Texas Code of Criminal Procedure Requires That Grand Jury Commissioner be a Freeholder.

Robert A. Shivers

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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 19.01 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. One qualification specifically requires that the prospective grand jury commissioner be a freeholder. This exalted stance of the freeholder springs from roots planted in English common law. In early American life "property ownership and payment of taxes were the accepted symbols of community membership and interest." 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." Recently, however, the United States Supreme Court has weakened the freeholder's privileged position. 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.

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." 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. 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." In deciding that appellant was entitled to counsel on appeal,
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

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16 Id. at —, 90 S. Ct. at 542, 24 L. Ed.2d at 581.
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 Turner24 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. State30 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 Bryant35 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. State37 "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).
25 Id. at —, 90 S. Ct. at 541, 24 L. Ed.2d at 580.
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, 260 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." 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.

Robert A. Shivers

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.