The Burger Court Opinion Writing Database

Duren v. Missouri

439 U.S. 357 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 2, 1979

Dear Byron:

Re: 77-6067 Billy Duren v. State of Missouri

I join your December 28 circulation.

Regards,

WEB

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 29, 1978

RE: No. 77-6067 Duren v. Missouri

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1978

Re: No. 77-6067, Duren v. Missouri

Dear Byron,

I am glad to join your opinion for the Court in this case.

My recollection is that we had a long but ultimately inconclusive discussion at the Conference directed to the problem of the retroactivity of this decision. I wonder if you have considered whether to say anything about that subject. In this connection, I understand that a number of cases are being held for this one.

Sincerely yours,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 28 NOV 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6067

Billy Duren, Petitioner, *v.* State of Missouri. | On Writ of Certiorari to the Supreme Court of Missouri.

[December —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), this Court held that systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community.[1] Under the system invalidated in *Taylor*, a woman could not serve on a jury unless she filed a written declaration of her willingness to do so.[2] As a result, although 53% of the persons eligible for jury service were women, less than 1% of the 1,800 persons whose names were drawn from the jury wheel during the year in which appellant Taylor's jury was chosen were female. *Id.*, at 524.

At the time of our decision in *Taylor*, no other State excluded women from jury duty unless they volunteered to serve.[3] However, five States, including Missouri, provided

[1] See *Taylor* v. *Louisiana*, 419 U. S. 522, 526–531, 538 (1975); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class. See *Taylor*, 419 U. S., at 426.

[2] See La. Const. Art. VII, § 41 (1974), and La. Code Crim. Proc., Art. 402 (West 1969), reproduced at 419 U. S., at 523 nn. 1 and 2.

[3] Two other States, New Hampshire and Florida, had recently abolished

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

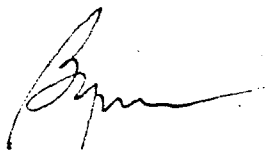
November 29, 1978

Re: No. 77-6067 - Duren v. Missouri

Dear Potter,

I have two per curiams at the printer that contain suggested dispositions with respect to the six held cases. Essentially, my recommendation is that Duren reaches all cases where juries were sworn after Taylor and in which the issue was raised in timely fashion and rejected by the State courts. Wainwright v. Sykes will take care of the rest of them. I realize that this disposition may not command a majority.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

pp 4, 7-8, 11

From: Mr. Justice White

Circulated: _____

Recirculated: 19 DEC 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6067

Billy Duren, Petitioner, *v.* State of Missouri. | On Writ of Certiorari to the Supreme Court of Missouri.

[December —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), this Court held that systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community.[1] Under the system invalidated in *Taylor*, a woman could not serve on a jury unless she filed a written declaration of her willingness to do so.[2] As a result, although 53% of the persons eligible for jury service were women, less than 1% of the 1,800 persons whose names were drawn from the jury wheel during the year in which appellant Taylor's jury was chosen were female. *Id.*, at 524.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 2 & 7

To: The C... ...tice
Mr. Just... ...rman
Mr. Just... ...art
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White
Circulated: _____
Recirculated: 12-26-7

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6067

Billy Duren, Petitioner, v. State of Missouri. | On Writ of Certiorari to the Supreme Court of Missouri.

[December —, 1978]

MR. JUSTICE WHITE delivered the opinion of the Court.

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), this Court held that systematic exclusion of women during the jury-selection process, resulting in jury pools not "reasonably representative" of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community.[1] Under the system invalidated in *Taylor*, a woman could not serve on a jury unless she filed a written declaration of her willingness to do so.[2] As a result, although 53% of the persons eligible for jury service were women, less than 1% of the 1,800 persons whose names were drawn from the jury wheel during the year in which appellant Taylor's jury was chosen were female. *Id.*, at 524.

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[3] Two other States, New Hampshire and Florida, had recently abolished

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 11, 1979

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 77-6067 — Duren v. Missouri

Two already circulated per curiams, relisted for the January 12, 1979 Conference, propose vacating and remanding in Nos. 77-6062, 77-6066, 77-6068, 77-7553, 77-6701, and 77-7021. This leaves only No. 77-6092, Hudson v. Georgia, in which the Georgia Supreme Court rejected petitioner's allegations of "intentional, discriminatory, and systematic exclusion" from the grand jury pool of women, blacks and young people. The latter claim was dismissed on the ground that young people are not a cognizable class. With respect to the other claims, the statistics introduced by petitioner showed that while 52% of the forum county is female, only 23.5% of the persons on the grand jury list were female; and that while 23% of the county is black, only 12% of the persons on the grand jury list were black.

The court below in affirming the conviction said that there was no evidence of a historical pattern of discrimination against blacks or women and noted that the Jury Commission had supplemented the voter registration list it was using with names of additional women and blacks. The court further noted that the Commission "had difficulty obtaining women on [its] list because of the exemption allowed by law for mothers of children under 14 years of age."

Petitioner's contentions apparently subsume both an equal protection attack and a fair-cross-section attack on the makeup of the grand jury pool. Duren

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1978

Re: 77-6067 - Duren v. Missouri

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 30, 1978

Re: No. 77-6067 - Duren v. Missouri

Dear Byron:

I go along.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 30, 1978

Re: No. 77-6067 - Duren v. Missouri

Dear Byron:

I go along.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

P.S. (to Justice White only) The misspelling, twice, in footnote 26, of the petitioning party's name in the case in 430 U.S. will cause Brother Rehnquist's Spanish blood to curdle. Mr. Putzel, of course, will catch the error. My clerk of a few years ago, who hailed from southern Texas, drilled me on both the spelling and the pronunciation, and I am still sensitive and brittle.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 4, 1978

No. 77-6067 Duren v. Missouri

Dear Byron:

Please join me.

Sincerely,

L. Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 4, 1978

Cases Held for Duren

77-6067

Dear Byron:

I am troubled by the retroactivity issue, and probably will write something.

I am joining your opinion in Duren because I believe the rationale of Taylor probably requires it. But I do not think this conclusion is free from reasonable doubt. The Missouri statute did not foreclose participation by women. It merely accorded them the option, and the actual participation was not negligible. In view of these differences, I am not disposed to apply Duren retroactively to the date of our decision in Taylor. I think Missouri judges and legislators might have believed reasonably that the statute of their state was not controlled by Taylor's rationale. Moreover, we are not dealing with the fairness of trials.

I am afraid I will not be able to write anything prior to Friday.

Sincerely,

Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 30, 1978

Re: No. 77-6067 Duren v. Missouri

Dear Byron:

As I told you on the telephone, I have not been able to keep up with the circulating opinions this week, and have not been able to write the short dissent in this case which I plan to do. I hope to get at it next week so as to not further delay you.

Sincerely,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: DEC 14 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6067

Billy Duren, Petitioner, *v.* State of Missouri. } On Writ of Certiorari to the Supreme Court of Missouri.

[January —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

The Court steadfastly maintained in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), when it "distinguished" *Hoyt* v. *Florida*, 368 U. S. 57 (1961), that its holding rested on the jury trial requirement of the Sixth and Fourteenth Amendments and not on the Equal Protection Clause of the Fourteenth Amendment. Today's decision makes a half-hearted effort to continue that fiction in footnotes 1 and 26, declaring that cases based on the Equal Protection Clause, such as *Alexander* v. *Louisiana*, 405 U. S. 1257 (1972), are not "entirely analogous" to the case at hand. The difference apparently lies in the fact, among others, that under equal protection analysis prima facie challenges are rebuttable by proof of absence of intent to discriminate, while under Sixth Amendment analysis intent is irrelevant but the State may show "adequate justification" for the disproportionate representation of the classes being compared. We are reminded, however, that disproportionality may not be justified "on merely rational grounds" and that justification requires that "a *significant* State interest be *manifestly* and *primarily* advanced" by the exemption criteria resulting in the disproportionate representation. *Ante*, p. 10. (emphasis supplied). That this language has strong overtones of equal protection is demonstrated in this Court's most recent application of the Equal Protection Clause to distinctions between men and women: "[C]lassifications by gender must serve *important* governmental objectives and must be

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqu

Circulated: _____

Recirculated: DEC 20 197

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-6067

Billy Duren, Petitioner, *v.* State of Missouri. } On Writ of Certiorari to the Supreme Court of Missouri.

[January —, 1979]

MR. JUSTICE REHNQUIST, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1978

Re: 77-6067 - Duren v. Missouri

Dear Byron:

Please join me.

Respectfully,

Mr. Justice White

Copies to the Conference