

THE STATE OF TEXAS,)	IN THE 292nd DISTRICT
)	COURT
Plaintiff,)	
)	DALLAS COUNTY, TEXAS
v.)	
)	
XXXX XXXX XXXX,)	
)	
Defendant .)	
_____)	

DEFENDANT S MEMORANDUM IN SUPPORT OF REQUEST FOR A TRIAL BY JURY REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY OR MOTION TO QUASH THE JURY PANEL

Defendant, XXXX XXXX XXXX, previously filed a motion requesting a trial by jury representing a fair cross-section of the community as required by the amendment VI of the United States Constitution. Defendant XXXX supplements that previous motion with this memorandum of law and specifically requests that the Court quash the jury panel.¹

On October 22, 2000, the Dallas Morning News published its statistical analysis of the composition of juries in Dallas County. (A copy of the this article as published on the Dallas Morning News website is attached.) In conducting this analysis, the Dallas Morning News interviewed Donna Roach, the individual in charge of issuing the jury summons for the Crowley Courts Building. Ms. Roach explained that State of Texas provides her with a jury pool for Dallas County. This jury pool is computer data downloaded on a C.D.Rom that contains

¹ 1A defendant does not have a right to a petit jury that represents a fair cross section of the community. *Illinois v. Holland*, 493 U.S. 474 (1989). The defendant s right to a fair cross section, however, does extend to the composition of the array from which the petit jury is selected. *Id.* The remedy sought, therefore, is a venire that reflects a fair cross section of Dallas County.

a list of Dallas County residents on the basis of voter registration information compiled by the State, and driver s license records compiled by the Texas Department of Public Safety, who are believed to be qualified jurors. This database of names is programmed to randomly generate the names which will comprise the jury summons issued for any given week.²

The Dallas Morning News tracked the issuance of 13,612 summons for the first week in March, 2000. It then randomly provided a questionnaire to 400 of those people who responded to the summons and reported for jury duty, and 400 people who failed to respond.³ This analysis established that 25% of the summons issued were to individuals who identified themselves as Hispanic, and that only 7% of those who reported for jury duty identified themselves as Hispanic.⁴

² The pool is not a wheel of qualified jurors. The summons are sent out to members of the pool are able to reply that they are not qualified and therefore do not have to answer the summons.

³ Almost 3000 of the 13,612 summons were returned as undeliverable because the addresses in the data base were no longer current. Texas law only requires that the jury wheels be generated every six years.

⁴ The study also established that 19% of the summons were issued to African-American whereas only 14% of those who reported are African-American; 51% percent of the summons were issued to those who identified themselves as white whereas 77% of those who reported are white. In addition, the study established that 39% of those issued summons identified themselves as having household incomes under \$35,000 whereas 13% of those who reported had a household income under \$35,000; 20% of those summoned identified themselves as having a household income over \$75,000 whereas 41% of those who reported have a household income over \$75,000. The study also established that young adults are under represented among those who report for jury duty, and individuals with more education are overrepresented. For the sake of simplicity this motion and memorandum will focus on the disparity of hispanics summoned,

The Sixth Amendment of the United States Constitution guarantees that a criminal defendant has the right to a speedy and public trial by an impartial jury. The Supreme Court has interpreted the Sixth Amendment's impartiality requirement to mean that a jury must represent a fair cross-section of the community. *E.g., Smith v. Texas*, 311 U.S. 128, 130 (1940). The notion of an impartial jury is symbolized by a group composed of people representing the various values, viewpoints, and experiences of a particular community. To satisfy the representative requirement of the Sixth Amendment, however, juries must be randomly selected from the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

The fair cross-section requirement does not entitle a defendant to a jury that mirrors the community and reflects the numerous distinctive groups present in the population. *Id.*, at 538. Rather, the Sixth Amendment guarantees a defendant the opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which trial courts draw juries must not systematically exclude distinctive groups in the community. If a jury wheel, pool, panel, or venire systematically excludes distinctive groups, then the resulting jury fails to constitute a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979).

In *Duren*, the Supreme Court set forth a clear three part test to establish a prima facie case of the violation of the fair cross-section requirement: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

If a defendant successfully proves that a prima facie fair cross-section violation has occurred, the burden shifts to the government to show that those aspects of the jury selection

and hispanics who report, for hispanics undoubtedly constitute a cognizable group and the disparity is greatest among the members of this group.

process . . . that result in the disproportionate exclusion of a distinctive group advance a significant state interest. *Id.*, at 367-68.

There is no doubt that the group alleged to be excluded in this case is a distinctive group in the community. Mexican-Americans with Spanish surnames are a clearly identifiable class with a history of subjugation to discriminatory treatment. *See Hernandez v. Texas*, 347 U.S. 475 (1954). There is also no doubt that an absolute statistical disparity of 18% establishes that Hispanics are underrepresented. Courts have routinely conceded that an absolute statistical disparity of over 10% percent meets the second prong of the test. *See United States v. Rodriguez*, 776 F.2d 1509, 1511, (11th Cir. 1985); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981); *United States v. Test*, 550 F.2d 577, 587 (10th Cir. 1976).

The real issue in this case is whether this underrepresentation is due to systematic exclusion of the group in the jury-selection process. On first consideration one might consider systematic exclusion to be synonymous with a jury selection process which engages in intentional discrimination. This notion, however, would be mistaken. A defendant need not show purposeful discrimination; he need only show that the jury selection procedure systematically exclude[s] distinctive groups in the community and thereby fail[s] to be reasonable representative thereof. *Castanada v. Partida*, 430 U.S. 482 (1977).⁵

⁵ An equal protection challenge, as opposed to a Sixth Amendment challenge requires a different showing. Prima facie showings under an equal protection challenge may be rebutted by proof of an absence to discriminate. *See* Justice Rehnquist's dissent in *Duren*. In addition, a Sixth Amendment challenge does not require that the defendant be a member of the underrepresented group. *See Taylor v Louisiana*, (male defendant successfully challenges law that permits the exclusion of women); and *Peters v. Kiff*, 407 U.S. 493 (1972) (case in which a white man was permitted to raise a challenge concerning the exclusion of blacks). In this case the defendant is a black male.

With respect to this issue, a useful comparison may be made between this case and *Cerda v. Texas*, 644 S.W.2d 875 (Tx. Ct. App. - Amarillo 1982). In *Cerda*, the defendant challenged the Hale County grand jury on the basis that it denied him equal protection of the law. The defendant established a prima facie case that there had been a substantial underrepresentation of Mexican-Americans, that went unrebutted. In *Cerda* the court of appeals acknowledged that Mexican-Americans were an identifiable class. The Court of Appeals accepted the defendant's evidence the population of Hale County was 38.03%, that the venire for grand jury service was 25% Mexican-American, but only 16.67% of the grand jurors selected were Mexican-American. Based on the figures the Court of Appeals concluded that the State had a burden to rebut the evidence of apparent discrimination. Because the State failed to do so, the Court of Appeals reversed the conviction and ordered the indictment dismissed.

In *Cerda*, based on absolute disparities similar to that in Dallas County today, the Court of Appeals ordered the indictment dismissed in the absence of rebuttal evidence from the State. In this case, there is direct evidence of systematic problems which give rise to the disparity. First, Dallas County does virtually nothing to enforce its jury summons. Counsel proffers that Donna Roach, the jury clerk responsible for the jury summons to the Crowley Criminal Courts building, will testify that it is the practice of the District Clerk's office to take no steps to enforce the summons by punishing violators who ignore the summons.⁶ The only mechanism for the district clerk to enforce the summons is to request a district judge to issue a *capias* for those who fail to report. This action is virtually never taken, and the defendant asks this Court itself to acknowledge for the record, when, if ever, it has attempted to enforce a jury summons by issuing a *capias* for someone who failed to report when summonsed.

In addition, the Dallas Morning News surveyed established that those individuals who failed to report overwhelmingly did so simply because they could not afford to do so. Individuals

⁶ Those who violate a jury summons are subject to a \$1000 fine and one year of imprisonment.

who have household incomes under \$35,000 were disproportionately Hispanic. Dallas County pays jurors only \$6.00 per day and State law does not require employers to pay employees who are absent as a result of jury service. As a result many Hispanic individual summonsed are confronted with the choice of foregoing the earnings necessary to meet minimal household expenses are reporting for jury service.⁷

In this case there is no doubt that Hispanics are a distinctive group within the community. There is no doubt that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to such persons in the community. Finally, this under representation is due to systematic exclusion of this group in the jury selection process as a result of this County's failure to enforce the jury summons and because this County then makes jury service so personally and financially onerous that many people can not or will not serve.⁸

⁷ Two articles from the Dallas Morning News are attached which address this issue. One entitled "Duty Calls, Few Answer" reflects some of the information gathered by the Dallas Morning News concerning the financial dilemma many individuals are placed in when summonsed for jury duty. The other article, entitled "No Excuses" reflects the New York experience in which jury pay was increased and the summons were enforced. In New York this greatly increased the representation of minorities on juries and insured that defendants received a jury pool reflecting a fair cross-section of the community.

This Court should quash the panel in this case and take measures to insure that the venire from which the defendant's venire is selected represent a fair cross-section of the Dallas County community.

Respectfully submitted,

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XXXX XXXX XXXX

CERTIFICATE OF SERVICE

I, XXXXlyn Mickelsen, do hereby certify that I caused a copy of the foregoing document to be served on the Dallas County District Attorney's Office 133 N. Industrial Blvd., Dallas, Texas _____ by hand-delivery _____ by first-class mail, postage pre-paid.

XXXXlyn Mickelsen