" of the discriminatory practices was insufficient to show that the selective process was not based on racial discrimination.[10] They joined Justice Frankfurter in a dissent on procedural grounds.[11] The facts of this case, compared to earlier practices in North Carolina, indicate that a substantial degree of progress toward eliminating race as a criteria for jury service has been made under the leadership of the Supreme Court. The majority opinion indicates that the Court will not gear constitutional requirements to mathematical proportions but, rather, will give considerable leeway to the states where an attempt has been made to put the jury selection system on an objective basis, thus lessening the opportunity for discrimination which exists when the choice of the jury panel depends on the personal selection and opinion of the jury commissioners.[12]

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[10] Justice Black wrote: "Certainly discriminatory results remained. I do not believe the Court should permit this tax list technique to be treated as a complete neutralizer of racial discrimination." Principal case at 432. This appears to be an overstatement of the majority position. His conclusion as to remaining discrimination is based on the difference in proportion of Negroes in the population and on the jury panel. If he would require the states to have roughly the same proportion of Negro jurors as there are Negroes in the population in order to satisfy his concept of equal protection, the result would be a jury system based on racial categories—the very thing that the Supreme Court has been striving to prevent. See Cassell v. Texas, note 5 supra. Because both total exclusion of Negroes from jury service and the inclusion of a number of Negroes proportionate to the population indicate that race is a factor in the selection process, the writer doubts that the Court can, with present techniques, reduce discriminatory selection much beyond the point reached in the principal case.

[11] A six to three majority in the principal case held, inter alia, that a denial of certiorari by the Supreme Court from a decision by the state court of last resort should have no substantive effect in subsequent proceedings. Justice Frankfurter's dissent was based on the fact that the court of appeals in the present case did give some effect to a previous denial of certiorari.

[12] See, for instance, Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164 (1940); Norris v. Alabama, note 6 supra; and Patton v. Mississippi, note 6 supra.