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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GARDENIA WHITE, et al., Plaintiffs,	)	
UNITED STATES OF AMERICA, By NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, Plaintiff-Intervenor,	)	CIVIL ACTION NO. 2263-N
v.	)	
BRUCE CROOK, et al., Defendants.	)	

REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR

BEN HARDEMAN,
United States Attorney

JOHN DOAR
Assistant Attorney General

CHARLES NESSON,
GEORGE RAYBORN
Attorneys,
Department of Justice

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I.

Mitchell v. Johnson, Civil Action No. 649-E, decided by this Court January 18, 1966, demonstrates that broad equitable relief is available against jury officials who fail in their "clear, affirmative duty" to see that "there is a nonracial jury selection." That decision establishes the right of Negroes as a class "to be free from racial discrimination

in jury selection procedures." This Court reaffirmed the constitutional principle, in the context of a civil action, that "purposeful discrimination against Negroes in selecting persons qualified for jury service involves arbitrary state action directly contrary to, and in violation of, the equal protection and due process clauses of the Fourteenth Amendment."

Mitchell v. Johnson also recognizes that the Alabama statutory scheme for jury selection, from which the defendants so clearly departed, is relevant in fashioning relief. As Judge Johnson wrote, "the purpose of the Alabama statutes is to insure at least a reasonable approximation to the requirements that jury venires include all qualified persons, and, hence, represent a cross-section of the community, with no significant groups being excluded without justifiable reasons."

Finally, it was said, "there is no question that under Section 1983, Title 42, United States Code, these plaintiffs, under the evidence in this case, are entitled to have the defendants adopt procedures that will insure that they and all other qualified members of their class in Macon County serve on juries."

These principles apply fully to the present case.

II.

Defendants make two basic arguments in the brief filed on behalf of defendant T. Werth Thagard to which we would like to respond. The contentions advanced are:

(1) Judge Thagard bears no responsibility for the discriminatory acts of the Lowndes County jury commissioners and, therefore, should not be subject to this Court's remedial decree.

(2) In any event, because Judge Thagard presides over the court for the Second Judicial Circuit of the State of Alabama, a federal injunction should not be made to run against him.

In our view, neither argument is well taken.

A. Judge Thagard bears responsibility for discrimination in the Lowndes County jury selection system.

The record does not indicate that Judge Thagard actively discriminated against Negroes, either in drawing names from the jury box or in the subsequent seating of jurors. Indeed, because the jury commissioners so effectively excluded Negroes when putting names into the jury box, there was little possibility for systematic discrimination beyond that point. But recognition of these factors does not foreclose the question whether Judge Thagard is an appropriate subject of this Court's equitable decree.

We maintain that regardless of his freedom from active discrimination, Judge Thagard bore a responsibility to see that any jury sitting in his court, and hence his court itself, was constitutionally composed. As the presiding judge, he was in charge. He had a duty and responsibility to see that the wrongdoing on the part of the jury commissioners was corrected, a duty and responsibility that he did not meet.

The question of Judge Thagard's ultimate responsibility was put beyond doubt by his own testimony at the hearing of this case. Government counsel asked Judge Thagard whether, if he were aware of any wrongdoing in the process by which names were placed in the jury box, he would consider it his duty, before drawing a venire, to see that the wrongdoing was corrected. Judge Thagard replied that if he thought wrongdoing had occurred, he would consider it his duty to correct it.

Nor can it be questioned that Judge Thagard was aware of the jury commissioners' practice in Lowndes County of excluding Negroes from jury service. It was his testimony which established that no Negro had ever sat on a Lowndes County petit jury.

We maintain, moreover, that Judge Thagard had the means as well as the duty to correct the discriminatory practices infecting the juries in his court. The statutes of Alabama expressly give a circuit judge authority to order the Jury Commission to empty and refill the jury box at any time. Alabama Code, Title 30, Section 22. The intent of this provision, clear on its face, is to empower judges to see that juries sitting in their courts are fairly constituted.

This statutory power was recently used for just such purpose by the Circuit Court of Macon County, Alabama. In the face of allegations of discrimination on the part of

the Macon County Jury Commission, the Circuit Court for the Fifth Judicial Circuit of Alabama, on its own motion, ordered the Jury Commissioners

> "to promptly empty and refill the Jury Box of Macon County, Alabama, with and place on the Jury Roll of said County, the names of every person possessing the qualifications prescribed [by Alabama law]." Order entered August 5, 1964, quoted in Mitchell v. Johnson, Civil Action No. 649-E, decided January 18, 1966.

In sum, Judge Thagard was aware that the Lowndes County jury commissioners excluded Negroes from the juries selected to try cases in his court. He had the responsibility and the authority to correct these unconstitutional practices. As the brief filed on his behalf states, he had authority "to run his own court on the basis of his own judgment and discretion." Because Judge Thagard failed to discharge his duty to oversee, and if necessary correct, the practices of the jury commissioners, he must be deemed in contemplation of law to share responsibility for the results.

B. It is appropriate, both on the law and the facts, to include Judge Thagard in the relief.

(1) The Lynchburg courtroom desegregation case

Wood v. Vaughan, 321 F.2d 480 (1963), decided by the Court of Appeals for the Fourth Circuit, is extremely strong authority on the point at issue. Wood involved desegregation of state courtrooms in Lynchburg, Virginia. As in this case, private Negro plaintiffs brought

a civil action in a federal district court seeking only prospective injunctive relief to prevent the continuation of racially discriminatory courtroom practices. Included as defendants were the respective judges of the Municipal Court, the Corporation Court, and the Circuit Court of Lynchburg. The district court granted motions to dismiss made by the three judges; see 209 F. Supp. 106, 108 (W.D. Va., 1962). On appeal, the Fourth Circuit Court of Appeals held:

> [W]e must now vacate the District Court's order sustaining the appellees' motion to dismiss, for the plaintiffs' allegations, if proved, are sufficient for a final injunction. 321 F.2d 480.

Although the issue of judicial immunity was not specifically discussed, the necessary result of the case is that state judges responsible for discriminatory practices in the administration of their court may be federally enjoined.[1/]

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1 / Wood is not alone in holding that federal injunctions may issue against state judges. In Bush v. Orleans Parish School Board, 187 F. Supp. 42 (U.S.D.C., E.D. La., 1960), the Honorable Oliver P. Carriere, Judge of the Civil District Court of the Parish of Orleans, Louisiana, was specifically enjoined from enforcing an injunction issued by him in connection with the desegregation of schools in New Orleans; motion to vacate denied, 364 U.S. 803; affirmed, 365 U.S. 569(1961).

Furthermore, this Court, in In re Wallace, 170 F. Supp. 63(1959), ordered Governor Wallace, at that time Judge of the Third Judicial Circuit of Alabama, to produce records sought by the Civil Rights Commission. And in United States v. Hildreth, 6 R.R. L.R. 185(1961), the District Court for the Northern District of Alabama ordered Judge Hildreth of the Seventeenth Judicial Circuit of Alabama to produce records sought by the Attorney General of the United States and to refrain from enforcing a conflicting order which Judge Hildreth had entered.

(2) Enactment by Congress of 18 U.S.C. 243 resolves any question of interference with state sovereignty.

Section 243 of Title 18, enacted in 1875, makes it a federal criminal offense for a state official charged with any duty in the selection of jurors to discriminate on account of race or color. By adopting this provision, Congress resolved the issue of interference with state sovereignty which the defendants argue to this Court. The position is fully stated in Ex Parte Virginia, 100 U.S. 339, a criminal case under §243 against a state judge:

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. 100 U.S. at 346.

If §243 permits federal criminal prosecutions of state judges, then surely it is appropriate to include a state judge in the far less severe remedy of a corrective federal injunction.

(3) Cases cited on behalf of Judge Thagard are not in point.

The brief on behalf of Judge Thagard cites numerous cases holding that judges are immune from damage suits based on their judicial actions. They are distinguishable on two grounds other than those argued above.

First, selecting jurors is, in the language of the law, a ministerial rather than a judicial act. This was clearly established by Ex Parte Virginia.

> It was insisted during the argument on behalf of the petitioner that Congress cannot punish a state judge for his official acts; and it was assumed that Judge Cole [judge of the county court of Pittsylvania County, Virginia], in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. ... Whether he was a county judge or not is of no importance. ... [Selecting jurors] is merely a ministerial act ...." 100 U.S. at 348.

Second, there is a clear distinction between cases such as those cited on behalf of Judge Thagard in which damages are sought against judges for their past actions, and the present case in which the relief sought is entirely

injunctive, with the design of enforcing the constitution for the future.[2]

(4) The evidence and needs for relief make especially appropriate the inclusion of Judge Thagard in this Court's decree.[3]

Judge Thagard stands at the head of the Lowndes County judicial system. We have shown above in Part II that he bore a responsibility which he did not meet for seeing that his juries were fairly selected. How well the jury system in Lowndes will work in the future depends largely on the extent to which he can be made sensitive to this responsibility. Judge Thagard is in position to prevent racial discrimination by the subordinate agents of his court -- thus to obtain fairly constituted juries in Lowndes County. That is the ultimate objective of this lawsuit, an objective to which Judge Thagard, by reason of the respect and authority he commands as Circuit

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2 / Dombrowski v. Phister, 380 U.S. 479, quoted at length at page 10 of Judge Thagard's brief, granted injunctive relief of a most far reaching nature against a state court, overcoming not only the considerations of comity involved in enjoining state criminal proceedings, but also the obstacle of the abstention doctrine. See Harlan J. dissenting.

3 / There is an amicus curiae brief filed in this case on behalf of the Alabama Circuit Judges Association. The brief writer, after arguing his conclusion that relief including Judge Thagard should not be granted, states that he "has not heard nor read the evidence introduced." Amicus brief, p.10.

Judge, is the key. All of the state officials connected with jury selection are subject to his leadership and direction.

In these circumstances we believe the Court should "utilize the full equitable powers" it possesses in order to afford "complete relief." United States v. Alabama, 192 F. Supp. 677 (M.D. Ala.), affirmed, 304 F.2d 583.

In addition to the prohibitory relief we have proposed, which includes Judge Thagard, we have asked that the defendants be required to keep certain records designed to bring to light any future discrimination in the processes of summoning, excusing, challenging, and striking jurors. By including Judge Thagard in these provisions we do not intend that he hire a secretary or keep the records himself. He should direct that the records be kept by the Clerk of Court. Much of the proposed record keeping is already done by the Clerk as a matter of course. The additional information which we would require is readily available to the Clerk.

In our view, the proposed record keeping provisions are very important. As the Court may appreciate from the volume of records in this case, piecing proof together from sprawling and incomplete records is a substantial hurdle to bringing to light even the grossest forms of jury discrimination. The hurdle is likely to be far more imposing in cases involving sophisticated jury exclusion practices. Compare Swain v. Alabama, 380 U.S. 202.

III.

Modifications and Considerations Relating to the Proposed Order

(a) In the corrected copy of our proposed order and decree we have made one significant change. The provision has been eliminated requiring the commissioners to return to the Clerk's Comprehensive List for a new name to replace any person disqualified for illiteracy. This makes it possible to test literacy at the courthouse when prospective jurors appear on the morning of court, thus avoiding the necessity for summoning jurors once to determine their qualifications and then again to serve. (See our main brief, corrected copy, 47-48.)

(b) We urge upon the court the importance of requiring names to be drawn from the Clerk's Comprehensive List by some methodic and objective method. The jury commissioners in Lowndes County purported to know almost everyone in the county. If the Commission is left discretion to pick and choose from the list, the value of starting with a list fairly representing a cross-section of the county may be lost.

IV.

A Recent Supreme Court Decision Supports Our View that the Court's Ruling on the Women Issue should be Prospective.

The Court's attention should be brought to the recent Supreme Court decision of Tehan v. Shott, decided

January 19, 1966, 34 Law Week 4095, and its bearing on the prospectivity of this Court's decision on the women issue. Tehan involved the retroactivity of the Supreme Court's decision last year that a prosecutor could not constitutionally comment upon a defendant's refusal to take the stand, Griffin v. California, 380 U.S. 609. In reasoning to its conclusion that the "no comment rule" of Griffin is prospective, the Court said:

> [W]e take as our starting point Linkletter's conclusion [Linkletter v. Walker, 381 U.S. 618] that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," that there is "no impediment-constitutional or philosophical-to the use of the same rule in the constitutional area where the exigencies of the situation require such an application," in short that "the Constitution neither prohibits nor requires restrospective effect." Upon that premise, resolution of the issue requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U.S. at 628-629.

The Tehan Court then proceeded to articulate three factors important to the Linkletter decision. The Fifth Amendment privilege against self-incrimination, at issue in Linkletter, is not "an adjunct to the ascertainment of truth;" there had been long standing reliance upon the former rule; and "retrospective application ... would create stresses upon the administration of justice ...." Finding that these factors applied to the no comment rule of Griffin, the Court ruled that Griffin is prospective.

We believe that the three factors would equally apply were this Court to rule that Alabama's statutory bar on jury service by women is unconstitutional.

Respectfully submitted,

JOHN DOAR
Assistant Attorney General

CHARLES R. NESSON,
GEORGE RAYBORN,
Attorneys,
Department of Justice
Washington, D. C. 20530

JANUARY 1966.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Brief for the Plaintiff-Intervenor, and corrected copies of Plaintiff-Intervenor's Proposed Findings of Fact, Conclusions of Law and Decree, and original Brief in Support thereof, upon the counsel of record for plaintiffs and defendants, by mailing copies to them at their office addresses, airmail postage prepaid, as follows:

Honorable Richmond Flowers
Attorney General
State of Alabama
Montgomery, Alabama;

Honorable Harry Cole
First National Bank Building
Montgomery, Alabama

Honorable Charles Morgan, Jr.
5 Forsyth Street, N. W.
Atlanta, Georgia

Honorable Orzell Billingsley,Jr.
1630 Fourth Avenue N.
Birmingham, Alabama

Dated January 1966.

CHARLES R. NESSON
Attorney
Department of Justice