406 SL grant

No. 2 Misc. 1953 Term
HERNANDEZ V. TEXAS
Cert to Court of Criminal Appeals of Texas. Timely.

Petitioner, a Mexican-American, was convicted of murder and sentenced to life imprisonment in the penitentiary. He claims that he was discriminated against at the trial and denied "equal protection" because persons of Mexican descent were systematically excluded from the grand and petit jury panels which brought the indictment and heard the case. Petitioner made timely motions to quash the indictment and the petit jury panels. The court overruled both motions, and the Court of Criminal Appeals affirmed.

This Court has held, and the petitioner does not deny, that the Texas method of selecting grand and petit juries through the use of jury commissioners is fair on its face and capable of being utilized without discrimination. Smith v. Texas, 311 US 128. He alleges that the discrimination occurs in the administration of the law.

It was stipulated by both parties that for 25 years there is no record of any person with a Mexican name serving on a jury commission, grand jury, or petit jury in Jackson County; that there are some male persons of Mexican descent who meet all the qualifications for such service; and that there was no person of Mexican descent on the list of talesmen. Proof was offered, and not contradicted, that 15% of the population of the county was

Mexican, and that 6 or 7% met the qualifications for jury service. The evidence of exclusion was based on the absence of Mexican sounding names on the list. Petitioner relies on the "rule of exclusion" of Morris v. Alabama, 294 US 587, to support the adequacy of his proof.

The court below held, and the respondent argues here, that Mexicans do not constitute a separate class, that they are white people, and, since both the grand and petit juries were composed of members of the white race, equal protection has been accorded them. The court relies on Cassell v. Texas, 339 US 282, in refusing to compel what they conclude would be proportional representation of national groups on juries. The court stated that "in so far as the question of discrimination in the organization of juries in state courts is concerned, the equal protection clause of the Fourteenth Amendment contemplated and recognized only two classes as coming within that guarantee: the white race, comprising one class, and the Negro race, comprising the other class."

It seems obvious that this is fallacious. If the Mexican-Americans are the objects of discrimination as a class, they are entitled to the protection of the 14th Amendment. Truax v. Raich, 239 US 33 (1915); Takahashi v. Fish & Game Commission, 334 US 410 (1948); Strauder v. West Virginia, 100 US 303, 308.

The petitioner attempted to prove that Mexicans are regarded as a separate race in Jackson County, Texas. The record shows that a separate school had existed for many years, that there was some exclusion from public places, and that even in the courthouse the toilet facilities were segregated. Participation in civic groups was minimal. Evidence was introduced to show that "white" citizens of the county made a distinction between "white" and "Mexican".

With regard to the opinion of Mr. Justice Reed in Cassell, supra, that discrimination may be found in the fact that the jury commissioners selected juries only from among persons they know personally and that they failed to inform themselves of the qualifications of others; the jury commissioners in the present case failed to make any effort to familiarize themselves with the qualifications of the eligible Mexicans. (R 86). The evidence on this point is not strong, however.

If it is determined that these Mexican-Americans are regarded as a separate "race" or "class" and that they are excluded from jury service on that basis, the court below should be reversed. The record can be read to support these contentions. The state has filed a brief in this case as requested last term. See memo, 346 Misc., 1952 Term.

Two further points remain. The state challenges the timeliness of the petition. Although it was filed on the 91st day, it is in time, the 90th day having been Inauguration Day, a legal holiday in the District of Columbia.

The petitioner has paid the filing fee, but has filed no printed papers. Both the petition and record are typed, and neither a motion nor an affidavit asking to proceed on typewritten papers has been received. Petitioner is represented by counsel, and this defect was called to their attention by the Clerk.

Unless barred by failure to conform to the rules, I think this petition should be granted.

GRANT RJF Op. R 168
251 S.W. 2d 531

Circulate