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STATUTORY NOTE

CONSTITUTIONAL LAW—TEXAS CODE OF CRIMINAL PROCEDURE REQUIRES THAT GRAND JURY COMMISSIONER BE A FREEHOLDER. TEX. CODE CRIM. PROC. ANN. art. 19.01 (1965).

Article 19.01¹ was enacted as part of a new code of criminal procedure by the 59th Legislature in 1965. The statute lists the procedure for appointment of grand jury commissioners and sets out their qualifications.² One qualification specifically requires that the prospective grand jury commissioner be a freeholder.³ This exalted stance of the freeholder springs from roots planted in English common law.⁴ In early American life "property ownership and payment of taxes were the accepted symbols of community membership and interest."⁵ Professor Galbraith has written that "in the new world, as in the old, it was assumed that power belonged as a right, to men who owned the land."⁶ Recently, however, the United States Supreme Court has weakened the freeholder's privileged position.⁷ Using the fourteenth amendment's equal protection clause as its vehicle, the Court has struck down practices and statutes that establish certain types of discrimination, including that based on wealth.⁸

In striking down the Virginia poll tax, the Supreme Court, through Mr. Justice Douglas stated, that "To introduce wealth . . . as a measure of a voter's qualifications is to introduce a capricious factor. The degree of the discrimination is irrelevant."⁹ This reaffirmed the generally accepted view that lines drawn on basis of wealth or property, like those of race, are traditionally disfavored, even though practiced. In *Griffin v. Illinois* the indigent defendant was guaranteed the right to a free transcript on appeal.¹⁰ The Court announced that a state, granting appellate review of criminal convictions, could not do so "in a way that discriminates against some convicted defendants on account of their poverty."¹¹ In deciding that appellant was entitled to counsel on appeal,

¹ TEX. CODE CRIM. PROC. ANN. art. 19.01 (1965).

² *Id.*

³ *Id.*, § 2.

⁴ *Blunt's Case*, 78 Eng. Rep. 655 (1595). The court held in this case that grand jurors must be freeholders even though the amount of their freehold was small.

⁵ J. PHILLIPS, *MUNICIPAL GOVERNMENT AND ADMINISTRATION IN AMERICA* 175 (1960).

⁶ J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 52 (1968).

⁷ *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1955); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed.2d 811 (1963), *reh. den.* 373 U.S. 905, 83 S. Ct. 1288, 10 L. Ed.2d 200 (1963); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1966).

⁸ *Id.*

⁹ *Harper v. Board of Elections*, 383 U.S. 663, 668, 86 S. Ct. 1079, 1082, 16 L. Ed.2d 169, 173 (1966).

¹⁰ 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1955).

¹¹ *Id.* at 18, 76 S. Ct. at 590, 100 L. Ed. at 898.

the Court stated that "An unconstitutional line . . . between rich and poor" would be drawn if an indigent convicted of a crime was not provided with counsel for his appeal.¹²

The termination of financial restraints impeding access to political rights was established in *Landes v. Town of Hempstead*,¹³ where property ownership as a condition precedent of the right to hold office was rejected. The requirement of property ownership as a prerequisite to voting in a town election was discarded in *Pierce v. Ossining*.¹⁴ Finally, in *Turner v. Fouche*,¹⁵ the United States Supreme Court held invalid the requirement that a member of the county board of education had to be a freeholder, calling such a requirement "invidious discrimination."¹⁶ All three of these decisions concerned themselves with the theory that basic rights could not be conditioned upon ownership of property.¹⁷

A requirement that a grand jury commissioner be a freeholder could necessarily exclude a non-freeholder from being considered for selection as a commissioner. Before a state may permit one group of citizens an advantage and withhold it from another group of citizens, "the attempted classification . . . must always rest upon some difference which bears a reasonable and just relationship to the action in respect to which the classification is proposed, and can never be made arbitrarily and without such basis."¹⁸ For an exclusionary rule to operate in the area of fundamental rights, the state must show strong compelling reasons for its operation.¹⁹ "Disparities and differences in treatment run afoul of the constitution when the statute can be said to reflect no rational policy."²⁰

The systematic exclusion of wage earners from federal juries was struck down by the Supreme Court in *Thiel v. Southern Pacific Company*.²¹ Relying on the *Thiel* decision, Judge Wisdom declared in a Fifth Circuit case:²²

The equal protection clause prohibits a state from making arbitrary

¹² *Douglas v. California*, 372 U.S. 353, 357, 83 S. Ct. 814, 816, 9 L. Ed.2d 811, 814 (1963).

¹³ 231 N.E.2d 120 (N.Y. 1967).

¹⁴ 292 F. Supp. 113 (S.D. N.Y. 1968).

¹⁵ — U.S. —, 90 S. Ct. 532, 24 L. Ed.2d 567 (1970).

¹⁶ *Id.* at —, 90 S. Ct. at 542, 24 L. Ed.2d at 581.

¹⁷ *Landes v. Town of Hempstead*, 231 N.E.2d 120 (N.Y. 1967); *Pierce v. Ossining*, 292 F. Supp. 113 (S.D. N.Y. 1968); *Turner v. Fouche*, — U.S. —, 90 S. Ct. 532, 24 L. Ed. 2d 467 (1970).

¹⁸ *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, 17 S. Ct. 255, 257, 41 L. Ed. 666, 668 (1897).

¹⁹ *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969). *Accord*, *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969).

²⁰ *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed.2d 393 (1961).

²¹ 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946).

²² *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966).

and unreasonable classifications. Exemption of daily wage earners as a class is an unreasonable classification . . . their economic standing has, as *Thiel* teaches, no relationship to their competence as jurors.²³

The Court in *Turner*²⁴ struck down the Georgia requirement that a member of the county school board had to be a freeholder stating that it was not necessary in this situation to decide whether the state had a compelling reason for the requirement. If a state establishes a classification where basic rights are limited, the classification must be relevant to the achievement of a valid state objective²⁵ and the state must show strong compelling reasons for its operation.²⁶

Following the above line of decisions, the freeholder requirement of Article 19.01 could be unconstitutional, especially if the "valid state objective" test is applied.²⁷

The constitutionality of Article 19.01 recently came under attack in *Rodriguez v. Brown*.²⁸ The petitioners claimed that Mexican-Americans were excluded from serving as grand jury commissioners. On appeal to the Fifth Circuit, Judge Ingraham pointed out that the requirements for qualification as a grand jury commissioner were directory and not mandatory,²⁹ citing *Cantu v. State*³⁰ and *Bryant v. State*.³¹ In *Cantu*,³² appellant challenged the array of a grand jury on the ground that one of the jury commissioners was not a freeholder.³³ However, after receiving evidence on the point, the court discovered that the commissioner was indeed a freeholder³⁴ and did not have to face the problem. Appellant in the *Bryant*³⁵ case excepted to the denial of the motion to quash the indictment against him based on the charge that one of the grand jury commissioners was not a freeholder.³⁶ The court stated that *Whittle v. State*³⁷ "settles the matter adversely to appellant's

²³ *Id.* at 723. See also Judge Wisdom's dissent in *Rodriguez v. Brown*, No. 28217 (5th Cir., July 2, 1970).

²⁴ *Turner v. Fouche*, — U.S. —, 90 S. Ct. 532, 24 L. Ed.2d 567 (1970).

²⁵ *Id.* at —, 90 S. Ct. at 541, 24 L. Ed.2d at 580.

²⁶ *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969). Accord, *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969).

²⁷ *Turner v. Fouche*, — U.S. —, 90 S. Ct. 532, 541, 24 L. Ed.2d 567, 580 (1970).

²⁸ No. 28217 (5th Cir., July 2, 1970).

²⁹ *Id.* at 9.

³⁰ 141 Tex. Crim. 99, 135 S.W.2d 705 (1940), cert. denied 312 U.S. 689, 61 S. Ct. 617, 85 L. Ed. 1126 (1941).

³¹ 97 Tex. Crim. 11, 269 S.W. 598 (1924).

³² 141 Tex. Crim. 99, 135 S.W.2d 705 (1940), cert. denied 312 U.S. 689, 61 S. Ct. 617, 85 L. Ed. 1126 (1941).

³³ *Id.* at 106, 135 S.W.2d at 709.

³⁴ *Id.* at 107, 135 S.W.2d at 709.

³⁵ 97 Tex. Crim. 11, 260 S.W. 598 (1924).

³⁶ *Id.* at 13, 260 S.W. at 599.

³⁷ 43 Tex. Crim. 468, 66 S.W. 771 (1902).

contention."⁸⁸ The *Whittle* decision says that ". . . it would be productive of such confusion as to produce a *public hardship*" to set aside a jury just because one of the requirements for qualification as a grand jury commissioner is not met.⁸⁹

The discriminatory practices based on property ownership have successfully been attacked; to require a qualification of property ownership for a particular public office or right it must be supported by strong and compelling reasons. Texas has offered no compelling reason and finds solace with the justification that it is a directory, rather than a mandatory, statute. Presently, the cases supporting directory classifications have only appeared where a non-freeholder became a grand jury commissioner believing that he was a freeholder. In effect, the selection of grand jury commissioners, according to the statute, must include the freeholder qualification. If a non-freeholder receives an appointment, the statutory conflict can be resolved by referring to the statute as directory, thus avoiding a "public hardship."

The Texas Legislature recently took a step in the right direction by amending Article 19.08 of the Texas Code of Criminal Procedure by deleting the freeholder requirement as a qualification to serve as a juror. In order to harmonize the process by which the accused is indicted and brought to trial, the archaic requirement in Article 19.01 should follow the same path.

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⁸⁸ 97 Tex. Crim. 11, 13, 260 S.W. 598, 600 (1924).

⁸⁹ 43 Tex. Crim. 468, 473, 66 S.W. 771, 772 (1902) (emphasis added). For an early English decision with a similar holding see *Anon*, 168 Eng. Rep. 747 (1810), where it was discovered that a grand juror was not a freeholder but ruled that he could serve.