NO. 2008-09025

263rd DISTRICT COURT GRAND JURY (2007 TERM),	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
v.	§	
	§	**HARRIS COUNTY, TEXAS**
CHARLES A. ROSENTHAL, In His Capacity as District Attorney of Harris County, Texas,	§	
Defendant,	§	**190th JUDICIAL DISTRICT**

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION FOR DECLARATORY JUDGMENT

Plaintiffs, nine members of the 263rd District Court Grand Jury (2007 Term), file their Third Amended Original Petition seeking a declaratory judgment against Harris County District Attorney Charles A. Rosenthal, in his capacity as District Attorney of Harris County, 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 are nine members of a Harris County Grand Jury empanelled by the 263rd Criminal District Court for the regular term from August 8, 2007, to November 2, 2007. Robert C. Ryan, Jeffrey L. Dorrell, Steven Howell, Barbara Coffman Buck, Shannon Burns, Dan Hall, Lonnie Buckner, Pat Riddle Womack, and JoAnn McCracken are all natural persons residing in Houston, Harris County, Texas.

3. Defendant Charles A. Rosenthal is the elected District Attorney of Harris County, Texas, and has appeared and answered in this cause for all purposes.

4. On March 10, 2008, Plaintiffs nonsuited their claims against The State of Texas without prejudice.

III. Jurisdiction and Venue

5. The Court has jurisdiction over Harris County District Attorney Charles A. 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[1] because the Legislature has conferred upon Texas civil courts the power to declare the "rights, status, and other legal relations of the parties whether or not further relief is or could be claimed," TEX. CIV. PRAC. & REM. CODE §37.003(a), and Plaintiffs seek a declaration that they have both the right and the privilege to disclose evidence showing that they were not a "runaway grand jury" when they indicted Texas Supreme Court Justice David M. Medina for evidence tampering.

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.

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[1] At least one court has held that a post-dismissal motion for disclosure of grand jury proceedings under TEX. CODE CRIM. PROC. 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 limited to petitions by a *criminal defendant*. There is 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 under TEX. CIV. PRAC. & REM. CODE §37.003 by grand jurors based on the existence of a right and 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 is properly invoked. Many Texas civil courts have exercised their jurisdiction to rule on the limits of grand jury secrecy under the rules of criminal procedure. *See* ***Marks v. Feldman***, 910 S.W.2d 73, 77-78 (Tex. App.—Dallas 1995) (interpreting FED. R. CRIM. P. 6(e)), *rev'd on other grounds*, ***United States Gov't v. Marks***, 949 S.W.2d 320 (Tex. 1997); *see also* ***Feldman v. Marks***, 960 S.W.2d 613 (Tex. 1996); ***Euresti v. Valdez***, 769 S.W.2d 575, 582 (Tex. App.—Corpus Christi 1989, no writ). While these courts reached different conclusions under the facts presented, their jurisdiction to rule on the issue was not successfully challenged.

V. Facts

9. This case presents the novel issue of whether a criminal defendant indicted for felony evidence tampering may call a press conference for the specific purpose of disparaging the character of the grand jurors who indicted him—and then invoke the protections of grand jury secrecy to prevent the jurors he attacks from defending themselves. Plaintiffs ask the Court to declare that the civil privilege to respond to defamatory attacks supersedes grand jury secrecy under the unique facts of this case.

10. After being summoned by the sheriff to appear before the 263rd District Court on August 6, 2007, and after appearing and being duly qualified and selected, 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. Plaintiffs were administered 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 unpresented 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. PROC. art. 19.34.

11. At the expiration of Plaintiffs' regular term on November 2, 2007, Plaintiffs were engaged in an unfinished investigation regarding the June 28, 2007, arson of Texas Supreme Court Justice David Michael Medina's home at 3507 High Falls Drive in Harris County. 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.

12. After hearing evidence in the Medina case, Plaintiffs asked the District Attorney to procure and present certain additional witnesses and evidence.

Over two months later, on about January 3, 2008, the District Attorney informed the Plaintiffs that he had "done nothing" to procure the additional witnesses and evidence requested. Then, in violation of article 20.19, the District Attorney urged Plaintiffs not to even meet to deliberate or vote on the Medina case.

13. 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) David Michael Medina for evidence tampering; and (ii) Francisca Medina for arson of the home. When instructed to draw the indictments, the District Attorney refused, in violation of TEX. CODE CRIM. PROC. 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." 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.

14. By 4:30 PM on the same day the indictments were handed down, local television stations were already reporting that 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.

15. Later that same day, Medina attorney Terry Yates held a televised press conference. With Supreme Court Justice David Medina sitting at his side approvingly, Yates attacked Plaintiffs as being "nutty," "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*. So inflammatory were the attacks on Plaintiffs that the headline in the ***Houston Chronicle*** on January 19, 2008, read, "**TABLE TURNS ON MEDINA GRAND JURY**," with

a subheading of "*Lawyer wants 2 sanctioned after indictments in fire are dropped*." *See* **Exhibit A**. Above the fold on Page 1 of the ***Houston Chronicle***, the friends, co-workers, professional colleagues, children, and grandchildren of the members of the 263rd District Court Grand Jury read this about Plaintiffs:

> ***"They've made a mockery of the entire process," [Medina criminal defense lawyer Terry] Yates said. "This is crazy. This is mind-boggling, what this grand jury has done. This is more than a runaway grand jury. This is a grand jury speeding away in a Lamborghini."***

Those who watched television heard even more distasteful attacks—all clearly sponsored and endorsed by the criminal defendant himself.

16. Plaintiffs Robert C. Ryan and Jeffrey L. Dorrell criticized the haste with which the indictments were dismissed because Rosenthal could not even have known what the evidence was that he claimed was "insufficient." On January 18, 2008, shortly before his press conference, Medina attorney Yates 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. PROC. 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. PROC. art. 20.02.

17. After the Medina indictments were dismissed, the grand jurors scheduled another session for January 23, 2008, and directed the Bailiff to issue several subpoenas for additional witnesses and evidence to be brought before the grand jury at that time. Anticipating that Plaintiffs would re-indict the Medinas, the District Attorney needed to find a way to stop Plaintiffs in their 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 grand jury to have been unlawfully constituted after November 2, 2007, nullifying over 30 felony indictments Plaintiffs 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 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, all grand jurors assiduously observed their oaths of secrecy in their deliberations and refused to reveal any of the evidence they considered, as they have ever since. Plaintiffs 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. PROC. art. 20.02 to the facts of the instant case.

19. Repeatedly accused of base and corrupt motives and hidden political agendas, Plaintiffs have been obliged to sit close-mouthed while an indicted felon and his attorney trumpet to media that the evidence was "insufficient" to support even any further investigation of the charges. On threat of fine and imprisonment under TEX. CODE CRIM. PROC. art. 20.02, Plaintiffs have been—and continue to be—restrained from responding to the attacks on their character by revealing how extensive the evidence of wrongdoing by Texas Supreme Court Justice David Medina actually was.

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[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 serious crimes in the womb is without precedent in recorded Texas jurisprudence.

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); 37.003(a). 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 entirely "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 Klan[3] ticket—first attacked grand jurors. After being attacked, grand jurors responded. The parallels to the instant case are remarkable.

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, Plaintiffs 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. <u>Therefore communications made in fair self-defense are privileged</u>. If a person is attacked in a newspaper, he may write to the**

[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.

> **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. Although the case at bar appears to be the first in which a civil court is asked to recognize that grand jurors have a privilege to respond to public attacks on them by a felon they indicted, this Court would not be the first civil court to hold that grand jury secrecy imposed by TEX. CODE CRIM. PROC. art. 20.02 has limits. *See, e.g.*, ***Euresti v. Valdez***, 769 S.W.2d 575, 582 (Tex. App.—Corpus Christi 1989, no writ) (grand jury testimony may be divulged to prove elements of malicious prosecution). Other Texas courts, too, have recognized exceptions to the veil of grand jury secrecy, finding that grand jury testimony or other facts may be used to impeach a witness,[4] prove perjury,[5] refresh a witness's recollection,[6] show circumstances in which grand jury secrets became known,[7] determine whether the grand jury was made up of the required number of persons,[8] or to determine whether an unauthorized person was present when the jurors were deliberating or voting.[9]

26. This would also not be the first Texas civil court to conclude that it had jurisdiction to issue a ruling affecting enforcement of a penal statute. *See, e.g.*, ***City of San Antonio v. Rankin***, 905 S.W.2d 427, 429, 431 (Tex. App.—San Antonio 1995, no writ) (affirming a civil injunction preventing city from enforcing a municipal ethics ordinance requiring fire chiefs to file annual financial disclosure statements, violation of which was a Class C misdemeanor). Clearly, there are many needs that outweigh considerations of grand jury secrecy. Texas

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4 *See* ***Wisdom v. State***, 61 S.W. 926, 927 (1901).
5 *See* ***Hines v. State***, 39 S.W. 935, 936 (1897).
6 *See* ***Spangler v. State***, 55 S.W. 326, 329 (1900).
7 *See* ***Addison v. State***, 211 S.W. 225 (1919).
8 *See* ***Rothschild v. State***, 7 Tex. Ct. App. 519, 537 (1880)
9 *See* ***Trevinio v. State***, 11 S.W. 447 (1889), *overruled on other grounds by* ***Singleton v. State***, 346 S.W.2d 328, 330 (Tex. Crim. App. 1961)

civil courts have exercised their jurisdiction to so hold in the past, and this Court may do so in the instant case.

27. 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. PROC. art. 20.02. Plaintiffs do not seek an injunction against enforcement of article 20.02—which Plaintiffs concede is constitutional and valid—but the recognition of the limited ***Houston Press*** privilege to except from application of the rule grand jurors who are responding to vicious, defamatory attacks upon their character in a public forum *by the criminal defendant they indicted*.

28. Only disclosing the evidence Plaintiffs considered will allow Plaintiffs to restore their good names by showing 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 criminal defense attorney for a sitting justice of the Texas Supreme Court and the Harris County District Attorney. Plaintiffs 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. PROC. art. 20.02.

29. 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. PROC. 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*.

30. 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. PROC. art. 20.02.

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

VII. Prayer

32. For these reasons, Plaintiffs ask that, after a trial on the merits, Plaintiffs have and recover of Defendant all of the following:

(a) Declaratory judgment that Plaintiffs have the right and privilege to publicly disclose evidence and testimony considered by the Grand Jury before voting the indictments of David M. Medina in response to David M. Medina's public attacks on Plaintiffs' character; and

(b) Declaratory judgment that Plaintiffs are not subject to the penalties of TEX. CODE CRIM. PROC. 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. PROC. 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,

DORRELL & FARRIS, L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2008, a true and correct copy of the foregoing was sent by hand delivery, certified mail, or telephonic document transfer in accordance with TEX. R. CIV. P. 21a to the following counsel of record:

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