

263rd DISTRICT COURT GRAND JURY (2007 TERM),
Plaintiff,

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IN THE DISTRICT COURT OF

v.

HARRIS COUNTY, TEXAS

CHUCK ROSENTHAL and STATE OF TEXAS,
Defendants,

190 JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION FOR DECLARATORY JUDGMENT

Plaintiffs were members of the 263rd District Court Grand Jury (2007 Term), and file their Original Petition seeking a declaratory judgment against Harris County District Attorney Chuck Rosenthal and the State of Texas, and would show the Court as follows:

I. Discovery Control Plan

1. Plaintiffs will conduct discovery in this suit under "Level 2," as set forth and made applicable to this suit by TEX. R. CIV. P. 190.3.

II. Parties

2. Plaintiffs Robert C. Ryan, Jeffrey L. Dorrell, Barbara Coffman Buck, Shannon Burns, Dan Hall, and Steven Howell are natural persons who were members of the Grand Jury empanelled by the 263rd District Court of Harris County, Texas, for the regular term from August 8, 2007, to November 2, 2007.

3. Defendant Chuck Rosenthal is the elected District Attorney of Harris County, Texas, who may be served with process at his usual place of business at the Harris County Criminal Justice Center, 1201 Franklin Street, Suite 600, Houston, Harris County, Texas 77002.

4. Defendant sovereign State of Texas has an interest in enforcement of the statutes in question, and may be given notice of suit by and through Texas Attorney General Gregg Abbott. TEX. CIV. PRAC. & REM. CODE §37.006(b).

III. Jurisdiction and Venue

5. The Court has jurisdiction over Harris County District Attorney Chuck Rosenthal because he is the party responsible for prosecuting violations of the statute at issue in this case. *See, e.g., Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. App.—Austin 1996, no writ).

6. The Court has subject matter jurisdiction over the controversy because Texas has waived sovereign immunity pursuant to TEX. CIV. PRAC. & REM. CODE §101.025; *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (by authorizing declaratory judgments to construe legislative enactments, the Declaratory Judgments Act necessarily waives governmental immunity).¹

7. Venue of this action is proper in Harris County, Texas, under TEX. CIV. PRAC. & REM. CODE §15.002(a)(1) because all or a substantial part of the acts or omissions giving rise to this suit occurred in Harris County.

IV. Conditions Precedent

8. All conditions precedent to filing this suit have been performed or have occurred.

¹ At least one court has held that a post-dismissal motion for disclosure of grand jury proceedings under TEX. CRIM. CODE Art. 20.02(d) is a criminal law matter that must be filed in a criminal court. *See Kelly v. State*, 151 S.W.3d 683, 686-87 (Tex. App.—Waco 2004, n.p.h.). However, Article 20.02(d) is specifically limited to petitions by a *criminal defendant*. The Code of Criminal Procedure contains no provision for *grand jurors* to petition for post-dismissal disclosure of evidence or proceedings. The instant cause is not a motion for post-dismissal disclosure under Article 20.02 by a criminal defendant based on “particularized need,” but a declaratory judgment action by grand jurors based on the existence of a privilege most famously recognized in the civil libel case of *Houston Press Co. v. Smith*, 3 S.W.2d 900, 907 (Tex. Civ. App.—Galveston 1928, writ dism’d w.o.j.). Therefore, this Court’s civil jurisdiction under the Declaratory Judgments Act is properly invoked.

V. Facts

9. After being duly summoned by the sheriff to appear before the 263rd District Court on or about **August 6, 2007**, and after appearing and being duly qualified and selected pursuant to TEX. CODE CRIM. P. Art. 19.01-19.24, Plaintiffs were sworn in as members of a Harris County Grand Jury to hear cases and vote on felony indictments arising in Harris County, Texas, until **November 2, 2007**. The presiding Judge of the 263rd District Court administered to Plaintiffs the following oath:

You solemnly swear that you will diligently inquire into, and true presentment make, of all such matters and things that shall be given you in charge; the State's counsel, your fellows' [counsel] and your own, you shall keep secret, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall ... leave [no] person unrepresented for love, fear, favor, affection or hope of reward; but you shall present things truly as they come to your knowledge, according to the best of your understanding, so help you God.

TEX. CODE CRIM. P. Art. 19.34.

10. At the expiration of Plaintiffs' regular term on **November 2, 2007**, Plaintiffs were engaged in two unfinished investigations. The Harris County District Attorney prepared and presented to the 263rd District Court—and the 263rd District Court signed—an order purporting to extend the term of the Grand Jury until **February 1, 2008**.

11. After hearing evidence and testimony surrounding the June 28, 2007, arson of sitting Texas Supreme Court Justice David Michael Medina's home at 3507 High Falls Drive in Harris County, the Grand Jury asked the District Attorney to present additional witnesses and evidence the Grand Jury had asked the District Attorney to coordinate. On or about **January 3, 2008**, the District Attorney informed the Grand Jury that he had "done nothing" toward the additional investigation. In violation of Art. 20.19, the District Attorney attempted to discourage the Grand Jury from even meeting to vote.

12. Nevertheless, Plaintiffs followed what they believed to be their oaths and the law, and on **January 17, 2008**, at about 1:30 PM voted indictments against (i) Hon. David Michael Medina for evidence tampering; and (ii) Francisca Medina, the wife of Justice Medina, for arson of the home. When instructed to draw the indictments, the District Attorney refused, in violation of TEX. CODE CRIM. P. Art. 20.20, which provides that the District Attorney “*shall prepare* all indictments which have been found, *with as little delay as possible*, and deliver them to the foreman.” [Emphasis added.] When the District Attorney refused, the arson investigator of the Harris County Fire Marshall’s office eventually prepared the indictments, forcing grand jurors to remain assembled without lunch until 3:30 PM, when the indictments were finally ready for signature by the Foreman.

13. By 4:30 PM on **January 17, 2008**, local television news stations were already reporting that Harris County District Attorney Chuck Rosenthal had stated publicly that the Medinas would not be prosecuted and that the indictments would immediately be dismissed without further investigation. At 9:00 AM on **January 18, 2008**, the indictments were dismissed by Hon. Brian Rains upon the motion of Assistant District Attorney Vic Wisner.

14. In response to the dismissals, Grand Jury Foreman Robert C. Ryan and Assistant Foreman Jeffrey L. Dorrell criticized Rosenthal’s decision to dismiss the indictments as made before the District Attorney could possibly have known what the evidence was that was alleged to be “insufficient.” On **January 18, 2008**, attorneys for the Medinas held press conferences in which they attacked Grand Jurors as “making a mockery of the grand jury system,” being “nutty,” a “runaway grand jury,” a “runaway grand jury in a Lamborghini,” “drunk with power,” “liberal activists with a grudge against conservative Republican judges,” and pawns of the Harris County Republican Party prosecuting a Republican vendetta against Rosenthal—embattled because of, among other things, a pending criminal contempt charge in U.S. District Court for *evidence tampering*.

15. On **January 18, 2008**, the attorney representing Supreme Court Justice David Medina moved the 263rd District Court to hold Ryan and Dorrell in contempt and jail them for 30 days for violating their oath of secrecy by having criticized Rosenthal's hasty dismissal of the Medina indictments. Medina attorneys argued that Grand Jurors violated TEX. CODE CRIM. P. Art. 20.02, which provides in relevant part that a Grand Juror who discloses "anything transpiring before the grand jury..."

...in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, imprisonment not exceeding 30 days, or both such fine and imprisonment.

TEX. CODE CRIM. P. Art. 20.02.

16. In truth, neither Ryan nor Dorrell—nor any other member of the Grand Jury—has ever revealed so much as a scintilla of the evidence the Grand Jury considered in handing down its indictments against the Medinas. After the Medina indictments were dismissed on **January 18, 2008**, the Grand Jurors scheduled another session for **January 23, 2008**, and the Grand Jury Foreman directed the Bailiff to issue several subpoenas for additional witnesses and evidence in the Medina case to be brought before the Grand Jury at that time. What happened next converted what was already a major media event into a circus sideshow that gained international notoriety.

17. Clearly anticipating that the Grand Jury would use the new evidence to re-indict the Medinas, the District Attorney needed to find a way to stop the Grand Jury in its tracks. On **January 22, 2008**, it was "discovered" *and brought to the attention of Medina's criminal defense attorneys* that there was a defect in the order of the 263rd District Court extending the Grand Jury's term beyond **November 2, 2007**.² The 263rd District Court then ruled that the defect caused the

² Such extraordinary aid by a sitting District Attorney to an indicted felony defendant designed to nullify a Grand Jury indictment, prevent a criminal prosecution, and kill the ongoing investigation of two serious crimes in the womb is without precedent in recorded Texas jurisprudence.

Grand Jury to have been unlawfully constituted after **November 2, 2007**, nullifying over 30 felony indictments the Grand Jury had handed down thereafter—including those of the Medinas. Thus, the District Attorney's office successfully invoked its own incompetence as both a sword and a shield to: (i) preempt the Grand Jury's scheduled meeting on **January 23, 2008**, (ii) invalidate Grand Jury subpoenas issued to new Medina witnesses to appear that same day, and (iii) terminate the Grand Jury's criminal investigation into the 2007 arson that destroyed the Medina home.

18. Eight members of the Grand Jury held a televised press conference on **January 22, 2008**, in defense of the attacks on their integrity. Even then, Grand Jurors assiduously observed their oaths of secrecy in their deliberations and refused to reveal any of the evidence they considered. The Grand Jurors have been—and continue to be—deprived of a fair opportunity to defend themselves against the assault on their integrity by uncertainty involving the application and construction of TEX. CODE CRIM. P. Art. 20.02 to the facts of the instant case.

19. Repeatedly accused of base and corrupt motives and hidden political agendas, Grand Jurors have been obliged to sit close-mouthed while District Attorney Rosenthal and his assistants trumpet to media that the evidence was “insufficient” to support either a criminal prosecution of the Medinas or even any further investigation of the charges. On threat of fine and imprisonment under TEX. CODE CRIM. P. Art. 20.02, Grand Jurors have been—and continue to be—restrained from responding to the attacks on their character by revealing how extensive the evidence of wrongdoing by the Medinas actually was.

VI. Causes of Action

20. A court may declare the rights, status, and other legal relations between parties to afford them relief from uncertainty and insecurity with respect to rights, status, and other legal relations. TEX. CIV. PRAC. & REM. CODE §37.002(b). A person whose rights are affected by a statute “may have determined any question of construction or validity” arising under the statute. TEX. CIV. PRAC. & REM. CODE §37.004(a). The power given to courts by the Declaratory Judgments Act to declare the rights and status of parties and remove uncertainties “is to be liberally construed.” TEX. CIV. PRAC. & REM. CODE §37.002(b).

21. The Declaratory Judgments Act is available here because:

- (i) A justiciable controversy has arisen as to which the rights of the parties are uncertain;
- (ii) Plaintiffs have a justiciable interest in the controversy; and
- (iii) The controversy will be terminated or the uncertainty removed by the declaration sought.

TEX. CIV. PRAC. & REM. CODE §37.002 *et seq.*; *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995).

A. Declaratory Judgment That Grand Jurors’ Disclosure of Evidence Considered in the Medina Indictments Would Be Privileged

22. Contrary to published reports, what the Medina Grand Jury did was not “unprecedented.” In 1923, another Houston Grand Jury publicly responded to accusations by a District Attorney that Grand Jurors had “violated their oaths of office” because of “corrupt motives and acts.” *Houston Press Co. v. Smith*, 3 S.W.2d 900, 907 (Tex. Civ. App.—Galveston 1928, writ *dism’d w.o.j.*). In *Houston Press*, District Attorney Dixie Smith—who had been elected on the Ku Klux Klan³ ticket—first attacked Grand Jurors. After being attacked, Grand Jurors responded. The parallels to the instant case are remarkable.

³ In the 1920s, the KKK was a powerful political force, especially in southern states—at one time, there were 17 members of the U.S. Senate who were elected on the KKK ticket.

23. As in the case at bar, the 1923 disagreement between the Grand Jury and the Harris County District Attorney in *Houston Press* was over whether there was sufficient evidence to indict. After being pilloried by the District Attorney, five members of the Grand Jury took to the 1923 equivalent of the airwaves, the *Houston Press*, to defend themselves. They signed an open letter stating in part:

Notwithstanding the mouthings of this inefficient and irresponsible political accident [a reference to Harris County District Attorney and Klansman Dixie Smith], we performed our exacting duties with courage, impartiality, and fidelity.

Houston Press, 3 S.W.2d at 903.

24. In the case at bar, Grand Jurors accused Rosenthal of showing political favoritism to a fellow Republican official by nullifying the indictment without even a cursory post-indictment investigation of the arson at issue. Similarly, in *Houston Press*, the Grand Jurors accused the District Attorney of showing favoritism to brother members of the Ku Klux Klan—specifically, among other things, by sweeping under the rug without an investigation *an arson case* in which another Klansman was the prime suspect. *Houston Press*, 3 S.W.2d at 904.

The manner in which ... District Attorney John D. Smith secretly quashed the Warren Case in justice court is open to considerable criticism. Not only was the hearing quashed but other attempts to hide the facts have been apparent in this investigation. Such secrecy is to be expected in Klan Hall at Milam Street and Capitol Avenue. It is not needed in our law machinery, however, where the lives of citizens are at stake.

Id. The *Houston Press* court of appeals characterized the Grand Jurors' statements as a reply to "a vicious attack" by the District Attorney, and opined:

Every man has the right to defend his character against false aspersion. It is one of the duties which he owes to himself and his family. Therefore communications made in fair self-defense are privileged. If a person is attacked in a newspaper, he may write to the paper to rebut the charges, and may at the same time retort upon his assailant, where such a retort is a necessary part of his defense or fairly arises out of the charges [the assailant] has made.

Id. at 907 [emphasis added].

25. In accordance with *Houston Press*, Plaintiffs seek a declaration that they have a privilege to fairly respond to the defamatory attacks upon their character by revealing the overwhelming evidence considered by the Grand Jury in voting the indictments of David and Francisca Medina. Plaintiffs should be able to do so without being prosecuted, sanctioned, fined, or jailed for violating TEX. CODE CRIM. P. Art. 20.02. Only disclosing the evidence will allow Plaintiffs to show convincingly that they were not animated by the vile and contemptible motives of which they have been publicly accused by truly the strangest of bedfellows—the Medinas’ criminal defense attorneys and the Harris County District Attorney’s office.

26. It is well-settled law in this State that:

The grand jury has the authority to conduct their own investigations, to subpoena evidence and witnesses, to fail to return indictments sought by the district attorney, and to indict on matters as to which the district attorney has presented no evidence and sought no indictment.

Taylor v. State, 735 S.W.2d 930, 946 (Tex. App.—Dallas 1987), *aff’d*, 786 S.W.2d 295 (Tex. Crim. App. 1990). Texas appellate courts have also held that—

[T]he courts will not go behind the actions of a grand jury to determine whether sufficient evidence existed to justify the return of an indictment; rather, an indictment, valid on its face, is sufficient to mandate a trial on the merits.

McCoy v. State, 773 S.W.2d 777, 779 (Tex. App.—Corpus Christi 1989, *pet. ref’d*) [emphasis added]. District Attorney Rosenthal’s apparent ignorance of such authorities is the source of the dispute giving rise to the instant case.

27. The District Attorney’s announcement to the press within minutes of the Medina indictments that the Medinas would not be prosecuted because of “insufficient evidence” was *itself* an attack upon the competence and integrity of the Grand Jurors to which they should be free to fairly respond. The Grand Jurors should be free, if they wish, to defend themselves without fear of incarceration or other sanction for doing so. The Court should so declare.

B. Declaratory Judgment That Grand Jurors' Disclosure of Evidence Considered in the Medina Indictments After November 2, 2007, Is Not Subject to the Secrecy Requirements of TEX. CODE CRIM. P. Art. 20.02.

28. It is not open to question that a Grand Juror who discloses “anything transpiring before the grand jury...”

...in the course of the official duties of the grand jury shall be liable to a fine as for contempt of the court, not exceeding five hundred dollars, imprisonment not exceeding 30 days, or both such fine and imprisonment.

TEX. CODE CRIM. P. Art. 20.02 [emphasis added]. It is clear that when Plaintiffs met to hear testimony and consider evidence in the Medina cases from **November 3, 2007**, to **January 17, 2008**, Plaintiffs subjectively believed that they were a legally constituted and empanelled Grand Jury. However, it is equally clear that—as the 263rd District Court has already ruled—*they were not*.

29. As a matter of law, Plaintiffs were not “in the course of the official duties of the grand jury” during the interregnum, and should not be subject to punishment for disclosing anything transpiring before what was, in legal effect, merely a meeting of 12 ordinary citizens, and not a legally constituted Grand Jury. The Court should so declare.

C. Declaratory Judgment That Grand Jurors' Disclosure of Evidence Considered in the Medina Indictments to Another Grand Jury Is Not Subject to the Secrecy Requirements of TEX. CODE CRIM. P. Art. 20.02.

30. Even if the Grand Jurors are prohibited from speaking publicly about evidence supporting the Medina indictments, the purpose of this secrecy would not be served by also prohibiting Grand Jurors from disclosing the evidence *to another grand jury* meeting under oath of secrecy. The interests of justice would be best served by allowing Grand Jurors to do so. The Court should so declare.

VII. Demand for Jury

31. Plaintiffs demand a jury trial and tender the jury fee herewith more than 30 days before trial, as required by law.

VIII. Requests for Disclosure

32. Pursuant to TEX. R. CIV. P. 194, Defendants are requested to disclose, within 50 days of service of this pleading, the information or material described in TEX. R. CIV. P. 194.2(a)-(1).

IX. Prayer

33. For these reasons, Plaintiffs ask that Defendants be cited to appear and answer and that, after a trial on the merits, Plaintiffs have and recover of Defendants all of the following:

- (a) Declaratory judgment that Plaintiffs are privileged to disclose any evidence and testimony considered by the Grand Jury before voting the indictments of David and Francisca Medina on **January 17, 2008**; and
- (b) Declaratory judgment that Plaintiffs are not subject to the penalties of TEX. CODE CRIM. P. Art. 20.02 for disclosing anything transpiring before the unlawfully constituted Grand Jury after **November 2, 2007**; and
- (c) Declaratory judgment that Plaintiffs are not subject to the penalties of TEX. CODE CRIM. P. Art. 20.02 for disclosing evidence and testimony considered by the Grand Jury supporting the indictments of David and Francisca Medina *before or after November 2, 2007*, to another lawfully constituted Harris County grand jury meeting in secret and whose members are bound by the oath of secrecy; and
- (d) All other relief, in law and in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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