1970

State of Utah v. Judy Carol Leggroan : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

—vs.—

JUDY CAROL LEGGROAN,

Defendant-Appellant.

Case No. 12048

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court, Salt Lake County, State of Utah
Honorable D. Frank Wilkins, Presiding

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STATEMENT OF NATURE OF THE CASE

This is a criminal proceeding in which the defendant, Judy Carol Leggroan was charged with the crime of murder in the first degree by information filed in the Third Judicial District Court for Salt Lake County on October 10, 1969.

DISPOSITION OF CASE BY LOWER COURT

The defendant was tried by jury before the honorable D. Frank Wilkins, District Judge, commencing November 24, 1969. On December 3, 1969 the case was submitted to

the jury which returned a verdict of guilty of the lesser included offense of murder in the second degree. On December 22, 1969 the defendant was sentenced and committed to the Utah State Prison for the indeterminate term as provided for the crime of murder in the second degree.

RELIEF SOUGHT ON APPEAL

The appellant seeks a new trial.

STATEMENT OF FACTS

Shortly after midnight on Sepembr 3, 1969, the police, responding to a call placed by the defendant (T-63), went to a residence in the northwest section of Salt Lake City and found the defendant's husband lying bleeding on the kitchen floor (T-22). He was taken to a hospital where he died shortly thereafter (T-71). The cause of death was multiple 22 calibre gunshot wounds (T-85), two in the chest and one in the back (T-78).

The defendant was apprehended at the scene (T-24) where, according to the police officer, she announced she had "shot the son-of-a-bitch with his own gun." The police officers observed that she was visibly upset (T-49) and at times her speech irrational (T-249). Her face showed signs of swelling around her eye and mouth (T-58) and a blood alcohol test, administered after 12:45 a.m., showed

her blood-alcohol level to be 0.197 per cent (T-254, 259), which expert opinion extrapolated to 0.227 per cent at the time leading up to the shooting (T-511).

A police officer who had interrogated the defendant at the scene testified that:

> [S]he told me that her and her husband had been arguing. She had left the house, and had walked to North Temple then east to the viaduct. She stated at this point he overtook her on foot and forced her to go back to the house with him. She stated that enroute back to the house he hit her twice . . . once in the eye and once in the mouth. . . . [A]fter they got to the house the argument continued. She stated that among other things he told her that she was nothing but a whore, and he also told her that her mother was a whore. She stated that at one time she had been a prostitute; however, her mother never had been. She stated that she got very angry when he accused — told her her mother was a prostitute. She stated that she reached down under the bed, picked up a gun. She stated . . . "I had to put guts in it" . . . [and] she stood up and shot him. She said she thought she fired about three shots. (T- 43, 44)

The officer also testified that she informed him that her husband had shot up the house the previous night and had taken a shot at her (T-56, 62). (The transcript on p. 44, line 19, is in error on this point. (Compare T-44 with T-56, 62.)

The state introduced evidence through the husband's mother and sister and a service station attendant that the defendant had threatened to "kill" the husband on several occasions in the past (T-157, 159, 174, 187-190).

The defendant testified that her husband had beaten her severely on numerous occasions resulting in the necessity for medical treatment, and on one occasion hospitalization (T-270-275). Two medical doctors testified in corroboration of her testimony on this point (T-384-388). She testified that these beatings had resulted in the loss of all her teeth over a three year period (T-284-286).

A number of witnesses, including the husband's mother and sister, testified to acts of violence committed by the husband upon the defendant (T-163, 165, 236, 400, 403, 492). In addition to the beatings, the defendant testified that her husband had threatened to kill her numerous times and had discharged a firearm in her direction of four different occasions, including the evening preceding the day of his death (T-277-280). This testimony was corroborated by the police officers, who observed numerous bullet holes at the defendant's residence (T-56, 118-123) and an eye witness to one of the incidents. (T-492, 493).

The defendant testified that on the evening of the homicide that she and her husband had quarreled about her refusing to go look at a house he wanted to buy (T-293). During this argument, the husband called her and

her mother black bitches and whores but the argument ceased when they went on separate errands (T-294). However, the argument resumed later in the evening and the defendant attempted to leave to spend the night at a motel. The husband pursued her and overtook her several blocks from their home. He forced her to return home, abusing her verbally and physically on the way and informing her that he had "something in the house, bitch, when you get to the house" (T-295-296).

The abuse continued in the house, and, when the husband again called the defendant's mother a whore, the argument erupted into a fight (T-296). The husband then threatened her with the gun and in the struggle she got it away from him and shot him (T-297). She immediately ran across the street and called the police (T-297).

The defense presented the testimony of two psychiatrists and a psychologist. The psychiatrists had the opinion that the defendant, while moderately retarded, knew the difference between right and wrong and was not subject to irresistible impulse (T-424-430, 435). The psychologist, who had tested the defendant extensively, had the opinion that under the conditions that existed on the night in question the defendant would sustain severe loss of control and be under the control of emotional impulses (T-455). He had the further opinion that the defendant in such a state would be unable to differentiate between right and wrong (T-460).

At the trial, the defense challenged the entire panel on the ground that it was selected from the tax assessment rolls which automatically excluded persons who were not record property holders with the effect of reducing the number of women, young people, poor people, and members of minority groups — all classes to which the defendant belonged (T-6, 14, 15). There were only ten women on the panel of fifty prospective jurors called for this case, of which only eight fell within the first thirty-two surviving the challenges for cause, and all of these were eliminated by the state's preemptory challenges (R-41-43). Apparently there were no members of minority races and the panel was noticeably composed of older people (T-14). Defense counsel proffered evidence as to the method of jury selection (T-6), but instead a stipulation was entered into that the state statutes regarding selection from assessment rolls were followed (T-14, 15).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DEFINING THE DIFFERENCE BETWEEN MURDER AND VOLUNTARY MANSLAUGHTER AND IN PLACING THE BURDEN OF PROOF ON DEFENDANT.

It is readily apparent from a reading of the transcript that a conviction of the lesser offense of voluntary manslaughter was a strong possibility in this case. It

was undisputed by the state that the homicide took place during or at least immediately following a domestic quarrel which had involved physical violence. The record is filled with evidence of provocation and passion. Hence the jury was faced with the problem of determining whether the provocation and passion involved in this case came within the definition of voluntary manslaughter, and, if they did their duty, they consulted the courts instructions on this very critical point. It is the contention of appellant that the court's instructions incorrectly stated the law so as to preclude a finding of voluntary manslaughter, not only in this case but under almost any conceivable fact situation.

The court instructed the jury that before they could find the defendant guilty of voluntary manslaughter they must believe among other things *beyond a reasonable doubt* that the killing was without malice and upon a sudden quarrel or in the heat of passion (Instruction No. 28) (R-70). The court, defined heat of passion as follows:

> The phrase "in the heat of passion," as used in these instruction, means in a state of mind known as anger, rage, resentment, or any other mental or emotional disturbance of sufficient intensity as to render the mind incapable of cool reflection, and productive of such emotional or mental state as to *irresistably compel an ordinary, reasonable person to commit the act charged.* . . . To reduce a homicide from murder to voluntary manslaughter on the ground that it was com-

> mitted "in the heat of passion," it must appear that such heat of passion was induced by an adequate provocation. And by "adequate provocation" is meant such provocation as in the ordinary experience of mankind may be reasonably considered sufficient to temporarily *destroy* an ordinary person's reason and judgment, to such an extent as to induce him to act under an uncontrollable or what may be considered in view of all the circumstances an irresistable passion (Instruction 18) (R. 63, 64) (emphasis added).

In other words, the jury was instructed that they could not reduce the charge to voluntary manslaughter unless they were convinced, beyond a reasonable doubt, that the provocation was so great that a reasonable man's mental state would be such that he would have been irresistably compelled to kill. If this were the standard, it would be much easier for the defendant to show he was entitled to an acquittal for reason of insanity or that the killing was justified than it would be for him to prove he was guilty of voluntary manslaughter. Under the doctrine of *State v. Green,* 78 Utah 580, 6 P. 2d 177 (1931), a defendant is entitled to acquittal if he raises a reasonable doubt that he (not the cool reasonable man) may have been suffering from a mental disease, even a temporary one, which caused an irresistible impulse to kill.

The law of this state requires an acquittal if there is reasonable doubt that the killing occured in a heat of passion caused by the rape or defilement of a female rel-

ative of the killer. 76-30-10 U.C.A. (1953). Presumably, this is because the law recognizes that even a reasonable, law abiding citizen might act rashly under such circumstances. However, it is certainly doubtful that such a person would be *irresistably compelled* to kill, since weekly parents and husbands manage to control their impulses and choose to report such incidents to the police rather than kill the person who committed the act on their daughter or wife. Surely, a person who killed under such circumstances would be hard put to prove beyond a reasonable doubt that an ordinary reasonable person would have been irresistably compelled to do the same thing. The legislature clearly did not put such a tremenously heavy burden on the defendant in the justifiable homicide statue and there is certainly no reason to believe that they wished to put such a burden on the defendant who merely seeks to reduce murder to voluntary manslaughter because of provoked heat of passion.

The prejudicial effect of the courts instruction was heightened by the testimony of the psychiatrists that it is doubtful that there is such a thing as an irresistable impulse even in persons who are severly mentally ill and that it is impossible to prove or disprove such an impulse (T-438). Although the doctors were testifying on the subject of the defense of insanity, the jury could not help be reminded that the two psychiatrists gave their opinion that the defendant was not acting under an "irrisist-

ible impulse" (T - 442, 443), when, they considered whether they were convinced she was acting in the "heat of passion" as defined by the court.

The origin of the language in the court's instruction was apparently the holding of the Territorial Supreme Court in *People v. Calton,* 5 Utah 451, 16 Pac. 902 *rev'd on other grounds,* 130 U.S. 83 (1888), approving the following instruction:

> To reduce homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person. No slight or trivial provocation, such as is not calculated to engender uncontrolled passion in any ordinary man, will suffice, 5 Utah at 459.

This instruction, however, differs in several important aspects from that given in the instant case. First there is no requirement that the reasonable person be compelled *to kill* as in the instant instruction. Nor is there any requirement, as in the instant instruction that the ordinary person's reason and judgment be destroyed — in fact the Court in that case stated that "it is too strong to say that the reason of the party should be dethroned . . . "'5 Utah at 460. Finally, in *Calton* there was no requirement that the jury find beyond a reasonable doubt that the killing occurred in a heat of passion — in

fact the Court stated the opposite, that the jury must give the defendant the benefit of any reasonable doubt. 5 Utah at 460. A reading of the entire opinion in *Calton* clearly indicates that that Court would certainly not have approved the extreme instructions given in the instant case.

The appellant does *not* for one moment argue that she is entitled to set her own standard of what is heat of passion and adequate provocation. However, she was entitled to a correct instruction as to what the standard is.

It has been held that the Utah Statue defining voluntary manslaughter is merely declaratory of common law. *State v. Cobo,* 90 Utah 89, 96, 60 P.2d (1936). WHARTON'S CRIMINAL LAW AND PROCEDURE defines "adequate provocation" as follows:

> Adequate provocation may consist in anything the natural tendency of which is to produce passion in ordinary men, and which the jury are satisfied did produce it in the case before them, and *does not* consist in such a provocation as must, by the laws of the human mind, produce such an effect with the certainty that physical effects follow from physical causes. §276. (Anderson ed. 1957) (emphasis added).

Note that the provocation must merely have a tendency to arouse passion in the reasonable man and there is no requirement that the rasonable man be irresistibly compelled to kill.

The identical language is used in 40 Am Jur 2d, *Homicide* 61, p. 354 Am Jur also points out that the passion need not, in fact cannot, exceed what a reasonable man can control. 40 Am Jur 2d 60, p. 354. This would seem reasonable since ordinarily the law does not make felonies something that a reasonable man cannot control. Am. Jur. 2d sates:

> A frequently approved statement of the rule declares that "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment. *Ibid.*

One great source of error in determining what will reduce an intentional, unlawful killing from murder to voluntary manslaughter is the confusing of the nature of the passion and provocation which would morally *excuse* and legally *justify* a killing with that passion and provocation which would negate the presence of malice aforethought without either excusing or justifying it. It is only the latter which is involved in voluntary manslaugther. The killing is still legally and morally wrong — a felony which is severely puished. It approaches the absurd to say that only a reasonable man who, through no fault of his own, is subjected to irrestible passion may commit it.

The second source of error is the common failure to recognize that the requirements "without malice" and "in the heat of passion" are not ordinary elements in the sense that, for example, premeditation and malice aforethought are in first degree murder. They are not things that the state must prove — rather, they are attributes which distinquish voluntary manslaughter from murder, and if any party would wish to show their presence it would be the defendant. The listing of these distinguishing features as "elements" of voluntary manslaughter which have to be proven beyond a reasonable doubt, as was done in this case (R-70), shifts the burden to the defense and leaves the jury in a quandry. They must be convinced beyond a reasonable doubt that there *was* malice to convict of murder and they must be equally convinced beyond a reasonable doubt that there was *not malice* in order to reduce to voluntary manslaughter. This, of course, is not the law, *People v. Calton, supra*, at 460, and apparently was inadvertent on the trial court's part and unnoticed by counsel. Nonetheless, this requirement that "heat of passion" be proved beyond a reasonable doubt coupled with definitions of "heat of passion" and "adequate provocation" which were so strict as to be practically impossible to prove at all, absolutely voided any chance of the jury reducing the charge to voluntary manslaughter.

Appellant is not unmindful of the fact that defense counsel at trial did not except to the instructions which

are complained of here and, in fact, submitted an instruction that, while not as extreme as the one given by the court, contained some of the same erroneous language. However, it is clear that this was not the type of situation where counsel was cleverly trying to have his cake and eat it too, since there was no conceivable gain to the defendant in having such a strict standard placed on "heat of passion." It certainly does not increase chances for acquittal on grounds of self defense, for example, to have even the provoked irresistible anger of the reasonable man so harshly condemned as felonious.

The giving of these erroneous instructions was clearly prejudicial to the appellant and if she were partly at fault because of her counsel's failure to take exception, life imprisonment seems a rather harsh penalty for such fault. The state also has an interest that a verdict in a criminal case be based on correct law despite what the defendant may do or fail to do. Surely a defendant could not "waive" major elements of a crime defined by the legislature or stipulate to be convicted of a non-existant crime.

In *State v. Cobo,* 90 Utah 89, 60 P.2d 952 (1936), this Court reversed a conviction because of defective instructions on voluntary manslaughter, despite defense counsel's failure to except, stating:

> We wish not to depart from the rule laid down in this jurisdiction that in ordinary cases on appeal errors relating to instructions or refusing requests to instruct will not be considered or reviewed unless exceptions thereto were properly taken by the party complaining. But in capital cases and in cases of grave and serious charged offenses and convictions of long terms of imprisonment, cases involving the life and liberty of the citizen, we think that when palpable error is made to appear on the face of the record and to the manifest prejudice of the accused, the court has the power to notice such error and to correct same, though no formal exception was taken to the ruling.

It is submitted that the error committed in the voluntary manslaughter instructions in the instant case is just as palpable and the prejudice just as manifest as that in *Cobo*.

POINT II

APPELLANT WAS DENIED A FAIR TRIAL BY A JURY OF HER PEERS BECAUSE THE JURY SELECTION SYSTEM UNFAIRLY EXCLUDED A SUBSTANTIAL PORTION OF THE COMMUNITY OF WHICH APPELLANT WAS A PART.

By excluding from jury service all those people in the community who were not on the assessment rolls of

Salt Lake County, the statute, §78-46-17 Utah Code, Ann., (1953), excluded a substantial portion of the community, the effect of which was to exclude a disproportionate number of qualified citizens who possess one or more of the following characteristics: black, young, poor, or female. All of these categories of persons are traditionally non-property holders,* as contrasted with those groups of people who are white, older, non-poor, or male, or those who possess more than one of these characteristics. These latter categories of people are traditionally those who hold most of the property. However, as will be shown by the following cases, it is not necessary to show the effect of the exclusion, it is enough to show that the exclusion itself exists.

In *Sims v. State of Georgia,* 389 U.S. 404, 88 S.Ct. 523, 14 L.Ed. 2d 634, the grand and petit jury lists were drawn up from the county tax digests, and were listed by race. Negroes made up 24% of the taxpayers, but only 4.7% of the names on the grand jury lists and 9.8% of the petit jury lists. This was said by the Court not to comport with constitutional standards. This challenge by the defendant was successful because it showed an exclusion from jury service of a class of citizens. There was no showing of the effect of this exclusion, that is.

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*While females appear often as real property holders, there are a great number of people who are not real property holders of record and who would only appear as automobile owners and usually the automobile is in the name of the male.

no showing that the result of the trial would have been different had other groups been included on the jury lists.

Similarly, in *Arnold v. State of North Carolina,* 376 U.S. 773, 84 S.Ct. 1032, a case dealing with grand juries, the Court in a per curiam opinion reversed a murder conviction pointing out that the tax records were used to get the jury lists, but that blacks and whites were listed separately on these tax records. In twenty-four years, only one Negro had been on a grand jury, and there were 4,800 Negroes in the community of 17,000. This was said to be a prima facie case of denial of equal protection. Here again, the key factor was the showing that there was a systematic and purposeful exclusion and discrimination, and that it was not an exclusion that resulted from chance. Again, there was no requirement that any effect be shown, it was only necessary to show that in fact the Negroes had been excluded.

An example of a failure to prove this purposeful exclusion is *Swain v. State of Alabama,* 380 U.S. 202, 85 S.Ct. 824, where the Court said that "A state's purposeful denial of Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." In that case, 26% of the community was black, while only 10-15% of the juries in the past five years had contained Negroes. The Court said that this was not token inclusion and did not amount

to invidious discrimination under the Fourteenth Amendment. The Court found no evidence that the jury commissioner applied different standards of qualification to the black community than he did to the white community. The system was labelled "haphazard" by the Court, and was not found to be purposeful discrimination. In that case, the racial imbalance was not shown to be purposeful and systematic, but was possibly the result of chance, and so the Court did not find any infirmities in the system.

Two other cases, *Whitus v. State of Georgia,* 385 U.S. 545, 87 S.Ct. 643, and *Jones v. State of Georgia,* 389 U.S. 24, 88 SCt 4, illustrate again how this purposeful discrimination was shown, and add a further dimension. In *Whitus,* the Court said the burden was on the defendant in a criminal case to prove the existence of purposeful discrimination, but once a prima facie case was made, the burden shifted to the State. In that case, 27% of the taxpayers were black, and under 8% of the names on the petit jury lists were black. The State offered no evidence to explain this, and so the Court held that the State did not rebut the prima facie case of the defendant. It thus appears that once the purposeful discrimination and exclusion is shown, the burden shifts to the State to explain it. Appellant argues that the statute itself, §78-46-17 Utah Code Ann., (1953), is a purposeful exclusion and discrimination against a class of persons, that is, non-property holders, those not appearing on the assess-

ment rolls. As *Hernandes v. State of Texas,* 347 U.S. 475, 74 S.Ct. 667, points out: "The constitutional command forbidding intentional exclusion is not limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice." 347 U.S. at p. 478.

Another example of a failure to sustain the burden of proving systematic exclusion, based on other than racial grounds, is *Hoyt v. State of Florida,* 368 U.S. 57, 82 S.Ct. 159, where the Court affirmed a second degree murder conviction of a woman by an all male jury. The defendant claimed that women would have been more understanding of her defense than men. The Court said that the Fourteenth Amendment does not entitle a defendant to a jury ". . . tailor made to the circumstances of the particular case, whether relative to the sex or other condition of the defendant." But, it also said that "All that is required is that the jury be indiscriminately chosen, untrammelled by *arbitrary* and *systematic exclusions.*" 368 U.S. at p. 58. It is clear that appellant has no right to a "tailor made" jury, but it is equally clear that in appellant's case there has not been a jury chosen "indiscriminately . . . , untrammelled by . . . systematic exclusions," as the Utah statute itself systematically and arbitrarily excludes a major portion of society.

There is a case which has held that the exclusion from jury lists of a large class of citizens is reversible

error. In 1945, the Supreme Court decided *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984 90 L.Ed 1181. In that case, the class excluded was "daily wage earners" The Court said,328 U.S. at p. 223: "Wage earners are a substantial portion of the community, a portion that can not be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." Also at p. 220, it was said that: "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. . . . Jury competence is an individual rather than a group or class matter. To disregard this fact is to open the door to class distinction and discrimination which are abhorrent to democratic ideals of trial by jury." And at p. 223, "Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for jury selection may have to discriminate against persons of low economic and social status." It must be noted that this was a civil action, for personal injury, by a passenger against a railroad, and the plaintiff complained that the verdict against him below must be reversed because the jury was not made up of a valid cross section of the community, but only contained pro-employer types. The Court agreed with plaintiff and reversed the judgement below. It would seem that this principle would hold more strongly in a criminal matter where personal liberty is involved. Again, it should be noted that plaintiff was not required to show the effect this exclusion had on his trial outcome, in fact, the Court said reversal was re-

quired whether or not plaintiff was prejudiced by the wrongful exclusion, or whether or not he was one of the excluded class.

This case further solidifies the argument that once the exclusion of a group is shown, the effect of such need not be shown. In *State v. Dodge,* 12 Utah 2d 293, 365 P.2d 798 (1961), this court said that the fact that the judge gave intelligence tests to the jurors was error, but not reversible error, and that the judge should stay within the statute. But, this court also said, that there "was no showing that the jury that tried appellant was not a fair jury taken from a cross section of the community in which he was tried, or that the result of appellant's trial would have been different had the 'quizzes' not been given." 365 P.2d at 800. But, in *Dodge,* as in *Swain* and *Hoyt,* supra, there was no showing of the exclusion of a particular class to begin with, and so this court required a showing of the effect of the judge's actions on defendant's trial outcome, but when a prima facie case of exclusion of a particular class is made, no such showing is required, as argued above.

The Supreme Court, has, in recent bond election cases, held that groups of citizens can not be excluded from the franchise. While these cases do not deal with jury selection, they are instructive as to what a State can not do in terms of excluding groups of citizens from participating in functions that affect their lives. In

Kramer v. Union Free School District, 395 U.S. 621, the Court held that a State can not restrict the vote in a school district election to owners and lessees of real property and parents of school children because exclusion of otherwise qualified voters was not shown to be necessary to promote a compelling state interest. While this case does not deal with jury selection, it can be persuasively argued that the State has no compelling interest in not allowing non-property holders, who are otherwise qualified to serve as jurors ,to serve as jury members.

In *Cipriano v. City of Houma,* 395 U.S. 701, the Court held that restricting the franchise to property taxpayers in an election on revenue bonds violated the Equal Protection Clause of the Fourteenth Amendment, because the non-property holders were effected by the revenue bonds as much as the property holders were. Likewise, in the case of jury service, non-property holders are effected by the makeup of a jury which may try them just as much as a property holder is so effected.

A similar holding as in *Cipriano, supra* is *City of Phoenix v. Kolodziejski,* 38 Law Week 4597, which held that the franchise cannot be restricted to property holders in a general obligation bond election, because the difference between the two classes is not substantial enough to justify excluding the latter, even though possible property holders did have a different interest than

non-property holders. Here again, as in the case of jury selection, both of these classes would seem to have an identical interest, and that would be to be tried by a jury that was a true cross section of the community and the result of this, a fair trial.

Holding the franchise in certain elections and inclusion on the list of people eligible for jury service, whether these function be considered duties, privileges, or rights, are not unrelated activities when the criteria that relates them is that all qualified persons should be treated alike.

In *Carter v. Jury Commission of Greene County,* 90 S.Ct. 518, 24 L.Ed.2d 549, there was a class action by a group of Negroes, alleging racial discrimination in jury selection. The Court held for defendants, and denied the affirmative relief sought by plaintiffs, but the Court said, 64 L.Ed.2d, at p. 557: "Whether jury service be deemed a right, privilege, or a duty, the State may no more extend it to some of its citizens or deny it to others on racial grounds than it may invidiously discriminate in offering and withholding the elective franchise."

There seems to be no reason why in place of the word "racial" in *Carter,* supra, the concepts of "non-property holder" and "young person who is a qualified voter" could not be substituted, for surely none of these labels make a person incompetent for jury service. Be-

cause, all that is required in Utah to be a person competent to serve as a juror in Utah is that one be a citizen over 21, be able to read and write the English language, be at least a six-month resident of the county, be a state taxpayer, and be of sound mind and discretion, § 78-46-8 Utah Code Ann., (1953). It is obvious that a person can be a non-property holder, or a young person, and still have all of these qualifications.

Clearly if competent groups of citizens are excluded from jury service, a truly representative cross-section of the community is not represented on the jury lists, nor on the juries.

CONCLUSION

Because the jury was improperly instructed on the lesser offense of Voluntary Manslaughter and because persons who were not property holders of record were excluded from the jury, the conviction of appellant should be reversed and the case remanded for new trial.

Respectfully submitted,

JOHN D. O'CONNELL
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