Louisiana Law Review

Volume 24 | Number 2
The Work of the Louisiana Appellate Courts for the 1962-1963 Term: A Symposium
February 1964

Racial Discrimination - Systematic Exclusion In Jury Selection

Byron Kantrow Jr.

AS A SEPARATE REGIME

Only the convenience of the parties to the lease, or of the court which must interpret it, seems to require that shut-in payments be treated as either royalties or rentals. The parties apparently are free to create separate or hybrid regimes by incorporating into the lease their own rules governing problems such as distribution of the shut-in payments, termination for nonpayment, and the others which are so conveniently handled by analogy to royalties or rentals.

CONCLUSION

In *Davis v. Laster* the court chose to resolve a controversy arising under a shut-in clause by characterizing shut-in payments as royalty. Since this characterization was derived from the terms of the lease, *Davis* does not foreclose a contractual attempt to classify shut-in payments as rentals or to create a separate regime for them. Rental characterization should prevent nonparticipating royalty owners from sharing in shut-in payments, but should have no effect on the lessee's diligent development obligation or interruption of prescription on nonparticipating royalty interests.

Gordon R. Crawford and William Shelby McKenzie

RACIAL DISCRIMINATION — SYSTEMATIC EXCLUSION IN JURY SELECTION

Due process and equal protection of the law under the fourteenth amendment to the United States Constitution guarantees no distinction shall be made in the selection of grand or petit juries on account of race, color, or previous condition of servitude.[1] This guarantee, which is also incorporated in the Louisiana Constitution[2] and Code of Criminal Procedure,[3] is denied by

1. Pierre v. Louisiana, 306 U.S. 354 (1939) established this principle. Subsequent Supreme Court cases elaborating this proposition include: Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Akins v. Texas, 325 U.S. 398 (1945); Patton v. Mississippi, 332 U.S. 463 (1947); Cassell v. Texas, 339 U.S. 282 (1950); Brown v. Allen, 344 U.S. 443 (1953); Avery v. Georgia, 345 U.S. 559 (1953); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958).

2. LA. CONST. art. I, § 9.

3. LA. R.S. 15:172 (1950).

systematic exclusion of Negroes from juries.[4] What constitutes systematic exclusion has caused courts much difficulty since the inquiry is basically factual, with each case presenting several important variables, the summation of which determines the issue. Although comprehensive rules are lacking, notwithstanding a great amount of litigation, it is possible to analyze the variables bearing on the question of systematic exclusion within the framework of certain general principles.

GENERAL PRINCIPLES

It will not suffice that the written laws of a state promise no discrimination; the fourteenth amendment requires that equal protection actually be given.[5] Thus local tradition cannot justify failure to comply with the constitutional mandate.[6]

To object to exclusion, a defendant must be a member of the excluded class.[7] He has no right to demand inclusion of a member of his race on a particular jury as he is not guaranteed inclusion but the absence of systematic exclusion.[8] Nor may he object to the state's use of its peremptory challenges to exclude members of his race called for jury service.[9]

Louisiana's jurisprudence is well settled that objections to the composition of grand or petit juries are waived unless made before trial.[10] While the United States Supreme Court has not specifically ruled on this question,[11] a recent federal case held failure to make a timely objection to systematic exclusion did

4. See note 1 *supra*.

5. Smith v. Texas, 311 U.S. 128, 130 (1940).

6. Eubanks v. Louisiana, 356 U.S. 584, 588 (1958).

7. Fay v. New York, 332 U.S. 261, 287 (1947). The court stated that it had never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class, but refused to decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case. See Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LA. L. REV. 655, 686 (1956) for an analytical discussion of this area.

8. Akins v. Texas, 325 U.S. 398, 403 (1945); State v. Dorsey, 207 La. 928, 954, 22 So. 2d 273, 281 (1945); State v. Augusta, 199 La. 896, 912, 7 So. 2d 177, 183 (1942). It should be noted that the same principles which forbid discrimination in the selection of petit juries also govern the selection of grand juries. Pierre v. Louisiana, 306 U.S. 354, 362 (1939).

9. State v. Anderson, 206 La. 986, 20 So. 2d 288 (1944).

10. State v. White, 193 La. 775, 192 So. 345 (1939). See *The Work of the Louisiana Supreme Court for the 1943-1944 Term — Criminal Law and Procedure*, 6 LA. L. REV. 173, 187 (1944).

11. While the United States Supreme Court has not ruled that objections must be made before trial, no cases were found where the Supreme Court ruled on the systematic exclusion issue when objection was not made before trial.

not preclude consideration in federal habeas corpus proceedings.[12]

FACTORS DETERMINING SYSTEMATIC EXCLUSION

Though no one factor can be considered determinative, the jurisprudence indicates several which are important in concluding whether systematic exclusion was present.

Period of Time

To constitute unlawful discrimination, systematic exclusion need not have continued for any extended period nor been practiced by a succession of jury commissioners.[13] However, absence of Negro jurors despite available qualified Negro citizens creates a presumption of discrimination[14] which requires the state to prove non-discrimination.[15] The United States Supreme Court has indicated the state's proof must go beyond mere assertions of performance of duty by officials.[16]

In the absence of a prima facie case additional factors which indicate discrimination must be proved.

Effort by Commissioners

Louisiana places primary responsibility for the selection of jurors in a jury commission[17] which must, without racial discrimination, select qualified jurors.[18] When jury commissioners

12. United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959).

13. Cassell v. Texas, 339 U.S. 282, 290 (1950). The court after quoting from Hill v. Texas, 316 U.S. 400 (1942) stated: "The existence of the kind of discrimination described in the *Hill* case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. Since the issue must be whether there has been discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long-continued unexplained absence of Negroes from many panels."

14. Norris v. Alabama, 294 U.S. 587 (1935); Slovenko, *The Jury System in Louisiana Criminal Law*, 17 LA. L. REV. 655, 687 (1956).

15. Avery v. Georgia, 345 U.S. 559, 562 (1953). When a prima facie case is made out the burden falls on the state to bring in sufficient evidence to dispel it.

16. Norris v. Alabama, 294 U.S. 587, 598 (1935). "If . . . the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the constitutional provision — adopted with special reference to their protection — would be but a vain and illusory requirement."

17. LA. R.S. 15:180 (1950): "Immediately after completing the general venire list, the commission shall select therefrom the names of twenty citizens, possessing the qualifications of grand jurors . . . ." *Id.* 15:181 provides for the drawing of petit jurors by the jury commission.

18. *Id.* 15:172: "The qualifications to serve as a grand juror or a petit juror

limit their selection to personal acquaintances, unconstitutional discrimination can automatically arise from commissioners who know no Negroes.[19] If Negro representation has been small, the courts often look to the effort made by the commission to obtain qualified Negroes. In *State v. Anderson*[20] the court found there had been a systematic exclusion of Negroes. The opinion stressed the lack of effort made by the commissioners to find qualified Negroes and indicated their duty was to make such an effort.[21] Conversely, in *State v. Dorsey*,[22] wherein the court found no systematic exclusion, the opinion emphasized the good faith effort made by the jury commission, which used registration rolls, directories, newspapers, insurance lists, federal jury rolls, and lists from colored organizations to obtain qualified Negroes.[23]

Selection Procedure

The United States Supreme Court has been extremely reluctant to sustain charges of discrimination based solely on a selection procedure set out by state law,[24] while it has sustained numerous objections to discriminatory practices by the persons in charge of effectuating such a plan.[25] Any practice which mere-

in any of the courts of this state shall be as follows: To be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is holden, for one year next preceding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case. In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community."

19. Smith v. Texas, 311 U.S. 128, 132 (1940): "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from Commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

20. 205 La. 710, 18 So. 2d 33 (1944).

21. *Id.* at 728, 18 So. 2d at 39: "The State made no effort to have the commissioners narrate the manner or way in which they selected the 300 names placed in the general venire box. They do not say they made any investigation, inquiry or effort to determine how many negroes were qualified to serve as grand and petit jurors. Thus, in the administration of the law, they failed to perform a duty placed upon them by the constitutional provisions in question as construed and applied by the highest court in our land."

22. 207 La. 928, 22 So. 2d 273 (1945).

23. *Id.* at 944, 22 So. 2d at 278.

24. See, *e.g.*, Patton v. Mississippi, 332 U.S. 463 (1947).

25. *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 350 U.S. 85 (1955); Avery v. Georgia, 345 U.S. 559 (1953); Cassell v. Texas, 339

ly presents an opportunity to discriminate is scrutinized by the court.[26] For example, in *Avery v. Georgia*[27] white and yellow tickets were used to distinguish white and colored persons during the selection process. Although no specific act of discrimination was proven in the selection procedure, the court, impressed with the opportunities presented to various officials to discriminate and the absence of Negroes selected, held there had been systematic exclusion.[28]

No statute specifies what sources Louisiana jury commissioners are to use in selecting qualified jurors.[29] Various ones have been adopted without any uniformity among different commissions.[30] The most controversial has been the use of voter registration rolls. Although such practice could be highly discriminatory in some Louisiana parishes, it has not been disapproved. In *State v. Perkins*[31] the voter registration rolls were used in a parish containing 540 Negro as compared to 34,000 white voters. The court, in upholding the use of registration rolls, reasoned that the qualifications for an elector and a juror were substantially the same in Louisiana.[32] Although it has been suggested that the United States Supreme Court in *Patton v. Mississippi* approved voter qualification as a reasonable requisite to jury service,[33] it cannot be said with certainty that the Court would uphold *Perkins* under present standards.

U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Pierre v. Louisiana, 306 U.S. 354 (1939).

26. See note 25 *supra*.

27. 345 U.S. 559 (1953). After the names of prospective jurors had been selected by jury commissioners, the names of white persons were printed on white tickets and the names of Negroes on yellow tickets, which were placed together in a jury box. A judge then drew a number of tickets from the box. He testified, without contradiction, that he had not discriminated in the drawing. The tickets drawn were handed to a sheriff, who entrusted them to a clerk, whose duty it was to "arrange" the tickets and to type in final form the list of persons to be called to serve on the panel. About 60 persons were on the panel from which the jury was selected, but there were no Negroes.

28. *Ibid.*

29. See note 18 *supra*.

30. Several of the numerous sources used include: directories, newspapers, insurance lists, tax lists, registration rolls, and federal jury rolls.

31. 211 La. 993, 31 So. 2d 188 (1947).

32. The court said: "Article 172 of the Code of Criminal Procedure does not require that a person be a registered voter in order to qualify for jury service. However, since the qualifications set forth in Article 172 with respect to age, residence, literacy and other requirements for jury service are substantially the same as those of an elector, the Jury Commission has found it is convenient to obtain its general venire list from the registration roll. This has been a long established custom and we do not find anything objectionable in the practice." *Id.* at 1005, 31 So. 2d at 192. See also State v. Mack, 243 La. 369, 144 So. 2d 363 (1962), which recently approved the use of voter registration lists.

33. Patton v. Mississippi, 332 U.S. 463 (1947). See Comment, 8 LA. L. REV.

Uncertainty and lack of uniformity in sources of selection point to the need for a legislative declaration of more specific selection procedure.

Economic and Educational Considerations

Often factors such as illiteracy and the inability of low wage earners to leave their jobs for jury service result in a small number of Negro veniremen despite a conscientious effort to secure fair representation.[34] Although this would probably never justify a total absence of Negro representation, the courts have indicated these standards will be considered in determining whether a fair number of Negroes have been included on the jury lists.[35] In *Brown v. Allen*[36] the United States Supreme Court recognized that a disproportionate number of white citizens were on the jury lists, "doubtless due to inequality of educational and economic opportunities."[37]

In the future, as the Negro continues to improve his educational and economic standards, this factor should depreciate in importance.

Percentages

Generally, percentages alone are not enough to show the systematic exclusion of Negroes.[38] The evolution of a conception of due process or equal protection that requires proportional

548, 551 (1948) for a discussion of the court's failure to strike down the Mississippi statute which approved of the use of voter rolls. The Supreme Court approved the use of tax lists in Brown v. Allen, 344 U.S. 443 (1953). In regard to the use of tax lists the court stated: "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. Short of an annual census or required population registration, these tax lists offer the most comprehensive source of available names. We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality." *Id.* at 474.

34. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Criminal Procedure*, 13 LA. L. REV. 326, 331 (1953).

35. State v. Dorsey, 207 La. 928, 950, 22 So. 2d 273, 280 (1945): "[W]e are convinced from a careful reading of all the testimony that a fair percentage of the members of the colored race was contained therein (referring to a list of 1360 names), especially when we take into consideration the economic, the moral, the educational, and other general conditions prevailing among the colored race in the Parish of Orleans."

36. 344 U.S. 443 (1953).

37. *Id.* at 473.

38. "Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals." Akins v. Texas, 325 U.S. 398, 403 (1945).

representation is in practicality precluded by the number of races and nationalities.

Percentage discrepancies which show very little Negro representation could become important when combined with other factors. For example, percentages may be significant to prove discrimination when a sizeable and unexplained disproportion is shown to have existed for a number of years.[39]

Token Inclusion

The sporadic inclusion of Negroes is not sufficient to defeat a claim of systematic exclusion. However, courts often have difficulty distinguishing token inclusion from unavailability of qualified Negroes. In *Cassell v. Texas*[40] token inclusion was evident since only one Negro had been placed on each of twenty-one successive grand jury lists. Justice Frankfurter's concurring statement that "the basis of selection cannot consciously take color into account"[41] created a difficult problem; commissioners frequently consciously included Negroes in an effort to meet, not defeat, the constitutional requiremnts.[42] The Louisiana Supreme Court in *State v. Green*[43] subsequently declared that there is not a token inclusion just because jury commissioners are conscious of including members of the colored race in order to comply with the due process and equal protection requirements of the fourteenth amendment.[44]

"The Constitution forbids discrimination; it does not deal with percentages. Percentages may be of value in cases where no representation exists or where token representation has been given in keeping with a scheme to deny equal protection of the laws." State v. Perkins, 211 La. 993, 1007, 31 So. 2d 188, 192 (1947).

39. As the number of Negroes serving increases, or the period of the exclusion decreases, the value of the percentage as proof is diminished until an unknown point is reached where it becomes merely a convenient manifestation of discrimination which must otherwise be proved. See Comment, 8 LA. L. REV. 548, 549 (1948).

40. 339 U.S. 282 (1950).

41. *Id.* at 295.

42. See 19 LA. L. REV. 421 (1959); 13 LA. L. REV. 330 (1953); 11 LA. L. REV. 241 (1951) for a discussion of the problem created.

43. 221 La. 713, 60 So. 2d 208 (1952).

44. The court's words were: "It would be fallacious, we think, to hold that, because jury commissioners, being conscious of the necessity of giving consideration to members of the colored race, as well as those of other races, in the selection of all juries in order to comply with the guarantees of the Fourteenth Amendment to the Federal Constitution, have purposely included Negroes on a jury panel, their forthright action constitutes discrimination in the absence of a showing that there was a planned limitation upon the number of Negroes to be chosen." *Id.* at 726, 60 So. 2d at 212.

In State v. Mack, 243 La. 369, 144 So. 2d 363 (1962) the court reiterated this principle by stating knowledge of a prospective juror's race on the part of the jury commission is inevitable under Louisiana's system of selection.

CONCLUSION

The constitutionality of a jury selection system is tested by weighing the various factors outlined above — duration of unrepresented period, efforts by commissioners to obtain representative juries, fairness of selection procedure, economic and educational circumstances, proportionality of representation and whether the representation is token. While each case must be decided on its own merits, knowledge of these factors should aid the attainment of constitutional jury selection.*

Byron Kantrow, Jr.

*The recent decision of Collins v. Walker, 242 La. 704, 138 So. 2d 546 (1962), conviction set aside, United States Court of Appeals, Fifth Circuit, No. 20537 (Dec. 6, 1963), was rendered at the time this Comment was set for publication. It held a Negro defendant's constitutional rights were violated by a forthright effort to include an ample number of Negroes on the grand jury. This case has not yet been published and will be noted in a subsequent issue of this *Review*.