

University of Miami Law Review

Volume 27
Number 1 *Volume 27 Issues 1-2 (Fall & Winter 1972)*

Article 15

1-1-1972

Discriminatory Jury Selection: Reversible Error Regardless of Defendant's Own Race

Ira C. Pollack

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Ira C. Pollack, *Discriminatory Jury Selection: Reversible Error Regardless of Defendant's Own Race*, 27 U. Miami L. Rev. 238 (1972)
Available at: <https://repository.law.miami.edu/umlr/vol27/iss1/15>

This Case Note is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

ment of any other, in order to justify requiring a newsman to testify before a grand jury.⁴³

The majority placed its hope in the proposition that law enforcement agencies, in their own interest, will police themselves, or in the alternative, that such a "hue and cry" will be raised that Congress and the state legislatures will take remedial action. In this regard, the majority's point is well taken that of all "interest groups," the news media are among the least defenseless. If anything will result in the awakening of the power of the press against blind sponsorship of "law and order" at the expense of constitutional rights, perhaps this decision will. And perhaps the fear alone of such an awakening will deter the government from any outlandish abuses of discretion. Meanwhile, if reporters seek their protection in the courtroom, *they* must be prepared to offer positive proof that the government's grand jury is on a mere "fishing expedition," or that in some other way one of the seven enumerated offenses⁴⁴ violating the freedom of press is occurring.

The question unresolved by *Branzburg*, which leaves the criteria for freedom of the press somewhat uncertain, is whether trial and appellate courts will truly take such applications for judicial protection on a case-by-case basis, or whether, in avoiding a solid shield of protection for all confidential relationships, the Supreme Court has left the news media in the exposed and unprotected position feared by the dissent.⁴⁵

DOUGLAS K. SILVIS

DISCRIMINATORY JURY SELECTION: REVERSIBLE ERROR REGARDLESS OF DEFENDANT'S OWN RACE

Petitioner, a white male, was indicted and convicted for burglary.¹ No member of either the grand jury which indicted him or the petit jury which convicted him was black. In a petition for federal habeas corpus relief, he raised the claim that discriminatory jury selection practices were used and that blacks were thereby systematically excluded from these bodies.² On the basis of this exclusion, the petitioner claimed that

43. *Branzburg v. Hayes*, 92 S. Ct. 2646 (1972).

44. See note 19, *supra*, and accompanying text.

45. The dissent, per Mr. Justice Stewart, expressed the fear that "[t]he court . . . invites state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government." 92 S. Ct. at 2671.

1. This action has a long and involved history. Petitioner was tried twice for this offense. The first trial resulted in a conviction that was reversed on appeal on fourth amendment grounds. *Peters v. State*, 114 Ga. App. 595, 115 S.E.2d 647 (1966). On retrial, petitioner was again found guilty. This conviction was affirmed on appeal. *Peters v. State*, 115 Ga. App. 743, 156 S.E.2d 195 (1967).

2. A previous petition was denied for failure to exhaust then-available state remedies. *Peters v. Rutledge*, 397 F.2d 731 (5th Cir. 1968).

his conviction violated the fourteenth amendment guarantees of due process and equal protection. The state contended that, since the petitioner himself was not black, he had not personally suffered unconstitutional discrimination. The petition was denied in the federal district court, and the Court of Appeals for the Fifth Circuit affirmed.³ On certiorari to the United States Supreme Court, *held*, reversed and remanded: A state can not, consistent with due process, subject a defendant to indictment by a grand jury or trial by a petit jury which has been selected in an arbitrary and discriminatory manner contrary to federal constitutional and statutory requirements. *Peters v. Kiff*, 92 S. Ct. 2163 (1972).

In *Peters*, the Court was faced with two main issues. The first was whether a white defendant has standing to challenge the exclusion of blacks from jury service. The second was whether the petitioner would be entitled to any relief on the basis of that constitutional violation without a showing of actual bias. The Court answered both of these questions in the affirmative.

In passing United States Code, title 18, section 243, which makes it a crime for a public official to exclude anyone from a grand or petit jury solely on the basis of race, Congress determined that such exclusion is a violation of the equal protection clause of the fourteenth amendment. Therefore, the Court reasoned that a violation occurs whether the defendant is a member of the excluded group or not. "[T]he existence of a constitutional violation does not depend on the circumstances of the person making the claim."⁴

Fortunately for the petitioner, the proof of unconstitutional exclusion was overwhelming. A previous decision of the Court of Appeals for the Fifth Circuit had examined the jury selection system of Muscogee County, Georgia, the site of petitioner's trial, and had found that system to be defective.⁵ That court held that the disparity between the adult population of Muscogee County, which was 30% black, the tax digests, showing 14% blacks, and jury lists containing only 3/4 of 1% blacks was so great that the system was totally defective, regardless of whether the exclusion was intentional.

The court of appeals also found that the same procedure was being used for both grand and petit jury selection and, therefore, any finding of unconstitutional exclusion would apply to both bodies. Since these findings were contemporaneous with petitioner's trial, the court suggested that they be held conclusive as far as the petitioner's claim was concerned. The Supreme Court appears to have accepted this suggestion, since its holding recognized as fact, the finding of discriminatory selection practices.

Despite the constitutional violation, there remained the question of

3. *Peters v. Kiff*, 441 F.2d 370 (5th cir. 1971).

4. 92 S. Ct. at 2166.

5. *Vanleeward v. Rutledge*, 369 F.2d 584 (5th Cir. 1966).

whether the petitioner was entitled to relief on the basis of that violation. The state contended that a defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.

The Court had never before considered a white defendant's claim of prejudice allegedly caused by the exclusion of another racial group from a jury. The majority of lower courts that had considered the question had declared it a necessary prerequisite that the defendant be a member of the excluded race.⁶ All previous cases decided by the Supreme Court had involved juries which excluded members of the defendant's own race. In those cases, the right to challenge exclusion rested on a presumption that a jury so constituted would be prejudiced against a defendant of the excluded race. For example, in *Strauder v. West Virginia*,⁷ the first case concerning discriminatory jury selection, the black defendant was convicted by a jury from which blacks were excluded by statute. The Court held that "every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against *his* race or color, because of race or color"⁸ *Strauder*, along with *Virginia v. Rives*⁹ and *Ex Parte Virginia*,¹⁰ was part of a landmark trilogy of cases. *Virginia v. Rives* concerned a black defendant's challenge to the lack of blacks in the venue from which his jury was drawn, while *Ex Parte Virginia* dealt with a challenge to a statute making it illegal to exclude blacks from grand or petit juries. Since all three cases involved black defendants, the Court was able to decide the cases on the narrow basis of equal protection for blacks under the fourteenth amendment.

Although actual injury had always been shown in earlier decisions, the Court found that additional constitutional values were involved in the present case. In so doing, the majority relied on cases such as *Strauder*, which had held that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine"¹¹ In *Williams v. Florida*,¹² the Court stated that jury selection should entail obtaining a representative cross-section of the community.¹³ Additionally, in *Ballard v. United States*¹⁴

6. 92 S. Ct. at 2165 n.4.

7. 100 U.S. 303 (1879).

8. *Id.* at 305 (emphasis added).

9. 100 U.S. 313 (1879).

10. 100 U.S. 339 (1879).

11. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

12. 399 U.S. 78 (1970).

13. The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence [T]he number [of jurors] should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.

Id. at 100 (emphasis added).

14. 329 U.S. 187 (1946).

the Court stated that the statutes relating to the qualifications for the choosing of jurors reflect a design to make the jury a truly representative cross-section of the community.¹⁵ Therefore, the *Peters* Court concluded that purposeful and systematic exclusion is a departure from the scheme of jury selection which Congress adopted, and is, therefore, in violation of the sixth amendment.¹⁶ However, since neither the fifth amendment right to a grand jury,¹⁷ nor the sixth amendment right to a petit jury¹⁸ restricts state action, the Court decided the case on other grounds.

The Court maintained that the due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding. If a state chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury. "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."¹⁹

However, in the case of a white defendant, was there actual bias, or was the exclusion of blacks from a jury a type of harmless error? The Court held that the impact of such an exclusion is too subtle and too pervasive to limit its effect to particular issues or cases.²⁰ As the Court had previously stated in *Ballard v. United States*,

reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection.²¹

In light of the great potential for harm latent in an unconstitutional jury selection system, any doubt as to the existence of prejudice should be resolved in favor of the defendant. Accordingly, the Court held that "whatever his race, a criminal defendant has standing to challenge the

15. The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

Id. at 192-93, citing *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

16. 92 S. Ct. at 2167.

17. Under *Hurtado v. California*, 110 U.S. 516 (1884), the fifth amendment right to a grand jury indictment does not apply to a state prosecution.

18. The right to a jury trial, made applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), was held nonretroactive in *DeStefano v. Woods*, 392 U.S. 631 (1968). Petitioner's trial occurred before *Duncan* and, therefore, he had no established constitutional right to a jury trial.

19. 92 S. Ct. at 2168.

20. [T]he opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.

. . . It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 2169.

21. *Ballard v. United States*, 329 U.S. 187, 195 (1946) (citation omitted).

system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law."²²

In a concurring opinion, in which he was joined by Justices Brennan and Powell, Justice White circumvented the problem of due process by contending that there had been a statutory violation. Enacted March 1, 1875, United States Code, title 18, section 243 (1970) states:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude. . . .

Accordingly, where citizens are disqualified from jury service on the grounds of race, a constitutional and statutory violation is involved. Thus, as the Supreme Court had previously held in *Hill v. Texas*,²³ no state may impose upon one convicted of a crime a trial procedure which the Constitution and an act of Congress passed pursuant to the Constitution forbid.

Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand.²⁴

Therefore, although the Court had never before set aside a conviction for arbitrary exclusion of a class of citizens from jury service where the defendant was not a member of the excluded class, Justice White reasoned that under the broad sweep of *Hill v. Texas*, and the statutory command of section 243, the court had the power to do so.

While perhaps reaching a desirable result in this particular case, the Court seems to have discounted several factors. Probably the most questionable part of the decision, as Chief Justice Burger pointed out in his dissent, is the holding that illegality in jury selection procedures necessarily voids a criminal conviction despite the absence of any demonstration of prejudice. It appears that while the Court has effectively found a way to dispel the spectre of discriminatory jury selection practices, it may have done so at too great a cost. This decision may open the door for a new area of appeal in that defendants, relying on this decision, can now claim bias due to a discriminatory action unrelated to their class or claim. The mere showing of such improper action by the selecting body will now be sufficient proof to require a finding of reversible constitutional error.

IRA C. POLLACK

22. 92 S. Ct. at 2169.

23. 316 U.S. 400 (1942).

24. *Id.* at 406.