IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1964

No. 368

LIDGE SCHOWGUROW,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

APPEAL FROM THE CIRCUIT COURT FOR CECIL COUNTY (J. DEWEESE CARTER, Chief Judge, EDWARD D. E. ROLLINS, Judge and THOMAS J. KEATING, JR., Judge)

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

On September 18, 1964, a jury impanelled before the Circuit Court for Cecil County (Carter, C.J., *Rollins and* Keating, JJ.) returned its verdict finding Appellant guilty of murder in the first degree, without capital punishment. Upon this verdict the Court sentenced the Appellant to the Maryland Penitentiary for the balance of his natural life. From this judgment the instant appeal is taken.

QUESTIONS PRESENTED

1. Does the portion of Article 36 of the Maryland Declaration of Rights which instructs that no person shall be deemed incompetent as a juror on account of religious belief, "provided he believes in the existence of God", *ipso jure* void the murder conviction of the Buddhist Appellant?

2. Was the Appellant's signed confession shown by the defense to have been the product of a will overborne by police pressure?

STATEMENT OF FACTS

The State accepts the Statement of Facts made by the Appellant.

ARGUMENT

I.

APPELLANT HAS FAILED TO DEMONSTRATE THAT EITHER THE GRAND JURY WHICH INDICTED HIM OR THE PETIT JURY WHICH CONVICTED HIM WAS NOT DRAWN INDISCRIMINATELY FROM THE CECIL COUNTY COMMUNITY, INCLUDING THOSE IN THAT COMMUNITY, IF ANY THERE BE, WHO PROFESS NOT TO BELIEVE IN THE EXISTENCE OF GOD.

Appellant complains that the constituency of the grand jury which indicted him and the petit jury which convicted him was such that he was denied both due process of law and equal protection of the law.

Due process of law is an oracular concept which eludes expository definition. Even the prodigious intellect of Justice Frankfurter found the task staggering. *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952). But, however complex the problem of definition, one finds solace, and at least visceral comprehension, in resort to due process's equivalent and basic measure: fairness and a sense of justice.

It is also helpful that fairness is as well the basic ingredient of equal protection of the laws, since it is through that Fourteenth Amendment guarantee — rather than due process — that the Supreme Court has scrutinized the effects of state jury selection procedures upon state criminal convictions. *Eubanks v. Louisiana*, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. 2d 991 (1958); see also fn. 2 in *United States v. Greenberg*, 200 F. Supp. 382, 387 (S.D.N.Y., 1961). It is, therefore, of no moment that the Appellant casts his appeal in both the due process and the equal protection molds. The question before this Court is one of fairness alone, and in that portion of the criminal process which is devoted to the selection of jurymen, fairness "requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammeled by any arbitrary and systematic exclusions". (*Hoyt v. Florida*, 368 U.S. 57, 59, 82 S. Ct. 159, 7 L. Ed. 2d 118 [1961]).

The Appellant, a Buddhist, asserts that his co-religionists have been *a priori* excluded from Cecil County jury service because (1) they do not believe in the existence of God and (2) nonbelievers are excluded from Cecil County jury service on account of that passage in Article 36 of the Maryland Declaration of Rights, which says:

> ". . . nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come."

The State does not understand him to argue either (1) that his constitutional rights guarantee him a Buddhist on either the grand or petit jury, or (2) that the mere fact no Buddhists appeared on either panel establishes proof

of exclusion because of their religious beliefs. Both issues have been determined against him. *Giles v. State*, 229 Md. 370, 378 (1962).

Appellant's argument proceeds, it seems, along these lines: he is a Buddhist; the presumed competency of Maryland juries requires each member to believe in the existence of God; if one member does not, the act of the jury is null and void (relying on *State v. Mercer*, 101 Md. 535 [1905]); the Supreme Court has taken judicial notice of the fact that Buddhism is one of several religions adhered to in this country, none of which teaches a belief in the existence of God (relying on fn. 11 in *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 [1961]); this notice requires the State to prove the absence of Buddhists in Cecil County, which it has not done; *q.e.d.* Buddhists have been excluded from Cecil County jury service, which exclusion is a constitutional defect on the criminal proceedings which culminated in his conviction and sentencing.

There are two principal errors in this syllogism.

First, to the extent that the *Mercer* decision may be construed to opine that the discovery of a single nonbeliever on a panel voids that panel's action, it was overruled by *Torcaso*, which held that expression of a belief in the existence of God could not be imposed as a condition precedent to holding public office.

Second, Mr. Justice Black's identification of Buddhism as an atheist religion in *Torcaso* does nothing but confirm what the encyclopedists tell us. It does not create any presumptions as to the extent of Buddhist practice in Maryland. It does not plant nor evangelize Buddhism on the Eastern Shore. It does not oblige the State's Attorney for Cecil County to canvass the countryside for naysaying witnesses to prove what is a good deal closer to common knowledge

than the tenets of Buddhism — that resident adherents to Buddhism are unknown to Cecil County.

Here is the center of dispute. The Appellant has proved nothing beyond his own allegiance to the Buddhist faith. He has not even tried to prove anything else. There is nothing in the record to show that there has ever been a single adherent of Buddhism resident in Cecil County who, aside from the belief-in-God issue, was otherwise qualified to serve as a juror, let alone that any Buddhist was excluded from the call or, being called, was excluded from the panel for failure to affirm his belief in the existence in God.

The *only pertinent evidence of any kind* is the uniform declaration of the oaths administered by the Clerk of the Circuit Court for Cecil County: "In the presence of Almighty God, you ..... do solemnly promise and declare that . . ." (E. 10). This declaration is no filter through which nonbelievers cannot pass. Appellant negotiated it himself without difficulty when he testified during his trial (E. 43), a fact which exposes the desperate emptiness of his present claim, something conjured up from a series of unfounded assumptions.

Appellant's argument that the State bears a burden to rebut a presumption that there are substantial numbers of Buddhists in Cecil County simply will not wash. The burden of establishing a *prima facie* case of deliberate and systematic exclusion of an identifiable and significant minority from jury service is irrefutably that of the defendant who has tendered the challenge. See *Arnold v. North Carolina*, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77 (1964). True this is even of federal jury challenges. In *United States v. Greenberg, supra*, 387, the Court stated:

> ". . . a party making the challenge has the burden of showing that the required and accepted standards

for jury selection have been violated. He must introduce or offer 'distinct evidence' in support of his challenge. *His failure to do so is fatal. . . .*" (Emphasis supplied.)

The most important single adjudication on this issue is *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954), cited in *Arnold*. There the Supreme Court reversed a murder conviction on account of demonstrably systematic exclusion of Mexicans — a significant minority in the county — from jury service. In the course of his opinion for the Court, Mr. Chief Justice Warren made the following observations (347 U.S. at 477, 478, 479-481):

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question directly, it has been recognized since Strauder v. West Virginia, 100 U.S. 303, 25 L. ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws. . . ."
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> * * * * * *
>
> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. . . ."
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> * * * * * *

"The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites'. One method by which this may be demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican'. The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here'). No substantial evidence was offered to rebut the logical inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

"Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by Norris v. Alabama, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the 'rule of exclusion', has been applied in other cases, and it is available in supplying proof of discrimination against any delineated class.

"The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames, and that 11% of the males over 21 bore such names. The County Tax Assessor

> testified that 6 or 7 percent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that 'for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County.' The parties also stipulated that 'there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury.' "

The Appellant has not met these minimal standards of proof. There is no instant showing that Buddhists or others not believing in the existence of God form a separate class in Cecil County. Nor is there any showing that Buddhists or others not believing in the existence of God form any significant part of the County's legal residents, of its landowners or of its general population. And these failings accord with the understanding and belief of those familiar with the ethnic and religious history of Cecil County.

Except as to its previously noted effect on the *Mercer* opinion, the *Torcaso* case, *supra*, is irrelevant to the present dispute. Its meaning, in the jury duty-group discrimination context, is that any Buddhist called for jury service cannot be excluded therefrom on account of his refusal to express a belief in the existence of God. Indeed, this decision is a complete answer to Appellant's argument that Article 36 sets apart believers and nonbelievers and keeps the latter off of juries. To the unknowable extent that this may have been true before *Torcaso*, it cannot be true today.

Also irrelevant is *United States v. Seeger*, 326 F. 2d 846 (2nd Cir., 1964), *cert. granted*, 377 U.S. 922, 84 S. Ct. 1222, 12 L. Ed. 2d 214 (1964), which simply held that a young

man who was conceded to be a sincere, conscientious objector but whose objections were not the product of religious belief in "a relation to a Supreme Being" — which was the statutory test for exemption from military service — could not be denied the exemption on that account alone.

II.

APPELLANT'S SIGNED CONFESSION WAS PREPARED IN AN ATMOSPHERE WHOLLY FREE FROM ANY FORM OF OFFICIAL COERCION OR INDUCEMENT AND IT WAS PROPERLY ADMITTED INTO EVIDENCE AS HIS FREE AND VOLUNTARY ACT.

There is nothing in the record which would even suggest that the Appellant's confession was anything other than a voluntary statement given freely and without constraint. Appellant was treated with courtesy and kindness by the officers of the Maryland State Police with whom he had contact at the North East Barrack. Not only was he fed (E. 37), but Trooper Fields bought him a pack of cigarettes when he first arrived at the Barrack (E. 48, 52).

Appellant did testify that he asked if he could make a telephone call to his family, but he affirmed on both direct and cross-examination that Trooper Fields did not tell him whether he could or could not place a call (E. 48, 52). Trooper Fields testified that Appellant "told me his family was obtaining an attorney" (E. 40). He did not recall any request by Appellant to make a phone call.

To the extent that an isolated refusal to permit an accused to telephone his family may be considered a significant indication of a will overborne to secure a confession, the State submits that Trooper Fields' testimony constitutes "believable, persuasive contradiction" thereof. *Mefford and Blackburn v. State*, 235 Md. 497, 514 (1964).

However, if it were not, the Appellant's own version of his efforts to get family and legal assistance does not es-

tablish "facts on which the Supreme Court acted and to which it limited its holding in *Escobedo*" (*Ibid.*, 516), and it stands in bold contrast to the persistence of the accused, and the runaround he got from the police, in *Thiess v. State*, 235 Md. 541 (1964), upon which the Appellant mistakenly relies.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court for Cecil County should be affirmed.

Respectfully submitted,

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