

506th Judicial District Court

Albert M. McCaig, Jr., Judge



www.Court506.com

Court Coordinator
Susie Schubert

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Grimes County
Waller County

July 27, 2015

836 Austin Street, Suite 307
Hempstead, Texas 77445
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Honorable John Whitmire
Texas State Senator, SD-15
Chair, Senate Criminal Justice Committee
803 Yale Street
Houston, TX 77007

Re: Senate Bill 135 / House Bill 2150; Relating to the establishment of Grand Juries

Senator Whitmire:

I represent two small counties in Southeast Texas; Waller and Grimes. With passage of SB 135 relating to the establishment of grand jurors, the Texas Legislature has saddled district judges with the unconscionable burden of being required to literally hand-pick grand juries in our courts.

On the surface the Bill may appear to be a panacea for what ails the grand jury system. In design and function it has the opposite effect. Article 19.26 states in part, "...the court shall select twelve fair and impartial persons ... and ... the court shall consider the county's demographics related to race, ethnicity, sex, and age.

My reading of the statute requires that the court – me, the judge – to conduct some form of *voir dire* on the jury panel to determine individual qualifications, which is no different than what I have been required to do. Then, however, I am to select twelve individuals. I cannot select the first twelve. I cannot select the first qualified. I cannot select the best qualified. I am to select twelve persons based on the seemingly subjective standards of race, ethnicity, sex, and age.

Where do I get such county demographics? Am I required to report the source of the demographics that I use? If I use the latest federal census, how do I account for population changes? If I miss the ethnic makeup of the county by some percentage points, is the empaneled grand jury subject to challenge? What percentage is an allowable variance? If I miss the demographics, is all that empaneled grand jury's actions subject to challenge? What is the difference between race and ethnicity? Do I determine race by observation or announcement, which then becomes profiling? How do I determine age other than relying on the appearance of someone and their integrity in filling out the juror questionnaire?

May I shuffle the panel if I see that it really doesn't fit the demographics? Am I allowed to delve into whether the individuals on the panel even want to serve on a grand

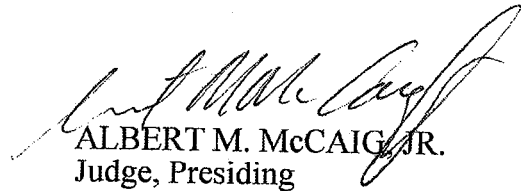
jury? May I run a criminal history on individuals so that I don't empanel past felons? If so, how does a district judge legally do that? If not, how do I determine their criminal history other than hoping a convicted felon will tell me? Does the word "*consider*" mean "*must consider*" or "*may consider*" or some other subjective standard?

The Texas Legislature has essentially established a law whereby a district judge can literally hand-pick members of a grand jury to fit his or her opinion of what is suitable. Such a situation places each of us district judges in a position of being accused of subjective manipulation of the grand jury process. That is so far from the probable intended consequences of the Bill.

In the past I used a double-blind system whereby grand jury commissioners were nominated by local officials from school boards, city councils, precinct offices, and other prominent entities. From those nominated, I then selected four grand jury commissioners, each from diverse parts of my counties, and also diverse in gender and ethnicity. Those four commissioners then nominated five individuals each for the grand jury panel. Out of those 20 true and good citizens, I used the first twelve qualified. I never hand-picked a member of the grand jury.

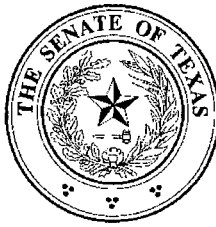
Even with the method I used, I suffered accusations of improperly influencing the makeup of the grand jury. That was not true; but the accusation was made. Now, however, with SB 135, I have no defense whatsoever to an accusation of hand-picking the grand jury because IT WILL BE TRUE!

This is a law that should be put on the next special session and repealed or greatly amended.


ALBERT M. McCAIG, JR.
Judge, Presiding

AMM/

c: Senator Joan Huffman, Vice-Chair, , Senate Criminal Justice Committee
Senator Konni Burton, Senate Criminal Justice Committee
Senator Brandon Creighton, Senate Criminal Justice Committee
Senator Juan Hinojosa, Senate Criminal Justice Committee
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Honorable Alfonzo Charles, Chair, Judicial Section SBOT
Honorable Olen Underwood, 2nd Administrative Region
Mr. David Slayton, Office of Court Administration



Senate Committee on Criminal Justice

Senator John Whitmire

Chair Senate Committee on Criminal Justice

July 31, 2015

The Honorable Albert M. McCaig, Jr
Judge, 506th Judicial Court
836 Austin Street, Suite 307
Hempstead, Texas 77445

Re: Grand Juries Selection

Dear Judge McCaig,

The abuses of the utilization of commissioners to select grand juries are well documented and I am sure you are aware of this issue. The abolishment of the system known as the "Key-man" or by its critics the "pick-a-pal" selection process is an important first step in regaining the trust of our citizens in the grand jury system. In fact Texas was the only state in our nation to allow its use. All the other states and the federal courts have long abandoned this practice.

The alternative method to the "Key-man" system is the random selection process, which has been authorized in statute for many years and widely used throughout the State. The processes for the random selection of grand jurors are well established within Texas and I am sure the Texas Office of Court Administration can furnish you with guidelines and suggested practices.

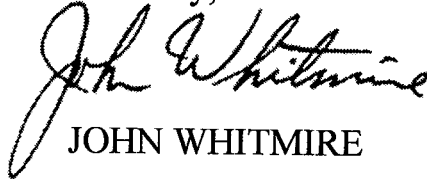
It appears that many of the concerns you have expressed are from a version of Senate Bill 135, that were not amended on to or passed in House Bill 2150. Rather than address those in this letter, I would suggest that you obtain the enrolled version of House Bill 2150 which is effective September 1, 2015. In some of your concerns you have overlooked sections of the statute that address and answer your questions. Article 19.20 provides that

the judge shall order the Sherriff to summoned only those individuals qualified to be a grand juror as established by Article 19.08. It is the Sherriff's responsibility to ensure that the panel from which you will then select 12 jurors and 4 alternatives, that are fair and impartial, are not felons and meet all the other qualification of Article 19.08.

Given the current environment of distrust by the public of our criminal justice system, it is imperative that we re-examine how we have been doing things and embrace practices that the public does support and in fact is demanding.

I appreciate your Service to the State of Texas and your participation in the restoration of faith by the public in the Grand Jury system.

Sincerely,

A handwritten signature in black ink, appearing to read "John Whitmire". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Whitmire" following in a similar style. The signature is positioned above the printed name "JOHN WHITMIRE".

JOHN WHITMIRE

JW:lc

506th Judicial District Court

Albert M. McCaig, Jr., Judge



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Court Coordinator
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Grimes County
Waller County

August 21, 2015

836 Austin Street, Suite 307
Hempstead, Texas 77445
Fax: 979.826.9149
Ofc: 979.921.0921

Honorable John Whitmire
Texas State Senator, SD-15
Chair, Senate Criminal Justice Committee
803 Yale Street
Houston, TX 77007

Re: Your letter to me of August 10, 2015, regarding House Bill 2150; Relating to the establishment of Grand Juries

Senator Whitmire:

Thank you for your letter. As you noted, part of my quotations came from SB-135 rather than HB-2150. However, that minor point does not alleviate the concerns that I have regarding the bill as a whole.

I will concede that there may be courts in the State of Texas that have abused the grand jury process in the past. I am not one of them. Given that the current mood in Austin is to change the process, I continue to have concerns about the present law and I continue to urge a revision of the law.

Article 19.20 requires the sheriff not to summon persons who do not possess the qualifications set out in Article 19.08. How does the Sheriff do that? Qualification for grand jury service has both an objective and a subjective component. Is the sheriff required to run a criminal history on every person named on the list that is derived from the jury selection process? Where does the sheriff find a data base that confirms a person's citizenship? How does the sheriff determine 19.08.6., familial relationships? Being of sound mind and good moral character can only be determined by personal interview by the court, which is a subjective test.

I realize that the Office of Court Administration is promulgating forms for use in the summons, but the necessary information for qualification and challenge is primarily post-summons information. There is no means for obtaining the pre-summons information. I recently empaneled a grand jury using the new statute just to see how it would work. Out of the panel I had two people who did not truthfully answer the question on prior convictions? Without my conducting a *voir dire* on qualifications, and without the district attorney's assistance, we would not have discovered those issues.

Article 19.23 provides the mode of test. That in its very basics, is a *voir dire*, and appears to prescribe a pre-summons test. Article 19.23.3., requires a criminal history (CCH) be run on every potential grand juror. The courts do not have the authority nor the means to

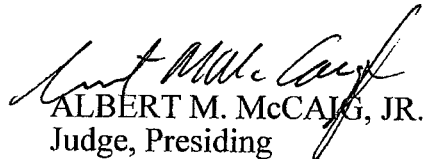
do that. Thus, that falls on the sheriff, and, once again, is a pre-summons test.

You noted in my earlier letter my quote from SB-135 rather than using HB-2150. You are correct. The signed bill uses the words, "The grand jurors and the alternate grand jurors shall be randomly selected from a fair cross section of the population of the area served by the court." In my prior letter, I addressed several concerns and they continue to be relevant. I address them once again here. Under the law, I cannot select the first twelve. I cannot select the first qualified. I cannot select the best qualified. I am to select twelve persons based on the seemingly subjective standards of "... a fair cross section of the population...". Where do I get such county demographics? What happens if I don't use a "fair cross section"? This language will allow the very abuse you are attempting to prevent.

Finally, I address Article 19.31. Once again, this places the court in the position of conducting a *voir dire* of the panel. Do I conduct this *voir dire* only if there is a challenge, or do I conduct it as part of the initial qualification process? Virtually every area of challenge is an area that must be addressed before a grand jury is empaneled. After a grand jury is empaneled and has taken action, it is far too late to find out about one of those ten areas of challenge. Once again, I as a judge am faced with the "how to" of the law.

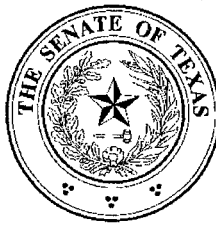
I remain convinced that the Texas Legislature has given us a law that is not only unworkable but is fraught with avenues of abuse. There are far too many subjective areas of qualification involved which allows the judge to hand pick a grand jury. The law may get rid of the potential for cronyism, but it certainly allows judges to type-cast a grand jury to stack the deck in favor of a certain type of individual. I don't intend to do that, and I hope most judges will not. However, if the intent of the Legislature was to get the cronyism out of the grand jury system, this law fails the test.

Given that the Legislature is not in the mood to repeal a recently passed law, this law does need to be greatly amended, with input from the people who have to use it.


ALBERT M. McCAIG, JR.
Judge, Presiding

AMM/

c: Senator Joan Huffman, Vice-Chair, , Senate Criminal Justice Committee
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Mr. David Slayton, Office of Court Administration



Senate Committee on Criminal Justice

Senator John Whitmire

Chair Senate Committee on Criminal Justice

September 15, 2015

The Honorable Albert M. McCaig, Jr
Judge, 506th Judicial Court
836 Austin Street, Suite 307
Hempstead, Texas 77445

Re: Grand Jury Selection

Dear Judge McCaig:

I strongly disagree with the conclusions you have reached and presented in your letters. The abolishment of the "key man" selection process for empaneling grand juries is a critical step towards providing fairness to the very important decisions grand juries render. The random selection process, which again, has been authorized in statute for many years and widely used throughout the State, is now the only method authorized in Texas Law.

The law does contain requirements for who can and cannot be empaneled as a grand juror, just as the old law did. The Sheriff and District Attorney do need to be involved in the verification of these qualifications, just as they always have.

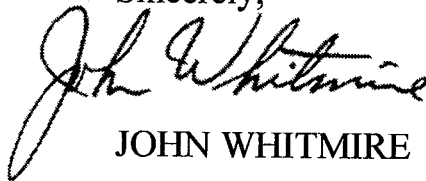
You seem overly concerned with the section of the law which states, "the court shall select twelve fair and impartial persons to serve as grand jurors and four additional persons to serve as alternate grand jurors. The grand jurors and the alternate grand jurors shall be randomly selected from a fair cross section of the population of the area served by the court". So long as the panel is randomly selected, the court can pick the first sixteen or not, it can question the entire panel or not, it can select the most qualified or not. It is within the court's discretion to determine if those selected are "fair and impartial" through direct questioning of the potential jurors by the court. This section of the law was thoroughly vetted and supported by Judges, District attorneys, constitutional law professors and the

Governor's Office. Through the vetting process, this group of stakeholders agreed that this section of law does not, and will not, create any mandates for courts or possible challenges to the panel. I also firmly believe that any judge who runs on a county-wide basis would have an understanding of who lives in that county. There is no other formula or demographic requirement in this section of the law.

The law was developed by those who will have to use it - Judges, District attorneys, trial attorneys and interested citizens - through four public committee hearings, two floor debates and constant communication with those interested parties who will have to use the law moving forward.. The use of commissioners in the former "key man" or, "pick-a-pal system," - the system you used - disenfranchised entire segments of the population. I must restate that to ensure fairness and to restore the public's faith in our criminal justice system, it is imperative that we continually re-examine our practices and embrace those which eliminate any and all appearances of bias and impropriety.

I can assure you that I will be watching with great interest the future grand juries empaneled in Waller County, as I am sure local, state, and national media outlets will be, as well.

Sincerely,

A handwritten signature in black ink, appearing to read "John Whitmire", with a stylized, cursive script.

JOHN WHITMIRE

JW:lc

Cc: Senator Joan Huffman, Vice-Chair, Senate Criminal Justice Committee
Senator Konni Burton, Senate Criminal Justice Committee
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Honorable Olen Underwood, 2nd Administrative Region
Mr. David Slayton, Office of Court Administration

Larance Coleman_SC

From: Judge <judge@court506.com>
Sent: Tuesday, September 15, 2015 8:18 PM
To: Larance Coleman_SC
Subject: Re: Ltr to Judge McCaig grand juries 9-15 (Final).docx

Follow Up Flag: Follow up
Flag Status: Flagged

I see you still don't get it. I don't object to a change in the law. I object to how it was changed. You left far too much individual discretion with the judges. And, by the way, I have not met one judge who approves of the new method. Finally, if the good Senator wants to threaten me with oversight in Waller and Grimes counties he is more than welcome to attend my grand jury formation days. In fact I will be glad to send invitations if he would like to attend.

Otherwise, I will stand by my comments. This was not a well throughout law.

AMcCaig

Sent from my iPad

On Sep 15, 2015, at 15:32, Larance Coleman_SC <Larance.Coleman_SC@senate.state.tx.us> wrote:

On behalf of Senator John Whitmire, response to your letter of August 21, 2015.

Thanks,

Larance Coleman
Senate Criminal Justice Committee

<Ltr to Judge McCaig grand juries 9-15 (Final).docx>