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Constitutional Law -- Equal Protection -- Discrimination Against Negroes in Selection of Jury

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in the *Pennekamp* and *Craig* cases would seem to indicate that the clear and present danger rule removes from the area of summary contempt proceedings all comment except that which threatens to create a situation in which it would become impossible for the courts to carry on their business.[22]

The conclusion that does emerge from these three cases is that the Supreme Court has determined that the right to freedom of speech and press requires a nation-wide, uniform policy[23] and that when the freedom of comment conflicts with the right to a fair and orderly administration of justice, the former will weigh heavily against the latter.[24]

It is believed that this rejection of the principle of judicial absolutism is more consonant with our fundamental ideas of the functions of a free press in a democracy than the views which formerly prevailed on the power of judges to punish summarily for contempt by publication.[25]

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Constitutional Law—Equal Protection—Discrimination Against Negroes in Selection of Jury

The question of denial of equal protection of the laws by discrimination against Negroes in selection of juries has recently arisen again in North Carolina.[1]

[22] "To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice." Mr. Justice Murphy concurring in Pennekamp v. Florida, 328 U. S. 331, 369 (1946). "The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice." Mr. Justice Murphy concurring in Craig v. Harney, —— U. S. ——, 67 S. Ct. 1249, 1258, 91 L. Ed. (Adv. Ops.) 1141, 1149 (1947).

[23] CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), p. 6.

[24] Craig v. Harney, —— U. S. ——, 67 S. Ct. 1249, 1253, 91 L. Ed. (Adv. Ops.) 1141, 1144 (1947).

[25] The court leaves open the question of the power of a state to protect the administration of justice by means other than summary contempt process. —— U. S. ——, 67 S. Ct. 1249, 1253, 91 L. Ed. (Adv. Ops.) 1141, 1144 (1947).

[1] In Spring Term, 1947, there were seven cases involving this question: State v. Koritz, 227 N. C. 552, 43 S. E. 2d 77 (1947); State v. Brunson, 227 N. C. 558, 43 S. E. 2d 82 (1947); State v. Jones, 227 N. C. 558, 43 S. E. 2d 82 (1947); State v. King, 227 N. C. 559, 43 S. E. 2d 82 (1947); State v. Watkins, 227 N. C. 560, 43 S. E. 2d 83 (1947); State v. James, 227 N. C. 561, 43 S. E. 2d 83 (1947); State v. Kirksey, 227 N. C. 445, 43 S. E. 2d 613 (1947). The opinion of the Koritz case was adopted in all of the others cited except State v. Kirksey. There a Negro was indicted for murder. After exhausting his peremptory challenges, he challenged the twelfth juror passed by the state peremptorily, in that he was a white man and jury was composed solely of white persons. Judge heard evidence and found as fact: that Negroes had been regularly summoned for jury duty in the county, that Negroes' names had not been excluded from the jury box and that there was no evidence before the court that discrimination had been practised because of race or color by the jury commissioners. It was held, on appeal, that to take advantage of an irregularity in constitution of a whole panel, defendant must have challenged the array. But that if challenge had been timely and appropriately taken, findings of fact by the presiding judge would be conclusive on appeal in the absence of gross abuse.

In a recent case,[2] one white man and three Negroes were convicted in a municipal court of resisting arrest. On trial de novo in the Superior Court, defendants moved to quash the panel from which the petit jury was to be drawn on ground of racial discrimination in its selection. The court, after hearing evidence and examining elaborate statistical affidavits, found no discrimination as a fact, that Negroes were fairly represented in the jury box and overruled the motion. The jury was then impanelled. Only twenty jurors were left on the regular panel and defendants had twenty-four peremptory challenges. Thereupon the court ordered a venire of twenty-five tales jurors, at least ten of whom were to be Negroes. The jury as constituted consisted of six names from the regular panel and six from the tales jurors, five of the tales jurors who were selected being Negroes. On appeal to the Supreme Court, the question of exclusion of Negroes from the jury was raised and the constitutionality of the jury selection statutes in North Carolina was challenged. The convictions were affirmed. It was held that the appellants were entitled to a fair and impartial jury, which they had had, that the statutes in question[3] were constitutional and that the ruling on the motion to quash was supported by the evidence. It was found that both parties had indicated satisfaction with the jury as constituted, although this is not clear from the record.

The right of trial by a jury selected without racial discrimination is insured basically by the "equal protection" clause[4] of the Fourteenth Amendment and by two federal statutes enacted pursuant to the enabling clause[5] of that amendment. One provides for removal of cases to the federal courts when it appears that trial in a state court will not be accompanied by protection of federal constitutional rights.[6] The other goes more directly to the point by making the practice of racial discrimination in federal or state jury selection a misdemeanor.[7]

Unfortunately, federal and North Carolina decisions have not succeeded in drawing more than an extremely nebulous line between regular selection and selection so discriminatory as to come within these constitutional and legislative prohibitions. Certain fairly well-defined principles have been established but beyond these each case seems to be decided on its own peculiar factual situation. Familiarity with these

[2] State v. Koritz, 227 N. C. 552, 43 S. E. 2d 77 (1947); *cert. denied*, —— U. S. ——, 68 S. Ct. 80, 92 L. Ed. (Adv. Ops.) 22 (1947).

[3] N. C. GEN. STAT. (1943) c. 9.

[4] U. S. CONST. AMEND. XIV. §1.

[5] U. S. CONST. AMEND. XIV. §5.

[6] 16 STAT. 144 (1870), 28 U. S. C. §74 (1940). This statute was restricted by Strauder v. West Virginia, 100 U. S. 303 (1879) to apply only where discrimination was by state law or constitutional provision.

[7] 18 STAT. 336 (1875), 8 U. S. C. §44 (1940). Held constitutional in *Ex parte* Virginia, 100 U. S. 339 (1879) and held to apply to selection by state or federal officers or agencies in state as well as in federal courts.

judicial principles and with the most striking factual situations may be relied upon to engender at least an intuitive "feeling" with regard to any particular case in this field. To this end, a brief survey of the application of the doctrine in the federal courts and in the Supreme Court of North Carolina would seem informative. Since the same body of law applies to discrimination in selection of jurors, whether they be grand or petit jurors, the cases will be discussed in that light.[8]

United States Supreme Court decisions have laid down several important principles. The Thirteenth, Fourteenth, and Fifteenth Amendments have as their purpose the abolition of involuntary servitude, including freedom of the African race, security and perpetuation of that freedom, and protection to colored men in it.[9] *Strauder v. West Virginia*[10] enunciated the doctrine that a statute taking from Negroes the right and privilege of being jurors because of color was a denial of equal protection of the laws. This interpretation was extended by a contemporaneous decision[11] to officers and agencies of a state through whom her powers were exerted. On the other hand a mixed jury is not essential to equal protection of the laws and the right to it is not given by federal statute or by the Fourteenth Amendment.[12]

On motion to quash an indictment because of discrimination, evidence should be heard and findings of fact made by the trial judge.[13] To raise the question in state courts, the proper state procedure must be used.[14] Generally a challenge to the array before trial is used by motion to quash the indictment[15] (if one is found by grand jury) or by motion to quash the petit jury panel if on warrant. And evidence must be offered to prove the recitals in the affidavits supporting the motion to quash, in absence of consent of prosecutors or court to the use of such affidavit as evidence.[16] There is a presumption that the officers

[8] Principles which forbid discrimination in selection of petit jurors govern selection of grand jurors. Pierre v. Louisiana, 306 U. S. 354 (1938); Norris v. Alabama, 294 U. S. 580 (1935); Martin v. Texas, 200 U. S. 316 (1906); Strauder v. West Virginia, 100 U. S. 303 (1879).

[9] Slaughter House Cases, 16 Wall. 36 (U. S. 1870).

[10] 100 U. S. 303 (1879).

[11] *Ex parte* Virginia, 100 U. S. 339 (1879) (county judge of Virginia who selected jurors was convicted of excluding Negro jurors solely on account of color); *accord*, Thomas v. Texas, 212 U. S. 278 (1908); Martin v. Texas, 200 U. S. 316 (1906); Neal v. Delaware, 103 U. S. 370 (1880). To come within the ban of illegal action, the exclusion must be solely because of race or color. Virginia v. Rives, 100 U. S. 313 (1879).

[12] Neal v. Delaware, 103 U. S. 370 (1880).

[13] Carter v. Texas, 177 U. S. 442 (1900).

[14] Tarrance v. Florida, 188 U. S. 519 (1903).

[15] Hill v. Texas, 316 U. S. 400 (1941); Smith v. Texas, 311 U. S. 128 (1940); Gibson v. Mississippi, 162 U. S. 565 (1895).

[16] Hale v. Kentucky, 303 U. S. 613 (1938) (affidavit supporting motion held sufficient to reverse when consent of prosecutor conferred evidentiary status upon it); Martin v. Texas, 200 U. S. 316 (1906); Brownfield v. South Carolina, 189 U. S. 426 (1903); Tarrance v. Florida, 188 U. S. 519 (1903); Smith v. Mississippi, 162 U. S. 592 (1895) (motion overruled in absence of evidence to support it, though allegations of long exclusion adequate).

or administrators who selected the jury acted lawfully and properly in the discharge of their duty.[17] Further, discrimination by exclusion may not be shown merely by proving that no one of complainant's race was on either of the juries.[18] Where there appeared upon the grand jury returning the indictment a Negro, and Negroes were proved to have been in the jury box and neither state constitution nor laws were assailed, the question was held one of fact and findings of the trial court remained undisturbed in the absence of such gross abuse as to amount to a denial of due process of law.[19] However, where a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, the Supreme Court will review the evidence to analyze the facts to enforce such federal right.[20]

The burden is on the defendant to establish discrimination against his race in selection of the jury.[21] But a prima facie case of discrimination may be made by a showing of long exclusion of Negroes from the juries.[22] This apparently is strengthened by a further showing of Negroes in the vicinity qualified to be jurors. This presumption may be rebutted by the prosecution, and the usual manner would seem to be by proof that any Negroes who were excluded were disqualified by other causes. Rebuttal of such a presumption would seem exceedingly difficult.

The North Carolina court has, of course, recognized the fundamental principle that the equal protection clause forbids discriminatory jury selection. *State v. Peoples*[23] invoked this principle in reversing a lower court which had overruled the motion to quash indictment and motion to quash petit panel. It is interesting to note that this is the only North Carolina decision reversing on this ground. But here reversal followed refusal by the trial court even to hear evidence on the question

[17] Tarrance v. Florida, 188 U. S. 519 (1903).

[18] Martin v. Texas, 200 U. S. 316 (1906).

[19] Akins v. Texas, 325 U. S. 398 (1944) (where it was stated that in examination of evidence to determine whether a federal constitutional right had been denied, great respect was accorded the conclusions of the state judiciary); *accord,* Thomas v. Texas, 212 U. S. 278 (1908).

[20] Norris v. Alabama, 294 U. S. 580 (1935); *accord,* Patton v. Mississippi, —U. S.—, 68 S. Ct. 184, 92 L. Ed. (Adv. Ops.) 164 (1947); Smith v. Texas, 311 U. S. 128 (1940); Chambers v. Florida, 309 U. S. 227 (1940); Pierre v. Louisiana, 306 U. S. 354 (1938).

[21] Akins v. Texas, 325 U. S. 398 (1944); *accord,* Martin v. Texas, 200 U. S. 316 (1906); Tarrance v. Florida, 188 U. S. 519 (1903).

[22] Patton v. Mississippi, —U. S.—, 68 S. Ct. 184, 92 L. Ed. (Adv. Ops.) 164 (1947); Hill v. Texas, 316 U. S. 400 (1935); Norris v. Alabama, 294 U. S. 580 (1935); *see* Pierre v. Louisiana, 306 U. S. 354, 361 (1938); Neal v. Delaware, 103 U. S. 370, 397 (1880).

[23] 131 N. C. 784, 42 S. E. 814 (1902) (exclusion of all Negroes from jury which found indictment against Negro where they were excluded solely because of color, was denial of equal protection of the laws).

of discrimination.[24] In reversing, our court held a motion to quash indictment to be the proper remedy where Negroes had been excluded from the grand jury solely because of color.[25]

In *State v. Daniels*,[26] on motion to quash because of irregularity in choosing white jurors disproportionately, it was held that the regulations governing selection of jurors were directory and not mandatory and that omission of qualified persons was not reversible error, if none of the jurors used were unqualified.

On motion to quash petit panel in *State v. Cooper*,[27] the court reiterated that since there was no contention that any of the jurors used were unqualified and since the trial court had found no discrimination as a fact, after hearing evidence, the findings of fact could not be reviewed in that there was evidence sufficient to support the finding and there was no gross abuse of discretion.

In 1937, *State v. Walls*[28] was decided. Here, at a prior term, the trial judge had quashed an indictment because of discrimination in the selection of the grand jury.[29] Removal to a federal court was attempted and failed because of no partiality in state constitution or statute.[30] New indictment was found by a grand jury from the same box as the one that had made the previous indictment. Jury lists had names of colored persons in red ink, those of whites in black ink. But when the new indictment was found, there was one Negro on the grand jury. In denying the motion, the trial judge found as a fact that there were 650 names of Negroes and 10,000 names of whites in jury box, and that there was no discrimination. On trial, petit jury was selected from a 60 man special venire chosen by the sheriff, of whom four were Negro. The Supreme Court affirmed the conviction, refusing to disturb in face of evidence to support the ruling of the trial judge.

The question has also arisen by motion in arrest of judgment.[31] The defendants showed that separate tax lists, from which jury lists were compiled, were kept for white and colored and evidence was introduced

[24] Record, p. 7, State v. Peoples, 131 N. C. 784, 42 S. E. 814 (1902) (trial judge stated: "This court has not the power to quash the bill on the grounds alleged . . . cannot investigate the matter alleged in said motion and affidavit under motion to quash.").

[25] *See* State v. Peoples, 131 N. C. 784, 791, 42 S. E. 814, 816 (1902); *accord*, State v. Lord, 225 N. C. 354, 34 S. E. 2d 205 (1945); State v. Daniels, 134 N. C. 641, 46 S. E. 743 (1904); State v. Haywood, 94 N. C. 847 (1886).

[26] 134 N. C. 641, 46 S. E. 743 (1904) (here court heard evidence and found as fact that jury lists had been regularly revised, with no discussion as to color, and only questions of competency and fitness considered). *But see* Norris v. Alabama, 294 U. S. 587, 596 (1935) (where different result when jury commissioners testified that color was never discussed).

[27] 205 N. C. 657, 172 S. E. 199 (1933).

[28] 211 N. C. 487, 191 S. E. 232 (1937), *cert. denied*, 302 U. S. 635 (1937).

[29] Record, p. 3, State v. Walls, *supra* note 28.

[30] See note 5 *supra*.

[31] State v. Bell, 212 N. C. 20, 192 S. E. 852 (1937).

tending to show that only two Negroes had served on juries in the county during the last 25 years although Negroes constituted forty per cent of a population of 35,000. But there was a showing that ten names of Negroes had been placed in the box at the last selection. No discrimination was found as a fact and all jurors selected were found qualified and unobjectionable. The Supreme Court on appeal held the findings of fact conclusive as supported by the evidence, particularly since the motion was made for the first time after verdict.[32]

The case that may be closest to the line in North Carolina is *State v. Henderson.*[33] A plea in abatement with supporting affidavit was filed before trial. The supporting affidavit of the clerk to the county commissioners stated that to his knowledge, having been present at each time that names were placed in the box, no colored names had been placed therein for 15 years at least "except on one occasion about two years ago when a number of names of members of the Negro race were placed in the jury box." It further asserted that no names of Negroes were placed in the box for the present term and that there were qualified Negroes in the county.[34] The court, as far as shown by the record, heard no evidence and found as a fact no discrimination. On appeal, findings of fact below were held conclusive.

The motion to strike out order for special venire and to dismiss jurors summoned thereunder was overruled in *State v. Lord.*[35] The court had directed that special veniremen of the colored race be summoned, number to bear the same proportion that colored people were to whites in the county. In selecting jury, all of the Negroes summoned were successfully challenged for cause in that they were not freeholders. The Supreme Court held that as there was nothing in the record to show exclusion and that as there was no showing that the special veniremen were not required to be freeholders[36] no error was shown.

Exceptions for disqualifications of grand jurors must be taken by motion to quash indictment before jury is sworn and impanelled to

[32] After verdict, defendant may not object to selection of the jury. State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908); State v. Boon, 80 N. C. 461 (1879); State v. Douglass, 63 N. C. 500 (1869).

[33] 216 N. C. 99, 3 S. E. 2d 357 (1939).

[34] Record, p. 6, State v. Henderson, *supra* note 33. *But cf.* Patton v. Mississippi, —U. S.—, 68 S. Ct. 184, 92 L. Ed. (Adv. Ops.) 164 (1947) (State's evidence that within last 30 years a single Negro had once been summoned but had not served, and that at some indefinite time the names of "two or three" unidentified Negroes had been placed on jury list *held,* not sufficient to overcome "strong evidence" of discrimination arising from uncontradicted showing of 30-year actual exclusion from jury service).

[35] 225 N. C. 354, 34 S. E. 2d 205 (1945). *Cf.* Neal v. Delaware, 103 U. S. 370 (1880) (where Negro moved for proportional Negro representation on panel).

[36] Requirement that jurors summoned be freeholders depended upon whether summoned under N. C. GEN. STAT. (1943) §9-29, where they must have been freeholders, while if drawn from jury box being a freeholder not requisite to qualification.

try the issue and if not so taken, such exceptions are deemed to be waived.[37]

When objection runs to the whole panel of jurors, it must be taken advantage of by a challenge to the array.[38] Challenge to the array can only be taken where there is partiality or misconduct in the sheriff, or some irregularity in making out the list.[39]

A member of one race cannot complain because he has been indicted or tried by a jury from which has been excluded illegally members of another race.[40] The qualifications imposed by the North Carolina jury selection statutes have long been held to be constitutional by the United States Supreme Court.[41]

A prima facie case of exclusion under the ruling in *Norris v. Alabama* (the *Scottsboro* case) has apparently never been established in North Carolina. Having one or more of the race allegedly discriminated against on the jury as finally impanelled tends to cure defects in both courts.[42] Calling Negroes as tales jurors seems to put the proceeding in a more impartial light even when none are on the jury as selected.[43] A showing in North Carolina that some names of colored persons have been placed in the jury box seems sufficient evidence on which to base a finding of no discrimination.[44]

There have been thirteen decisions on the question of racial discrimination in jury selection in North Carolina. Seven of these were decided in 1947,[45] and six of the seven were certified to the United States Supreme Court. Certiorari has been denied in one; granted in five.

While the evidence of exclusion in the principal case, though elab-

[37] N. C. GEN. STAT. (1943) §9-26.

[38] State v. Levy, 187 N. C. 581, 122 S. E. 386 (1924); *accord,* State v. Mallard, 184 N. C. 667, 114 S. E. 17 (1922); State v. Parker, 132 N. C. 1015, 43 S. E. 830 (1903); Moore v. Navassa Guano Co., 130 N. C. 229, 41 S. E. 293 (1902); State v. Stanton, 118 N. C. 1182, 24 S. E. 536 (1896); State v. Hensley, 94 N. C. 1021 (1886).

[39] State v. Speaks, 94 N. C. 873 (1886).

[40] State v. Sims, 213 N. C. 590, 197 S. E. 176 (1938).

[41] *See* Strauder v. West Virginia, 100 U. S. 303, 310 (1879).

[42] The courts have never specifically so held, but the final result seems a factor given much weight. *See* Akins v. Texas, 325 U. S. 398 (1944); Thomas v. Texas, 212 U. S. 278 (1908); State v. Koritz, 227 N. C. 552, 43 S. E. 2d 77 (1947), *cert. denied,* —— U. S. ——, 68 S. Ct. 80, 92 L. Ed. (Adv. Ops.) 22 (1947); State v. Walls, 211 N. C. 487, 191 S. E. 232 (1937), *cert. denied,* 302 U. S. 635 (1937). Certiorari has been granted in the companion cases which adopted the opinion of the Koritz case, their only difference being that there were no Negroes on the juries there as finally constituted. (16 U. S. L. WEEK 3191 [U. S. Dec. 16, 1947]). If they should be reversed, the factor of Negroes on the jury as finally constituted would seem established as decisive.

[43] State v. Lord, 225 N. C. 354, 34 S. E. 2d 205 (1945); State v. Walls, 211 N. C. 487, 191 S. E. 232 (1937), *cert. denied,* 302 U. S. 635 (1937).

[44] Extreme application in State v. Henderson, 216 N. C. 99, 3 S. E. 2d 357 (1937).

[45] The currently decided cases are set out in note 1 *supra.*

orate, is not as strong as that in other North Carolina cases, the jury commissioners are seemingly traveling a path that is perilously close to the danger area.

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Criminal Law—Receiving Stolen Goods—Elements in the Crime

In *State v. Yow*,[1] the defendant was indicted for larceny and receiving stolen goods. The state's evidence tended to show the following: Prosecuting witness had a pistol stolen from a locked compartment in his car parked in front of the defendant's sandwich shop. Immediately previous to the theft, the prosecuting witness had shown the defendant the pistol, and had thereafter absented himself from his car for a period of not more than five minutes, during which time the pistol was stolen. Defendant denied all knowledge of the crime, and promised to aid in returning the stolen article. Two months later, officers with a search warrant entered the defendant's home and asked defendant's wife the location of the pistol. She directed them to a dresser where it was found unconcealed in the top drawer. The defendant's motion for a non-suit was denied. The jury acquitted the defendant upon the charge of larceny, but found him guilty of receiving stolen goods. On appeal, the Supreme Court of North Carolina reversed the conviction and held the non-suit should have been allowed, among other grounds, for insufficient evidence that the defendant received the goods, or if he did, that he received them with a felonious intent.

It is necessary in order to convict an accused of receiving stolen goods that the state prove the property was received, that at the time of receipt it was stolen property, that the receiver knew the property was stolen, and that his intent in receiving it was felonious.[2]

It must be shown that, in fact and in law, the property was stolen at the time of receipt by the accused.[3] If the goods were not stolen, or were stolen but have since come back into the possession of the

[1] 227 N. C. 585, 42 S. E. 2d 661 (1947). Justice Barnhill dissenting without opinion.

[2] N. C. GEN. STAT. (1943) §14-71: *Receiving stolen goods:* If any person shall receive any chattel, property, money, valuable security or other things whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, he shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

[3] State v. Shoaf, 68 N. C. 375 (1873).