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Constitutional Law -- Systematic Exclusion of Negroes from Grand Juries -- Sufficiency of Evidence for Prima Facie Case

communist. It is obviously prudent for federal workers to convict an alleged communist and imprudent to acquit him. One cannot disregard the conclusion that trial by jurors whose personal security will either actually or apparently be promoted by conviction and endangered by acquittal is not trial by an impartial jury.[12]

It is therefore imperative that in selecting a jury which would consist of federal employees in the District of Columbia, the courts be solicitous in considering the nature and circumstances of the matters involved in the prosecution.[13] In view of the above considerations, the court, in the instant case, would be justified in imputing bias to all federal workers who serve as jurors in communist trials.

CONSTITUTIONAL LAW—SYSTEMATIC EXCLUSION OF NEGROES FROM GRAND JURIES—SUFFICIENCY OF EVIDENCE FOR PRIMA FACIE CASE

The defendant, a Negro, was indicted for assault. Motion was made to vacate the indictment on the ground that Negroes were systematically and intentionally excluded from serving on the grand jury. Evidence was introduced showing that though there were qualified Negroes who had served on the petit jury from whose members the grand jurors were chosen, no Negroes had been called on the grand jury for ten years. *Held*, on appeal, the defendant failed to present a prima facie case of systematic exclusion. *People v. Dessaure*, 299 N.Y. 126, 85 N.E.2d 900; *cert. denied*, 69 Sup. Ct. 1510 (1949).

While a Negro has no right to racial representation on a grand jury in proportion to the number of his race in the community,[1] nor even to be represented,[2] the Constitution [3] guarantees a defendant that his race shall not be discriminated against by state officials in the selection of juries. Because of the difficulty of showing intentional discrimination by direct proof of such misconduct by state officials, the Negro defendant has had to resort to other means of proving systematic exclusion of his race from jury service.

In *Neal v. Delaware* [4] the Supreme Court determined that a prima facie case of systematic exclusion was established by showing absence of Negroes from jury panels for a long period of time, together with proof that there were

12. *See* United States v. Eisler, 75 F. Supp. 640 (D.C. 1948) (dissenting opinion).
13. *See* United States v. Wood, *supra*; Frazier v. United States, *supra*.

1. Thomas v. Texas, 212 U.S. 278 (1908).
2. Martin v. Texas, 200 U.S. 316 (1906).
3. U.S. CONST. AMEND. XIV § 1; 18 STAT. 336 (1875), 8 U.S.C. § 44 (1942) "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. . . ." (Emphasis added).
4. 103 U.S. 370 (1880).

an appreciable number of qualified Negroes in the community.[5] Since the Court did not evolve a precise test in that decision, state courts, therefore, could distinguish subsequent cases [6] before them, as in the instant case, on the ground that a smaller percentage of Negroes resided in the community than in the *Neal* case, or the United States decisions following.[7]

Recently in *Patton v. Mississippi*,[8] the Supreme Court approached the exclusion problem anew. This case held that the defendant's prima facie case was established by merely proving that no Negro had been called to jury duty from the Negroes in the community over an extended period of time. Thus, it was unnecessary to show that there was an appreciable number of qualified Negroes in the county *in proportion to the white population*.[9] The mathematical proportion test as a test of racial discrimination in the selection of jurors was discarded *sub silentio* as unsound.

The lower court, in the instant case, held that defendant did not establish a prima facie case, although he showed no Negroes were summoned to the grand jury for ten years, because there were so few Negroes in the community that their absence could as easily have been laid to chance as to intentional exclusion. Pending the appeal in the principal case, the opinion in the *Patton* case was handed down. But the New York Court of Appeals failed to apply the more liberal view established in the *Patton* case [10] and adopted the narrower view of the lower court based on the mathematical proportion reasoning as developed in the cases following *Neal v. Delaware*.[11] It would appear that the decision in the instant case is not in keeping with the trend towards greater recognition of civil rights manifested by *Patton v. Mississippi*.

CRIMINAL LAW—DETERMINATION OF PROXIMATE CAUSE BY COURT AND JURY

Defendant was convicted of murder in the first degree under the Pennsylvania felony murder statute.[1] An off-duty policeman had attempted

5. *Accord*, Hill v. Texas, 316 U.S. 400 (1942); Hale v. Kentucky, 303 U.S. 613 (1938); Montgomery v. State, 55 Fla. 97, 45 So. 879 (1908).

6. People v. Dessaure, 193 Misc. 381, 68 N.Y.S.2d 108 (Sup. Ct. 1946); Bruster v. States, 40 Okla. Cr. R. 25, 266 Pac. 486 (1928); Swain v. State, 215 Ind. 259, 18 N.E.2d 921 (1913).

7. Hill v. Texas, *supra;* Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939).

8. 332 U.S. 463 (1947).

9. "But whatever the precise number of qualified colored electors in the county, there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write, or to meet any other or all of the statutory tests, we do not doubt that the state could have proved it." Patton v. Mississippi, 332 U.S. 463, 468 (1947).

10. Compare the time interval in the instant case of ten years with a thirty year period in the *Patton* case.

11. Hill v. Texas, *supra;* Pierre v. Louisiana, *supra;* Hale v. Kentucky, *supra*.

1. "All murder . . . which shall be committed in the perpetration of . . . robbery . . . shall be murder in the first degree." PA. PENAL CODE § 4701 (1939).