No. 11679

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. KELLY,

Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
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GUY A. B. DOVELL,
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TACOMA 2, WASHINGTON

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BRIEF OF APPELLEE

QUESTION INVOLVED

Did the systematic exclusion of women from the grand jury panel and the grand jury drawn therefrom that returned the indictment against the appellant herein upon the charge of which he was convicted and later sentenced and committed render such indictment void thereby involving a denial of due

process, and the conviction subject to attack on such ground in a habeas corpus proceeding?

STATEMENT

On September 21, 1932, an indictment containing two counts was returned against Harry C. Kelly, the appellant herein, in the Southern Division of the United States District Court for the Northern District of California, which charged him in Count One with robbing a person having lawful charge, control and custody of mail matter and, in effecting the robbery, putting such person's life in jeopardy by the use of a dangerous weapon, contrary to 18 U.S.C. 320 (R. 6-7). Thereafter on September 23, 1932, appellant was arraigned, pleaded guilty to Count One of the indictment and was sentenced to a term of imprisonment for the period of twenty-five years. (R. 8).

Appellant was just received at the McNeil Island Penitentiary on October 9, 1932 (R. 10). On March 21, 1933 he was transferred to the United States Penitentiary at Leavenworth, Kansas, and on September 4, 1934, was transferred to the United States Penitentiary at Alcatraz, California. (See *Kelly v. Johnston*, 111 F. (2d) 613), and on January 8, 1946 was returned to McNeil Island from Alcatraz.

While at Alcatraz, the appellant made at least

five applications for Writ of Habeas Corpus, some of which culminated in appeals.

In *Kelly v. Johnston*, 111 F. (2d) 613, appellant denied he was informed of his right to counsel, but the appellate court found otherwise and affirmed the district court's decision.

In *Kelly v. Johnston*, 128 F. (2d) 793, appellant repeated his former grounds and in addition sought to show the stamps taken in the robbery were not mail matter within the contemplation of the statute. The appellate court affirmed the District Court, and due to appellant's record of convictions did not feel disposed to recommend that his sentence be commuted by the President to the time then served.

In addition to the foregoing proceedings, appellant's motion for appointment of counsel to represent him on appeal in forma pauperis from denial of motion to vacate and set aside his judgment and sentence was denied by the court.

Kelly v. United States, 135 F. (2d) 919.

The appellant represented himself in his aforementioned appeal, after the court's denial to appoint counsel and the appellate court affirmed the order of the district court denying his motion to vacate and

set aside the judgment and sentence. (R. 12).

Kelly v. United States, 138 F. (2d) 489.

These denials in the District Court of California and in the Circuit Court of Appeals did not satisfy appellant's craving for judicial determination, and from each appellate court decision, except the motion for counsel he sought and was denied a writ of certiorari by the Supreme Court, as well as a rehearing thereon, respectively.

Kelly v. Johnston, 312 U.S. 691, 715;

Kelly v. Johnston, 317 U.S. 699, and 318 U.S. 798;

Kelly v. United States, 324 U.S. 855, 888.

The appellant filed his present application for Writ of Habeas Corpus on April 4, 1947 (R. 5) with the District Court, and appellee was thereupon ordered to show cause on April 29, 1947, of the detention of appellant (R. 16-17).

To the order to show cause, appellee filed his response on April 23, 1947 (R. 21) and produced in court the body of the appellant at time of return and hearing on April 29, 1947 (R. 22, and transcript hearing).

The appellant at time of said hearing made oral traverse to appellee's return and confined the issue to the question hereinbefore stated, (R. 23, where-

upon the District Court, after full hearing, (Transcript Hearing, pages 1-20, R. 37-56) entered its order denying the application and dismissing the action. (R. 23-24). From that final order appellant has brought this appeal in forma pauperis, (R. 27-36), leave to so appeal having been indicated by the District Court at the time of said hearing. (Tr. Hearing 19) and prior to this court's decision in *Redmon v. Squier, Warden*, on May 16, 1947.

ARGUMENT

Appellant's extensive reasoning set forth in his brief is based entirely upon the premise that dismissal of an indictment in a criminal cause upon grounds of exclusion of women from the grand jury panel, and so from the grand jury returning the indictment is a determination that such indictment is beyond all question void.

The fact that appellant plead guilty to the count of the indictment upon which he was sentenced and committed seems in no way to soothe his belated feeling of having been slighted in proceedings that admittedly lacked feminine adornment and above all in a state so endowed.

As early as October 15, 1883, the Supreme Court had in connection with proceedings on the qualifica-

tion and disqualification of certain persons for grand jury service, expressed its opinion as follows:

> "The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challange the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings taken in impanelling and swearing the grand jury; but relates only to the qualification or disqualification of certain persons sworn upon the jury, or excluded therefrom; or to mere irregularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularities."
>
> *United States v. Gale*, 109 U.S. 65, 67.

And further on page 70, the court said:

> "These remarks apply with additional force where the objection is not to the disqualification of jurors who are actully sworn upon the panel, but to the exclusion or excuse of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable and have all the necessary qualifications, it is of less moment to the accused what persons may have been set aside or excused. The present case is of the latter kind. No complaint is made that any of the grand jurors who found the indictment were disqualified to serve, or were in any respect improper persons. It is only complained that the court excluded some persons for an improper cause, that is, because they labored under the disqualification created by the 820th Section of the Revised Statutes, which is alleged to be unconstitutional. It is not complained that the jury ac-

> tually impaneled was not a good one; but that other persons equally good had a right to be placed on it. These persons do not complain. If their right to serve on the grand jury was improperly infringed, perhaps they might complain of being excluded. That is another matter. Or, perhaps, the defendants, if correct in their assumption that the law is unconstitutional, and that the court was governed by an improper rule in excluding persons under it, might have had the benefit of the error by moving to quash the indictment, or by pleading in abatement. But passing by these proper modes of taking the objection, they waited until they had been tried and convicted on a plea of not guilty, and then moved in arrest of judgment. We think they were too late in raising the objection."

Thereafter the matter of a qualified grand jury was tested in habeas corpus proceeding of *Ex parte Wilson*, 140 U.S. 575, and the Supreme Court in a decision dated May 25, 1891, in the language of headnote 3, held:

> "A deficiency in the number of grand jurors prescribed by law, there being present a number sufficient to find an indictment, is a defect not going to the matter of jurisdiction, and one which cannot be taken advantage of after conviction, by Writ of Habeas Corpus."

Again in *Kaizo v. Henry*, 211 U.S. 146, decided November 16, 1908, proceedings upon habeas corpus petition alleging questionable citizenship of the grand jury, the court at page 149, said:

"The indictment though voidable, if the objec-

> tion is seasonably taken, as it was in this case, is not void."

To the same effect is *Harlan v. McGourin*, 218 U.S. 442, decided November 28, 1910, upon habeas corpus proceedings, raising objections to the organization of the grand jury.

> See also *United States ex rel McCann v. Thompson*, 56 F. Supp. 661, aff'd 144 F. (2d), 604, cert. denied, 323 U.S. 790; and Title 18 U. S. C. A. Section 556a.

The more recent decision in *Ballard v. United States*, 329 U.S. 187, a criminal cause, dismissing indictment found by grand jury drawn from a panel from which women were excluded, is not applicable to the instant case. Rather, the words of the dissenting opinion of Justice Frankfurter on page 199 are pertinent where he said:

> "Even now, this court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process."

Similar construction has been placed upon the effect of the Ballard case by the Circuit Court of Appeals for the Ninth Circuit in *Redmon v. Squier, Warden*, decided May 16, 1947, wherein the court held:

> "As far as the Ballard case, supra, is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings. The objection should be made

seasonably, by motion to quash, or some similar motion."

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.