Louisiana Law Review

Volume 27 | Number 1
December 1966

Constitutional Law - Equal Protection - Systematic Inclusion in Jury Selection

John T. Cox Jr.

the damage as "indirectly resulting"[26] from the act committed in Livingston Parish.

It is submitted that the court adopted a restricted view of article 74. It qualifies the phrase "where the damages were sustained" to mean there must be independent damage and it cannot be "indirectly resulting" from another cause of action. This will prevent "forum shopping" in the situation where the injury occurs in one parish and the injured party goes to another parish to recover from the injury but carries the pain with him. Article 74 had as one of its purposes the remedying of earlier cases[27] in which the wrongful conduct occurred in one parish and the damages were sustained in another. The court in the instant case seems to indicate that this remedy will be available only where there is a substantial damage incurred in a second parish. This interpretation will serve to prevent the splitting of a cause of action in order to allow the plaintiff to pick capriciously the venue in which he will sue.[28] It is submitted that the apparent desire of the legislature, to prevent forum shopping yet allow the action to be brought in the parish where the damage was sustained, should not be limited as in the instant case. It seems the court has injected a new question into all tort actions, that of whether the damages claimed are "direct and determinable" or whether they are "indirect and subjectively nebulous."

Charles S. McCowan, Jr.

CONSTITUTIONAL LAW — EQUAL PROTECTION — SYSTEMATIC INCLUSION IN JURY SELECTION

Brooks, a Negro, was indicted for rape of a white woman by a grand jury impaneled under a system that excluded Negroes. Aware that Brook's indictment was invalid because of a decision rendered since the original indictment,[1] the district judge appointed a new jury commission. This commission selected sixteen prospective jurors, two of them Negroes, who were also chosen for the new grand jury that re-indicted Brooks. A mo-

26. 184 So. 2d 625, 627 (La. App. 4th Cir. 1966).
27. See note 8 *supra*.
28. LA. CODE OF CIVIL PROCEDURE art. 425 (1960).
1. Stoker v. State, 331 S.W.2d 310 (Tex. Crim. App. 1960). Conviction reversed and indictment dismissed because of 50-year history of exclusion of Negroes on the grand jury list.

tion to quash the indictment because of intentional *inclusion* of Negroes on the grand jury was denied and Brooks was convicted. The Texas Court of Criminal Appeals also rejected[2] this claim of unconstitutional racial inclusion.[3] After exhausting state remedies,[4] Brooks sought federal habeas corpus relief. The district court refused the writ and he appealed. *Held,* denial of the writ affirmed. Constitutional standards requiring fair representation, and the duty of jury commissioners to be acquainted with identifiable elements of the community which have been the object of state discrimination not only permit, but compel conscious inclusion of Negroes where necessary to insure a representative jury panel, provided there is no purposeful inclusion of a predetermined number. *Brooks v. Beto,* 366 F.2d 1 (5th Cir. 1966).

As early as 1879, the United States Supreme Court announced:

> "It is a right to which every colored man is entitled that in the selection of jurors . . . there shall be no *exclusion* of his race . . . because of . . . color."[5] (Emphasis added.)

The very next term, the Court reiterated this proposition,[6] and it has become well settled through emphasis and re-emphasis that constitutional due process and equal protection do not tolerate exclusion from jury lists because of race.[7] *Akins v. Texas*[8] added that the rule against racial exclusion may not be circumvented by token inclusion if the number to be included is predetermined or purposefully limited. It was this practice Justice Frankfurter condemned in his concurring opinion in *Cassell v. Texas*[9] as purposeful exclusion through inclusion of token num-

2. Failing to comply with procedural requirements as set out under TEXAS CODE CRIM. PROC. art. 759a, § 6 (1965 Supplement) : "[T]he facts adduced in connection with any motion shall be filed with the clerk separately from the facts adduced bearing upon the guilt or innocence of the defendant," the evidence in the hearing of the motion could not be considered. Thus, Brooks' contention fell at the state appeal level without a real determination of its merits.

3. Brooks v. State, 342 S.W.2d 439 (Tex. Crim. App. 1960), *on rehearing,* 342 S.W.2d 442 (Tex. Crim. App. 1961).

4. 28 U.S.C. § 2254 (1952).

5. Virginia v. Rives, 100 U.S. 313, 322-23 (1879).

6. Neal v. Delaware, 103 U.S. 370 (1880).

7. See Swain v. Alabama, 380 U.S. 202 (1965) ; Coleman v. Alabama, 377 U.S. 129 (1964) ; Hernandez v. Texas, 347 U.S. 475 (1954) ; Avery v. Georgia, 345 U.S. 559 (1953) ; Brown v. Allen, 344 U.S. 443 (1953) ; Pierre v. Louisiana, 306 U.S. 354 (1939) ; Norris v. Alabama, 294 U.S. 587 (1935) ; Rogers v. Alabama, 192 U.S. 226 (1904) ; Gibson v. Mississippi, 162 U.S. 565 (1896).

8. 325 U.S. 398 (1945).

9. 339 U.S. 282, 294-95 (1950).

bers. From this background, and with "arguments which were admittedly 'opposite and paradoxical'," [10] *Collins v. Walker* [11] held that purposeful inclusion of Negroes in a grand jury list discriminated against a Negro accused and an indictment by such a grand jury was invalid.

The original *Collins* opinion, which was withdrawn and not officially published,[12] relied on the broad language of *Cassell*, conceding, however, that its facts were distinguishable.[13] In the substituted opinion[14] there was no reliance on or even mention of the case; however, in the court's final rehearing opinion,[15] reliance on *Cassell* returned, but without the factual distinction.[16] Thus *Collins*, entangled in a trilogy of opinions, resulted in a decree that systematic inclusion of Negroes on a jury, as well as systematic exclusion, was a violation of the Equal Protection Clause of the fourteenth amendment. In the words of Judge Dawkins:

> "[T]he majority decision now rendered indeed places jury commissioners . . . in a virtually insoluble dilemma, where compilation of a constitutional jury list may be an impossibility."[17]

With both systematic inclusion and exclusion of Negroes offending the Constitution, systematic selection of grand jury venires would be difficult. A jury containing no Negroes would be open to attack for systematic exclusion, while a jury having Negro membership (in any number) could come under fire for systematic inclusion. The Court attempted to ameliorate the dilemma by permitting inclusion if far enough removed from the final selection.[18] However, *Collins*'s compound enigma can be seen in Judge Jones's statement that "perhaps Negroes must be

10. See *The Work of the Louisiana Appellate Courts for the 1962-1963 Term — Criminal Procedure*, 24 LA. L. REV. 326, 331 (1964).

11. 329 F.2d 100 (5th Cir. 1964), *on rehearing*, 335 F.2d 417 (5th Cir. 1964), *cert. denied sub nom.*, Hanchey v. Collins, 379 U.S. 901 (1964).

12. It is the revised opinion, substituted for the original, that is found at 329 F.2d 100 (5th Cir. 1964). The original may be found in "Appendix A" to Judge Dawkins' dissenting opinion on the second rehearing, 335 F.2d 417, 429 (5th Cir. 1964).

13. 335 F.2d 417, 433 (5th Cir. 1964).

14. 329 F.2d 100 (5th Cir. 1964). This opinion used much of the same general reasoning as the original. It omitted statements and implications, felt to be unnecessary and possibly offensive, concerning fears of Negroes in voting without bias on the jury.

15. 335 F.2d 417 (5th Cir. 1964).

16. *Id.* at 420.

17. 335 F.2d 417, 421 (5th Cir. 1964) (dissenting opinion).

18. *Id.* at 420-21.

included in the general venire list although it will be assumed that this is not to be done purposefully."[19]

Despite the presumption that officers selecting a jury panel have performed their duty lawfully,[20] *Collins* aroused grave concern whether any grand jury could return valid indictments of Negroes.[21] In the instant case the court recognized the dilemma of having a jury that represents a fair cross section of the community,[22] chosen by selectors under a duty to learn of qualified Negroes in the community,[23] and a doctrine of neither inclusion nor exclusion because of race.[24] *Brooks* specifically overruled *Collins* and formulated two requirements—(1) fair representation and (2) a duty to know significant identifiable elements of the community which have been the object of state discrimination,[25] this duty requiring inclusion in some cases. The court stated clearly that if in the community make-up, identifiable racial groups are significant elements, awareness of the community must include an awareness of race as such.

> "When that class is a racial group and, moreover, a racial group which historically has been the object or victim of state-generated discrimination, the selectors can perform their constitutionally-imposed duty only by being conscious of that class."[26]

The court explained the idea of class consciousness and the duty of the jury selectors in these words:

> "[A] juror selector could fulfill that duty only by being aware of that race and the *steps reasonably needed to assure representation* of that race in the 'universe' from which jurors are obtained. Not only may he do so, *he must*."[27] (Emphasis added.)

The requirement seems clear — systematic inclusion is part

19. *Id.* at 421 (concurring opinion).
20. Tarrance v. Florida, 188 U.S. 519 (1903).
21. Shortly after *Collins*, LA. R.S. 15:180 (1950) was amended by La. Acts 1964, No. 161, providing that the names of jurymen should be drawn "indiscriminately and by lot" from the general venire in an effort to avoid charges of systematic inclusion or exclusion.
22. Swain v. Alabama, 380 U.S. 202 (1965); Akins v. Texas, 325 U.S. 398 (1945); Martin v. Texas, 200 U.S. 316 (1906).
23. Hernandez v. Texas, 347 U.S. 475 (1954); Hill v. Texas, 316 U.S. 400 (1942); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962).
24. Cassell v. Texas, 339 U.S. 282 (1950); Collins v. Walker, 329 F.2d 100 (5th Cir. 1964).
25. No. 22809 at 46, U.S. Ct. App., 5th Cir., July 29, 1966.
26. *Id.* at 50.
27. *Id.* at 50-51.

of the duty of jury selectors as "the steps reasonably needed to assure representation":

> "[I]ntentional inclusion on the general jury list based on race is a means of converting the constitutional mandate of a fair jury list into a reality."[28]

Thus the court has presented a clear outline of how the practical problems of jury selection may be met.

It is submitted that *Collins* met its inevitable fate and the instant case offers not only a solution to the dilemma facing many jury commissions, but also is more in keeping with the historical trend of decisions in this area. *Collins* appears to be a mutation created through reliance on dicta and excerpts taken out of context, while *Brooks* states clearly what has been implied in earlier decisions. In *Akins v. Texas*[29] the Supreme Court, by affirming a conviction on a record showing purposeful inclusion, in effect approved such inclusion. In *Moore v. State*[30] a charge of exclusion was rejected when no studied evasion was found, but rather it was demonstrated that there was a deliberate attempt to insure Negro representation by inclusion. There the Supreme Court denied certiorari.[31] Even *Cassell*, upon which *Collins* purported to rely, has not been treated by the Supreme Court as a prohibition against purposeful inclusion. On the contrary, it has been considered a case of *exclusion* through a device of *limited inclusion*, as in *Brown v. Allen*[32] where *Cassell* was cited in support of the proposition that limited inclusion equals systematic exclusion. In *Eubanks v. Louisiana*,[33] *Cassell* was cited as one of an unbroken line of cases holding *exclusion* because of race to be a denial of equal protection. In *Hernandez v. Texas*[34] the Court characterized *Cassell* as a rule of *exclusion*. The language[35] from *Cassell* relied on in *Collins* was dicta, the very next sentence in the decision being: "Our holding that there was discrimintion . . . is based on another ground."[36] Thus *Collins* found no real support in the case it cited, and with-

28. *Id.* at 73 (concurring opinion).
29. 325 U.S. 398, 404 n.4, 406 (1945).
30. 229 Ark. 335, 315 S.W.2d 907 (1958).
31. 358 U.S. 946 (1959).
32. 344 U.S. 443, 470-71 (1953).
33. 356 U.S. 584, 585 (1958).
34. 347 U.S. 475, 480 n.11 (1954).
35. 339 U.S. 282, 287 (1950): "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."
36. 339 U.S. 282, 287 (1950).

out the approach adopted in the withdrawn opinion, many of its generalities rested on unfirm ground.

Judge Wisdom, concurring,[37] feels *Brooks* and *Collins* are not inconsistent because of the difference in the jury systems in the cases. Yet, it would seem there is no way the principles of the two decisions could have survived together. It is submitted that Judge Wisdom's distinction is too fine and too susceptible of arbitrary application. Further, it seems to ignore the compelling reason for the demise of *Collins*; that *Collins* was unrealistic and left no jury safe from attack. It is submitted that to distinguish *Collins* because of the different stages in the selection process at which inclusion occurred adds little to the solution of the dilemma created. There are too many methods of jury selection with different levels in their process.[38] To say inclusion at the "general venire level" (which perhaps includes several hundred names) or the "prospective panel level" (which includes few names more than the number to be selected) is permissible, but not at the "final selection level," offers no solution to a state with two levels in its selection process. May such a state still include at its beginning level, even though this level is not a general venire of hundreds, but a select group only a few more than those necessary on the final panel, and at its second level also, which results in the final panel? Or must there be no inclusion at the second level because it is the final process? Or since there are only two levels, closely related, is there any room for inclusion at all? What is the position of the state with an even larger number of stages? It is simply unworkable to predicate purposeful inclusion on the number of stages removed from final selection, and would result in a case by case determination rather than by general principles.

The dangers envisioned by Judges Gewin and Bell in their separate concurring opinions in *Brooks* are perhaps exaggerated. To say that jury selection officials will be on trial for "failing

37. No. 22809 at 57, U.S. Ct. App., 5th Cir., July 29, 1966 (concurring opinion).

38. Louisiana has a three-stage selection process. See LA. R.S. 15:172-203 (1950); after January 1, 1967, LA. CODE OF CRIMINAL PROCEDURE arts. 401-419 (1967). Texas employs a two-stage process. TEXAS CODE OF CRIM. PROC. arts. 19.06-19.26 (1965). For examples of other selection procedures, see N.Y. JUDICIARY LAW § 684, three-stage process; ILL. R.S. ch. 78, §§ 1-12 (1957), modified three-stage process including provisions for summonsing bystanders if necessary to complete the panel; MISS. CODE ch. 9, §§ 1766-1780 (1942, recompiled 1956), four-stage procedure involving several jury boxes and at least two drawings.

to do enough searching"[39] is to say no more than could have been said prior to *Brooks*. Contrary to Judge Gewin's analysis, the majority in *Brooks* does not demand a searching for *all components* of a particular community; it requires knowledge of "*significant identifiable* elements of the community which have been the *object of state* discrimination." While astute counsel might attempt to use the rule to challenge juries that are not mirrors of the community,[40] it will not be a lavish new ground for delay. Perfectly proportional representation is not contemplated by the majority in the instant case: "The dual requirements making awareness of race inevitable must be met . . . . It must never, simply never, be applied to secure proportional representation."[41] The court points out that neither symbolic nor proportional representation is permitted; proportional as well as token representation will be condemned as a form of exclusion in the guise of limited inclusion. This is consistent with *Swain v. Alabama*[42] where the Supreme Court held that the jury list need not be a perfect mirror of the community nor an accurate reflection of the proportionate strength of every identifiable group.

However, how is a jury list to be fairly representative of the community without some consideration being given to proportion? Thus when the Court decries proportional representation, it must mean only representation that is *exactly proportional.* But one may find it difficult to distinguish *Brooks*'s required inclusion from the inclusion damned as being exclusion through token compliance or proportional representation. Notwithstanding, this stand on purposeful inclusion presents a clearly defined method to safeguard many juries from attack.

The majority opinion simply takes the constitutional premise that a jury list must reflect a fair cross-section of the community and provides a means to accomplish this — requiring acquaintance with the make-up of the community and purposeful inclusion based on an awareness of race. *Brooks* may seem to create a weighty formula, speaking as it does of fair representation, the duty to become acquainted and the duty to include where necessary. However, the rule of *Brooks* is more an ingre-

39. No. 22809 at 68, U.S. Ct. App., 5th Cir., July 29, 1966 (concurring opinion).
40. See Swain v. Alabama, 380 U.S. 202 (1965).
41. No. 22809 at 51, U.S. Ct. App., 5th Cir., July 29, 1966.
42. 380 U.S. 202 (1965).

dient than a formula. It requires conscious inclusion, an ingredient that was unavailable before, but which is now permissible for formulas to be precisely developed in the future. Certainly the instant case leaves many questions, for the court did not deal with the practical problems of the nebulous area between "inclusion" and "inclusion of predetermined numbers." It simply opens the way by overruling *Collins* and seems to suggest that as subsequent cases arise, specific guidelines will be considered. With *Collins* the door was closed to any method of deliberate inclusion, even as a means of procuring a fair representation of Negroes. *Brooks* removes the impossible situation of *Collins* by not only permitting conscious inclusion, but demanding it where necessary to promote fair representation. Thus the holding in *Brooks* is limited, only putting aside the barrier that prevented use of the most logical means of producing fairly representative jury lists, *i.e.*, consciously correcting exclusion by inclusion. Undoubtedly the court must and will establish more stringent sanctions in the actual administration of permissible inclusion. As the Fifth Circuit Court said earlier, "[W]e synthesize principles and sanctions which experience demonstrates are needed."[43]

Brooks is more in keeping with earlier decisions than *Collins* and puts forth a mandate that is a workable component in the major problem in jury selection — a solution at least during our present racially conscious times.[44] It is submitted that the instant case offers to a judge instructing a jury commission the safe position of stating the dual constitutional requirements of *Brooks* and offers to the commission a realistic means of adhering to those instructions.

John T. Cox, Jr.

CONSTITUTIONAL LAW — RIGHT TO COUNSEL

Incriminating statements obtained by isolated interrogation of each of four defendants in police custody were admitted at trial. No defendant had been warned of his constitutional rights at the outset of questioning. *Held*, convictions reversed. If state-

43. United States v. Ward, 349 F.2d 795, 802 (5th Cir. 1965).

44. The court intimates that the affirmative duty of inclusion may pass away as the ultimate formula is devised. "As success is achieved and the constitutional ideal of a prejudiceless society is attained, the law will surely have both the capacity for and the duty of molding its relief to that hoped for situation." Brooks v. Beto, No. 22809 at 55, U.S. Ct. App., 5th Cir., July 29, 1966.