# Texas Grand Jury Selection System - Discretion to Discriminate, The

Frederick W. Burnett Jr.

where a state court decree denied a person ownership of property and yet the federal court taxed him on the same property. Such a result is obviously unjust and raises the question of whether or not the state court decree could then be questioned or would still be considered as res judicata in any subsequent state action.

However, on a more practical basis it would appear that although the state court decree can never be considered controlling or binding, it will hopefully be examined closely by the federal judge and "properly regarded" if it appears in line with other decisions of the state courts. If such an examination is not made, it appears that the only recourse would be the obviously difficult recourse of establishing an abuse of discretion by the federal judge.

### IV. Conclusion

The *Bosch* opinion, although phrased in rather narrow language, may have consequences vastly beyond the scope of estate taxation. If it can now be said that *Erie* applies in non-diversity federal jurisdiction any time an issue turns on a determination of state law, many areas such as Admiralty and Bankruptcy may now be subject to the *Erie* doctrine.[35]

In addition, problems will obviously arise due to state court decisions binding on the parties, which are disregarded for purposes of federal taxation. It appears that the only safe method of protecting a person against future adverse tax consequences is to appeal the state court decision to the highest court of the state.

*John J. Kendrick, Jr.*

## The Texas Grand Jury Selection System — Discretion To Discriminate?

Brooks, a Negro, was originally indicted by an all-white grand jury of Van Zandt County, Texas, for the rape of a white woman. Historically, Van Zandt County had never had a Negro serve on either the grand or petit juries despite the trial judges' repeated instructions to the jury commissioners not to exclude jurors because of race.[1] Aware of the high mortality rate of indictments based on similar statistical evidence,[2] the district judge appointed five new jury commissioners, one of whom was a Negro. The new jury commission then proceeded to select sixteen prospective grand jurors, two of whom were Negroes. These two Negroes were among

[35] *Cf.* Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1033 (1953).

[1] Van Zandt County had a population of about 25,000 of which approximately 10 per cent were Negroes.

[2] *E.g.*, Stoker v. State, 331 S.W.2d 310 (Tex. Crim. App. 1960), in which a criminal conviction was reversed and the indictment dismissed because over the past fifty years no Negro had been included in the grand jury list.

the twelve individuals impaneled by the district judge who subsequently reindicted Brooks.

During the trial Brooks contended that the Negro members of the grand jury were intentionally included because of their race and that such inclusion violated his fourteenth amendment right of equal protection under the law. The court denied the motion and Brooks was convicted. Following Brook's exhaustion of state remedies,[3] the federal district court denied his application for writ of habeas corpus,[4] and he appealed to the Fifth Circuit sitting en banc. *Held, affirmed*: In the Texas statutory scheme of selecting grand jurors, purposeful inclusion of two Negroes in the general venire list of sixteen is a justified means of insuring the constitutional requirement that a jury be fairly representative of the community. *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 87 Sup. Ct. 1169 (1967).

## I. Grand Jury Selection and the Fourteenth Amendment

*The Grand Jury Concept* The grand jury is designed to bring to trial persons accused of public offenses upon just grounds and to protect the citizens against unwarranted prosecution, either by the government or by any person moved by private enmity.[5] The grand jury determines whether it is probable that the one accused committed the crime in question, and an affirmative finding will result in the return of an indictment. The cause will then be brought before the petit (trial) jury which determines actual guilt or innocence of the accused.[6] While a trial jury is impaneled to try one case only, the grand jury's life is for a full term of court.[7]

All states having grand juries[8] statutorily prescribe various qualifications for prospective jurors.[9] The Texas statute, representative of the majority, provides in addition to the standard specific requirements that the candidate be of sound mind and good moral character.[10]

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[3] Brooks v. State, 342 S.W.2d 439 (Tex. Crim. App. 1960), *on rehearing*, 342 S.W.2d 439 (1961).

[4] Brooks v. Beto, 241 F. Supp. 743 (S.D. Tex. 1965).

[5] The fifth amendment to the United States Constitution provides: "[N]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The Constitution of the State of Texas reads in part: "and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury. . . ."

[6] The grand jury is regarded as an informing or accusing body rather than as a judicial tribunal. Adams v. State, 214 Ind. 603, 17 N.E.2d 84 (1938).

[7] A term of court in Texas may last from three to six months depending upon the county involved.

[8] It has been held that the states are not required to use a grand jury. Hurtado v. California, 110 U.S. 516 (1884). But if a grand jury is used the same constitutional standards governing petit juries are applied to its selection, and racial discrimination is grounds for reversal, even if there is no complaint regarding the selection of the trial jury. Pierre v. Louisiana, 306 U.S. 354 (1939). However, it has been argued that discrimination in the selection of the grand jury cannot harm a defendant who has been found guilty beyond a reasonable doubt by a fairly selected trial jury. See Cassell v. Texas, 339 U.S. 282, 299-302 (1950) (Jackson, J., dissenting).

[9] The Supreme Court has treated the qualifications for grand and petit jurors as being interchangable.

[10] Tex. Code Crim. Proc. Ann. art. 19.08 (1966). Other states require that the prospective juror be of "good character." Ala. Code tit. 30, § 21 (1959). Virginia requires a variation of most of the above plus the rather ambiguous qualification that a person "be suitable in all respects." Va. Code Ann. § 8-174 (1952). In addition, most states have laws permitting the exclusion from jury lists of certain classes of persons such as lawyers, doctors, ministers and

*The Petit Jury Exclusion Cases* As early as 1880, the Supreme Court in *Strauder v. West Virginia*[11] held that it was a denial of equal protection of the laws for a state to try a Negro defendant before a jury from which all members of his race had been excluded by statute. One year later the Court in *Neal v. Delaware*[12] extended the principle of *Strauder* and held that discrimination against Negroes by officers charged by statute with the selection and summoning of jurors is likewise a violation. On the other hand, it was held quite early that a defendant in a criminal case has no constitutional right to be indicted or tried by any particular jury, or by a jury composed in part of members of his race.[13]

In 1935 the Supreme Court held that the defendant made out a prima facie case of discrimination by showing that although Negroes comprised seven and one-half per cent of the total adult male population of Jackson County, Alabama, no Negroes in the recollection of witnesses had ever served on either the grand or petit jury.[14] Under this "exclusion rule" the state has the burden of showing that the exclusion does not flow from discrimination,[15] and the jury commissioner's general denial of discrimination is insufficient to rebut the defendant's strong prima facie case.[16] This presumption is useful to a defendant in cases of total exclusion but when the exclusion from the jury list is less than blatant, problems of proof become considerable. Thus, in *Swain v. Alabama*,[17] the defendant pointed out that no Negroes had ever served on a petit jury in Talladega County, Alabama. However, there were two Negroes on the grand jury which indicted Swain for the rape of a white woman, and since 1950 there had been an average of ten to fifteen per cent Negroes on the jury list, as compared with twenty-five per cent in the community at large. The Court

educators. This is generally held to be permissible because of the nature of their respective occupations. See, *e.g.*, Rawlins v. Georgia, 201 U.S. 638 (1906). For a typical list of exemptions, see IDAHO CODE ANN. §§ 2-203 to 2-205 (1948).

[11] 100 U.S. 303 (1879).

[12] 103 U.S. 370 (1880).

[13] *E.g.*, in Martin v. Texas, 200 U.S. 316 (1906), the Court found that the mere absence from a grand or petit jury of members of the defendant's race is insufficient of itself to show discrimination against the defendant in the selection of the jury. See also Bush v. Kentucky, 107 U.S. 110, 117 (1882); Virginia v. Rives, 100 U.S. 313 (1879). *Cf.*, Akins v. Texas, 325 U.S. 398, 403 (1945), ("[V]ariations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued.") It has also been generally assumed that standing to object to racial discrimination is restricted to members of the excluded class. Alexander v. State, 160 Tex. Crim. 460, 274 S.W.2d 81, *cert. denied*, 348 U.S. 872 (1954) (a white man cannot complain of the exclusion of Negroes from his jury); State v. Jones, 44 Del. 372, 57 A.2d 109 (1947) (a man does not have standing to object to the exclusion of women). On the other hand, in recent cases a number of courts have repudiated this rule. See, *e.g.*, State v. Lowry, 263 N.C. 536, 544, 139 S.E.2d 870, 876 (1965). See generally Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 920-23 (1965).

[14] Norris v. Alabama, 294 U.S. 587 (1935). The Court held that this single fact made out a "prima facie case of the denial of equal protection which the Constitution guarantees." *Id.* at 591.

[15] See Avery v. Georgia, 345 U.S. 559, 562-63 (1953).

[16] *E.g.*, Eubanks v. Louisiana, 356 U.S. 584 (1958). Nor is it sufficient that the commissioners simply do not know any qualified Negroes. Hill v. Texas, 316 U.S. 400, 404 (1942); Smith v. Texas, 311 U.S. 128, 132 (1940).

[17] 380 U.S. 202 (1965).

stated that this percentage did not show "purposeful discrimination based on race alone."[18]

*The Selection of Grand Jurors* The most recent legislative approach, in many states other than Texas, to insure non-discriminatory selection of grand and petit jurors is a lottery wheel containing names of hundreds of potential jurors.[19] Assuming that the large list of names contained in the lottery wheel is truly representative of the community, a charge of discrimination in selection of jurors would be unavailable to a defendant because any given selection is purely a matter of mathematical chance.

In direct contrast is the Texas system, in which jury commissioners have almost unlimited discretion to choose a small list of names from which the grand jury is impaneled.[20] The district judge selects not less than three nor more than five qualified persons from different portions of the county to serve as jury commissioners.[21] The judge instructs them on their duties[22] and administers a comprehensive oath.[23] The district clerk furnishes the commissioners a list of names of those who appear from the records of the court to be exempt or disqualified from service on the grand jury. He also furnishes the last tax assessment roll of the county. With this information before them, the commissioners are free to select sixteen[24] prospective grand jurors who meet broadly defined statutory standards.[25] The names of those selected are written down in numerical sequence, sealed in an envelope, and delivered to the district judge in open court.[26] When the list is opened an inquiry is held as to their qualifications and the first twelve who are qualified are impaneled as the grand jury.

In 1942, a series of cases began involving the grand juries of Dallas County, Texas. In the first of these cases[27] the Supreme Court reversed the conviction of a Negro because Negroes had been totally excluded from grand juries for sixteen years (including the grand jury which indicted the defendant). The Court rejected as inadequate the commissioners' defense that they were not acquainted with any qualified Negroes. Following this decision Dallas County jury commissioners began to seek out at

[18] The Court also rejected the petitioner's claim that the prosecution had used its peremptory strikes to exclude Negroes. The Court held that there is a presumption that the prosecution used its peremptory challenges to secure an impartial jury and that this presumption is not overcome by allegations that in the case at hand, all Negroes were removed because they were Negroes. *Id.* at 222. *Cf.*, Comment, 52 VA. L. REV. 1157 (1966).

[19] LA. REV. STAT. 15:180 (1950) was amended by LA. CODE CRIM. PROC. art. 411 (1967) to provide that the names of jurymen should be drawn "indiscriminately and by lot" from the general venire list in an effort to avoid charges of systematic inclusion or exclusion.

[20] See notes 44 and 45 *infra* and accompanying text.

[21] The qualifications for jury commissioner are:

1. Be intelligent citizens of the county and able to read and write the English language;
2. Be qualified jurors and freeholders in the county;
3. Have no suit in said court which requires intervention of a jury;
4. Be residents of different parts of the county;
5. The same person shall not act as jury commissioner more than once in the same year.

TEX. CODE CRIM. PROC. ANN. art. 19.01 (1966).

[22] TEX. REV. CIV. STAT. ANN. art. 336 (1964).

[23] TEX. REV. CIV. STAT. ANN. art. 335 (1964).

[24] In 1965 the number of prospective grand jurors was increased from sixteen to twenty. TEX. CODE CRIM. PROC. ANN. art. 19.06 (1966).

[25] See note 10 *supra* and accompanying text.

[26] TEX. REV. CIV. STAT. ANN. art. 340 (1964).

[27] Hill v. Texas, 316 U.S. 400 (1942).

least a few qualified Negroes to serve on grand juries. This practice was soon tested in the courts by a Negro defendant who alleged that the jury commissioners discriminated by limiting the number of Negroes chosen for service on the grand jury to one per jury.[28] The Supreme Court affirmed the conviction on the grounds that the commissioners were making a good faith effort to comply with the constitutional mandate.[29] However, the Court was quick to rebuff the Dallas jury commissioners when they accepted this implied invitation to practice "proportional limitation," *i.e.*, limiting the representation on the grand jury to the same ratio as the Negro population of the community bears to the entire population. In *Cassell v. Texas*[30] the Court reversed the conviction of a Negro who had been indicted by an all-white grand jury. Primarily the decision emphasized that the commissioners had failed "in their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color."[31] However, the court added a condemnation of proportional limitation as being violative of the Constitution.[32]

The only logical nexus unifying these Dallas County cases is that the jury commissioners must act in good faith, and their "basis of selection cannot consciously take color into account."[33] Yet in each case the Court avoided a decision on the constitutionality of the Texas statutes which grant broad discretion to the jury commissioners.

The confusion created by the Supreme Court in failing to articulate meaningful standards for the courts and other public officials to follow is evidenced by two recent Fifth Circuit cases. In *Collins v. Walker*,[34] after several hearings and opinions, the court, relying on *Cassell*, held that it was a denial of equal protection to a Negro to try him upon an indictment returned by a grand jury on which six Negroes were deliberately included because of race. Unfortunately, after declaring purposeful inclusion unconstitutional, the court failed to explain how a relatively small list of prospective grand jurors (sixteen) could be selected so as to be truly representative of the community without consciously taking race into account.[35]

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[28] Akins v. Texas, 325 U.S. 398 (1945).

[29] During the five and one-half years after *Hill* there were twenty-one grand juries in Dallas County. Out of these, a single Negro appeared on seventeen grand juries and none on the remaining four. In the *Akins* case there was uncontroverted testimony by three jury commissioners that they had no intention of placing more than one Negro on the grand jury drawn by them. *Id.* at 409. In a strong dissent, Mr. Justice Murphey stated that "clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce." *Id.* at 410.

[30] 339 U.S. 282 (1950).

[31] *Id.* at 289.

[32] *Id.* at 286-87.

[33] *Id.* at 295 (Frankfurter, J., concurring).

[34] 335 F.2d 417 (5th Cir. 1964), *cert. denied*, 379 U.S. 901 (1964).

[35] Judge Jones, concurring in the result, pointed out:

> The basis of selection cannot consciously take color into account . . . yet in the general venire list, it may be that 'the jury commissioners have an affirmative duty to include qualified Negroes in that list.' Thus it seems that perhaps Negroes must be included in the general venire list, although it will be assumed that this is not to be done purposefully lest the Constitution be infringed.

335 F.2d at 421.

## II. BROOKS v. BETO

The inconsistencies in *Collins* recently led the Fifth Circuit to overrule it in *Brooks v. Beto*.[36] The explanation given by the court was that *Cassell* had condemned only proportional limitation, not purposeful inclusion. The Court noted that the language of *Cassell* so heavily relied on by the majority in *Collins* was merely dictum[37] and the case was actually decided on other grounds.[38] Instead, the *Brooks* court held that by purposefully including two Negroes the jury commissioners had fulfilled their duty. The court reasoned that the Constitution requires:

> (a) a fair cross section and (b) to attain that cross section, jury selectors must become acquainted with that community's human resources, which is to say, significant elements—significant racial elements—of that community. That cannot be done without a conscious recognition of that element's existence.[39]

However, the court did not explain how fair representation could be achieved through conscious inclusion without the result being proportional limitation. Assuming discretionary selection as found in the Texas jury selection system is constitutional and purposeful inclusion is an acceptable aspect of this system, it follows that the jury commissioners can stop including at some point in the selection. If the point reached is consistently the same as the proportion of Negroes in the community, it amounts to proportional limitation forbidden by *Cassell*.[40] If consistently higher, other groups (*i.e.*, whites) would clearly have an equal protection claim.

Perhaps the real reason for the demise of *Collins* is reflected in the embarrassing position into which the Fifth Circuit had adjudicated itself. The circuit conceded the difficulty of the position when it lamented ". . . what was Judge Dawson to do?"[41] If *Collins* was correct law, purposeful inclusion would be invalid. On the other hand, statistical evidence of total exclusion of Negroes from a grand jury has been held to make out a prima facie case of discrimination.[42] Therefore, a county such as Van Zandt which statistically practiced exclusion apparently would be unable to bring a valid indictment against any criminal even if the grand jury was actually chosen without discrimination. In his concurring opinion in *Brooks*, Judge Wisdom accurately described the majority's verbal gymnastics while trying to extricate itself from this contradiction when he termed the opinion an "eloquent apologia."[43]

## III. CONCLUSION

Exclusion, proportional limitation, and purposeful inclusion are all

[36] 366 F.2d 1 (1966).
[37] In *Cassell*, Mr. Justice Reed wrote: "Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither *inclusion* or exclusion because of race." 339 U.S. at 287. (Emphasis added.)
[38] See note 31 *supra* and accompanying text.
[39] 366 F.2d at 14.
[40] See note 32 *supra* and accompanying text. See also Note, 52 VA. L. REV. 1069, 1104 (1966).
[41] 366 F.2d at 9.
[42] *E.g.*, Norris v. Alabama, 294 U.S. 587 (1935).
[43] 366 F.2d at 26.

symptoms of the same basic evil—excess discretion. This excess, manifesting itself in the form of discrimination, is no more than a substitution of the jury commissioner's own subjective standards for the supposedly objective qualifications established by statute. That a juror "must be of sound mind and good moral character"[44] is not even arguably susceptible of objective qualification. This is little more than an invitation to the jury commissioner to pick and choose those persons whom he *personally* considers to be qualified, as determined by his own standards. As pointed out by the Court in *Smith v. Texas*:

> Here, the Texas statutory scheme is not in itself unfair; but by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable.[45]

It cannot be denied that the Texas statutory method is itself designed to bring the human factor of discretion and carefully considered choice into the mechanics of jury selection. And it is in the administration of such discretionary statutes that challenges of discrimination most frequently arise. Instead of seizing the opportunity to strike down the Texas jury selection system at the place where excess discretion can lead to abuse, the court elected to continue attacking this constitutional dilemma on an insufficient case-by-case basis. The discretion of the jury commissioners to fashion sub silentio the qualifications which jurors must possess and their power to select the individuals to whom these standards will apply should be eliminated. It is submitted that Texas should adopt a lottery system by which both grand and petit jurors are selected purely upon mathematical chance.[46] Names to be drawn from the jury wheel should be taken from a large list which would insure fair community representation. Voter registration lists would not seem objectionable and have in fact been approved as sources of jury lists by a number of federal courts.[47] By adopting such a non-discriminatory system, many of the frequent cries of discrimination would be silenced.

*Frederick W. Burnett, Jr.*

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[44] TEX. CODE CRIM. PROC. art. 19.08(3) (1965).

[45] 311 U.S. 128, 130-31 (1940).

[46] In his concurring opinion in Cassell v. Texas, 339 U.S. 282, 291 (1949), Mr. Justice Frankfurter states: "Assuming that the grand jury pool fairly enough reflects the racial composition of the community, there is no basis for a claim of constitutional discrimination if without design it comes to pass that a particular grand jury has no representation of a particular class." This statement would seem most apropos to a lottery selection system.

[47] See, *e.g.*, Gorin v. United States, 313 F.2d 641, 644 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963).