5-1-2016

SYSTEMATICALLY SHUTTING DOORS: THE KEY MAN SYSTEM IN TEXAS GRAND JURIES

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TEXAS GRAND

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by

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Presented to the Faculty of the Honors College of

The University of Texas at Arlington in Partial Fulfillment

of the Requirements

for the Degree of

HONORS BACHELOR OF ARTS IN POLITICAL SCIENCE

THE UNIVERSITY OF TEXAS AT ARLINGTON

May 2016

ACKNOWLEDGMENTS

I would like to thank Dr. Joseph Ignagni for his helpfulness and patience through his mentoring of me in not only the process of writing this thesis, but also much of my undergraduate career. His passion for teaching the law to students sparked in me a similar passion to gain an understanding and appreciation for the law that will hopefully one day be close to his own.

November 20, 2015

ABSTRACT

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The University of Texas at Arlington, 2015

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Grand juries, while currently not a central part of the American justice system, are still in use in many states. However, the regulation of state grand juries has been quite meager, to say the least. In Texas specifically, the use of the "key man" jury selection technique was used for grand juries until June 2015. This technique can be easily used to discriminate against minorities during the grand jury selection process, and has been shown to do just that for some time. Through analysis of court cases dealing with Texas' use of the key man system, examination of the ways in which the Supreme Court arrived at its holdings, and evaluation of these holdings in the light of holdings inother related cases, I will explain why the key man system has stayed in use for as long as it has in Texas and why it was only recently retired.

TABLE OF CONTENTS

LIST OF TABLES

CHAPTER 1

INTRODUCTION

"The grand jury has been praised as the greatest instrument of freedom known to democratic government and a bulwark against oppression" (as cited in Fukurai, 2001, pg. 9). "In time of peace, no citizen is able to perform a higher duty than to render grand jury service" (MacCorkle, 1966, pg. 4). Both of these statements sound quite impressive indeed. Unfortunately, if one were to ask the average person on the street what the purpose of a grand jury is, very few would be able to give the correct response. Most think that it is simply a more important version of the petit jury that actually decides guilt. Even in the case where the function of the grand jury is understood, its use is extremely controversial (Fukurai, 2001, pg. 9). One might find the lack of understanding regarding grand juries to be strange, as they do not perform very complicated functions. Grand juries perform two basic functions, the first of which is to screen a prosecutor's case to determine whether or not there is enough information to bring an indictment (and thus begin a trial). The second function of grand juries is to assist the prosecutor in gathering information regarding a potential indictment (Fukurai, 2001, pg. 9).

There are quite a few sources of contention surrounding the use of grand juries. One is that grand juries do not tend to be an accurate representation of the jurisdiction from which they are drawn, and instead are usually made up of community elites (Erlanger, 1970, pg. 346-56). Also, many studies have shown that grand juries tend to simply be "rubber stamps" for the prosecutor when he or she decides to pursue the prosecution of

certain individuals (Clark, 1975). The description of the grand jury as a "bulwark against oppression" quoted earlier might be more idealistic than realistic. Instead, the grand jury is seen by many as "a 'sword' in the hands of the prosecutors in the fight against crime" (Fukurai, 2001, pg. 9). Could the protectionary role of the modern grand jury be too weak while the role as a tool of the prosecution be too strong? Many elements of the grand jury have a solid possibility of contributing to these subjects of contention.

The institution of the grand jury has been in place for quite some time now, but has obviously had many different evolutions and incarnations. Historians believe the first precursor to the modern grand jury dates back to 1166 in the form of King Henry II's Assize of Clarendon (Frankel & Naftalis, 1977, pg. 6). The idea was to have local Englishmen act on their personal knowledge of goings-on in their communities and report their investigations back to the king (Brenner, 1995, pg. 68). This early form of the grand jury was not exactly concerned with protecting the rights of citizens of the king, but instead was a vehicle for the monarch to enforce whatever law he chose to make (Frankel & Naftalis, 1977, pg. 7). Thankfully, the grand jury did develop past this stage of being used for exploitation. In fact, the right to have a grand jury decide whether or not charges should be brought against an individual was important enough to be included in the Magna Carta (Brenner, 1995, pg. 69). Instead of a simply an instrument of the crown, it was changing to be seen as more of a protection of the individual from the state. However, it was not until 1681 that a grand jury exerted its influence to protect against over-zealous accusations. This was done in the cases of Anthony, the Earl of Shaftesbury, and one Stephen Cooledge. Both of these men were Protestants against King Charles II's desire to reform the Catholic Church in England, and the king sought to have both of them indicted

by the grand jury for treason. He also wanted the grand jury proceedings to be held in public, so as to gain a greater amount of control over them. However, the grand jurors refused to bow to the king's wishes. They heard the evidence in private and then refused to indict, contrary to the desires of the crown (Frankel & Naftalis, 1977, pg. 9).

The grand jury was brought to the American colonies by British immigrants, and the institution generally acted to protect citizens from government oppression (Brenner, 1995, pg. 70). The American Revolution did very little to change the grand jury in the colonies; in fact, the grand jury remained relatively the same until the late 19th century (Brenner, 1995, pg. 71). At this time, the grand jury came increasingly under the control of the prosecuting attorney (Brenner, 1995, pg. 71). Federal grand juries are guaranteed by the 5th amendment to the Constitution, but many states provided ways for the grand juries to be abolished in their state constitutions as they saw this late 19th century shift in grand jury usage (Brenner, 1995, pg. 72).

The purpose of this study is to analyze the use of the key man jury selection technique in Texas grand juries. This analysis will be done by first exploring the negative effects of grand jury discrimination and establishing the why it is a problem. Afterwards, cases dealing with grand jury discrimination will be reviewed. The majority of these cases will be based in Texas; however, some out-of-state cases will be covered when they establish an important concept tied to Texas grand jury discrimination cases. The case review will be followed by a brief development of a general theory as to why the Texas key man system remained in place for such an extended period of time.

CHAPTER 2

DISCRIMINATION: WHY IS IT AN ISSUE?

2.1 The Key Man System

The use of the key man jury selection technique in Texas grand juries up until this year has definitely served as a point of controversy (Tex. H.B. 2150, 84th Leg., R.S., 2015). Federal law requires all jurors for grand and petit juries alike to be selected at random, but that stipulation does not apply to grand juries used in the states (Fukurai, 2001, pg. 16). For some time, Texas used a grand jury selection that method could be easily exploited in order to disenfranchise minorities. Normally referred to as the "key man" system, this method allows the judge to appoint jury commissioners and in turn those jury commissioners select the members of the grand jury (MacCorkle, 1966, pg. 5). The only requirements for these jury commissioners are that they must be intelligent citizens of the county and be able to read and write the English language, be qualified jurors and freeholders in the county, have no suit in said court which requires the intervention of a jury, and be residents of the different portions of the county. Also, the same person may not act as a jury commissioner more than once in the same year (as cited in MacCorkle, 1966, pg. 5).

The law also requires there to be an absence of racial discrimination in the selection of jury commissioners and grand jurors (MacCorkle, 1996, pg. 5). This does not seem to always be the case, as we will later see. Aside from these stipulations, the amount of discretion allowed to judges when it comes to selecting the jury commissioners is

enormous. It is not very difficult to see where a propensity for discrimination could arise with this system.

2.2. Issues with Discrimination on Grand Juries

Aside from a violation of the law, why would grand jury discrimination be detrimental to the society in which it is occurring? Hiroshi Fukurai of the University of California at Santa Cruz has done some enlightening research on that subject. Taking evidence from past Supreme Court cases and jury studies, Fukurai has found that grand jury practices enabling discrimination reinforce racial stereotypes (2001, pg. 10). The belief many people have that racially homogeneous grand juries will be biased against other races might not necessarily be true, but it can potentially take away from the confidence citizens have in the indictments or verdicts resulting from actions taken by the institution (Fukurai, 2001, pg. 11). The grand jury itself is hurt by discrimination-enabling selection practices as they have been shown to limit the fact-finding capabilities of the jury. Jurors of different races have been shown to have the propensity to ask questions of differing natures, and having only a racially homogeneous jury removes the likelihood of those questions being asked (Fukurai, 2001, pg. 11). Minority witnesses also have been shown to be more likely to be intimidated during testifying when the entire grand jury is white (as cited in Fukurai, 2001, pg. 11). On a more practical note, an entirely white grand jury is prone to have difficulty communicating with those of different cultures (Fukurai, 2001, pg. 11).

There is also a matter of perceived hypocrisy if discriminatory grand jury selection processes are in place. The justice system attempts to eliminate discrimination within other institutions, and if the courts refuse to apply the same standard to themselves that they

apply to others then there is danger of the "jeopardy of their [the court's] moral authority" (Fukurai, 2001, pg. 11). Justice Douglas even wrote in an opinion that discrimination in grand jury selection procedures lead to "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (*Ballard v. United States*, 1946, pg. 195).

Psychologically, participation in jury proceedings has been found to have a profoundly positive effect on minority persons (Fukurai, 2001, pg. 12). Dale Broeder of Duke Law School did a study in which the perceptions of black people concerning the jury system were analyzed. In this study, the feelings of black of a black man regarding his experience with jury service are worth noting:

> "I was extremely proud… It was… one of the proudest moments of my life. Ever `since I was a little kid in [one of the Southern states]…, I've had a desire to serve. Of course, people with dark skin are not permitted to serve… down there. I've read many books on the jury and when I was first called to serve I went to the library and read up on the jury system and what a fine institution it is. I think it's really a wonderful way in which citizens regardless of their color can participate in the administration of justice. When I got my summons… I got a sense of really belonging to the American community… it was a very proud moment when I opened my letter and found that I had been… selected to serve on a federal jury" (Broeder, 1965, pg. 26).

Previously, the dominance of the prosecutor in grand jury proceedings was mentioned as part of the motivation behind the removal of grand juries from state constitutions. Interestingly enough, it has been found that racially homogeneous grand juries are less likely than racially diverse grand juries to oppose the recommendations of prosecutors (Fukurai, 2001, pg. 12). Racially homogeneous grand juries also tend to have a propensity to make decisions more quickly than racially diverse grand juries, which could lead to hasty mistakes in judgment (Fukurai, 2001, pg 12). Justice Marshall observed of

the issue that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience the range of which is unknown, and perhaps unknowable" (*Peters v. Kiff*, 1972, pg. 503).

C.K. Rowland of the University of Texas performed a series of studies regarding the subject the relation between grand jury composition and performance. Specifically, he sought to find to "what extent is variance in grand jury composition related to variance in grand jury performance?" (Rowland, 1979, pg. 323). His study was based on the population of Harris County, Texas (this is where the city of Houston is located) between 1972 and 1975. These juries were shown to have trends typical of national patterns of homogeneous jury composition and compliance with the prosecution, and for that reason this research is relevant to our exploration of the negative results of discriminatory grand jury selection procedures (Rowland, 1979, pg. 324). The indicator of grand jury performance chosen in the study was the propensity of the jury to return no-bills (non-indictments). This is because no-bill propensity is the "most common indicator of grand jury independence found in studies of grand jury performance" (Rowland, 1979, pg. 325). This is most likely due to the fact of the normal influence of the prosecutor. The results of the study are found in the table below:

Table 2.1: Influence of the Prosecutor (Rowland, 1979, pg. 326)

Relationship between Variance in Percentage of No Bills and Grand Jury Heterogeneity ($N = 38$)

	Bivariate Correlation	Partial Correlation	Contribution to Explained Variance
SES	.57	.57	.31
Race	—.37	—.27	.07
Age	.25	.22	.05
Sex	.23	.14	.02
			$R^2 = .45$

The factors measured in a comparison of their varying effects on the percentage of no-bills issued by the grand jury were socioeconomic heterogeneity (SES), race, age, and sex. According to the findings form this study, 45% of the variance of the grand jury's likelihood to return a no-bill is related to the heterogeneity of the jury. While the greatest contribution to this variance is socioeconomic heterogeneity, race is also a significant factor.

Normally grand juries are supposed to carefully consider the evidence presented to them in order to determine whether or not an indictment should be issued. This only makes sense; they are determining whether or not criminal charges should be pursued against individuals. These charges could change their lives even if they are eventually cleared of any wrongdoing. In the event of an over-zealous district attorney, the grand jury should be a shield for citizens. But how can the grand jury be much of a shield if it takes an extremely small amount of time to deliberate? Surprisingly, the Harris county grand juries, having a typical homogeneous composition, spend on average five minutes per case (Carp, 1975, pg. 856). This is deeply disturbing, especially considering that the average of five minutes includes the assistant district attorney's summary of the case and his personal recommendation as to how the grand jury should proceed (Carp, 1975, pg. 856).

It has been made clear that the composition of the grand jury is an important factor in its performance and that grand jury selection techniques that have a propensity to create more homogeneous jury compositions by discriminating against minorities can be harmful. This harm can be through a negative impact to the grand jury's effectiveness, contribution to simple cooperation with the district attorney, and the public's perception of the grand jury as well as the justice system in its entirety. Knowing this, why was Texas' key man system been allowed to stay in use for as long as was? An analysis of Supreme Court cases dealing with the grand juries of Texas and related subjects will shed light on the subject.

CHAPTER 3

CASE ANALYSIS

3.1 *Smith v. Texas*

The first case to be examined is that of *Smith v. Texas* (1940). Smith is a fairly straightforward and simple case, but it establishes an important principle for future cases. In the case, a black man was indicted by a grand jury in a county where black men were systematically excluded from grand jury service solely on account of their race. Justice Black wrote that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" (*Smith v. Texas*, 1940, pg. 130). The grand jury that indicted Smith was found to not be representative of his community, and thus Smith's indictment was found to be in violation of the Fourteenth Amendment of the Constitution's equal protection clause. Another important holding from Smith is found in the following quote: "[t]he fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough." (*Smith v. Texas*, 1940, pg. 130). This is important when considering that Texas law does state that there can be no racial discrimination in the selection of jury commissioners or grand jurors (MacCorkle, 1966, pg. 5). Simply the fact that the law says there may not be any racial discrimination in jury selection processes is not enough to satisfy the Supreme Court that there is indeed no racial discrimination in said processes.

3.2 *Hill v. Texas*

Hill v. Texas (1942) is more complicated than *Smith*. Two years after *Smith*, this case also involves a violation of the Fourteenth Amendment's equal protection clause. The petitioner was indicted for rape by a grand jury in Dallas County, Texas. Black individuals had been systematically excluded from grand jury service in Dallas County by jury commissioners and other court staff solely due to race. As a result, the petitioner filed a motion to have the indictment issued by the grand jury squashed due to Fourteenth Amendment equal protection violations. Lower courts refused to squash the indictment as they believed that petitioner Hill had not sufficiently proved that blacks were excluded from the grand jury strictly due to their race. In other words, the lower courts believed he had not shown that blacks were not excluded from grand jury service simply due to lack of qualifications for jury service. The petitioner had made a *prima facie* case of discrimination on the grand jury, assuming that the clear absence of blacks having ever been on a grand jury in Dallas County would be enough for the courts to recognize a violation of Fourteenth Amendment rights. However, this discrimination by Dallas County grand juries had occurred for about 16 years (*Hill v. Texas*, 1942, pg. 403). Justice Black wrote in *Smith v. Texas* that "Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service" (1940, pg. 131). Justice Stone believed that this precedent set by *Smith* applied to the *Hill* case. *Neal v. Delaware* was also referenced, specifically this quote: "It was, we think, under all the circumstances, a violent presumption which the State court indulged that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those

officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries" (1880, pg. 397). According to Justice Stone, the same "violent presumption" made by the State court of Delaware was made by the State courts of Texas. The Court assumed that if there was any other evidence contrary to the *prima facie* case of discrimination made by the petitioner, it would have been mentioned by the State. As it was none was brought up, the Court found that the State failed to disprove the petitioner's case of *prima facie* discrimination in the grand jury selection and thus found a violation of the Fourteenth Amendment equal protection clause.

3.3 *Akins v. Texas*

Continuing chronologically, *Akins v. Texas* (1945) is the next case important to our analysis of discriminatory grand jury selection procedures in Texas. Like *Hill*, this case originated in Dallas County. The petitioner was convicted of murder with malice and was sentenced to death. On appeal, the petitioner (who was black) claimed he had been discriminated against under the due process and equal protection clauses of the Fourteenth Amendment. A similar *prima facie* case of discrimination like the one in *Hill* was argued here; the grand jury commissioners were accused of purposefully limiting the number of black jurors on the grand jury that indicted the petitioner. Justice Reed reaffirms the findings of both *Hill* and *Smith* that discrimination in the selection of a grand jury is indeed a Fourteenth Amendment violation. However, Justice Reed is more hesitant to label a lack of black members on a grand jury as a racial discrimination. He states: "It cannot be lightly concluded that officers of the courts disregard this accepted standard of justice" (*Akins v. Texas*, 1945, pg. 401). The "accepted standard of justice" here is referring to the fact that racial discrimination is illegal in grand jury selection. Justice Reed also makes specific

mention of how much latitude the jury commissioners are allowed with respect to selecting the members of the grand jury. He does still affirm its validity, though. An important principle mentioned in this case is that "[f]airness in [grand jury] selection has never been held to require proportional representation of races upon a jury" (*Akins v. Texas*, 1945, pg. 403). This principle was found in the case of *Virginia v. Rives* (1880) in which the petitioner specifically requested that one-third of the grand jury be composed of black jurors. Justice Strong reiterated the right of the petitioner to have a grand jury that has not been discriminatorily selected based on race. Afterwards, he states that nowhere is the right for the petitioner to specifically have a "jury composed in part of colored men" (*Virginia v. Rives*, 1880, pg. 323). In other words, while grand juries cannot be selected using discriminatory practices, there is also no guarantee that a portion of the grand jury will be of the same race as a potential defendant. Interestingly enough, *Rives* was cited in a dissenting opinion in *Neal v. Delaware*. Chief Justice Waite was of the opinion that the holding in Rives completely destroyed any case of *prima facie* discrimination that could be made before the Court (*Neal v. Delaware*, 1880, pg. 398). While this might indeed seem like a logical argument, that was not the opinion of the majority of the Court.

Based the holdings found in *Rives* and cases similar to it, Justice Reed did not find sufficient evidence of a Fourteenth Amendment violation in *Akins v. Texas*. "Purposeful discrimination is not sustained by showing that, on a single grand jury, the number of members of one's race is less than that race's proportion of eligible individuals" (*Akins v. Texas*, 1945, pg. 403). The Court also interviewed the various jury commissioners for petitioner Akins' case. Not surprisingly, the commissioners completely denied having any sort of racially discriminatory bias when selecting the grand jurors. The Court accepts the

word of the commissioners as evidence in the case and refuses to "believe that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list" (*Akins v. Texas*, 1945, pg. 407). The Court found it unnecessary to address the issue of whether or not "purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles [sic] is invalid under the Fourteenth Amendment" (*Akins v. Texas*, 1945, pg. 407). The Court is moving away from the acceptance of *prima facie* cases of discrimination in grand jury selection procedures, and it is at the setting the proverbial bar much higher for a *prima facie* case of discrimination in grand jury selection procedures to be made. Of the cases we have analyzed in Texas so far, this is the first that did not result in a victory for the petitioner alleging discrimination.

3.4 *Cassell v. Texas*

The next case dealing with potentially discriminatory grand jury selection practices in Texas is *Cassell v. Texas* (1950). The petitioner in this case was charged with murder, similar to many of the earlier cases that have analyzed. After his conviction, he appealed the decision on the basis that the grand jury that indicted him was comprised solely of white men. Also like previous cases, petitioner Cassell believed his Fourteenth Amendment rights of equal protection and due process to have been violated by this grand jury. He claimed that the Dallas County jury either eliminated blacks from "the list of grand jurymen either because of deliberate limitation by the Dallas County jury commissioners, or because of failure by the commissioners to acquaint themselves with available Negroes" (*Cassell v. Texas*, 1950, pg. 283). The Court set accepted certiorari to determine the veracity of these claims. The Court again affirmed the approval of the key man jury selection technique

and focused on the results of its use, like in previously observed cases. Instead of actually attacking the system of selection, the petitioner in this case attacked the particular manner in which the selection was done by the jury commissioners.

The Court rejected the *prima facie* argument of discrimination as they had done in *Atkins v. Texas*. Analysis of grand juries between the period of June 1, 1942, and November 1947 (when the petitioner in Cassell was indicted) was used by the Court in their rejection of the *prima facie* argument. During this time, 6.7% of the grand jurors were black. However, at this time there was a poll tax in effect. One of the qualifications for an individual to be a member of the grand jury was to be eligible to vote. This particular method of disenfranchising minorities was not challenged by the petitioner in this case, and as is such was not addressed by the Court. The percentage of black individuals actually eligible for grand jury service was extremely similar to the actual percentage of grand jurors that had been chosen during the observed time period, and that fact was the main reason for the Court's rejection of the petitioner's *prima facie* discrimination argument (*Cassell v. Texas*, 1950, pg. 285).

The other argument made by the petitioner in Cassell was that after the holding from Hill was released, the jury commissioners simply made it policy to ensure they selected not more than a single black juror on a grand jury. The result of *Akins* in Dallas County was purported to have been interpreted to mean that blacks could indeed be discriminated against with regards to grand jury selection as long as the discrimination allowed for the number of blacks on the grand jury to be proportionally equal to the number of blacks eligible for grand jury service. The Court clarified that "proportional racial limitation is therefore forbidden," in the event that there indeed was any confusion on the

matter by Dallas County (*Cassell v. Texas*, 1950, pg. 287). This was not the matter that the Court considered when determining that racial discrimination was a factor in Cassell's indictment, though.

The grand jury commissioners' testimony was a key part in determining the Court's holding in this case, while it was only mentioned as a bit of an aside in *Akins v. Texas*. When asked why there were no blacks on the list of potential grand jurors that they had selected, the jury commissioners stated that none of the black people they knew were eligible for grand jury service. However, the Court did not take this as a reasonable response to disprove a case of potential discrimination in the grand jury selection process. In response to the statements of the jury commissioners, the Justice Reed wrote "When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination" (*Cassell v. Texas*, 1950, pg. 289). Here, responsibility for occurring discrimination in grand jury selection has been specifically placed on jury commissioners. Direct attacks on the key man grand jury selection have not been brought before the Court yet, but with the Court itself fingering jury commissioners and telling them to perform their jobs in a better manner could possibly lead to the entire key man system being questioned in later court cases.

3.5 *Hernandez v. Texas*

Hernandez v. Texas (1954) is the first case we will be analyzing that deals with people of Mexican decent as opposed to those of African-American decent. Yet another murder was the crime our petitioner was indicted for by a grand jury. This jury was located

in Jackson County. On appeal, the petitioner argued that Mexican Americans had been systematically excluded from grand and petit jury service, as well as from serving as grand jury commissioners. On account of these alleged discriminatory practices, petitioner Hernandez argued that his indictment by grand jury was in violation of the equal protection and due process clauses of the Fourteenth Amendment. The state of Texas made a rather amusing assertion against the *prima facie* argument of discrimination by the petitioner. That assertion was that the only races available to be considered in the scope of the Fourteenth Amendment were "White and Negro" (*Hernandez v. Texas*, 1954, pg. 477). The Court clarified for the state of Texas that the Fourteenth Amendment is "not directed at discrimination due to a 'two class theory'—that is, based upon differences between 'White' and Negro" (*Hernandez v .Texas*, 1954, pg. 477).

Once the outrageous claim by the State of Texas regarding the Fourteenth Amendment was dealt with, the Justice Warren moved on to the actual substance of the Court's opinion. Again, the petitioner does not challenge the use of the key man system. Nevertheless, Justice Warren does state the fact that the system has been seen to have a potential for abuse with respect to discrimination (*Hernandez v. Texas*, 1954, pg. 478). One of the main burdens that was put on the petitioner for the purpose of proving his claim of *prima facie* discrimination was to show that Mexican Americans were a different class in Jackson County from "whites" (*Hernandez v. Texas*, 1954, pg. 479). This was sufficiently proved by the petitioner. Next, the petitioner needed to show that there indeed was discrimination towards Mexican Americans. Specifically, in order to show that there was a case of *prima facie* discrimination, the petitioner followed a pattern set forth in *Norris v. Alabama* (1935). In that case, it was shown that although there were a substantial amount

of blacks who were qualified for jury service in Jackson County, none had ever served on any grand or petit jury in the county. Petitioner Hernandez did the same in *Hernandez*, except for Mexican Americans. The State of Texas responded to the findings of petitioner Hernandez by presenting the testimony of five jury commissioners. These jury commissioners (like in *Cassell v. Texas*) stated that there had been no discrimination based on race in their selection process. Further, they said that "their only objective had been to select those they thought best qualified" (*Hernandez v. Texas*, 1954, pg. 481). Unfortunately for the State of Texas, the Supreme Court was unconvinced by this testimony from the jury commissioners. Indeed, it seems quite unlikely that it would be admitted during their testimony even if there was discrimination based on race from the jury commissioners. This was most likely the reasoning of the majority opinion in *Hernandez* as well. Justice Warren wrote "it taxes our credulity to say that mere chance resulted in their being no members of this class among the over six thousand jurors called in the past 25 years" (*Hernandez v. Texas*,1954, pg. 482). As is such, a violation of the Fourteenth Amendment due process and equal protection clauses was found and the petitioner's conviction was overturned. In this case, it seems that the Supreme Court is clearly cognizant as to the propensity of the key man system to be used in a discriminatory manner. The Court also seems to be unwilling to accept the word of grand jury commissioners when they state that they do not discriminate when selecting grand jurors, at least in cases where there is evidence of discrimination apparent. The Court seems to be much more wary of Texas grand jury selection procedures, and is probably much more likely to find cases of discrimination when dealing with Texas grand juries as a result.

3.6 *Swain v. Alabama*

Before moving on to the last case we will cover from Texas, there are a few out-of-state cases that are of relevance. The first is *Swain v. Alabama* (1965). The petitioner in this case was indicted by a grand jury in Talladega County, Alabama. The petitioner alleged discrimination in the selection of his grand jury due to both a lack of an adequate amount black persons on the grand jury that indicted him and also on the petit jury that convicted him. Specifically, the prosecution's use of strikes to eliminate the potential black members of the petit solely based on race was alleged. Justice White wrote in the Court's opinion that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge" (*Swain v. Alabama*, 1965, pg. 221-222). While not directly relevant to our analysis of grand jury discrimination, this quote shows that the Court does hold certain procedures in higher regard than the Fourteenth Amendment. This could be something that we see later in our analysis. An important quote from Justice White in the opinion of *Swain v. Alabama* is "[u]ndoubtedly the selection of prospective jurors was somewhat haphazard, and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race" (1965, pg. 209). Also the Court does recognize that there are problematic juror selection procedures in place in different states, the existence of said procedure does not in and of itself equate to discrimination. However, the most important information found in the opinion of Swain is the guide given by Justice White with regards to the percentage of disparity between blacks' representation in the general public of the community and their representation on grand juries that can be used as evidence of

discrimination in selection processes. While a specific percentage of disparity that can qualify to be used as evidence for discrimination is not given, Justice White does state that purposeful discrimination based on race is unable to be proved "by showing that an identifiable group in community is underrepresented by as much as 10%" (*Swain v. Alabama*, 1965, pg. 209). So apparently the disparity between a race's representation in a community and it's representation on grand juries must be at some level above 10%, at least according to Justice White in Swain.

3.7 *Turner v. Fouche*

Turner v. Fouche (1970) was a case that originated from Taliaferro County, Georgia. Georgia used a very similar jury selection system to Texas, with a judge selecting six jury commissioners who in turn select members of the grand jury. One of the periodic duties of a grand jury in Georgia is to select the five members of the school board (*Turner v. Fouch*,1970, pg. 348). This case was a class action suit brought against the county education board, the jury commissioners, and three specific white grand jurors. The allegation was that in Taliaferro County, where about 60% of the population is black, whites were consistently overrepresented and blacks were consistently underrepresented on the grand jury. As is such, it was complained that this grand jury appointed only white members to the county school board. There were particular Georgia constitutional and statutory provisions that allowed for this type of discrimination, and these provisions were directly challenged as well (*Turner v. Fouch*, 1970, pg. 350). As the Court has held so far with regards to Texas' key man system, Georgia's system for selecting grand jurors was not held to be unconstitutional strictly due to the fact that it has a potential to be exploited for the purpose of racial discrimination. A potential of use for discrimination is not enough;

it must be proved that a grand jury selection system is indeed being used for discrimination (*Turner v. Fouche*, 1970, pg. 355).

While Swain did not give a specific percentage of difference between a race's representation in the community and a the race's representation on grand juries that would be adequate to show discrimination, the Court in Turner found a percentage of difference that apparently was enough for intervention. In contrast to the about 60% of blacks in the population of Taliaferro County, only 37% of the individuals on the list from which the grand jury was drawn were black (*Turner v. Fouche*, 1970, pg. 359). The Court found this approximately 23% discrepancy to be substantial enough to warrant intervention. Of the 178 citizens removed from the grand jury list for lack of "intelligence" or "uprightness," 171 of these were black. Justice Stewart wrote "[o]n the record as presently constituted, it is impossible to say that this purge of Negroes from the roster of potential jurors did not contribute in substantial measure to the ultimate underrepresentation" (*Turner v. Fouche*, 1970, pg. 359). The *prima facie* case of discrimination made by the class action suit was not sufficiently overcome by the appellants, and as is such the case was vacated and remanded back to lower courts (*Turner v. Fouche*, 1970, pg. 364). It is most interesting that the 23% difference in representation of blacks in the community versus their representation on grand juries was seen as substantial enough for the Supreme Court to intervene, while it had earlier held that 10% was not substantial enough for Supreme Court intervention (*Swain v. Alabama*, 1965, pg. 209).

3.8 *Alexander v. Louisiana*

The last out-of-state case we will analyze separate from other cases is *Alexander v. Louisiana* (1972). This case originated from Lafayette Parish in Louisiana. Jury

commissioners were utilized in Lafayette Parish, like with the Texas key man system. The petitioner made *prima facie* argument of discrimination given that that blacks were only included on grand jury lists in token numbers and that females were also excluded. Petitioner believed this discrimination was a violation of the due process and equal protection clauses of the Fourteenth Amendment (*Alexander v. Louisiana*, 1972, pg. 626-627). Unlike other cases we have observed, the petitioner in this case did not argue that there had been absolutely no representation of blacks on grand juries in Lafayette Parish. Instead, he argued that "there has been a consistent process of progressive and disproportionate reduction of the number of Negroes eligible to serve on the grand jury at each stage of the selection process until ultimately an all-white grand jury was selected to indict him" (*Alexander v. Louisiana*, 1972, pg. 629). In Lafayette Parish, 21% of the population was black and eligible for jury service. In contrast, only 7% of the final group selection for possible grand jury service was black. In the grand jury venire of the petitioner, the number dropped to 5%. The actual grand jury that indicted the petitioner had no black members (*Alexander v. Louisiana*,1972, pg. 629-630).

In considering the petitioner's argument, the Court stated that there has not been a mathematical standard established as precedent for determining when cases of discrimination are "systematic" (*Alexander v. Louisiana*, 1972, pg. 629-630). We have also seen this absence of a clear directive from the Court in *Swain v. Alabama* and *Turner v. Fouche*. However, the Court does have other evidence of discrimination based on race aside from the discrepancy in the percentage of blacks eligible for jury service and the actual percentage of blacks considered for the grand jury. In questionnaires sent out to potential grand jurors by jury commissioners, racial designation was required. This was

seen by the Court as a clear opportunity for racial discrimination by the jury commissioners (Alexander v. Louisiana, 1972, pg. 630). The most important holding to our analysis of the use of the key man system in Texas is the holding that once a *prima facie* case of discrimination is adequately established, the burden then shifts to the State to disprove said burden. The State can do this by showing that the selection procedures in place are indeed racially neutral in spite of seemingly discriminatory results (Alexander v. Lousiaina, 1972, pg. 631-632). It seems from this case that the Court has a preference to not only use statistical evidence of discrimination when attempting to determine if there has been a Fourteenth Amendment violation during a grand jury selection process. Instead, it could be gathered that the Court prefers to use statistical evidence coupled with other very clear showings of possible racial discrimination in the grand jury selection process.

3.9 *Castaneda v. Partida*

Castaneda v. Partida (1977) is one of the most interesting cases involving grand jury discrimination. The respondent in this situation one Rodrigo Partida, who was indicted by a Hidalgo County, Texas, grand jury for burglary with intent to rape. He claimed there was discrimination in the selection process of the grand jury that indicted him (*Castaneda v. Partida*, 1977, pg. 485). In other words, the key man jury selection system was being directly challenged. Taking information from the census data of 1970, it seemed that 79.1% of Hidalgo County's population was Mexican American (*Castaneda v. Partida*, 1977, pg. 486). However, Mexican American grand jurors from 1962 to 1972 accounted for an average of only 39% of all grand jurors during this time period (*Castaneda v. Partida*, 1977, pg. 487). During the course of the respondent's appeals, the testimony of the judge who had selected the jury commissioners was introduced. This judge stated that he had

attempted to select more Mexican American jury commissioners than jury commissioners of other ethnic groups. Another counter to the respondent's *prima facie* case of discrimination that was raised was fact that there were many elective positions held by Mexican Americans in Hidalgo County, and it was thought that Mexican Americans would not discriminate against their own race (*Castaneda v. Partida*, 1977, pg. 490). However, the Court refused to accept this argument, stating that "[t]he fact that certain elected officials are Mexican American demonstrates nothing about the motivations and methods of the grand jury commissioners who select persons for grand jury lists" (*Castaneda v. Partida*, 1977, pg. 499).

In *Partida*, the Court outlined a specific test to determine whether or not an equal protection violation has occurred in the context of grand jury selection. First, the identifiable group to which one belongs must be shown to be recognizably different from other groups. This can be with respect to the laws (their written language or their application), class, etc. Afterwards, the proportion of the group in question to the total population and the proportion of the group called to serve as grand jurors must be compared over an extensive period of time in order to gauge the exact degree of underrepresentation. If there is a selection procedure in place that has the obvious possibility of manipulation for the purpose of racial discrimination, then this coupled with the earlier shown statistical disparities can be used to support the purported claim of discrimination (*Castaneda v. Partida*, 1977, pg. 494).

The Court did not have any issues identifying that Mexican Americans were an identifiable group in Hidalgo County or that the key man system was open to be used for abuse (Grand Jury Discrimination, 1977, pg. 536). After the holding of this case was

announced, many attorneys proved that a group in question was identifiable and different through citing previous cases where the group was recognized as such (Stone, 1981, pg. 673). For *Partida*, *Hernandez v. Texas* (1954) was used for this purpose *Castaneda v. Partida*, 1977, pg. 494). In order to show the degree of underrepresentation, there are a few different statistical models that could be used, but the one chosen in *Partida* was the statistical decision theory (SDT). Interestingly enough, *Partida* was the very first case in which SDT was used to measure statistical disparities (Stone, 1981, pg. 678). This method is supposedly superior to other statistical methods that could be used for the same purpose as it "takes into account not only the disparity between the group's representation in the population and its representation among grand jurors but, more importantly, the improbability that such a disparity would have resulted from a racially and ethnically neutral random selection process" (Stone, 1981, pg. 678). Using SDT, it was shown that there was indeed a significant degree of underrepresentation of Mexican Americans on grand juries in Hidalgo County, and the respondent was able to meet the 3-pronged test established by Justice Blackmun (*Castaneda v. Partida*, 1977, pg. 496-497). The state was unable to rebut the *prima facie* case of discrimination established by the respondent, and as is such the Court affirmed the Court of Appeals' holding that there was indeed a violation of the Equal Protection Clause of the Fourteenth Amendment (*Castaneda v. Partida*, 1977, pg. 501). However, the use of the key man system in Texas was *not* struck down as unconstitutional, even though it was admitted that it was "highly subjective" (*Castaneda v. Partida*¸1977, pg. 497).

CHAPTER 4

WHY FOR SO LONG?

The use of the key man system in Texas was never deemed unconstitutional. As mentioned at the beginning of this paper, it was just this year retired from use by the Texas legislature. Specifically, the Texas House Bill that removed the key man system stated: "[the] district judge shall direct that 20 to 125 prospective grand jurors be selected and summoned, with return on summons, in the same manner as for the selection and summons of panels for the trials of civil cases in the district courts" (Tex. H.B. 2150, 84th Leg., R.S., 2015). Why was it only just recently retired from use when it has been repeatedly tolerated in cases where discrimination in grand jury selection was found? It seems that the answer to that question is probably a combination of two elements. The first is the Supreme Court's repeated assertion that a grand jury selection system with the potential to be used for racially discriminatory purposes is not in and of itself unconstitutional; it must be proved that it was used to discriminate based on race (Turner v. Fouch¸1970, pg. 355). Using that reasoning, a system would never been found to be unconstitutional, but its improper use could be. Analysis of Supreme Court cases dealing with this subject shows that this is most likely the feeling of the Court on the matter. I would argue the second reason as to why the key man system was only recently retired from use is the indictment of Texas governor Rick Perry in 2014 (Ellis, 2014). While the grand jury that indicted Perry was actually chosen by random selection due to a particular judge's preference for that method, the Perry indictment put Texas grand juries front-and-center in the minds of many people

(Langford, 2014). Current Texas governor Greg Abbott probably was in favor of the change in order to gain some political capital. In the end, the key man system did not leave Texas with an explosion but instead a sputter. Continued instances of the Supreme Court stating issues with the system but leaving it alone slowly tore away at its legitimacy till eventually the Texas legislature put it out of its misery. Would fewer cases of discrimination in Texas grand jury selection have occurred if the Supreme Court labeled the entire system as unconstitutional early on? One individual who would answer in the affirmative is Alfred Dewayne Brown.

Mr. Brown is a man who was convicted of the capital murder of a Houston, TX police officer in 2003. He was convicted even though there were telephone records supporting the alibi he gave when charged with the murder. He was sentenced to death, even after it was revealed that a member of the grand jury that indicted Mr. Brown actually *threatened* an essential witness in Mr. Brown's case, after which she changed her story. The jury foreperson on the petit jury that convicted Mr. Brown was actually a Houston police officer. This jury was selected by the key man system, and this situation shows how the possibility for discrimination in grand jury selection can arise even outside of purely racial motivations (Miller, 2015). Mr. Brown spent a little more than 12 years on death row as a result of his questionable conviction, and was just released on June 8th, 2015 (Rogers, 2015). After he was released and his situation became more widely known, Mr. Brown became a "poster child" for grand jury reform in Texas (Miller, 2015). It is hoped that the elimination of the key man system in Texas grand jury selection will greatly reduce the amount of tragic stories such as this one.

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David Austin Black attended the University of Texas at Arlington majoring in Political Science and minoring in French. He studied in France during the summer of 2014 through a program offered by UT Arlington's Honors College, of which he is a member. That experience, coupled with a class in Russian politics, sparked Austin's interest in international law, which he plans to pursue by attending law school after successfully completing his undergraduate education. After law school, Austin hopes to work with foreign policy in some capacity.