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The Constitution and the All-White Jury

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Two recent Kentucky cases, *Pool* v *Commonwealth*[1] and *Logan* v *Commonwealth*[2] involve objections by defendants, in both cases Negroes, to indictment by a grand jury in the selection of which, it was alleged, Negroes had been systematically excluded because of their race. Since this ground for appeal is being extensively employed throughout the South, as evidenced by the above cases and by a series of recent decisions by the Supreme Court of the United States,[3] it is thought appropriate to examine in this note the extent of the constitutional right of a Negro to a jury from which his race is not systematically excluded, and to point out the legal steps by which he may enforce this right.

Since 1880 when it rendered the decision in the case of *Strauder* v *West Virginia*,[4] the Supreme Court has consistently denounced discrimination in the selection of juries, both grand and petit, and in those cases in which the question has been properly raised, has reversed convictions of Negroes in state courts which deprive those Negroes of this right.[5] In that case it appeared that a West Virginia statute prevented Negroes from serving on a jury The Negro defendant, indicated for murder, petitioned the trial court for a removal of the case to the Federal court in pursuance of a Federal statute[6] which author-

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[1] 308 Ky. 107, 213 S.W 2d 603 (1948).
308 Ky. 259, 214 S.W 2d 279 (1948).

[3] Patton v. Mississippi, 332 U. S. 463, 68 Sup. Ct. 184, 92 L. Ed. 164 (1947); Akins v. Texas, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945); Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942); Smith v. Texas, 311 U. S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940); Pierre v. Louisiana, 306 U. S. 354, 59 Sup. Ct. 536, 83 L. Ed. 757 (1939); Hale v. Kentucky, 303 U. S. 613, 58 Sup. Ct. 753, 82 L. Ed. 1050 (1938); Hollins v. Oklahoma, 295 U. S. 394, 55 Sup. Ct. 784, 79 L. Ed. 1082 (1935); Norris v. Alabama, 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074 (1935).

[4] 100 U. S. 303, 25 L. Ed. 664 (1880).

[5] Patton v. Mississippi, 332 U. S. 463, 68 Sup. Ct. 184, 92 L. Ed. 164 (1947); Hill v. Texas, 316 U. S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942); Smith v. Texas, 311 U. S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940); Pierre v. Louisiana, 306 U. S. 354, 59 Sup. Ct. 536, 83 L. Ed. 757 (1939); Hale v. Kentucky, 303 U. S. 613, 58 Sup. Ct. 753, 82 L. Ed. 1050 (1938); Hollins v. Oklahoma, 295 U. S. 394, 55 Sup. Ct. 784, 79 L. Ed. 1500 (1935); Norris v. Alabama, 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074 (1935); Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 418 (1904); Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839 (1900); Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880).

[6] REV. STAT. sec. 641 (1875), 28 U. S. C. sec. 74 (1947).

izes such a removal when a defendant is being deprived of a constitutional right, on the ground of discrimination against his race in the selection of the jury The trial court denied the petition and the defendant was convicted. This conviction was affirmed by the Supreme Court of West Virginia; whereupon the defendant sued out a writ of error in the Supreme Court of the United States, which reversed, holding that the petition for removal should have been granted because of the fact that such discrimination violated the defendant's rights under the equal protection and due process clauses of the Fourteenth Amendment.[7] The Supreme Court took pains to point out that the question was not whether the defendant had a right to a jury composed of members of the Negro race, but whether " in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury "[8]

That same year, however, in the case of *Virginia* v *Rives*,[9] the Court sharply curtailed the applicability of the removal statute, holding a defendant entitled to removal of his case to Federal court only when the law of the state in which he was being tried required discrimination, as was the situation in the *Strauder* case. The Court reasoned that the removal statute required that the defendant petition for removal "before trial," and since there was no Virginia *statute* which required or authorized discrimination against Negroes, the defendant was unable to say in advance that his legal rights were being denied, despite the fact that the defendant might know that the local practice was, and had always been, to exclude Negroes from jury service. This logic was followed in *Neal* v *Delaware*,[10] also decided in 1880, in which case the Court denied the applicability of the removal statute to the defendant's case even though the Delaware constitution excluded Negroes from service on the jury The Court held that the adoption of the Fourteenth Amendment to the Federal Constitution nullified the offending section of the state constitution; hence, no state law, in effect at the time, sanctioned the discrimination, and the petition was properly denied. A similar result was reached in an

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[7] " nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[8] Strauder v. West Virginia, 100 U. S. 303, 305, 25 L. Ed. 664, 665 (1880).

[9] 100 U. S. 313, 25 L. Ed. 667 (1880).

[10] 103 U. S. 370, 26 L. Ed. 567 (1881).

[11] 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354 (1883).

1882 case, *Bush* v *Kentucky*,[11] in which the alleged discrimination was based upon a statute which had already been declared unconstitutional by the Kentucky Court of Appeals,[12] but had never been formally repealed. Thus, within three years from the time it proclaimed the right of a defendant to a jury selected without discrimination against such defendant's race, the Court effectively denied access to what had appeared to be the most convenient means of enforcing the right. This construction of the removal statute has been followed rigidly and undoubtedly is still the law.[13] As will be seen, however, it does not deprive a Negro of a remedy in such cases. For, as was stated in a recent Federal case:

> "The removal of a criminal prosecution or a civil cause under the statute in question because of the denial of a civil right or the enforcement of such a right must arise out of the destruction of such right by the constitution or statutory laws of the state wherein the action is pending. The statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are committed by officers or individuals the remedy is the prosecution of the case to the highest court of the state and then to the Supreme Court of the United States as the laws of the United States authorize."[14]

Such an interpretation of the removal statute has been criticized as placing a needless obstacle in the way of the enforcement of a Negro defendant's Constitutional right. It is said that by forcing the prosecution of appeals grounded upon the type of discrimination here discussed all the way to the nation s highest court, the decision makes practically impossible the final enforcement of rights by an impecunious defendant, if state courts persist in their failure to eliminate such exclusion.[15] Be this as it may, the remedy of " prosecution of the case to the Supreme Court of the United States "[16] by writ of certiorari has, as hitherto stated, become increasingly effective and increasingly common.

In earlier cases in which this remedy was employed the court appears to have enforced rather rigorously the procedural prerequisites. and several convictions were affirmed because of a failure to comply

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[12] Commonwealth v. Johnson, 78 Ky. 509 (1880).

[13] Commonwealth of Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633 (1906); Hull v. Jackson County Circuit Court, 138 F 2d 820 (C.C.A. 6th 1943).

[14] Hull v. Jackson County Circuit Court, 138 F 2d 820, 821 (C.C.A. 6th 1943).

[15] Note, 29 ILL. L. REV. 498 (1934).

[16] See note 14 *supra*.

with evidentiary requirements.[17] In another instance, in *Thomas* v. *State of Texas*,[18] the Court reached the same result by giving almost conclusive effect to the findings of fact of the state court. There it was said:

> " whether such discrimination was practised in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us."[19]

Thus, by these means, the Court, though it continued to profess its adherence to the principle enunciated in the *Strauder* case, actually affirmed every conviction which it reviewed between 1880 and 1935, with the exception of two. In the first of these two, *Carter* v *Texas*,[20] decided in 1900, the defendant, a Negro, moved to quash the indictment on the ground of discrimination, and offered to introduce evidence showing that members of his race were systematically excluded from the grand jury because of their race. The trial court refused to hear the evidence and denied the motion. Upon affirmance by the Court of Criminal Appeals of Texas, the United States Supreme Court granted certiorari and held that the defendant had been deprived of his constitutional rights.

The second of these reversals, *Rogers* v *Alabama*,[21] decided four years later, was similar on its facts. There, the defendant, a Negro indicated for murder, duly filed a motion to quash the indictment on the ground that members of his race had been discriminated against in the selection of the grand jury which indicted him. The motion was denied and the defendant excepted; whereupon the Supreme Court of Alabama overruled this exception " seemingly on the ground that the prolixity of the motion was sufficient to justify the action of the court below "[22] The Supreme Court of the United States reversed, with Mr. Justice Holmes stating the unanimous opinion that, "A motion of that length (two pages), made for the sole purpose of setting up a constitutional right and distinctly claiming it, cannot be with-

[17] Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497 (1905); Brownfield v. South Carolina, 189 U. S. 426, 23 Sup. Ct. 513, 47 L. Ed. 882 (1903); Tarrance v. Florida, 188 U. S. 519, 23 Sup. Ct. 402, 47 L. Ed. 572 (1903); Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082 (1896).

[18] 212 U. S. 278, 29 Sup. Ct. 393, 53 L. Ed. 512 (1909).

[19] *Id.* at 282, 29 Sup. Ct. at 395, 53 L. Ed. at 514.

[20] 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839 (1900).

[21] 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 418 (1904).

[22] *Id.* at 229-230, 24 Sup. Ct. at —, 48 L. Ed. at 418.

drawn for prolixity from the consideration of this court, under the color of local practice, because it contains a statement of matter which perhaps it would have been better to omit but which is relevant to the principal fact averred."[23] From this, it would appear that only in those extreme cases in which the defendant was not even permitted to raise the issue of discrimination in the state court, did the Court overcome its reluctance to enforce the Negro defendants constitutional rights.

In the case of *Norris* v *Alabama*,[24] decided in 1935, was the first of a modern series of decisions which tend in practice, as well as in theory, to secure this right. In that case, Norris was one of the nine Negro defendants in the famous "Scottsboro Case,"[25] eight of whom were convicted of rape in the trial court. It will be remembered that the conviction of seven of these defendants was affirmed by the Supreme Court of Alabama, but reversed by the Supreme Court of the United Ctates[26] " upon the ground that the defendants had been denied due process of law in that the trial court had failed to make an effective appointment of counsel to aid them in preparing and presenting their defense."[27] After the remand, the defendant's (Norris) motion for a change of venue was granted and the case brought to trial in Morgan County Alabama. At the outset the defendant moved to quash the indictment on the ground of exclusion of Negroes from the grand jury in Jackson County, where the defendant was indicted. A motion to quash the trial *venire* in Morgan County was also made upon the same ground. After hearing evidence on the charge, the trial court denied both motions, to which ruling the defendant excepted. The trial proceeded, resulting in the conviction of Norris, who was sentenced to death. The Supreme Court of Alabama affirmed the judgment,[28] and the Supreme Court of the United States granted certiorari.[29] It is desired to include a portion of the review of the evidence found in Mr. Chief Justice Hughes opinion, since such evidence as appeared in this case is in nearly every respect typical of most of the cases which have arisen on this point in Southern states:

"*The evidence on the motion to quash the indictment.* In

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[23] *Id.* at 230, 24 Sup. Ct. at —· 48 L. Ed. at 418.
[24] 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074 (1935).
[25] Powell v. Alabama, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932).
[26] *Ibid.*
[27] Norris v. Alabama, 294 U. S. 587, 588, 55 Sup. Ct. 579, 579, 79 L. Ed. 1074, 1076 (1935).
[28] Norris v. State, 229 Ala. 226, 156 So. 556 (1934).
[29] Norris v. Alabama, 293 U. S. 552, 55 Sup. Ct. 345, 79 L. Ed. 655 (1935).

> 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2,688 were negroes. The male population over twenty-one years of age numbered 8,801, and of these, 666 were Negroes.
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> The qualifications of jurors were thus prescribed by the state statute (Alabama Code, 1923, sec. 8603): 'The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.
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> Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson County. The testimony, as the state court said, tended to show that 'in a long number of years no Negro had been called for jury service in that county. It appeared that no Negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County. The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had never known of a single instance where any Negro sat on any grand or petit jury in the entire history of that county.'"[30]

Of this evidence, the Supreme Court said that it " made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees."[31] As to the alleged discrimination in the selection of the trial *venire*, the Court held that there also the evidence, similar to that set out above, was sufficient to establish discrimination. The state's evidence seeking to rebut the showing of discrimination is summarized by the statement of one of the jury commissioners: "I do not know of any Negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good charac-

[30] Norris v. Alabama, 294 U. S. 587, 590-591, 55 Sup. Ct. 579, 580-581, 79 L. Ed. 1074, 1077-78 (1935).

[31] *Id.* at 591, 55 Sup. Ct. at 581, 79 L. Ed. at 1078.

ter and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude."[32] Of this, the Supreme Court said: "In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan County It is so sweeping, and so contrary to the evidence as to the many qualified Negroes that it destroys the intended effect of the commissioner s testimony"[33] It continued, " a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained."[34]

It appears that the Court in this case eliminated one of the two methods by which it had, in former years, declined to enforce the right of a Negro defendant—the acceptance of the state court's finding of fact that no discrimination existed. Evidence of this change of position is graphically illustrated by a comparison of the quotation from *Thomas* v. *State of Texas, supra,* with the statement of the Court in a 1939 case, *Pierre* v *Louisiana*:

> "In our consideration of the facts and conclusion of the facts the conclusions reached by the Supreme Court of Louisiana are entitled to great respect. Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country s laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts "[35]

That the Court also became inclined to a more liberal view insofar as procedure in such cases is concerned is thought to be shown by subsequent cases. One of these, *Hale* v *Kentucky,*[36] illustrates this point. There, " petitioner, a negro, was indicted in 1936 for murder in McCracken County, Kentucky He moved to set aside the indictment upon the ground that the jury commissioners had excluded from the list from which the grand jury was drawn all persons of African descent because of their race and color and thus denied to him the equal protection of the laws in violation of the Constitution of the United States."[37] He presented an affidavit alleging that " the

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[32] *Id.* at 598-599, 55 Sup. Ct. at 584, 79 L. Ed. at 1081.
[33] *Id.* at 599, 55 Sup. Ct. at 584, 79 L. Ed. at 1081.
[34] *Ibid.*
[35] Pierre v. Louisiana, 306 U. S. 354, 358, 59 Sup. Ct. 536, 538-539, 83 L. Ed. 760, 76— (1939).
[36] 303 U. S. 613, 58 Sup. Ct. 753, 82 L. Ed. 1050 (1938).
[37] *Id.* at 614, 58 Sup. Ct. at 753, 82 L. Ed. at 1051.

assessor s books for the county contained the names of approximately 6000 white persons and 700 Negroes who were qualified for jury service "[38] but that the jury commissioners filled the wheel for jury service exclusively with the names of white citizens and that no Negro was excluded " because he was not an intelligent, sober, discreet, and impartial citizen, resident housekeeper of the county or not of the requisite age."[39]

> "The affidavit further stated that petitioner could prove by sheriffs of McCracken County, serving respectively from 1906 to 1936, that during their terms no Negroes had been summoned for service on any grand or petit jury in the county nor was the name of any Negro placed in the hands of the sheriff to be so summoned; also that petitioner could prove by federal officials that for many years prior to 1936 Negro citizens of the county had served on juries in the federal court at Paducah; also that petitioner could prove by many named citizens of standing in the community that for a long period of years there were Negroes who were citizens of the county and qualified for service on juries in the state court. Petitioner alleged that the proof would show a long continued unvarying and wholesale exclusion of Negroes from jury service in this county on account of their race and color, and that this practice had been systematic and arbitrary on the part of the officers and commissioners selecting names for jury service for a period of fifty years or longer."[40]

The Commonwealth s Attorney, having stipulated that the affidavit should be considered as evidence and that all witnesses named would testify as therein set forth, introduced no evidence to the contrary The motion to set aside the indictment was denied, however, as was a subsequent motion to discharge the entire panel of the trial jury upon the same facts. Hale, having reserved his exceptions, pleaded not guilty and the trial proceeded; he was convicted and sentenced to death. The judgment was affirmed by the Court of Appeals of Kentucky[41] which apparently grounded its decision on this point upon the fact that Hale s affidavit did not set out that the undenied discrimination against Negroes occurred" solely because they were members of that race,"[42] as the Court of Appeals believed to be required by previous Supreme Court decisions. The Supreme Court granted certiorari[43] and on argument of the case there, the then Assistant Attorney General of Kentucky, Mr. A. E. Funk, conceded that if the facts set forth in the affidavits were sufficient to show a denial of the peti-

[38] *Ibid.*
[39] *Ibid.*
[40] *Id.* at 614-615, 58 Sup. Ct. at 753, 82 L. Ed. at 1051-1052.
[41] Hale v. Commonwealth, 269 Ky. 743, 108 S.W 2d 716 (1937).
[42] *Id.* at 748, 108 S.W 2d at 718.
[43] Hale v. Kentucky, 303 U. S. 629, 58 Sup. Ct. 523, 82 L. Ed. 1089 (1938).

tioner's constitutional rights, the judgment should be reversed. The Court, finding them sufficient, did reverse, ignoring the state court's technical point.

That such reversals are forcing a change in the practice of selecting a jury so as to exclude Negroes entirely is shown by the case of *Akins* v *Texas*.[44] The facts of that case, which was decided in 1944, indicate that the jury commissioners of Dallas County, Texas, were attempting to abide at least by the letter of the decisions handed down shortly before in *Smith* v *Texas*[45] and *Hill* v *Texas*.[46] In both of these cases convictions of rape were reversed by the Supreme Court of the United States because of the exclusion of Negroes from the grand juries bringing the indictments. In the *Akins* case it appeared that a former conviction of Akins, a Negro, had been reversed by the Court of Criminal Appeals of Texas on the issue of discrimination. Following this, the judge of the district court instructed the jury commissioners that there should be no discrimination against anyone because of his color; whereupon these commissioners placed upon the grand jury panel the name of one Negro. Akins was then reindicted by the grand jury on which the one Negro was serving, and, his timely motion to quash the indictment having been denied, he was convicted of murder and sentenced to death. The Court of Criminal Appeals affirmed the judgment, and the Supreme Court granted certiorari.[47] The discrimination alleged this time " was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one, who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found."[48] The Court, after reviewing the evidence, was " unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list,"[49] and affirmed the judgment. Mr. Justice Reed, delivering the opinion of the majority, stated: "This conclusion makes it unnecessary to decide whether a purposeful limitation of jurors by race to the approximate proportion that the elegible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment."[50]

Mr. Justice Murphy wrote a forceful dissenting opinion, in which

[44] 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945).
[45] 311 U. S. 128, 61 Sup. Ct. 164, 85 L. Ed. 84 (1940).
[46] 316 U. S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942).
[47] Akins v. Texas, 324 U. S. 836, 65 Sup. Ct. 865, 89 L. Ed. 1400 (1945).
[48] Akins v. Texas, 325 U. S. 398, 400, 65 Sup. Ct. 1276, 1277-1278, 89 L. Ed. 1692, 1694 (1945).
[49] *Id.* at 407, 65 Sup. Ct. at 1281, 89 L. Ed. at 1698.
[50] *Ibid.*

Mr. Chief Justice Stone concurred. There it was stated that the record clearly showed that the jury commissioners intended to discriminate against Negroes by limiting to one their representation on the grand jury, and that, "The equal protection clause guarantees petitioner not only the right to have Negroes considered as prospective veniremen but also the right to have them considered without numerical or proportional limitation."[51] It seems safe to predict that this question of whether proportional limitation is constitutional will require a decision in the near future.

The latest word on discrimination in the selection of the jury is found in the Supreme Court decision in the case of *Patton* v *Mississippi*.[52] In this case the defendant, a Negro, was convicted of murder despite his timely motions to quash the indictment and to set aside the trial panel because of discrimination. The Supreme Court of Mississippi affirmed the judgment, justifying its decision as follows; Section 1762 of the Mississippi Code enumerates certain qualifications for jurors, the most important of which were that one must be a male citizen and a qualified elector." To be such a "qualified elector" one must produce satisfactory evidence of payment of an annual poll tax and be able to read any section of the State Constitution or to understand the same when read to him, or to give a reasonable interpretation thereof. The Mississippi court estimated that approximately twenty-five Negroes out of a total Negro population of 12,511 would be so qualified, and concluded:

> "Of the 25 qualified Negro male electors there would be left, therefore, as those not exempt, 12 or 13 available male Negro electors as compared with 5,500 to 6,000 male white electors as to whom, after deducting 500 to 1,000 exempt, would leave a proportion of 5,000 nonexempt white jurors to 12 or 13 nonexempt Negro jurors, or about one-fourth of one percent Negro jurors—400 to 1
> For the reasons already heretofore stated there was only a chance of 1 in 400 that a Negro would appear on such a venire and as this venire was of one hundred jurors, the sheriff, had he brought in a Negro would have had to discriminate against white jurors, not against Negroes—he could not be expected to bring in one-fourth of one Negro."[53]

Judge Black, who wrote the reversing opinion of the United States Supreme Court, was unconvinced by these statistics, stating that they illustrate " the unwisdom of attempting to disprove systematic racial discrimination in the selection of jurors by percentage calcula-

[51] *Id.* at 409, 65 Sup. Ct. at 1282, 89 L. Ed. at 1699.
[52] 332 U. S. 463, 68 Sup. Ct. 184, 92 L. Ed. — (1947).
[53] *Id.* at 467, 68 Sup. Ct. at 187, 92 L. Ed. at —

tions applied to the composition of a single venire."[54] He further stated:

> "It is to be noted at once that the indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. When such a showing was made it became a duty of the state to try to justify such an exclusion as having been brought about for some reason other than racial discrimination."[55]

The opinion then concluded:

> "We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."[56]

Considering then, the principles enunciated in the foregoing series of cases, there can be little doubt that the Court of Appeals of Kentucky reached the correct conclusion on the issue of discrimination in the two recent cases which prompted this inquiry In the first of these, *Pool* v *Commonwealth,* the defendant, a Negro, was indicted by the grand jury of Christian County for the murder of a white woman. He was convicted and sentenced to death. Among other grounds for reversal which the defendant urged on appeal were: (1) The trial court erred in denying his petition to remove the case to Federal court, and (2) the indictment should have been quashed on defendant's motion because of the systematic exclusion of Negroes from jury service in Christian County solely because of their race. The Court of Appeals affirmed the rulings of the circuit court in denying these motions. Looking first at the petition for removal, it is seen that defendant specified therein three grounds as justification for the requested removal: (1) that he was held without right of bail, (2) that he was without mental capacity at the time of the crime, and (3) that he was a victim of racial prejudice. Considering only the third of these grounds, it will be remembered that the Federal removal statute, as interpreted by the Supreme Court, permits removal only in cases where a defendant is being deprived of a constitutional right by the constitution or statutes of a state. The defendant did not even make

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[54] *Id.* at 468, 68 Sup. Ct. at 187, 92 L. Ed. at —
[55] *Id.* at 466, 68 Sup. Ct. at 186, 92 L. Ed. at —
[56] *Id.* at 468-469, 68 Sup. Ct. at 187, 92 L. Ed. at —

such an allegation. As for the defendant's assignment of error in that his motion to quash the indictment was overruled, it appears that the trial court carefully considered the defendant's assertion by separate hearing. The evidence showed that,

> " the jury commissioners of the county, which has a colored population amounting to about 30% of the total, had been regularly instructed not to exclude colored persons from jury service on a racial basis; that names of colored persons had been drawn from the jury wheel for jury service with a fair degree of regularity during the past few years; that at least one or possibly more names of colored persons had been drawn for petit jury service from that same lot of jury wheel names which produced the very grand jury of appellant's indictment. This county has one colored magistrate and he himself testified on this hearing to the effect that he had personally done grand jury service within the past few years and that numerous colored persons of the county had done jury service, especially on petit juries in the last few years."[57]

It will be noted that this evidence appears much stronger against the allegation of discrimination than that presented in *Akins* v *Texas, supra,* in which the Supreme Court declined to conclude that discrimination existed. It can hardly be questioned, therefore, that the Supreme Court would affirm the Kentucky Court's decision.[58]

In the second of these Kentucky cases, *Logan* v *Commonwealth,* the defendant, a Negro indicted for rape of a white woman, was convicted and sentenced to twenty years imprisonment. He appealed, one of his grounds being that the trial court, Daviess Circuit Court, erred in overruling the motion to quash the indictment. It appears that at the outset of the trial the following motion, signed by Logan's counsel, was filed.

> "Comes the defendant William Henry Logan, by counsel, and moves the court to set aside the indictment herein, on the grounds that a substantial error was made in the summoning and formation of the grand jury in that qualified Negro citizens are systematically excluded from service thereon, solely because of their race and color."[59]

No affidavit was filed and no proof to support the motion was offered. The trial court therefore overruled it. The Court of Appeals affirmed this action on the authority of *Montjoy* v *Commonwealth,*[60] in which a similar fact situation appeared, and in which case certiorari

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[57] Pool v. Commonwealth, 308 Ky. 107, 111, 213 S.W 2d 603, 605 (1948).

[58] The Court of Appeals itself pointed out in its opinion that the petitioner might prosecute his cause further: "We think the trial court made no error in overruling appellant's petition for removal, but if we ourselves are in error in this respect he has further recourse to the U. S. Supreme Court by petition for a review on writ of certiorari." *Id.* at 110, 213 S.W 2d at 605.

[59] Logan v. Commonwealth, 308 Ky. 259, 261, 214 S.W 2d 279, 280 (1948).

[60] 262 Ky. 426, 90 S.W 2d 362 (1935).

was denied by the Supreme Court of the United States.[61] This case illustrates the requirement, long ago established by the Supreme Court[62] and never since relaxed, that in order for a defendant to be entitled to a setting aside of a jury or to a quashing of an indictment, he must offer proof in support of his motion.

In conclusion, then, it is believed beyond question that on the fact the Court of Appeals rendered the correct decision in each of two recent cases which it reviewed. Further, insofar as the general problem of discrimination in the selection of juries is concerned, it is thought that the situation at the present time is as follows: The Supreme Court has shown itself extremely zealous in protecting the right of a Negro defendant to be indicted and tried by a jury from which members of his race are not systematically excluded solely because of their race. It appears that the requisite evidence which will be considered by that Court as proving such discrimination is a showing that, although there are a considerable number of Negroes who are qualified for jury service, no member of that race has served on a jury (grand and petit jury cases appear to be identically treated) for a long period of years. Such a showing has repeatedly been held sufficient to establish at least a *prima facie* case of discrimination. And if such a showing is made it appears extremely unlikely, practically speaking, that a satisfactory rebuttal can be made by the prosecution. It is well settled that the statute authorizing removal of cases in which a defendant is deprived of a constitutional right, to Federal court is without application in this type of case today This is true because of the requirement that, in order to justify such a removal, the discrimination must be of constitutional or statutory origin. No such provision exists in Kentucky today,[63] or in any other state. The method of enforcement of the right is, then, by prosecution of the cause to the court of last resort of the state, and then to the Supreme Court of the United States if the state court denies relief. In order to pursue such a course, it is necessary that a Negro defendant, (1) if he wishes to object to the grand jury, move at the outset of the trial to quash the indictment, or if his objection is to the petit jury, move to set aside the panel; (2) accompany such a motion with an affidavit setting forth the defendant's allegation of exclusion of Negroes, systematically and solely

[61] Montjoy v. Kentucky, 298 U.S. 646, 56 Sup. Ct. 961, 80 L. Ed. 1376 (1936).
[62] Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082 (1896).
[63] In Commonwealth v. Johnson, 78 Ky. 509, 511 (1880), the court said: "We therefore hold that so much of our statute as excludes all persons other than white men from service on juries is unconstitutional, and that no person can be lawfully excluded from any jury on account of his race or color."

because of their race, and naming the witnesses by whom the defendant intends to prove such discrimination; (3) offer his evidence; (4) except to an overruling of his motion after the evidence has been heard, or to any denial by the court to hear such evidence; (5) assign as error the trial court's ruling, upon appeal to the state s highest court; and (6) petition the Supreme Court of the United States for a writ of certiorari, if relief be denied in the state court.

Finally, the determination of the Supreme Court to enforce obedience to the Constitution, as interpreted by that Court, reversing and remanding cases in which discrimination in the selection of the jury is found, appears unlikely to be deterred by any excuse, or by any scheme designed to disguise discrimination which in reality exists. Jurisdictions which persist in excluding qualified Negro citizens from jury service are believed to be inviting frequent appeals from convictions of Negro defendants.