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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 282 So. 2d 491 (1973).

JURISDICTION

On September 5, 1973 the Supreme Court of the State of Louisiana entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed on November 8, 1973. The Jurisdictional Statement was filed on

November 13, 1973 and appellee's Motion to Dismiss was filed on January 25, 1974. Probable jurisdiction was noted on February 19, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1257 (2).

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

La. Const. Art. VII, §41

The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. . . .

La. Code of Criminal Procedure, Art. 402

A woman shall not be selected for jury service unless she has previously filed with the clerk of court, of the parish in which she resides a written declaration of her desire to be subject to jury service.

QUESTIONS PRESENTED

1. Whether La. Const. Art. VII, §41 and La. Code of Criminal Procedure, Art. 402 in providing an automatic exemption for all women from jury service violate the Sixth and Fourteenth Amendments of the United States Constitution?

2. Whether appellant, a male, has been deprived of an impartial jury and fair trial within the guarantees of the Sixth and Fourteenth Amendments of the United States Constitution by reason of the systematic exclusion of women from the jury selection process governed by La. Const. Art. VII, §41 and La. Code of Criminal Procedure, Art. 402?

STATEMENT OF THE CASE

The appellant, a male, was convicted of aggravated kidnapping in 1972 by a jury in St. Tammany Parish, Louisiana selected from an all male 175 member jury venire. (App. p. 4-7). He was initially sentenced to death, but a motion in arrest of judgment was ultimately sustained by the state Supreme Court and the sentence was changed to life imprisonment. (App. p. 18).

A pre-trial motion to quash the petit jury venire was filed on the grounds that the systematic exclusion of women violated federal constitutional guarantees of a fair trial, due process and equal protection of the laws. (App. p. 2). The motion was denied and on appeal of appellant's conviction the same objection was urged by bill of exception and assignment of error. (App. p. 9 ¶5, p. 16 ¶10). The Louisiana Supreme Court affirmed the conviction. (App. p. 18). A dissenting opinion would have found that the automatic jury duty exemption for women provided by the state constitution and statute violates the Sixth and Fourteenth Amendments of the United States Constitution. (App. p. 20). The majority opinion held that "our law, which permits the calling for jury service only those women who have filed with the clerk of court a written declaration of their desire to be subject to jury service is neither irrational nor discriminatory", and cited the assumption in *Hoyt v. Florida,* 368 U.S. 57 (1961) that "woman is still regarded as the center of home and family life." (App. p. 17).

SUMMARY OF ARGUMENT

Louisiana laws prohibiting jury duty by women except to those who pre-register their desire to volunteer in effect systematically exclude women as a class and discernible segment of society. *Ballard v.*

United States, 329 U.S. 187 (1946). As a result appellant was deprived of his fundamental constitutional right to be tried by a jury selected from a representative cross section of the community, as guaranteed by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. No other specific injury or harm need be shown. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Peters v. Kiff*, 407 U.S. 493 (1972).

The legal and factual considerations which in 1961 prompted the Court in *Hoyt v. Florida*, supra, 368 U.S. 57 (1961), to uphold a similar statute are no longer relevant. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Louisiana's statutory exemption for women cannot withstand the strict scrutiny required when it infringes appellant's fundamental constitutional right to be tried by an impartially chosen jury. *San Antonio Independant School District v. Rodriguez*, 411 U.S. 1, 17 (1973), or when it discriminates between the sexes. *Reed* and *Frontiero*, supra. Louisiana can show no compelling public interest for the exemption which would justify the violation of basic constitutional rights. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

ARGUMENT

I.

ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE AND SECTION 41 OF ARTICLE 7 OF THE LOUISIANA CONSTITUTION SYSTEMATICALLY EXCLUDE WOMEN AS A CLASS FROM JURY SERVICE.

Clearly, the automatic exemption granted to all women operates to exclude them from jury duty. Appellant was tried before a jury selected from a venire

numbering 175, not one of whom was a woman (App. p. 4-7). This happened in a judicial district where 53% of the population of persons eligible for jury service is female. Not over 10% of the persons in the jury wheel of the entire parish of St. Tammany are female. In the period December 8, 1971-December 4, 1972, only 13 women were included in a total of 1850 names drawn for petit jury terms. In Washington Parish, which together with St. Tammany comprise the Twenty-Second Judicial District, not more than two women have ever been known to volunteer for jury service and only once has a woman been actually included in a petit jury venire. (Stipulation of Facts, *Louisiana v. Healy*, No. 73-759, App. p. 83, 84).

II.

THE EXCLUSION OF WOMEN FROM JURY DUTY HAS VIOLATED APPELLANT'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Due process demands that a jury be selected from a representative cross section of the community, *Smith v. Texas,* 311 U.S. 128, 139 (1941); *Peters v. Kiff,* supra, 407 U.S. 493 (1972), and the exclusion of a discernible class from jury service destroys the possibility that the jury will reflect the required cross section of the community, 407 U.S. at 500.

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. 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." 407 U.S. at 503, 504.

The Court has previously recognized women as a discernible class, whose systematic exclusion eliminates the possibility of an impartially selected jury. *Ballard v. United States,* 329 U.S. 187 (1946).

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. . . ." A "distinct quality is lost if either sex is excluded." 329 U.S. at 193, 194.

In *Peters,* supra, the Court was concerned with the standing of a white petitioner to attack a state court jury on the ground that the systematic exclusion of blacks denied him due process. The trial and conviction took place prior to *Duncan v. Louisiana,* 391 U.S. 145 (1968). The majority opinion in *Peters* acknowledged his standing to complain, observing that "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." 407 U.S. at 500. The concurring opinion agreed to his standing because of a specific statutory prohibition against race discrimination. 407 U.S. at 503, 504. The dissenting opinion would have required a demonstration by the petitioner of prejudice to him or a basis for presuming prejudice by establishing that his conviction resulted from the exclusion of blacks. 407 U.S. at 507.

The majority opinion in *Peters* believed that there would have been no question whatever of the petitioner's standing to challenge the exclusion of

blacks had the trial and conviction been "post-Duncan." 407 U.S. at 500. Indeed the dissenting opinion agreed "that juries, should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' referred to in Duncan v. Louisiana, 391 U.S. 145, 156, 20 L.Ed 2d 491, 500, 88 S. Ct. 1444 (1968), is surely enriched when all voices can be heard. But we are not here concerned with the essential attributes of trial by jury. In fact, since petitioner was tried two years before this Court's decision in Duncan, there was no constitutional requirement that he be tried before a jury at all." 407 U.S. at 510, 511.

Appellant was tried and convicted in 1972, subsequent to *Duncan* and the Court *is* "here concerned with the essential attributes of trial by jury." See *Williams v. Florida,* 399 U.S. 78, 100 (1970) and *Carter v. Jury Commission,* 396 U.S. 320 (1970). When *Duncan* made the Sixth Amendment applicable to the states via the Fourteenth, it also made relevant to state court jury proceedings the following observation by the Court in *Ballard v. United States,* supra:

> "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. . . . The injury is not limited to the defendant–there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

III.

LOUISIANA CAN SHOW NO COMPELLING PUBLIC INTEREST FOR THE AUTOMATIC EXEMPTION.

In *Peters v. Kiff*, supra, the majority opinion revealed that:

> "It is of course a separate question whether his challenge would prevail, i.e., whether the exclusion might be found to have sufficient justification. See Rawlins v. Georgia, 201 U.S. 638, 640, 50 L. Ed 899, 900, 26 S. Ct. 560 (1906) holding that a state may exclude certain occupational categories from jury service 'on the bona fide ground that it is for the good of the community that their regular work should not be interrupted.' We have no occasion here to consider what interests might justify an exclusion, or what standard should be applied, since the only question in this case is not the validity of an exclusion but simply standing to challenge it." 407 U.S. at 510, footnote 10.

A post-*Duncan* automatic jury duty exemption for all women in state courts can no more be justified than the blanket exemption granted to all daily wage earners in *Thiel v. Southern Pacific Co.*, supra, 328 U.S. 217 (1946).

In *Thiel* the Court reasoned that "a Federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved." 328 U.S. at 224. The Court further stressed that jury service is a duty as well as a privilege and that a blanket exclusion of all daily wage earners weakens the institution of trial by jury.

Appellee relies entirely on this Court's opinion in *Hoyt v. Florida*, supra 368 U.S. 57 (1961), which upheld a similar statutory exemption. However the

sands of time have shifted beneath the foundation of *Hoyt*. Its legal and factual considerations are no longer relevant.

Legally, "strict scrunity" of the statutory exemption is now required rather than the "minimum rationality" test employed by the Court in *Hoyt*, because by the exemption appellant has been deprived of a fundamental constitutional right, *Duncan v. Louisiana*, supra 391 U.S. 145 (1968); *San Antonio Independant School District v. Rodriguez*, supra, 411 U.S. 1 (1973).

Factually, the exemption can no longer be justified by the assumption in *Hoyt* that women are "the center of home and family life." Only a portion of women today fit that description. The percentage of women in the labor force has rapidly grown so that by the end of 1972 over 33 million women were included and 42% of these were permanent, full time workers. 58.5% of women workers were married and living with their husbands. *Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education; Women in The Labor Force.* 26.9% of mothers with children under three years of age; 36.1% with children 3-5 years of age; 50.2% with children 6-17 years of age were in the labor force. *Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4 at 34 (April 1973).* In Louisiana, the statistics generally reflect those for the nation. *Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, Final Report PC (1) - C - 20 Louisiana 195.* The same source reveals that in 1970 – 37% of the mothers with children under 18 were in the labor force and 59% of the total adult female population had no children under the age of 18. Over half of all Louisiana women in the labor force 25 to 59 years old hold permanent full time jobs. *Holton, Administrator, Commission on the Status of Women, State Department of Labor of*

Louisiana Women Workers in Louisiana, 1970 (July 1972).

Louisiana is the only state to retain an automatic, volunteers only, exemption for women. *Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate, in Hearing on S. J. Res. 61 Before the Subcomm. on Constitutional amendments of the Senate Comm. on the Judiciary, 91st Cong, 2d Sess. 725-27 (1970).* Moreover, the exemption does not extend to the federal courts in Louisiana. See 28 U.S.C. §1862. Appellee cannot responsibly argue that it would place too great an administrative burden on the courts to call women for jury duty.

IV.

THE LOUISIANA STATUTORY EXEMPTION DISCRIMINATES SOLELY ON THE BASIS OF SEX WITHOUT REGARD TO FITNESS TO SERVE ON JURIES

Appellee, relying upon *Hoyt v. Florida,* supra, 368 U.S. 57 (1961), argues that the general exemption for women does not purport to exclude women from jury service, "but rather accords them the privilege to serve without imposing the duty to do so." (Motion to Dismiss, p. 2). But men are not accorded the same "privilege" to file with the clerk of court a written declaration of their desire to serve.

Appellant has shown above that statistically the automatic exemption is tantamount to automatic exclusion. For no one can be expected to volunteer for the onerous task of jury service. *Alexander v. Louisiana,* 405 U.S. 625, 643, (Concurring Opinion) (1971).

Since *Hoyt* the Court has adopted a different standard in examining laws or regulations which

discriminate solely on the basis of sex. *Reed v. Reed*, supra 404 U.S. 71 (1971); *Frontiero v. Richardson*, supra, 411 U.S. 677 (1973). No longer may a statute constitutionally draw a sharp line between the sexes solely for administrative convenience, and no longer will the Court permit a distinction based upon assumptions that women are the center of home and family life and that men alone are expected to bear the heat of civic, political and commercial activity.

By a discrimination based solely on sex, without regard to fitness to serve, the automatic exemption granted to women by the Louisiana constitution and statute deprived appellant of a jury selected from a representative cross section of the community in violation of the Sixth and Fourteenth Amendments.

CONCLUSION

The opinion of the Supreme Court of the State of Louisiana affirming appellant's conviction and upholding the constitutionality of La. Const. Art. VII §41

and La. Code of Crim. Proc., Art. 402 should be reversed, and his conviction and sentence to life imprisonment should be annulled and set aside.

Respectfully submitted,

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May, 1974

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